



# Analysis of Klobuchar-Warner-McCain Internet Ads Legislation (S. 1989,<sup>1</sup> 115th Cong.)

*So-Called “Honest Ads Act” Is Dishonest About Its Effects*

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November 2017

## *Introduction and Executive Summary*

Americans’ First Amendment rights to free speech are foundational to our open society, our democratic discourse, and our way of life. Like all Americans, the Institute for Free Speech (“IFS”)<sup>3</sup> is deeply disturbed by Russian efforts to exploit our open society to interfere in our election campaigns and sow discord among Americans. Any legislative response, however, should be tailored to addressing foreign actors. Legislation that attempts to limit foreign interference in our democracy by broadly regulating the free speech rights of Americans would, in fact, undermine our democracy and directly advance Vladimir Putin’s agenda.

S. 1989, the so-called “Honest Ads Act,” fails both tests: it fails to meaningfully address foreign interference, while placing considerable limits and burdens on the online political speech of Americans.

Specifically, the “Honest Ads Act” would:

- Regulate the 99.99% of online political ads purchased by Americans in order to address the less-than 0.01% purchased by foreigners.
- Expand the universe of regulated online political speech (by Americans) beyond paid advertising to include, apparently, communications on groups’ or individuals’ own websites and e-mail messages.

Specifically, the bill would subject these communications to the Federal Election Commission’s (“FEC”) burdensome disclaimer and reporting requirements. As a result, speakers would be susceptible to politically motivated complaints, investigations, and legal liability if they are unable to correctly discern whether and how they are regulated under these complex laws. These costs would negate many of the Internet’s benefits in enabling low-cost, grassroots campaigns to effect political and social change.

- Regulate speech (by Americans) about legislative issues by expanding the definition of “electioneering communications” – historically limited to large-scale TV and radio campaigns targeted to the electorate in a campaign for office – to include online advertising, even if the ads are not targeted in any way at the relevant electorate.
- Impose what is effectively a new public reporting requirement on (American) sponsors of online issue ads by expanding the “public file” requirement for broadcast, cable, and satellite media ads to many online platforms. Both advertisers and online platforms would be liable for providing and maintaining the information required to be kept

<sup>1</sup> A companion bill, H.R. 4077, has been introduced in the House of Representatives. There do not appear to be any substantive differences between the two bills.

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<sup>3</sup> The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government. Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. The Institute is the nation’s largest organization dedicated solely to protecting First Amendment political rights.

in these files, which would also increase the costs of online advertising, especially for low-cost grassroots movements.

The “public file” also may subject (American) organizers of contentious but important political causes like “Black Lives Matter” and the Tea Party to harassment by opponents monitoring the content, distribution, and sponsorship of their activities.

- Impose new legal liability on broadcast, cable, satellite, and Internet media platforms if they allow political advertising by prohibited speakers to slip through, thereby driving up the costs of political advertising, especially for online ads where compliance costs are relatively high.
- Impose inflexible disclaimer requirements on online ads that may make many forms of small, popular, and cost-effective ads off-limits for (American) political advertisers.
- Inexplicably weaken the ability of state and local party committees to involve volunteers and distribute materials to support their candidates, thereby furthering the decline of political parties that are already reeling from passage of the “Bipartisan Campaign Finance Reform Act” of 2002.

## Analysis

### I. Using Russians As an Excuse to Regulate the Other 99.99% of Online Political Ads

The provisions of S. 1989 are not limited to, or even specifically aimed at, regulating political speech by foreign interests. Rather, the bill proposes to regulate online political speech for all Americans. Keeping this in mind, it is important to note at the outset that, even by the sponsors' own accounts and the legislative findings included in the bill's preamble, the "Honest Ads Act" takes a sledgehammer to a problem requiring a scalpel. It regulates a huge swath of online political speech, nearly all of it from Americans, in order to regulate a minuscule percentage of ads from foreign sources.

Citing research by Borrell Associates, S. 1989 and Sen. Klobuchar note that more than \$1.4 billion was spent on political ads during the 2016 election campaign.<sup>4</sup> Of this amount, only some \$100,000 (or less than 1/100 of one percent) thus far has been reported as having come from Russian sources.<sup>5</sup>

S. 1989 is being sold as a measure "to help prevent foreign interference in future elections" and "[f]irst and foremost . . . an issue of national security."<sup>6</sup> But the fact is 99.99% of the online political speech the bill seeks to regulate, even on its own terms, is by Americans. Unless Americans exercising their First Amendment rights is now "an issue of national security," the bill is simply using Russian interference as a stalking horse to help realize the longstanding goal of the speech regulation lobby to impose more burdens on political speech.<sup>7</sup>

Members of Congress should not be baited by Russian attempts to influence our elections into rushing head-first to pass a bill that is not targeted in any way at preventing foreign interference. Instead, if legislation is necessary, it should be crafted first to address foreign political activity. If lawmakers are inclined to broadly regulate Americans' online political speech – a policy IFS believes is unwise because of its impacts on First Amendment rights – legislation to that effect should be addressed separately, honestly, and deliberatively.

### II. Don't Fear the Internet

At a general but very pervasive level, S. 1989 would regulate online political speech, pure and simple. The scope of regulated content would include not only speech about elections and candidates, but also speech about legislative and policy issues. In other words, the bill would regulate speech that is at the core of the First Amendment's protections.<sup>8</sup>

There are reasonable debates to be had over whether, and to what extent, political speech should be subject to any regulation in the first instance. However, S. 1989 begins with the mistaken premise that the existing regulation of political speech on certain forms of mass media should be extended to the Internet simply because the Internet has become an effective and pervasive means of communications.

