



May 20, 2020

Washington State Public Disclosure Commission
P.O. Box 40908
Olympia, WA 98504-0908

RE: Proposed Emergency Rules Implementing Substitute Senate Bill 6152

Dear Commissioners:

Thank you for your May 14, 2020 email seeking feedback regarding draft emergency rules implementing Substitute Senate Bill 6152. The initial draft rules are thoughtful and help clarify to the regulated community how they are to comply with substantial new disclosure and document retention requirements that result from this new law.

As legal counsel to a wide variety of candidates, political committees, nonprofits, trade associations and corporations, and as a former professional campaign manager and political consultant, I have some perspective and comments regarding a few sections of these proposed rules. Please note that these comments reflect my own opinion and analysis and are not made on behalf of any particular client of mine.

NEW SECTION

Certification for Contributions from Entities - Prohibited Activity by Foreign Nationals

Section 2

Section 2 states that a certification confirming that there is no foreign financing or influence of a contribution to candidate or political committee:

“...must be received in writing by the candidate or committee before each contribution from an entity is deposited, pursuant to requirements under RCW 42.17A.220.”

RCW 42.17A.220 mandates that any contributions are deposited within five (5) business days of receipt.

In practice, many candidates and political committees who receive contributions from partnerships, associations, corporations, organizations, or other combinations of persons will receive those contributions online, in the mail, or in person. In many, but not all, of those cases, a suitable form or reply device with suggested attestation language can be developed to provide the certification required.

However, it is also common – particularly to smaller, local campaigns but also to larger campaigns and committees – for contributions to simply show up in the mail or to be handed to a candidate, staff member or campaign volunteer without any reply device. Under the draft rule here, for a contribution

from any entity other than an individual, a committee would have to process such a contribution as follows:

- 1) Immediately open any envelope containing a contribution (presumably a check),
- 2) Determine whether the contribution is from a:
 - a. partnership,
 - b. association,
 - c. corporation,
 - d. organization, or
 - e. other combinations of persons,
(Not always easy to do from the name on a checking account),
- 3) Find contact information for the entity making the contribution,
- 4) Contact the entity and actually reach a person (an "agent" under the proposed rules) authorized to make the contribution,
- 5) Email, mail, fax or hand deliver a certification form to the agent,
- 6) The agent must fill out the certification,
- 7) The completed certification must be sent back to the committee,
- 8) The committee must physically (or possibly electronically) recognize that the certification has been received and review it for completeness.

After these 8 steps are complete then and only then under the proposed rule can a contribution be deposited and only if all steps were completed within five business days. The burden on candidates and political committees in accomplishing these 8 steps within five business days is substantial particularly, again, for smaller, more local candidates where there may be no campaign staff or limited volunteer campaign support.

Conversely, frequent, established contributors to candidates and political committees will likely adapt to the new rules by prospectively providing certifications to recipients of their contributions. Similarly, candidates and particularly incumbents in highly competitive races will be better able to afford the additional staff and/or contractors necessary to have a chance to secure certifications within the time frame required.

There can be no question here that the smaller, first-time and lower profile candidates and campaigns will have a tremendous disadvantage in processing this type of contribution compared to incumbents and frequent candidates with well-supported and financed campaigns.

An Alternative

An alternative to this proposed rule would allowing contributions from partnerships, associations, corporations, organizations, or other combinations of persons to be deposited within five business days as required by RCW 42.17A.220, but not allow the funds to be spent or used by the campaign until certification is received at some later date. While it might seem less than desirable to have candidate committees track and hold funds that are not eligible to be used, in fact this practice is common with candidate committees when they receive contributions before a primary election that are designated or otherwise only eligible to be used for a general election.

It is important to note that it is common for campaigns and committees to deposit contributions from individuals without having required employer or occupation information. Usually committees follow

up with phone calls, emails, or letters to secure this information or use other research methods to fill in blanks, but none of this information must be secured in writing from a contributor before a contribution is deposited – unlike what is required with this proposed rule.

Under this alternative there are reasonable arguments that there should be no time limit for obtaining the required certification long as the funds are held by the committee and not spent. However, other reasonable time frames could be adopted such as requiring certification to be received a week before the primary or general election, or within 30 or 15 days of receipt. Even 10 business days after receipt would be an improvement and is similar to the federal requirement that contributions reasonably suspected to be from foreign nationals be returned within 10 days unless evidence is secured that the contribution is likely not from or influenced by a foreign national. In the case of the new Washington law, a much higher standard of rigor seems to have been proposed regardless of whether there is evidence that a contribution could be foreign sourced or influenced.

Section 3(a)

This section requires certification be made by “the authorized agent” of the contributor. This language may cause confusion among contributors who might struggle with that term since registered agents of organizations often do not have the authority to make contributions on behalf of an entity and in fact there can be more than one individual with the ability to authorize contributions. Language could instead allow certification by “an authorized agent” of the entity.

Section 3(d)

Section 3 describes attestation language that may be used for certification of no prohibited activity by foreign nationals. In particular, Section 3(d) suggests that a contributor attest that:

“...the entity making the contribution is not financed in any part by a foreign national;”
(underline for emphasis)

The statute states that a contribution can't be sourced from a foreign national. However, this proposed language implies that an entity that is organized in the United States but foreign national-owned at any level can't make a contribution even if all the funds are U.S. sourced and the decision to contribute is only made by non-foreign nationals. That is beyond the reading of the new Washington law as well as the federal statutes after which it is modeled. It is even in conflict with the proposed “NEW SECTION – Prohibited Activity by Foreign Nationals - Contribution, Expenditure, Political Advertising, or Electioneering Communication” which fully contemplates that companies with foreign national or partial foreign national ownership can make political contributions within clear guidelines.

To conform with the federal model and to be consistent with other proposed rules, the language should instead simply read:

“... the contribution is not financed in any part by a foreign national;”

Thank you again for the opportunity to provide these comments.

Sincerely,


Dan Brady, WSBA #33731