



STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION

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June 18, 2015

TO: Commission Members
FROM: Tony Perkins, Acting Assistant Director
RE: **Preliminary discussion – Rule Making or other Future
Commission Action Regarding Definition of “Contribution”**

Agenda Item

At its June 25, 2015 meeting, the Commission is scheduled to consider whether the guidance contained in WAC 390-05-210 *Definition – Contribution* should be updated.

Background

WAC 390-05-210, the Commission’s current rule addressing duplicating political advertising and coordinated activities, was enacted in 1993 to implement Initiative 134. The provisions related to duplicating advertising have not substantively changed since 1993. The factors that determine coordination have not changed since 1993, other than 2007 amendments to make allowances for campaigns that share individuals who perform ministerial functions.

In 2007, the Commission recognized that technology, especially the evolving nature of the Internet, was creating no-cost or low-cost opportunities for candidates and other campaign participants to distribute political advertising. The Commission adopted PDC Interpretation 07-04, *Online Campaign Activities*, to provide guidance to state political campaign participants and explain how the Commission would apply disclosure laws and rules to online campaign activities. The interpretation focused on sponsor identification for online activities and disclosing expenditures. The application of WAC 390-05-210 was not addressed in the interpretation.

In 2013, the Commission adopted several rules addressing Internet campaign activity and revised PDC Interpretation 07-04 accordingly. The scope of this rule making consisted of sponsor identification and other disclosures that must be included in online advertising and updating volunteer activities (i.e., what is not a contribution). The subject of duplicating political advertising was briefly

discussed during this rule making, but WAC 390-05-210 was not reviewed in depth.

The Commission recently presided over an enforcement matter in which the respondent was alleged to have made over-limit, in-kind contributions to a candidate. These in-kind contributions resulted from the respondent reproducing a portion of a candidate’s political advertising by copying select portions of the candidate’s website and incorporating those copied portions into the respondent’s political advertising, without evidence that the expenditures were actually coordinated with the candidate or the candidate’s campaign.

Analysis

RCW 42.17A.005(13)(a)(iii) defines “contribution” to include:

The financing by a person of the dissemination, distribution, or republication, in whole or in part, of broadcast, written, graphic, or other form of political advertising or electioneering communication prepared by a candidate, a political committee, or its authorized agent[.]

The Commission’s rules currently define “contribution,” in relevant part, as follows:

*(2) **Duplicating political advertising.** The financing by a person of the dissemination, distribution, or republication, in whole or in part, of broadcast, written, graphic, or other form of political advertising prepared by a candidate, a political committee, or the authorized agent of a candidate or political committee. . . .*

WAC 390-05-210(2).

The statute and rule also define contributions as expenditures that are coordinated with the benefitting party. Generally, coordination consists of an expenditure being made “in cooperation, consultation, concert or collaboration with, or at the request or suggestion of a [candidate], the [candidate’s authorized committee or agent].”¹ However, in defining the duplication of political advertising as a contribution, RCW 42.17A.005(13)(a)(iii) and WAC 390-05-210(2) do not include corresponding language concerning the coordination of expenditures.

The Federal Election Commission addresses coordinated activities and duplicating a candidate’s political advertising in separate regulations, 11 CFR

¹ The rule similarly addresses coordinating expenditures with a caucus political committee, a bona fide political party, and other political committees. WAC 390-05-210(3)-(6).

109.21 and 11 CFR 109.23. The federal duplication rule is not hinged on coordination. Under the federal rule, a person who duplicates any advertising, or a portion of advertising, is making a contribution subject to the applicable limit. The benefitted candidate, however, is relieved from having to accept or report a contribution. 11 CFR 109.23(a). Sponsors of political ads that duplicate federal candidate advertising are narrowly excepted from making a contribution when 1) the campaign material is incorporated into a communication that advocates the defeat of the candidate or party that prepared the material and 2) the campaign material used consists of a brief quote of materials that demonstrate a candidate’s position as part of a person’s expression of its own views. 11 CFR 109.23(b)(2) and (4). The Commission’s rule does not make these exceptions.

Review

Staff believes the facts of the recent enforcement case teed up two questions for the Commission:

1. Does the Commission wish to amend its rule to relieve a candidate or ballot measure campaign from accepting and reporting a contribution when political advertising is duplicated without coordination?
2. Does the Commission wish to review its rules to determine if updates are necessary given how developing technology has impacted campaign activities, including how campaigns use the Internet?

If the Commission proceeds with review, these questions should be addressed:

Scope

- Does the Commission wish to limit its review to WAC 390-05-210 to consider creating a safe harbor that allows for minimal duplication of political advertising under specific conditions?
- Does the Commission wish to review all of its rules to consider offering updated guidance in light of technology developments?

Method

- In the event the Commission decides updated guidance is necessary, is rule making or an amendment to Interpretation 07-04 the preferred vehicle?

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