



March 29, 2019

Submitted electronically to traceye.hartman@maryland.gov.

David J. McManus, Jr.
Chairman, State Board of Elections
151 West Street, Suite 200
Annapolis, MD 21401

**Re: Comments on Proposed Rulemaking to Implement Online
Electioneering Transparency & Accountability Act**

Dear Chairman McManus and Vice Chairman Hogan,

The Campaign Legal Center (“CLC”) respectfully submits these comments in response to the Notice of Proposed Action to adopt regulations implementing the Online Electioneering Transparency and Accountability Act (“Act”).¹ 46 Md. Reg. 326 (Mar. 1, 2019).

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening the democratic process across all levels of government. Since the organization’s founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court cases. Our work promotes every citizen’s right to participate in our democracy and to know the true sources of funds spent to influence elections.

CLC has expressed continuous support for the Act. In April 2018, CLC sent a letter to Governor Hogan, urging him to sign the Act in order to improve transparency and prevent foreign interference in Maryland elections.² CLC also

¹ 2018 Md. Laws Ch. 834 (effective July 1, 2018).

² Letter from Catherine Hinckley Kelley, Director of Policy & State Programs, Campaign Legal Center, to Gov. Larry Hogan (April 25, 2018), <https://campaignlegal.org/sites/default/files/CLC%20letter%20supporting%20OETA.pdf>.

participated as an amicus curiae supporting Maryland's defense of the Act in a lawsuit brought by certain news organizations.³

CLC supports the State Board's decision to promulgate regulations under the Act. We make the following comments in an effort to ensure the State Board's final regulations are consistent with the full scope of the Act's disclosure and recordkeeping requirements.

I. The Act's Disclosure and Recordkeeping Requirements Are Triggered When *any Person* Requests Placement of a Qualifying Paid Digital Communication on an Online Platform.

One of the ways the Act closed Maryland's digital disclosure loophole was by requiring "online platforms"⁴ to disclose and maintain certain information about digital political ads disseminated on the platforms. Under the Act, "[a] person who directly or indirectly requests placement of a qualifying paid digital communication on an online platform" must notify the platform, upon placing the communication, that the communication is a "qualifying paid digital communication."⁵ Md. Code, Elec. Law § 13-405(a)(1). The Act, in turn, requires an online platform to maintain and make publicly available certain records regarding qualifying paid digital communications ("QPDCs") disseminated through the online platform for which the platform received notice under §13-405(a). *Id.* § 13-405(b)-(c).

The Act minimizes the burdens on online platforms by requiring a purchaser of a QPDC to provide an online platform with the information necessary for the platform to comply with the law's disclosure and recordkeeping requirements. Md. Code, Elec. Law § 13-405(d)(1). Further, the Act provides that an online platform "may rely in good faith" on the information furnished by a QPDC purchaser in fulfilling the platform's compliance obligations. *Id.* § 13-405(d)(2).

The Act authorizes the State Administrator to investigate potential violations of the law by *any* "purchaser of a qualifying paid digital communication," and, in

³ See Brief for Campaign Legal Center & Common Cause as Amici Curiae Supporting Defendants, *Wash. Post v. McManus*, No. 1:18-cv-02527 (D. Md. 2018), available at <https://campaignlegal.org/document/washington-post-v-mcmanus-us-district-court-district-maryland-amicus-brief-clc-and-common>.

⁴ "Online platform" means 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." Md. Code, Elec. Law § 1-101(dd-1).

⁵ The Act defines "qualifying paid digital communication" 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." Md. Code, Elec. Law § 1-101 (ll-1).

certain circumstances, the State Board may request that the Attorney General initiate a civil action for injunctive relief against a QPDC purchaser. Md. Code, Elec. Law §§ 13-405.1(a)(1), 13-405.1(b)(1).

As these provisions make clear, while the General Assembly included statutory definitions limiting the scope of the terms “qualifying paid digital communication” and “online platform,” it did not limit the scope of QPDC purchasers covered by the Act.

II. Definition of “Political Advertising Purchaser” in Proposed Regulation Section 33.13.21.01(B)(3).

The proposed regulations introduce a new defined term, “political advertising purchaser,” which purports to delineate the persons and entities required to provide notice and information to an online platform under Election Law §§ 13-405(a) and (d), respectively. A “political advertising purchaser” is limited to the following categories of purchasers, to the extent they seek to disseminate QPDCs through an online platform: a political committee;⁶ a candidate; a person required to register for filing independent expenditure reports under Election Law § 13-306;⁷ a person required to register for filing electioneering communication reports under Election Law § 13-307;⁸ a “participating organization”;⁹ an out-of-state political committee required to file reports with the State Board;¹⁰ and an “agent,” as defined in COMAR 33.13.07.01.¹¹ In other words, the proposed regulations define “political advertising purchaser” as a group of ad buyers who are already subject to, and presumably complying with, existing campaign finance disclosure requirements.

⁶ See Md. Code, Elec. Law § 1-101(gg) (“Political committee” means a combination of two or more individuals that has as its major purpose promoting the success or defeat of a candidate, political party, question, or prospective question submitted to a vote at any election.”)

⁷ “Within 48 hours after a person makes aggregate independent expenditures of \$5,000 or more in an election cycle for campaign material that is a public communication, the person shall file a registration form with the State Board.” Md. Code, Elec. Law § 13-306(b).

