



STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION

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TO: Commission Members
FROM: Tony Perkins, Acting Assistant Director
DATE : May 21, 2015
RE: **May 28, 2015 Meeting - Draft New Rules, Rule Amendments -
Alternative Responses to Non-Compliance**

Background

At its March 26, 2015 regular meeting, the Commission began a discussion of its 2013 – 2015 Strategic Plan action item, “*Enhance and adopt guidance for alternative responses to non-compliance (e.g., technical assistance, warning/advisory letters, notices of correction, etc.) and amend regulations accordingly.*” Staff discussed the need for additional tools to facilitate the expeditious resolution of minor complaints, helping to ensure the efficient and effective use of Commission and staff resources. The Commission considered a variety of possible alternative responses to non-compliance, together with the nature of complaints that may call for an alternative response.

Following the March meeting, staff conducted stakeholder work concerning one possible alternative response, the publication of complaints and responses in a manner similar to the Fair Campaign Practices Code complaint process (WAC 390-32-030).

On April 20, 2015, Lori Anderson filed a preproposal statement with the Code Reviser for rule making on alternative responses to non-compliance.

At the Commission’s April 26, 2015 meeting, staff presented the results of staff’s stakeholder work, and an update on possible new and amended rules. The Commission asked staff to bring draft rule language back to the Commission for review and possible approval at the May meeting.

Action & Next Steps

The May 28, 2015 agenda includes a review and possible Commission approval of seven proposed draft rule amendments, and drafts of four proposed new rules.

All of the draft language prepared for the May meeting concerns sections under Chapter 390-37 WAC, the Commission's enforcement hearing (adjudicative proceeding) rules.

Staff will also discuss policy questions that have come up in the process of writing draft rules. Following that discussion, and based on the Commission's direction, staff will produce draft language for possible amendments to other rules, including sections under Chapters 390-37 and 390-32 WAC (the Fair Campaign Practices Code). Staff will bring that language to the Commission on or after the June meeting for review and possible approval, together with any revised draft language requested at the May meeting.

After the Commission has approved proposed rule language to address this strategic plan item, staff will file the proposal with the Code Reviser, scheduling a public hearing and possible adoption in the later summer or early fall. The rules would become effective 31 days after adoption.

Enclosed Drafts

The following is a summary of the enclosed draft rule amendments, and drafts of new rules, to provide for alternative responses to non-compliance. In addition to the substantive changes being recommended, the draft rule amendments also include non-substantive changes (reformatting citations, eliminating redundancies, etc.).

Draft New Rules:

- **WAC 390-37-055** – To describe the available alternative responses to non-compliance under the Commission's amended rules;
- **WAC 390-37-056** – To explain the Commission's goals and objectives in providing for alternative responses to non-compliance, and the factors and considerations that the executive director may weigh in authorizing an alternative response;
- **WAC 390-37-057** – To establish procedures for notices of correction as an alternative response to non-compliance; and
- **WAC 390-37-058** – To establish procedures for deferred enforcement as an alternative response to non-compliance.

Draft Amended Rules:

- **WAC 390-37-010** – To include notices of correction and deferred enforcement among the alternative resolution methods discussed (in general terms) in the current rule;

- **WAC 390-37-050** – To provide for a description, in a respondent’s notice of complaint, of any alternative response issued as of the date of the notice;
- **WAC 390-37-060** – To provide authority for the executive director to issue an alternative response to non-compliance following an initial review of a complaint. In addition, to clarify the Commission’s policy concerning the inspection and copying of records generated or collected during the course of an investigation.
- **WAC 390-37-070** – To provide for alternative responses without the concurrence of the chair or the chair’s designee, in accordance with the process provided by the Commission’s amended rules;
- **WAC 390-37-103** – To establish that, following receipt of a staff report concerning alleged violations, the Commission may also direct staff to issue an alternative response in accordance with the Commission’s rules;
- **WAC 390-37-140** – To provide the authority of the presiding officer to assess a penalty of up to \$1,000 at a brief adjudicative proceeding (brief hearing); and
- **WAC 390-37-142** – To reflect the increased penalty authority for brief hearings provided by WAC 390-37-140. In addition, to provide the process for a respondent to waive a brief hearing, as authorized under the Administrative Procedures Act, by submitting a statement of understanding and other required elements.

