State of Washington
PUBLIC DISCLOSURE COMMISSION
711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908
(360) 753-1111 • FAX (360) 753-1112
Toll Free 1-877-601-2828 • E-mail: pdc@pdc.wa.gov • Website: www.pdc.wa.gov

Memo

To: PDC Commissioners
From: Sean Flynn, General Counsel
Date: April 25, 2023
Re: Candidate Surplus Fund Transfers to a Campaign for a Different Office (RCW 42.17A.490)

This memo presents a question of interpretation regarding RCW 42.17A.490 and whether contribution limits apply when contributions designated as surplus from a candidate's campaign are transferred to the same candidate's subsequent campaign for a different office. Staff has previously provided published guidance on this issue. That guidance recently has been questioned, which has prompted staff to bring the issue to the Commissioners' attention and provide the following analysis for consideration.

Background

Contributors are limited in the amounts they can give to a candidate in each election cycle. RCW 42.17A.405. Contribution limits serve an important function of protecting against the disproportionate influence and control of certain individuals and organizations over the election of public officials.

Contributions left over from a candidate's campaign are considered surplus and may be used by the candidate only for certain purposes, specifically avoiding any personal benefits to the candidate. RCW 42.17A.430. One permissive use allows candidates to transfer surplus funds into the candidate's future campaign for the same office. Such a transfer does not constitute a contribution to the new campaign, so that the funds can be recorded as a lump sum, without counting towards the contribution limit of any contributor. *Id*. ("The disposal of surplus funds under this section shall not be considered a contribution for purposes of this chapter.")

A separate provision of law prohibits a candidate from transferring contributions from one campaign to another campaign for a *different* office, including the transfer of surplus funds, unless the candidate receives written permission from each contributor whose contribution is moved to the new campaign. RCW 42.17A.490. (The attribution for such transfer follows the first-in-first-out accounting method.) Unlike RCW 42.17A.430, section .490 does not expressly

set forth whether such a transfer of surplus funds constitutes a contribution to the new campaign for purposes of contribution limits. If, as with a campaign for the same office, the authorized transfer of surplus funds to the campaign for a different office is not treated as a contribution, then the contributor who authorizes the transfer would be allowed to make a separate contribution to the candidate's new campaign up to the relevant contribution limit.

Question presented

When a contributor gives permission to transfer the value of their contribution from a candidate's surplus campaign funds to that same candidate's subsequent campaign for a different office, does that transfer count towards the contributor's contribution limit for the subsequent campaign?

Analysis

The issue presented here is whether a permissible transfer of surplus funds from one campaign to a subsequent campaign for a different office, given the prior written approval of each contributor, must be attributed as a contribution and thus subject to the contribution limits for the new campaign. Staff has published guidance that recognizes this type of transfer as a use of surplus funds that is not required to be attributed to the contributors whose approval was given to authorize the transfer. The guidance states:

> When a candidate is transferring contributions left over from a previously completed election campaign to a new campaign for a different office, those contributions that are moved to the new campaign are NOT attributed to their sources, nor do they count against the contributor's limit for the new campaign. The funds are simply moved as a lump sum of surplus funds to the new account.[1]

Pursuant to this guidance, such a transfer would not be attributed to the contributor and does not count towards the contribution limit of the contributor.

The reasoning for this interpretation is based on the understanding that once campaign funds become surplus, they lose the character of being tracked as a contribution. This is consistent with the treatment under RCW 42.17A.430 regarding the transfer of surplus funds to a candidate's subsequent campaign for the same office. The reasoning supported by the definition of surplus funds, which includes the balance of contributions after all campaign expenses have been paid. RCW 42.17A.005(51). Since the law permits the disposal of such funds for certain non-campaign purposes, unrelated to the original purpose for which the funds were received, those funds are no longer campaign-related, so they are no longer attributed to contributors.

This guidance has been questioned, however, when read in relation to the law that separately permits the transfer of surplus funds to a candidate's subsequent campaign for a different office.

