

# STATE OF ALASKA

## Department of Administration

### Alaska Public Offices Commission

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## Commission Orders on Substantial Compliance

Attached you will find the following documents:

- (1) APOC staff memo of February 11, 2010 regarding substantial compliance criteria
- (2) Commission Order of February 24, 2010 adopting substantial compliance criteria
- (3) Commission Order of June 10, 2010 adopting additional substantial compliance criteria

Please contact APOC staff at (907) 276-4176 or 1-800-478-4176 if you have any questions regarding these documents.

# MEMORANDUM

State of Alaska

## ALASKA PUBLIC OFFICES COMMISSION

DEPARTMENT OF ADMINISTRATION

**TO:** Holly R. Hill,  
Executive Director,  
APOC

**DATE:** February 11, 2010

**FROM:** Jason Brandeis  
Associate Attorney II

**SUBJECT:** Substantial Compliance Criteria

### ISSUE

The statutes and regulations of the Alaska Public Offices Commission require timely reporting and provide for penalties for failure to file or for filing reports and statements which do not substantially comply with the law. The Commission has never defined substantial compliance but acknowledges that in some cases strict compliance is not equitable. This principle is recognized in the Commission's adoption of the Civil Penalty Assessment Appeal Mitigation Criteria in which penalties may be reduced or waived based on defined criteria. Building on this foundation, Staff seeks to introduce a means by which Staff can comply with APOC regulations which require Staff to evaluate discrepancies or deficiencies in reports and filings and seek correction, while simultaneously considering the report or filing to be in substantial compliance. Accordingly, Staff requests that the Commission provide a defined set of criteria that will establish the baseline Staff should apply in order to consider a filing, report, or other document in substantial compliance with APOC statutes and regulations.

### DISCUSSION

The Alaska Supreme Court has defined substantial compliance as "conduct which falls short of strict compliance with the statutory registration requirements, but which affords the public the same protection that strict compliance would offer." *Jones v. Short*, 696 P.2d 665, 667 n. 10 (Alaska 1985) (holding that if a contractor whose registration has expired still protects the public, the contractor has substantially complied with the registration statutes); *see also Nenana City Sch. Dist. v. Coghill*, 898 P.2d 929, 933 (Alaska 1995) (holding that a teacher whose teaching certificate had lapsed was in substantial compliance with the regulations because the public was otherwise similarly protected).

In the APOC context, the Court has held that substantial compliance is the appropriate standard for determining violations of statutory disclosure requirements under AS 39.50.030. *Grimm v. Wagoner*, 77 P.3d 423, 433-434 (Alaska 2003). This decision was based largely on the Court's finding that "substantial

compliance is the standard APOC has adopted in deciding whether to undertake an investigation or impose a civil penalty.” *Id.* at 433. Indeed, APOC regulations require Staff to determine if a filer is in substantial compliance with APOC statutes and regulations before initiating an investigation or referring the matter to the Commission for review and possible imposition of a civil penalty. This standard is echoed throughout the regulations and applies to public official financial disclosure filings, campaign and candidate reports, lobbyist reports, and legislative financial disclosure forms. For example:

#### **Public Official Financial Disclosure**

- 2 AAC 50.110(c)(1), Civil Penalties for Late or Incomplete Statements from Filers Other than Municipal Candidates: If filer failed to substantially comply by failing to disclose a major source of income, staff may recommend the Commission impose a fine.
- 2 AAC 50.127(d), Procedures for Incomplete Statements from Candidates for State Elective Office: If filer failed to comply substantially, staff shall undertake preliminary investigation and report findings to the Commission. The Commission shall determine the appropriate penalty.
- 2 AAC 135(j)(1), Civil Penalty Assessment for Late Filing by Municipal Officers: If filer failed to substantially comply by failing to disclose a major source of income, staff may recommend the Commission impose a fine.
- 2 AAC 140(d), Procedures for Incomplete Statements for Candidates for Municipal Office: If filer failed to comply substantially, staff shall undertake preliminary investigation and report findings to the Commission. The Commission shall determine the appropriate penalty.
- 2 AAC 50.143, Corrected Incomplete Statements: If staff discovers an obvious deficiency on the face of a filing, staff shall notify the filer. The filer then has 15 days to correct the deficiency. If corrected within 15 days, staff shall consider this a mitigation and may not assess a penalty.

