

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 949 (Delegate Washington)
Ways and Means

Election Law - Disclosure of Qualifying Paid Digital Communications - Revisions

This bill modifies the records relating to qualifying paid digital communications that online platforms are required to maintain and make available to the State Board of Elections (SBE). **The bill takes effect June 1, 2020.**

Fiscal Summary

State Effect: The bill does not directly affect State finances.

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Under the bill, the following records are no longer required to be maintained and made available to SBE, on request:

- the candidate or ballot issue to which the qualifying paid digital communication relates and whether the qualifying paid digital communication supports or opposes that candidate or ballot issue;
- the dates and times that the qualifying paid digital communication was first disseminated and last disseminated;
- a digital copy of the content of the qualifying paid digital communication;

- an approximate description of the geographic locations where the qualifying paid digital communication was disseminated;
- an approximate description of the audience that received or was targeted to receive the qualifying paid digital communication; and
- the total number of impressions generated by the qualifying paid digital communication.

Instead, the online platform must maintain and make available to SBE, on request, the records regarding the qualifying paid digital communication that the online platform maintains in the ordinary course of its business of selling any form of advertising on the online platform.

Under both current law and under the bill, the records must be maintained and made available to SBE on request:

- for each qualifying paid digital communication a purchaser requests to disseminate through the online platform and for which the purchaser provides specified notice to the online platform that the communication is a qualifying paid digital communication;
- within 48 hours after a qualifying paid digital communication is first disseminated on the online platform; and
- for at least one year after the general election following the date when the online platform disseminated the qualifying paid digital communication.

Current Law/Background:

Qualifying Paid Digital Communications

Under Chapters 833 and 834 of 2018, a person who directly or indirectly requests placement of a “qualifying paid digital communication” on an online platform must expressly notify the online platform at the time the request for placement is made that the communication is a qualifying paid digital communication.

“Qualifying paid digital communication” is defined as any electronic communication that (1) is campaign material; (2) is placed or promoted for a fee on an online platform; (3) is disseminated to 500 or more individuals; and (4) does not propose a commercial transaction. “Online platform” is defined as any public-facing website, web application, or digital application, including a social network, ad network, or search engine, that (1) has 100,000 or more unique monthly United States visitors or users for a majority of months during the immediately preceding 12 months and (2) receives payment for qualifying paid digital communications.

An online platform must maintain specified records for each qualifying paid digital communication a purchaser requests to disseminate through the online platform and for which the purchaser has provided notice of it being a qualifying paid digital communication. Certain records must be made available to the public (regarding those responsible for the qualifying paid digital communication and the amount paid for its placement) on the Internet, in a clearly identifiable location on the online platform's website and searchable by purchaser, within 48 hours of the purchase of a qualifying paid digital communication. Other records must be made available to SBE on request (regarding the content of the qualifying paid digital communication, the timing of the dissemination, the geographic and audience focus of the dissemination, and the exposure generated by the dissemination), within 48 hours after a qualifying paid digital communication is first disseminated.

A purchaser of a qualifying paid digital communication must provide the online platform with the information necessary in order for the online platform to maintain the required records, and an online platform may rely in good faith on the information provided by a purchaser. The records made available to and obtained by SBE are not subject to inspection under the Public Information Act.

An online platform must make reasonable efforts to (1) allow SBE to take specified actions, generally relating to implementation and enforcement of the requirements applicable to qualifying paid digital communications and (2) in accordance with specified federal law, comply with any subpoena issued in connection with an investigation concerning the compliance of a purchaser of a qualifying paid digital communication with the bill's requirements or campaign material authority line requirements.

The State Administrator of Elections may investigate a potential violation of requirements applicable to a purchaser of a qualifying paid digital communication (including campaign material authority line requirements), and in furtherance of an investigation, the State Administrator may issue a subpoena and a circuit court may compel compliance with a subpoena.

At the conclusion of an investigation, SBE may request that the Attorney General institute an action in a circuit court for injunctive relief to (1) require a purchaser of a qualifying paid digital communication to comply with applicable requirements or (2) require an online platform to remove a qualifying paid digital communication if the qualifying paid digital communication or the purchaser does not comply with applicable requirements. Before requesting that the Attorney General seek an injunction, SBE must notify a purchaser of a qualifying paid digital communication who is the subject of an investigation of the circumstances that gave rise to the investigation.

A circuit court may grant injunctive relief only if the Attorney General shows by clear and convincing evidence that a violation of applicable requirements is being committed.

Enforcement of Chapters 833 and 834 Against Certain Entities Enjoined

The U.S. District Court for the District of Maryland, in a lawsuit brought by various media outlets (*The Washington Post, et al., v. David J. McManus, Jr., et al.*), has granted a preliminary injunction preventing the State from enforcing – against the plaintiff media outlets – the requirements under Chapters 833 and 834 that are applicable to online platforms. The 4th Circuit U.S. Court of Appeals recently upheld, in December 2019, the District Court’s decision to grant the preliminary injunction. The District Court and Court of Appeals both held that the requirements applicable to online platforms were likely unconstitutional, due to violating First Amendment rights of free speech and a free press, as applied to the plaintiffs in the case.

Small Business Effect: The bill may have a meaningful impact on any small business online platforms subject to the bill’s requirements which, under the bill, will no longer need to maintain the currently required records relating to qualifying paid digital communications and instead will need to only maintain records that the online platforms maintain in the ordinary course of their business selling any form of advertising on their platform.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 781 (Senator Zucker) - Education, Health, and Environmental Affairs.

Information Source(s): State Board of Elections; Department of Legislative Services

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