



Item 5a - Staff Memo

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Nicolas Heidorn, Executive Director

TO: Public Ethics Commission
FROM: Nicolas Heidorn, Executive Director
DATE: September 29, 2023
RE: Proposed Per Diem Late Fee Waiver Guidelines

Under the Political Reform Act (PRA) and under the Oakland Master Fee Schedule (MFS), the Public Ethics Commission (PEC or Commission) is generally required to charge a \$10/day fee for late campaign finance and lobbyist statements. (This late filing fee is in addition to any other penalties the PEC's Enforcement Program may bring for missing filing deadlines.) The Executive Director, for good cause, may waive these late fees, subject to certain limitations in State or City law. The City Charter requires the PEC to establish guidelines for the waiver of per diem late fees, which must be posted on the PEC's website, and to establish criteria for a person to appeal the Executive Director's decision to the full Commission.

Staff is recommending that the PEC adopt the attached "Oakland Public Ethics Commission Guidelines for Waiving Late Filing Fees." This report provides a summary and explanation of these guidelines.

Background

A. Charter Requirements. Section 603(f)(5) of the City Charter describes the PEC's responsibilities in imposing lobbying, campaign finance, and government ethics per diem late filing fees. Under the Charter:

- The PEC must establish waiver guidelines and post them online.
- The PEC must prescribe criteria for appealing the Executive Director's decisions to not waive a late filing fee.
- A late filing that triggers the assessment of a fee of \$1,000 or more by the Commission shall be placed on a Commission meeting agenda before issuance of the fee.

Presently, the PEC only imposes per diem late fees for late campaign finance statements. With recent amendments to the Master Fee Schedule, the PEC is now authorized to assess per diem late fees for late lobbying statements. Presently, the PEC does not assess per diem late fees for any other government ethics statements.

B. Campaign Finance Statements. Under state law, candidates and political committees are required to file periodic reports disclosing their campaign activities. For candidates, this generally includes at least two semi-annual reports and two pre-election reports in election years. The PEC is the local filing officer for campaign finance disclosure statements relating to Oakland elections. (OMC 3.12.240(A).) Under Section 91013(a) of the Government Code, a person who files a late campaign finance statement or report after a deadline is liable "in the amount of ten dollars (\$10) per day after the deadline until the statement or report is filed." (See also OMC 3.12.240(D).) The PEC is not required to enforce this

Item 5a - Staff Memo

liability if “on an impartial basis the filing officer determines that the late filing was not willful and that enforcement of the liability will not further the purposes of the” Political Reform Act (PRA). (GC 91013(a).)

However, the PRA prohibits a filing officer from waiving late filing fees a certain number of days after written notice has been sent to the non-filer, depending on the type of statement at issue. The PRA provides:

“no liability shall be waived if a statement or report is not filed within ... five days for a campaign statement required to be filed 12 days before an election, and 10 days for all other statements or reports, after the filing officer has sent specific written notice of the filing requirement.”

Because the PEC’s practice is to provide written notice to campaign statement non-filers on the second day that their statement is late, late fees for second pre-election statements may not be waived after day seven and late fees for other campaign finance reports may not be waived after day 12.

C. Lobbying Statements. Under the Lobbyist Registration Act (LRA), lobbyists are required to file quarterly disclosures of their lobbying activity, which is due 30 days after the end of a quarter. This year, the PEC proposed, and the City Council adopted, amendments to the Master Fee Schedule which imposed a \$10 “Late Fee per day until registration form or report is filed.” At its August meeting, the PEC proposed amendments to the LRA to:

- Incorporate this fee;
- Cap the total fee amount to \$1,000; and
- Permit the Executive Director to “reduce or waive a late filing fee under \$500 if the Executive Director determines that the late filing was not willful and that enforcement will not further the purposes of this Chapter. The Executive Director shall report any reductions or waivers of the late filing fee at the next regular meeting of the Public Ethics Commission.”

(Proposed OMC 3.20.225(B).) These proposed amendments are being considered by the City Council.

Other Jurisdictions’ Guidelines

Staff has identified a number of jurisdictions that have adopted late filing fee waiver guidelines. Generally, jurisdictions have adopted a strict approach, only waiving fees where the late filing was largely outside of the control of the filer. For example, [San Francisco](#) only permits a fee waiver for late campaign finance reports in cases of “incapacitation for medical reasons, hospitalization, involvement in an accident, and death” or “other unique, unintentional factors beyond the filer’s control.” The [Fair Political Practices Commission](#) (FPPC) has adopted an almost identical standard for the late filing of Form 700 Statements of Economic Interest.

