Tallman Trask

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Chair Fred Jarrett
Public Disclosure Commission
711 Capitol Way S., #206
Olympia, WA 98104

Chair Jarrett, Vice Chair Isserlis, and Commissioner Downing:

I am writing today both to respond to the questions put forward by the Public Disclosure Commission about improving digital political advertising disclosures and to more generally comment on the rulemaking around digital advertising disclosures.

I am a rising third-year law student at the University of Washington and previously worked on political campaigns in Washington. During my time working on campaigns, I purchased political and issue advertising in both digital and non-digital formats. Additionally, I filed the complaint which led to the State's recent enforcement action involving Twitter and filed complaints involved in the State's recent enforcement actions against Facebook and Google. I am, as far as I know, the only person who has both purchased digital political advertising and filed complaints involving commercial advertisers selling digital political ads.

I applaud the Commission for continuing to look at ways to improve digital advertising disclosure and believe that changes to existing laws could make them more functional and beneficial, but I am also concerned with the potentially harmful impacts of the current approach and the timing of the rulemaking process. Despite my strong belief that digital advertising, like that offered by Facebook and Google, can offer important benefits to smaller campaigns, and make it easier (or even possible) for those campaigns to purchase advertising and reach voters, any change to the disclosure rules intended to encourage large digital commercial advertisers to reenter the market must not compromise transparency or other goals.

While I have included significantly more expansive comments below, I think it may be helpful to summarize my comments as well:

- **Notifications from Campaigns and Campaign Disclosure Contents**
    - Commercial advertiser disclosures function as a check on candidate disclosures and, at least potentially, on undisclosed political advertising and political advertising from individuals and organizations who have failed to report any political activities.
    - Shifting requirements from commercial advertisers to campaigns and committees would undermine the purpose and function of commercial advertiser disclosures.
    - Commercial advertiser disclosures are, in practice, an independent confirmation of campaign and committee disclosures; shifting requirements away from commercial advertisers and to campaigns, committees, or others acting on behalf

of campaigns or committees undermines the independence of the disclosures and limits their ability to serve as a check on candidate and committee disclosures.
    - Notification requirements may provide for easier and simpler commercial advertiser compliance with requirements and, in some forms, are worth considering.
    - Notification requirements must not fully eliminate the potential for commercial advertiser liability because doing so would eliminate existing recordkeeping and disclosure incentives.
    - Because notification requirements place a limit, to some extent, on the check function of commercial advertiser disclosures, they should only be permitted to the extent that commercial advertisers are able to limit noncompliant purchases. For example, commercial advertisers could be permitted to impose notification requirements and to gain access to extended disclosure timelines or other benefits where they do, but should only be permitted to access these extend timelines the first time an individual, campaign, committee, or other person involved with the purchase of political advertising purchases it without properly notifying the commercial advertiser. That is, previous purchases without notification, from any commercial advertiser, should serve as notification for all future purposes and commercial advertisers should be held to the same disclosure standards for them as for notification-compliant purchases. Commercial advertisers should be required to report notification non-compliant buyers to the Commission so that other commercial advertisers can access information about these buyers and are made aware that ads purchased by those buyers are never subject to the extended disclosure timelines.
- **Commercial Advertiser Disclosure Timelines**
    - Current rules provide some flexibility for commercial advertisers through the "promptly" language and should be maintained
    - Any changes to the rules for digital commercial advertisers must be considered in relation to the rules for commercial advertisers generally. Loosening the requirements currently applicable to all advertisers for only for some commercial advertisers, like digital advertisers, makes them relatively stricter for the other commercial advertisers. There is no compelling reason why smaller, non-digital commercial advertisers should be subject to stricter regulatory requirements than large digital commercial advertisers and any change to timelines should only be considered to the extent it is considered for all advertisers.
    - Where the goal of an action is to rectify compliance issues or a lack of market participation and the cause of those issues appears to be based in rules applicable to all commercial advertisers, changes should only be considered in the context of all commercial advertisers. That is, as the portions of WAC 390-18-050 which relate to disclosure timelines are applicable not just to digital advertisers but also to newspapers, television and radio stations, printers, billboard companies, and others, any changes to those requirements must be viewed and considered in the context of all commercial advertisers. Or, Facebook's noncompliance with existing rules must be looked at alongside the ability of hundreds of other commercial advertisers to comply with those same rules

- If the Commission does decide to allow for additional time, the timelines should be clear, inflexible, and based on the existing timelines for committees and campaigns.
- Adjusting only WAC 390-18-050(3)(b)(i) and related disclosure-to-requesters timelines would not solve the digital advertising disclosure compliance issues in cases where commercial advertisers have not been informed advertising is political advertising because digital commercial advertisers would still be required to meet the recordkeeping requirements of WAC 390-18-050(4). Those recordkeeping requirements, however, appear to be outside the scope of the rulemaking preproposal.

