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Public Disclosure Commission
711 Capitol Way #206
PO Box 40908
Olympia, Washington 98504-0908

RE: Comments Regarding Proposed Permanent Rules re SSB 6152
Our File No. 3263-288

Dear Commission members,

We are writing to you on behalf of SEIU 775 and OneAmerica concerning the proposed permanent rules you are considering to implement SSB 6152. Please accept the following as our comments on the matter.

As the PDC is already aware, SEIU 775 and OneAmerica have significant concerns about SSB 6152 as passed by the Legislature, particularly in regards to its impact on the ability of immigrants to engage in the political process in Washington State. Putting the onus on political committees and candidates to aggressively track and police the citizenship status of every person involved in a group that makes a contribution is not consistent with the values of our state and will further discourage political engagement by those that are already largely excluded from participation.

Beyond those previously expressed concerns, however, the PDC has now proposed permanent rules to implement SSB 6152. As currently drafted, the rules create three specific problems which we respectfully request the Commission resolve in the manner proposed below.

I. The PDC Should Clarify That Money Received In The Form Of Membership Dues Is Money Received For Full Consideration.

WAC 390-16-330(1)(a), as currently proposed, provides that a contribution, expenditure, political advertising, or electioneering communication is "financed in any part 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, anything of value received from a foreign national "for less than full consideration." The phrase "less than full consideration," also used in the emergency rule, is not defined, and has been the subject of some debate and confusion.

"Consideration" is defined under Washington law as "any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange." *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791 (2004) (quoting *King v. Riveland,* 125 Wn.2d 500, 505, 886 P.2d 160 (1994)). Consideration is "a bargained-for exchange of promises." *Id.* Washington State follows the *Restatement (Second) of Contracts,* which in turn states:

> (1) To constitute consideration, a performance or a return promise must be bargained for.
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
> (3) The performance may consist of
> (a) an act other than a promise, or
> (b) a forbearance, or
> (c) the creation, modification, or destruction of a legal relation.

Restatement (Second) of Contracts § 71(1)-(3) (1981) (quoted in *Labriola, supra,* 152 Wn.2d at 833-834).

The concept of "full consideration," as opposed to the term "consideration," does not arise out of contract law or doctrine. Rather, it is something that is derived from the definition of "contribution" contained in the FCPA, which defines a contribution as something that is provided "for less than full consideration." RCW 42.17A.005(15(a)(i). *See, e.g.,* RCW 42.17A.635(3) (defining a "gift" as meaning "a voluntary transfer of any thing of value without consideration of equal or greater value"). Put simply, something given in exchange for a thing of value is either being given for full consideration, or it is being given (in part or whole) as a "gift" – the two terms are mutually exclusive of one another.

Because payment of membership dues is clearly in no way a "gift," it is in fact "full consideration," given in exchange for the rights and privileges of membership, whatever those might be in any particular instance. This is in fact already explicit in a different PDC regulation, WAC 390-16-309(3)(d), which provides, in the context of determining whether two affiliated entities are to be treated as a single person for the purposes of contribution limits, that "Full consideration includes the payment of membership dues."

WAC 390-16-330(1)(a) should therefore be drafted to make this clear, as set forth below.

II. The PDC Should Clarify That Its Definition Of When A Contribution, Expenditure, Political Advertising, Or Electioneering Communication Is "Financed In Any Part By A Foreign National" Applies To Every Part Of SSB 6152, Not Merely To RCW 42.17A.417.

For some reason, the subsection of proposed permanent rule WAC 390-16-330(1)(a) that defines the meaning of "financed in any part by a foreign national" makes that definition applicable only for "the purposes of RCW 42.17A.417." Yet numerous other provisions of SSB 6152 use precisely that same phrase. Thus, any candidate or political committee required to file a report regarding political expenditures must attest that it has received a certification from any partnership, association, corporation, organization, or other combination of persons making a contribution to the candidate or

political committee that this contribution was not "financed in any part by a foreign national." *See* Sections 3, 4, and 7. Similarly, SSB 6152 provides that any person making an independent expenditure and any sponsor of political advertising or electioneering communications attest that their expenditures were not "financed in any part by a foreign national." *See* Sections 5, 6, and 8. And each candidate or political committee that has accepted a contribution, and each out-of-state committee that has accepted a contribution reportable under RCW 42.17A.250, from a partnership, association, corporation, organization, or other combination of persons must receive a certification from each contributor attesting that the contribution is not "financed in any part by a foreign national." Section 10.

