

Rule Making



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: pdcc@pdcc.wa.gov • Website: www.pdcc.wa.gov

To: Members, Washington State Public Disclosure Commission
From: Lori Anderson, Communications & Training Officer
Date: October 2, 2015
Re: Rule Making – Enforcement Alternatives – Discussion and Possible Approval of Draft Proposed Rule Language

Agenda Item

At the October 5, 2015, special meeting, the Commission will consider proposed draft language for:

PROPOSED NEW RULES

- WAC 390-37-061 Alternative responses to noncompliance – Goals and objectives – Factors to be considered, and
- WAC 390-37-075 Deferred enforcement – Process.

PROPOSED AMENDED RULES

- WAC 390-37-060 Enforcement procedures – Investigation of complaints – Initiation of hearing (adjudicative proceeding),
- WAC 390-37-070 Enforcement procedures – Complaints dismissed by executive director,
- WAC 390-37-090 Cases resolvable by stipulation prior to an enforcement hearing (adjudicative proceeding, or by other alternative dispute mechanisms, and
- WAC 390-37-103 Commission options following receipt of a staff report on alleged violations.

Background

For the last several months, the Commission has engaged in rule making intended to establish more efficient and customer friendly alternatives to adjudicative proceedings for resolving complaints alleging minor or technical violations of RCW 42.17A. During the September 24 public hearing to consider adopting the proposals, the Commission heard testimony that the proposed rules appeared to delegate to the executive director the Commission's authority to determine a violation of RCW 42.17A, which is prohibited by RCW 4217A.110(2).

The Commission directed staff to revise the proposals so that authority to determine a violation is not delegated. The Commission also expressed a desire to have the new rules take effect in January. To accommodate a December hearing during the regular commission meeting and allow a January effective date, notice of the hearing must be filed before noon on October 21.

Revisions - Substantive

<u>Previously Considered Proposal</u>	<u>Purpose</u>	<u>Revision</u>
new WAC 390-37-055	sets out alternatives	<ul style="list-style-type: none"> Provisions inserted in proposed WAC 390-37-060. Proposed .055 eliminated.
new WAC 390-37-056	Establishing factors under which alternatives can be used	<ul style="list-style-type: none"> Revised to clarify that the executive director does not determine whether a violation occurred by authorizing an alternative resolution. Renumbered to .061
new WAC 390-37-057	Establish notices of correction as a new alternative.	<ul style="list-style-type: none"> Provisions inserted in proposed WAC 390-37-060 that allows resolution by warning letter to be conditioned upon the respondent's reaching or maintaining compliance. Proposed .057 eliminated.
new WAC 390-37-058	Establish deferred enforcement process	<ul style="list-style-type: none"> Commission consent is required. Renumbered to .075

Revisions - Other

Renumbering the remaining proposed new rules necessitated revisions to other proposed amendments under consideration. Staff is also taking the opportunity to make non-substantive housekeeping changes while the rules are open.

Commission Action

Staff believes these revisions appropriately respond to the concerns expressed during the hearing, streamline the proposed rules, and make the Commission's intent more clear.

Staff requests the Commission approve the attached draft proposed language for new WACs 390-37-061 and 390-37-075 and draft proposed amendments to WACs 3900-37-010, 390-37-060, 390-37-070, 390-37-090, 390-37-103amend WAC 390-18-050. The proposed amendments clarify that commercial advertisers records related to electioneering communications are subject to the public inspection provisions of RCW 42.17A.345. Once approved, staff will file a notice of hearing with the code reviser to schedule a December 2015 hearing.

Attachments: Revised draft proposed rules

NEW SECTION

WAC ~~((390-37-056))~~ 390-37-061 Alternative Responses to Non-Compliance - Goals and Objectives - Factors to be Considered. (1) In considering appropriate responses to non-compliance with RCW 42.17A or WAC 390, the commission considers whether a formal investigation or adjudicative proceeding constitutes an efficient and effective use of public funds; or whether an alternative response better meets the commission's mission and public expectations by allowing the expedited resolution of minor ~~((complaints))~~ and technical alleged violations, and the focusing of staff and commission resources on major alleged violations of RCW 42.17A and WAC 390.

