

# SUNSET ADVISORY COMMISSION

FINAL REPORT  
WITH LEGISLATIVE ACTION

*Texas  
Ethics Commission*

JULY 2013



# *Sunset Advisory Commission*

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*Cover photo: The Texas Capitol is a marvel of craftsmanship down to the smallest details. The beautifully carved wood door frames are emphasized with elaborate, custom-designed bronze hinges and hardware produced especially for the building by Sargent and Co. of New Haven, Connecticut, in the late 1880s. The eight inch by eight inch hinges are inscribed with the words "Texas Capitol", decorated with incised designs of geometric and stylized floral motifs, and weigh over seven pounds each.*

# TEXAS ETHICS COMMISSION

SUNSET FINAL REPORT WITH LEGISLATIVE ACTION  
JULY 2013

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This document is intended to compile all recommendations and action taken by the Sunset Advisory Commission for an agency under Sunset review. The following explains how the document is expanded and reissued to include responses from agency staff and the public.

- *Sunset Staff Report, March 2012* – Sunset staff develops a separate report on each individual agency, or on a group of related agencies. Each report contains both statutory and management recommendations developed after the staff’s extensive evaluation of the agency.
  - *Sunset Staff Report with Hearing Material, April 2012* – Adds responses from agency staff and the public to Sunset staff recommendations, as well as new issues raised for consideration by the Sunset Commission at its public hearing.
  - *Sunset Staff Report with Decision Material, May 2012* – Adds additional responses, testimony, or new issues raised during and after the public hearing for consideration by the Sunset Commission at its decision meeting.
  - *Sunset Staff Report with Commission Decisions, June 2012* – Adds the decisions of the Sunset Commission on staff recommendations and new issues. Statutory changes adopted by the Commission are presented to the Legislature in the agency’s Sunset bill.
  - *Sunset Final Report with Legislative Action, July 2013* – Summarizes the final results of an agency’s Sunset review, including action taken by the Legislature on Sunset Commission recommendations and new provisions added by the Legislature to the agency’s Sunset bill.
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# SUMMARY



# SUMMARY

The people of Texas had every reason to believe they were getting an ethics agency when they voted for the constitutional amendment creating the Texas Ethics Commission in 1991. They did not vote for a Disclosure Filing Commission, and likely would not have done so.

Disclosure, however, *is* the central tenet of Texas' system for dealing with campaign finance, personal financial statements, and lobby activity reports. That is not to say that the state's disclosure-based system cannot deliver meaningful ethics oversight. Given the few limits state law places on campaign contributions and expenditures, Texas' approach to ethics relies on disclosure to shine a light on political financial activity for the public to see and judge. For this cleansing light to meaningfully effect ethical behavior, the Texas Ethics Commission must operate in a tense political environment to ensure that disclosure is timely and accurate and that enforcement actions are fair and *reflect fairly* on filers. Several major issues emerged from this vantage point.

Enforcement of disclosure laws works in such a way that even innocent mistakes may result in candidates or officeholders being portrayed as ethics violators, with a stigmatizing impact that is out of proportion to the seriousness of the mistake. Such a portrayal refracts the light of disclosure and potentially colors the public's view of the matter in a way that bears directly on the reputation and political fortunes of candidates and elected and appointed officials. To be sure, such matters involving errors should still be avoided and dealt with appropriately when they occur.

Unlike the agency's early years, however, quick and easy access to computerized disclosure information, a more contentious political climate, and greater amounts of money flowing around public office heighten the potential and temptation to use disclosure less for illumination than for political opportunism. Further, enforcement procedures different from those of many regulatory agencies may also affect the role and effectiveness of the Texas Ethics Commission. Finally, the agency's budget has been stagnant from 2002 through the current biennium, resulting in computer and other resources that have not kept pace with needs.

The agency also administers disclosure provisions under laws containing outdated or inefficient requirements. Sunset staff recommends changes to streamline some disclosure requirements and to address some concerns about personal financial statements. However, wholesale changes to match information required in these statements to the nature of the public position a filer holds, or to update potentially antiquated requirements, require specialized expertise or otherwise require value judgments that do not lend themselves to objective evaluation. As a result, such changes are not included in this report.

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*Enforcement of disclosure laws may result in candidates or officeholders being stigmatized as ethics violators for innocent mistakes.*

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Finally, as a constitutional agency, the Commission is subject to review under the Sunset Act, but not abolishment. For that reason, the report also does not contain a recommendation to continue its functions and duties.

The following material summarizes issues and recommendations contained in the report.

