

Newsweek

If Facebook Regulates Political Ads, Do We Still Need Congress to Act?

John Samples

November 15, 2017

Congress is considering the Honest Ads Act, an effort to force disclosure of political advertising on the Internet.

We ought to be skeptical any time Congress seeks to manage a private forum for purposes of improving political speech. I want to examine how the managers of that private forum have responded to the bill.

Facebook has announced a host of changes to its advertising marketplace, attempting to forestall regulation by satisfying congressional concerns through private action.

Facebook is acting to counter a threat of regulation and that itself is disturbing. We do not wish to see Facebook bullied into actions that run counter to their own inclinations.

Yet, Facebook also has a history of seeking to satisfy its users, and it is possible that such business motives are at work. Perhaps we should avoid for now deciding that Facebook has been coerced.

That said, there is good reason to believe that self-regulation can address the concerns of lawmakers more effectively than government action.

The Honest Ads Act is purportedly intended to reduce the ability of foreign governments to meddle in our elections while providing voters with access to information about the source of advertisements. Targeted advertisements, which appear only to users who match certain profiles, are of particular interest to legislators.

The bill attempts to achieve these goals by expanding the Federal Election Campaign Act in a number of ways.

First, it would require disclaimers in online political advertisements specifying who paid for the advertisement, to appear “in letters at least as large as the majority of the text in the communication” for text adverts, and for at least four seconds in videos. It is unclear how these requirements would apply to GIFs.

Platforms, meanwhile, would have to maintain searchable records of all advertisements concerning “a national legislative issue of public importance” including descriptions of the targeted audience, the advert’s price, and the name of the candidate or issue to which the advert pertains.

The FCC would be tasked with establishing rules to establish a common data format for these records, and authoring a biannual report concerning transparency in both paid and as-yet-undefined unpaid political advertising.

Facebook’s proposal provides its users with information in a far more user-friendly fashion than the bill, and in some cases, goes above and beyond what would be required by the Honest Ads Act.

All advertisements, political or not, will be tied to a sponsoring page, accessible through the advertisement, which will house an archive of other advertisements the page has run in the past four years.

A universal advert archive is likely to be more effective in informing Facebook users than mandated disclosure for adverts concerning “national legislative issues of public importance.” This nebulous category is either unlikely to fully capture the issues that divide America (Is “creeping sharia” a national legislative issue?) or prone to exert a chilling effect on constitutionally protected speech.

Anyone desiring to run election related advertisements, a clear, predefined category, will be required to verify their identity and location. The adverts themselves will include a built-in disclaimer, and a link to information describing the amount spend on the ad, the number of people who have viewed the ad, and demographic data concerning the advert’s intended audience.

These requirements will first apply to federal elections, with planned expansion to cover state elections and referendums.

This planned, flexible, expansion is a key element of Facebook’s proposal that cannot be replicated with legislation. Unlike the Honest Ads Act, Facebook’s advertising policies can be tested and tweaked in an ongoing fashion, before their rollout in America’s 2018 midterms, they will be tested in Canada.

Legislation cannot be tested before it is implemented, let alone tested at any sort of realistic scale, and, particularly given its once-size-fits-all approach and partisan salience, is unlikely to be updated as time goes on. If enacted, attempts to amend or improve the Honest Ads Act will be politically fraught as Republicans and Democrats identify and re-litigate specific elements of the law which may seem to advance the cause of one party over the other.

Facebook’s proposal also distinguishes itself from the Honest Ads Act in ease of compliance. The Honest Ads Act requires anyone seeking to purchase a qualifying political advertisement,

still a somewhat murky category, to furnish information concerning their identity and the nature of their advertising, on Facebook, this data collection is baked in, reducing the risk of noncompliance.

If you fail to fill in the required information, your advertisement will not run, no ifs, ands, or buts. The wider net and evolving nature of Facebook's proposal seems to put it above the Honest Ads Act, though the bill was likely instrumental in spurring, and setting goals for, Facebook's political advertising policy.

Facebook is trying to govern their private forum in way that responds to congressional concerns and perhaps, the wishes of their users. We might wish Congress stay clear of the Internet, but that seems unlikely just now. Facebook's effort may have the additional advantage of showing that private governance can work well in a forum that implicates freedom of speech.

Private governance can be practiced with varying levels of efficacy, however, last week's Senate Intelligence Committee hearings on Russian influence demonstrated that while Congress may have the power to regulate social media platforms, it does not have the institutional expertise to deal well with Facebook and other private forums.

Private governance may be the actual next alternative to new and expanding government regulation of speech on the Internet. Facebook is making that next alternative real. Those who doubt the wisdom of government control of speech forums will be hopeful about the prospects for private governance.

John Samples is a vice president at the Cato Institute. He is the author of The Struggle to Limit Government: A Modern Political History and The Fallacy of Campaign Finance Reform.