The California [Secretary of State](#), as to late campaign finance and state lobbying statements, and the [City of Laguna Beach](#), for PRA-required forms, have adopted a somewhat more lenient standard. Full waivers are only available if there is an “[u]nplanned medical incapacity or death of the filer or the filer’s immediate family” or for the “[u]navailability of records.” However, first-time filers may have 50% of their fee waived if “the filer was not using a professional or experienced treasurer at the time

Item 5a - Staff Memo

of the filing obligation and the filer had a comparatively low level of activity that they failed to report in a timely manner” and the filer never filed statements previously.

Proposed Oakland PEC Guidelines

Similar to the guidelines adopted by the Secretary of State, the FPPC, San Francisco, and Laguna Beach, the proposed PEC Guidelines would require that a filer demonstrate compelling reasons, beyond the filer’s control, to qualify for a good cause fee waiver. The proposed Guidelines include examples of good cause which expressly includes if the filer or their immediate family are medically incapacitated, hospitalized, or involved in a serious accident or are a victim of crime, or if the filer’s files are unavailable due to theft or destruction caused by a natural disaster, for example. The proposed Guidelines also include examples of reasons that would not constitute good cause, such as a filer not being aware of the deadline or being on vacation.

However, to alleviate some of the strictness of this standard, staff is also proposing that there be a presumption of good cause for a late filer who has no prior late filings and who is only 1-5 days late for a second campaign pre-election statement, and 1-7 days for all other campaign or lobbying statements. Where filings are only a few days late, and the filer has no prior record of late filings, it is unlikely that the violation was intentional; the harm to the public from the delayed reporting is likely to be small or non-existent; and the administrative cost of imposing and collecting a fee may exceed the value of the fee.

State law restricts the Executive Director’s ability to waive late campaign filing fees more than five days after written notice has been provided to the filer for second campaign pre-election statements and more than ten days after written notice for other campaign statements. As described above, because the PEC provides notice of a late filing on day two, the Director is unable to waive fees after day seven for second campaign pre-election statements and after day 12 for all other campaign statements. Those limitations are noted in the proposed Guidelines.

Under the proposed LRA amendments, recently recommended to the City Council by the PEC, the Executive Director may only waive late fees of less than \$500 (i.e. of less than 50 days). That proposed limitation is incorporated into these proposed Guidelines, prohibiting waiver after 49 days.

The chart below, reproduced in the proposed Guidelines, summarizes when the Executive Director may waive per diem late filing fees:

2nd Pre-Election Statement	All Other Campaign Statements	Lobbying Statements
<ul style="list-style-type: none"> • 1-5 days late: ~ <i>No priors</i>: good cause presumed ~ <i>Priors</i>: for good cause • 6-7 days late: for good cause • 8+ days late: no waiver 	<ul style="list-style-type: none"> • 1-7 days late: ~ <i>No priors</i>: good cause presumed ~ <i>Priors</i>: for good cause • 8-12 days late: for good cause • 13+ days late: no waiver 	<ul style="list-style-type: none"> • 1-7 days late: ~ <i>No priors</i>: good cause presumed ~ <i>Priors</i>: for good cause • 8-49 days late: for good cause • 50+ days late: no waiver

The Guidelines also adopt procedures for appealing the Executive Director’s decision not to waive filing fees to the full Commission. Under the proposed Guidelines, an appeal must be made within 14 days of being notified of the Executive Director’s decision. The appeal would be scheduled for the next

regular PEC meeting and the appellant would be required to appear in person to answer questions from the Commission. The PEC would review the Director’s decision under an abuse of discretion standard.

Adopting Late Filing Fee Guidelines

Under OMC 2.24.020, the PEC’s adoption of “policies, procedures, and regulations for the conduct of its business” must be transmitted to the City Council within seven days of adoption. Within 60 days of adoption, the City Council may, by a two-thirds vote, veto those policies, procedures, and regulations. It is unclear whether the adoption of waiver guidelines falls under this requirement. However, in an abundance of caution, staff plans to transmit these procedures to the City Council.

Staff Recommendation

Staff recommends that the Commission adopt the attached “Oakland Public Ethics Commission Guidelines for Waiving Late Filing Fees.”

Additional Attachment: Oakland Public Ethics Commission Guidelines for Waiving Late Filing Fees