

Political Advertising and Advertising Technology

Privacy Law & Policy Webinar Series | October 28, 2020



Ronald M. Jacobs

Chair, Political Law Practice | +1 202.344.8215 | RMJacobs@Venable.com

Rob Hartwell

Associate, Privacy Practice | +1 202.344.4663 | RLHartwell@Venable.com

VENABLE LLP

Agenda

- Brief Election Update – Potential Chaos
- Policy Maker View of the Industry
- Federal & State Regulatory Landscape
- Industry Self-Regulation
- What This Means for Companies

CLE Credit

This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour, of which one hour applies to the general credit requirement, and by the State Bar of New York in the amount of one credit hour, of which one credit hour can be applied toward the Areas of Professional Practice requirement. Venable certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California and State Bar of New York, which govern minimum continuing legal education. Venable is a State Bar of California and State Bar of New York approved MCLE provider.

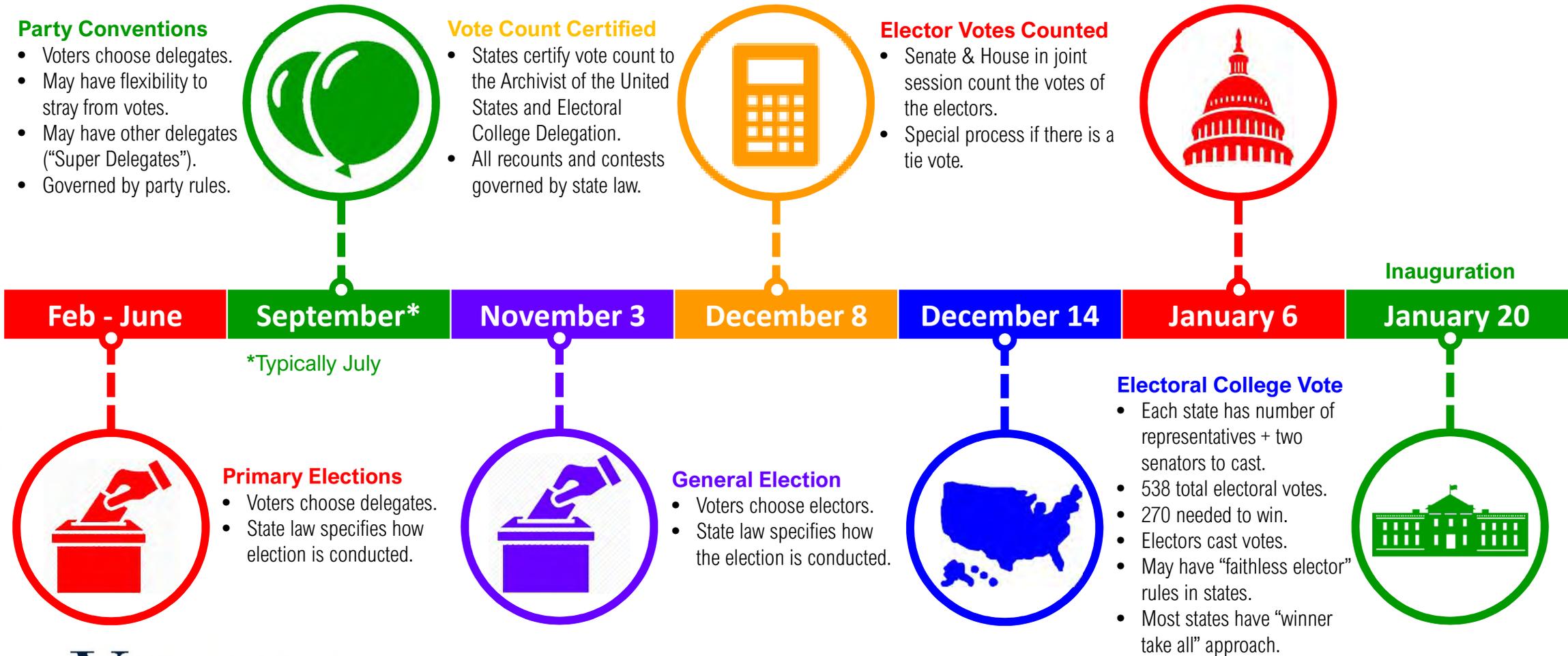
A code will be announced during the presentation, and a CLE submission form will be sent to participants next week via email.

This presentation is intended as a summary of the issues presented and is not intended to provide legal advice. It is provided for the general information of the attendees. Legal counsel and advice should be sought for any specific questions and before taking any action in reliance on the information presented.