Policy Questions – Possible Additional Rules

As staff prepares draft rule language to provide for the publication of complaints and responses concerning alleged violations of RCW 42.17A in a manner similar to the Fair Campaign Practices Code complaint process (WAC 390-32-030), we would appreciate guidance to help us understand the Commission’s goals.

As an alternative to a formal investigation or adjudicative proceeding, the complaint publication process could be used to fully dispose of the allegations in a complaint. If this is Commission’s preferred option, staff understands that this alternative response would be reserved for instances where the executive director determines that a formal investigation would not effectively address the complaint, taking into account the nature of the allegations, the available evidence, and the Commission’s goals, objectives, and the factors described in the new rule WAC 390-37-056.

Alternatively, the complaint publication process could be used to provide for the provisional resolution of a complaint. This airing of the issues could be followed by further review of the complaint and processing by staff under WAC 390-37-060, including a possible formal investigation and adjudicative proceeding, a report to

the Commission, or an additional alternative response (e.g., a formal written warning, notice of correction, or deferred enforcement).

With the Commission's direction on this point, staff will provide draft language for the Commission's review and possible approval on or after the June meeting. Note that if the Commission chooses to pursue the complaint publication process as a provisional resolution method, it may be necessary to revise the draft amendment to WAC 390-37-060, to establish the effect of the complaint publication process on the availability of investigative records for copying and inspection.

Finally, unrelated to the above, if the Commission proceeds with rule making to increase the brief hearing penalty authority to \$1,000, it may also wish to consider adjusting the brief hearing penalty schedules in WAC 390-37-155 (for electronic filing), WAC 390-37-160 (for F-1 reporting), WAC 390-37-165 (for C-1 and F-1 reporting), WAC 390-37-170 (for L-2 reporting), and WAC 390-37-175 (for L-3 reporting). Currently, those penalty schedules allow for a maximum penalty of \$500 for a respondent's third violation. The Commission may also wish to leave these penalty schedules as they are, and reserve penalties above \$500 for violations not addressed in the schedules (e.g., late contribution or expenditure reporting, uses of public facilities to assist a candidate's campaign, etc.). Copies of the existing penalty schedules are enclosed for the Commission's reference.

Enclosures:

Draft Amended Rules

WAC 390-37-010 Enforcement procedures—General.

WAC 390-37-050 Enforcement procedures—Respondent's notice of complaint.

WAC 390-37-060 Enforcement procedures—Alternative Responses to Non-compliance—Investigation of complaints—Initiation of hearing (adjudicative proceeding).

WAC 390-37-070 Enforcement procedures—Complaints dismissed by executive director.

WAC 390-37-103 Commission options following receipt of a staff report on alleged violations.

WAC 390-37-140 Brief enforcement hearings (adjudicative proceedings)—Authority.

WAC 390-37-142 Brief enforcement hearing (adjudicative proceeding)—Procedure.

Draft New Rules

WAC 390-37-055 Alternatives to adjudicative proceedings in response to non-compliance.

WAC 390-37-056 Alternative Responses to Non-Compliance - Goals and

Objectives – Factors to be Considered.
WAC 390-37-057 Notices of correction - Process.
WAC 390-37-058 Deferred enforcement - Process.

Existing Rules – Brief Hearing Penalty Schedules

WAC 390-37-155 Electronic filing brief enforcement hearing penalty schedule.
WAC 390-37-160 Statement of financial affairs (F-1) penalty schedule.
WAC 390-37-165 Candidate registration statement (C-1)/candidate statement of financial affairs (F-1) penalty schedule.
WAC 390-37-170 Lobbyist monthly expense report (L-2) penalty schedule.
WAC 390-37-175 Lobbyist employer report (L-3) penalty schedule.