#### **Campaigns/Candidates**

- 2 AAC 50.399(i): If staff finds substantial noncompliance with AS 15.13 or this chapter, staff shall bring the matter to commission for review.

#### **Lobbyists**

- 2 AAC 50.507(h), Civil Penalty Assessments: Upon review of report, if staff finds substantial noncompliance, staff shall bring the matter to the Commission and the Commission shall consider a fine.

#### **Legislative Financial Disclosure**

- 2 AAC 50.800, Corrected Incomplete Disclosure Statements: If staff discovers an obvious deficiency on the face of a filing, staff shall notify the filer. The filer then has 15 days to correct the deficiency. If corrected within 15 days, staff shall consider this a mitigation and may not assess a penalty.

- 2 AAC 805(e), Procedures for Incomplete or Late disclosure Statements from Incumbent Candidates: If filer failed to comply substantially, staff shall undertake preliminary investigation and report findings to the Commission. The Commission shall determine the appropriate penalty.

Under these regulations, APOC will not begin an investigation, initiate a complaint, or assess a fine or penalty if a filer has substantially complied with the filing requirements—that is, if a filing contains deficiencies deemed *insubstantial*. And by default the regulations presume that if a deficiency is insubstantial, then it is not to be referred to the Commission but is considered in compliance. The regulations direct Staff to make that determination, and if Staff finds that the deficiency was substantial (i.e., not in substantial compliance), Staff must investigate and refer the matter to the Commission for consideration of a civil penalty. But the regulations do not define the term “substantial compliance” and absent a consistent definition or a clear set of criteria, the possibility of confusion and error for Staff and filers increases.

Though the term is undefined, the regulations do provide some insight into what is considered substantial compliance. In the context of public official financial disclosures, an “accurate representation” of a filer’s financial affairs, and if a candidate fails to report a “*major source* of income, interest in real property, business interest, loan, trust, or other substantial financial interest,” the filer is not in substantial compliance. AS 39.50.030(a); 2 AAC 50.110(c)(1), 2 AAC 135(j)(1) (emphasis added); see also *Grimm v. Wagoner*, 77 P.3d at 431. The public official and legislative disclosure regulations also instruct Staff to look for “obvious deficiencies” and to allow filers an opportunity to correct such mistakes. 2 AAC 50.143, 2 AAC 50.800.

It is also clear that the concept of substantial compliance is not intended to excuse failure to timely comply with APOC reporting requirements—the Court has shown little tolerance for failure to strictly comply with filing dates. See *State v. Jeffrey*, 170 P.3d 226, 233-234 (Alaska 2007). But there is a distinction between “substantive compliance” with a regulation and “deadline compliance,” *Grimm*, 77 P.3d at 431, and that distinction is what substantial compliance concerns. Substantial compliance measures “the extent to which a disclosure complies with substantive requirements.” *Id.*

## **RECOMMENDATION**

Staff recommends that a set of criteria be developed to allow Staff to determine what filing deficiencies are considered insubstantial. Just as mitigation criteria are reviewed when Staff prepare civil penalty appeals, this new set of substantial compliance criteria will be applied when Staff review filings, reports and other documents as part of their auditing procedures or other business processes. Staff proposes to use these new criteria in carrying out its responsibility to determine whether to refer a matter to the Commission for a penalty assessment or to contact the filer and request correction of a deficiency and allow a certain amount of time to comply.

Staff proposes using the same definitions as set out in the mitigation criteria. That is, Staff proposes, as a baseline, to consider that a deficiency is “insubstantial” if it involves no significant harm to the public as defined by Mitigation Criteria dated November 2009 as set out below:

**No Significant Harm to the Public:** The error creates no significant harm to the public when there are no aggravating factors and:

1. the dollar amount missing from a form or disclosure is *de minimus*;
2. the dollar amount of the information missing from a form or disclosure is marginal and the filer self-reported the error; or
3. the missing or incomplete information is readily available to the public through another forum.