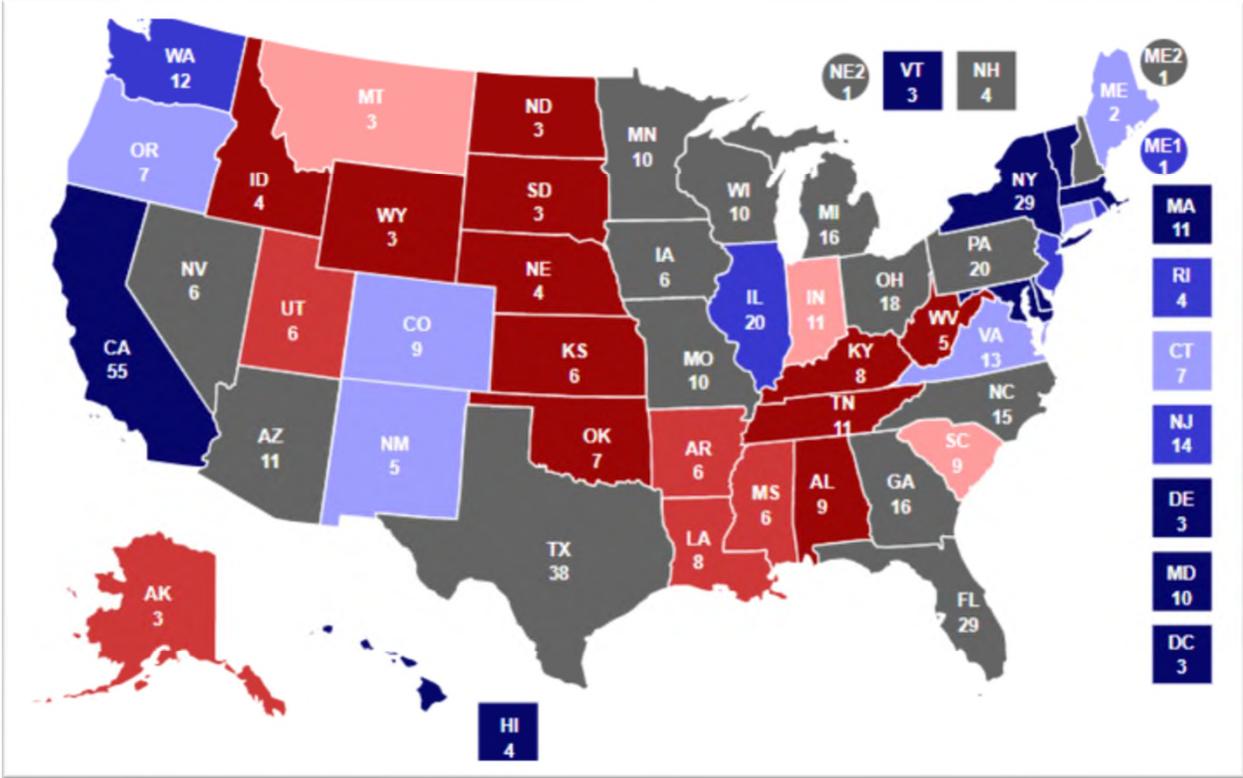
Brief Election Update – Potential Chaos

6 Days to Go

The Process of Electing a President



Electoral College in Action



Map Source: RealClearPolitics

- 270 Electoral College votes are necessary to win.
- Based on current polling, President Trump has a fairly solid 115 electoral votes and Vice President Biden is fairly certain to have 212.
- That leaves 211 electoral votes spread over 16 states that are currently polling as toss-ups (most are winner-take-all but Nebraska and Maine apportion by congressional districts).
- Vice President Biden needs to capture 59 of the remaining 211 votes.

Things That Can Go Wrong

- Candidate dies.
- Problems with casting votes.
- Difficulty counting the votes.
- Competing slates of electors as a result of vote counting issues.
- Rejection of electors and contingent election.

Death of a Candidate



Before Election Day

- Parties name replacement.
- Ballots cannot be changed after they have been finalized, so voters do not see new names.
- If the deceased candidate wins, question if electors would or could cast votes for party-named replacements.
- Issue of whether House would accept electors voting for replacement.
- No history of this happening.
- Voters would know that a vote for the deceased candidate is potentially a vote for replacement candidate.



Before Votes Are Certified

- Situation arises only if the candidate who won dies.
- No process specified in this scenario.
- Political party may try to use process to name new candidate, but voters would have had no say in who this person is and would have voted for someone else.
- Even if incumbent wins, no specific provision to say Vice President becomes President.



Before the Electoral College Votes

- No process specified.
- Votes from states would have been certified for someone who was still alive at that time.
- Supreme Court upheld state laws removing or punishing “faithless” Electoral College delegates.
- The Court acknowledged the possible chaos death or incapacity of a candidate could create but declined to provide guidance.
- Note the faithless elector issue arises in all three of these scenarios if the winner dies before Congress has accepted votes.



Before Congress Counts Electoral College Votes

- At this point electors would have cast their ballots for a living candidate who then dies.
- No process specified.
- Congress would likely have to choose the next President.
- House selects President, Senate selects Vice President.
- If the House cannot select a President, the new Vice President selected by the Senate becomes President until the House decides.



Before Inauguration Day

- The House and Senate have counted and accepted the electoral votes and named the President and Vice President Elect, and then the President-Elect dies.
- Twentieth Amendment is clear that the Vice President Elect, who would have received votes on election day, and majority vote of Electoral College, and those votes would have been accepted by Congress, becomes the new President on Inauguration Day



Voting Issues

Casting Ballots

- Concerns about absentee ballots sent through the mail and delivery times.
- Concerns about long lines and voting in person because of COVID-19.
- Changes in voting locations and reductions in voting locations because of COVID-19 issues.
- Concerns about voters not knowing how to complete an absentee ballot correctly.