- **Digital Commercial Advertiser Disclosure Contents**
  - As long as other disclosure and recordkeeping requirements are met, the method of payment information required in current disclosures is unnecessary. Except to the degree they are able to further other disclosure goals, impressions are also not a necessary part of disclosures. Information about the purchaser, the date and cost of their purchase, and a copy of the ad itself, along with certain demographic targeting and reach information as explained below, are however all useful and necessary elements of the existing requirements.
  - While both reach and targeting information are helpful, targeting information is slightly more useful when considering candidate and committee behavior and reach information is slightly more useful when considering commercial advertiser behavior.
  - Even if candidates and committees are required to disclose certain targeting information to the Commission, commercial advertisers should also be required to disclose that information because those disclosures would provide a check on candidate and committee disclosures.
  - The most important portions of digital commercial advertiser disclosures, other than those which provide a check on candidate and committee disclosures, are those which allow requesters to discover any potential discriminatory ad targeting or reach. Digital commercial advertisers should at the minimum be required to disclose information about targeting and reach related to protected classes defined in Washington or federal law and proxy characteristics which can be used to approximate protected classes, to the extent they collect that information. At the very least then and where they collect the information, digital commercial advertiser disclosures should include all information that an advertiser has about targeting and reach related to: race, age, familial status, creed or religion, color, national origin, citizenship and national origin, immigration status, sex, veteran status, sexual orientation, the presence of any disability, or any proxy characteristic related to those. As political ideology is a protected class in at least one Washington municipality, where advertisers collect or create information about ideology, they should be required to include that information in disclosures. Additionally, because they can often be used as discriminatory proxy characteristics and may play a meaningful role in political advertising, digital commercial advertisers should be required to disclose any information they have about the specific location (up to and including ZIP codes) of audiences targeted

and reached and earnings or wealth of audiences targeted and reached, to the extent they collect that information.
    - Commercial advertisers should be required to disclose reach information as well as targeting information because that information allows for requesters to discover proxy characteristics and discriminatory intent.
    - If the Commission is to amend the disclosure contents requirements in WAC 390-18-050(6)(g), it should in any case consider replacing the current language (a "description of the demographic information (e.g., age, gender, race, location, etc.) of the audiences targeted and reached") with either a concrete list of demographic characteristics or a reference to protected classes and statutory definitions of those classes.
- **Other Concerns**
    - The State's ongoing case against Facebook, involving WAC 390-18-050, must be seen as part of the context of this rulemaking. Amending and changing rules while that litigation continues is more likely to confuse commercial advertisers and voters than it is to clarify rules. Any final rulemaking should be delayed until that case has concluded.
    - The Commission likely does not have the power to meaningfully adjust some commercial advertiser disclosure requirements because they are statutory and not regulatory. As a result, the more appropriate path to making changes to digital commercial advertiser disclosure requirements, and the one least likely to create further confusion, is legislative.
    - "Safe harbor" rules and other similar structures are incompatible with existing statutory requirements and should not be considered.
    - Recent actions by a large digital commercial advertiser limit the ability of voters and others to access any information about political advertising except through commercial advertiser disclosures. As a result of the actions of the advertiser, which drew the ire of the Federal Trade Commission, Washington's existing commercial advertiser disclosure structure is likely the only remaining independent and auditable source of information about digital political advertising anywhere in the country. The actions of this advertiser also raise questions about their commitment to, and their understanding of the importance of, transparency in advertising. The Commission should not adjust rules in order to make it easier for entities who have undermined transparency to comply with Washington's long-standing rules.

Notifications and Disclosures from Campaigns

The Commission has asked if campaigns should be required to notify commercial advertisers that an order is political advertising, and what should campaigns be required to report to the PDC about the ads they purchase.

Before discussing notifications and campaign requirements, I think it is important to discuss the purpose of commercial advertiser disclosure requirements. Commercial advertiser disclosures are not an end to themselves; rather, they are a check. The disclosures provide voters and enforcers with information about candidate expenditures in a way which can be used to confirm candidate

disclosures. They are also a check on parties who have failed to follow disclosure requirements generally; if an organization were to purchase ads without properly filing with the Commission and thus without providing information to voters about their fundraising and spending, commercial advertiser disclosures and recordkeeping are a way for voters and enforcers to access information about these bad actors and defend the integrity of our political process. Commercial advertiser disclosures, in some cases, also allow voters access to advertising they may otherwise not see. A voter may, for example, live in a district that crosses newspaper or media markets and have limited access to advertising related to elections in which they plan to vote; a similar set of circumstances exists where a commercial advertiser makes it simple for a campaign to target only some voters in a district. Commercial advertiser disclosures are not similarly limited and allow anyone to access copies of advertising. The advertiser disclosure and recordkeeping requirements thus allow voters to access unique and hard-to-find information about candidates and committees seeking their support or their vote. The disclosures fit neatly within the triumvirate of *Buckley* disclosure interests: they serve the informational interest by helping voters access advertising in elections; they serve the enforcement interest by both providing a check on candidate and committee disclosures and by providing a tool through which enforcers and voters can discover undisclosed political advertising purchases, by persons who file reports with the Commission and those who do not; and they serve the anti-corruption interest by helping to ensure that political advertising spending in Washington is fully disclosed as full disclosure itself serves to deter corrupt political activities.

Current commercial advertiser disclosure requirements further these efforts, in part, by providing independent confirmation of the information contained within candidate and committee disclosures. In that, the independence of these disclosures from candidates and committees serves an important and meaningful purpose and, if the current information in commercial advertiser disclosures was instead only provided by candidates, the information would no longer serve the same purpose. While independent information about a candidate's spending can confirm (or not confirm) the accuracy of a candidate's reported expenditures, an advertising disclosure system reliant only on information from candidates does not and cannot serve this same role.

