Mx. Fox Blackhorn
Public Disclosure Commission
711 Capitol Way, Room 206
PO Box 40908
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Re: Facebook, Inc.'s Response to Complaint Case 55351

Mx. Blackhorn:

On August 12, Facebook, Inc. ("Facebook") responded to my complaint of July 24. In their response, Facebook identifies a number of pertinent and important issues related to political advertising in Washington. Facebook does not, however, adequately address the issue raised by the complaint. Taking Facebook's claims in turn, each clearly fails to recognize the issue.

First, Facebook claims that commercial advertiser requirements do not apply as Facebook "is not accepting, providing, or selling Washington Political Ads." Here, Facebook appears to attempt to replace the actual circumstances, in which there is no question that Facebook ran and accepted payment for political ads (an act which clearly meets any reasonable definition of "selling") related to at least the 2019 Seattle City Council primary election, with Facebook's stated desire to not accept or sell these ads. While it is certainly laudable that Facebook, upon recognizing that their processes or other obligations would likely make it difficult for the company to fully comply with the requirements of the law, decided to disallow the sale of Washington political ads, the allowance of the sale and the actual sale are different things. The administrative code does not define commercial advertiser based on intent, but rather based on action; if a company "sells the service of communicating messages . . . for broadcast or distribution to the general public or segments of the general public [through] . . . paid internet or digital communications . . . for the purpose of appealing, directly or indirectly for votes or for financial or other support in any election campaign,"[1] they are a commercial advertiser regardless of their intent. As it does not appear to be the case that anyone is contesting the claim, nor could anyone reasonably contest the claim, that Facebook sold such a service, it is the case that Facebook must be considered a commercial advertiser under WAC 390-18-050.

Facebook continues the claim against being a commercial advertiser by pointing to the fact that any sales of Washington political ads after December 28, 2018 was in violation of Facebook's policies. Facebook's polices do not, however, provide a reason to define the company's actions as something other than a sale of political ads. The question here is not if Facebook wanted to sell political ads (they have stated they do not and there is no reason to believe that is not the case), or if buyers were violating Facebook's policies by purchasing such ads, but rather if Facebook actually sold those ads and, if so, if they are required to disclose specific information about those sales and ads like other advertising sellers. The policies, while nice, are not particularly applicable to the act. Beyond that, the claim that Facebook does not "accept" Washington political ads is clearly incorrect as evidenced not only by the disclosures provided in the original complaint, but also by Facebook's own Ad Library; if Facebook did not "accept" Washington political ads, the ads disclosed in the library would not have run, and Facebook would not have accepted payment for those ads. Facebook here appears to be claiming that the ads which ran simply fell through the cracks despite Facebook's intent to not accept these ads; the law, however, does not appear to offer an exemption for ads which companies sold against their own

[1] WAC 390-18-050

policies, as a result of the inadequacy of their own practices and procedures, or simply in haste prior to reconsidering such sales. Rather, it applies to ads which have been sold, and makes no mention of the intent or desire of the seller.

Here, Facebook is essentially making a "broken mousetrap" defense against the complaint. They are claiming that they are exempt from the requirements of the law because the systems and measures they put in place (and designed) did not effectively catch violations, and that therefore the violations are not something which the law can address. A broken system is not, however, an excuse; even if the trap doesn't catch any mice, it doesn't mean that the company is absolved from their responsibility to take certain actions related to the mice when someone sees them, or their obligations to give regulators information about the mice. Or, without the mousetrap, the law requires disclosure of specific information by political ad sellers even if the seller did not desire to sell the ads, was not aware of the ads until someone pointed out the issue, and later (after calling the exterminator rather than building an ineffective mousetrap) removed the ads in question.

Furthermore, Facebook confuses the description of acts by a commercial advertiser within RCW 42.17A.345 with a definition of commercial advertiser. That definition, as clearly provided in WAC 390-18-050 and RCW 42.17A.005, is not predicated on "providing" advertising as Facebook would like to believe, but rather on the sale of advertising. If they sold ads, there does not appear to be an easy way out of the commercial advertiser definition.

Second, Facebook claims that any complaint is preempted by federal law. Facebook's claim here misunderstands the nature of the complaint filed; Facebook's response incorrectly claims that the complaint seeks to hold Facebook liable for "failing to detect and remove certain pieces of political advertising that were created and posted on the platform by third parties in violation of Facebook's policies." The complaint, rather than being about the detection and removal of content, is specifically about disclosure of information, or the lack thereof, about a specific and defined advertising content. While it may be the case that Facebook is protected, as they claim, against claims relating to "screening, monitoring, and removal" of content under Section 230 of the Communications Decency Act ("CDA"), the section and act provide no such protection against claims related to disclosure of information about third-party content. That is, the complaint does not claim that Facebook screened, monitored, or removed content wrongly (or otherwise), nor is it even concerned with screening, monitoring, and removal of content. In the context of the complaint and political advertising in Washington, it seems that any such issues related to screening and monitoring are, in fact, contained purely within Facebook's own policies; there is no reason to assume that Facebook is specifically obligated to screen, monitor, or remove political advertising content as a result of Washington's campaign finance disclosure rules, but simply that they are required to disclose specific information about that political advertising content. Given that disclosures of information about content do not appear to be a subject of the CDA, and that the complaint does not relate to "screening, monitoring, or removal" of content, the CDA appears immaterial to Facebook's obligations under RCW 42.17A.345 and WAC 390-18-050 to the extent that those obligations relate specifically to the disclosure of information.

