# Petition for Conversion of Interpretive or Policy Statement into Rule

Per RCW 34.05.230(2), I am formally petitioning the Public Disclosure Commission (PDC) to convert any interpretive or policy statement relating to the requirements described below in Exhibit A, or otherwise relating to the meaning of the term "purpose of each expenditure" (as described in RCW 42.17A.240(7)) into rules.

In addition to Exhibit A, I am also appending a copy of the recent Petition for Declaratory Order that I have submitted with the PDC on 9/9/22. I am also appending my written public comment from the agency's 7/28/22 Regular Meeting. Altogether, this 22-page PDF constitutes my Petition for Conversion of Interpretive or Policy Statement into Rule.

RCW 34.05.230(2) states that, "[u]pon submission, the agency shall notify the joint administrative rules review committee of the petition" and that "[w]ithin sixty days after submission of a petition, the agency shall either deny the petition in writing, stating its reasons for the denial, or initiate rule-making proceedings in accordance with this chapter."

DATE: September 9, 2022

Conner Edwards
Professional Campaign Treasurer

# Exhibit A: Current Staff-created Interpretive Guidance (9/9/22)

This is a list of current staff-created interpretive guidance, issued unilaterally by agency staff without any basis in state law, without any basis in administrative rule, without any input from the public, and without any approval/action from the Commissioners.

1. Requirement that, for expenditures that include payments to subvendors, that filers include the full address of the subvendors.

2. Requirement that, for expenditures for broadcast/TV advertising, that filers provide the dates that the ads are running in the purpose/description field.

3. Requirement that, for digital advertising, that filers provide: a) the name of the platform on which ads are appearing if specified by the campaign, and b) the run dates or "number of impressions" in the purpose/description field.

4. Requirement that, for mileage reimbursement expenditures, that filers provide: a) the number of miles, b) reimbursement rate used, and c) period covered in the purpose/description field.

5. Requirement that, for newspaper/periodical advertising, that filers provide the dates that the ads are running in the purpose/description field.

6. Requirement that, for expenditures reimbursing candidates for lost earnings, that filers provide: a) the candidate's monthly salary/wages/income, and b) the period covered in the purpose/description field.

7. Requirement that, for expenditures for radio advertising, that filers provide the dates that the ads are running in the purpose/description field.

8. Requirement that, for expenditures for robocalls, that filers provide: a) the number of calls made, and b) the "period covered" in the purpose/description field.

9. Requirement that, for expenditures for travel, that filers provide the traveler's name in the purpose/description field.

10. Requirement that, for every expenditure, that filers must select a specific expenditure category.

**BEFORE THE PUBLIC DISCLOSURE COMMISSION**
**OF THE STATE OF WASHINGTON**

| | |
|---|---|
| In re:<br>CONNER EDWARDS,<br>Petitioner. | No: _____<br><br>PETITION FOR DECLARATORY ORDER |

Conner Edwards, a professional campaign treasurer, petitions the Public Disclosure Commission ("Commission" or "PDC" or "Agency") for a binding declaratory order, under RCW 34.05.240 and WAC 390-12-250, to resolve present uncertainty regarding application of RCW 42.17A ("Fair Campaign Practices Act" or "FCPA") and WAC 390.

## BACKGROUND OF PETITION AND RELEVANT FACTS

### Introduction

On or around June of 2021, agency staff at the PDC began communicating new guidance to filers relating to how filers describe expenditures on form C4. This new guidance requested that filers provide additional details surrounding certain types of expenditures that agency staff had not previously requested filers provide. In some instances, this guidance directly contradicted relevant provisions of the Washington Administrative Code (WAC) covering the same subject matter.

No change in state law or administrative rule necessitated this change in guidance. The Commissioners did not approve this change. Agency stakeholders were not informed that this change was contemplated, nor were they provided an opportunity to provide feedback regarding this change prior to its implementation.

Previous iterations of the Commission have followed the Administrative Procedures Act (APA) rulemaking process for instituting new descriptive requirements.[1] Among other things, this rulemaking process involves: a) informing stakeholders of the contemplated regulatory change, b) providing stakeholders with an opportunity to comment on that change, and c) submitting the proposal to the agency's governing body for approval after consideration of comments received.

Confused by this new guidance that had no basis in state law or administrative rule, I reached out to agency staff to try to get an answer to this question: *was this new guidance just a mere suggestion for filers, or was this new guidance an agency directive that filers would be fined (or face other administrative sanctions) for violating?*

After sending dozens of e-mails back and forth with agency staff, my question was not answered. Over the last 13 months, I have brought up my concerns with this new agency guidance and its applicability in written or spoken testimony at no less than 7 meetings of the PDC. I have also briefly brought up these concerns in meetings with 4 of the 5 Commissioners. To date, I have received no substantive response from the agency that would answer my question.

All of my informal efforts to obtain an answer to this question have completely failed. Having exhausted my informal options, I now submit this Petition for Declaratory Order in the hope that the Commissioners will provide the clear, straightforward answer I have been seeking for over a year.

## Agency Guidance

This petition deals heavily with the subject of agency guidance: advice that the agency offers to the public on how to comply with the FCPA. That being the case, it is important to understand the three broad groupings of guidance provided by the PDC.

### 1. "Plain English" Guidance

> This type of guidance is the translation of highly legalistic statutory language into words that people can easily understand. The vast majority of guidance that the agency offers to filers is this type.

[1] See WAC 390-16-037, WAC 390-16-205.