## Issues and Recommendations

### *Issue 1*

#### **The State's Ethics Enforcement Process Unnecessarily Focuses on Minor Reporting Infractions.**

The Commission's principal enforcement tool for violations of the law, other than late reporting, is civil penalties issued through the sworn complaint process. In Texas' disclosure-based ethics system, almost any error is a potential violation, and filers found to be in violation of disclosure laws in even minor ways may be stigmatized as ethics violators. This stigma can mislead the public as to a person's character, be devastating to political careers, and provide incentives to misuse the agency's complaint process for political purposes. Several factors contribute to this situation, including the public's difficulty in determining the seriousness of violations, the legalistic appearance of complaint documents, the absence of a system to review reports for accuracy on submission, and the lack of full audits to encourage compliance.

Overhauling the agency's current statutory enforcement system and strengthening processes for reviewing reports would create a system that matches agency enforcement action taken to sanction a violation with the seriousness of the violation, helping to remove the potential for stigma while still ensuring full disclosure.

#### **Key Recommendations**

- Develop a system for resolving complaints that aligns enforcement actions with the seriousness of violations.
- Direct the agency to strengthen systems to verify the completeness and accuracy of disclosure information.

### *Issue 2*

#### **The Hearings Process for Ethics Complaints Weakens the Commission's Effectiveness in Enforcing Disclosure Laws.**

Unlike many state agencies with enforcement authority, the agency's full Commission is involved in both developing proposed enforcement actions and sitting as final judge to take final action on sworn complaints. This process could bias Commissioners as to the outcome of a complaint since they actually were involved in its investigation. Also, unlike many state agencies, a respondent to a complaint may choose to bypass the agency's hearings process on the complaint and go to court under a trial *de novo* standard. This approach essentially throws out the agency's work and record, weakening its enforcement powers.

Elimination or reduction of Commissioner involvement in preliminary review and preliminary hearing stages would reduce any potential or appearance of bias when the Commission sits as judge in the formal stage of complaint resolution. Prohibiting a respondent's bypass of agency hearings process and requiring courts to review appeals based on review of the agency's developed record under the substantial evidence rule would ensure the agency's meaningful role in deciding sworn complaints.

### **Key Recommendations**

- Eliminate Commissioner involvement in the preliminary review of a sworn complaint and restructure the preliminary hearing to include only two Commissioners.
- Provide for judicial review of Commission decisions based on substantial evidence of the record and decisions made by the Commission.

## ***Issue 3***

### **The Agency's Technology and Information Management Have Not Kept Pace With Its Workload and Changing User Needs.**

The Texas Ethics Commission's general revenue budget has been stagnant since 2002 while its workload and need for technology have increased. Computer systems to support efficient and accurate filing of reports and public accessibility have not kept pace with needs or the march of technology. The agency does not have funds to check disclosure documents for facial compliance after submission, nor to conduct complete audits at a later point, reducing assistance and incentives to achieve accurate reporting and compliance. Sworn complaints, a major workload issue for the agency, have increased dramatically from 168 in fiscal year 2004 to 374 in fiscal year 2011. The agency's education program has been eliminated this biennium, closing off an avenue for educating filers on the state's complicated disclosure laws.

The Texas Ethics Commission collects lobby registration fees that offset about 40 percent of the agency's general revenue appropriation of about \$2 million annually. Unlike related agencies in some states, however, the Texas Ethics Commission does not have the authority to collect fees from the approximately 4,000 political committees, elected officials, and candidates filing reports with the agency. Additional revenues from such a fee could help address agency needs, which in turn could make report filing easier and more accurate, ease agency workload on sworn complaints, and encourage compliance.

### **Key Recommendations**

- Require candidates, elected officeholders, and political committees filing disclosure reports with the Texas Ethics Commission to pay an annual fee to help support the agency's operations.
- Add rider language to the General Appropriations Act that provides additional funding to the Texas Ethics Commission contingent on collection of sufficient revenue from the new reporting fee.

## ***Issue 4***

### **Antiquated Filing Requirements Waste Agency Resources and Do Not Promote Meaningful Disclosure.**

State law requires candidates, state officers and employees, certain local officers, caucuses, political committees, and lobbyists to submit periodic reports to the agency disclosing campaign, lobby activity, and personal financial information. Several outdated, inconsistent, or unnecessary statutory provisions impede full, transparent, and efficient disclosure. Revising these provisions would modernize the filing of certain reports, improve transparency, and streamline the agency's filing operations.

#### **Key Recommendations**

- Require personal financial statements to be submitted electronically and made available online after sensitive personal information is redacted.
- Eliminate the civil penalty exemption for smaller general-purpose committees.
- Remove the statutory prohibition on posting reports of major party candidates whose opponents have not yet filed.

## ***Issue 5***

### **The Texas Ethics Commission's Statute Complies With Standard Elements Analyzed During Sunset Reviews.**

Among the standard elements considered in a Sunset review, the Texas Sunset Act directs the Sunset Commission to recommend the continuation or abolishment of each reporting requirement established in law for an agency under review. The Texas Ethics Commission has a single reporting requirement to submit a biennial report to the Legislature regarding its activities. Continuing this requirement would keep the Legislature apprised of important ethics information and necessary statutory changes.

