



PUBLIC DISCLOSURE COMMISSION

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To: Members, Washington State Public Disclosure Commission
From: Lori Anderson, Communications & Training Officer
Date: August 19, 2016
Re: Developing Guidance – Survey Results

In June 2016, the Commission discussed the use of campaign funds for post-election campaign expenses, soliciting contributions and making expenditures for campaign-related litigation, and related policy subjects. Tony Perkins' June briefing memo is attached. Before considering the questions staff raised, the Commission asked that stakeholders be consulted.

Survey

Stakeholders were asked:

1. What questions have come up in the following subject areas that you believe were not answered by the Commission's rules or interpretations, or only partially answered:
 - a. Permitted and prohibited use of contributions during a campaign;
 - b. Allowed post-election expenditures of campaign funds;
 - c. Contributions and expenditures for litigation in ballot proposition campaigns (e.g., pre-election challenges, signature disputes, etc.);
 - d. Recounts and recount-related litigation in candidate and ballot proposition races;
 - e. Ballot curing activities and related expenses;
 - f. The application of contribution limits to contributions and expenditures for ballot curing, litigation, legal defense, or any other activity;
 - g. How to report contributions and expenditures for ballot curing, litigation, legal defense, or any other activity;
 - h. Accounting and recordkeeping requirements for candidates who are subject to primary and general election contribution limits;
 - i. How candidates who are subject to contribution limits may spend primary and general election contributions;
 - j. Differences in the rules that apply to candidates and ballot measure campaigns; and
 - k. Permitted and prohibited use of surplus campaign funds.
2. Should the Commission consider the possible use of surplus funds for recounts, litigation, and other uses not discussed in RCW 42.17A.430?

3. Do you think transferred contributions should be accounted for separately from other receipts on campaign reports? [Examples of transferred contributions were provided.]

Stakeholder Engagement

The online survey went live the evening of July 27. Invitations to take the survey were emailed to 1,750 stakeholders consisting of currently registered political committees, full-reporting candidates, and 131 interested parties who have asked to receive notice of Commission action. The survey was also linked to the Commission's website and Facebook page. Forty-one responses have been received to date.

Survey Responses

Unanswered questions: Stakeholders did not raise policy questions that the Commission should address. A few responses make it clear that some of the information currently available is not easily found and the staff will work on a remedy. Actual responses are attached.

Using surplus for recounts, litigation, etc.:

Yes 61%
No 39%

Track transferred contributions separately:

Yes 60%
No 40%

Attachments: Tony Perkins' June 23 memo w/out enclosures
Survey responses



STATE OF WASHINGTON
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June 13, 2016

TO: Commission Members
FROM: Tony Perkins, Compliance Officer
RE: **Preliminary Discussion – Rule Making or other Future
Commission Action Regarding the Use of Campaign Funds for
Post-Election Expenses**

Agenda Item

At its June 23, 2016 meeting, the Commission is scheduled to consider the use of campaign funds for post-election expenses. Following discussion, the Commission may decide to begin the rulemaking process to provide guidance on the question to candidates and political committee officers. The Commission may also direct staff to work on an interpretive statement, or take some other action.

Background

The Commission has previously considered issues related to this question, i.e., the use of contributions and expenditures governed under RCW 42.17A either partially or completely outside the context of an active election campaign.

In 2009, the Commission began preliminary discussions concerning legal defense funds established by a candidate or elected official to defray attorney's fees and other legal costs, including costs incurred in a campaign or electoral context. This discussion continued into 2010, when the Commission and PDC staff studied the issue with representatives of the Executive Ethics Board, the Legislative Ethics Board, and the Commission on Judicial Conduct. In 2011, the staff of the four agencies issued a report titled *Legal Defense Funds Work Group Report*, a copy of which is enclosed with this memo.

In the 2012 legislative session, the Commission requested legislation to bring legal defense funds under the reporting framework of RCW 42.17A. However, that legislation, SB 6056, did not become law.