In order to eliminate confusion or ambiguity regarding the meaning of this phrase, which is central to the various requirements and prohibitions contained in SSB 6152, we suggest that the language limiting this definition to "the purpose of RCW 42.17A.417" be stricken, making clear that the FCPA attributes a single, consistent definition to the phrase "financed in part by a foreign national."

III. Requiring Organizations That Lawfully Receive Money From Foreign Nationals To Segregate That Money Internally Is Not Mandated By SSB 6152, Does Not Further The Purposes Of The Act, And Is Administratively Unworkable.

As noted above, SSB 6152 provides, generally, that that any candidate or political committee required to file a report regarding political expenditures must attest that it has received a certification from any partnership, association, corporation, organization, or other combination of persons making a contribution that the contribution was not "financed in any part by a foreign national." *See* Sections 3, 4, and 7. Similarly, SSB 6152 provides that any person making an independent expenditure and any sponsor of political advertising or electioneering communications attest that their expenditures were not "financed in any part by a foreign national." *See* Sections 5, 6, and 8.

Proposed WAC 390-16-330(1)(b) unreasonably exceeds these requirements, however, by making such certifications and attestations proper only where the entity that lawfully received money from a foreign national (for less than full consideration) has "segregated [those funds], using reasonable accounting methods, from the funding source used by the entity to finance a contribution, expenditure, advertisement, or communication," and by going on to provide that "funding from a foreign national may not be used to supplant, replace, or replenish the funding source or any of the resources or activities funded by that source."

As a practical matter, this means that if an organization, such as SEIU 775, OneAmerica, the ACLU, Planned Parenthood, or any other entity, has received even one dollar as a gift or donation from a foreign national, e.g., a person lawfully residing in Washington State pursuant to a student or work visa, a Dreamer, or even a citizen of another country, such as Canada, then that organization is categorically prohibited from participating in electoral political activity in this state. That is because it is impossible, as a practical matter, for any entity to show not only that it "segregates" all funds received from foreign nationals, but that it does not use those funds to "supplant, replace, or replenish the funding source or any of the resources or activities" that that organization engages in. Unless an organization absolutely refuses to use money from foreign nationals to assist in *any of its normal activities,* which is an entirely unreasonable expectation, the organization is effectively disbarred from spending *any* money on electoral politics in Washington.

This is patently unreasonable and does not further the purposes of the Act. A better approach is that which was adopted by the Legislature in RCW 42.17A.500. In that case, the law provides that "A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual." RCW 42.17A.500(1). That is not dissimilar to the prohibition in SSB 6152 against making contributions or expenditures that are financed by foreign nationals. However, the Legislature went on to provide, categorically, that "A labor organization does not use agency shop fees when it uses its general treasury funds to make such contributions or expenditures if it has sufficient revenues from sources other than agency shop fees in its general treasury to fund such contributions or expenditures." RCW 42.17A.500(2). Thus, rather than forcing unions to segregate revenues from agency shop fees, and rather than further prohibiting the use of agency shop fees "to supplant, replace, or replenish the funding source or any of the resources or activities funded by" the union, the Legislature acknowledged the reality that so long as there are sufficient revenues from non-prohibited sources, the reasonable and preferable solution is to deem that revenues from prohibited sources are not involved in the expenditures at issue.

Similarly, here, rather than the unwise and unworkable segregation set forth in the proposed permanent rule, the PDC should instead adopt an analogous provision, as set forth below.

IV. Requiring Candidates And Political Committees To Obtain The Requisite Certification From Donating Entities Each Time A Contribution Is Received, Instead Of Just Once During Each Election Campaign, Does Not Further The Purposes Of The Act, And Imposes An Unreasonable Administrative Burden.

SSB 6152 requires certain various entities that are required to file reports with the PDC obtain a certification from anyone not a natural person attesting to the non-foreign source of the money received or spent. Thus, entities filing C-4 or C-5 reports and reports filed pursuant to RCW 42.17A.265 must confirm that they have received a statement that the candidate or political committee has received a certification from any partnership, association, corporation, organization, or other combination of persons making a contribution to the candidate or political committee that: "(a) The contribution is not financed in any part by a foreign national; and (b) Foreign nationals are not involved in making decisions regarding the contribution in any way." *See S*ections 3, 4, and 7.