⁸ “Within 48 hours after a person makes aggregate disbursements of \$5,000 or more in an election cycle for electioneering communications, the person shall file a registration form with the State Board.” Md. Code, Elec. Law § 13-307(b).

⁹ See Md. Code, Elec. Law § 13-309.2(a)(3) (“Participating organization” means any entity that: (i) is organized under § 501(c)(4) or (6) or § 527 of the Internal Revenue Code; and (ii) makes political disbursements.”).

¹⁰ “An out-of-state political committee shall register with the State Board on a form that the State Board prescribes within 48 hours after directly or indirectly making transfers in a cumulative amount of \$6,000 or more in an election cycle to one or more campaign finance entities organized under Subtitle 2, Part II of this title.” Md. Code, Elec. Law § 13-301(b)(1); *see also id.* § 13-301(a) (“In this section, ‘out-of-state political committee’ means a nonfederal political committee organized under the law of another state.”).

¹¹ See COMAR 33.13.07.01(B)(1) (“Agent” means a person acting on behalf of and in coordination with a political committee.”).

By narrowly defining “political advertising purchaser,” the proposed regulations would restrict the class of persons and entities required to provide notice to online platforms when they are seeking to place QPDCs. Md. Code, Elec. Law § 13-405(a). Correspondingly, the proposal’s narrow definition of “political advertising purchaser” would limit who must furnish online platforms with the information necessary for platforms to comply with the Act’s disclosure and recordkeeping requirements under Election Law §§ 13-405(b) and 13-405(c).

III. The Proposed “Political Advertising Purchaser” Definition and Corresponding Requirements Are Inconsistent with the Act’s Broader Requirements.

The proposal to limit the Act’s notice, disclosure, and recordkeeping requirements through the introduction of the “political advertising purchaser” definition is inconsistent with the Act’s clear command that its provisions apply when *any* person “directly or indirectly requests placement of a qualifying paid digital communication on an online platform.” Md. Code, Elec. Law § 13-405(a)(1). If promulgated, the proposed regulations would create confusion about how “a person who directly or indirectly requests placement of a qualifying paid digital communication on an online platform,” but who falls outside the “political advertising purchaser” definition, should comply with the *statutory* notice requirements, and how online platforms that disseminate ads purchased by those other QPDC purchasers should fulfill their own *statutory* disclosure and recordkeeping obligations. To the extent the proposed regulations mislead those persons who are not “political advertising purchasers” into mistakenly believing they are excused from their statutory obligations under the Act, the proposed rules would likely lead to violations of the Act and to a decrease in the digital transparency the Act was passed to promote.

For example, under the proposed regulations, if an entity paid for a QPDC that constituted an independent expenditure or an electioneering communication, the organization would become subject to requirements as a “political advertising purchaser” only if it also was required to register for filing independent expenditure or electioneering communication reports with the State Board—an obligation triggered only by spending \$5,000 or more on independent expenditures or electioneering communications within an election cycle. Md. Code, Elec. Law §§ 13-306, 13-307. Thus, despite the Act’s broad coverage and lack of spending thresholds, the proposed regulations would fail to regulate a substantial amount of digital campaign advertising, including express advocacy communications, when paid for by persons that had not exceeded the \$5,000 threshold for independent expenditure or electioneering communication registration. This is plainly inconsistent with the scope of the Act.

Moreover, the Act’s definition of “qualifying paid digital communication” encompasses any “*campaign material*” placed for a fee on an online platform and disseminated to 500 or more individuals; the statutory definition of “campaign material” includes any text or graphic material that “relates to a candidate, prospective candidate, or the approval or rejection of a question or prospective question.” Md. Code, Elec. Law § 1-101(k). On its face, the “campaign material” term

is broader than the Maryland Code’s definitions of “independent expenditure”¹² and “electioneering communication.”¹³ By partially restricting requirements for “political advertising purchasers” to persons who make independent expenditures and electioneering communications, the proposed regulations would further narrow the range of political advertisements disclosed as QPDCs.

Any final regulations must conform to the full scope of the Act’s provisions and correct these deficiencies in the proposed regulations, which leave a large swath of QPDCs outside of the digital disclosure framework carefully formulated by the General Assembly.

Conclusion

CLC appreciates the opportunity to submit these comments to the State Board. We would be happy to answer questions or to provide additional information to assist the State Board with this rulemaking going forward.

Respectfully submitted,

/s/

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/s/

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Legal Counsel

¹² Generally, an “independent expenditure” is defined as a gift, transfer, or disbursement “*expressly advocating* the success or defeat of a clearly identified candidate or ballot issue if the gift, transfer, disbursement, or promise of money or a thing of value is not made in coordination, cooperation, consultation, understanding, agreement, or concert with, or at the request or suggestion of, a candidate, a campaign finance entity of a candidate, an agent of a candidate, or a ballot issue committee.” Md. Code, Elec. Law § 1-101(bb)(1) (emphasis added).

¹³ In general, an “electioneering communication” is defined as a cable, broadcast, radio, or digital communication or a mass mailing that “refers to clearly identified candidate;” is made within 60 days of an election in which the candidate or issue is on the ballot; and is capable of being received by certain numbers of individuals in the constituency where the candidate or issue is on the ballot. Md. Code, Elec. Law § 13-307(3).