**2. Official Commission Interpretive Guidance**

This type of guidance is an official expression of the Commission's interpretation on the meaning and applicability of provisions of the FCPA. This type of guidance typically takes the form of Commission Interpretations[2] or Declaratory Orders.[3]

There is an established process for the adoption of official Commission interpretive guidance. Consistent with the authority delegated to the Executive Director by rule[4], agency staff draft a proposed Commission Interpretation or Declaratory Order for presentation to the Commission. Following a presentation by staff, Commissioners have an opportunity to suggest edits to the draft and either accept or reject the proposal. These presentations are noted on the agency's official agendas, so members of the public are aware that the change is being considered and have an opportunity to provide input to the Commissioners before the change is finalized.

**3. Staff-Created Interpretive Guidance**

This type of guidance is what agency staff claim to be an interpretation of what a particular statute requires. In reality however, this type of guidance appears to a pseudo-legislative expression of what agency staff would prefer a statute to require. I say this because staff-created interpretive guidance, especially as it relates to descriptive requirements, is not based on the plain language of the FCPA or even interpretations of the FCPA as understood by any of the interpretive canons of statutory construction.

This type of guidance, as it relates to descriptive requirements, is concerning to treasurers for a number of reasons. First, compliance with this guidance is an administrative headache for us, as tracking down the precise details of expenditures often involves repeated, time-consuming outreach to third parties. Second, this type of guidance asks us to disclose details of strategic campaign spending decisions beyond that which we believe is legally required. Third, this type of guidance is developed without notice to or input from the public or agency stakeholders. Fourth, this type of guidance is not discussed or

[2] See RCW 34.05.230.
[3] See RCW 34.05.240.
[4] See WAC 390-05-120.

approved by the Commission. Fifth, we are often not notified that there is new staff-created interpretive guidance and often don't notice this new guidance until many months after the guidance has gone into effect. Sixth, we are unsure whether or not we can be penalized for violating this interpretive guidance if we are otherwise in compliance with RCW 42.17A or WAC 390. Finally, it is not clear that agency staff may issue interpretation of FCPA statutes to begin with, in light of the FCPA's restrictions on the delegation of power to staff and the Commission's limited grant of authority to agency staff to act on the Commission's behalf.

## PETITION FOR DECLARATORY ORDER PREREQUISITES

**Uncertainty necessitating resolution exists - RCW 34.05.240 (1)(a)**

I work as a professional campaign treasurer. In that role, I am responsible for drafting and filing C4s with the PDC on behalf of candidate/political committees. I am unclear on what level of detail I am legally obligated to provide for certain types of expenditures under the FCPA. I have made repeated attempts to reach out to agency staff to resolve this uncertainty. In essence, agency staff respond by saying that the agency "could" find a violation based solely on a violation of staff interpretive guidance. "Could" used in the context of a future event implies an uncertainty. That is the very uncertainty I am hoping to resolve by requesting a declaratory order.

For reference, the current list of staff-created interpretive guidance as it relates to descriptive requirements is attached to this petition as Exhibit A.

**There is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion – RCW 34.05.240 (1)(b)**

Filers are unclear as to what level of detail we are legally obligated to provide when describing the "purpose" of expenditures on form C4. Candidate/political committees and campaign treasurers would generally prefer to disclose as few details as possible about expenditures on form C4 while still remaining compliant with RCW 42.17A and WAC 390. For candidate/political committees, this is usually because they don't want to disclose strategic campaign spending decisions to opponents unless that disclosure is required by law. For campaign treasurers, it is because tracking down information relating to the precise nature of expenditures is a time-consuming administrative nightmare, particularly for pre-election reports

where treasurers are only afforded 24 hours from the end of the reporting period to prepare and file the required C4. Having to track down precise details about expenditures that treasurers may not be legally obligated to report unnecessarily increases the amount of time it takes to prepare draft C4 reports for each campaign the treasurer serves. Since there is such a limited number of hours for preparing these reports, this uncertainty has the effect of limiting the number of clients that campaign treasurers would otherwise choose to take on. [5] This reduces the potential net income of campaign treasurers.

**That the uncertainty adversely affects the petitioner - RCW 34.05.240 (1)(c)**

See above. As a campaign treasurer, I currently spend time tracking down and reporting precise details about expenditures that may not legally need to be reported. Additionally, because of the current tight 24-hour turnaround that campaign treasurers currently have to file pre-election C4 reports, the amount of time spent per client tracking down precise details relating to expenditures limits the overall number of clients that I would otherwise choose to take on.

**That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested - RCW 34.05.240 (1)(c)**

Under the present circumstances, issuing a declaratory order on one or both of the questions presented would have no adverse effect on others or the general public. On the contrary, it would clarify the reach of the FCPA, and provide useful guidance to agency staff and Washington-

[5] Two other professional campaign treasurers offered comments relating to this point at the August 25, 2022. Regular Meeting of the PDC. Link: https://tvw.org/video/Public-Disclosure-Commission-2022081063/?eventID=2022081063

Abbot Taylor: "*As some other treasurers have attested to**, there are four days out of the year that determine how many clients I can take on**. And those 4 days are those 24-hour turnarounds on those C4s. **There is only so much, so many accounts you can reconcile and C4s you can whip through in a 24-hour period.***" (2:49:32 – 2:50:00)

Janet Miller: "*I think the timelines offered right now [for C4 reporting] are really almost impossible. Last election cycle **I literally pulled two all-nighters to make sure that I was able to get my C4s in within the 24-hour period**. It's not, it can't be done well, let's put it that way. And what we want is reports to get in and we want them to be on time and we want them to be correct, and a 24-hour turnaround time for those is untenable*." (10:44 – 11:20)

based campaigns/political committees. It may highlight a need for rulemaking or the issuance of an official Commission interpretation on the subject of descriptive requirements.

