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OPTING OUT OF POLITICAL ADVERTISING: NOT SO SIMPLE

by Gary A. Kibel

If you don't like being retargeted by an online retailer, click the AdChoices icon and opt out of the provider who is retargeting you.

If you don't like the daily deal emails from that site where you made just one purchase and didn't notice the pre-checked box signing you up for their email alerts, just click the unsubscribe link at the bottom of the next email.

If you want the politicians to leave you alone during the next month and a half, well, it may not be that easy.

Political speech is a cherished, respected and protected right. The First Amendment didn't come first because it was low-hanging fruit. The regulatory landscape reflects that special status. Politicians realize how effective online advertising can be, and they are not throwing away their shot.

Commercial marketers have a variety of consumer preference and opt-out mechanisms imposed by law, self-regulatory obligations and generally accepted industry practices that must be observed. They are generally consistently applied regardless of the product or service being offered. Opting out of marketing messages from a big-box store follows a similar process to that when opting out of marketing messages from a computer manufacturer. But political advertising can be a different beast altogether.

For example, marketers are familiar with the Can Spam Act and the obligation to include information on how to opt out from receiving further email messages. However, the Can Spam Act only applies to commercial messages.

The Federal Trade Commission has clearly stated that political messages are protected under the First Amendment. They are not commercial messages under the Can Spam Act and the opt-out requirements of the law therefore do not apply. While most campaigns will offer an opt-out from emails as a courtesy to relieve your inbox, they are not legally obligated to do so.

Don't like getting phone calls at home from marketers? Just sign up and add your telephone number to the National Do-Not-Call Registry to make the calls stop. However, the Federal Communications Commission has stated that the National Do-Not-Call Registry does not apply to political telephone calls. While some restrictions under the Telephone Consumer Protection Act do apply to political advertising, you can't completely escape messages from the politicians in the same manner as you would for a marketer.

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Political content used to be considered “sensitive” by some and various online services would prohibit political ads in their advertising acceptable use policies. Today this is rarely the case, as the money from political advertising is hard for any service to resist. Therefore, political ads are prevalent everywhere online. Your political persuasions are not considered to be sensitive information. Neither the Digital Advertising Alliance nor the Network Advertising Initiative include political advertising in their definition of sensitive data.

Then there’s the issue of including the AdChoices icon on behaviorally targeted political ads. While most data providers and platforms will insist upon the inclusion of the icon for opt-out purposes, one could envision a regulator refusing to bring an action against a political campaign for failing to follow the self-regulatory requirements or a campaign asserting that it cannot be compelled to include or follow such an opt-out mechanism.

Therefore, political ads may continue to inundate you, at times without common consumer preference and opt-out mechanisms that marketers regularly observe. Perhaps the only foolproof way to eliminate receiving political ads is to cut the cord ’til after Nov. 8, but then you’ll miss all the fun.

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