A requirement that candidates and committees purchasing political advertising inform commercial advertisers that the advertising is political advertising may make compliance and recordkeeping simpler for commercial advertisers and could play a meaningful and important role in a future commerical advertiser disclosure structure. However, the current structure relies on potential liability to encourage compliance by commercial advertisers and, even if a notification requirement was put in place, this liability should not be fully eliminated. If a commercial advertiser unreasonably delayed disclosure or failed to keep records of advertising, that advertiser should still face some potential legal risk. Notification requirements should, instead of eliminating liability, provide only for a more flexible or extended disclosure structure where advertising purchasers have failed to notify commercial advertisers. That is, notification requirements should only allow commercial advertisers additional time to comply with disclosure and recordkeeping rules rather than provide any sort of broad exemption from those rules.

Notification requirements also, however, place additional burdens on candidates and committees and shift burdens away from commercial advertisers. This limits, at least to some degree, the independent function of the disclosures; where burdens are shifted away from independent actors, there is necessarily some reduction in the independence of those disclosures. That shift, in some small way, makes disclosures and a disclosure system involving a notification requirement slightly less independent than a system which does not include the requirement.

Most prominently, however, a notification requirement would relieve digital commercial advertisers of regulatory burdens faced by every other commercial advertiser, and would do so without any necessary trade-off or clear benefit to voters and others seeking disclosures (other than digital commercial advertisers complying with the regulations, but compliance alone is not a justification; arsonists would have an easier time complying with arson statutes if they only involved certain accelerants, but that does not mean there would be a social benefit in limiting arson statutes). There ought to be some benefit to transparency or to the political advertising landscape in general. If the Commission is to impose a notification requirement on candidates, the structure should provide a benefit to candidates as well. Given the current lack of compliance, the clearest benefit to candidates would be some sort of guarantee that all purchasers of political advertising from a commercial advertiser are subject to the same rules and are following the same rules.

I suggest that, if the Commission wishes to impose a notification requirement, it imposes the following structure:

- Commercial advertisers may choose either to require notifications or to not require notification
- Where commercial advertisers choose not to require notifications, they would be subject to existing disclosure and recordkeeping requirements for all political advertisements, even where they have not been informed the ads are political advertisements. The obligation to identify advertisements as political or not sits with the commercial advertiser.
- Where commercial advertisers choose to require notifications, they would be subject to existing disclosure requirements for political advertisements where they have been informed the advertisements are political advertisements, and subject to an extended and more flexible disclosure period where they have not been informed. In each case, recordkeeping requirements would be the same. Commercial advertisers could still be held liable if they do not maintain records about political advertisements even where they have not been informed they are political advertisements, but would have an extended time to disclose the information and to ensure records are accurate if they have not been informed. However, extended notification timelines should only be available where the advertising purchaser has not previously purchased advertising without notifications. To support that last element, commercial advertisers who have chosen to require notifications should also be required to supply information about noncompliant buyers to the Commission and the Commission should maintain a public list of noncompliant buyers. Commercial advertisers should not be prohibited from imposing additional requirements, including additional fees, on noncompliant buyers. Inclusion on the list of noncompliant buyers should, perhaps, expire after a given number of election cycles.

To provide an example of how this could work in practice, imagine Candidate Shannon and Local Consultants purchased advertising from MiniBlogger and Ogler for Candidate Shannon's campaign. They did not inform either commercial advertiser that the advertising was political. Ogler has decided to not require notifications and is subject to existing disclosure and recordkeeping requirements. MiniBlogger has opted to require notifications and, because Candidate Shannon did not inform them of the nature of the advertising, MiniBlogger has extra time to provide records about the advertising. Upon discovering that Candidate Shannon, Local Consultants, and Candidate Shannon's campaign manager (whose account was used to buy the ads) purchased non-notification complaint advertising, MiniBlogger reports their names to the Commission, as required. The Commission includes Candidate Shannon, Local Consultants, and the campaign manager on the public list of noncompliant buyers, and extended disclosure periods are no longer available for those buyers. Next election cycle, Local Consultants purchases advertising for a ballot measure from MyBook without notifying MyBook the advertising is political advertising; extended disclosure timelines are not available for this advertising even though Local Consultants did not inform MyBook and, because MyBook has included terms about noncompliant buyers in their advertising terms, Local Consultants may be liable for some costs related to MyBook's attempts to comply with the law or any enforcement actions taken against MyBook, should MyBook choose to enforce their terms.

A system like the one described about is preferable to one which only requires notifications because commercial advertisers are unlikely to have any interest in enforcing requirements against noncompliant buyers, and traditionally have not enforced terms or requirements against them. For example, at least one firm involved in the advertising purchases described in my 2019 complaint against continued to purchase thousands of dollars of issue advertising on Facebook for an extended period after the complaint was filed, and with the last purchase occurring after the Commission voted to refer the matter to the Attorney General's Office. Because digital commercial advertisers have also historically struggled to meaningfully limit purchases by advertisers who have failed to comply with advertisers' self-imposed political advertising bans, the system also provides a necessary mechanism for encouraging enforcement of rules against noncompliance buyers by limiting extended disclosure timelines to circumstances where commercial advertisers were unaware a buyer had a history of noncompliance with notification requirements.