**Petition clearly states the question the declaratory order is to answer – WAC 390-12-250 (1)(a)**

See below section, entitled "Questions Presented".

**Petition provides a statement of facts which raise the question – WAC 390-12-250 (1)(b)**

See above section, entitled "Background of Petition and Relevant Facts". See also the current list of staff-created interpretive guidance as it relates to descriptive requirements, attached to this petition as Exhibit A.

## QUESTIONS PRESENTED

1. May the Executive Director (or their designee) issue their own interpretations of what the FCPA requires without approval from the Commission, in spite of the FCPA's restrictions on the powers of the Executive Director and the Commission's non-delegation of the power to issue interpretations?

2. Does the violation of staff-created interpretative guidance relating to descriptive requirements constitute a violation of the FCPA even though the guidance has no basis in state law or administrative rule?

## REQUESTED DECLARATORY ORDER

I request a declaratory order stating that: 1) the Executive Director (or their designee) may not issue interpretive guidance without approval from the Commission, and 2) that the violation of staff-created interpretive guidance relating to descriptive requirements does not constitute a violation of the FCPA.

## ANALYSIS

1. **Executive Director (or their designee) may not issue interpretive guidance without approval from the Commission.**

In 1972, the Public Disclosure Commission was created when voters overwhelming approved Initiative 276. Pursuant to the language of that initiative, the agency is governed by a 5-member board of individuals ("Commissioners") who are appointed by the Governor with the consent of the Washington State Senate.

The initiative assigned several responsibilities and powers to the Commissioners.[6] One of these powers was the ability to appoint an Executive Director to assist the Commission in carrying out its duties.[7]

The framers of the initiative, seeking to retain most of the agency's power with the Commissioners, limited the powers of the Executive Director in several important ways. First, the Executive Director was prohibited from adopting, amending, or rescinding rules.[8] That power could only be exercised by the Commissioners. Second, the Executive Director was prohibited from exercising the power to determine that a violation of the FCPA had occurred.[9] That power could also only be exercised by the Commissioners.

Finally, the Executive Director was only allowed to perform such duties and have such powers as the Commission specifically delegated.[10] All other responsibilities and powers were retained with the Commissioners. Consistent with this statutory authority, the Commissioners specifically delegated certain powers to the Executive Director via rule.[11] This rule also allowed the Executive Director to delegate this authority to their subordinates as needed and appropriate.[12]

Relevant to the discussion today, the Commission granted the Executive Director the power to: "**research, develop, and draft** policy positions, administrative rules, **interpretations** and advisory options **for presentation to the commission**" [emphasis added]. This language indicates that the Executive Director may not act unilaterally to issue interpretations of FCPA requirements.

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[6] RCW 42.17A.105, RCW 42.17A.110.
[7] RCW 42.17A.110(2).
[8] *Id*.
[9] *Id*.
[10] *Id.*
[11] WAC 390-05-210.
[12] *Id*.

Rather, the Executive Director may only research, develop, and draft interpretations for presentation to the Commission; it is the Commissioners' prerogative to adopt, modify or reject a proposed interpretation.

To date, the Commission has not issued an interpretation of what constitutes "purpose of each expenditure" as that language is used in RCW 42.17A.240(7), the provision of the FCPA most at issue in this Petition. [13]

**2. The violation of staff-created interpretive guidance, as it relates to descriptive requirements, does not constitute a violation of the FCPA.**

Assuming, *arguendo*, that the Commission answers the above question by saying the Executive Director *does* have the ability to unilaterally issue their own interpretations of FCPA requirements, a more important question remains: does the violation of these interpretations constitute a violation of the FCPA? For purposes of this petition, I am asking the question only in the narrow context of staff interpretations as they relate to descriptive requirements.

The Commission should issue an order to clarify that violation of current staff-created interpretative guidance is not a violation of the FCPA, because there is no reasonable basis for staff's interpretation of what the FCPA requires as it relates to the term "purpose of each expenditure" described in RCW 42.17A.240(7). A complete list of staff-created interpretive guidance, as it exists today, is attached as Exhibit A. This guidance purports to interpret RCW 42.17A.240(7), the statute most at issue in this petition.

That statute reads, in relevant part: "[e]ach report required under RCW 42.17A.235 (1) through (4)[14]… shall disclose the following… [t]he name and address of each person to whom an expenditure was made in the aggregate amount of more than fifty dollars during the period covered by this report, the amount, date, and **purpose of each expenditure**, and the total sum of all expenditures." [emphasis added]

[13] See list of all Commission Interpretations: https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions?combine=&field_type_of_guideline_target_id_1=85

[14] This language references form C4.

The Britannica Dictionary defines purpose as meaning: "the reason why something is done or used : the aim or intention of something." This is the plain meaning of the word "purpose", and that term is not defined elsewhere in the FCPA. The FCPA's use of the broad term "purpose" can be contrasted with language contained elsewhere in the FCPA, such as RCW 42.17A.345 (a.k.a. "Commercial Advertiser Statute") that requires commercial advertisers to maintain and make available upon request a description of "[the] **exact nature and extent of the services rendered**".[15] [emphasis added]

If you read RCW 42.17A.240(7) carefully, you will notice that it makes no mention of requiring filers to provide the number of "impressions" for digital ad purchases, or the name of the traveler for travel-related campaign expenditures, or the precise methodology used by filers to calculate mileage reimbursements, or any of the other purported requirements listed as staff-created interpretive guidance in Exhibit A. Neither do WAC 390-16-037 or WAC 390-16-205 (administrative rules adopted lawfully under the APA relating to RCW 42.17A.240(7)) make any mention of these requirements.