S. 1989 justifies its broad regulation of online political speech by citing the ability of Internet platforms to reach hundreds of millions of Americans, which the bill contends "has greatly facilitated the scope and effectiveness of disinformation campaigns."<sup>9</sup> Similarly, the bill cites the ability to use social media to target communications with precision to receptive audiences as facilitating "political advertisements that are contradictory, racially or socially inflammatory, or materially false."<sup>10</sup>

While these may be downsides to the Internet, these same features of the Internet empower the average person to initiate and participate in movements for political and social change and to challenge power and authority. For example, while democracy remains a work in progress in the Middle East, social media played a prominent role in popular uprisings against

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4 S. 1989, § 3(6); Sens. Warner & Klobuchar Introduce the Honest Ads Act, Youtube.com (Oct. 19, 2017) at <https://www.youtube.com/watch?v=LVEJjNNLWlk> (5:51-5:58). While S. 1989 does not clearly explain that this amount is specific to election-related spending, Sen. Klobuchar's comments clarified that "\$1.4 billion was spent on online advertising in the 2016 election." See also Borrell Assoc., 2015 to 2016 Political Advertising Outlook, at <https://www.borrellassociates.com/industry-papers/papers/2015-to-2016-political-advertising-outlook-august-15-detail>; Kate Kaye, Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up, ADAGE.COM (Jan. 3, 2017), at <http://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346/>.

5 S. 1989, § 3(4).

6 News Release: Klobuchar, Warner, McCain Introduce Legislation to Improve National Security and Protect Integrity of U.S. Elections by Bringing Transparency and Accountability to Online Political Ads (Oct. 19, 2017), at <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=4D8BEA1F-291E-477E-9B47-F08883DE39B4>.

7 See, e.g., S.J. Res. 19 (113th Cong., 2nd Sess.), Roll Call Vote No. 261 (Sep. 11, 2014) (vote to amend the First Amendment to allow greater regulation of the "spending of money . . . to influence elections").

8 See, e.g., *Meyer v. Grant*, 486 U.S. 414, 422 and 425 (1988).

9 S. 1989, § 3(7).

10 *Id.* § 3(8).

autocratic regimes in the region several years ago.<sup>11</sup> Closer to home, the “Tea Party,” “Women’s March,” and “Me Too” campaign were fueled by the pervasive and personal reach of social media.<sup>12</sup>

Naturally, government officials may find the Internet’s power to accelerate democratic or social change movements unnerving. But the Internet’s role in facilitating participatory democracy should argue for a more reflective and less reflexive regulatory approach.

### III. Undoing the FEC’s Internet Exemption

S. 1989 would undo the FEC’s “Internet exemption,” which continues to set the appropriate framework for regulating online political speech. Under this exemption, online political speech generally is unregulated unless it is in the form of paid ads. By negating the FEC’s carefully considered Internet regulations,<sup>13</sup> S. 1989 would increase the costs of online political speech and subject many online speakers to the risk of legal complaints, investigations, and penalties.

In enacting the agency’s “Internet exemption,” the FEC recognized the Internet is unique in that:

- it “provides a means to communicate with a large and geographically widespread audience, often at very little cost”;
- “individuals can create their own political commentary and actively engage in political debate, rather than just read the views of others”; and
- “[w]hereas the corporations and other organizations capable of paying for advertising in traditional forms of mass communication are also likely to possess the financial resources to obtain legal counsel and monitor Commission regulations, individuals and small groups generally do not have such resources. Nor do they have the resources . . . to respond to politically motivated complaints in the enforcement context.”<sup>14</sup>

None of these justifications for an enlightened regulatory approach to Internet communications has changed over the 11 years since the FEC enacted its Internet rules. By imposing additional FEC disclaimer and reporting requirements and risk of legal liability, S. 1989 would add significant regulatory costs to online political speech and substantially negate the tremendous benefits of Internet media. As the FEC noted, this is a particular challenge for the smaller and less well-established grassroots organizations, for whom the Internet has provided a low-cost and effective means of organizing and getting their message out, and one that is far superior to any other communications medium available.

At the outset, it is important to note that, even under the current rules, paid Internet advertising is subject to regulation. Specifically, under the FEC’s existing rules, Internet communications generally are not regulated unless they are “communications placed for a fee on another person’s Web site.”<sup>15</sup> However, other forms of online communications, such as mass e-mails; creating, maintaining, or hosting a website; Facebook posts; Twitter tweets; YouTube uploads; or “any other form of communication distributed over the Internet” are not regulated.<sup>16</sup>

S. 1989 would severely erode the FEC’s current Internet rules by changing the standard that triggers regulation to any “paid Internet, or paid digital communication.”<sup>17</sup> This is a vaguer and broader standard than what the FEC’s rules currently regulate. The bill’s use of different terminology to describe the scope of regulated Internet communications suggests an intentional effort to cover additional forms of online speech. This is especially so in light of the bill drafters’ apparent familiarity with the FEC’s regulations.<sup>18</sup> Indeed, the “paid Internet, or paid digital communication” standard is broader than even the standard set forth elsewhere in S. 1989 for “electioneering communications” (discussed in the next section) that are “placed or promoted for a fee on an online platform.”<sup>19</sup>

11 See, e.g., Mark Pfeifle, *Lessons Learned From the 140-Character Rebellion*, HUFFINGTON POST, at <https://www.huffingtonpost.com/mark-pfeifle/lessons-learned-from-the-2-b-829928.html>.

12 See, e.g., Rick Santelli’s Shout Heard ‘Round the World, CNBC.COM (updated Aug. 5, 2010), at <https://www.cnbc.com/id/29283701>; Perry Stein, *The woman who started the Women’s March with a Facebook post reflects: ‘It was mind-boggling.’* WASH. POST (Jan. 31, 2017), at <https://www.washingtonpost.com/news/local/wp/2017/01/31/the-woman-who-started-the-womens-march-with-a-facebook-post-reflects-it-was-mind-boggling/>; Sophie Gilbert, *The Movement of #MeToo*, THE ATLANTIC (Oct. 16, 2017), at <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/>.