Counting Ballots

- Staffing issues because of COVID-19.
- Use of drop boxes and concerns about safety of those ballots—both loss of ballots and injection of new ballots.
- Quantity of absentee ballots will far surpass that of previous years—some states process ballots before election day, others do not.
- Different and frequently changing rules for return deadline of absentee ballots.



Counting/Certifying Issues

Counting Ballots

- Delays because of absentee ballots.
- Concerns over legitimacy of absentee ballots.
- Concerns about multiple votes from absentee and in-person.
- Fewer issues with determining voter intent (hanging chads) with modern voting equipment.
- Concerns about electronic voting equipment—security, accuracy, reporting.

Determining Results

- **Canvass:** Official results as reported from local elections officials up to state.
- **Recount:** Request for officials to recount the votes. Some states have mandatory recounts when vote is within certain threshold.
- **Contest:** Challenge of results in court. Most states have special provisions for how conducted. Limited to specific issues.
- **Litigation:** Outside of the contest procedures, attempts at injunctions or other relief against process.



Electoral College Process

- Electors meet in person in each state at location set by legislature.
- Vote by paper, one vote for President, one for Vice President.
- Electors count ballots.
- Complete six “Certificates of Vote” which contain:
 - Two lists, one including votes for the President, the other votes for the Vice President.
 - Includes the names of persons receiving votes and the number of votes cast for them.
- Electors pair Certificates of Votes with Certificates of Ascertainment (provided by the state governors) and sign, seal, and certify them (3 U.S.C. §§8-10).



Process for Counting Electoral Votes

- 1:00 p.m. January 6, Joint Session of Congress in the House Chamber
- The Vice President presides as President of the Senate.
- The Vice President opens the certificates and presents them to four tellers, two from each chamber.
- The tellers read and make a list of the returns.
- When the votes have been ascertained and counted, the tellers transmit them to the Vice President.
- If one of the tickets has received a majority of 270 or more electoral votes, the Vice President announces the results, which “shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President.”



Contingent Election

- Three times there have been Contingent Elections—two after the 12th Amendment changed the process.
- House selects the President, Senate selects the Vice President.
- House must vote immediately after contingency declared, and no other business may be considered.



House

- Top three vote getters only
- One vote per state
- Delegation votes to determine vote
- Currently 26 R majority delegations, 23 D majority delegations, 1 tied
- Majority vote—could have a tie



Senate

- Majority vote
- Each Senator votes—no state-by-state voting
- Vice President would cast tie vote



No President?

- If House cannot select a President by Inauguration Day, then the new Vice President (either by majority vote of the Electoral College or by majority vote of the Senate if there is a contingent election) becomes Acting President on January 20 under the Twentieth Amendment until a President is chosen.
- If there is no new Vice President, then the Presidential Succession Act of 1947 provides for the Speaker of the House to serve as Acting President until a President or Vice President is chosen.
- If the Speaker does not wish to serve, then the President Pro Tempore of the Senate becomes Acting President (currently Chuck Grassley of Iowa).
- If either the Speaker or the President Pro Tempore becomes President, they must **resign their seat in Congress** immediately before being sworn in as Acting President.
 - Serious issues with Senate majority given current breakdown.
 - Would not just regain their seats once President is chosen.

Key Pressure Points

- Watch out for voting issues and vote counting issues, especially in swing states.
- Potential for recount and contest procedures to drag on.
- Watch out for potential competing slates of electors (probably low likelihood, but not impossible).
- Watch out for challenges to electoral votes and lack of majority vote.
- Death or incapacity of candidate or winner of election would create serious issues.
- Changes in House and Senate makeup during this election mean we cannot game out a contingent election—a split in the House and Senate as we have now could cause problems.

