May 20, 2020

Submitted electronically to pdc@pdc.wa.gov

David Ammons, Chair
Washington Public Disclosure Commission
711 Capitol Way S., #206
Olympia, WA 98504

Dear Chair Ammons and Members of the Commission,

Campaign Legal Center ("CLC") respectfully submits these written comments to the Public Disclosure Commission ("PDC") regarding the proposed emergency rules to implement Substitute Senate Bill 6152 ("S.S.B. 6152").[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 participate in a democratic process that is transparent and free from foreign interference.

With the enactment of S.S.B. 6152's amendments to the Fair Campaign Practices Act ("FCPA"), Washington State joined the growing number of states across the country that have adopted measures to safeguard against foreign interference in American elections.[2] CLC commends the PDC's decision to issue emergency rules implementing the new law in advance of the state's upcoming primary and general elections. Issuing rules now will help to prevent foreign meddling in Washington's

[1] *See* Act of Mar. 25, 2020, ch. 152, 2020 Wash. Sess. Law 1212.
[2] *See, e.g.*, Alaska Stat. § 15.13.058 (prohibiting contributions and expenditures by "foreign nationals" and "foreign-influenced corporations"); Cal. Gov't Code § 85320 (prohibiting "foreign governments" and "foreign principals" from making contributions or expenditures to support or oppose a state or local ballot measure); Md. Code, Elec. Law § 13-236.1 (prohibiting "foreign principals" from making contributions, independent expenditures, or electioneering communications in connection with ballot issues); Mont. Code § 13-37-502 (prohibiting contributions or expenditures by "foreign nationals"); N.D. Code § 16.1-08.1-03.15 (prohibiting contributions or expenditures by "foreign nationals"); W.V. Code § 3-8-5g (prohibiting "foreign nationals" from making contributions or expenditures).

2020 elections and provide valuable guidance to the regulated community to facilitate compliance with the new requirements in Washington law.

CLC's comments and recommendations are intended to assist the PDC in ensuring that its emergency rules clearly and effectively implement Washington's proscription against foreign national spending and the corresponding certification requirements for candidates, committees, and other entities making contributions or expenditures in Washington elections this year. Parts I and II of these comments concern the first section of the proposed rules ("Prohibited Activity by Foreign Nationals-Contribution, Expenditure, Political Advertising, or Electioneering Communication"). Part III addresses the certification requirements in the second section of the proposed rules ("Certification for Contributions from Entities-Prohibited Activity by Foreign Nationals"). Lastly, Part IV includes a general comment regarding the definition of "foreign national."

I. Removing "for the purpose of financing" qualification in prohibition on using "direct payments" from foreign nationals for contributions or expenditures

To ensure the PDC's emergency rules effectively prevent foreign nationals from financing contributions, expenditures, and election-related advertisements in Washington, CLC recommends removing the "for the purpose of financing" qualification under paragraph (1)(a)(i) of the first section of the proposed rules. In addition to reducing the scope of the foreign national spending prohibition, this qualification likely would invite the type of evasion enabled by the now defunct Federal Election Commission ("FEC") rule for donor disclosure on independent expenditure reports.[3]

In the first section of the proposed rules, paragraph (1)(a)(i) states, in part, that "a contribution, expenditure, political advertising, or electioneering communication is financed by a foreign national"—and thereby prohibited—if a person uses a "funding source" that includes "[a]ny direct payment by a foreign national *for the purpose of* financing *the* contribution, expenditure, advertisement, or communication."[4] The qualification that a "direct payment" by a foreign national is prohibited only if it is "for the purpose of financing" a particular contribution, expenditure, advertisement, or communication would unnecessarily narrow, and limit the effectiveness of, the broader prohibition in S.S.B. 6152. In effect, this limited interpretation of the new law would not forbid the use of payments from foreign nationals for contributions or expenditures if those payments were given to influence Washington elections more generally or were provided with no explicit instructions on their use.

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[3] *See CLC Analysis: FEC Rule Kept As Much As $769 Million in Political Spending in the Dark*, CAMPAIGN LEGAL CTR. (Nov. 12, 2018), https://campaignlegal.org/document/clc-analysis-fec-rule-kept-much-769-million-political-spending-dark.