13 See FEC, Explanation and Justification for Final Rules on Internet Communications, 71 Fed. Reg. 18,589 (Apr. 12, 2006).

14 *Id.* at 18,590-18,591.

15 11 C.F.R. §§ 100.26, 100.155.

16 *Id.* § 100.155(b).

17 S. 1989, § 5(a).

18 See, S. 1989, § 7(b)(2) (this provision is discussed more below).

19 Compare S. 1989, § 5(a) with *id.*, § 6(a)(1)(D); see also *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Thus, if S. 1989 were enacted, it is likely that anyone operating a website, for example, may unwittingly run afoul of the FEC's disclaimer and reporting requirements by posting unflattering information about a federal candidate or elected official. This is because the costs of hosting and maintaining a website likely would qualify the website as a "paid Internet, or paid digital communication."<sup>20</sup> Similarly, a group that sends out a voter guide or a legislative scorecard using a paid e-mail service or mobile device app likely would be making a "paid Internet, or paid digital communication" under S. 1989. Even a group's Facebook posts, Twitter tweets, and YouTube uploads could be regulated if paid staff are used to create such content.<sup>21</sup> In other words, the "Honest Ads Act" would regulate communications that are not "ads" at all.

In theory, the FEC's disclaimer, reporting, and recordkeeping requirements would apply in these contexts only to communications that "expressly advocate" the election or defeat of candidates<sup>22</sup> – ostensibly a narrow and well-defined universe of speech.<sup>23</sup> However, the FEC commissioners themselves often can't agree on what constitutes "express advocacy,"<sup>24</sup> and courts also have punted by holding that whether speech is "express advocacy" may be indeterminable in "cases that fall close to the line."<sup>25</sup> Thus, S. 1989 will put more online speakers at the mercy of FEC bureaucrats who will decide whether their speech has triggered the regulatory requirements. These burdens would apply for a "paid Internet, or paid digital communication" of any amount whatsoever for the disclaimer requirement,<sup>26</sup> and as little as \$250 for the reporting requirement.<sup>27</sup>

While compelling speakers to comply with disclaimer and reporting requirements may, in theory, seem like no big deal, in practice, these requirements are anything but straightforward. As IFS has demonstrated, a super PAC ran by Harvard Law Professor Larry Lessig, a self-styled campaign finance policy expert and advocate, was unable to correctly decipher the FEC's disclaimer requirements.<sup>28</sup> It also bears repeating that S. 1989 will impose monetary penalties on speech (after being subject to complaints and investigations) if speakers fail to correctly divine and comply with these requirements.<sup>29</sup> Thus, S. 1989 will force speakers, at great expense, to consult the small cottage industry of campaign finance attorneys (most of whom are concentrated "inside the Beltway") before speaking.<sup>30</sup> Many speakers, especially smaller groups, would choose silence instead.

#### IV. Expanding Regulation of Issue Speech to the Internet

S. 1989 purports to be premised on the unique ability of Internet advertising to micro-target recipients,<sup>31</sup> but its "electioneering communications" provision doesn't match the bill's premise. Not only would S. 1989 expand the existing disclaimer and reporting requirements for "electioneering communications" to online advertising, but it would do so indiscriminately by covering communications that are not even targeted to any relevant electorate. In other words, an online ad only running in Texas that named a Senate leader from New York would become a regulated communication. A similar TV or radio ad would not. The bill's regulation of online issue speech in this overbroad manner raises serious questions about its constitutionality.

Despite their name, so-called "electioneering communications" often encompass issue speech not related to any elections. For example, an ad asking members of the public to contact their Senators about a criminal justice reform bill pending in Congress has been held to be an "electioneering communication," even though the ad did not praise or criticize the elected

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20 Prior to the FEC adopting its current regulation in 2006, which S. 1989 would alter, the FEC routinely found that any expenditure of funds to maintain a personal website constituted a regulated expenditure. *See, e.g.*, FEC Adv. Op. No. 1998-22 (Leo Smith) (where an individual citizen creates a website with political content, "costs associated with the creation and maintaining of the web site, ... would be considered an expenditure under the Act and Commission regulations."); FEC Advisory Opinion 1999-25 (D-Net) (website maintained by League of Women Voters would not be regulated as a campaign "expenditure" only if it was operated on a non-partisan basis). *See also, e.g.*, FEC Matter Under Review 6795: Citizens for Responsibility for Ethics in Washington ("CREW") allegedly failed to file FEC reports for content on its website impugning the character and fitness for office of various federal candidates and elected officials, and for maintaining a list of the "Most Corrupt Members of Congress," among other activities. As two of the FEC's commissioners explained, CREW's activities fell within the Internet exemption. *Id.*, Statement of Reasons of Commissioners Lee E. Goodman and Caroline C. Hunter. S. 1989 would remove the Internet exemption for organizations like CREW.

21 *See* FEC, Matter Under Review 6729 (Checks and Balances for Economic Growth), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen (explaining that YouTube videos are covered by the Internet exemption).

22 11 C.F.R. §§ 110.11(a), (b)(3) (disclaimer requirement for independent expenditures); 109.10 (reporting requirement for independent expenditures); *see also id.* § 100.16 (defining "independent expenditure"); FEC Instructions for Form 5, at <https://www.fec.gov/resources/cms-content/documents/fecfrm5i.pdf> (setting forth recordkeeping requirement).

23 *Buckley v. Valeo*, 424 U.S. 1, 44 n.52, 80, and 80 n.108 (1976).

24 *See, e.g.*, FEC Adv. Op. No. 2012-11 (Free Speech).

25 *Free Speech v. FEC*, 720 F.3d 788, 795-96 (10th Cir. 2013); *but see FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 474 (2007) ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

26 11 C.F.R. § 110.11(a)(2); S. 1989, § 5(a).