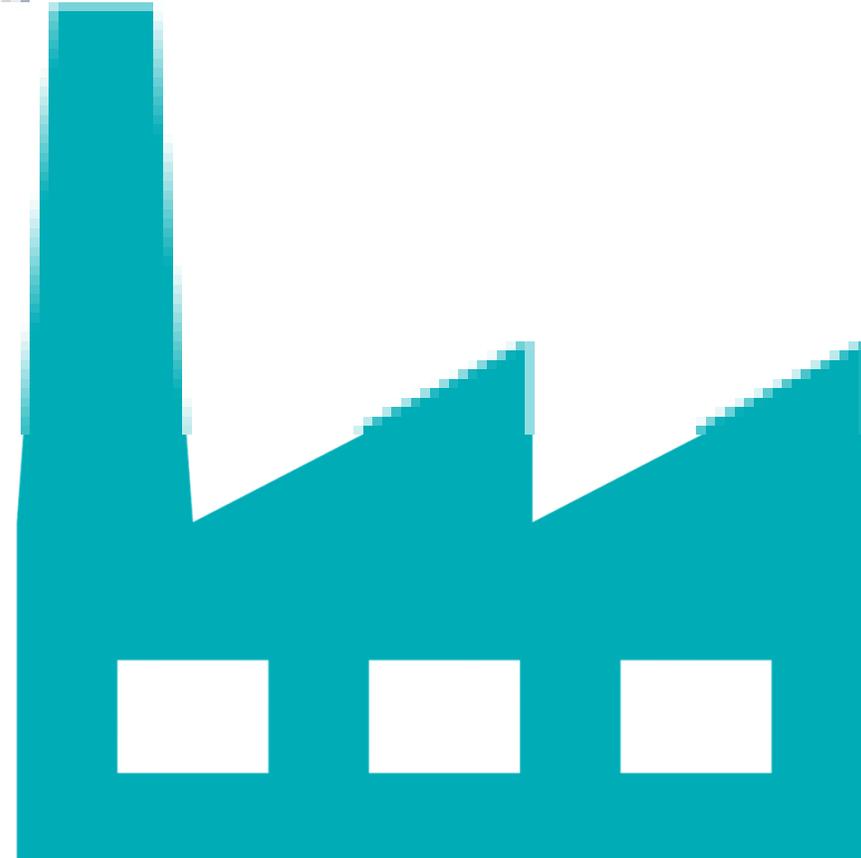


Policy Maker View of the Industry

What they think you do

Who Is in the Digital Political Ad Industry?

- Candidates, PACs, nonprofits (the advertisers)
- Political consultants
- Digital advertising firms
- Publishers
- Exchanges
- Demand-side platforms
- Supply-side platforms



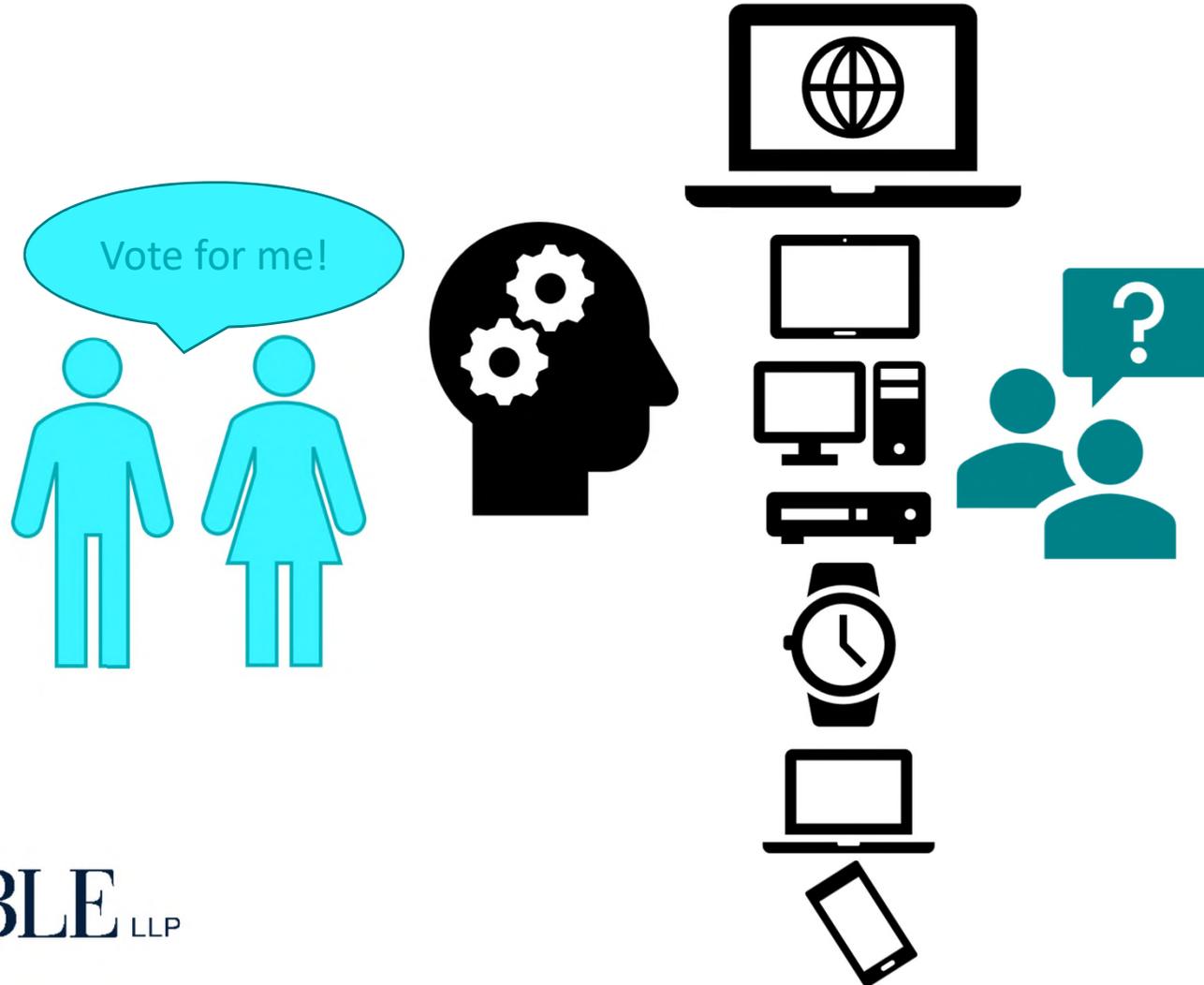
How Policymakers View the Digital Political Advertising Ecosystem

