March 6, 2020

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

Re: Comments on proposed revision of PDC Interpretation 07-02

Public Disclosure Commission Staff,

The Freedom Foundation (the "Foundation") appreciates the opportunity to submit the following comments on the Public Disclosure Commission's (PDC) proposed revisions of Interpretation 07-02.

Overall, the revised interpretation explains the primary purpose test with greater comprehensibility and concision than the existing interpretation. However, there are two issues about which the Foundation would like to provide substantive comments. Additionally, please find attached a series of non-substantive suggested edits to further improve the precision and clarity of the proposed revisions.

The proposed threshold to help determine when an organization's political activity presumptively renders it a political committee should be lowered from 30 to 20 percent of expenditures.

The Foundation appreciates the PDC's effort to provide more direct guidance to organizations seeking to determine their reporting obligations under the Fair Campaign Practices Act (FCPA), Chapter 42.56 RCW, by noting in the proposed revisions that,

> "…an organization using over 30 percent of its general treasury budget or resources on spending in election campaigns may provide an initial indication that election activity is a primary purpose of the organization. This does not mean that the 30 percent is a ridged [sic] threshold or a determining factor to qualify as a political committee, but that measurement will assist in applying the court of appeals factors."

However, lowering this guidance threshold from 30 to 20 percent of an organization's expenditures would be more congruent with jurisprudence on the primary purpose test and existing PDC regulations, as well as better promote the statutory goals of the FCPA to promote disclosure of campaign finance activity.

First, state courts have established that, when a majority of an organization's spending (50 percent plus one penny) is "put toward electoral political activity," no additional analysis is needed to prove its status as a political committee. *See Evergreen Freedom Foundation v. Washington Ed. Ass'n.,* 111 Wn. App. 586 (Wash. Ct. App. 2002).

Even if an organization spends less than a majority of its funds on electoral politics, it may still be considered a political committee if *at least one* of its primary purposes is to engage in political campaign activity. *See State v. Evans,* 86 Wn.2d 503 (1976) ("Where the surrounding facts and circumstances indicate that the primary or one of the primary purposes of the person making the contribution is to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions, then that person becomes a 'political committee' and is subject to the [FCPA's] disclosure requirements."), and *Utter v. Bldg. Industry Ass'n of Wash.*, 182 Wn.2d 398 (2015).

It is not difficult to envision factual circumstances in which an entity has as one of its primary purposes affecting electoral politics yet devotes less than 30 percent of its expenditures to such pursuits.

For example, consider a hypothetical organization with four purposes, one consuming 70 percent of its budget, one consuming 20 percent, and two consuming 5 percent each.

If the first purpose is political, then no additional inquiry is necessary into the organization's status as a political committee as electoral politics is indisputably *the* primary purpose of the organization. Even if only the second purpose is political, however, it would still be quite reasonable to conclude that the organization was a political committee because it's second major purpose (not "the" primary purpose but "a" primary purpose) was to engage in political campaign activity.

Second, existing PDC regulations specify that "out-of-state political committees" governed by RCW 42.17A.250 meet the definition of "political committee" in RCW 42.17A.005(40), and must report all contributions and expenditures accordingly, if 20 percent or more of their "aggregate expenditures for all political campaign activity nationwide" go to "support and/or oppose Washington candidates for state, local and judicial office, Washington ballot measures and/or Washington political committees." *See* WAC 390-16-049(2)(b)(iii).

It makes no legal or logical sense to require an out-of-state political committee to fully disclose its financial transactions as a political committee if spends 20 percent of its budget on political activities in Washington, but to permit an in-state entity to refrain from having to report as a political committee unless it spends more than 30 percent of its budget on such activities. For consistency and ease of administration, the guidance threshold in Interpretation 07-02 should align with the existing 20 percent threshold in WAC 390-16-049(2)(b)(iii) governing out-of-state political committees.

