



Item 5a - Staff memo

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TO: Public Ethics Commission
FROM: Simon Russell, Enforcement Chief
DATE: September 22, 2023
RE: Proposed amendments to PEC Complaint Procedures and Penalty Guidelines re: expanding violation types eligible for streamline settlement; authorizing Executive Director to enter streamlined settlement agreements on own authority; authorizing use of diversion to resolve streamlined cases; for discussion and vote at the October 11, 2023, meeting of the Public Ethics Commission

OVERVIEW

PEC staff is proposing changes to how the Commission processes what are known as “streamline cases.” These are cases involving common, low-level types of violations such as the late filing of a Form 700 or campaign finance report, where no aggravating factors exist. The purpose of the streamline program is to facilitate a quick and predictable resolution of these low-level matters, in order to free up staff resources for more serious cases.

This report summarizes proposed amendments to the PEC’s Complaint Procedures and Penalty Guidelines that would do the following:

1. Expand the types of violations that may be resolved by way of a streamlined settlement agreement;
2. Clarify the circumstances under which particular types of violations may be eligible for resolution by way of a streamlined settlement agreement;
3. Authorize the Executive Director to enter most streamlined settlement agreements on their own authority, without the necessity of a vote by the Commission (as is currently required for all case resolutions, streamlined or not);
4. Require that Commission staff inform the Commission of any such streamlined settlement agreements entered into by the Executive Director; and
5. Authorize use of diversion to resolve some streamlined cases.

The goal of these changes is to allow Enforcement to initiate and resolve a larger volume of low-level cases, with the aim of fostering a Citywide culture of compliance in a manner that is not overly punitive nor a substantial drain on limited PEC staff resources.

Because the Complaint Procedures and Penalty Guidelines are issued by the PEC itself, the Commissioners may vote to amend them without the necessity of a subsequent vote by the City Council (as is needed for ordinance changes) or adoption by Oakland voters via ballot measure (as is needed for City Charter changes). However, should the Commission vote to adopt any of the changes being proposed here by staff, the City Council must be notified and given a 60-day window to reject the proposed changes.

BACKGROUND: ENFORCEMENT’S STREAMLINE AND DIVERSION PROGRAMS

“Streamline” cases are those involving the most minor types of violations over which the PEC has enforcement jurisdiction. Currently, these involve the late filing of required forms (e.g. Form 700 or campaign finance statements) or the receipt of impermissible but low-value gifts. They are also cases in which no aggravating factors are present. For example, while the late filing of a Form 700 might be considered a minor violation, it would be an aggravating factor (and therefore not a streamline case) if it turned out that the late filer also had an unreported source of income that created a conflict of interest in their job. Typically, the respondent in a streamline case has never had a prior violation of a similar type, and wants to work with Commission staff in order to quickly resolve the matter.

These types of cases are called “streamline” because the PEC endeavors to resolve them quickly in exchange for a minor penalty. This is possible for two reasons. First, we have Penalty Guidelines that provide a clear timetable and penalty tiers for these kinds of cases. And second, we have also developed a stripped-down stipulation template that is less detailed than the ones staff prepares to resolve “mainline” cases (where the facts of the case are necessarily more complicated, and therefore require more description and analysis).

However, streamline settlement agreements must still be approved by the full Commission at one of its public meetings, just as in a mainline case. And only the following types of cases are currently eligible for streamlined resolution under the Penalty Guidelines:

- a. Form 700 Non-Filer and Non-Reporter (GEA § 2.25.040);
- b. Gift Restrictions (GEA § 2.25.060C);
- c. Form 301 Non-Filer (OCRA § 3.12.190); and
- d. Campaign Statement/Report Non-Filer and Non-Reporter (OCRA § 3.12.240);

The streamline program was created in 2015 when the PEC adopted its Penalty Guidelines. It is not mentioned in the PEC's Complaint Procedures, which govern how complaints and cases are processed.

In 2020, the PEC amended its Complaint Procedures in order to allow certain cases to be resolved via diversion (usually in the form of a training). Similar to the streamline program, it was intended to be used in cases involving less-serious violations. However, neither the Complaint Procedures nor the Penalty Guidelines were amended to make clear that diversion could be used to resolve streamline cases in addition to mainline ones.