27 52 U.S.C. § 30104(c)(1).

28 Inst. for Free Speech, *FEC Complaint: Mayday PAC violated campaign finance laws* (Nov. 20, 2014), at <http://www.ifs.org/2014/11/20/fec-complaint-mayday-pac-violated-campaign-finance-laws/>.

29 *See* 52 U.S.C. § 30109(a).

30 *See Citizens United v. FEC*, 558 U.S. 310, 324 (2010) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day.").

31 Note 10, *supra*.

officials in any way.<sup>32</sup> Under existing law, broadcast, cable, or satellite ads that refer to federal candidates or elected officials, but that do not expressly advocate their election or defeat, are regulated as “electioneering communications” if they:

- (1) Refer to a clearly identified federal candidate or elected official;
- (2) Are publicly distributed within 60 days before the general election in which the referenced candidate or official is on the ballot, or within 30 days before the primary election or party convention or caucus in which the candidate or official is seeking the party’s nomination; and
- (3) Are “targeted to the relevant electorate.”<sup>33</sup>

Importantly, with respect to the last condition, the ad must be capable of reaching at least 50,000 or more persons in the jurisdiction the candidate seeks to represent, in the case of congressional candidates, or, in the case of presidential candidates, in the state holding the primary or anywhere in the country in the case of a national nominating convention.<sup>34</sup>

Like express advocacy communications, “electioneering communications” are subject to complex FEC disclaimer, reporting, and recordkeeping requirements.<sup>35</sup>

S. 1989 would extend the regulation of “electioneering communications” to “any communication which is placed or promoted for a fee on an online platform,” and which references a federal candidate or officeholder within a relevant 30- or 60-day pre-election time window.<sup>36</sup> Notably and ironically, given the bill’s concern about micro-targeting on online platforms, S. 1989 dispenses with any targeting requirement whatsoever for online “electioneering communications.”<sup>37</sup>

Thus, an online issue ad could be regulated as an “electioneering communication” if it targets New York residents to contact House Ways and Means Committee Chairman Kevin Brady, a Texas Congressman, to urge him to oppose a provision in a tax reform bill to disallow deductions for state taxes from individuals’ federal income taxes – an issue which disproportionately affects New Yorkers.<sup>38</sup> Similarly, an online issue ad would be an “electioneering communication” if it targets Texans to call on Senate Minority Leader Chuck Schumer, a Senator from New York, to stop blocking judicial nominees.<sup>39</sup> Even an ad that refers to a bill by the sponsor’s name (e.g., the Klobuchar-Warner-McCain bill) would trigger regulation if the sponsor were up for election, notwithstanding that the ad was targeted to a “geofenced” area 1,000 miles away from the sponsor’s state or district. Obviously, the recipients of the online ads in these examples are ineligible to vote for or against the referenced elected officials,<sup>40</sup> and it makes no sense for S. 1989 to regulate these ads under the campaign finance laws, even if they were to be disseminated within the designated pre-election time windows.

The Supreme Court has upheld the current federal “electioneering communication” regime against constitutional challenges, both facially<sup>41</sup> and as-applied to “pejorative” ads about then-Senator Hillary Clinton’s 2008 bid for the Democratic presidential nomination.<sup>42</sup> But it did so because “the vast majority of [electioneering communication] ads clearly” sought to elect candidates or defeat candidates.<sup>43</sup> The government documented, through a record the *Citizens United v. FEC* Court recounted as being “over 100,000 pages long,”<sup>44</sup> that Congress had precisely targeted the type of communication and forms of media required to regulate “candidate advertisements masquerading as issue ads.”<sup>45</sup> Indeed, the *McConnell v. FEC* Court itself

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32 See *Independence Inst. v. FEC*, 216 F. Supp. 3d 176 (D. D.C. 2016), *aff’d per curiam*, 137 S. Ct. 1204 (2017).

33 52 U.S.C. § 30104(f)(3).

34 11 C.F.R. § 100.29.

35 11 C.F.R. §§ 110.11(a)(4), (b)(3), (c)(4); 104.20(d).

36 S. 1989, § 6(a)(1).

37 *Id.*, § 6(a)(2).

38 See Marisa Schultz, *Trump tax plan eliminates big perk for high-tax states*, N.Y. POST (Sep. 27, 2017), at <http://nypost.com/2017/09/27/trump-tax-plan-eliminates-big-perk-for-high-tax-states/>.

39 See Jordain Carney, *Trump blasts Schumer, Democrats for ‘obstructing’ nominations*, THE HILL (Oct. 16, 2017), at <http://thehill.com/homenews/administration/355680-trump-blasts-schumer-democrats-for-obstructing-nominations>.

40 U.S. Const., Art. I § 2(1) and Amend. XVII § 1.

41 *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 201-202 (2003).

42 *Citizens United*, 558 U.S. at 366-367; also *Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from denial of *cert.*) (“And finally in *Citizens United v. Federal Election Comm’n*, the Court concluded that federally required disclosure ‘avoid[ed] confusion by making clear’ to voters that advertisements naming then-Senator Hillary Clinton and ‘contain[ing] pejorative references to her candidacy’ were ‘not funded by a candidate or political party’”) (quoting *Citizens United*, 558 U.S. at 368).

43 *McConnell*, 540 U.S. at 206; *id.* at 193 (“And although the resulting advertisements do not urge the viewer to vote for or against a candidate *in so many words*, they are no less *clearly intended* to influence the election”) (emphasis added).

44 *Citizens United*, 558 U.S. at 332 (citation and quotation marks omitted).