Third, the FCPA's clearly established goal of disclosure supports a broad interpretation of the definition of "political committee" and, correspondingly, a lower guidance threshold. *See* RCW 42.17A.001(1) ("[P]olitical campaign and lobbying contributions and expenditures [are to] be fully disclosed to the public and… secrecy is to be avoided."); RCW 42.17A.001(11) (the FCPA "shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying…"); RCW 42.17A.060 (ensuring the PDC "provide[s] the general public timely access to all contribution and expenditure reports submitted by candidates, continuing political committees, bona fide political parties, lobbyists, and lobbyists' employers" and finding that "failure to meet goals for full and timely disclosure threatens to undermine our electoral process."); RCW 42.17A.300(1)(a) ("Timely disclosure to voters of the identity and sources of funding for electioneering communications is vitally important to the integrity of state, local, and judicial elections."); RCW 42.17A.904 (the FCPA is "to be liberally construed to effectuate [its] policies and purposes…"); and *State of Washington v. Freedom Foundation*, 192 Wn.2d 782, 796 (2019) (emphasizing "the FCPA's directive for liberal construction.")

Given the lack of any fixed legal threshold for determining the point at which an entity becomes a political committee based on its expenditures, the PDC's interpretation should strongly emphasize the potential that an organization spending less than the guidance threshold — regardless of the level the PDC ultimately determines is appropriate — may still meet the legal criteria to be considered a political committee, and that any fixed threshold therefore does *not* establish a "safe harbor" below which an entity would not be considered a political committee

The PDC should retain the acknowledgement that an entity may be considered a political committee over varying periods of time.

As a final observation, the Foundation commends the PDC for its acknowledgement in the proposed revised interpretation that,

> "When an organization's expenditure activity raises to the level of becoming a political committee, in some cases such designation may apply for a limited period of time, such as a year, election cycle, or other specified timeframe related to the spending activity of the organization."

State courts have acknowledged that an entity can be a political committee for varying periods of time. In *Evergreen Freedom Foundation,* the Court of Appeals held:

> "…an appropriate framework for determining whether electoral political activity is one of an organization's primary purposes should include an examination of the stated goals and mission of the organization and whether electoral political activity was a primary means of achieving the stated goals and mission *during the period in question*… If, after making these considerations, the fact finder determines that, on the whole, the evidence indicates that one of the organization's primary purposes was electoral political activity *during the period in question,* and the organization received political contributions as defined in the Act, then the organization was a political committee *for that period* and should comply with the appropriate disclosure requirements." (Emphasis added)

The Washington State Supreme Court in *Utter* further embraced the concept that an entity can be a political committee for a specific period of time, noting:

> "Under exacting scrutiny, the question of whether any applicable [FCPA] registration requirements, as applied to BIAW *during any relevant time period*, would have resulted in an unconstitutionally onerous burden involves a strong factual component — it would require a court to address the specific reporting requirements and balance the burden of the

> disclosure requirements for *the specific time period in that particular case* against the government's interest in providing the public with campaign finance information. We do not have a sufficient factual record to determine whether any applicable reporting requirements as applied to BIAW *at the relevant time* would have been onerous or would have been substantially related to the government's interest, nor have the parties briefed this issue in depth." (emphasis added, internal citations omitted).

While both *Evergreen Freedom Foundation* and *Utter* involved factual allegations that a specific entity had been a political committee over the course of a specific "election cycle," complete election cycles are not the only period of time relevant to an inquiry into an organization's reporting obligations under the FCPA.

RCW 42.17A.005(20) defines "election cycle" as,

> "…the period beginning on the first day of January after the date of the last previous general election for the office that *the candidate* seeks and ending on December 31st after the next election for the office. In the case of a special election to fill a vacancy in an office, 'election cycle' means the period beginning on the day the vacancy occurs and ending on December 31st after the special election." (Emphasis added)

This definition applies exclusively to *candidate* elections and makes no mention of ballot measures. The definition of "political committee," however, specifically includes persons engaged in supporting or opposing "any candidate *or any ballot proposition*" (emphasis added). RCW 42.17A.005(40).

If, to evaluate whether an entity satisfies the primary purpose test and is a political committee under the "maker of expenditures" prong because of expenditures made supporting or opposing a ballot measure, a fact finder must evaluate the entity's expenditures over the course of an "election cycle" — the definition of which *excludes* ballot measures — then no entity could be considered a political committee on the basis of its opposition to or support of a ballot measure, an untenable result clearly at odds with the FCPA.

