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Submitted electronically to [digitaladrules@pdc.wa.gov](mailto:digitaladrules@pdc.wa.gov)

Fred Jarrett, Chair  
Public Disclosure Commission  
711 Capitol Way S., #206  
Olympia, WA 98504

Dear Chair Jarrett and Members of the Commission:

Campaign Legal Center (“CLC”) respectfully submits these written comments to the Public Disclosure Commission (“PDC”) in response to its request for public input regarding how to improve digital political advertising disclosure.<sup>1</sup>

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels. Since its 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 proceedings. Our work promotes every American’s right to a responsive and transparent democracy. In the last several years, CLC has filed comments on PDC rulemakings and staff counsel Austin Graham participated in the PDC’s January 2020 public forum about digital political ads, “Big Data, Big Dollars.”

Washington’s Fair Campaign Practices Act has long been recognized for its comprehensive and effective transparency and accountability rules. Ongoing developments in Washington concerning major online platforms’ noncompliance with the state’s transparency mandates for “commercial advertisers,” however, have exposed some of the novel challenges to disclosure in the Digital Age.<sup>2</sup>

Future rule revisions should fulfill the Act’s transparency objectives by strengthening the disclosure rules for digital ads in state elections.<sup>3</sup> These comments address two of the three questions on which the PDC seeks public input: (I) “Should campaigns be required to notify commercial advertisers than an order is political advertising, and what should campaigns be required to report to the PDC about the ads they purchase?”; and (II) “What particular details about political advertising are important for the public to know?”

## **I. Notice Requirements for Purchasers of Political Ads**

We recommend that the PDC’s rule require purchasers of political advertising to notify digital commercial advertisers when they purchase ads subject to public inspection requirements. Chiefly, a notice requirement would spur compliance with Washington’s disclosure system, as commercial advertisers, upon receiving notice, could begin compiling the necessary information and records in anticipation of a

<sup>1</sup> See <https://www.pdc.wa.gov/tell-commission-about-digital-ad-rules>.

<sup>2</sup> See Eli Sanders, *Google Will Pay \$400,000 to End Political Ad Lawsuit Brought by Washington State*, WILD WEST (June 17, 2021), <https://wildwest.substack.com/p/news-google-will-pay-400000-to-end> (“Various arguments have been offered by Google to justify its contention that it doesn’t have to comply with Washington State’s election law, including the fabulously circular argument that because Google bans political ads in Washington State, it doesn’t have to comply with Washington State transparency law when it nevertheless sells such ads.”).

<sup>3</sup> See Wash. Rev. Code § 42.17A.001 (“Declaration of Policy.”).

future public inspection request.<sup>4</sup> However, the failure of a political ad purchaser to provide notice, on its own, should not absolve a commercial advertiser of its general duties under RCW 42.17A.345.

## II. Key Information about Digital Political Ads

As the volume of online spending in elections continues to grow, so does the importance of modernizing disclosure requirements for the digital landscape.<sup>5</sup> Revisions to the PDC’s commercial advertiser rule should focus on making more information about digital political ads available to the public and enabling easier access to that information.

Currently, the PDC’s rule and Washington law require a digital platform that is a “commercial advertiser”<sup>6</sup> to permit public inspection of the following information for “political advertising”<sup>7</sup> and “electioneering communications”<sup>8</sup> sold by the platform:

- (i) the name of the candidate or ballot measure supported or opposed by the ad, or the name of the candidate otherwise identified, and whether the ad supports or opposes the candidate or measure;
- (ii) the name and address of the ad’s sponsor, including a federal employee identification number or other verifiable information;
- (iii) the total cost of the ad or an initial cost estimate if the total cost is not yet available, who made the payment, when payment was made, and what method of payment was used;
- (iv) the dates the commercial advertiser rendered service;
- (v) a copy of the political advertisement or electioneering communication, along with a “description of the major work components or tasks” required to provide the advertising or communication services; and

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<sup>4</sup> If Washington established a government-hosted archive of digital political ads, the notice requirement for political ad purchasers would become less critical. *See infra* pp. 4-5.

<sup>5</sup> *See* Howard Homonoff, *2020 Political Ad Spending Exploded: Did It Work?*, FORBES (Dec. 8, 2020), <https://www.forbes.com/sites/howardhomonoff/2020/12/08/2020-political-ad-spending-exploded-did-it-work/?sh=44ea1c243ce0> (“In the 2015-2016 election cycle, digital media accounted for roughly 2-3% of political ad spend. That jumped to 18% in [the 2019-2020 cycle].”).