In 2012, following discussion by the Commission at its September 27, 2012 meeting, PDC General Counsel Nancy Krier issued guidance to Attorney Rob Maguire in response to questions concerning the use of a candidate's active or surplus campaign funds for election recounts and election-related litigation, contributions to or made by a bona fide political party committee for the same purposes, and any reporting requirements and limits that apply to donated legal services. Among other guidance, Nancy's memo stated that legal defense funds established by a candidate remain outside the reporting framework of RCW 42.17A, with the exception of the potential requirement to disclose income on the Personal Financial Affairs Statement reporting form (F-1). A copy of Nancy's guidance is enclosed with this memo.

Current Washington Law

Washington law provides a cutoff date for contributions to candidates who are subject to contribution limits. For the primary election, contributions subject to primary limits may not be made after the date of the primary election unless the candidate loses the election, has debts outstanding as of the date of that election, and has insufficient funds to pay those debts. RCW 42.17A.405(2). In this case, the candidate may conduct additional fundraising against primary limits up to thirty days following the primary election. WAC 390-17-302 defines "outstanding primary debts," "outstanding debts" and "debts outstanding." The definition does not include recounts or recount litigation. The rule requires a losing primary election candidate to return all post-primary contributions in excess of the amount needed to satisfy outstanding primary debts to the contributors of the funds.

Candidates who lose in the primary election or are otherwise not a candidate in the general election must also return general election-designated contributions to the contributors of the funds. WAC 390-17-300(6). There is no requirement for a candidate to return contributions received from a political party or caucus committee, since those contributions are aggregated for the election cycle, and not for the primary or general election.

Candidates who are subject to limits and who appear on the general election ballot may accept contributions applied to the contributor's general election limit if the contributions are made on or before December 31st of the election year. RCW 42.17A.405(2).

There is no deadline in law or rule for a candidate to cease expenditures from the candidate's campaign account and dispose of remaining funds. However, the Commission's rules provide that if an expenditure made from surplus funds qualifies the person making the expenditure as a candidate or political committee in a future election, the person must file a final report for the prior campaign, and

a registration statement and initial report for the new campaign. WAC 390-16-230.

In addition, at all times, the law restricts the expenditure of contributions received and reported under RCW 42.17A for personal use. RCW 42.17A.445. The Commission's rules provide that any expenditure of a candidate's campaign funds that is not directly related to the candidate's election campaign is a personal use of campaign funds, and assumed to be prohibited. WAC 390-16-238. The rule further provides that an expenditure of a candidate's campaign funds shall be considered personal use if it fulfills or pays for any commitment, obligation or expense that would exist irrespective of the candidate's election campaign.

Among other guidance proposed by Nancy Krier, at its September 27, 2012 meeting, the Commission concurred that a candidate's active campaign funds may be used for post-election recount litigation without constituting a prohibited personal use, but a candidate's surplus funds may not be used for this purpose. However, a candidate may transfer surplus funds to a political party for the party's use in financing a recount or recount litigation. "Surplus funds" are defined by RCW 42.17A.005(46) as the balance of contributions that remain in the possession or control of a committee or candidate subsequent to the election for which the contributions were received, and that are in excess of the amount necessary to pay remaining debts incurred with respect to that election. The use of surplus funds is governed under RCW 42.17A.430.

Neither the personal use prohibition at RCW 42.17A.445 nor the relevant rule explicitly provides for recounts or recount litigation as an allowable use of campaign funds that is directly related to a candidate's campaign. Neither do they provide other examples or parameters for acceptable post-election campaign expenses. The guidance approved by the Commission at its September 27, 2012 meeting concerning recounts or recount litigation was not subsequently formalized in a rule or interpretative statement.

Requirements of Other Jurisdictions

Like Washington law, the Seattle Municipal Code allows campaign contributions to be transferred or expended to an individual for "election campaign and post-election campaign related expenses." Unlike Washington law, the Seattle Municipal Code (SMC) requires that a campaign dispose of its surplus funds in one of the ways provided by the code by no later than the 30th day of April in the year following the date of the election (or for special elections, the 30th day of the fifth month following the date of the election). The SMC does not include a definition of "surplus funds," but generally provides for the disposal and reporting of campaign funds that remain after paying all election and post-election

expenses. Copies of SMC 2.04.375 and Elections Code Rule 11 are enclosed with this memo.