In summary, existing commercial advertiser disclosure requirements are an important check on candidate advertisers and, if the Commission chooses to impose a notification requirement on persons purchasing political advertising, it should only do so where:

- Commercial advertisers are given a choice between existing requirements and opting into a structure with required notifications.
- Commercial advertisers are required to report buyers who fail to comply with notification requirements to the Commission and where buyers have been reported future purchases by those buyers are no longer subject to extended disclosure timelines, even where they have not notified the commercial advertiser. Commercial advertisers should not be prohibited from imposing additional requirements on previously noncompliant buyers.

- Notification requirements should not eliminate commercial advertiser liability; rather than removing liability, a failure to notify a commercial advertiser should only permit the commercial advertiser additional time to comply with requirements, and a failure to comply after the extended time should still allow for potential enforcement actions against the commercial advertiser.

Disclosure Timelines

The Commission asked for the public's thoughts on if commercial advertisers should be allowed more time to respond to disclosure requests in instances where the sponsor has not told indicated that the order was political advertising. While I believe that, in isolation and in the abstract, providing more time for commercial advertisers to respond to disclosure requests where they are not been told that advertising is political may be beneficial, I also believe that providing digital commercial advertisers with this leeway without providing it to other commercial advertisers is likely harmful. Further, do not believe there is any indication of a widespread advertiser compliance or identification issue except related to digital commercial advertising. Thus, I think, when considering the issue in isolation, the Commission should decline to provide additional time.

Providing additional time may benefit both commercial advertisers and the public because that time may make full disclosure possible. Similarly, it may allow commercial advertisers to provide applicable and meaningful information about advertising more fully. And it may do so without harming the public's ability to access information when needed, assuming any extra time does not allow commercial advertisers to withhold disclosures until after an election.

However, as the Commission's webpage requesting comment makes clear, the existing law "applies equally to all providers of political ads." Under the existing structure, a print shop, a low-power radio station, a local newspaper, and a large digital advertising sellers from Menlo Park are rightly subject to the same timelines and requirements, with some minor differences based on the kind of services those commercial advertisers provide. Any timeline changes that could result from this rulemaking seems likely to only apply to digital commercial advertisers, however, and seem likely to result from compliance problems which only exist for certain large advertisers.

Timeline changes like those implied by the question would mean that, suddenly, Yakima's KDNA FM, a local non-profit Spanish-language radio station that describes itself "la voz del campesino" ("the voice of the farmer") would be subject to more stringent disclosure timelines and rules than Facebook, if either decided to sell political ads. It would mean that Capitol City Press, an employee-owned union print shop in Tumwater, would be subject to more stringent timelines than Google. It would mean that the Omak-Okanagan Chronicle, a small circulation newspaper and Okanagan County's paper of record, would face more demanding disclosure requirements than Twitter, if the company decided to sell political advertising again. To all of which I simply ask: why? Why should local journalism, already struggling in the face of declining advertising revenue, face greater hurdles to ad sales than the largest commercial advertisers? Why, when selling ads, should a newspaper with thousands of readers be subject to more stringent regulations than companies with hundreds of millions of daily users? Why should

small non-profit radio stations be required to disclose information faster than the world's most profitable companies? The answer to all those questions is the same: they shouldn't be. And, right now, they are not. Changing the disclosure timelines for digital commercial advertisers, however, would also mean smaller, local advertisers would face relatively stricter rules.

Because the current timelines treat all commercial advertisers equally, and because it is impossible to justify relatively stricter regulations for small, local advertisers than large digital advertisers, it only makes sense to adjust timelines if those adjustments apply equally to all commercial advertisers. Doing so, however, would be outside the scope of the current rulemaking. And, even if the Commission determined that adjusting timelines for all commercial advertisers was worth considering, it is not clear there is a reason to do so. As the existing rules applies to all commercial advertisers, adjusting them to encourage compliance only makes sense to the extent to the degree that there appears to be a compliance issue across commercial advertisers. However, there is no indication that a majority of commercial advertisers in Washington struggle to meet current timelines, with or without identification by political advertising buyers. A cursory review of recent PDC complaints turns up none against radio stations which have failed to identify political advertising. Nor do there appear to be any recent complaints involving a failure by a newspaper to meet recordkeeping and timeline requirements. As far as I am aware, a print shop has never faced a complaint where the shop was unaware that advertising it produced was political. Television stations similarly seem to have no issue keeping and maintaining records about political ads and providing that information when they receive a request, often making "ad books" easily accessible. Not even commercial advertisers who were selling ads prior to the passage of Initiative 276 appear to have struggled with disclosure compliance after the law was passed. In fact, of the hundreds or perhaps even thousands of commercial advertisers who have sold political advertising in Washington since 1972, only a very few digital commercial advertisers appear to have consistently struggled to identify political advertising and make disclosures within the defined timelines. Commercial advertisers in general do not appear to struggle with complying with the current requirements.