(2) In authorizing an alternative response to alleged non-compliance ~~((for minor violations as provided by WAC 390-37-055))~~, the executive director may consider the nature of the alleged violation and any relevant circumstances, including but not limited to the factors described in (3) of

this section; Provided that if, after weighing the relevant circumstances and factors, the executive director determines that there is evidence ~~((of complex or significant violations))~~ that so warrants, the allegations shall be addressed through a formal investigation as provided by WAC 390-37-060.

(3) The factors the executive director may consider in ~~((authorizing))~~ permitting an alternative response to non-compliance, a formal investigation, or an adjudicative proceeding include, but are not limited to:

<i>An alternative response to non-compliance may be appropriate if...</i>	<i>A formal investigation and possible adjudicative hearing may be appropriate if...</i>
It appears that non-compliance resulted from a good-faith error, omission, or misunderstanding.	It appears that the non-compliance may have resulted from a knowing or intentional effort to conceal, deceive or mislead, or violate the law or rule, or from collusive behavior.
The respondent is a first-time filer.	The respondent has experience in complying with the applicable requirements.
The respondent's compliance history indicates the non-compliance was isolated or limited in nature, and not indicative of systematic or on-going problems.	The non-compliance is part of a pattern of violations by the respondent, or in the case of a political committee or other entity, part of a pattern of violations by the respondent's officers, staff, principal decision-makers, consultants, or sponsoring organization.
The impact of the non-compliance on the public was minimal.	The non-compliance deprived the public of timely or accurate information during a time-sensitive period in a campaign, legislative session, etc., or otherwise had a significant or material impact on the public.

<p>The respondent's organization or campaign was relatively unsophisticated or small.</p>	<p>The respondent or the respondent's organization or campaign demonstrated a relatively high level of sophistication, or was well-financed and staffed.</p>
<p>The total expenditures by the respondent in the campaign or statement period were relatively modest.</p>	<p>The campaign or statement period involved significant expenditures by the respondent.</p>
<p>The amount of late-reported activity, or the duration of the untimely disclosure, was small in proportion to the amount of activity that was timely reported by the respondent.</p>	<p>The late or unreported activity was significant in amount or duration under the circumstances, including in proportion to the total amount of expenditures by the respondent in the campaign or statement period.</p>
<p>There is no evidence that any person, including an entity or organization, benefitted politically or economically from the non-compliance.</p>	<p>It appears the respondent or anyone else benefitted politically or economically from the non-compliance.</p>
<p>Personal emergency or illness of the respondent or member of his or her immediate family contributed to the non-compliance.</p>	<p>There are no circumstances that appear to mitigate or appropriately explain the late reporting or other non-compliance.</p>
<p>Other emergencies such as fire, flood, or utility failure prevented compliance.</p>	<p>There are no circumstances that appear to mitigate or appropriately explain the late reporting or other non-compliance.</p>
<p>Commission staff or equipment error, including technical problems at the agency prevented or delayed electronic filing.</p>	<p>Commission staff or equipment error did not appear to contribute to the non-compliance.</p>
<p>The non-compliance resulted from the respondent's demonstrated good-faith uncertainty concerning staff guidance or instructions, a lack of clarity in the rule or statute, or uncertainty concerning the valid application of the commission's rules.</p>	<p>It appears the respondent understood the application of staff's guidance or instructions, and did not dispute the valid application of the commission's rules.</p>
<p>The respondent quickly took corrective action or initiated other remedial measures prior to any complaint, or when non-compliance was brought to respondent's attention (e.g., filing missing reports, amending incomplete or inaccurate reports, returning prohibited or over limit contributions).</p>	<p>The respondent appeared negligent or unwilling to address the non-compliance.</p>

