



November 29, 2021

Submitted electronically to pdc@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” or “Commission”) in response to its request for public comment regarding the proposed rulemaking to amend Washington Administrative Code section 390-18-050 (“Commercial advertisers—public inspection of records”).¹

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.

CLC supports revisions to Washington’s regulatory regime that clarify and strengthen disclosure requirements for commercial advertisers, especially for digital political advertising. In August, CLC submitted written comments to the Commission in response to its request for public input on questions related to possible revisions to WAC section 390-18-050,² and those comments made several recommendations for ensuring any changes to the rule continue to advance the transparency goals of the Fair Campaign Practices Act.³ The following comments similarly include recommendations to ensure that the proposed amendments to the PDC’s rule cohere with the statute’s objectives and provide Washington’s electorate with greater access to information about political advertising in state and local elections.

Part I of these comments supports the PDC’s proposed amendments to allow a limited extension of time for a commercial advertiser to comply with a public inspection request where the sponsor of political advertising did not identify its political ad purchases as such despite the commercial advertiser’s initial request for that information. Part II urges the PDC to retain the existing rule’s requirement for commercial advertisers to provide, as part of their books of account, identifying information about the names of candidates or ballot

¹ See Wash. Reg. 21-21-056 (filed Oct. 15, 2021), <https://lawfilesexternal.wa.gov/law/wsrpdf/2021/21/21-21-056.pdf>.

² See *We want to hear from you*, WASH. PDC, <https://www.pdc.wa.gov/tell-commission-about-digital-ad-rules>.

³ Comments from CLC to Wash. PDC (filed Aug. 20, 2021), <https://www.pdc.wa.gov/sites/default/files/meeting-resources/032%28AP~2.PDF>.

measures supported or opposed by political advertising. Part III recommends the PDC's rule require commercial advertisers to include the dates on which political advertising was publicly displayed in their books of account, and Part IV suggests adding a definition of "digital communication platform" for purposes of the rule. Finally, Part V recommends that the PDC specify the time for commercial advertisers to comply with the PDC's own request for political ad information made under RCW 42.17A.345(2).

I. CLC Supports Allowing More Time for Commercial Advertisers to Comply with Public Inspection Requests in Limited Circumstances.

The proposed rule would grant a commercial advertiser an additional three business days to respond to a public inspection request if, at the time a political ad was purchased, (1) the commercial advertiser asked the purchaser, in writing, whether the purchase included political advertising or electioneering communications, and (2) the purchaser did not disclose that information to the commercial advertiser.⁴ In the absence of clear statutory authority under RCW 42.17A.345 for the PDC to require sponsors of political ads to affirmatively notify commercial advertisers that they are purchasing political ads,⁵ the proposed rule's amendments to section 390-18-050(5) would facilitate greater compliance by creating an incentive for commercial advertisers to proactively ask ad sponsors to identify their political advertising at the point of purchase, while also allowing for a reasonable "cure period" if a sponsor failed to identify political advertising despite the commercial advertiser's initial request.

Importantly, these amendments would not abrogate or diminish commercial advertisers' general duty to maintain and provide public access to information concerning political ads that they have sold, nor would it exempt commercial advertisers from potential liability if they failed to fully comply with public inspection requests after the three-day cure period.

II. The Final Rule Should Continue Requiring Commercial Advertisers to Disclose Names of Candidates or Ballot Measures Identified in Political Ads.

In its final rule, CLC recommends that the PDC continue to require commercial advertisers to include the name of the candidate or ballot measure supported, opposed, or otherwise identified in political advertising or electioneering communications as part of their books of account subject to public inspection requests.

The name of the specific candidate or ballot measure that is the subject of a political ad, and whether the ad supports or opposes that candidate or measure, is important information for citizens who make public information requests to commercial advertisers. This information can help voters, journalists, watchdog groups, and others to search and sort political ads on commercial advertisers' websites using the names of candidates or ballot measures, and also allows them to determine the aggregate number of ads supporting or opposing particular candidates or ballot measure by different sponsors.

⁴ See Proposed Rule § 390-18-050(5).

