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.)