That being the case, on what basis are agency staff requesting that filers disclose these details? Agency staff insist that their guidance on descriptive requirements is their interpretation of what RCW 42.17A.240(7) requires.

And how did agency staff arrive at these interpretations? It's not entirely clear. No canon of statutory interpretation applied to RCW 42.17A.240(7) could reasonably lead to the guidance that agency staff have generated. I don't have a definitive answer. However, from my conversations with agency staff, it appears that agency staff seem to interpret RCW 42.17A.240(7) as providing them with a broad, pseudo-legislative grant of authority to generate whatever interpretation of "purpose of each expenditure" they want, whenever they want, as long as they are willing to claim these details are of interest to the public or the agency.

Agency staff may try to dispute this claim and point to one statute and two administrative rules as being a basis for some of the interpretive guidance they have created. These arguments are easily debunked.

[15] RCW 42.17A.345(1)(b)

**Staff-created Interpretive Guidance on Run Dates**

First, staff may claim that their interpretive guidance requesting filers provide the run date for certain forms of political advertising (such as digital ads, robocalls, newspaper ads) in the "purpose" field on form C4 is because of the requirement contained in RCW 42.17A.305(1)(e).

This claim is based on a misreading of what that statute requires. RCW 42.17A.305 describes the reporting obligations of entities that make electioneering communications, and not entities that sponsor political advertising generally.

At first glance, the term "electioneering communication" would appear to be synonymous with political advertising based on its plain meaning, but "electioneering communication" is actually a FCPA term of art that is defined in RCW 42.17A.005(21). Per RCW 42.17A.005(21)(b)(viii), **any** expenditure made by an authorized committee of a candidate for state, local, or judicial office is explicitly **not** considered an electioneering communication. This means that normal political advertising sponsored by a candidate committee is NOT an electioneering communication, and is not governed by the requirements of RCW 42.17A.305(1)(e). Furthermore, the statute requires that the sponsor of electioneering communications report the run date on a form developed by the Commission for the disclosure of independent expenditures/electioneering communications and this form is designated as form C6, not form C4. Form C4 is the form relating to the "purpose" statute at question here.[16] Candidate authorized committees are not required to file C6 forms when they make expenditures for candidate political advertising.

Put simply, RCW 42.17A.305(1)(e) requires *only* sponsors of electioneering communications to disclose the run dates of their ads and it is *only* required that this information be disclosed on form C6, not form C4. As such, this statute provides no basis for agency staff requesting that filers disclose run dates of political advertising expenditures on form C4.

**Staff-created Interpretive Guidance on Quantities**

Next, staff may claim that their guidance requesting filers provide quantities for certain types of expenditures (such as robocalls, numbers of "impressions" for digital advertisements, or miles

[16] WAC 390-16-060.

traveled for mileage reimbursements) is based on WAC 390-16-037. Specifically, they may point to "Example B" in that rule as a basis for requesting filers to disclose quantities for certain expenditures.

Of course, the language in "Example B" requiring quantities specifically reads: "if an expenditure is made directly to a vendor **for printing**." [emphasis added] In the only other example provided in the rule, which pertains to robocalls, the number of robocalls was not disclosed in the purpose field, suggesting disclosure of quantities is not a requirement generally and is only a requirement as it relates to printing. It is important to note that the example in WAC 390-16-037 of how to properly disclose details relating to robocalls in the purpose field explicitly and directly contradicts the staff-created interpretive guidance on the same subject. The staff interpretive guidance requests we disclose the run dates and quantities of robocalls for robocall expenditures, but the example provided in rule shows that those details need not be disclosed.

As such, agency staff have no basis under WAC 390-16-037 for requesting that filers provide quantities for expenditures (except for printed items, which is a requirement).

**Staff-created Interpretive Guidance on Subvendors**

Finally, staff may claim that their guidance requesting filers provide addresses of subvendors is based on WAC 390-16-205. Specifically, the language in WAC 390-16-205 states that expenditures made by vendors to other vendors (subvendors) that benefit the candidate or committee making the expenditure shall be reported: "as if made or incurred by the candidate or committee directly".

But what does that mean exactly? Should each payment to subvendors be reported with a separate address for the subvendor? The rule answers that question with a definitive "no" by providing a clear example of how filers should disclose payments to subvendors. The expenditure is listed as a single line item, and in the description field, the filer provides an item-by-item breakdown with the cost associated with each item.

Not only is this method of reporting consistent with the example provided in WAC 390-16-205, but it is also consistent with guidance that the agency has previously offered to filers who use ORCA.[17]

As such, agency staff has no basis under the FCPA for requesting that filers provide the address of subvendors. [18]

## CONCLUSION

For the foregoing reasons, the Commission should enter a declaratory order that the agency's Executive Director (or their designee) may not issue their own interpretations of what the FCPA requires, absent approval from the Commission. Furthermore, the Commission should enter a declaratory order that the violation of staff-created interpretive guidance, as it relates to descriptive requirements, does not constitute a violation of the FCPA as the interpretive guidance has no basis in RCW 42.17A.240(7) or relevant administrative rules.

