



Jodi Jensen
608.284.2611
jjensen@gklaw.com



Mike B. Wittenwyler
608.284.2616
mwittenwyler@gklaw.com

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Facebook establishes disclosure requirements for “political advertising” - includes issue advocacy and nonpartisan public policy communications

Last month, Facebook and Twitter adopted disclosure requirements for “political advertising.” While Twitter narrowly defined covered communications, Facebook adopted an extremely broad standard. Under the Facebook advertising policy, some organizations that engage in public policy discussions, sponsor grassroots lobbying communications on federal, state or local public policy issues or sponsor voter registration drives and get-out-the vote programs will have to:

- Register with Facebook
- Include “paid for” disclaimers on posts
- Disclose limited information about spending and targeting

The policy covers both for-profit entities and tax-exempt corporations organized under section 501(c) of the Internal Revenue Code (the Code), including section 501(c)(3) public charities, that place advertisements on Facebook or pay to “boost” their posts. Unless the content violates another advertising policy, Facebook is not regulating the content of what it defines as a political advertisement (ad). However, Facebook will remove any political ads that do not comply with Facebook registration and disclaimer requirements, even when the protected speech complies with campaign finance laws and the Code.

What does Twitter consider “political?”

Twitter’s political advertising policy applies only to committees and candidates registered with the Federal Election Commission (FEC) and to organizations or individuals that expressly advocate for or against a clearly-identified federal candidate. The policy does not apply to express advocacy involving non-federal candidates and it expressly excludes “issue ads” i.e., grassroots lobbying communications.

What does Facebook consider “political?”

Facebook broadly defines political advertising to include paid communications regulated by state and federal campaign finance laws and the Code, as well communications that are currently unregulated and excluded from statutory disclosures including “paid for” disclaimers and reports of expenditures. There is no election period during which the policy applies. An ad that fits one of the following categories is political even if disseminated months or years before the next election.

- **Express advocacy:** Communications regulated by state and federal campaign finance laws are political ads. This covers express advocacy communications that call for the election or defeat of a clearly identified candidate.
- **Referendums/ballot initiatives:** Communications that relate to any election, referendum or ballot initiative are political ads. Unlike campaign finance law,

Facebook does not exclude informational communications by a state or local government that approved a ballot initiative.

- **Grassroots lobbying:** A grassroots lobbying communication – often referred to as issue advocacy – generally refers to a public policy issue, takes a position on the issue and encourages the recipient of the communication to take lobbying action, such as contacting an elected official i.e., a call to action. Such communications are not regulated by campaign finance laws unless they fit the definition of an electioneering communication. Under the Facebook policy, however, communications that are related to any “national legislative issue of public importance”¹ in any place where the ad is being run are political ads. The policy cites a number of examples including budget, economy, crime, guns, education, environment, government reform, health and values. State and local debates on such issues are covered by the policy.
- **Electioneering communications with no time limits:** Electioneering communications are communications about public policy issues that refer to a clearly-identified candidate. Under federal law and the laws of states that regulate such communications, regulation is limited to a defined pre-election period. Facebook, however, includes no temporal requirement. Under the policy, communications by, on behalf of, or about a current or former candidate for public office are political ads, regardless of their proximity to an election. As a result, communications historically made by section 501(c)(3) public charities that criticize elected officials for a vote or policy position without a call to action, that contain nonpartisan voter guides or that highlight an award presented to an elected official are political ads.
- **Public policy communications:** With its regulation of “national legislative issues of public importance,” the Facebook policy covers communications that are not regulated by campaign finance laws or the Code, such as the posting of educational materials or research findings, policy papers or opinion pieces. Facebook has blocked paid content posted by news organizations and a publisher promoting a book about President Trump under this broad definition because neither registered with Facebook or included “paid for” disclaimers.²
- **Voter education, registration and get-out-the vote communications:** Get-out-the vote and “election information campaigns” are political ads under the Facebook policy. Unlike federal and state laws, Facebook does not exclude nonpartisan voter education campaigns, voter registration drives and get-out-the vote programs often managed by section 501(c)(3) organizations.

