

**Administrative Procedures Act Petition per RCW 34.05.330
Petition for Amendment of WAC 390-37-060**

Proposed Modification - WAC 390-37-060 – “Public disclosure commission— Case initiation and resolution procedures—Alternative responses to noncompliance—Technical corrections—Investigation of complaints—Initiation of adjudicative proceeding.”

WAC 390-37-060

Case initiation and resolution procedures—Alternative responses to noncompliance—Technical corrections—Investigation of complaints—Initiation of adjudicative proceeding.

...

(1)(d) The executive director may, with the concurrence of the commission chair or the chair’s designee, resolve any complaint that alleges minor 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 will be clearly explained in the written warning. A respondent's failure to meet conditions may result in a complaint being reopened.

...

Background

At the last several meetings, there has been increasing interest from the Commissioners in how agency staff use warning letters to dismiss complaints where there is evidence that a violation has occurred. The Commissioners also recently expressed concern that warnings issued by staff do little to deter future non-compliance, and discussed whether more cases should be brought to the Commission in hearings so that findings of violation could be issued, and fines assessed.

To put it simply, agency staff use warning letters to dismiss complaints when the staff’s investigation determines that there was a violation that occurred, but staff believe that it would be more expedient to simply dismiss the case as opposed to taking it to a hearing before the Commission. Because staff dislike having to do the work associated with taking cases to the Commission, this is the most common outcome for cases where a violation occurred. Not surprisingly, by consistently issuing dismissals in cases where violations have occurred, agency staff have fostered a regulatory environment where noncompliance has become widespread.

After all, if hardly anyone ever gets fined when they fail to file reports on time, why should filers bother to spend time, money, or energy to comply with the deadlines? Why waste money by hiring a treasurer? Why take the time to understand what the law requires and comply if there are no consequences for noncompliance?

Why this proposed change?

This proposed change is intended to create a small but meaningful degree of oversight from the Commission with respect to how agency staff use warning letter dismissals in cases where a violation has occurred.

Under this proposal, if agency staff want to dismiss a complaint with a warning letter in a case where a violation has occurred, they will first have to seek approval from the chair of the Commission. If the chair is not convinced that it is appropriate for staff to use a warning letter to dismiss a case where a violation has occurred, the case will proceed to adjudication.

Change is warranted for this reason: agency staff simply have too great of an incentive to dismiss meritorious complaints as opposed to pursuing penalties. While it is obviously far more expedient for staff to dismiss a meritorious complaint than it is to prosecute it, this has fostered an environment where noncompliance is widespread. When staff consistently dismiss complaints when there is evidence of a violation, the Commissioners are effectively unable to weigh in on what the appropriate penalty in a particular case would be. Additionally, because these cases are not elevated to the Commissioners' attention, they are unable to weigh in on what the root problem of the noncompliance may be and what potential solutions might be considered.

The warning letter dismissal was originally intended to be a tool for the agency to deal with instances where violations were truly minor in nature and of no consequence to the public. Instead, the warning letter dismissal has become a tool for agency staff to effectively ignore and paper-over widespread issues of noncompliance in the filing community – especially as it relates to late and non-filed C3s/C4s.

Once a complaint has been dismissed with a warning letter, my understanding is that the principles of res adjudicata apply and the Commission has no ability to weigh in or change the outcome of that case.

The FCPA specifically vests the Commissioners with management and oversight of the agency, including the ability to determine what fines are appropriate when a violation has occurred. When the Commission is effectively prevented from being able to determine whether it is appropriate to dismiss a particular case when the respondent committed a violation, the Commission is not able to properly exercise that oversight.

Conclusion

To state the obvious: no one likes monetary penalties, and it would be far better if everyone just complied with the law and filed reports on time. However, the reality is that when the other methods fail (like reminders and compliance training), monetary penalties are pretty much the only tool that the agency has to incentivize filers to follow the law.

If hardly anyone ever gets fined when they fail to file reports on time, why should filers bother to spend time, money, or energy to comply with the deadlines? Why waste money on a treasurer? Why take the time to understand what the law requires and comply if there are no consequences for noncompliance?

Former PDC Commissioner Russ Lehman recently weighed in on the agency's use of warning letters.¹ He noted that warning letter dismissals send a message to the regulated community about what violations they could get away with before the agency seeks actual penalties. He was absolutely right.

The Commission should have meaningful oversight over how the agency staff use warning letter dismissals to ensure that the agency is striking the right balance with respect to how this tool is being used. Adopting this petition as a rule would accomplish that.

¹ <https://www.thejoltnews.com/stories/public-disclosure-commission-failed-to-fulfill-its-mission,11154>



PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE

Print Form

In accordance with [RCW 34.05.330](#), the Office of Financial Management (OFM) created this form for individuals or groups who wish to petition a state agency or institution of higher education to adopt, amend, or repeal an administrative rule. You may use this form to submit your request. You also may contact agencies using other formats, such as a letter or email.

The agency or institution will give full consideration to your petition and will respond to you within 60 days of receiving your petition. For more information on the rule petition process, see Chapter 82-05 of the Washington Administrative Code (WAC) at <http://apps.leg.wa.gov/wac/default.aspx?cite=82-05>.

CONTACT INFORMATION *(please type or print)*

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COMPLETING AND SENDING PETITION FORM

- Check all of the boxes that apply.
- Provide relevant examples.
- Include suggested language for a rule, if possible.
- Attach additional pages, if needed.
- Send your petition to the agency with authority to adopt or administer the rule. Here is a list of agencies and their rules coordinators: <http://www.leg.wa.gov/CodeReviser/Documents/RClist.htm>.

INFORMATION ON RULE PETITION

Agency responsible for adopting or administering the rule: Public Disclosure Commission

1. NEW RULE - I am requesting the agency to adopt a new rule.

The subject (or purpose) of this rule is: _____

The rule is needed because: _____

The new rule would affect the following people or groups: _____

2. AMEND RULE - I am requesting the agency to change an existing rule.

List rule number (WAC), if known: WAC 390-37-060

I am requesting the following change: Requiring the executive director to seek concurrence of the commission chair or the chair's designee prior to dismissing an enforcement case with a warning letter.

This change is needed because: Staff's misuse of warning letters has fostered an environment where noncompliance has become widespread. Also, see attached petition.

The effect of this rule change will be: Increasing filer compliance and improving Commission oversight over the staff.

The rule is not clearly or simply stated: _____

3. REPEAL RULE - I am requesting the agency to eliminate an existing rule.

List rule number (WAC), if known: _____

(Check one or more boxes)

It does not do what it was intended to do.

It is no longer needed because: _____

It imposes unreasonable costs: _____

The agency has no authority to make this rule: _____

It is applied differently to public and private parties: _____

It conflicts with another federal, state, or local law or rule. List conflicting law or rule, if known: _____

It duplicates another federal, state or local law or rule. List duplicate law or rule, if known: _____

Other (please explain): _____