45 *McConnell*, 540 U.S. at 132 (quotation marks omitted); *id.* at 127-128 (noting that “so-called issue ads,” which “eschewed the use of magic words,” were “almost all [] aired in the 60 days immediately preceding a federal election”).

noted that it “assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.”<sup>46</sup>

By contrast, the regulation of online issue ads under S. 1989 as “electioneering communications” would run into a potential constitutional buzz saw because: (1) the bill would regulate ads that are targeted to recipients ineligible to vote for or against the referenced candidates; and (2) the bill recites no evidence whatsoever that online issue ads are “candidate advertisements masquerading as issue ads.”

## V. New “Public File” Reporting Requirement for Online Ads

S. 1989 also would require online advertisers and platforms to comply with the “public file” requirements that currently apply to broadcasters and cable and satellite system operators. This is, in effect, a new reporting requirement for online ads that would cover not only speech about candidates, but also speech about any “national legislative issue of public importance.” The “public file” requirement would raise the costs of online speech, and likely would impede or deter, and may even end, many small grassroots advertising efforts.

Specifically, any person or group spending as little as \$500 during a calendar year on “qualified political advertisements” on many popular and widely-accessed Internet platforms (including news and social networking websites, search engines, and mobile apps) would have to provide certain information to those platforms, and the information would have to be posted in an online “public file.”<sup>47</sup>

These files would have to include:

- A digital copy of the regulated ad;
- A description of the audience targeted by the ad, the number of views generated, and the dates and times the ad was first and last displayed;
- The average rate charged for the ad;
- The name of, and the office sought by, the candidate referenced in the ad, or the “national legislative issue” discussed in the ad; and
- For sponsors that are not candidates or their campaign committees, the name of the sponsor; the name, address, and phone number for the sponsor’s contact person; and a list of the chief executive officers or board members of the sponsors.<sup>48</sup>

The term “national legislative issue of public importance” is not defined, and is borrowed from the “public file” requirements for broadcasters under the federal Communications Act, which also does not define this term.<sup>49</sup> In practice, broadcasters’ advertising departments have interpreted this term loosely to cover most forms of non-commercial advertising. Thus, grassroots groups using social media to promote contentious but important causes, such as the “Tea Party,” “Black Lives Matter,” or the “Women’s March,” to targeted supporters, may find themselves targeted for harassment and retaliation by opponents monitoring the content and scope of their online advertising campaigns using the information reported in the “public file.”

Moreover, S. 1989 would impose liability on both advertisers and online platforms for properly providing and collecting the information, which must be retained and made publicly accessible for at least four years after each ad is purchased.<sup>50</sup> Penalties could amount to several thousand dollars per violation.<sup>51</sup> (Oddly enough, S. 1989 also would place these requirements under the campaign finance law, and enforcement authority under the FEC, even though much of the speech covered by these requirements would have nothing to do with federal elections.<sup>52</sup>) The combination of these compliance costs and legal risks may cause many online platforms to conclude that it is not worth their while to offer any political or issue advertising at low-dollar amounts, to the detriment of small grassroots groups.

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46 *McConnell*, 540 U.S. at 206 n.88.

47 S. 1989, § 8.

48 *Id.*

49 *See* 47 U.S.C. § 315(e)(1)(B)(iii).

50 S. 1989, § 8.

51 *Id.*; *see also* 52 U.S.C. § 30109(a)(5), (6).

52 *See id.*

Sen. Klobuchar claims the bill “harmonizes the rules governing broadcasters, radio, print, on one hand, and online on the other.”<sup>53</sup> However, to the extent Sen. Klobuchar’s statement covers the “public file” requirement, she is mistaken on this point. Advertisers using telephone calls, canvassing, and print (e.g., newspapers, magazines, direct mailers, and pamphlets) are not subject to the “public file” requirement.<sup>54</sup> Moreover, broadcasters are subject to the “public file” requirement because they are required to act in the “public interest” due to the scarcity of the portion of the electromagnetic spectrum over which content and data may be transmitted, or, in the case of cable and satellite operators, because their services affect broadcast service.<sup>55</sup>

The “online platforms” that would be regulated by S. 1989 are not at all like broadcast, cable, or satellite services. To the extent that they have any “bandwidth” limitations, they are not in any way comparable to the spectrum limitations for broadcasters. Regardless of whether there are alternative policy reasons for subjecting online platforms to heightened regulation, lawmakers should not be misled by the false proposition that the “public file” justifications that apply to broadcast, cable, and satellite media also apply to Internet media.

Facebook and Twitter have recently announced their own efforts to address foreign propaganda, which contain some similarities to the “public file” requirement that S. 1989 would impose.<sup>56</sup> Nevertheless, these self-initiated measures are preferable to inflexible, one-size-fits-all legislation, as they can be adjusted and tailored over time to meet each platform’s unique advertising program and changing foreign threats.

## VI. Imposing Liability for Policing Prohibited Speakers to All Media Outlets

S. 1989 also would make broadcast, cable, satellite, and Internet media companies liable for failing to make “reasonable efforts to ensure that” express advocacy ads and “electioneering communications” are not purchased “directly or indirectly” by any foreign national.<sup>57</sup> Similar to the imposition of liability on online platforms for maintaining a “public file,” this requirement for media outlets to act as gatekeepers against foreign nationals will ultimately be passed on in the form of increased costs for all advertisers – especially for online ads, where the cost of compliance will often be far higher relative to the costs of the ads themselves.

This is especially the case since “reasonable efforts” are undefined, and careful lawyers will doubtlessly suggest a conservative approach that will further drive up the costs of small-scale advertising. Moreover, given the apparently discrete ad buys by Russian interests driving this legislation,<sup>58</sup> Congress will be understood to have targeted both large-scale ad buys where individual vetting is economically viable, and small-scale advertising where it is not. Basic economics suggests the result: online platforms will not offer small-scale products that are unprofitable.