PROPOSED AMENDMENTS TO THE PROGRAMS

In the years since the streamline program was initiated, Enforcement has found that it frequently encounters certain types of low-level violations that are not included in the current version of the streamline program. These include minor campaign contribution limit violations and minor misuse of City resources, among others. More often than not, these are straightforward cases with no significant aggravating factors, and would therefore be ideal for streamline resolution.

Enforcement has also found that some of our current procedural requirements can frustrate the purpose of the streamline program. Aside from lower penalties, the main advantage to a streamline program for respondents is its predictability – knowing that a matter will be resolved quickly, discretely, and on definite terms. And for staff, the main advantage is the ability to quickly resolve simple cases without expending the full amount of resources necessary for a mainline case.

However, the requirement that streamlined stipulations be finalized through a vote by the full Commission at a public meeting results in a process that can be uncertain and intimidating for respondents. It can also be confusing for respondents who are unfamiliar with the PEC and don't understand why staff can't simply execute an agreement with them, among other inconveniences (e.g. the necessity of obtaining a cashier's check for the penalty amount prior to the full Commission meeting, instead of paying by personal check). For some respondents, this can make them reluctant to engage in the process at all, with the result that staff must spend more time trying to contact and follow up with them. It also requires staff to invest limited resources on the preparation and presentation of these cases at Commission meetings, just as it would with a mainline case.

Staff is aware that certain types of streamline cases might merit closer scrutiny via a full Commission vote. For example, streamline cases involving elected officials or senior City staff tend to be of heightened public interest, even if the underlying violation is not serious. And even for streamline cases involving ordinary respondents, clear eligibility criteria will be

necessary to ensure that only the most straightforward and uncontroversial cases would be resolved without a Commission vote.

Finally, staff has often found that low-level violations occur because the respondent is simply unfamiliar with the law in question. In these instances, an ideal resolution may be for the respondent to take a diversion training rather than pay a fine; but this is not expressly given as an option for resolution under the current streamline program.

For these reasons, staff is recommending changes to the streamline program in order to address these concerns. Attached to this memo are red-lined versions of the PEC's Complaint Procedures and Penalty Guidelines, including the specific changes being recommended by staff. A summary of the proposed changes is as follows:

For the streamline program:

- Allowing the Executive Director to enter most streamline settlement agreements on their own authority, without requiring a vote by the full Commission.
- All streamline settlement agreements will be reported to the Commission at the next PEC meeting, but no vote will be required because the agreements are already final.
- Notwithstanding the above, still requiring Commission approval for streamline cases involving the following types of respondents: elected City officials and their Chiefs of Staff; OUSD Board members; any City Department Director; or campaigns that have received or spent more than \$50,000 in the prior year.
- Adding the following types of violations for streamline eligibility: Misuse of City Resources, Contribution Limit Violations, Contractor Contribution Prohibition, Campaign Statement Non-Filing and Mis-Reporting, Lobbyist Registration Non-Filing, and Lobbyist Report Non-Filing and Mis-Reporting.
- Clarifying the circumstances under which those violations will be eligible for streamline settlement. In addition to the requirement that no aggravating factors be present, the following eligibility criteria are proposed (depending upon the type of violation):

Violation Type	Criteria Making a Case Eligible For Streamline Settlement
Form 700 Non-Filer	The form in question is no more than six months late. ¹
Form 700 Non-Reporter (i.e., someone files a Form 700 but fails to include required information, such as a source of income or a gift)	The unreported interest does not give rise to a reasonable likelihood or appearance of a conflict of interest or undue influence over the respondent’s exercise of their official duties.
Misuse of City Resources	The total value of misused City resources is \$100 or less and does not involve campaign activity.
Gift Restrictions (i.e., receiving a gift with a value over the legal limit)	The aggregate amount of the gift(s) from a single source is no more than \$250 over the legal limit, the source of the gift(s) was not a restricted source or a lobbyist, and the gift does not give rise to a reasonable likelihood or appearance of a conflict of interest or undue influence over the Respondent’s exercise of their official duties.
Making or Receiving a Campaign Contribution Over the Legal Limit	The total amount of the aggregate contributions from a single source in excess of the contribution limit is \$250 or less.
City Contractor Making a Campaign Contribution	The total amount of the aggregate contributions from a single prohibited source or its principals is \$250 or less.
Form 301 Non-Filer (i.e., the form that allows a candidate to accept contributions at the higher limit in exchange for abiding by the spending limit) ²	The form in question is no more than ninety (90) calendar days late.