In the event the Commission does believes there is some merit in requiring filers to comply with current staff-created interpretive guidance,[19] the Commission should engage in rulemaking to codify this guidance as a formal requirement in the Washington Administrative Code. RCW 42.17A.240(12) provides a broad grant of authority to the Commission to require filers to

[17] See archived PDC manual for candidates circa 2015: http://web.archive.org/web/20151016133540/http://www.pdc.wa.gov/archive/filerassistance/manuals/pdf/2015/2015.Man.StCan.pdf (See pg. 57-58 as numbered in PDF, pgs. 49-50 as numbered in manual: note how addresses for subvendors "XYZ Print Co." and "My Mailhouse" are not provided.)

[18] On a substantive level, I want to note that filers are almost never told the addresses for subvendors, and we are lucky if we are even notified of the existence of subvendors for certain types of expenditures. I simply cannot imagine why the addresses of subvendors (as opposed to just their identity like we have always provided), would be of interest to the public. If they want to find the address of the subvendor, why don't they just Google it like we have to? Up until recently, we have never been requested to provide the address of subvendors and the world hasn't fallen apart. Who in the agency came up with this and why? Why wasn't the Commission consulted about this? Why weren't filers given an opportunity to comment on this change?

[19] It is worth pointing out that filer compliance with staff-created interpretive guidance as it relates to descriptive requirements is low to practically non-existent depending on the individual piece of guidance. For instance, virtually no-one complies with the guidance that, for describing in-kind contributions, filers should include the full address of the vendor that the in-kind contribution was purchased from (as opposed to simply disclosing the address of the in-kind contributor). I think this non-compliance can be attributed to four things: 1) staff only created this guidance sometime in the last 12 months, 2) staff did not send out a notice to filers that they had created this guidance, 3) this new agency guidance contradicts old agency guidance, and 4) filers feel the voters wouldn't have the slightest bit of interest in this information.

provide additional information beyond that which must be disclosed by statute on form C4. There is only one major restriction on the exercise of this authority: the requirement must be instituted via rule, following the APA's rulemaking process. Past iterations of the Commission have used this rulemaking process to impose new descriptive requirements on filers.[20]

The procedures required by the APA's rulemaking process (which requires outreach to the public, opportunity for interested parties to provide comment on proposed requirements, and discussion/approval by those who govern the agency) has been described by some as bureaucratic. The bureaucracy associated with the APA's rulemaking process is intended to ensure that members of the public can meaningfully participate in the development of agency requirements which affect them. This bureaucracy is a feature, not a glitch, of the APA's rulemaking process.

If the Commission believes that some or all of the staff-created interpretive guidance may have some value as legal requirements, the Commission should exercise its rulemaking authority to engage in a collaborative process with the public, agency stakeholders, and agency staff, to formulate a proposal that definitively identifies the level of detail that filers must provide when describing expenditures on form C4. To provide the Commission with this option, an APA Petition to initiate rulemaking on this subject will be filed concurrently with this Petition for Declaratory Order.

In the event the Commission declines to answer the questions posed in this Petition for Declaratory Order and also declines to codify staff-created interpretive guidance into rule, I intend to draw the conclusion that the staff-created interpretive guidance relating to descriptive requirements is only a mere suggestion to filers, and that violation of this interpretive guidance does not constitute a violation of the FCPA.

If, following final agency action on these petitions, anyone from the agency believes that conclusion to be incorrect, I request that they inform me of the reason(s) why they believe that to be the case by e-mailing me directly at CG.Edwards53@gmail.com.

[20] See WAC 390-16-037, WAC 390-16-205.

DATE: September 9, 2022

Conner Edwards
Campaign Treasurer

Written Comment For 7.28.22 Regular Meeting of the Public Disclosure Commission
Conner Edwards

# Descriptive Requirements and the Administrative Procedures Act (APA)

**Background**

In June of 2021, a new version of ORCA was released, the first significant update in many years. For background, ORCA is the program that campaigns use to communicate contribution/expenditure information to the public via the filing of C3/C4 reports.

This new version of ORCA had an updated interface for entering expenditures. As part of this new interface, the program requested that we provide additional details for certain types of expenditures that *we had never previously been asked to disclose and that no statute or administrative rule required us to disclose.* Some of these requests were very odd, asking us to disclose things like the address of sub-vendors, the dimensions of yard signs, or the number of "impressions" for digital ads. [1]

Shortly after seeing this new guidance, I reached out to agency staff to try to determine if this new non-RCW/WAC based guidance was either: a) just a mere suggestion for filers on what to include in the description field, or b) ostensibly a new legal requirement that campaigns could conceivably be fined or otherwise penalized for failing to comply with.

If the answer was the former (just a mere suggestion) that wouldn't be problematic at all; agencies can suggest whatever they'd like to suggest. If the answer was the latter (ostensibly a new legal requirement) that would be problematic because state agencies are required to go through the APA's rulemaking process to implement new legal requirements and that process had not been followed. I looked through old agency agendas, meeting minutes, and listened to recordings of previous meetings. Not only had the APA's formal rulemaking process not been followed, I could find no evidence of *any* notice to the public, outreach to agency stakeholders, or even any discussion or approval from the Commissioners on the updated guidance.