Lastly, media outlets may be spurred by liability concerns to engage in undesirable profiling, or to impede advertising containing disfavored viewpoints under the guise of investigating a speaker’s eligibility to sponsor the ad.<sup>59</sup>

## VII. Inflexible and Impractical Disclaimer Requirements

S. 1989 also would impose additional and inflexible disclaimer burdens on Internet ads. Much of these rules are written for broadcast ads and are impractical for many online ad formats, and not just small-sized display ads. These disclaimers are already defective and arguably unconstitutional for some current broadcast formats.

The complete FEC-required disclaimer that S. 1989 would expand for online ads can be quite unwieldy, especially for space-limited ads. For independent expenditures and electioneering communications, the disclaimer must provide the sponsor’s name; street address, telephone number, or website URL; and state that the ad is not authorized by any candidate or candidate’s committee.<sup>60</sup> In addition, TV and radio ads must include an audio disclaimer that “[Sponsor’s name] is responsible for

53 Sens. Warner & Klobuchar Introduce the Honest Ads Act, *supra* note 4 at 7:00-7:10.

54 See note 49, *supra*.

55 See 47 U.S.C. § 309; FCC, Licensing, at <https://www.fcc.gov/licensing-databases/licensing>; FCC, *In re* Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees (Jan. 28, 2016) ¶¶ 5-7, at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-16-4A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-4A1.pdf); FCC, Public Inspection Files, at <https://publicfiles.fcc.gov/>. Cable operators are regulated because they are thought to affect broadcast service. See FCC, Cable Television, at <https://www.fcc.gov/media/engineering/cable-television>.

56 Mary Clare Jalonick, *Facebook announces new transparency for political ads before Russia hearing*, CHICAGO TRIBUNE (Oct. 27, 2017), at <http://www.chicagotribune.com/bluesky/technology/ct-facebook-ads-20171027-story.html>; Cecilia Kang and Daisuke Wakabayashi, *Twitter Plans to Open Ad Data to Users*, N.Y. TIMES (Oct. 24, 2017), at <https://www.nytimes.com/2017/10/24/technology/twitter-political-ad-data.html>.

57 S. 1989, § 9.

58 See, e.g., Tom Huddleston, Jr., *Russian Facebook Ads Targeted Muslims, Gun Owners, Black Lives Matter*, FORTUNE.COM (Oct. 2, 2017), at <http://fortune.com/2017/10/02/facebook-russian-ads-congress/> (describing “nearly 3,000 ads” from “hundreds of Russian-linked accounts”).

59 See, e.g., Kyle Swenson, *Twitter calls foul on Rep. Marsha Blackburn ad because of ‘baby body parts’ comment*, WASH. POST (Oct. 10, 2017), at [https://www.washingtonpost.com/news/morning-mix/wp/2017/10/10/twitter-calls-foul-on-rep-marsha-blackburn-ad-due-to-baby-body-parts-comment/?utm\\_term=.a34e139ad8d0](https://www.washingtonpost.com/news/morning-mix/wp/2017/10/10/twitter-calls-foul-on-rep-marsha-blackburn-ad-due-to-baby-body-parts-comment/?utm_term=.a34e139ad8d0).

60 11 C.F.R. § 110.11(a)(2) and (4), (b)(3).

the content of this advertising” and video ads must contain a similar text disclaimer; S. 1989 would require all online video and audio ads also to contain this same verbiage.<sup>61</sup>

For candidate-sponsored ads, the disclaimer must state, “Paid for by [name of candidate’s campaign committee].”<sup>62</sup> In addition, TV and radio ads must include an audio disclaimer spoken by the candidate stating his or her name, and that he or she has approved the message, and TV ads also must contain a full-screen view of the candidate making the statement or a photo of the candidate that appears during the voice-over statement.<sup>63</sup> TV ads also must contain an on-screen text disclaimer containing “a similar statement” of candidate approval.<sup>64</sup> Again, S. 1989 would extend these candidate approval statements (commonly known as “stand by your ad” disclaimers) to online audio and video ads.<sup>65</sup>

The current radio ad disclaimers often run for as long as 10 to 15 seconds, depending on the name of the group and contact information provided, but many online radio or podcast ad formats are limited to only 10 to 15 second lengths.<sup>66</sup> Online video ads also are commonly much shorter than broadcast TV ads.<sup>67</sup>

Under the FEC’s existing disclaimer requirements, there are exemptions for “small items” and communications where it is “impracticable” to include a disclaimer.<sup>68</sup> Such small items include pens, buttons, and bumper stickers, but also include Google search ads and presumably other small online ads.<sup>69</sup>

S. 1989 would make “qualified Internet or digital communications” (i.e., those “placed or promoted for a fee on an online platform”) ineligible for these exemptions from the disclaimer requirements.<sup>70</sup> At a minimum, a digital ad would have to contain on its face the name of the ad’s sponsor, and this information could not be displayed by alternative means, such as “clicking through” the ad.<sup>71</sup> The ad also would have to provide some means for recipients to obtain the complete required disclaimer, thus barring the use of formats where this may be technically impossible or impractical or if the vendor does not allow for it.<sup>72</sup> Notably, the complete disclaimer also could not be provided by linking to the advertiser’s website where all of the remaining information would be available, but rather must be provided on a stand-alone page.<sup>73</sup> Thus, S. 1989 may make many forms of small, popular, and low-cost Internet and digital ads off-limits for political advertisers.

## VIII. Eviscerating the Volunteer Materials and Sample Ballot Exemptions for State and Local Party Committees

S. 1989 also, quite inexplicably, would eviscerate the volunteer materials and slate card/sample ballot exemptions for state and local party committees, thus further weakening the role of the already beleaguered political parties. As with the rest of the legislation, the provision targeting the party committees has absolutely nothing to do with the bill’s purported concerns about foreign interference and Internet activities.<sup>74</sup>

The volunteer materials exemption is at the heart of the quintessential campaign volunteer experience, and it permits citizens in every part of the country to get involved in politics. It covers prototypical volunteer activities, such as stuffing envelopes and distributing door hangers in support of candidates. Under the existing volunteer materials exemption, if state and local political parties use volunteers to distribute these materials, the costs are exempt from the contribution and coordinated expenditure caps that limit how much parties may spend to support their candidates.<sup>75</sup> Similarly, state and local parties are permitted to publish and distribute slate cards and sample ballots that list at least three of their candidates for any office,

61 *Id.* § 110.11(c)(4); S. 1989, § 7(c).