¹ This will apply only to Form 700s due in 2024 and later. This year (2023), Enforcement may use streamlined settlement for Form 700s that are more than six months late, as we work with the City Clerk’s office to obtain regularly-updated data on late-filers (not previously available to the PEC, which is not the filing officer for Form 700s) and make City staff aware of our intentions to broadly enforce the Form 700 requirement and make streamline settlement available as an inducement to file.

² Measure W (2022) eliminated the two-tier contribution limit system, and therefore Form 301s are not currently in use. But given the delayed implementation of the Democracy Dollars program, we are keeping this violation type in the Penalty Guidelines until it is clear that Form 301s will no longer be necessary.

<p>Non-Filing or Mis-Reporting on a Pre-Election Campaign Statement (i.e., the campaign finance reports that must be filed every few weeks before an election)</p>	<p>The report is no more than thirty (30) calendar days late and the unreported activity does not exceed \$5,000 in either contributions raised or expenditures made.</p>
<p>Non-Filing or Mis-Reporting on a Semiannual Campaign Statement (i.e., the campaign finance reports that must be filed every six months during non-election periods)</p>	<p>The report is no more than one-hundred and eighty (180) calendar days late and the unreported activity does not exceed \$5,000 in either contributions raised or expenditures made.</p>
<p>Non-Filing or Mis-Reporting on a Form 496 or 497 (i.e., the campaign finance reports that must be filed within 24 hours of receiving a large contribution or putting out an “independent expenditure” such as a mailer)</p>	<p>The report is no more than seven (7) calendar days late, the unreported activity does not exceed \$10,000 in either contributions raised or expenditures made, and the report is filed before the date of the election.</p>
<p>Lobbyist Registration Non-Filer</p>	<p>The registration form is no more than one-hundred and eighty (180) days late, and the total compensation received for previously-unreported lobbying does not exceed \$2,000 in a single quarter or, in the case of a salaried lobbyist, the total pro rata share of their salary attributable to lobbying activity over the unreported period does not exceed \$2,000 in a single quarter.</p>
<p>Lobbyist Report Non-Filer and Non-Reporter (i.e., a lobbyist is registered but fails to file their quarterly report of their clients and compensation)</p>	<p>The report in question is no more ninety (90) days late, and total compensation received for unreported lobbying activity is \$2,000 or less or, in the case of a salaried lobbyist, the total pro rata share of their salary attributable to lobbying activity over the unreported period does not exceed \$2,000.</p>

For the diversion program:

- Clarifying that diversion may be used to resolve some streamline cases.
- Clarifying that diversion may be used to resolve staff-initiated cases, and not just those initiated by a public complaint.
- Harmonizing the procedural requirements of the diversion program with the proposed changes to the streamline program procedures (e.g. not requiring the Commission to approve diversion agreements in streamline cases resolved under the Executive Director’s authority).

The proposed changes to the Complaint Procedures and Penalty Guidelines also include some non-substantive amendments for clarity and consistency (e.g. referring to the Oakland Campaign Reform Act as “OCRA” in the Penalty Guidelines instead of “CRA,” because the latter acronym is rarely used elsewhere).

STAFF RECOMMENDATION AND NEXT STEPS

Staff presents these proposed amendments to the Complaint Procedures and Penalty Guidelines to the Commission and recommends approval.

If the Commission approves these amendments, they will be forwarded to the City Council. No Council vote is necessary for their adoption; however the Council will have sixty days to exercise a veto over their adoption. If that does not happen, the amendments will come into force.