I believe it is important to suggest here that the compliance struggles involving Facebook and Google are not the result of regulations, but rather the result of intentional choices made by the companies. While other commerical advertisers have traditionally sold advertising though a sales department or other process involving manual review of advertising, allowing them to easily, quickly, and consistently identify political advertising, Facebook and Google have chosen to employ a different advertising sales process, which often includes only automated or limited manual review. That different process allows the companies to sell advertising at lower rates than other commercial advertisers, which is part of why they provide valuable services to small campaigns, but it is also what creates their compliance struggles. The problem is not that the existing structure asks too much of companies, but that a small number of companies have decided to sell low-cost, high-volume advertising and to dispense with traditional manual review of advertising and as a result of that choice struggle to meet regulatory requirements. It is certainly not the responsibility of the Commission or the State to change the rules now that a few companies have discovered they are incapable of developing technology which makes it possible for them to easily square their ad sales business model with Washington's long-standing disclosure structure. That structure, which voters put in place decades before the companies were founded and before the companies' founders were even born, is simply not the problem here. I

would humbly suggest that if the companies are interested in avoiding future complaints, and if the Commission is interested in encouraging future compliance with the law, the best path to that outcome is not regulatory change but the companies developing technologies and systems which are consistently capable of meeting the needs of Washington's transparency laws, just like every other commercial advertiser appears to have been able to do.

In any case, if the Commission decides it is important to offer a small sub-class of commercial advertisers extended disclosure timelines, those timelines should be based on existing timelines for other participants in the political process and should not allow for disclosures to be delayed beyond election dates. Any changes to the timelines should attempt to match existing requirements for campaigns filing expenditure reports. That is, if the Commission amends timelines for disclosure where an ad buyer has not informed the seller that the advertising is political advertising, the Commission should consider rules which require disclosure no later than:

- The tenth day of the month following the month in which the ad purchase was made, or
- The twenty-first day before an election, or
- The seventh day before an election, or
- The tenth day of the month following an election, whichever is sooner.

If the Commission believes that structure is too complex, a simpler schedule could be built based on contribution report schedule for campaigns. This structure would require disclosure no later than:

- The next Monday if the ad purchased in the four months preceding a special election, or
- The next Monday if the ad was purchased in the five months preceding a general election, or
- The tenth day of the month following the month in which the ad purchase was made, whichever is sooner.

In addition, the Commission should consider if the day of the election the ad is related to is an appropriate disclosure deadline in all cases, no matter the purchase date. Disclosure timelines based on existing rules for campaigns and including an election day deadline, like the ones suggested above, could clarify requirements without meaningfully reducing transparency.

While considering if advertisers should be allowed more time to respond to disclosure requests, the Commission should also consider clarifying the timeline for responding to disclosure requests generally. WAC 390-18-050 currently requires that advertisers supplying records via digital transmission, like the system that Facebook currently employs, supply records "promptly upon request" and that information about advertisements "must be made available within twenty-four hours of the time when the advertisement or communication initially has been publicly distributed or broadcast." The current regulations do not actually require commercial advertisers supplying information by digital transmission to meet any specific timeline following a request; rather, they require that they have the information available for disclosure within twenty-four hours and then, after a request, send it to the request "promptly." That combination is confusing for both data seekers and commercial advertisers. Should the Commission adjust disclosure

timelines, “promptly upon request” in WAC 390-18-050(3)(b)(i) should be replaced with “within 24 hours of receiving a request” except where that would conflict with the adjusted timelines.

Relatedly, the current regulations, because of the “promptly, upon request” phrasing, already supply some flexibility which may allow digital advertisers some extra time where they do not know advertising is political advertising or have not been informed that it is political. It is difficult to imagine a reasonable reading of “promptly” which does not interpret it to mean something slightly different where records are readily available then when they are not. Indeed, that is an issue I raised in my 2019 complaint against Facebook. While I believe the company failed to supply me with information promptly, my complaint also contained my belief that “Facebook does not keep or maintain the required records in a form which can be shared, accessed, or inspected.” That is, the allegation related to disclosure timing was built around WAC 390-18-050(4) and the only firm and indisputably defined timeline Facebook failed to meet, at least in terms of my complaint, was not a requirement based on how long they had to send information to me (a WAC 390-18-050(3)(b)(i) concern), but rather a timeline based on how long they were allowed between when an ad was purchased and when they were required to have records about political advertising in their ad books and prepared for disclosure (a WAC 390-18-050(4) concern).

That is, commercial advertisers already have some flexibility in the amount of time they are allowed to respond to disclosure requests because existing regulations only require “prompt” disclosure. However, commercial advertisers are subject to a requirement that their political advertising records contain ad records within twenty-four hours of distribution. Those requirements, however, are different requirements; an advertiser could fail to keep timely records, violating WAC 390-18-050(4), while still disclosing records “promptly,” or vice versa. Because the rulemaking preproposal contemplates only the scope and timing for inspection of records, and not recordkeeping requirements, I am not comfortable commenting on changes to recordkeeping requirements the Commission has not suggested it is considering. I would, however, suggest that if the Commission were to change disclosure response timelines without amending recordkeeping requirements, that commercial advertisers would likely see less flexibility. And, if the law in 2019 had allowed commercial advertisers additional time to respond to a disclosure request involving ads where they have not been informed that advertising is political advertising, I still would have filed my complaints because those advertisers still may have been in violation of the equally important timely recordkeeping requirements.