62 11 C.F.R. § 110.11(b)(1).

63 *Id.* § 110.11(c)(3).

64 *Id.*

65 S. 1989, § 7(c).

66 See *Personalization of Audio: Shorter Audio Ads*, PANDORAFORBRANDS.COM (Aug. 24, 2017), at <http://pandoraforbrands.com/insight/personalization-of-audio-shorter-audio-ads/> and Everything You Need to Know about Podcast Advertising, CLEVERISM.COM (Apr. 9, 2016), at <https://www.cleverism.com/everything-about-podcast-advertising/>.

67 See, e.g., Garrett Sloane, *Facebook Gets Brands Ready for 6-Second Video Ads*, ADAGE.COM (Jul. 26, 2017), at <http://adage.com/article/digital/facebook-brands-ready-6-video-ads/309929/>.

68 11 C.F.R. § 110.11(f)(1)(i), (ii).

69 See FEC Adv. Op. No. 2010-19 (Google).

70 S. 1989, § 7(b)(2).

71 *Id.*, § 7(b)(1).

72 *Id.*

73 *Id.*

74 While it has recently been reported that Russian “trolls” were behind the “@TEN\_GOP” Twitter account, which purported to be affiliated with the Tennessee state Republican Party, the provision in S. 1989 addressing the volunteer materials exemption would not in any way address the issue of fake social media accounts impersonating state and local party committees. See Charlie Warzel, *Russian Troll @TEN\_GOP Account Was Tweeting This Summer*, BUZZFEEDNEWS (Oct. 24, 2017), at [https://www.buzzfeed.com/charliewarzel/new-charts-show-what-the-russian-troll-tengop-account-was?utm\\_term=.deQ6dkmO9#.yegnXQ9D2](https://www.buzzfeed.com/charliewarzel/new-charts-show-what-the-russian-troll-tengop-account-was?utm_term=.deQ6dkmO9#.yegnXQ9D2).

75 52 U.S.C. § 30101(8)(B)(ix), (9)(B)(viii).

including federal office, free from the contribution and coordinated expenditure limits.<sup>76</sup> Certain types of paid mass media communications, such as broadcast, newspaper, and magazine ads, and commercially distributed direct mail (in the case of the volunteer materials exemption), are off-limits for both of these exemptions.<sup>77</sup>

As the Republican National Committee has explained in comments to the FEC regarding this exemption:

In drafting the volunteer materials exemption in 1979, Congress' purpose was to 'encourage volunteers to work for and with local and state political party organizations.' Volunteers do the bulk of the work for our state and local parties and at the grassroots levels throughout the country, as they play a pivotal role in the production and distribution of campaign materials and mailers.<sup>78</sup>

Certainly, Democrats are every bit as reliant on the volunteer materials exemption.<sup>79</sup>

Currently, only ads "on broadcast stations, or in newspapers, magazines, or similar types of general public political advertising" are ineligible for the slate card/sample ballot exemption.<sup>80</sup> However, S. 1989 would eviscerate the slate card/sample ballot exemption by making all forms of "public communication" off-limits, including flyers, brochures, door hangers, and mailers (all of which qualify as "public communications").<sup>81</sup> Similarly, only "broadcasting, newspapers, magazines, billboards, [commercial] direct mail, or similar types of general public communication or political advertising" are currently ineligible for the volunteer materials exemption.<sup>82</sup> But S. 1989 also would blow a hole in the volunteer materials exemption by making all forms of "public communication," including stuffing envelopes, off-limits.<sup>83</sup>

The bill's attack on state and local party committees is particularly perplexing, given that experts in both parties, and from both ends of the campaign finance policy spectrum, agree that the parties have already been severely and unduly diminished by the last round of "reforms" enacted to the campaign finance laws (i.e., the Bipartisan Campaign Reform Act of 2002 ("BCRA")).<sup>84</sup> S. 1989 would further the decline of the state and local parties.

## IX. An Alternative Legislative Approach: Examining and Possibly Amending or Updating FARA

Instead of enacting new laws that would regulate online political speech for all Americans, as S. 1989 would do, Congress could consider addressing the problem of foreign interference in our election campaigns by passing legislation that actually focuses on *the problem of foreign interference in our election campaigns*. While there is already a law – the Foreign Agents Registration Act ("FARA") – that regulates foreign propaganda campaigns in the U.S., the law arguably permits activities such as the Russian hijinks on social media last year to go unregulated. Congress could enact some relatively simple amendments to FARA to close these loopholes.<sup>85</sup>

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76 *Id.* § 30101(8)(B)(v), (9)(B)(iv).

77 *Supra* notes 75 and 76.

78 Republican National Comm., Comments on Alternative Draft Policies on the Volunteer Materials Exemption (Apr. 13, 2010), at <https://transition.fec.gov/law/policy/volunteer/comm04.pdf> (quoting H.R. Rep. No. 422, 96th Cong., 1st Sess. at 9).

79 *See, e.g.*, FEC Matters Under Review 5575 (Alaska Democratic Party), 3248 (New York Democratic Party), 4471 (Montana State Democratic Comm.), 5824/5825 (Pennsylvania Democratic State Comm.), 5837 (Missouri Democratic State Comm.).

80 52 U.S.C. § 30101(8)(B)(v), (9)(B)(iv). The FEC interprets the term "direct mail" as "any mailing(s) by a commercial vendor or any mailing(s) made from commercial lists." 11 C.F.R. §§ 100.87(a), 100.147(a).

