

May 19, 2020

Public Disclosure Commission
711 Capitol Way S. #206
P.O. Box 40908
Olympia, WA 98504

Re: Proposed Emergency Rules implementing SSB 6152

Public Disclosure Commission Staff,

The Freedom Foundation (the “Foundation”) appreciates the opportunity to submit the following comments regarding the Public Disclosure Commission’s (“PDC”) proposed emergency rules implementing Substitute Senate Bill 6152 (2020).

In short, our only concern is that the regulation proposed by the PDC to implement the bill’s prohibition against foreign funding of Washington elections may improperly narrow the scope of the prohibitions established by the Legislature.

The stated purpose of SSB 6152 is to,

“...protect the prohibition on foreign influence in our state and local elections by requiring certification that contributions, expenditures, political advertising, and electioneering communications are not financed in any part by foreign nationals...”

(emphasis added)

To that end, Section 9 of the legislation provides in part:

“(2) A person may not make a contribution to any candidate or political committee, make an expenditure in support of or in opposition to any candidate or ballot measure, or sponsor political advertising or an electioneering communication, if:
(a) The contribution, expenditure, political advertising, or electioneering communication is financed in any part by a foreign national; or
(b) Foreign nationals are involved in making decisions regarding the contribution, expenditure, political advertising, or electioneering communication in any way.”

(emphasis added).

The scope of this statute is quite broad. The inclusion of language like “in any part” makes it difficult to read subsection (2)(a) as anything other than a total ban on the use of funds provided by foreign nationals to make political contributions or expenditures in Washington elections.

However, the PDC’s proposed regulation implementing this statutory prohibition is not nearly so broad, instead providing:

“(1) Prohibited financing by foreign nationals.

(a) For purposes of session law 2020 ch 152 s 9 [SSB 6152], a contribution, expenditure, political advertising, or electioneering communication is financed by a foreign national if the person making the contribution or expenditure, or sponsoring the advertisement or communication, uses a funding source that includes in whole or in part:

(i) Any direct payment by a foreign national for the purpose of financing the contribution, expenditure, advertisement, or communication; or

(ii) Any 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.”

(emphasis added).

By adding a requirement that the funds provided by the foreign national(s) be “*for the purpose of*” political contribution(s) or expenditure(s), the PDC’s regulation significantly limits the scope of the statute’s prohibition, and adds an intent requirement on the part of the foreign national that is found nowhere in the statutory text.¹

Under the PDC’s proposed regulation, a foreign national could legally provide 100 percent of the funds used by a person² to make contributions or expenditures in Washington elections, so long as it could not be proven that the foreign national intended the funds to be used by the person “for the purpose of” making political contributions or expenditures. One can easily conceive a situation in which a foreign national funds an agent in Washington and, although never specifically instructed to do so, the agent is implicitly trusted to dispense the funds on electoral politics in a manner benefitting the foreign national.

Under such facts, the “purpose” requirement would make enforcement difficult, if not impossible, as the legality of any foreign-funded contribution could not be ascertained without an investigation into the “purpose” of the foreign national providing the funds. The “purpose” requirement therefore does not comport with the intent or plain language of SSB 6152.

Further, the creation of a “purpose” requirement by the PDC would run contrary to the legislative directive that the Fair Campaign Practices Act be “liberally construed,” significantly limiting the reach of a statute obviously intended to interdict *any* financing by foreign nationals. *See* RCW 42.17A.904.

The Freedom Foundation does not necessarily disagree with the PDC that addition of a “purpose” requirement would make for better policy. However, policy judgements as such are reserved to the people’s elected representatives in the Legislature, not to administrative agencies. Accordingly, the

¹ Moreover, the inclusion of “direct payment” language seems to allow for circumvention of the regulation if the foreign national structures the payment in such a way as to be “indirect,” a circumstance not permitted by the statute.

² “Person” is defined by RCW 42.17A.005(38) as “...an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized.”

PDC's emergency regulations for SSB 6152 should refrain from creating a "purpose" requirement where the Legislature has not seen fit to do so.

We appreciate your consideration of our views in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Maxford Nelsen". The signature is fluid and cursive, with a long horizontal stroke at the end.

Maxford Nelsen
Director of Labor Policy
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