Candidates/PACs/
Nonprofits

Agencies

Publishers

Voters



How the Digital Political Advertising Ecosystem Actually Works

Candidates/PACs/
Nonprofits

Agencies

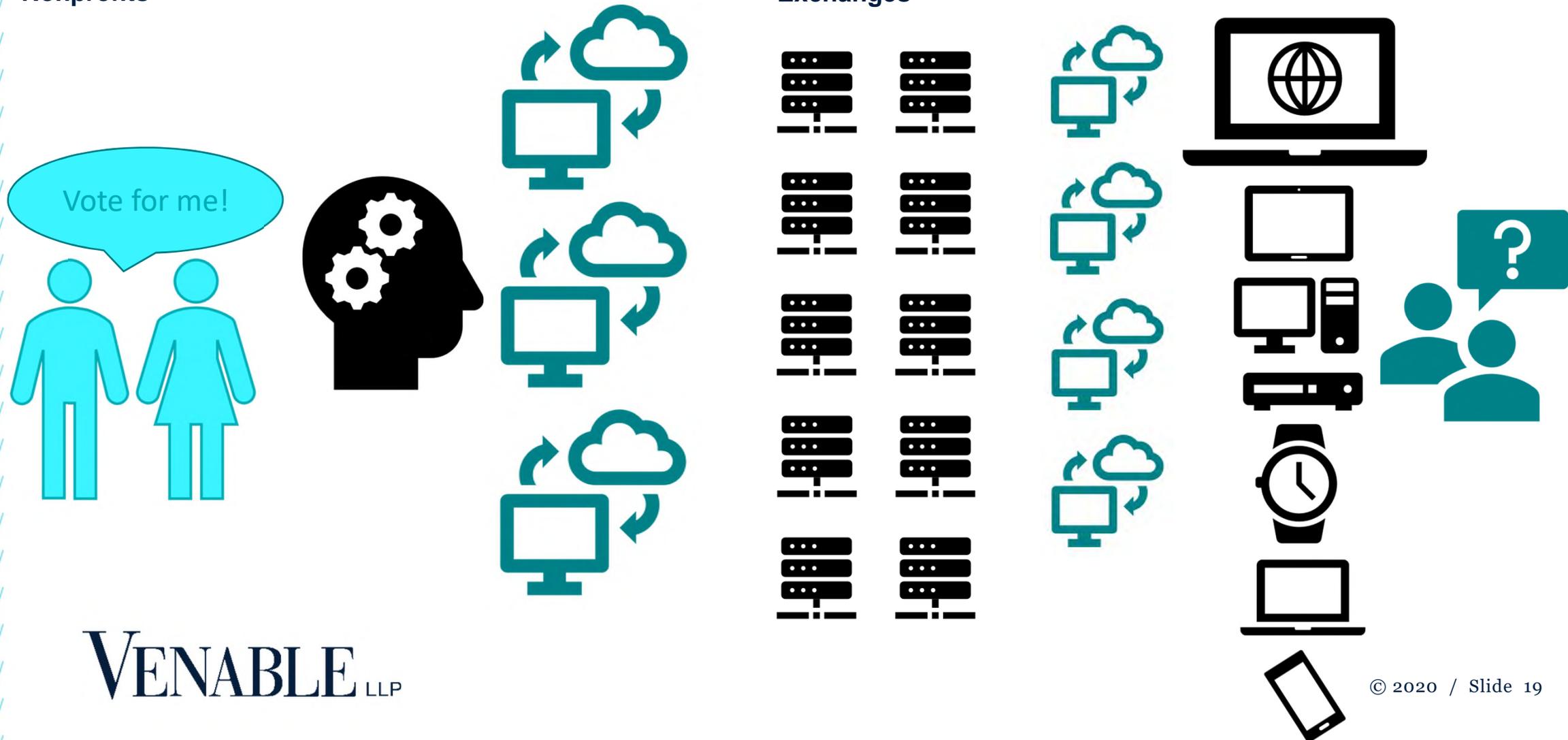
DSP

Ad Networks &
Exchanges

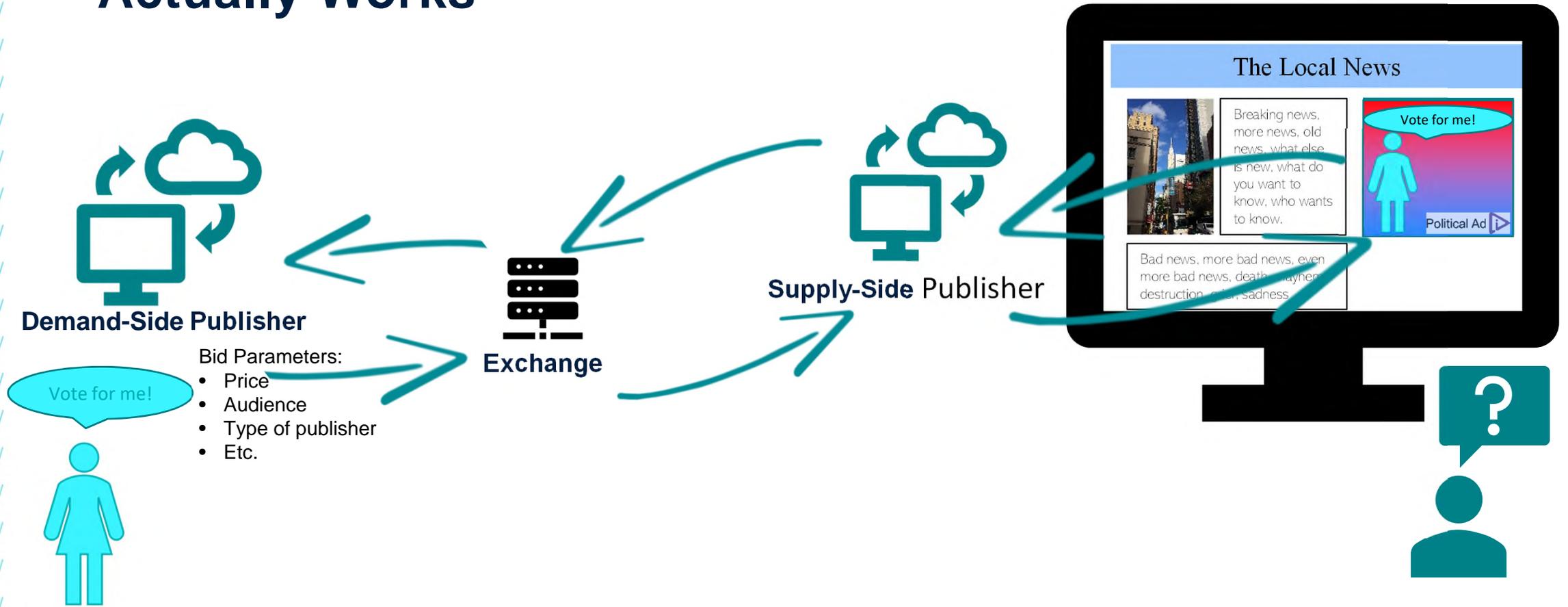
SSP

Publishers

Voters



How the Digital Political Advertising Ecosystem Actually Works





Federal & State Regulatory Landscape

What's there & what's to come

Why Do Federal & State Policy Makers Care?

- **Experience and history**

- Cambridge Analytica
- Concerns about foreign intervention about U.S. campaigns
- Mistrust of social media
- Concerns about small ad exemptions and “dark money”

- **Technology and business**

- Shifting of ad spending
- Increased sophistication and effectiveness of online targeting
- Convergence of platforms
- Complexity and perceived opacity of online advertising

The Federal Landscape

Traditional Political Advertising vs. Online Advertising: Advertisers' Obligations Remain, but Laws that Regulate the "Publisher" or Distributor" Generally Do Not Apply Online:

- Public File Requirements
- Pricing
- No Censorship

BUT...

- Candidates, Committees, and PACs
- must still make financial disclosures and include disclaimers on most ads

- *No federal laws require websites or platforms to track online political advertising or maintain publicly available archives of advertisements that have run*
- *There are no rules that would require the same or comparable pricing to be offered to different candidates, or*
- *Broadcast rules against censoring political ads do not apply*
- *Disclaimers generally required, indicating who paid for ads that advocate for the election or defeat of a candidate or solicit contributions*



Proposed Federal Laws

- **Banning Microtargeted Political Ads Act**
