

Response to comments on Petition for Declaratory Order – 9/29/22 – Conner Edwards

Hello-

I wanted to take the opportunity to briefly respond to a few of the comments that were made at the meeting last Thursday discussing my recent Petition for Declaratory Order. Please also consider this response as supplemental material to my Petition pursuant to WAC 390-12-250(4).

- 1) Commissioner Hayward: *“...I haven’t made any kind of decision or analysis on this, I’ll just say it’s a legitimate major concern out there that people have. That there are WACs that say X, and then there are policy guidances that appear to maybe wander from the WAC, expand from the WAC. And they are concerned that that expansion hasn’t also been approved by the Commissioners...”*

Response: In a nutshell, this is the very issue that led to the filing of my recent APA Petitions. Agency staff have published guidance asking filers to go above and beyond what the RCWs and WACs require for the level of detail we must include when describing expenditures. For reference, the provisions dealing with these descriptive requirements can be found in RCW 42.17.240(7), RCW 42.17A.240(8), WAC 390-16-037, and WAC 390-16-205.

These provisions provide no authority for the staff-created interpretive guidance described in my Petition. In some instances, the staff-created interpretive guidance directly contradicts what the WACs say, as well as directly contradicting previously issued versions of agency guidance.

- 2) Chair Jarrett: *“...my understanding is the way we have gotten into this question is that as we have updated our systems, and one of the things we’ve added into the systems is a drop-down menu. And the drop-down menu has values and I think we’re learning a lot about how that works. The initial list was far too long and unorganized [unintelligible] James and his team have been updating that. So, I think we’ve got some learning to do about how we help our customers to fill in the reports... ... in my mind that’s the problem that Conner is really dealing with...”*

Response: Is the drop-down categorization problematic? Absolutely. Are there too many vague, duplicative, and unnecessary categories? Yes. Is it problematic that staff have provided virtually no guidance on what categories to use for certain expenditures? You bet.

But is the drop-down categorization menu really the main problem here? No, it is not.

Agency staff merely use the drop-down categorization menu to communicate the guidance that asks us to go above and beyond what state law and administrative rule require us to do when describing expenditures on form C4. The problem would fundamentally be the same if the drop-down menu did not exist at all, but agency staff communicated the same guidance through the agency website.

I’ll also note that much of this staff-created interpretive guidance is not new at all, goes back to at least 2017, and predates the current version of ORCA with its drop-down menu.

- 3) Commissioner Downing: *“... just in looking at the examples that Conner cites I think a lot of it relates to our desire to be sure we are consistent in the area of the information provided by commercial advertisers, when you talk about traditional media or digital media. None of those ten [examples of staff-created interpretive guidance described in the Petition] jumps off the page*

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at me as being something that ought to be the subject of rulemaking and an amendment to the WAC. I think they are consistent with the statute, and consistent with the WAC and that's just on the surface of it..."

Response: I have a number of responses I would like to make to this, based on my understanding of Commissioner Downing's comments.

- a) First, I would point out that this guidance is not consistent with any of the provisions of law and rule that detail how campaigns must describe expenditures: RCW 42.17A.240, WAC 390-16-037, & WAC 390-16-205. A person could spend hours looking at these provisions and be unable to find any basis for such staff-created interpretive guidance as the short-lived "you must disclose the dimensions of yard signs purchased" and "for travel expenditures you must tell us who the person traveling was". In a few instances, as detailed in the Petition, the staff-created interpretive guidance actually **directly contradicts** the WACs.

So, from the context of the comment, I assume Commissioner Downing was referring to RCW 42.17.345 and WAC 390-18-050. The plain language of these provisions is very clear that they apply only to the level of detail that must be maintained in the books of account by commercial advertisers. These provisions simply do not apply to how campaigns must describe expenditures on form C4.