**Looking for Answers**

After a series of lengthy/frustrating e-mail conversations with agency staff, my question was not answered. I filed a series of complaints with the sole intention of testing the agency to see how it would respond to a complaint alleging a violation of this non-RCW/WAC based guidance. [2] In response, the agency requested that the respondents update their reports to comply with the new non-RCW/WAC based guidance. After the respondents updated their reports, the agency dismissed the complaints as "requests for technical correction". In essence, when the agency decides to treat a complaint as a "request for technical correction", they are asking the respondent to correct some action the agency perceives as being violative. If the respondent does not take the corrective action suggested by the agency, they are subjected to an investigation which can lead to fines and other forms of administrative

[1] Even today, fully 12 months after the new guidance on descriptive requirements was put into ORCA, much of this guidance can only be found by ORCA users and not folks who use the agency's website to research requirements. See website: https://www.pdc.wa.gov/registration-reporting/candidates-committees/expenditures-debts/expenditures-require-additional-disclosure

[2] See PDC Case No. 98589, 98610, 98702, 98707, 98732, 98734, & 95815 (2).

sanctions. Contrast this to a complaint alleging some action that the agency did not perceive to be violative: it would be dismissed as "frivolous or unfounded" as outlined in WAC 390-37-060(1)(a).

So, seemingly, the question had finally been answered: the new non-RCW/WAC based guidance was not a mere suggestion to filers but rather something that the agency viewed as a legally enforceable requirement; albeit a requirement the violation of which did not materially harm the public interest. [3]

This was concerning because, per RCW 42.17A.110, it is the appointed Commissioners who are empowered to adopt, modify, and rescind rules, following the APA's rulemaking process. This statute specifically prevents staff from exercising this power. [4]

**What is a "rule" anyways?**

"Rule" is a term of art defined in RCW 34.05.010(16), the Administrative Procedures Act. Under that statute, "rule" is defined to mean, in relevant part: "any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction;…".

In other words, a requirement does not have to be in the Washington Administrative Code (WAC) in order to be considered a rule; it is a rule if it meets the definition of "rule" contained in RCW 34.05.010(16).[5] If a requirement meets the APA's definition of a rule, the agency must follow the APA's rulemaking process; if the agency fails to follow that process, the rule is invalid.[6] The purpose of this requirement is to ensure that members of the public can meaningfully participate in the development of agency requirements that affect them.[7] While the APA's process may seem bureaucratic, it has several important components, such as a) notice to the public, b) solicitation of public comment, c) consideration of public comment, and d) debate/approval by the agency's governing body.

**The Takeaway**

Based on the agency's conduct in adjudicating complaints alleging violation of the non-RCW/WAC based guidance, it appears that this guidance is not a mere suggestion for filers. Instead, this guidance meets the definition of a "rule" as defined in the APA. Because the agency failed to follow the APA's rulemaking process (including notice to the public, solicitation of public comment, consideration of

[3] Not "materially harm[ing] the public interest" is a statutory prerequisite for resolving a complaint as a technical correction. See RCW 42.17A.005(52).

[4] See RCW 42.17A.110(2).

[5] "***If a regulation falls within the statutory definition of a rule, it is treated as a rule*.**" Hunter v. Univ. of Washington, 101 Wash. App. 283, 289, 2 P.3d 1022, 1026 (2000).

[6] ***"The APA provides that in a proceeding involving review of a rule: the court shall declare the rule invalid ... if it finds that [the rule] ... was adopted without compliance with statutory rule-making procedures.... RCW 34.05.570(2)(c). Rule-making procedures under the APA involve providing the public with both notice of the proposed rule and an opportunity to comment on the proposal at a public rule-making hearing. See RCW 34.05.320; RCW 34.05.325."*** Simpson Tacoma Kraft Co. v. Dep't of Ecology, 119 Wash. 2d 640, 648–49, 835 P.2d 1030, 1035 (1992).

[7] "**The purpose of such rule-making procedures is to ensure that members of the public can participate meaningfully in the development of agency policies which affect them. Andersen, 64 Wash.L.Rev. at 791. In enacting the 1988 APA, the Legislature intended to provide greater public access to administrative decisionmaking. See RCW 34.05.001.**" Simpson Tacoma Kraft Co. v. Dep't of Ecology, 119 Wash. 2d 640, 649, 835 P.2d 1030, 1035 (1992)

public comment, debate/approval by the agency's governing body, etc.) the rules would appear to be invalid and unenforceable.

**Why am I making such a big deal about such a small thing?**

First, I would argue that that's how many negative practices are started, particularly those involving government agencies. The negative practice starts out as a "small thing" and then, when it goes unchallenged, it grows and grows. Eventually, what started out as a "small thing" has become an accepted custom. The adoption of new requirements without notice/outreach to the public is negative because it prevents the community affected by the requirements from participating in their development.

Second, for those of us that must comply with descriptive requirements, this isn't a small thing at all. Very frequently, it is one or two pieces of information for descriptive requirements that we are lacking that turns a relatively straightforward reporting period into an absolute nightmare. This is especially the case when missing small bits of information for multiple clients. As I believe Kurt Young has mentioned at many meetings over the past year when discussing audits, commercial advertisers frequently leave detailed information off their invoices, and we must attempt to track this information down, which is time consuming and frustrating.

Third, on a substantive level, it makes no sense to require us to provide such a great level of detail for expenditures. My best guess is that the number of people statewide who are interested in this level of detail likely number in the mid to high dozens. For those few with such an intense interest, these details (and more) are available to them through the robust commercial advertiser inspection statute.[8] By and large however, voters are far more interested in who contributes what to campaigns, as opposed to the precise details of the campaign expenditures.