In preparing this memo, PDC staff consulted with Polly Grow of the staff of the Seattle Ethics and Elections Commission (SEEC). Polly stated that SEEC would likely view expenses from a candidate's campaign account for a recount or recount litigation as allowable post-election campaign expenses. She stated further that if a candidate were involved in recount litigation beyond the five-month deadline for the disposal of surplus funds, SEEC would consider whether the funds used for that litigation were "surplus funds." If not, they could conclude that the funds were not yet subject to the deadline.

Review

Staff believes the background and resources discussed above tee up several questions for Commission to consider:

1. Does the Commission wish to review its prior conclusion that recounts and recount litigation are an acceptable use of a candidate's active campaign funds?
2. If the Commission believes this conclusion from 2012 is still valid, is there a need to formalize it through rulemaking or an interpretive statement?
3. Beyond the issue of recounts and recount litigation, is there a need for additional parameters for acceptable post-election expenses from a candidate or political committee's campaign funds? Or does the Commission believe the personal use prohibition in RCW 42.17A.445 and the standards set forth in WAC 390-16-238 offer sufficient guidance?
4. Given the Commission's prior conclusion that expenses for recounts and recount litigation may be incurred in a postelection period and paid from active campaign funds, but surplus funds may not be used for this same purpose, does the Commission see a need to clarify when active campaign funds become surplus funds? Or does the Commission believe that the application of "surplus funds" as defined by RCW 42.17A.005(46) is clear?
5. Does the Commission see a need for a cutoff date for the disposal of surplus funds, similar to the City of Seattle? If so, does the Commission want to add this to the list of possible topics for agency request legislation?

Other possible questions:

6. Does the Commission believe losing primary election candidates should be allowed to conduct additional fundraising against primary limits beyond the primary election date, in order to fund a recount or recount litigation? If so, does the Commission want to add this to the list of possible topics for agency request legislation? (Note: Staff does not have information indicating that primary election recounts or related litigation are common expenses for candidates bound by the limits of RCW 42.17A.405.)

If the Commission directs staff to begin the review process, staff will present options for the Commission's consideration at a future meeting.

Enclosures

- *Legal Defense Funds Work Group Report*
- *October 2, 2012 PDC Letter and Memo of Guidance to Rob Maguire*
- *RCW 42.17A.405 – Limits specified – Exemptions*
- *WAC 390-17-302 – Contributions after the primary election*
- *WAC 390-17-300 – Contribution designation for primary and general election*
- *WAC 390-16-230 – Surplus campaign funds – Use in future*
- *RCW 42.17A.445 – Personal use of contributions – When permitted*
- *WAC 390-16-238 – Personal use of contributions – Standard*
- *RCW 42.17A.005(Excerpt) – Definition – Surplus Funds*
- *RCW 42.17A.430 – Disposal of surplus funds*
- *SMC 2.04.375 – Reporting and disposition of campaign funds after election*
- *Seattle Elections Code Rule 11*

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Q1 Please tell us about questions you have had in these subject areas that you believe were not answered by the Commission's rules or interpretations, or only partially answered:

Answered: 17 Skipped: 24

Answer Choices	Responses
Permitted and prohibited use of contributions during a campaign	64.71% 11
Allowed post-election expenditures of campaign funds	58.82% 10
Contributions and expenditures for litigation in ballot proposition campaigns (e.g., pre-election challenges, signature disputes, etc.)	41.18% 7
Recounts and recount-related litigation in candidate and ballot proposition races	41.18% 7
Ballot curing activities and related expenses	41.18% 7
The application of contribution limits to contributions and expenditures for ballot curing, litigation, legal defense, or any other activity	41.18% 7
How to report contributions and expenditures for ballot curing, litigation, legal defense, or any other activity	41.18% 7
Accounting and recordkeeping requirements for candidates who are subject to primary and general election contribution limits	58.82% 10
How candidates who are subject to contribution limits may spend primary and general election contributions	41.18% 7
Differences in the rules that apply to candidates and ballot measure campaigns	52.94% 9
Permitted and prohibited use of surplus campaign funds	52.94% 9