In summation, the Commission should not change existing timelines for responding to disclosure requests for digital commercial advertisers where those advertisers have not been informed that advertising is political advertising because:

- Existing regulations already provide for a flexible timeline through the “promptly” language
- Any change which lengthens timelines exclusively for digital advertisers would cause non-digital advertisers, like local newspapers and radio stations, to be subject to relatively stricter requirements, and there is no justification for subjecting them to stricter rules
- A change to requirements for all advertisers is difficult to justify because, over the five decades since Initiative 276 was passed, nearly all commercial advertisers appear to have

had no issue complying with disclosure rules; existing compliance struggles appear to be the result of corporate choices, not regulatory structures
- Even if disclosure response timelines were changed, digital commercial advertisers who accept political advertising they have not been informed is political advertising would likely still be in violation of WAC 390-18-050 because they are unlikely to keep timely records of that advertising

However, if the Commission does decide to change disclosure timeline requirements, the Commission should consider:

- Implementing a structure based on existing filing timelines and requirements for campaigns and committees
- Allowing extended disclosures timelines only where those timelines do not allow disclosures to be delayed beyond an applicable election date
- Removing the "promptly" language in WAC 390-18-050(3)(b)(i) and imposing a firm and universally applicable timeline in its place

While the Commission should consider those changes if considering changes at all, it is important to note that those changes likely exceed the scope of the rulemaking preproposal.

Digital Commercial Advertiser Disclosure Contents

The Commission asked for the public's input on what details about digital political advertising are important to know as part of disclosures, clarifying that the current rules require "platforms to provide a copy of the ad, the name and address of the person actually paying for the advertising, the total cost of the ad, date and method of payment, demographic targeting, and number of impressions, among other details."

Current requirements, in some ways, exceed what is necessary. For example, where other disclosure requirements are met, method of payment information provides little or no additional transparency. It simply does not matter if a campaign used a credit card or a wad of cash to pay for advertising as long as the advertising expenditures and campaign contributions are properly reported. To the extent there are any concerns about some kind of fraud or other efforts by campaigns to hide spending through nefarious methods of payment, or advertisers underreporting costs, those concerns can be dealt with through complaints about specific behavior and investigations related to it; there is no need to preemptively require method of payment disclosure. Similarly, impressions may not be useful information, for two reasons: first, impressions are platform-calculated and cannot be audited; and second, impressions are less meaningful than reach and targeting data because, while knowing that the average user saw an ad a dozen times may provide some information about goals or spending, it does not further general transparency goals in the same way that information about the ad itself or ad targeting does.

Both targeting and reach data are, however, useful and disclosure requirements involving both should be maintained. Targeting information is slightly more useful when considering candidate and committee behavior, while reach information is slightly more useful when considering commercial advertiser behavior. Requirements that commercial advertisers disclose both

targeting and reach data should be maintained even if candidates and committees are required to disclose certain targeting information to the Commission because those disclosures would provide a check on candidate and committee disclosures and, as described above, the primary function of commerical advertiser disclosures as to act as a check on candidate and committee disclosures. If targeting data, for example, were to be disclosed only by candidates, independent confirmation of the accuracy of that data would be essentially impossible without the assistance of commercial advertisers, who seem unlikely to provide that information except when legally required to provide it. If the Commission were to consider requiring disclosure of targeting information by candidates and committees, this requirement should only be imposed if it exists alongside commercial advertiser disclosures of the same information. Candidate disclosures, in place of independent information from commercial advertisers, would be relatively useless.

In terms of the content of disclosures, the most important portions of digital commercial advertiser disclosures, other than those which provide a check on candidate and committee disclosures and which provide tools through which voters and enforcers can discover and act against nefarious advertising purchases, are those which allow requesters to discover any potential discriminatory ad targeting or reach. Digital commercial advertisers should at the minimum be required to disclose information about targeting and reach related to protected classes defined in Washington or federal law and proxy characteristics which can be used to approximate protected classes, to the extent they collect that information. At the very least then and where they collect the information, digital commercial advertiser disclosures should include all information an advertiser collects or maintains about targeting and reach related to: race, age, familial status, creed or religion, color, national origin, citizenship and national origin, immigration status, sex, veteran status, sexual orientation, the presence of any disability, or any proxy characteristic related to those characteristics. As political ideology is a protected class in at least one Washington municipality, where advertisers collect or create information about ideology, they should be required to include that information in disclosures. Additionally, because they can often be used as discriminatory proxy characteristics and may play a meaningful role in political advertising, digital commercial advertisers should be required to disclose any information they have about the specific location (up to and including ZIP codes) of audiences targeted and reached, and any information they have about the earnings or wealth of audiences targeted and reached.

While reach information can provide some value on its own, targeting information is also valuable. In combination, the two can be used to uncover discriminatory intent in advertising purchases where buyers use proxy characteristics to stand in for protected class information. For example, if a buyer were to determine that users who a commercial advertiser had determined were interested in farmers' markets and lived in a series of ZIP codes were disproportionately younger and whiter, and then used this information to target political advertising to an almost exclusively younger and whiter audience, that activity could only be determined where both targeting and reach data are available. And that decision to intentionally limit political advertising in a discriminatory manner is clearly meaningful information. As a result, commercial advertisers should be required to disclose reach information as well as targeting information because that information allows for requesters to discover proxy characteristics and discriminatory intent.