What qualifies as a Facebook ad?

A political ad includes both traditional ads and boosted posts. Traditional ads appear as side ads on a desktop computer and within the newsfeed on mobile devices. They take advantage of sophisticated targeting tools and often contain buttons like “shop now,” “book now,” “sign up” or “download.”

A boosted post promotes an existing Facebook post to a target audience based on age, gender and location for a fee. Any boosted post that contains political or issue speech is a political ad subject to disclosure requirements. An organization that posts information about pending legislation to address a “national issue of public importance” on its Facebook page and then boosts the post has likely engaged in political advertising. Notably, however, original content is not required to trigger disclosure. For example, an organization that posts a link to newspaper article about the federal budget or an editorial critical of an elected official on its Facebook page, and then boosts the post, has engaged in political advertising.

What does not qualify as a Facebook ad?

A post to an organization’s Facebook page that fits the definition of a political ad is not subject to registration and disclaimer requirements as long as the organization does not pay to boost the post. Note that if an organization posts an express advocacy communication, the communication itself must contain a “paid for” disclaimer under applicable state or federal campaign finance law.

¹ <https://www.facebook.com/business/help/214754279118974>.

² Russell Brandom, The Verge, Facebook’s ad rules are forcing news outlets to register as political advertisers, June 1, 2018, <https://www.theverge.com/2018/6/1/17416710/facebook-political-ad-rules-news-promotion-blocked>.

What is required of ad sponsors?

Sponsors of political ads on Facebook must do the following:

- Obtain Facebook authorization to create and run political ads. A page administrator must set up 2-factor authentication and complete of an online form with the following information:
 - Driver's license or passport number
 - U.S. mailing address
 - Last four digits of social security number
- Include a "paid for" disclaimer at the top of each political ad. This is required even when a disclaimer appears in embedded or linked content.

What information about an ad is publicly available?

Facebook archives information about each political ad. The archive is searchable and [available here](#), but information about a specific ad can also be accessed by clicking on the ad's disclaimer. The archive contains the following information for every political ad on Facebook:

- Geographic location targeted
- Audience breakdown by gender and age range
- Estimated number of impressions within a range
- Amount spent within a range
- How long the ad has been running

Statutory disclaimer requirements

The Facebook policy requires "paid for" disclaimers on certain communications even when no such disclaimers are required under state or federal laws. Campaign finance laws generally require disclaimers on ads by political committees and organizations that sponsor independent expenditures i.e., communications that expressly advocate for the election or defeat of a clearly-identified candidate for federal, state or local office. However, these requirements often do not apply to internet communications and social media platforms. The FEC recently began drafting rules for disclaimers on independent expenditures appearing on online platforms.

While federal law does not require disclaimers on grassroots lobbying communications, their inclusion is a best practice among advocacy organizations. Some states require disclaimers on grassroots lobbying communications via regulation of lobbying or electioneering communications. Requirements differ by state based on the identity of the sponsor, the cost and timing of an ad and the manner in which it is disseminated.

Unlike the Facebook policy, state and federal law do not require disclaimers on nonpartisan election-related communications, public policy discussions and educational and research materials.

Conclusion

If not revised, Facebook's broad definition of political advertising will impact social welfare organizations, trade associations, labor organizations and even public charities that engage in lobbying, public policy discussions, policy-related educational and research activities and nonpartisan voter registration, education and turnout programs. Paying to boost a post that relates to a public policy issue, an elected official or an election – even if it is nonpartisan – likely requires registration and the use of disclaimers, and it will result in public disclosure of some spending and targeting data. Organizations that engage in any of these activities risk removal of their ads or boosted posts by Facebook if they have not previously registered to engage in political advertising.