With approval of these criteria, Staff anticipate resolving insubstantial deficiencies without coming before the Commission as contemplated by APOC regulations. Some examples follow:

*Hypothetical A*

Candidate Smith calls APOC 6 months after she was reelected to office and says that she forgot to give some contribution information to her accountant that should have been on the 30 day report. The contributions total \$900.00. Candidate Smith ran unopposed in the election. Staff advises Smith to file an amended report within 15 days and places a memo to this effect in Smith’s file. (No harm to the public.)

*Hypothetical B*

Candidate Jones calls APOC and says that he received a bill from a cell phone provider for cell phone usage during the final days of his campaign. It is now three months after the year-end report deadline in which the expense should have been reported. The bill is \$60. Staff advises Jones to file an amended report within 15 days and places a memo to this effect in Jones’ file. (*De minimus*)

**CONCLUSION**

If a filing deficiency falls within the definition of insubstantial as set out above, Staff can then give the filer some time to correct the error and, if corrected in a timely fashion, place the corrected information in the file with no further action. Essentially, the filer is in substantial compliance with the law and the Commission will have given Staff some well-defined criteria in which to evaluate these minor discrepancies. Should the filer not comply with Staff’s request, the incident can be referred to the commission for further action.

The criteria proposed above may not be a complete set of criteria and Staff welcomes any additions or changes. Staff believes that such a set of criteria will facilitate more compliance amongst filers.

Currently, when filers have minor deficiencies in their reports and filings, they feel wronged and seek redress through the civil penalty appeal process. Through the appeal process, the Commission applies mitigation criteria, which arrives at a similar result but at a great cost in Staff and Commission time.

**THE LAST TWO PAGES OF THIS DOCUMENT (THE SIGNED ORDERS) ARE NOT ADA ACCESSIBLE. If you have any questions or need assistance please contact our offices at 907-276-4176.**

**BY ORDER OF THE ALASKA PUBLIC OFFICES COMMISSION**

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IN THE MATTER OF THE  
SUBSTANTIAL COMPLIANCE CRITERIA  
FOR REVIEW OF FILINGS WITH THE  
ALASKA PUBLIC OFFICES COMMISSION

**ORDER**

The Commission, having reviewed the Alaska Public Offices Commission Staff memorandum dated February 11, 2010 concerning substantial compliance with APOC statutes and regulations at the February 2010 Commission Meeting, hereby adopts the following Substantial Compliance Criteria:

A filing under AS 39.50, AS 24.60.200-260, AS 24.45, or AS 15.13 is considered “substantially compliant” if it involves no significant harm to the public as defined by the Mitigation Criteria dated November 2009 as set out below:

**No Significant Harm to the Public:** The error creates no significant harm to the public when there are no aggravating factors and:

1. the dollar amount missing from a form or disclosure is *de minimus*;
2. the dollar amount of the information missing from a form or disclosure is marginal and the filer self-reported the error; or
3. the missing or incomplete information is readily available to the public through another forum.

Signed by Order of the Commission this 24<sup>th</sup> day of February, 2010

Elizabeth J. Hickerson  
Elizabeth J. Hickerson, Chair  
Alaska Public Offices Commission

## BY ORDER OF THE ALASKA PUBLIC OFFICES COMMISSION

IN THE MATTER OF THE  
SUBSTANTIAL COMPLIANCE CRITERIA  
FOR REVIEW OF FILINGS WITH THE  
ALASKA PUBLIC OFFICES COMMISSION

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### ORDER

The Commission, having reviewed the Alaska Public Offices Commission Staff memorandum dated May 25, 2010 concerning substantial compliance with APOC statutes and regulations at the June 2010 Commission Meeting, hereby adopts the following Substantial Compliance Criteria:

1. A filer who does not report the annual Permanent Fund Dividend as income on their financial disclosure filing is considered to be in substantial compliance with APOC reporting requirements.
2. A filer who does not include a compassionate gift provided to a legislator or legislative employee on a lobbyist report, but the compassionate gift is reported by the recipient of the gift on a filing to legislative ethics and a copy of that filing comes to APOC is considered to be in substantial compliance with APOC reporting requirements.

Signed by Order of the Commission this 10<sup>th</sup> day of June, 2010.

  
Elizabeth J. Hickerson, Chair  
Alaska Public Offices Commission