However, if the Commission is to amend the disclosure contents requirements in WAC 390-18-050(6)(g), it should in any case consider replacing the current language (a "description of the demographic information (e.g., age, gender, race, location, etc.) of the audiences targeted and reached") with either a concrete list of demographic characteristics or a reference to protected classes and statutory definitions of those classes, even if the Commission considers other changes to disclosure requirements like limiting disclosures to only targeting or reach data rather than both or shifting disclosure requirements from commercial advertisers to campaigns (despite the untransparent impacts of that shift). A firm list of information subject to disclosure would make the disclosure structure simpler for candidates and requesters, and make compliance easier and clearer for commercial advertisers and candidates. It would be much simpler for a requester to be certain disclosures are complete were there a more exhaustive list than the current description.

In summary, the Commission should not shift reporting requirements from commercial advertisers to candidates or committees. There are several changes the Commission should consider when looking at the existing disclosure content requirements:

- Method of payment information is likely unnecessary. The Commission should also consider if impressions provide added value to disclosures.
- The Commission should maintain both targeting and reach content requirements, and commercial advertiser disclosure requirments for each, even if candidates and committees are also required to disclose targeting information.
- The Commission should consider replacing the current disclosure contents requirements in WAC 390-18-050(6)(g) with a more extensive and more concrete list of required information, and should consider if anti-discrimination laws and protected classes provide a useful guide.

Additional Concerns

Summary judgement motions in State's ongoing case against Facebook, which involves WAC 390-18-050, are due before this rulemaking process is likely to conclude. No matter the outcome, the case is likely to help clarify the meaning of existing rules and standards, and the applicability of them to digital commercial advertisers. Those potential impacts, and the case, must be considered as part of the context of this rulemaking because the decision in the case will necessarily influence interpretations of WAC 390-18-050 as currently written. In that, the case is likely to provide clarity to commercial advertisers, campaigns and candidates, and requesters.

However, the current rulemaking schedule may result in changes to WAC 390-18-050 occurring at about the same time as the Facebook case, the first and only case which requires interpreting WAC 390-18-050, is decided. Changes to the rules, in that context, are likely to create more confusion. If, for example, the current regulations are found, as Facebook argues, to be too onerous and changes made by the Commission through this rulemaking loosen requirements, it may be unclear if the amended regulations are still too stringent, and the same enforcement and compliance struggles that have led to this rulemaking are likely to reappear. The same is true in the opposite circumstances; if the current rules found to not be too stringent and the Commission makes the requirements more extensive through this rulemaking, enforcement and compliance

struggles are again likely to reappear. In fact, no matter the outcome of the case and no matter how the Commission changes the existing rules, the combination of the two occurring in close proximity is likely to create more confusion about the requirements for everyone interested in commercial advertiser disclosures.

Beyond the potential for confusion, final rulemaking while the case is pending is improper because the Commission cannot possibly have access to all the information necessary to make an informed decision about how the rules can or should be changed until after a final decision is rendered in the Facebook case. If, for example, the Commission were to desire amending the rules to include more stringent requirements, a decision in the Facebook case holding the current rules to be too stringent should play a role in that decision making. However, the outcome of the Facebook case can only play a role in this rulemaking if there is a decision in the Facebook case prior to any final rulemaking. That, under the current schedules, is essentially impossible.

The Commission should thus delay final rulemaking until after a decision has been rendered in the Facebook case.

Such a delay is unlikely to cause harm; as the Facebook case appear likely to be decided at the summary judgement stage, a delay will not necessarily be lengthy. A delay may only mean waiting a few months to finalize the process, and the possibility of new rules being in place prior to the August 2022 primary election would remain. Indeed, the harms are likely to be particularly limited because the commercial advertisers most likely to be impacted by changes to digital advertiser rules neither desire to participate in the market currently nor seem likely to make disclosures. That is, a delay in rulemaking runs no risk of creating less transparency and, because commercial advertiser decisions about market participation seem as likely to be impacted by the Facebook case as by rulemaking, a delay is unlikely to limit their participation on its own.

While the Commission can clearly amend WAC 390-18-050 to shift commercial advertiser requirments, it also likely does not have the power to meaningfully adjust some commercial advertiser disclosure requirements, including some of those involving disclosure timelines, because those requirements are rooted in statutory, rather than regulatory, requirements. For example, even if the Commission extended regulatory disclosure timelines, commercial advertisers would still be subject to the RCW 42.17A.345 requirements that commercial advertisers maintain “current books of account” and that these books be made available for public inspection during regular business hours. That is, if the Commission were to amend disclosure requirements to, say, allow digital advertisers additional time when they have not been notified advertising is political advertising, those digital advertisers would still be in violation of RCW 42.17A.345 if they failed to keep current books and to make those books available for inspection. Notifications required by regulation play no role in that statutory requirement. In other words, the functional impact of a changes to disclosure timelines in WAC 390-18-050 without changes to RCW 42.17A.345 is likely to be minimal and may create a conflict between statutory and regulatory requirements. As a result of the likely conflict between any loosened regulatory disclosure timelines and statutory requirements, the more appropriate path to making changes to digital commercial advertiser disclosure requirements is likely legislative and not regulatory.