 - *Goal is not transparency but outlawing political niche advertising based on personal data*
 - *Would prohibit online platform with 50 million annual visitors from targeting or permitting the targeting allowing someone else to “target” political ads*
 - *“Targeting” is broadly defined to mean **use computational processes, including algorithms to transmit ads to a subset of users based on personal information** without an opt-in (except for targeting a broad geography)*
 - *Would impose broadcast-like requirements*
 - *Websites, platforms, apps, and social networks (online platforms) with 50 million unique monthly U.S. visitors to make reasonable efforts to ensure that covered political ads are not purchased by a foreign national*
 - *“Online platforms” to maintain a public file of the identity of purchaser, subject, copy, date and time first and last displayed, audience targeted, number of views generated, and average rate charged for candidate and issue ads “as soon as possible” – purchaser to provide needed information*
 - *House bill similar to HONEST ADS*
- **Proposed FEC Rules**
- **HONEST ADS Act**
 - Model for much state legislation
- **SHIELD ACT**

Most Activity and Regulation in the States

- Most states require advertisers to include a disclaimer of some sort:
 - Paid for by Joe Blow for Governor
 - Joe Blow for Governor, Sally Smith, Treasurer
 - Paid for by Citizens for Low Economic Growth, Not authorized by any candidate, visit state.sos.gov for more information and contributors
- Most states impose record-keeping requirements on political committees
- Some states have begun to impose requirements on ad platforms:
 - Certification of compliance by advertisers
 - Disclosures generated or vetted by platform
 - Record-keeping or “database” requirements