Finally, these descriptive requirements are a smorgasbord for people who enjoy filing PDC complaints for insignificant reasons. Per the *agency's own position in adjudication of complaints against filers who fail to follow the non-RCW/WAC based guidance*, this type of violation "does not materially harm the public interest". If the violation of a requirement does not materially harm the public interest, why should it be a requirement in the first place?

**Questions (Response Requested)**

To remove any doubt surrounding this set of non-RCW/WAC based guidance and how the agency views this guidance, I am requesting a response to the following questions.

1) Are filers legally required to follow the non-RCW/WAC based guidance highlighted in red on the attached "Table of Descriptive Requirements"? Put differently, could we potentially be fined or face other administrative sanctions for failing to include this level of detail on reports or failing

[8] See RCW 42.17A.345. See also, PDC Declaratory Order 9. Interestingly, in Footnote 1, it says that commercial advertisers were originally required to file regular reports with the Commission about the details of political advertising that they sold until that was changed in 1975. If the PDC believes that it is so important for such a high level of detail to be communicated to the public regarding expenditures, the agency ought to consider requesting that the original statutory language be re-adopted when drafting its 2023 agency request legislation. Link: https://www.pdc.wa.gov/sites/default/files/2021-05/DECL_9.pdf

to amend the reports to include this level of detail when requested by the agency in response to a PDC complaint?

2) If the answer to Question 1 is "yes", on what grounds does this guidance not constitute a "rule", as defined in RCW 34.05.010(16), that the agency would have to follow the APA's rulemaking process to lawfully implement? Please cite to relevant statutes/rules/caselaw if applicable.

**Conclusion**

At its core, the idea that any agency can unilaterally implement new requirements without any basis in state law, without any basis in duly adopted administrative rule, without any notice to or input from the public, and without any approval/action from the agency's governing body is unreasonable.

Both the agency and the public at large can benefit from the APA's rulemaking process that includes such important features as notice to the public, outreach to stakeholders, and discussion amongst the Commissioners before any final approval.

Previous iterations of this Commission have followed the APA's rulemaking process for instituting new descriptive requirements. The current iteration of this Commission should follow this wise tradition. To state the obvious, the Commission doesn't even have to act on any feedback it receives from the agency's regulated community before adopting new descriptive requirements. But the agency should at least be willing to hear us out.

As always, if anyone reading this believes that I have gotten my facts wrong or thinks my analysis is off, I encourage you to please reach out to me and say so, identifying with specificity what you believe to be incorrect. However, based on everything I have seen/heard/read, I don't believe that to be the case.

Best,

Conner Edwards
Campaign Treasurer
(425) 533-1677 cell

**PS.** Interestingly, the APA foresaw that some agencies may try to use "a statement, guideline, or document that is of general applicability, or its equivalent" in place of an appropriately adopted rule. To that end, they created a process by which members of the public may petition the Legislature's Joint Administrative Rules Review Committee (JARRC) to "determine whether the statement, guideline, or document that is of general applicability, or its equivalent, is being used as a rule that has not been adopted in accordance with all provisions of law." See RCW 34.05.655(1).

**PPS.** In the past, when the PDC has offered official guidance to the public, it has done so through the use of an Official Interpretation or Declaratory Order. When the agency has does these things, they have been put before the Commissioners for discussion/approval. Also, the agency typically notes these things on the meeting agendas so the public, if they wanted to, could provide comment on them. For these reasons, this seems to be the superior way for the agency to modify guidance to the regulated community.

In WAC 390-05-120 (the only section of the WAC that clearly sets forth the powers of a member of the agency's staff), it says that the Executive Director has the power to "[r]esearch, develop, and draft policy positions, administrative rules, interpretations and advisory options **for presentation to the commission**." [emphasis added]. To me, this suggests that neither the Executive Director nor any other members of the staff have the ability to unilaterally change agency policy positions or interpretations, and that any proposed changes must be approved by the Commission. From everything I've been able to see, that didn't happen, but it should have.