<p>The respondent made a good-faith effort to comply, including by consulting with commission staff following a complaint and cooperating during any preliminary investigation, or demonstrated a wish to acknowledge and take responsibility for the alleged violation.</p>	<p>The respondent failed to provide a timely or adequate response to the complaint, or was otherwise uncooperative.</p>
<p>The alleged violation was or is being addressed under an analogous local ordinance, regulation, or policy.</p>	<p>The Commission has primary jurisdiction over the alleged violation.</p>
<p>The alleged violation presents a new question or issue for the Commission's interpretation.</p>	<p>The alleged violation does not present a case of first impression.</p>
<p>Other factors relevant to a particular case</p>	

NEW SECTION

WAC ~~((390-37-058))~~ 390-37-075 Deferred Enforcement -
Process. (1) As provided by ~~((WAC 390-37-055))~~ 390-37-060,

~~((and considering the factors set forth in WAC 390-37-056(3),
the executive director))~~ the chair or the chair's designee
commissioner may authorize deferred enforcement: ~~((as an
alternative response to non-compliance in lieu of a formal
investigation, adjudicative proceeding, or both.~~

~~(2) The executive director may authorize deferred
enforcement:~~

~~(a) following an initial review of a complaint, when
minor or technical violations by the respondent are readily
apparent); or~~

~~(b))~~ (a) following a formal investigation, in lieu of
a notice of administrative charges for an adjudicative
proceeding; or

~~((e))~~ (b) after a notice of administrative charges,
prior to an adjudicative proceeding.

~~((3))~~ (2) The executive director will recommend to the chair the conditions of a deferred enforcement. The conditions shall be clearly defined and agreed to by the respondent, along with the consequences for failure to meet the conditions of the deferral. Negotiations regarding deferred enforcement shall be informal and without prejudice to rights of a participant in the negotiations.

~~((4))~~ (3) With ~~((an agreement between the respondent and commission staff))~~ concurrence of the chair or the chair's designee commissioner, the executive director or designee (commission staff) shall memorialize the pertinent facts and the conditions of the deferral in writing to the respondent, together with the consequences for failure to meet the conditions of the deferral. The agreement shall be signed by staff and the respondent. Staff shall notify the respondent that any administrative charges issued in the matter are stayed pending satisfaction of the deferral conditions.

(5) Once the deferral conditions are met, the complaint shall be dismissed with no further investigation or action as provided by WAC 390-37-070.

(6) If the deferral conditions are not met, the complaint shall proceed in accordance with WAC 390-37-060.

AMENDATORY SECTION (Amending WSR 12-03-002, filed 1/4/12, effective 2/4/12)

WAC 390-37-010 Enforcement procedures—General. This chapter provides the procedures for adjudicative proceedings (enforcement hearings) in compliance cases under the commission's jurisdiction. The procedures are also governed by RCW 42.17A.755, and the adjudicative proceedings provisions of chapter 34.05 RCW. Unless they differ or are otherwise specifically addressed in this chapter, the procedure, are supplemented by the model rules of procedure in chapter 10-08 WAC. In lieu of holding an adjudicative proceeding or issuing an order as a result of such a proceeding, the commission may refer the matter to the attorney general or other law enforcement agency pursuant to RCW 42.17A.105(5) and 42.17A.755.

In addition, the procedures for requesting a hearing on a petition to modify or suspend reporting requirements are provided in RCW 42.17A.120 and chapters 390-24 and 390-28 WAC.

The policy of the commission (~~((shall be))~~) is to facilitate the resolution of compliance matters in a fair and expeditious manner. The commission encourages the parties to consider alternative resolution or partial resolution procedures (~~((such as stipulations under WAC))~~) as

set forth in (~~WAC 390-37-057, 390-37-058,~~) WACs 390-37-060, 390-37-075 or 390-37-090, when appropriate. Informal settlements are encouraged by RCW 34.05.060.

[Statutory Authority: RCW 42.17A.110. WSR 12-03-002, § 390-37-010, filed 1/4/12, effective 2/4/12. Statutory Authority: RCW 42.17.370. WSR 03-22-065, § 390-37-010, filed 11/4/03, effective 12/5/03; Order 79, § 390-37-010, filed 6/25/76.]