Facebook looks to the Stored Communications Act ("SCA") to bolster the response, but this also falls short within the specific context of the claim. While it is certainly the case that the SCA provides certain protections and prohibits certain disclosures, it does not apply here for two clear reasons. First, the SCA only prohibits the disclosure of "records" which contain the individual's "name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print

or a photograph."[2] Except in the specific case of ad buyers, neither RCW 42.17A.345 nor WAC 390-18-050 require advertisers to disclose records which include such information; rather than personally identifiable information or the advertiser's complete record on individuals, they only oblige commercial advertisers to disclose "demographic information (e.g., age, gender, race, location, etc.) of the audiences targeted and reached, 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 by the advertisement of communication."[3] Further, the SCA provides clear exemptions for circumstances in which the provider, such as Facebook, has obtained "lawful consent"[4] from users.[5] Facebook's own terms of service provide such consent from users, informing users that Facebook can and does share information with regulators when there is "a good-faith belief it is necessary to . . . protect ourselves (including our rights, property or Products), you or others, including as part of investigations or regulatory inquiries."[6] Additionally, Facebook's terms specifically call out instances where it is necessary to "detect, prevent and address . . . unauthorized use of the Products [or] violations of our terms or policies."[7] As Facebook has presumably received lawful consent as a result of these terms, and has made it clear in their response that they believe any Washington political advertising purchase was made in violation of their terms and polices, the SCA ought to provide no hinderance to Facebook disclosing the information required by RCW 42.17A.345 and WAC 390-18-150, with the possible narrow exception of identifying information about advertising purchasers.

Third, Facebook requests that the Public Disclosure Commission ("PDC") decline to pursue the complaint as a result of Facebook's good-faith efforts to comply with the law. While the PDC is far more aware of any communications the Commission has had with Facebook about these issues, it appears worth noting that Facebook's policy appears to be a policy without teeth. That is, Facebook does not appear to have sanctioned any of the individuals or entities which, in violation of Facebooks terms, have purchased Washington political advertising. Rather, they appear to have adopted a whack-a-mole strategy in which they retroactively disapprove Washington political ads as they become aware of them, and pursue no action against purchasers of such ads. Facebook's own terms offer a remedy here, but it appears to be one which Facebook, as part of the company's efforts to comply, seems unwilling to take: they could "suspend or permanently disable" account access for as a result of individuals or Page acts which "clearly, seriously or repeatedly breached [Facebook's] Terms or Policies."[8] Facebook, however, appears to have taken no such action to date; in fact, some Pages mentioned in the original complaint, which had ads removed in violation of the policy, continued running other ads in violation of the policy

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[2] 5 U.S. Code § 552a

[3] WAC 390-18-050

[4] 18 U.S. Code § 2702

[5] Facebook appears to believe they have received such consent broadly for ad content; without such consent it would at least potentially be a violation of the SCA as Facebook sees it for the company to disclose the content of advertising within their Ad Library as the SCA protects against the disclosure of the contents of electronic communication, of which targeted advertising is presumably part, without consent. It seems difficult to argue that Facebook's has received consent for to release the content of communications, but has not received consent to release certain demographic information related to some of those communications.

[6] See Facebook's data policy, available here: https://www.facebook.com/about/privacy/update#legal-requests-prevent-harm (accessed 8/13/19)

[7] Ibid

[8] Facebook's terms, available here: https://www.facebook.com/legal/terms/update (accessed 8/13/19)

through the primary election.[9] It seems reasonable to expect and assume that a good-faith effort to comply would include, at the very least, a cursory examination of other ads being run by Pages associated with ads being run in violation of the terms, if not sanctions for individuals and Pages purchasing such ads as allowed by Facebook's terms. Without such actions by Facebook, it appears difficult to accept that the company is making a strong and complete effort to comply with the laws and policies of the State of Washington, even as such efforts relate to Facebook's own policies and leaving completely aside the disclosure requirements.

The law is quite clear: if a company or individual sells political ads, there are certain disclosure requirements they must meet. Facebook has sold political ads, and yet they have not met the requirements. Rather, they seek to claim that such requirements to not apply to them as a result of federal law which does not relate to disclosure of information, or federal law for which they are likely exempt from as a result of the "lawful consent" contained within their own terms and policies. Further, while the company claims to be making an effort to enforce their policies to the extent that they apply here, there is not any clear evidence that they have sanctioned individuals or Pages as a result of violations of those policies nor that they have consistently looked into other ads run by Pages or individuals who have run ads in clear violation of the policies.

Thank you again for your consideration of this important matter and your continued pursuit of transparency in Washington's political advertising and campaign finance.

Tallman Trask

[9] See, for example, Moms for Seattle: https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&q=Moms%20For%20Seattle&view_all_page_id=2074153722879640