These kinds of concerns are heightened when considering "safe harbor" rules and other similar structures. These structures, which limit liability in specific circumstances, are incompatible with existing statutory requirements and, even if created in regulations, would not provide commercial advertisers with "safe harbor" from statutory disclosure requirements because these requirements require "current books" and disclosure of those books and do not contemplate "safe harbors." And, because these requirements limit and delay disclosures, they are at the core anti-transparent and should not be considered.

In addition to Washington-specific legal considerations, the Commission should consider the potential impact of recent anti-transparent actions by Facebook and if these actions change the context of this rulemaking process. In a widely reported decision earlier this month, Facebook banned academic researchers investigating political ad targeting and COVID-19 misinformation from their platform, functionally prohibiting their research and chilling the potential of future research. The researchers banned by Facebook include Laura Edelson, who spoke about her research at the Commission's forum on digital advertising last year; Edelson's research relied on information voluntarily provided by Facebook users. Facebook's ban was premised on the idea that the research violated user privacy; the privacy question, however, involved not everyday users, but political advertising buyers. In other words, a large digital commercial advertiser recently prohibited researchers from accessing data voluntarily provided by users because political advertising buyers, including (presumably) nefarious purchasers, had not consented to those users voluntarily sharing data about the advertising they were seeing. As discussed in prior Commission meetings, the current rulemaking is at least in part influenced by conversations between Commission staff and representatives of Facebook. It is not clear, however, why a commercial advertiser which has made intentional choices to protect the secrecy of political advertising on the platform, banned researchers from accessing data users voluntarily provide about political advertising, and refuses to comply with long-standing state transparency laws should have any influence in conversations about improving transparency and disclosure structures.

However, no matter the role Facebook ought to play in conversations, their action has created another concern which the Commission ought to consider: with academic research into digital political advertising targeting now functionally prohibited by commercial advertisers, Washington's existing commercial advertiser disclosure structure is likely the only system, anywhere in the country, which allows voters to any meaningful access to any independent data about digital political advertising. Any other system is either entirely reliant on non-independent, and completely voluntary and optional, disclosures from commercial advertisers, who (as exemplified by Facebook's recent research ban) often have conflicting interests and may prefer to give advertiser privacy primacy over political advertising transparency.

In summary, the Commission should consider the impact of additional issues when engaging in this rulemaking process. Specifically, the Commission should:

- Consider delaying any final rulemaking until the Facebook case has been decided in order to ensure that any rules comport with that decision and that the Commission does not create confusion.

- Consider the limits on impacts of regulatory changes imposed by statutory disclosure requirements, and if legislative action is necessary to implement any extended disclosure timelines or "safe harbor" structures.
- Consider if anti-transparent actions by digital commercial advertisers, include prohibitions on independent research imposed because commercial advertisers may be more concerned with political advertising buyer privacy than with political advertising transparency, should play a role in the rulemaking process.
- Understand that WAC 390-18-050 is likely the only independent means, anywhere in the country, through which voters can access any meaningful data from commercial advertisers about political advertising.

Conclusion

The Commission is right to consider changes to the existing commercial advertiser disclosure structure and digital commercial advertising disclosure requirements. While the existing system may maximize potential transparency, a lack of compliance by some commercial advertisers limits its effectiveness. However, the current timeline for rulemaking is improper and the Commission should delay any final rulemaking until after a final resolution of the State's ongoing WAC 390-18-050 enforcement action against Facebook in order to ensure that any future rules comport with any limits imposed by that litigation.

Once it is a more appropriate time to finalize rulemaking, the Commission should:

- Impose notification requirements only where commercial advertisers opt in to those requirements, and ensure that enforcement incentives (like the noncompliant buyers structure suggested above) are in place alongside any notification requirements.
- Limit changes to existing commercial advertiser disclosure timelines, which already provide some flexibility, and, if changes are made, only make changes which base commercial advertiser disclosure timelines on candidate and committee disclosure timelines.
- Continue to require that commercial advertiser disclosures include information about the purchaser, the date and cost of their purchase, and a copy of the ad itself, along with certain demographic targeting and reach information. Method of purchase and impressions information is, however, not necessary. In addition, the Commission should consider replacing the current open-ended "demographic information" requirement with a more concrete list of information, including location, demographic characteristics related to membership in a protected class as defined by Washington and federal law, and proxies for demographic characteristics related to membership in a protected class. Disclosures should include information about both targeting and reach as the two serve different purposes in disclosures.
- Consider the effective limits of regulatory change imposed by RCW 42.17A.345, particularly as it relates to notification, recordkeeping, and disclosure timeline requirements, as well as its incompatibility with "safe harbor" rules. Additionally, the Commission should consider if legislative rather than regulatory action is more appropriate here.

- Contemplate the impacts of recent anti-transparent actions by large digital commercial advertisers and if those actions suggest the need for a more stringent disclosure structure and continued enforcement efforts against commercial advertisers rather than a change to existing disclosure rules.

With the quick disclaimer that I have provided these comments solely on my own behalf and they do not necessarily represent the views of anyone else, thank you as always for your continued work on this important issue and please do not hesitate to reach out if you have any questions.

Sincerely,

Tallman Trask