AMENDATORY SECTION (Amending WSR 03-22-065, filed 11/4/03, effective 12/5/03)

WAC 390-37-050 Enforcement procedures—Respondent's notice of complaint. Within ten business days of receipt by the commission of a complaint which on its face appears to have merit, the commission shall notify the respondent that a complaint has been filed. The notice shall set forth the nature of the complaint and its origin (citizen complaint, commission or other) and the statutory provision alleged to have been violated. If (~~commission staff has issued~~) an alternative response to the alleged violation has been issued as provided by this chapter, the notice shall also describe that response, including any conditions the respondent is required to meet.

[Statutory Authority: RCW 42.17.370. WSR 03-22-065, § 390-37-050, filed 11/4/03, effective 12/5/03. Statutory Authority: RCW 42.17.370(1). WSR 79-08-046 (Order 79-03), § 390-37-050, filed 7/19/79; Order 81, § 390-37-050, filed 7/22/76.]

AMENDATORY SECTION (Amending WSR 12-18-015, filed 8/24/12, effective 9/24/12)

WAC 390-37-060 Enforcement procedures—Alternative responses to noncompliance—Investigation of complaints—Initiation of ((hearing
(+) adjudicative proceeding((+)). (1) Upon receipt of a complaint, the

~~((following will occur:~~

~~(a) The))~~ executive director will conduct an initial review of the complaint to determine ~~((if it is))~~ what action will be taken.
~~((obviously unfounded or frivolous or appears on its face to have merit.))~~ An initial review is a preliminary investigation to determine whether the allegations are limited to minor or technical violations of chapter 42.17A or if there is sufficient ground indicating that a material violation of chapter 42.17A RCW may have occurred so as to warrant a formal investigation. ~~((and/))~~ ~~((or the respondent may not be in substantial compliance with the relevant statutes and rules))~~.

(a) The executive director shall return any complaint that is obviously unfounded or frivolous. The executive director will inform the complainant why the complaint is returned.

(b) The executive director may resolve any complaint that alleges minor or technical violations of chapter 42.17A by issuing a formal written warning. If the resolution is conditioned upon the respondent reaching or maintaining compliance, specific expectations and any deadlines should be clearly explained in the written warning. A respondent's failure to meet conditions may result in a complaint being re-opened.

(c) The executive director may use the complaint publication process set out in WAC 390-32-030 to resolve any complaint that alleges minor or technical violations of chapter 42.17A RCW.

(d) ~~((Whenever))~~ The director shall initiate a formal investigation whenever an initial review of a complaint indicates that a material violation of chapter 42.17A RCW may have occurred ~~((and/))~~ ~~((or the respondent may not be in substantial compliance with the relevant statutes and rules, the executive director may))~~ ~~((direct a formal investigation be conducted.~~

~~((c))~~:

~~(i) Resolve the complaint through an alternative response as provided in WAC 390-37-055; or~~

~~(ii) Direct a formal investigation be conducted.)~~

(2) If the executive director determines a formal investigation will require the expenditure of substantial resources, the executive director may request review and concurrence by the commission before proceeding.

~~((2))~~ (3) The executive director shall initiate an adjudicative proceeding or provide a report to the commission whenever ~~((an))~~ a formal investigation reveals facts that the executive director has reason to believe are a material violation of chapter 42.17A RCW and do not constitute substantial compliance.

~~((3))~~ (4) The respondent and complainant shall be notified of the date of the adjudicative proceeding or a report on an enforcement matter no later than ten calendar days before that date. The notice shall contain the information required by RCW 34.05.434~~((The complainant shall also be provided a copy of this notice))~~, the staff investigative report, and any charges to be adjudicated. The notice, whenever possible, will be delivered electronically.

~~((4))~~ (5) It is the policy of the commission during the course of any investigation that all records generated or collected as a re-

sult of that investigation are exempt from public inspection and copying under RCW 42.56.240(1).