⁵ See Memorandum from Sean Flynn, General Counsel, to PDC Commissioners at 2 (Sept. 17, 2021), <https://www.pdc.wa.gov/sites/default/files/meeting-resources/0801DI~1.PDF> (noting that "an express requirement compelling campaigns to disclose to a third party (rather than the PDC) may be outside the scope of this rulemaking").

Requiring commercial advertisers to include the names of candidates or measures as part of their books of account is not a substantial recordkeeping burden. As the PDC's legal staff has explained, "in all but extreme exceptions, political advertising is readily identifiable by very direct and express appeals to vote for or against a candidate or measure."⁶ Moreover, the candidate or ballot measure supported or opposed by an ad often may *not* be readily apparent from other information contained in commercial advertisers' books of account, especially in the case of political advertising sponsored by groups that are not registered political committees; the inclusion of the names of candidates and measures in advertisers' books of account thus enables members of the public to more easily identify relevant advertisements during their public inspections.

Accordingly, the PDC's final rule should continue to require that commercial advertisers disclose this important information in their books of account.

III. The Final Rule Should Require Commercial Advertisers to Disclose the Dates on Which Political Advertising Was Publicly Displayed.

As part of the rule's existing requirement for commercial advertisers to disclose "dates the commercial advertiser rendered service,"⁷ the final rule should specify that a commercial advertiser must disclose the start and end dates on which a political ad was publicly displayed, or contracted to be publicly displayed, through the services provided by the commercial advertiser. This data would inform the public of exactly when a particular sponsor's political ads were publicly disseminated by the commercial advertiser, providing more informational context about that advertising.

IV. The Final Rule Should Define "Digital Communication Platform."

The proposed rule refers to specific requirements for political ads hosted by "digital communication platforms,"⁸ but this term is not defined in the proposed rule or in Washington's statute. To clarify the meaning of this key term, as well as the scope of commercial advertisers' disclosure duties for online and digital political ads, the PDC's final rule should define "digital communication platform" in broad, flexible terms.

CLC suggests including a definition of "digital communication platform" similar to the definition of "online platform" employed in recent federal election legislation, including H.R. 1 and the Freedom to Vote Act.⁹

CLC's suggested rule text: "Digital communication platform" includes any public-facing website, internet-enabled application, or other digital application that displays, or causes to be displayed, political advertising or electioneering communications.

⁶ Memorandum from Sean Flynn, General Counsel, to PDC Commissioners at 2 (Sept. 17, 2021), <https://www.pdc.wa.gov/sites/default/files/meeting-resources/0801DI~1.PDF>.

⁷ See Wash. Admin. Code § 390-18-050(5)(d).

⁸ Proposed Rule § 390-18-050(2), (7)(g).

⁹ See For the People Act, H.R. 1, 117th Cong. § 4208 (2021); S. 2747, 117th Cong. § 6108 (2021).

V. The Final Rule Should Specify the Amount of Time for Commercial Advertisers to Provide Political Ad Information to the PDC.

While the proposed rule would introduce new timing requirements with respect to public inspection requests made to commercial advertisers,¹⁰ the rule also should specify the required time for commercial advertisers to provide political ad information to the PDC pursuant to RCW 42.17A.345(2).¹¹ This addition to the rule would make clear the deadline for commercial advertisers to provide the required information in response to a request from the PDC, and generally aid the PDC's enforcement of the law.

Conclusion

CLC would like to thank the PDC for its consideration of our comments on this important rulemaking. We are available to answer follow-up questions or provide additional information to the PDC as it continues to assess potential revisions to its disclosure rules for commercial advertisers.

Respectfully,

/s/ Austin Graham

Austin Graham
Legal Counsel

/s/ Patrick Llewellyn

Patrick Llewellyn
Director, State Campaign Finance

¹⁰ See Proposed Rule § 390-18-050(3), (5).

¹¹ "At the request of the commission, each commercial advertiser required to comply with subsection (1) of this section shall provide to the commission copies of the information that must be maintained and be open for public inspection pursuant to subsection (1) of this section." Wash. Rev. Code § 42.17A.345(2).