Further, the Attorney General's Office has taken the position that an entity can qualify as a political committee for periods of time shorter than a complete election cycle.

On July 11, 2017, the Attorney General filed litigation against SEIU Leadership Council 14 in Thurston County Superior Court for failure to register and report as a political committee for *calendar years* 2014 and 2016. *State of Washington v. SEIU Leadership Council 14,* Case No. 17-2-04061-34. The litigation was settled in February 2019, with SEIU Leadership Council 14 agreeing to pay up to $250,000 in penalties and fees for its failure to report as a political committee in at least calendars years 2014 and 2016.

Given the lack of statutory or judicial bright lines about the periods of time relevant to an inquiry into an entity's status as a political committee, as well as the FCPA's broad presumptions in favor of disclosure, the PDC should retain its proposed advisory language emphasizing the possibility that an entity may qualify as a political committee for various, limited periods of time.

Conclusion

The Foundation applauds the PDC for working to improve its guidance to the regulated community via an update to Interpretation 07-02 and appreciates the opportunity to offer its views on the proposed revisions.

Please do not hesitate to let us know if the PDC would like further information regarding any of the issues raised in these comments or if the Foundation can be of any further assistance in this matter.

Sincerely,

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PDC Interpretation

APPROVAL DATE:	May 2, 2007	NUMBER:	07-02
STATUS:	Revised xxxxx [2019]	APPROVED BY:	Commission
REFERENCES:	RCW 42.17A.005(40); AGO 1973 No. 14; *State v. Evans*, 86 Wn.2d 503 (1976); *Evergreen Freedom Foundation v. Washington Education Assn.*, 111 Wn. App. 386 (2002); *Human Life of Wash. v. Brumsickle*, *624 F.3d 990 (2010); Utter v. Bldg. Industry Ass'n of Wash., 182 Wn.2d 398 (2015); State v. Grocery Manufactures Ass'n*, 5 Wn.App.2d 169 (2018).		

"Primary Purpose Test" (Definition of Political Committee)

The Public Disclosure Commission enforces the campaign disclosure provisions and contribution limits found in RCW 42.17A and Title 390 WAC. This interpretative statement is a summary of the "primary purpose test" used to determine whether an individual or entity has engaged in sufficient election spending activities to require registration as a "political committee" under the Fair Campaign Practices Act (FCPA).

Under the FCPA, an entity becomes a political committee~~s~~ and must register with the PDC upon initial engagement in campaign financing and must then regularly report on such activities. The FCPA defines "political committee" as any individual or entity that has "the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." RCW 42.17A.005(40). There are two independent qualifying activities included in the definition: receiving contributions and making expenditures. The registration requirement can be triggered by either of those activities. *See State v. Grocery Manufactures Ass'n*, 5 Wn.App.2d 169 (2018) (citing *Utter v. Bldg. Industry Ass'n of Wash.,* 182 Wn.2d 398 (2015)).

The contribution prong is met when an individual or entity begins to solicit or otherwise expects to receive contributions to support or oppose an election campaign, regardless of any spending activity. The application of the expenditure prong is not as straightforward and has raised questions, particularly for corporations, associations, labor unions or similar organizations that do not solicit political contributions and are not necessarily created specifically to finance campaign activities, but nevertheless spend money in election campaigns.

Courts have developed a test for determining the threshold of spending activity that meets the expenditure prong. Under this test, an organization making expenditures becomes a political committee only if it is determined that "a primary purpose" of the organization is to affect governmental decision making by supporting or opposing candidates or ballot propositions.

This test is not expressly codified in law but was ~~introduced~~ established soon after FCPA was enacted to address the questions raised about the scope of coverage. The test has been accepted and ~~expounded~~ developed by the courts over time to provide guidance ~~on~~ when determining who is required to report as a political committee.

The "primary purpose" test first was articulated in a formal Attorney General's Opinion (AGO) issued within the same year the original Initiative 276 was enacted. AGO 1973 No. 14. The question presented in the AGO was whether a corporation, or similar organization, becomes a political committee whenever it makes a contribution to an election campaign. The AGO concluded that the law was intended only to include organizations whose primary purpose was to influence elections, since many of the reporting requirements would be incompatible with an organization whose funding activities are not primarily related to campaign spending.