<sup>6</sup> “Commercial advertiser” is defined as “any person that sells the service of communicating messages or producing material for broadcast or distribution to the general public or segments of the general public whether through brochures, fliers, newspapers, magazines, television, radio, billboards, direct mail advertising, printing, paid internet or digital communications, or any other means of mass communications used for the purpose of appealing, directly or indirectly, for votes or for financial or other support in any election campaign.” Wash. Rev. Code § 42.17A.005(10); *see also* Wash. Admin. Code § 390-18-050(1).

<sup>7</sup> *See* Wash. Rev. Code § 42.17A.005(40) (“Political advertising’ includes any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, digital communication, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign.”).

<sup>8</sup> *See id.* § 42.17A.005(21)(a) (“Electioneering communication’ means any broadcast, cable, or satellite television, radio transmission, digital communication, United States postal service mailing, billboard, newspaper, or periodical that: (i) Clearly identifies a candidate for a state, local, or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate’s name; (ii) Is broadcast, transmitted electronically or by other means, mailed, erected, distributed, or otherwise published within sixty days before any election for that office in the jurisdiction in which the candidate is seeking election; and (iii) Either alone, or in combination with one or more communications identifying the candidate by the same sponsor during the sixty days before an election, has a fair market value or cost of one thousand dollars or more.”).

(vi) a description of the demographic information of the audience targeted by the ad, “to the extent such information is collected by the commercial advertiser as part of its regular course of business,” and the total number of impressions generated.<sup>9</sup>

Generally, the PDC’s rule for commercial advertisers already encompasses important information that voters need to “make informed decisions and give proper weight to different speakers and messages” in the political marketplace.<sup>10</sup> However, we recommend that the PDC make several additions to its rule to improve the accessibility of information about digital advertising in Washington’s elections.

***a. Identifying individual contacts for political ad purchasers***

First, the PDC’s rule should require that commercial advertisers provide contact information for at least one individual who is authorized to act on behalf of a purchaser of political advertising. In the case of a candidate or political committee, this individual contact could be the candidate or committee’s treasurer, and, to satisfy this requirement, the commercial advertiser could include in its books of account the same contact information listed in the committee’s public campaign filings. For other entities, which may not have registered or filed reports with the PDC, commercial advertisers should produce the name, address, email, and phone number for an individual point of contact. Importantly, this addition to the rule would aid legal compliance and enforcement by allowing the PDC, journalists, and watchdog organizations to follow up with an individual about any errors or omissions in the purchaser’s political advertising.

***b. Disclosing the website where a political ad was publicly displayed***

Next, we recommend that the PDC’s rule require digital commercial advertisers to disclose the name and URL of the online platform or application where a political advertisement was ultimately displayed to the public, if the ad did not appear on the commercial advertiser’s own site. When a political committee or other group purchases a digital ad, there are often multiple links in the digital ecosystem between the purchaser and the platform that publicly displays the ad, such as supply-side providers, demand-side providers, and ad exchanges.<sup>11</sup> Currently, Washington’s commercial advertiser rule specifies that the digital platform that “hosts” political advertising is not required to maintain records of the advertising “if it has been purchased directly through another commercial advertiser.”<sup>12</sup> However, the rule does not obligate the commercial advertiser “that directly sells the advertising or communications to the original purchaser” to include, as part of the records subject to public inspection, the platform on which the ad eventually appeared.

Requiring commercial advertisers to identify the platforms on which their political ads are displayed will ensure the public knows where a particular political ad actually appeared online when the commercial advertiser that sold the ad did not also “host” it.

***c. Creating a government-hosted public archive of political ads***

Finally, we believe the public’s interest in transparency is best served by a publicly accessible, government-hosted archive of digital political ads. Among their benefits, public ad archives present the most effective solution to the modern problem of “dark” ads in elections—*i.e.*, online ads microtargeted to specific segments of voters but otherwise invisible to the rest of the public, including election authorities.<sup>13</sup> The

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<sup>9</sup> Wash. Admin. Code § 390-18-050; Wash. Rev. Code § 42.17A.345.

<sup>10</sup> *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

<sup>11</sup> See, e.g., *What the Tech are DSPs, SSPs, and DMPSs?*, TRADEDESK (Mar. 30, 2021), <https://www.thetradedesk.com/us/news/what-the-tech-are-dsps-ssps-and-dmps>.