- b) Second, perhaps the Commission might want to maintain consistency between the level of detail required to be maintained by commercial advertisers and the level of detail required to be reported by campaigns. But, at this moment in time, there is no provision of law or rule that manifests this desire. It remains a mere desire and does not carry the force of law. If the Commission tried to codify this desire, the agency could expect treasurers to show up in force to oppose this idea because of the tremendous and unjustified burdens it would impose.
- c) Third, I would point out that the staff-created interpretive guidance is nowhere near consistent with the commercial advertiser detail requirements in WAC 390-18-050(7). That administrative rule goes **far further** in mandating the precise level of detail that must be maintained by commercial advertisers when compared to the staff-created interpretive guidance for what campaigns must report when describing expenditures.
- d) Fourth, I would point out that a desire to be consistent with RCW 42.17.345 and WAC 390-18-050 would still not explain the basis for such staff-created interpretive guidance as the guidance that we include the name of the traveler for travel-related expenditures and the other guidance on descriptive requirements not dealing with expenditures for political advertising.
- e) Finally, Commissioner Downing's remarks arguably seem to imply that rulemaking is not an appropriate vehicle for establishing new descriptive requirements. Director Lavalley

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made somewhat similar remarks at a private meeting during the 2022 legislative session.

Well, why not?

For commercial advertisers, the level of detail that they are required to maintain in their books of account was not left open for staff interpretation. Rather, it was specifically defined through APA rulemaking.

This provided members of that specific regulated community with ample opportunity to bring their thoughts and concerns about the requirements before the Commission, so that they could be considered prior to the WAC being adopted.

Are treasurers not entitled to participate in the development of these requirements and to bring our thoughts and concerns before the Commission for consideration prior to their adoption? Are we not entitled to a clear enumeration of our legal obligations in state law or administrative rule? Commercial advertisers are entitled to this, but treasurers are not?

- 4) Director Lavallee: *“...it’s an art not a science what constitutes a valid subject for rulemaking vs. guidance...”*

Response: Is the level of detail that must be maintained by commercial advertisers “an art not a science”? No. Rather, the level of detail has been clearly set forth in WAC 390-18-050(7), which was adopted pursuant to APA rulemaking.

So then, why shouldn’t the level of detail that campaigns must include when describing expenditures also be clearly enumerated in the WAC as opposed to being the subject of freewheeling guidance generated by agency staff without any sort of public process?

If this really is an art and not a science, it should be the Commissioners controlling the brush (with input from stakeholders and agency staff) as opposed to agency staff controlling the brush (without input from either stakeholders or the Commissioners).

- 5) Director Lavallee: *“...some of our WACs in fact give examples and so by necessity there is some interpretation that has to go with that.”*

Response: I have a difficult time understanding how staff can look at the RCWs and WACs that deal with the subject of descriptive requirements and come up with interpretive guidance like the short-lived “you must disclose the dimensions of yard signs purchased” and “for travel expenditures you must tell us who the person traveling was” when there is absolutely no basis for that guidance in any of the relevant provisions.

Moreover, how can staff look at the examples provided in WAC and come up with guidance that **directly contradicts** those examples?

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I hope that staff will detail the process that they use to generate such guidance at the October meeting.

- 6) Director Lavallee: *“...[referring to staff-created interpretive guidance] I don’t think any of these trouble me particularly...”*

Response: Well of course this guidance doesn’t trouble Director Lavallee. If it did, I imagine he would have had the guidance removed by now.

This guidance does trouble us as treasurers, and it should trouble the Commissioners as well.

- 7) Chair Jarrett: *“...in my thinking about it, when I was reading through Conner’s writeups, we might want to have a longer discussion about how we deal with this kind of a problem when we have our retreat...”*

Response: I’m glad to hear that the Commission will be discussing this issue further. If agency staff are allowed to unilaterally generate guidance that materially affects the legal responsibilities of filers, it represents a usurpation of the Commissioners’ powers that is prohibited under the FCPA. RCW 42.17A.110 effectively prohibits agency staff from determining what constitutes a violation of the FCPA, and also prohibits agency staff from engaging in rulemaking. What is happening here appears to be a hybrid of those two things.

For my part, if I see any new guidance from staff that asks us as filers to go above and beyond what the RCWs and WACs require, you can expect me to file more of these types of petitions.