The state supreme court soon adopted the AGO's conclusion in *State v. Evans*, 86 Wn.2d 503 (1976), ~~by articulating a standard~~finding that an organization becomes a political committee when the facts and circumstances indicate that "the primary purpose or one of the primary purposes" of the organization is to support or oppose candidates or ballot measures. *Id.* at 509. The court, as well as the federal Ninth Circuit Court of Appeals, has since confirmed the constitutionality of this standard and has clarified that campaign financing can be one of several "primary purposes" sufficient to ~~satisfy~~ trigger the requirement~~s~~ to report as a political committee. *See Utter v. Bldg. Industry Ass'n of Wash*., 182 Wn.2d 398 (2015); *and see Human Life of Wash. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010).

While disclosure serves an important state interest, the *Evans* court cautioned that the law was not intended to indiscriminately capture all entities that engage in political activities. *Evans*, 86 Wn. 2d at 508. The primary purpose test recognizes the need for some balance, but does not include any specific measurement of activity or priority that constitutes a "primary" purpose of an organization. Courts have acknowledged that most organizations do not have ~~one~~ a single determinable purpose and therefore consideration of the nuances of organizational structure is important to meet the state's interest in disclosure of political activities. *See Brumsickle*, 624 F.3d at 1011. If, however, political advocacy is just one of the tools an organization uses to meet its legitimate non-political goals, then such activity may not be a "primary" purpose of the organization. *Evergreen Freedom Foundation v. Washington Ed. Ass'n*., 111 Wn. App. 586 (Wash. Ct. App. 2002).

In considering this balance, the Court of Appeals has offered factors to provide guidance to courts when determining an organization's primary purpose. In *Evergreen Freedom Foundation*, 111 Wn. App. at 600, the court of appeals offered a nonexclusive list of factors to consider, including:

> (1) the content of the stated goals and mission of the organization; (2) whether the organization's actions further its stated goals and mission; (3) whether the stated goals and mission of the organization would be substantially achieved by a favorable outcome in an upcoming election; and (4) whether the organization uses means other than electoral political activity to achieve its stated goals and mission.

The court explained that these factors were not intended to be applied as a formula~~, but~~

~~rather to avoid overreliance on the stated purpose of the organization,~~ and that they can be disregarded if ~~its~~an organization's activities reveal that most of its efforts are put toward electoral political activity.

The PDC uses the primary purpose test, as established by the courts, for guidance ~~on~~when determining ~~when~~ whether an organization's activities require registration as a political committee under the FCPA. The test ~~provides~~ is a meaningful tool to help ensure the public receives information that makes political spending a priority, while narrowing such requirements so that groups that only incidentally engage in such activity are not included.[1] The PDC uses the factors provided by the court of appeals in the *Evergreen Freedom Foundation* case to help determine the proper threshold for disclosure that will satisfy the public's interest in the political activities of organizations engaged in the electoral process. When an organization's expenditure activity ~~raises~~ rises to the level of becoming a political committee, in some cases such designation may apply for a limited period of time, such as a year, election cycle, or other specified timeframe related to the spending activity of the organization.

In order to assist organizations in evaluating whether their election spending activities require registration and reporting as a political committee, the PDC recognizes that an organization using over 30 percent of its general treasury budget or resources on spending in election campaigns may provide an initial indication that election activity is a primary purpose of the organization. This does not mean that the 30 percent is a ~~ridged~~rigid threshold or a determining factor to qualify as a political committee, but that measurement will assist in applying the court of appeals factors. When an organization considers engaging in political spending activities, while maintaining its non-political activities, it should consider creating and registering a separate political committee to manage and report exclusively on the political activities in order to avoid required reporting on any non-~~-~~political activities.

[1] The recent enactment of the DISCLOSE ACT (2018) requires registration and limited reporting for nonprofit organizations who make "incidental" expenditures in political campaigns, but do not qualify as a political committee under the FCPA.