State Platform Requirements

- California, New York, Maryland, and Washington imposed responsibilities for “online platforms related to digital political advertising”
- Each state has a similar definition of the platforms (most public-facing websites, social media platforms, *including ad networks and search engines*)
 - Crucial differences between states related to the size of covered entities and other triggers
- Similar definitions of covered ads, which tend to be narrowly tailored to avoid free speech issues
 - Key differences around types of ads covered (text and image vs. video and email) and record-keeping requirements

State Enforcement & Status

- Maryland
 - Local newspaper publishers and affiliated websites, including the *Washington Post*, brought suit in federal district court, which enjoined application of the law to those parties. The Fourth Circuit affirmed this decision. Legislation introduced to amend the requirements, but failed to pass because of COVID-19
- New York
 - No enforcement yet, but non-compliance could carry significant fines
- Washington
 - In 2018, Facebook and Google agreed to settle lawsuits over their non-compliance with Washington state's online political ads requirements (Google paid \$217,000 and Facebook paid \$238,000).
 - In 2020, Washington again filed suit against Facebook, alleging violations of the state's online political ads requirements

Proposed State Laws

- New laws are proposed in every legislative session. This year laws were proposed in:
 - Maryland
 - Illinois
 - Connecticut
- More assumed to be proposed in the next sessions as well across the country
- Washington Public Disclosure Commission (PDC), which regulates political ads, issued a report that proposed registration and digital identification numbers for each campaign and ad placed online

Industry Self-Regulation

Working with Policy Makers for a Solution

DAA Political Ads Icon: Self-Regulatory Option

Political Ad



What It Does

- Identifies the ad as a political ad
- Provides a simple way to let users obtain more information
- Flexible:
 - Can be customized to meet state law
 - DAA has set minimum floor
- Maryland in particular has created regulations that work with the DAA icon

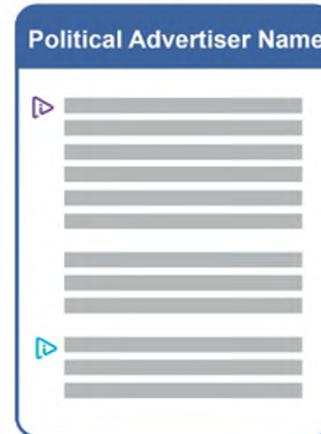
How It Works

Political Ad That is Also Interest-Based Advertising (IBA)

Political ad enhanced notice and link to a disclosure by the political advertiser as well as an interest-based advertising disclosure with required link(s) to consumer choice mechanisms.



Example



Political Ad Disclosure

YourAdChoices
Disclosure
(IBA)

Popup Contents

- Name of the political advertiser;
- Phone number, address, website, or alternative and reliable contact information for the advertiser;
- Other information required by applicable federal or state law for such notices;
- Link to a government database of contributions and expenditures for the advertiser, if applicable;
- Any disclaimers required by state or federal law, if the ad itself is too small to display them (as permitted by applicable law); and
- Name(s) of the advertiser's CEO, member of the executive committee or board of directors, or treasurer.

In Practice

The image displays a campaign management interface with several key components:

- Main Campaign View:** Shows campaign details such as Description (\$2,000.00), CPM (\$30.00), Impressions (None), and Investment (None).
- Left Sidebar:** Contains navigation options like PAGES, NOTES, and DISCUSS. A red box highlights a specific menu item.
- Targeting Panel:** Lists various targeting options like Fees, OneView, Context, Domains, etc.
- Political Advertiser Disclosure Form:** A form with fields for Political Advertiser Name, CEO name, Address, Telephone Number, and Email. A red box highlights the form title.
- Political Disclosure Form Overlay:** A purple overlay form with fields for Political Advertiser Name, Political Advertiser's Executives, Address, City, State, Zip Code, Telephone Number, Email, Website, Primary Contact Type, Express Advocacy, and Exemption Reasons.

In Practice

NOWCAST KOAT Action 7 News at 6am Watch on Demand ▶

KOAT ACTION NEWS 85° WEATHER SEARCH

BREAKING NEWS: COVID-19 maps of New Mexico: Latest coronavirus cases by county < 2 / 5 > ||

Paid for by Daymon Ely for NM House District 23, David Duhigg, Treasurer. **DAYMON ELY IS TAKING A STAND FOR NEW MEXICO.** **LEARN MORE** ▶

Advertisement

Michael Reynolds **ALBUQUERQUE, NM 87102**
Change 📍
85° F ☀️ 0%
Feels like 85°F Sunny
[VIEW INTERACTIVE RADAR](#)

Paid for by Daymon Ely for NM House District 23, David Duhigg, Treasurer. **DAYMON ELY IS TAKING A STAND FOR NEW MEXICO.** **LEARN MORE** ▶

Political Ad ▶

What It Is Not

- Does not require platforms to maintain information
- Does not impose disclosure beyond what is generally required by states
- Does not create an ad database

What This Means for Companies

Are Political Ads Worth the Risk?