(a) The records are exempt until:

~~(i) ((The enforcement matter is scheduled for an adjudicative proceeding;~~

~~(ii) After receiving a report on an enforcement matter, the commission accepts the investigation as complete and moves the matter forward to an adjudicative proceeding, or dismisses the complaint, or refers the matter to law enforcement authorities under RCW 42.17A.105 or 42.17A.755(3);~~

~~(iii) The commission or chair concur in a dismissal by the executive director; or~~

~~(iv) The commission or executive director otherwise finally disposes of the complaint.)~~ A final staff investigative report is submitted; or

(ii) The executive director issues a final disposition of the complaint through an alternative response as provided in this section.

(b) Without waiving any exemptions from public disclosure that are otherwise available for pending investigations, the commission may make public:

(i) A copy of a complaint filed with or submitted to the commission, including any attachments; ~~((and))~~

(ii) A copy of the Respondent's initial response to a complaint;
and

(iii) Materials concerning an enforcement matter that are placed on the commission's web site with a commission meeting agenda.

(c) If a request is made for any such record that implicates the privacy of an individual as defined in RCW 42.56.050, written notice of the records request may be provided to the individual in order that such individual may request a protective order from a court under RCW 42.56.540.

(d) Certain documents provided to the commission shall be returned to candidates, campaigns, or political committees as required by RCW 42.17A.105 within seven calendar days of the commission's final action upon completion of an audit or field investigation.

[Statutory Authority: RCW 42.56.100, 42.56.040, and 42.17A.110. WSR 12-18-015, § 390-37-060, filed 8/24/12, effective 9/24/12. Statutory Authority: RCW 42.17A.110. WSR 12-03-002, § 390-37-060, filed 1/4/12, effective 2/4/12. Statutory Authority: RCW 42.17.370. WSR 05-11-001, § 390-37-060, filed 5/4/05, effective 6/4/05; WSR 03-22-065, § 390-37-060, filed 11/4/03, effective 12/5/03; WSR 93-24-003, § 390-37-060,

filed 11/18/93, effective 12/19/93; WSR 91-16-072, § 390-37-060, filed 8/2/91, effective 9/2/91. Statutory Authority: RCW 42.17.370(1). WSR 86-04-071 (Order 86-01), § 390-37-060, filed 2/5/86; WSR 84-12-017 and 84-12-029 (Orders 84-03 and 84-03A), § 390-37-060, filed 5/25/84 and 5/29/84; Order 81, § 390-37-060, filed 7/22/76.]

AMENDATORY SECTION (Amending WSR 12-03-002, filed 1/4/12, effective 2/4/12)

WAC 390-37-070 Enforcement procedures—Complaints dismissed by executive director. The executive director, (~~(with the concurrence of the chair or the chair's designee~~ commissioner~~)~~) [~~← restore~~] at any time prior to consideration by the commission, may dismiss a complaint which on its face, or as shown by investigation, does not show reason to believe that a material violation of the sections of chapter 42.17A RCW that are enforced by the commission has occurred (~~(and/or)~~), shows that the respondent is in substantial compliance with the relevant statutes or rules, or shows that formal enforcement action is not warranted.

~~((The dismissal may occur:~~

~~(1) Following an initial review, through an alternative response authorized by the executive director as provided by WAC 390-37-060; or~~

~~(2) Following a formal investigation, with the concurrence of the chair or the chair's designee.))~~

[Statutory Authority: RCW 42.17A.110. WSR 12-03-002, § 390-37-070, filed 1/4/12, effective 2/4/12. Statutory Authority: RCW 42.17.370. WSR 03-22-065, § 390-37-070, filed 11/4/03, effective 12/5/03. Statutory Authority: RCW 42.17.390. WSR 94-05-010, § 390-37-070, filed 2/3/94, effective 3/6/94. Statutory Authority: RCW 42.17.370(1). WSR 86-04-071 (Order 86-01), § 390-37-070, filed 2/5/86; WSR 84-12-017 (Order 84-03), § 390-37-070, filed 5/25/84; Order 81, § 390-37-070, filed 7/22/76.]