#	Permitted and prohibited use of contributions during a campaign	Date
1	None at this time.	8/8/2016 4:35 PM
2	none	8/8/2016 3:59 PM
3	It is very difficult to talk with a person from your office. They only care to respond by email	8/8/2016 12:18 PM
4	The \$200 fee for a donation to any candidate, regardless of size, which appears to be calculated to punish parties or geographic units of parties with small treasuries. The fee should be 5% of the donation.	8/3/2016 10:10 AM
5	Sometimes volunteers print campaign information at home. Do we need to track all of this as in-kind donations is there a monetary limit, like anything over \$10 or do we estimate everything?	8/2/2016 6:53 PM
6	none	8/2/2016 5:45 PM
7	The rules seem to be clear as to how donations can be used in litigation but the PDC is allowing use of 2016 donations to be used to defend a 2014 personal injury lawsuit, which the rules seem not to allow.	8/2/2016 5:11 PM
8	nothing personal (clothing, dry cleaning, etc) allowed as campaign expenses	8/2/2016 4:42 PM
9	That is pretty easy to find for me.	8/2/2016 4:36 PM
10	Fairly clear	8/2/2016 1:55 PM
11	Are there limits? Booze must be bad. What about gas?	7/28/2016 9:04 PM
#	Allowed post-election expenditures of campaign funds	Date
1	After what date?	8/13/2016 9:11 AM
2	None at this time	8/8/2016 4:35 PM
3	none	8/8/2016 3:59 PM
4	Not clear about expenses billed after final report.	8/3/2016 11:07 AM

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5	Are post election parties an acceptable expense?	8/2/2016 6:53 PM
6	none	8/2/2016 5:45 PM
7	assume current campaign's funds can be used only to pay bills for current campaign. Then funds can go into Surplus Funds, charity, or into re-election campaign	8/2/2016 4:42 PM
8	That is pretty easy to find for me.	8/2/2016 4:36 PM
9	Not clear enough	8/2/2016 1:55 PM
10	Pizza for my staff? Flying to Hawaii for a Senate meeting? I thought I could give my money to my partner in the house	7/28/2016 9:04 PM
#	Contributions and expenditures for litigation in ballot proposition campaigns (e.g., pre-election challenges, signature disputes, etc.)	Date
1	None at this time	8/8/2016 4:35 PM
2	n/a	8/8/2016 3:59 PM
3	Could be easier to find and interpret.	8/3/2016 10:10 AM
4	none	8/2/2016 5:45 PM
5	never came up	8/2/2016 4:42 PM
6	Never looked for this.	8/2/2016 4:36 PM
7	I can't pay for my lawyer? The people gave me this money	7/28/2016 9:04 PM
#	Recounts and recount-related litigation in candidate and ballot proposition races	Date
1	None at this time	8/8/2016 4:35 PM
2	n/a	8/8/2016 3:59 PM
3	Could be easier to find and interpret.	8/3/2016 10:10 AM
4	none	8/2/2016 5:45 PM
5	never came up	8/2/2016 4:42 PM
6	I have never found this information on the PDC site.	8/2/2016 4:36 PM
7	I can't pay for my lawyer? The people gave me this money	7/28/2016 9:04 PM
#	Ballot curing activities and related expenses	Date
1	What is "ballot curing activities"?	8/8/2016 4:35 PM
2	n/a	8/8/2016 3:59 PM
3	What is ballot curing?	8/3/2016 10:10 AM
4	none	8/2/2016 5:45 PM
5	never came up	8/2/2016 4:42 PM
6	I have never found this information on the PDC site.	8/2/2016 4:36 PM
7	I cure hams, not ballots	7/28/2016 9:04 PM
#	The application of contribution limits to contributions and expenditures for ballot curing, litigation, legal defense, or any other activity	Date
1	What is "ballot curing"?	8/8/2016 4:35 PM
2	n/a	8/8/2016 3:59 PM
3	Explain the question.	8/3/2016 10:10 AM
4	none	8/2/2016 5:45 PM
5	never came up	8/2/2016 4:42 PM
6	I have never found this information on the PDC site.	8/2/2016 4:36 PM
7	This question is like the equation for sending a human being into outer space. We cure hams, have laws and do what? Track the money or whatnot	7/28/2016 9:04 PM
#	How to report contributions and expenditures for ballot curing, litigation, legal defense, or any other activity	Date