# Table of Descriptive Requirements for Expenditures on Form C4

*See RCW 42.17A.240(7) & (12)*

| Requirements created by the Legislature following the process required by Article II of the Washington State Constitution | Requirements created by the Public Disclosure Commission following the process required by RCW 34.05, the Administrative Procedures Act | Purported requirements unilaterally implimented by agency staff without any basis in state law, without any basis in administrative rule, without any notice to or input from the public, and without any approval/action from the Commissioners |
|---|---|---|
| **Requirement that, for every itemized expenditure (expenditures over $50), filers must describe the general purpose of the expenditure in the purpose/description field.** ***RCW 42.17A.240(7).*** | **Requirement that, for expenditures made to vendors that include subpayments on the campaign's behalf to third parties intended to benefit the campaign, that filers must provide a breakdown of these payments and the names of the receipients in the purpose/description field.** ***WAC 390-16-205(1)-(3).*** | **Requirement that, for expenditures that include payments to subvendors, that filers include the full address of the subvendors. [1] *** |
| **Requirement that, for expenditure made for soliciting or procuring signatures on an initiative or referendum petition, filers must include the electronic contact information of each person to whom an expenditure was made in the purpose/description field.** ***RCW 42.17A.240(8).*** | **Requirement that, for expenditures made to consultants or other agents to perform tasks such as fundraising, survey design, or campaign plan development, that filers describe those tasks in the purpose/description field.** ***WAC 390-16-205(3).*** | **Requirement that, for expenditures for broadcast/TV advertising, that filers provide the dates that the ads are running in the purpose/description field. [2] ϴ** |
| | **Requirement that, for expenditures supporting or opposing candidate(s) or ballot measure(s), that filers must identify the candidate(s) or ballot measure(s) in the purpose/description field unless already listed on the statement of organization.** ***WAC 390-16-037(1).*** | **Requirement that, for digital advertising, that filers provide: a) the name of the platform on which ads are appearing if specified by the campaign, and b) the run dates or "number of impressions" in the purpose/description field. [3] *** |
| | **Requirement that, for expenditures made to to a candidate or political committee pursuant to an agreement or understanding of any kind regarding how the recipient will use the expenditure, that filers must describe that agreement or understanding in the purpose/description field.** ***WAC 390-16-037(2).*** | **Requirement that, for mileage reimbursement expenditures, that filers provide: a) the number of miles, b) reimbursement rate used, and c) period covered in the purpose/description field. *** |
| | **Requirement that, for expenditures made directly to vendors for GOTV phone calls or robocalls, that filers must describe the jurisdiction(s) targeted by the phone calls or robocalls.** ***WAC 390-16-037(2).*** | **Requirement that, for newspaper/periodical advertising, that filers provide the dates that the ads are running in the purpose/description field. ϕ** |
| | **Requirement that, for expenditures made directly to a vendor for printing, that filers must include the printed item and the quantity purchased.** ***WAC 390-16-037(2).*** | **Requirement that, for expenditures reimbursing candidates for lost earnings, that filers provide: a) the candidate's monthly salary/wages/income, and b) the period covered in the purpose/description field.** |
| | | **Requirement that, for expenditures for the printing of yard signs, that filers provide the sizes of the yard signs purchased in the purpose/description field. [4] *** |
| | | **Requirement that, for expenditures for radio advertising, that filers provide the dates that the ads are running in the purpose/description field. ϕ** |
| | | **Requirement that, for expenditures for robocalls, that filers provide: a) the number of calls made, and b) the "period covered" in the purpose/description field. [5] *** |
| | | **Requirement that, for expenditures for travel, that filers provide the traveler's name in the purpose/description field. ϕ** |
| | | **Requirement that, for every expenditure, that filers must select a specific expenditure category. [6] *** |

## Footnotes

***** Requirement described in ORCA and not on PDC website.
**ϕ** Requirement described on PDC website and not in ORCA.
**ϴ** Discrepency exists between ORCA and PDC website guidance for this requirement: PDC website says filers must include run-dates only "if-known", which implies we don't have to try to track down that information if we don't have it, as is often the case because of poor invoice descriptions on the part of commercial advertisers.

**1.** This requirement is directly contradicted by WAC 390-16-205 which provides a clear example of how payments to subvendors are disclosed: by disclosing the name of the subvendor, the money paid to them, and the purpose of the payment; not the address of subvendors. Up until approximately May 2021, when the agency updated ORCA, this was how campaigns disclosed payments to subvendors. This is a frustrating requirement because we are lucky if vendors even disclose the existance of subvendors to us: the address of subvendors does not make it onto the invoices. I cannot imagine why the address of subvendors would be of any interest to the public.

**2.** The language of this that requires us to provide run dates is contradicted by the example of how campaigns should describe payments for broadcast political advertisement contained in WAC 390-16-205, see Example C.

**3.** This is another confusing requirement. An "impression" is how many times someone has seen a digital ad. Generally, this wouldn't be a static number: the number we input at the time of drafting the report would already likely be incorrect by the time we file the report if the ad is still active. Are we required to amend our reports when the number of impressions for the ad rises?

**4**. In an e-mail sent on 9/23/21, Deputy Director Bradford clarified that we do not need to include the dimensions of the yard signs in the description field if they are 4'x8' or under. This was very positive news for us because virtually all yard signs are 4'x8' or under. On 10/5/21, I requested that the inaccurate guidance in ORCA be corrected. On 5/17/22, noticing this problem had still not been corrected, I asked if there was an estimate on fixing the guidance. I did not receive a response, but it was finally fixed sometime in early July 2022. It took nearly 9 months for the inaccurate guidance to be corrected.

**5.** This requirement is directly contradicted by WAC 390-16-037(2) which provides a clear example of how to disclose robocalls and does not require us to disclose the quantity of calls or the dates that the calls are made.

**6.** The list of categories that filers are being asked to choose from is lengthy, vague, and ever-changing. As of 7/2/22, there are 33 different categories in ORCA, down from the 47(!) different categories we had to choose from last year when this requirement was unilaterally implimented by agency staff over the bipartisan objections of professional campaign treasurers. It is not always clear what category we should use for certain expenditures because of category overlap/vagueness. For context, filers with the FEC only have 12 categories to choose from, which makes categorizing expenditures significantly easier. I sent an e-mail seeking guidance from agency staff on 8/4/21 on what categories we should use for certain common expenditures. Nearly a full calendar year later, I have still not received any response. I have noticed that certain categories have disappeared from the list entirely without any notice or explanation being provided to filers. Because of the confusion related to expenditure categorization, the resulting categorization data is not of high quality or particularly helpful. (I will note that in the past, there was a "chart of accounts" function in the old ORCA that somewhat resembled the new ORCA categorization field. However, unlike the new ORCA categorization field, the "chart of accounts" we put into the program was not visible to public, was not a legal requirement, and for that reason, the majority of us just ignored it.)