What Are the Benefits of Accepting Digital Political Advertising?

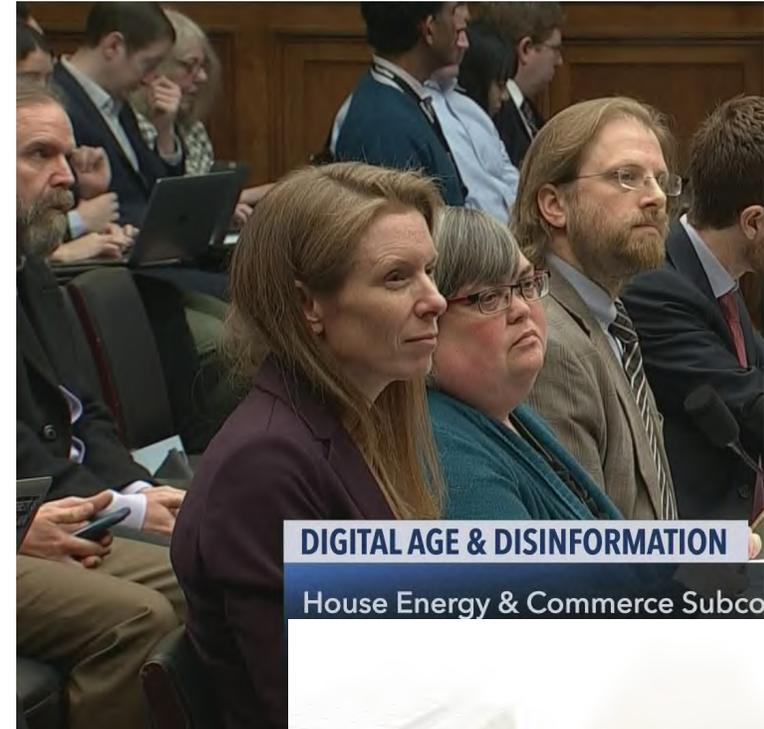
- Tap into a large new market of advertising that can increase revenue
- New techniques and data can be developed to improve overall advertising operations
- New relationships and contacts to improve business development outside the political realm

What Are the Risks of Accepting Digital Political Advertising?

- Political Ad Specific Legal Liability
 - State political ad laws can carry heavy fines and are technically different from state to state
- Non-Political Ad Specific Liability
 - Other general digital advertising laws and self-regulatory requirements apply (e.g., DAA Interest-Based Advertising Principles for targeted political ads)
- Reputational Harm
 - If you help place a political ad promoting disinformation, social unrest, or other politically controversial material you will make headlines and potentially end up before Congress

Hot Button Issues: Disinformation

- Congress held multiple hearings that required C-suite-level executives to answer questions about political ads their companies placed
- Multiple *Wall Street Journal*, *New York Times*, and *Washington Post* articles highlighted concerns related to digital targeted political advertising, disinformation, and the companies placing the ads



Hot Button Issues: Location Data

- Location Data & Tracking:
 - Various companies and campaigns have used location data to identify and target participants in various protests across the country, leading to various negative headlines
 - General disinformation and other “bad actors” leverage location data to suppress the vote in key areas, sometimes targeting minorities with false election day information

Political operatives are targeting propaganda by location

Political Groups Track Protesters' Cellphone Data

Voting and advocacy groups track cellphones of participants and send messages; the tactics are 'deeply spooky yet extremely helpful,' says one user

Hot Button Issues: Turning Off Political Ads

- Platforms are starting to consider timed prohibitions on political advertising, potentially causing campaigns to end prematurely
- Potential bans of this type may open opportunities for other companies to engage with political advertisers to continue campaigns on different platforms where the bans are not present

Facebook Widens Ban on Political Ads as Alarm Rises Over Election

Political ads will be banned indefinitely after polls close on Nov. 3 and the company plans new steps to limit misinformation about the results.

Twitter Will Ban All Political Ads, C.E.O. Jack Dorsey Says

Risk Mitigation Strategies

- Look at the sources of data used for targeting
 - Was it obtained legally?
 - Who has the right to use it?
 - Is it trustworthy?
 - Can it be used for the current purpose?
 - How is the audience being targeted?
 - Who ends up with what data after audiences are segmented?
- Consider the content of the ad
 - Does it comply with applicable standards (e.g., legal or platform-based) or your own policies on ad content?

Risk Mitigation Strategies

- Figuring out if it is a political ad at all
- Determining whether it is federal, state, or local and who the advertiser is
- Determining whether it triggers any state-specific rules
- Ascertaining whether the ad complies with state law
- Doing diligence on the advertiser—different in the political space
- May be more difficult if dealing with different parts of the ecosystem and white label products

Questions?



Ronald M. Jacobs

Chair, Political Law

202.344.8215

RMJacobs@Venable.com



Rob Hartwell

Associate, Privacy

202.344.4663

rlhartwell@Venable.com



© 2020 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP