

Petition for Declaratory Order

On the Classification of Undeposited Checks Under the FCPA

By Conner Edwards

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BEFORE THE PUBLIC DISCLOSURE COMMISSION OF THE STATE OF WASHINGTON

CONNER EDWARDS,
Petitioner.

PETITION FOR DECLARATORY
ORDER

CLASSIFICATION OF
UNDEPOSITED CHECKS
UNDER THE FCPA

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 as it relates to the classification of undeposited checks under the FCPA.

BACKGROUND OF PETITION AND RELEVANT FACTS

While declining in overall popularity in modern society as a method of payment, checks still remain one of the most common tools for Washington State campaigns to make payments to vendors and refund contributors.

At the October Regular Meeting of the PDC, the Commission heard a case in which one of the allegations charged by PDC staff was that the respondent had failed to timely disclose a \$159.22 expenditure. Because this allegation was the least significant of the charges, very little effort appears to have been expended by the PDC staff or the respondent discussing the legal issues involved.

This issue, while of minimal overall consequence in the above-referenced case, actually has broad implications for the PDC’s regulated community. The decision ultimately made by the agency raises significant new questions and uncertainties for campaigns and campaign treasurers about how to handle transactions relating to one of the most common forms of payment: the check. This petition is an effort to resolve that uncertainty.

PETITION FOR DECLARATORY ORDER PREREQUISITES

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

I live in Washington State and work as a professional campaign treasurer. In that role, I am responsible for drafting/filing C3s and C4s with the PDC on behalf of campaigns. The order issued by the PDC in Case No. 146593 created uncertainty necessitating resolution because it does not address how the agency believes undeposited checks should be reported.

In one section, the order concludes that the respondent “failed to timely disclose expenditures on C-4 reports”, which suggests that the undeposited check sent to the vendor should have been reported as a monetary expenditure. In another section, the order concludes that the \$159.22 payment at issue was ultimately disclosed “87 days late”, suggesting that the payment was properly disclosed as a debt, albeit belatedly.

Both of these interpretations conflict with pre-existing published agency guidance (described below in the body of this Petition) and the language of the FCPA. This creates an uncertainty necessitating resolution.

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)

As detailed above, the PDC’s order in Case No. 146593 conflicts with pre-existing published agency guidance and creates confusion as to how the agency intends to interpret the FCPA’s application with respect to this issue. The declaratory order issued by this agency should clearly set forth the circumstances in which undeposited checks should be disclosed and whether they are properly disclosed as monetary expenditures or debts on form C4.

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

See above. As a professional campaign treasurer, I am responsible for drafting/filing C3s and C4s with the PDC on behalf of campaigns. This uncertainty as to the application of the FCPA affects my ability to file timely/accurate reports. Additionally, as a Washington State registered

voter, the application of the FCPA to this scenario affects my right¹ to know of the financing of political campaigns.

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 present circumstances, issuing a declaratory order on 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-based campaigns. It may highlight a need for rulemaking, the issuance of an official Commission interpretation on this subject, or changes to existing agency guidance.

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”.

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

See below section, entitled “Questions Presented”.

QUESTIONS PRESENTED

1. When a campaign sends a check to a vendor and the vendor does not deposit the check, should the undeposited check be classified as a “debt” or a “monetary expenditure” under the FCPA?
2. If a campaign sends a check to refund a contributor to bring the contributor below the applicable contribution limit and the contributor does not deposit the check, has the campaign refunded the contributor?

¹ RCW 42.17A.001(10)

3. In the event that the agency determines that checks written but not deposited by the recipient are monetary expenditures under the FCPA, under what circumstances would campaigns be obligated to amend reports to indicate that the funds never actually transferred?

REQUESTED DECLARATORY ORDER

I request a declaratory order stating that: 1) when a campaign sends a check to a vendor and the vendor does not deposit the check, the undeposited check is properly classified as a “debt” and not a “monetary expenditure” under the FCPA, and; 2) when a campaign sends a check to refund a contributor (to bring the contributor below the applicable contribution limit) and the contributor does not deposit the check, that the campaign has not refunded the contributor. I have no preference with respect to the declaratory order issued in the third question presented.

Regardless of whatever the Commission decides, I would welcome any declaratory order which would resolve the present uncertainty regarding the application of the FCPA to these issues.

ANALYSIS

- 1. When a campaign sends a check to a vendor and the vendor does not deposit the check, the undeposited check should be classified as a “debt” and not a “monetary expenditure” under the FCPA.**

Different classification of campaign finance activity under the FCPA.

Under the FCPA, there are two broad categories of disclosable campaign finance activity: “expenditures” and “contributions”. These are statutory terms defined in RCW 42.17A.005(15)(a) & (b) respectively. Within these statutory terms there are primarily six separate sub-categories of disclosable campaign finance activity. How the activity is disclosed (and whether it is required to be disclosed) depends on the precise nature of the activity at issue.

Below is an abbreviated overview of these sub-categories.

“Contributions” – RCW 42.17A.005(15)(a)

Monetary Contribution² – The donation of money to a campaign. Monetary contributions are required to be disclosed only after being deposited into the campaign’s bank account. Required to be disclosed on form C3.

Monetary Loan³ – The loan of money to the campaign with an agreement to repay. Monetary loans are required to be disclosed only after being deposited by the receiving campaign. Required to be disclosed on form C3.

In-Kind Contribution⁴ – The donation of goods/services to a campaign for less than fair market value. In-kind contributions are only required to be disclosed if the contributor has donated \$25 or more during the election cycle. If the contributor is a campaign volunteer, their in-kind contributions to the campaign are required to be disclosed only if the value of the in-kind contribution reaches \$200. In-kind contributions are required to be disclosed on form C4.

In-Kind Loan⁵ – The loan of goods/services to the campaign with an agreement to repay. In-kind loans are required to be disclosed on form C4.

Pledge⁶ – A promise of a future monetary or in-kind contribution. Pledges are reportable only if the pledge is for \$150 or more. Required to be disclosed on form C4.

“Expenditures” – RCW 42.17A.005(15)(b)

Monetary Expenditure⁷ – The payment of campaign funds to a recipient. Required to be disclosed on form C4.

Debt⁸ – An outstanding amount that the campaign is obligated to pay but – for whatever reason – has not yet paid. Debts are reportable when the debt is more than \$1000 and, either: 1) the amount owed is outstanding as of the last day of the reporting period and has been outstanding for more than five business days in the 30 days before an election; or 2) the debt is outstanding as of the last day of the reporting period and has been outstanding for more than 10 business days during all other times.⁹

² <https://www.pdc.wa.gov/registration-reporting/candidates-committees/contributions>

³ <https://www.pdc.wa.gov/registration-reporting/candidates-committees/contributions/loans-monetary-and-kind>

⁴ <https://www.pdc.wa.gov/registration-reporting/candidates-committees/contributions/kind-contributions>

⁵ <https://www.pdc.wa.gov/registration-reporting/candidates-committees/contributions/loans-monetary-and-kind>

⁶ <https://www.pdc.wa.gov/registration-reporting/candidates-committees/contributions/pledges>

⁷ <https://www.pdc.wa.gov/registration-reporting/candidates-committees/expenditures-debts>

⁸ <https://www.pdc.wa.gov/registration-reporting/candidates-committees/expenditures-debts/outstanding-debts>

Legal function of checks.

A check functions as a written promise made by the campaign to pay the vendor the amount listed on the face of the check. The campaign has not actually paid the vendor until the funds actually leave the account of the campaign. If the check is never deposited by the vendor, the funds do not transfer out of the campaign's account.

Because an undeposited check is an outstanding amount that the campaign is obligated to pay – but has not yet paid – it is a debt under the FCPA's statutory scheme. As such, it would be reportable in the same manner and circumstances in which debt is reported on form C4. Thus, it would generally not be disclosable if the total amount of the outstanding obligation was \$1000 or less. This leads us to the confusion created by the agency's recent order in Case 146593.

Order issued in PDC Case No. 146593 is subject to multiple interpretations, each of which conflicts with the plain language in the FCPA and pre-existing agency guidance.

As described above, Case 146593 concerned an allegation that the respondent failed to timely report an undeposited \$159.22 check that had been sent to a campaign vendor. The Commission ultimately determined that a violation had occurred and issued an order finding the respondent liable. As I have already described above, there are two possible interpretations of the order issued by the agency. First, the order could be interpreted as taking the position that the \$159.22 undeposited check was required to have been disclosed as a debt during the reporting period in which the check was sent. Alternatively, the order could be interpreted as taking the position that the \$159.22 undeposited check was required to have been disclosed as a monetary expenditure during the reporting period in which the check was sent.

These two interpretations are in conflict with one another. Making matters worse, each of these interpretations conflict with the plain language of the FCPA and existing agency guidance. The conflict with the FCPA and existing agency guidance will be described below for each interpretation.

Conflicts with interpretation #1: Undeposited checks are required to be disclosed as debts, even if the check is below \$1000.

This view conflicts with both the plain language of the FCPA and existing agency guidance. We will examine each in turn.

Conflict with FCPA

As described above, debts are only disclosable if certain requirements are met.¹⁰ The first threshold requirement is that the amount owed must be for more than \$1000. In Case 146593, the amount owed on the undeposited check was only \$159.22. As such, the plain language of the FCPA conflicts with the first possible interpretation of the agency’s order in Case 146593.

Conflict with Agency Guidance

On the agency’s website¹¹, the guidance re-states the FCPA’s threshold requirement that debts are only disclosable if the outstanding amount owed is for more than \$1000. In the agency’s training video¹² “Compliance 101”, the narrator specifically states that: *“debt is reported on the C4 only if the amount is over \$1000.”* In Case 146593, the amount owed on the undeposited check was only \$159.22. As such, the agency’s guidance conflicts with the first possible interpretation of the agency’s order in Case 146593.

Conflicts with interpretation #2: Undeposited checks are monetary expenditures.

This view conflicts with both the plain language of the FCPA and existing agency guidance. We will examine each in turn.

Conflict with FCPA

As described above, there are two sub-categories of the term “expenditure” as defined in the FCPA: monetary expenditures and debts. Since a check written by the campaign (but not deposited by the vendor) constitutes only a promise made by the campaign to pay the vendor, it cannot be said to be a monetary expenditure unless and until the vendor actually deposits the check and the funds leave the campaign’s account. The campaign retains full control of the funds unless and until the vendor actually deposits the check and the funds leave the campaign’s

¹⁰ See RCW 42.17A.240(9), WAC 390-16-042, and WAC 390-05-400

¹¹<https://www.pdc.wa.gov/registration-reporting/candidates-committees/expenditures-debts/outstanding-debts>

¹² <https://youtu.be/M8j5S-A1dxw?si=JPrIAAVq6MFBiz9W&t=1770> (See 29:30 mark)

account. As such, the plain language of the FCPA conflicts with the second possible interpretation of the agency's order in Case 146593.

Conflict with Agency Guidance

In the agency's online published guidance, the agency instructs the campaign on what constitutes a reportable debt:

*"...[s]ince one of the purposes of campaign disclosure reporting is to show **how the campaign dollars are spent**, your reports would be incomplete **without including those debts the campaign is obligated to pay but, for whatever reason, has not as yet**. In Part 3 of Schedule B, you'll list each order placed (but not paid), **debt or other obligation** (except loans) of more than \$1,000..."¹³ [emphasis added]*

Since a check written by the campaign (but not deposited by the vendor) constitutes only a promise made by the campaign to pay the vendor, it cannot be said to be a monetary expenditure unless and until the vendor actually deposits the check and the funds leave the campaign's account.

However, there is an even more explicit conflict between the interpretation that undeposited checks to vendors are disclosable as monetary expenditures and pre-existing agency guidance. Specifically, this interpretation conflicts with the guidance that filers receive when entering transactions into the PDC's specialized reporting program.

One of the most important jobs of a campaign treasurer is to reconcile the bank statement of the campaign with the information that is inputted into the agency's ORCA¹⁴ program and ultimately filed on form C4. The foremost key indicator of a successful reconciliation is that Line 18 (Cash on hand) on form C4 matches the campaign's bank balance as of the last day of the reporting period. This guidance is even included on every C4 that is filed with the agency. See below a screenshot from a recent C4 filed with the agency.

¹³ <https://www.pdc.wa.gov/registration-reporting/candidates-committees/expenditures-debts/outstanding-debts>

¹⁴ ORCA is the PDC's web-based campaign finance management system that is used to file C3 and C4 reports.

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public
**SUMMARY FULL REPORT RECEIPTS
AND EXPENDITURES**

C4

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Bob Ferguson for Governor -
PO Box 22169
Seattle, WA
GOVERNOR
State of Washington

Coverage: 10/15/2024 to 10/28/2024
Final report: No
Report number: 110258281 Amends 110257005
Election year: 2024
Date submitted: 11/03/2024

RECEIPTS

1. Previous total cash and in-kind contributions (last C4 line 8).		\$13,017,655.91
2. Cash received (Schedule A line 1).	\$581,845.98	
3. In-kind contributions received (Line 1 schedule B).	\$410,126.49	
4. Total cash and in-kind contributions received this period (Lines 2 + 3).		\$991,972.47
5. Loan principal repayments made (Line 2 schedule L).	\$0.00	
6. Corrections (Lines 1 or 3 schedule C).	(\$2,000.00)	
7. Net adjustments this period (Lines 5 + 6).		(\$2,000.00)
8. Total cash and in-kind contributions during campaign (Lines 1 + 4 + 7).		\$14,007,628.38
9. Total pledge payments due (Line 2 schedule B).	\$0.00	

EXPENDITURES

10. Previous total cash and in-kind expenditures (Last C-4 line 17).		\$12,844,428.80
11. Cash expenditures (Line 3 schedule A).	\$686,821.57	
12. In-kind expenditures (Line 1 schedule B).	\$410,126.49	
13. Total cash and in-kind expenditures made this period (Lines 11 + 12).		\$1,096,948.06
14. Loan principal repayment made (Line 2 schedule L).	\$0.00	
15. Corrections (Lines 2 + 3 schedule C).	(\$2,000.00)	
16. Net adjustments this period (Lines 14 + 15).		(\$2,000.00)
17. Total cash and in-kind expenditures during campaign (Lines 10 + 13 + 16).		\$13,939,376.86

CASH SUMMARY

18. Cash on hand (Lines 8 - 17)	\$68,251.52
Line 18 should equal your bank account balance(s) plus your petty cash balance.	
19. Liabilities: (Sum of loans and debts owed)	\$189,428.86
20. Balance (Lines 18 - 19)	(\$121,177.34)

CASH SUMMARY

18. Cash on hand (Lines 8 - 17)	\$68,251.52
Line 18 should equal your bank account balance(s) plus your petty cash balance.	
19. Liabilities: (Sum of loans and debts owed)	\$189,428.86
20. Balance (Lines 18 - 19)	(\$121,177.34)

Note the guidance below: “Line 18 should equal your bank account balance(s) plus your petty cash balance.”

I certify this report is true and complete to the best of my knowledge
Treasurer's name and date
Abbot Taylor - 11/03/2024

<https://sapolio.pdc.wa.gov/publicreg/statements/campaign-finance-report/110258281>

1/13

Here’s why this guidance statement on the Line 18 balance is important. If a campaign were to enter the amount of a check (which was sent to a vendor but not deposited by the vendor) as a monetary expenditure, the agency’s ORCA program would subtract the amount of that check from the Line 18 cash on hand balance. Because bank statements do not reflect checks that are written but not deposited, disclosing these checks as monetary expenditures would cause the Line 18 balance to not match the bank account balance.

This being the case, if the agency were to require campaigns to disclose undeposited checks as monetary expenditures, it would mean that campaigns would have to file reports that had Line 18 balances that did not actually match the campaign’s bank account balance as explicitly demanded by the guidance contained on form C4.

This interpretation would place campaigns in an untenable position. Campaigns would have to either: 1) omit an item from the C4 (undeposited check) which the agency interprets as a “monetary expenditure”, thus putting themselves at risk of agency enforcement action, or 2) file

an inaccurate C4 report, which is itself a violation¹⁵ of the FCPA and also places the campaign at risk of agency enforcement action.

Because of the above, the agency's guidance conflicts with the second possible interpretation of the agency's order in Case 146593.

2. When a campaign sends a check to refund a contributor (to bring the contributor below the applicable contribution limit) and the contributor does not deposit the check, the campaign has not refunded the contributor.

Under the FCPA, there are multiple scenarios¹⁶ under which a campaign would have to refund all or part of a contribution that has already been deposited. In nearly all circumstances¹⁷, these refunds are accomplished by writing a check to the contributor and transmitting the check to them for the overlimit amount. This most frequently occurs by mailing the check. Oftentimes, these checks are not deposited by the recipient on a timely basis and the funds (which the campaign is not legally permitted to retain) remain in the campaign's bank account. In most instances, the failure of the contributor to deposit the check is the result of some form of human error. In some instances, zealous contributors believe that they are actually helping the campaign by not depositing the refund check for this reason: if the refund check is not deposited, the campaign retains use of the originally donated funds.

Under the second possible interpretations of the agency's order in Case 146593 (that undeposited checks are monetary expenditures), these types of problems could flourish. First, members of the public would have no way of knowing whether or not campaigns had actually refunded overlimit contributions: the C4 forms would reflect that the refunds had occurred, but the public would

¹⁵ RCW 42.17A.145

¹⁶ Common scenarios include: a) the contributor has given more than the maximum limit allowed by law for the particular office sought, b) the contribution has pushed the campaign beyond the allowable limits for mini-reporting, c) the campaign loses in the primary and thus is required to refund all contributions attributable to the general, d) the campaign has not been able to secure the "foreign certification" from the contributor and thus must refund the contribution.

¹⁷ In some circumstances, a campaign is able to electronically refund a contributor who has made an online donation through the campaign's online donation platform. However, it is not possible to refund someone who has made a check or cash donation in this way.

have no way of differentiating between checks that were deposited or not deposited by the contributor. Consider this hypothetical scenario.

Hypothetical Scenario Under PDC's 2nd Possible Interpretation

Candidate Jarrett is running for Mercer Island School Board. The individual contribution limit for the race is \$1,200. Donor Musk, a wealthy businessman, mails a personal check to Candidate Jarrett for \$10,000. This is over the applicable limit by \$8,800. Candidate Jarrett deposits the check and issues a partial refund for \$8,800 to Donor Musk. Donor Musk does not deposit the check. Candidate Jarrett retains use of the funds but reports the refund as a monetary expenditure on form C4. Because it's been reported on Candidate Jarrett's C4, voters incorrectly assume that Candidate Jarrett has refunded Donor Musk's excess contribution. Candidate Jarrett's Line 18 "cash on hand" balance does not match his actual bank account balance. In reality, Candidate Jarrett retains the \$8,800 and the ability to use those funds.

In order to both properly interpret the FCPA and protect the public against this type of scenario, the PDC should determine that when a campaign sends a check to refund a contributor to bring the contributor below the applicable contribution limit (and the contributor does not deposit the check) that the campaign has not refunded the contributor.

3. In the event that the agency determines that undeposited checks do constitute monetary expenditures, the agency should clarify the circumstances in which campaigns are obligated to amend previously filed reports to indicate the funds were not actually transferred.

For the reasons I've repeatedly highlighted above, I believe that undeposited checks are properly classified under the FCPA's statutory scheme as debts and not monetary expenditures. In the event that the Commission ultimately decides that undeposited checks are monetary expenditures, the agency should consider and address the consequences of this approach.

If the Commission takes this approach, the agency will effectively be asking campaigns **to disclose transactions that have not actually occurred and may not actually occur.** To members of the public, it will appear as if these transactions have actually occurred and diminish their statutory right to be informed about campaign finance activity.¹⁸

At what point is a campaign obligated to amend a previously filed report to indicate to the PDC and the public that the funds were never actually transferred from the campaign to the recipient?

¹⁸ RCW 42.17A.001(10)

Is it 30 days after mailing the check? 90 days? 180 days? After the election ends? What is the standard to which the PDC is going to hold campaigns?

If the agency adopts the view that undeposited checks constitute monetary expenditures under the FCPA, the agency should clarify the circumstances in which campaigns are obligated to amend previously filed reports to indicate the funds were not actually transferred.

CONCLUSION

For the reasons listed above, the Commission should enter a declaratory order to resolve the uncertainties regarding the present application of the FCPA.



Conner Edwards
Campaign Treasurer

POSTSCRIPT

While Case No. 146593 was being heard, Vice Chair Leach posed an interesting hypothetical to the counsel for the respondent relating to undeposited checks.¹⁹

Leach: *“Couldn’t somebody game the system if I hire a hotshot consultant and I say: ‘here’s your \$100,000 but please don’t cash your check until after the election?’”*

My response would be this: no, it would not be possible to game the system in this way. The FCPA was designed to protect against tactics like this. A campaign check for \$100,000 would still be disclosable on form C4. However, it would be disclosable as a debt (because it was over the FCPA’s \$1000 debt reporting threshold), not a monetary expenditure.

To most people, this is a distinction without a difference. However, it matters a lot to us as treasurers who actually have to compile and submit these reports.

¹⁹ <https://twv.org/video/washington-state-public-disclosure-commission-2024101027/?eventID=2024101027>
(2:21:46)

If the agency determines that undeposited checks constitute expenditures/refunds (despite the plain language of the FCPA), people will absolutely find a way to game the system.

POST-POSTSCRIPT

If someone actually attempted the scenario described by Vice Chair Leach and it resulted in a complaint being filed, the agency staff would almost certainly dismiss that complaint with a warning letter and no penalty.

Screenshot from the PDC's ORCA Program