[4] Emphasis added.

The FCPA, as amended by S.S.B. 6152, makes no reference to the "purpose" or intent of a foreign national in making payments to another person who then uses those payments to make a contribution, expenditure, or election-related ad; rather, the statute broadly prohibits any person from making a "contribution, expenditure, political advertising, or electioneering communication [] financed *in any part* by a foreign national."[5] Narrowing the scope of the prohibition to direct payments "for the purpose of financing" specific contributions or election-related spending would make the restriction easy for sophisticated foreign nationals to evade, and would be susceptible to gamesmanship by bad actors seeking to circumvent Washington's foreign national spending prohibition.

Indeed, a similar limitation on the scope of campaign finance donor disclosure requirements has been notoriously ineffectual, as there is often no evidence available to establish donors' intentions regarding funds they provide to organizations that engage in political spending. For many years, the FEC narrowly construed reporting obligations for non-committee organizations that made independent expenditures in federal races, requiring these organizations only to disclose donors who provided contributions in excess of $200 "*for the purpose of furthering*" specific expenditures.[6] This regulatory standard proved laughably easy for sophisticated organizations and their donors to evade and significantly undermined the transparency of independent spending in federal elections.[7] In 2018, a federal court invalidated the FEC's donor disclosure requirements for independent expenditure reporting, holding that the rule "impermissibly narrow[ed] the mandated disclosure" in contravention of Congress's intent in enacting the underlying law.[8]

CLC thus strongly urges the PDC to omit this unnecessary qualification and align the emergency rules with the FCPA's broad bar on foreign national spending.

II. Clarifying the meaning of "subsidy" as used in the emergency rules

CLC also recommends that the PDC clarify the meaning of "subsidy" as used in paragraphs (1)(a)(ii) and (1)(b) of the first section of the proposed rules. Paragraph (1)(a)(ii) generally provides that "a contribution, expenditure, political advertising, or electioneering communication is financed by a foreign national" if the person

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[5] Act of Mar. 25, 2020, ch. 152, § 9, 2020 Wash. Sess. Law 1212, 1229 (emphasis added).

[6] 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

[7] By one estimate, non-committee groups that did not have to disclose their donors spent at least $769 million on independent expenditures in federal elections between 2010 and 2018. *CLC Analysis: FEC Rule Kept As Much As $769 Million in Political Spending in the Dark*, CAMPAIGN LEGAL CTR. (Nov. 12, 2018), https://campaignlegal.org/document/clc-analysis-fec-rule-kept-much-769-million-political-spending-dark.

[8] *Citizens for Responsibility and Ethics in Washington v. FEC*, 316 F. Supp. 3d 349, 423 (D.D.C. 2018), appeal docketed, (D.C. Cir. Aug 30, 2018) (No. 18-5261).

making the contribution, expenditure, advertising, or communication uses a funding source that consists of "[a]ny subsidy made by a foreign national, such as a gift, loan, donation, or any use or exchange of goods or services for less than full consideration." In turn, paragraph (1)(b) requires that a "subsidy" received from a foreign national must be segregated from any funding source that will be used for financing a contribution, expenditure, political advertisement, or electioneering communication in Washington.

While paragraph (1)(a)(ii) includes a non-exhaustive list of possible "subsidies," including gifts, loans, and goods or services provided for less than full consideration,[9] the proposed rules do not define the term "subsidy," or explain how a "subsidy" differs from a "direct payment."[10] Further, we are not aware of any statutory or regulatory definition of "subsidy" in the FCPA or existing PDC rules. Due to the importance of the term "subsidy" within a key section of the rules, CLC recommends including a definition that clarifies its meaning.

III. Specifying certification requirements for sources of independent expenditures, political advertising, and electioneering communications

CLC also recommends clarifying the requirements for certifications by organizations that make independent expenditures, political advertisements, or electioneering communications. A central feature of S.S.B. 6152's amendments to the FCPA is the introduction of certification requirements for sources of contributions, expenditures, and election-related ads.[11] Generally, the new law requires the source of a contribution, independent expenditure, political advertisement, or electioneering communication to provide, as part of a campaign finance report, a certification attesting that no foreign national has provided financing or participated in the decision-making for the contribution or election-related spending.[12]

The second section of the proposed rules describes the content of certifications from entities making direct contributions to candidates or committees, but it does not specify requirements for certifications from sources of independent expenditures and

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[9] In the proposed rules, a "subsidy" includes both in-kind support ("goods or services for less than full consideration") and certain monetary transfers (a "loan" or "donation").