<sup>12</sup> Wash. Admin. Code § 390-18-050(2).

<sup>13</sup> See Julia Carrie Wong, *‘It might work too well’: the dark art of political advertising online*, GUARDIAN (Mar. 19, 2018), <https://www.theguardian.com/technology/2018/mar/19/facebook-political-ads-social-media-history-online-democracy>; Kelly Born, *How states are experimenting with digital political advertising regulation: Interview with Campaign Legal Center’s Erin*

PDC's rule already refers to the potential creation of a government ad archive at some future point,<sup>14</sup> and we strongly encourage the PDC to pursue this option.

A centralized, government-hosted archive offers at least four advantages over a platform-based approach to political ad records:<sup>15</sup>

**First**, a government-hosted archive would create a centralized repository of comprehensive and standardized information about digital advertising in state elections. With this approach, the public could rely on the government's archive as a "one-stop shop" for accessing information about digital ads during election season, regardless of where the ads actually appeared online. Government-hosted archives also make it easier to monitor legal compliance, while saving voters, watchdog groups, journalists, and law enforcement officials the time and resources involved in combing through multiple websites' databases to locate political ad information.

**Second**, a government-hosted archive would largely eliminate recurring compliance issues involving digital commercial advertisers. In recent years, Facebook and Google have repeatedly failed to publicly disclose the full range of political ad information required by Washington law.<sup>16</sup> But a government archive would help to resolve these compliance problems, because the purchasers of political advertising, rather than the platforms that display it, would bear primary responsibility for reporting information about their political ads for the government's public archive. Although platforms would still have to assist ad purchasers by providing them certain information, such as the number of impressions generated by a particular political ad, the purchasers of the ads would bear ultimate responsibility for disclosing the information required for the archive.<sup>17</sup>

**Third**, a government archive better assures long-term preservation of digital ad information for the public. Platform-based archives, especially those created by smaller and less established websites, present a risk that voters will lose access to political ad information if platforms dissolve in the future. A government-hosted archive, by contrast, provides greater certainty regarding the long-term availability of digital ad information.

**Fourth**, a government-hosted archive enables broad access to political ad information without imposing significant compliance costs on smaller online platforms, for which the costs may be disproportionate. Concerns about burdening smaller "third-party" platforms were among the reasons cited by the Fourth Circuit Court of Appeals when it affirmed an injunction against Maryland's digital disclosure requirements for online platforms.<sup>18</sup> To be sure, the Fourth Circuit's decision was narrow, applying only to a group of newspapers that sold political ads on their websites and focusing on unique

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*Chlopak*, HEWLETT FOUND. (May 28, 2019), <https://hewlett.org/how-states-are-experimenting-with-digital-political-advertising-regulation-interview-with-campaign-legal-centers-erin-chlopak/>.

<sup>14</sup> See Wash. Admin. Code § 390-18-050(3) ("Until such time as the PDC provides an open access platform on its website for this information, which will replace the following methods of inspection for all required information . . .").

<sup>15</sup> Wash. Admin. Code § 390-18-050(2).

<sup>16</sup> See David Gutman, *Google to pay Washington state \$400,000 to settle campaign finance lawsuit*, SEATTLE TIMES (June 17, 2021), <https://www.seattletimes.com/seattle-news/google-to-pay-washington-state-400000-to-settle-campaign-finance-lawsuit/>.

<sup>17</sup> For example, New York has implemented a government archive of political ads, and, under its system, online platforms must verify that each purchaser of an independent expenditure ad has properly registered with the State Board of Elections at the time of the ad's purchase. N.Y. Elec. Law § 14-107-b(1). Thus, New York's law utilizes online platforms as a backstop to secure compliance with the state's digital archive requirements.

<sup>18</sup> *Wash. Post v. McManus*, 944 F.3d 506, 522 (4th Cir. 2019) (concluding that Maryland's digital ad archive law is "too broad because it fails to distinguish between platforms large and small").

features of Maryland's law, including a disconnect between the law and the legislature's goal of combatting foreign election interference. Still, the ruling signals additional reasons to favor a government-hosted ad archive.

### **Conclusion**

We thank the PDC for considering CLC's input on these critical questions. We would be happy to answer questions or provide additional information as the PDC continues to evaluate potential revisions to its rule.

Respectfully,

/s/ Austin Graham

Austin Graham

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/s/ Patrick Llewellyn

Patrick Llewellyn

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