AMENDATORY SECTION (Amending WSR 06-14-057, filed 6/29/06, effective 7/30/06)

WAC 390-37-090 ~~((Informal settlement))~~Cases resolvable by stipulation prior to an enforcement hearing (adjudicative proceeding), or by other alternative dispute mechanisms. (1) RCW 34.05.060 authorizes agencies to establish by rule specific procedures for attempting and executing informal settlement of matters. The following procedures are available for informal dispute resolution prior to an adjudicative proceeding that may make more elaborate proceedings under the Administrative Procedure Act unnecessary.

(a) Any enforcement matter before the commission which has not yet been heard in an adjudicative proceeding may be resolved by settlement. The respondent shall communicate his or her request to the executive director or designee (commission staff), setting forth all pertinent facts and the desired remedy. Settlement negotiations shall be informal and without prejudice to rights of a participant in the negotiations.

(b) When the executive director and respondent agree to terms of any stipulation of facts, violations, and/or penalty, commission staff shall prepare the stipulation for presentation to the commission.

(c) Any proposed stipulation shall be in writing and signed by each party to the stipulation or his or her representative. The executive director shall sign for commission staff. Any stipulation to facts (~~and~~), violations, or penalty shall be provided (~~(prior to or at the hearing. Stipulations to penalty shall be provided)~~) by 4:00 p.m. (~~the~~) three business days preceding the hearing. The commission has the option of accepting, rejecting, or modifying the proposed stipulation or asking for additional facts to be presented. If the commission accepts the stipulation or modifies the stipulation with the agreement of the opposing party, the commission shall enter an order in conformity with the terms of the stipulation. If the commission

rejects the stipulation or the opposing party does not agree to the commission's proposed modifications to the stipulation, and if no revised stipulation or staff report is presented to the commission, then an adjudicative proceeding shall be scheduled and held.

(2) Parties are encouraged to be creative in resolving cases without further litigation where appropriate.

(3) Following a stipulation of facts or law, if the commission determines certain sanctions or other steps are required by the respondent as a result of the alternative dispute resolution including stipulations and that it intends to enter an order, and the respondent does not timely raise an objection at the hearing, it shall be presumed that the respondent has waived objections and appeals, and agrees to the entry of the order.

[Statutory Authority: RCW 42.17.370. WSR 06-14-057, § 390-37-090, filed 6/29/06, effective 7/30/06; WSR 05-11-001, § 390-37-090, filed 5/4/05, effective 6/4/05; WSR 03-22-065, § 390-37-090, filed 11/4/03, effective 12/5/03; WSR 91-16-072, § 390-37-090, filed 8/2/91, effective 9/2/91. Statutory Authority: RCW 42.17.370(1). WSR 86-04-071 (Order 86-01), § 390-37-090, filed 2/5/86; WSR 84-12-017 (Order 84-03), § 390-37-090, filed 5/25/84; Order 81, § 390-37-090, filed 7/22/76.]

AMENDATORY SECTION (Amending WSR 12-01-047, filed 12/14/11, effective 1/14/12)

WAC 390-37-103 Commission options following receipt of a staff report on alleged violations. Upon receipt of a staff report concerning alleged violations of those sections of chapter 42.17A RCW that the commission enforces, the commission may:

(1) ~~((Schedule the matter for a hearing (adjudicative proceeding); or))~~ Direct the executive director to issue an alternative response as provided in WAC 390-37-060;

(2) ~~((Issue an order; or))~~ Defer enforcement as provided in WAC 390-37-075;

(3) ~~((Direct the executive director to issue an alternative response as provided in WAC 390-37-060; or))~~ Issue an order; or

(4) Refer the matter or apparent violations to the attorney general or other enforcement agency pursuant to RCW 42.17A.105(5) and 42.17A.750.

[Statutory Authority: RCW 42.17.130 and 42.17.093. WSR 12-01-047, § 390-37-103, filed 12/14/11, effective 1/14/12. Statutory Authority: RCW 42.17.370. WSR 03-22-065, § 390-37-103, filed 11/4/03, effective 12/5/03.]