[10] Presumably, the meaning of "direct payment" is similar to the definition of "payment" (i.e., "a monetary transfer") in Wash. Admin. Code 390-05-521.

[11] Act of Mar. 25, 2020, ch. 152, §§ 3-8, 2020 Wash. Sess. Law 1212, 1221-28.

[12] In the case of a contribution to a candidate or committee, including an incidental committee or out-of-state political committee, the contributor provides the certification to the recipient committee, which then must include a statement that it has received the necessary certification from the contributor on its next campaign finance report. For independent expenditures, political advertising, and electioneering communications, the source of the expenditure, advertising, or communication must include the certification as part of a disclosure report filed directly with the PDC. *Id*.

election-related ads. Because non-committee organizations generally do not have to disclose identifying information about their donors like registered committees do,[13] the certifications provided by these organizations when reporting independent expenditures or election-related advertisements will provide one of the primary mechanisms for ensuring their compliance with the new restriction on foreign nationals financing or making decisions regarding spending in state campaigns. Accordingly, the emergency rules should also specify the information required for certifications submitted by groups responsible for independent expenditures, political advertising, and electioneering communications.

IV. Incorporating references to federal definitions to clarify meaning of "foreign national" under FCPA

As amended by S.S.B. 6152, the FPCA defines "foreign national"[14] similarly to federal election law.[15] Notably, the "foreign national" definition in the Federal Election Campaign Act also incorporates, by reference, the Foreign Agents Registration Act's ("FARA") definitions of "government of a foreign country"[16] and

[13] *Compare* Wash. Rev. Code § 42.17A.240 *with* § 42.17A.255.

[14] Under the new state law, a "foreign national" includes an individual who is not a U.S. citizens or lawful permanent resident; the government of a foreign country; a foreign political party; and a corporation or other entity "that is organized under the laws of or has its principal place of business in a foreign country." § 2, 2020 Wash. Sess. Law at 1212.

[15] *See* 52 U.S.C. § 30121(b) (defining "foreign national" as "a foreign principal, as such term is defined by section 611(b) of Title 22," or "an individual who is not a citizen of the United States or a national of the United States . . . and who is not lawfully admitted for permanent residence"); 22 U.S.C. § 611(b) (defining "foreign principal" to include "a government of a foreign country and a foreign political party," and "a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.").

[16] 22 U.S.C. § 611(e) ("The term 'government of a foreign country' includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States").

"foreign political party,"[17] both of which are types of "foreign principals" prohibited from making contributions or expenditures in U.S. elections.[18]

In light of the overlap between the FCPA's and federal statute's definitions of "foreign national," the PDC should review the definitions of "government of a foreign country" and "foreign political party" in FARA, and consider incorporating them by reference in the emergency rules. Adding that reference in the rules would make clear specific types of foreign actors prohibited from making contributions and expenditures in Washington elections.

Conclusion

CLC supports the PDC's decision to issue emergency rules to help prevent foreign interference in Washington's upcoming elections, and respectfully urges the PDC to consider incorporating our suggestions to ensure the effectiveness of the emergency rules and to limit opportunities for circumvention of the new law. We appreciate having the opportunity to provide input on this important rulemaking and would be happy to provide additional information to assist the PDC in promulgating the emergency rules.

Respectfully submitted,

/s/
Austin Graham
Legal Counsel

[17] *Id.* § 611(f) ("The term 'foreign political party' includes any organization or any other combination of individuals in a country other than the United States, or any unit or branch thereof, having for an aim or purpose, or which is engaged in any activity devoted in whole or in part to, the establishment, administration, control, or acquisition of administration or control, of a government of a foreign country or a subdivision thereof, or the furtherance or influencing of the political or public interests, policies, or relations of a government of a foreign country or a subdivision thereof").
[18] *Id.* § 611(b).