Unfortunately, the proposed WAC 390-16-335 unreasonably exceeds these requirements by requiring that a new required certification be provided *each time* a partnership, association, corporation, organization, or other combination of persons makes a contribution to the reporting entity. Such an interpretation of SSB 6152 serves no social purpose and imposes a tremendous records-keeping burden on political committees, candidates, and contributors. Requiring that this certification be provided just once during the duration of any one election campaign would fully meet the legislative purpose of these requirements while substantially easing the burden on all participants in electoral political activity in Washington.

As a practical matter, organizations that choose to make contributions to candidates or political committees in Washington must, as a result of SSB 6152 (and, in the case of candidate races, federal law) ensure that those contributions are not funded by foreign nationals. The Legislature has decided to require such organizations to acknowledge their awareness of that requirement by so certifying to any

recipient of their largesse. Once that acknowledgement has been made, however, it serves no purpose to require that it be repeated for every single contribution made to the same recipient during the same electoral campaign. The contributing organization will, as a practical matter, have already arranged its internal finances, if it in any way *does* receive foreign financing, such that it can be sure that it will not be using that foreign financing to fund its contributions. Making it recertify that fact (i.e., that it knows the law and intends to comply with it) every time it makes a contribution to the same recipient during the same campaign season serves no purpose except to impose a substantial bookkeeping burden on both the contributors and the recipients of contributions, and threaten to cause needless litigation (in the form of technically meritorious, but fundamentally pointless, PDC complaints) whenever some contributor or recipient fails to strictly adhere to this requirement.

V. Recommended Permanent Rules

For the reasons set forth above, permanent rule WAC 390-16-330 should read:

> **WAC 390-16-330 Prohibited financing and involvement by foreign nationals. (1) Prohibited financing by foreign nationals. (1) Prohibited financing by foreign nationals.** (a) ~~For purposes of RCW 42.17A.417, a~~A contribution, expenditure, political advertising, or electioneering communication is "financed in any part 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, anything of value received from a foreign national for less than full consideration. Such value may include, but is not limited to, a loan, gift, deposit, subscription, forgiveness of indebtedness, donation, advance, pledge, payment, transfer of funds, or goods and services. Full consideration includes the payment of membership dues.
> (b) Anything of value received from a foreign national for less than full consideration may not be used ~~must be segregated, using reasonable accounting methods, from the funding source used~~ by the entity to finance a contribution, expenditure, advertisement, or communication. ~~Funding from a foreign national may not be used to supplant, replace, or replenish the funding source or any of the resources or activities funded by that source.~~ An entity does not use funding received from a foreign national for less than full consideration when it uses its general treasury funds to finance a contribution, expenditure, advertisement, or communication if it has sufficient revenues from other sources in its general treasury to finance such contributions, expenditures, advertisements, or communications.

For the reasons set forth above, permanent rule WAC 390-16-335 should be modified so as to make it clear that every political committee and candidate recipient of a political contribution from an partnership, association, corporation, organization, or other combination of persons making a contribution to the candidate or political committee need only receive the required certification once from each such entity during the duration of any one election campaign.

> **WAC 390-16-335 Certification for contributions from entities—Prohibited activity by foreign nationals.** (1) The certification required for a candidate or political committee to accept ~~each~~ contributions from a partnership, association, corporation, organization, or other combination of persons must be received in writing, either:

(a) By the date the first report including the contribution is due, or within ten business days, whichever is later; or

(b) Within thirty days from the date the first contribution is received, so long as the candidate or committee separates uncertified contributions using reasonable accounting methods, to prevent commingling with other contributions, until the certification is received.

(2) Any uncertified contribution must be refunded or returned by the applicable deadline in subsection (1) of this section. The failure to timely refund or return an uncertified contribution constitutes a violation of chapter 42.17A RCW.

(3) Entities may use a certification that conforms to the suggested format below or provide a different format, so long as it provides the following information:

(a) The name of the entity making the contribution and the authorized agent;

(b) A statement that the entity is not a foreign national, as defined in RCW 42.17A.005(24);

(c) A statement that the contribution is not financed in any part by a foreign national, and that the candidate or committee will not make contributions financed in any part by a foreign national going forward;

(d) A statement that foreign nationals were not and will not be involved in making decisions regarding the contribution in any way;

(e) The amount of the first contribution and the date it was made; and

(f) The date the certification was submitted.

Thank you for your attention to these concerns and consideration of this proposal. We would be happy to provide further information upon request. We would also appreciate the opportunity to address the Commission directly on this matter at the December 3, 2020, hearing, where the Commission will be receiving public comment on the proposed permanent regulations.

Sincerely,

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Counsel for SEIU 775 & OneAmerica

cc: Adam Glickman
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