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1	None, other than the ones above.	8/8/2016 4:35 PM
2	n/a	8/8/2016 3:59 PM
3	See above.	8/3/2016 10:10 AM
4	none	8/2/2016 5:45 PM
5	never came up	8/2/2016 4:42 PM
6	I have never found this information on the PDC site.	8/2/2016 4:36 PM
7	Forms, internet	7/28/2016 9:04 PM
#	Accounting and recordkeeping requirements for candidates who are subject to primary and general election contribution limits	Date
1	..or when you are a candidate for the General ONLY.	8/15/2016 5:35 PM
2	Are General Funds required to be in a separate account?	8/13/2016 9:11 AM
3	None	8/8/2016 4:35 PM
4	none	8/8/2016 3:59 PM
5	How the contribution limits are set in Orca	8/4/2016 4:02 PM
6	none	8/2/2016 5:45 PM
7	instructions are clear. ORCA makes it easy	8/2/2016 4:42 PM
8	That is pretty easy to find for me.	8/2/2016 4:36 PM
9	The requirements are exceedingly lax of accounting standards.	8/2/2016 1:55 PM
10	Paid accountant	7/28/2016 9:04 PM
#	How candidates who are subject to contribution limits may spend primary and general election contributions	Date
1	None	8/8/2016 4:35 PM
2	none	8/8/2016 3:59 PM
3	none	8/2/2016 5:45 PM
4	instructions are clear.	8/2/2016 4:42 PM
5	That is harder to find, but I know how.	8/2/2016 4:36 PM
6	With the new top two primaries, a mid campaign cut off point is unnecessary.	8/2/2016 1:55 PM
7	Paid accountant	7/28/2016 9:04 PM
#	Differences in the rules that apply to candidates and ballot measure campaigns	Date
1	...or judicial versus regular candidates	8/15/2016 5:35 PM
2	None	8/8/2016 4:35 PM
3	n/a	8/8/2016 3:59 PM
4	Being a single issue group, when do we need to start reporting for a subsequent ballot initiative	8/3/2016 11:07 AM
5	none	8/2/2016 5:45 PM
6	never came up	8/2/2016 4:42 PM
7	N/A	8/2/2016 4:36 PM
8	They should be the same	8/2/2016 1:55 PM
9	Corporations	7/28/2016 9:04 PM
#	Permitted and prohibited use of surplus campaign funds	Date
1	None	8/8/2016 4:35 PM
2	In this case, candidate's personal funds should be able to be refunded up to a certain amount regardless of whether they were a loan or candidate's "personal funds."	8/8/2016 3:59 PM
3	What to do with surplus office equipment (ie computers) after the election is over.	8/8/2016 2:22 PM

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4	I created a surplus fund at the end of an election where the candidate did not win. It was unclear on the website that only elected candidates create surplus funds.	8/3/2016 5:48 PM
5	Can a one spend surplus campaign funds on another race in a later election?	8/2/2016 5:45 PM
6	instructions are clear.	8/2/2016 4:42 PM
7	That is pretty easy to find for me.	8/2/2016 4:36 PM
8	Most of us understand this clearly. Tim E. is not most of us.	8/2/2016 1:55 PM
9	What are they? W/o rigamarole	7/28/2016 9:04 PM