[1] The guidance is available on the PDC website. See https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/using-contributions-different-office

RCW 42.17A.490(2). That law requires the candidate to obtain approval from each contributor to authorize the transfer of their contribution amount to the new campaign, even where the transfer comes from the candidate's surplus funds. The required approval of the contributor to make such a transfer raises an inference that the transfer maintains the character of a contribution and as such is attributable to the contributor and counted towards the contributor's limit for the new campaign. Furthermore, the language of section 430 providing that "[t]he disposal of surplus funds *under this section* shall not be considered a contribution for purposes of this chapter" (emphasis added), does not expressly include transfers authorized under section 490.

Staff's current guidance has appeal in that it is consistent with how the disposition of surplus funds are not treated as contributions under section 430, including the transfer to a candidate's subsequent campaign for the same office. There is no reference in that section that any other uses of surplus funds may be treated differently. While section 490 provides for different use of surplus funds, not addressed in section 430, it is silent on whether such use should be considered a contribution.

An initial issue to consider is which section(s) govern the nature of the activity. The use of surplus funds for a campaign to a different office is not one of the permitted uses under section 430. The authority for making a transfer to a different office is provided under section 490. While that provision does not state expressly whether an authorized transfer is attributed as a contribution, it also does not expressly exclude the transfer from being treated as a contribution, as is provided for other uses of surplus funds, including campaigns for the same office, under section 430.

The legislative history of the surplus funds law offers some context here. Initiative 134 (1993) created both the general surplus funds disposition requirements (RCW 42.17A.430) as well as the specific authorized transfer of "contributions" to a campaign for a different office (RCW 42.17A.490).[2] That Initiative also created contribution limits for candidate elections, so the drafters were cognizant to how the use of surplus funds could affect contribution limits. However, I-134 as passed by the voters did not state whether the disposal of surplus funds was considered a contribution.

The Initiative soon was amended in 1995 in several meaningful ways. First, the law specified that the disposal of surplus funds authorized under section 430 did not constitute a contribution. Second, the legislature also amended section 490 to provide that a contributor's approved transfer to a candidate's campaign for a different office applied to contributions "whether or not surplus." RCW 42.17A.490(2). Finally, section 490 was changed further to specify that if the contributor does not approve of the transfer of their contribution, then "the contribution *must be considered surplus funds* and disposed of in accordance with [RCW 42.17A.430]." (Emphasis added).

[2] The Fair Campaign Practices Act was recodified in 2010. The statutory references used here provide the current citations.

These changes suggest an intended distinction between how the disposal of surplus funds are treated under the general provisions of section 430, and the specific authorization of surplus funds transferred to a campaign for a different office, per section 490. Importantly, the 1995 amendments specifically included surplus funds in the procedure under section 490 permitting transfers to a different office. The amendments to section 490 further provide the condition that if a contributor does not authorize the transfer of their contribution to the new campaign under that section, then the contribution "must be considered surplus funds" and subject to the disposal provisions under section 430. The converse of that condition suggests that the provisions of section 430 do *not* apply to the transfer of funds that are approved by the contributor. The simultaneous amendment to section 430 stating that the disposal of surplus funds is not a contribution only expressly applies to those uses specified under that section, was not included to section 490.

The legislative history offers some support to interpret section 490 as applying contribution limits to the transfer of surplus funds to a different office. By requiring the candidate to receive the contributor's authorization to transfer surplus funds for a different office, those funds do not share the same anonymous "leftover" character of other surplus funds that are unattributed to a contributor. The purpose of requiring a contributor's approval would serve the purpose of tracking the contributor's intent to apply their contribution to the new campaign. However, there remains a tension that the use of surplus funds is not considered a contribution for some purposes but may be attributed to the original contributor for other purposes.

Recommendation

As this subject raises substantive questions about existing agency published guidance, staff believes it is appropriate to bring the question to the attention of the Commission for possible action. The issue is time-sensitive regarding potential 2024 campaigns, including legislative and statewide races likely to commence soon after the end of the legislative session. (*Sine die* was April 23, 2023).

If the Commission determines some action is necessary, one option is to address this issue as a statement of interpretation on the law. Interpretive statements are advisory only and would guide the public on the Commission's current opinion and likely course of action, but would not be determinative in any compliance matter.

Another possible action would be to open rulemaking, which would provide binding and enforceable requirements. Staff is mindful, however, that rulemaking requires a lengthy process that could run into the election freeze period beginning July 1st and lasting through the general election. Such a timeframe would present a considerable delay for 2024 campaigns seeking clarity.