81 S. 1989, § 5(b)(1)(A), (2)(B); 52 U.S.C. § 30101(22) (defining "public communication").

82 52 U.S.C. § 30101(8)(B)(ix), (9)(B)(viii).

83 *Id.*, § 5(b)(1)(B); 52 U.S.C. § 30101(22) (defining "public communication"). It is unclear whether S. 1989 would preserve the existing statutory exemption for certain other "campaign materials" like "handbills" and "brochures." *Compare id. with* 52 U.S.C. § 30101(8)(B)(ix), (22). The bill's treatment of all "public communications" as ineligible under the volunteer materials exemption, but apparent preservation of certain "campaign materials" in the preamble of 52 U.S.C. §§ 30101(8)(B)(ix), would render the statute internally contradictory. Similarly, the statute would be rendered internally inconsistent by the bill's treatment of all "public communications" as ineligible under the volunteer materials exemption contained in the statute's definition of a "contribution," while a conforming change would not be made to this exemption under the statute's existing definition of an "expenditure." *Compare* S. 1989, § 5(b)(1)(B) and 52 U.S.C. § 30101(8)(B)(ix)(1) (addressing volunteer materials exemption under the "contribution" definition) *with* S. 1989, § 5(b)(2) and 52 U.S.C. § 30101(9)(B)(viii) (not addressing the volunteer materials exemption under the "expenditure" definition).

84 *See, e.g.*, Minn. Democratic Farmer Labor Party, Petition for Rulemaking to Strengthen Political Parties (Jun. 14, 2016), at [http://www.ifs.org/wp-content/uploads/2016/06/Petition-for-Rulemaking\\_Sandler-Reiff\\_6.2016.pdf](http://www.ifs.org/wp-content/uploads/2016/06/Petition-for-Rulemaking_Sandler-Reiff_6.2016.pdf); Neil Reiff and Don McGahn, *A Decade of McCain-Feingold*, CAMPAIGNS & ELECTIONS (Apr. 16, 2014), at <https://www.campaignsandelections.com/campaign-insider/a-decade-of-mccain-feingold>; Ian Vandewalker & Daniel I. Weiner, *Stronger Parties, Stronger Democracy: Rethinking Reform*, BRENNAN CENTER FOR JUSTICE (2015) at 5, at [https://www.brennancenter.org/sites/default/files/publications/Stronger\\_Parties\\_Stronger\\_Democracy.pdf](https://www.brennancenter.org/sites/default/files/publications/Stronger_Parties_Stronger_Democracy.pdf) ("That BCRA has had some impact in this regard [in weakening the political parties] is relatively clear.").

85 Americans and their government conduct a good deal of "political speech" abroad. For that reason, any legislation that will affect the legality of foreign activity in the United States should be carefully vetted by the Department of State.

For example, under FARA, agents of “foreign principals” engaged in “political activities” in the United States are required to: (1) register semiannually with the Department of Justice (“DOJ”); (2) include certain disclaimers on their “informational materials”; and (3) file with DOJ copies of those materials, which are available for public inspection.<sup>86</sup> Thus, FARA already contains the core reporting, disclaimer, and recordkeeping provisions of S. 1989, but unlike S. 1989, FARA is tailored to regulate only the political speech of foreign governments and foreign nationals.

“Foreign principals” covered by FARA include foreign governments, foreign political parties, and any person or organization outside of the U.S., other than individual U.S. citizens with domicile in the U.S.<sup>87</sup> Covered “political activities” include any activities: (1) to influence the U.S. government or the American public “with respect to formulating, adopting, or changing the domestic or foreign policies of the United States”; or (2) that affect the “political or public interests, policies, or relations of a government of a foreign country or foreign political party.”<sup>88</sup>

Under these definitions, the content of most, if not all, of the Russian ads purchased on social media last year and targeted at Americans likely would have been covered. Even the ads that did not specifically mention any candidates likely would have been covered, to the extent they related to U.S. domestic policies or affected Moscow’s political interests. However, because the ads apparently were purchased on social media directly by Russian entities,<sup>89</sup> and not through any intermediary “agent,” they arguably were not subject to FARA’s requirements.

Congress could amend FARA Sections 612 and 614 so that foreign governments, foreign political parties, and any other foreign nationals and entities that engage in covered “political activities” directly (i.e., not through any intermediary agent) with the American public are covered under the law. The types of “informational materials” covered under Section 614 also could be defined to include, but not be limited to, both paid and unpaid Internet and digital communications targeted at Americans (in addition to traditional forms of mass media communications).

These are only two examples and broad overviews of potential legislative fixes to FARA, and may not exhaust all of the possible ways in which the law could be amended to address foreign interference in U.S. election campaigns. IFS emphasizes, however, that any legislative changes must be precisely tailored so that the United States does not become a hermit society that is impervious to information from outside of our borders.

## *Conclusion*

Whether intentional or not, S. 1989 is using foreign interference with our election campaigns as an excuse to regulate all Americans’ online political speech. If adopted, these additional and costly legal burdens will make America look a little bit more like Russia. If Congress believes additional laws are necessary, it could consider amending and updating the Foreign Agents Registration Act.

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<sup>86</sup> 22 U.S.C. §§ 612, 614.

<sup>87</sup> *Id.* § 611(b).

<sup>88</sup> *Id.* § 611(o). Foreign nationals are already prohibited from making any disbursements for express advocacy and electioneering communications. 52 U.S.C. § 30121(a)(1)(C).

<sup>89</sup> See, e.g., Hunter Schwarz, *This is how easy it is to buy a Facebook ad like the Russian ‘troll farms’ did*, CNN.COM (Sep. 30, 2017), at <http://www.cnn.com/2017/09/30/politics/buy-facebook-ads-like-russian-trolls-do/index.html>.

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