#### **Key Recommendation**

- Continue requiring the Commission to submit its biennial report to the Legislature.

## **Fiscal Implication Summary**

These recommendations would have an estimated positive fiscal impact to General Revenue of \$71,050. Additionally, the report recommends a new fee to be paid by certain filers to raise funds specifically to offset agency costs for improved computer technology, report review, auditing processes, or other improvements, but which are not counted as a revenue gain to the State. The fiscal impact for each recommendation is summarized below.

**Issue 1** — The recommendation in this issue to strengthen systems to verify the completeness and accuracy of disclosure information would require improvements in the electronic filing system, facial compliance checks of reported information, and an enhanced audit system. Costs to develop these systems would be offset by additional revenue resulting from a new reporting fee recommended in Issue 3.

*Issue 3* — Authorizing the Commission to charge candidates, elected officeholders, and political committees an annual fee to support the agency's operations would likely result in a \$200,000 annual gain to General Revenue, assuming a \$50 fee. These revenues are intended for appropriation to the agency for developing the systems highlighted in Issue 1 or other priorities of the Legislature and would not result in a net revenue gain to the State.

*Issue 4* — Removing the exemption from civil penalties enjoyed by certain general-purpose committees that fail to timely file required reports would result in annual revenue gain to General Revenue of about \$67,550. An additional savings of \$3,500 would result from removing prescriptive mailing requirements from statute and allowing staff to determine the appropriate method for sending late notices and sworn complaint correspondence.

***Texas Ethics Commission***

<b>Fiscal Year</b>	<b>Gain to the General Revenue Fund</b>	<b>Savings to the General Revenue Fund</b>
2014	\$67,550	\$3,500
2015	\$67,550	\$3,500
2016	\$67,550	\$3,500
2017	\$67,550	\$3,500
2018	\$67,550	\$3,500





## SUMMARY OF FINAL RESULTS

### *S.B. 219 Huffman (D. Bonnen) — Vetoed*

Strongly held values, divergent public and individual interests, and a sometimes ruthless political environment make crafting and enacting workable solutions in ethics matters a struggle. Complicated, arcane ethics laws are difficult to understand, much less fix. The stakes are high and the perceived effects of changes on potential winners and losers can polarize discourse and harden positions, making common ground hard to find. Expectations for dramatic change can overwhelm other more easily achievable solutions, making such efforts seem small and pointless.

The Sunset review of the Ethics Commission occurred on just such a treacherous landscape and resulted in Senate Bill 219, the Ethics Commission Sunset bill, falling to a gubernatorial veto. The vetoed bill included a Sunset Commission recommendation that revised the Ethics Commission's enforcement authority to distinguish between minor reporting errors and more serious offenses. This revision was intended to clarify for the public the significance of violations, help remove the stigma unfairly placed on public officials accused of being "ethics violators" for minor reporting issues, and allow the agency to better focus its efforts on more significant violations to ensure the integrity of the overall process. Other Sunset Commission recommendations in the bill would have updated the disclosure process in light of technological changes and clarified various provisions in the lobby law to make expectations on lobbyists more apparent.

The Legislature added other provisions to S.B. 219 beyond those recommended by the Sunset Commission. The bill included a "resign-to-run" provision that required a member of the Railroad Commission to resign after announcing or becoming a candidate for other elective office. This provision was intended to keep a sitting commissioner's attention focused on agency business and to discourage use of the office to promote campaign donations in support of another elected position. The bill also enacted a modest reporting fee, effective in fiscal year 2016, to provide more secure funding for ongoing improvements to the Commission's computer systems, critical to efficient and user-friendly reporting. The shortcomings of the agency's technology highlighted in the Sunset review supported the Legislature's ultimate decision to appropriate \$3.5 million to the agency to overhaul its computer technology. The bill also included a series of other provisions changing disclosure or lobby laws.

The Governor's veto proclamation, on page 6c, included the bill's resign-to-run and fee provisions among the reasons for the veto. According to the proclamation, the resign-to-run requirement would change the structure of a constitutional agency without the consent of the Texas voters. The proclamation also noted that those filing campaign finance reports should not be charged for participating in a process intended to be transparent to pay for a state agency.

The Ethics Commission is created by state constitution and is not subject to abolishment under the Texas Sunset Act. The next Sunset review of the agency is scheduled for 2025.

The Sunset review of the Texas Ethics Commission resulted in one Sunset Commission recommendation being enacted in legislation other than S.B. 219, and two management actions that are nonstatutory, as summarized below.

- Clarifies in the Lobby Law that a lobby registrant does not lose any protection under the Lobby Law if reporting a portion of a joint expenditure made by a non-registrant. (H.B. 2984)
- Directs the agency to strengthen systems to verify the completeness and accuracy of disclosure information. (management action – nonstatutory)
- Directs the agency to better track and analyze information such as call volume detail and sworn complaint allegations. (management action – nonstatutory)

#### **Fiscal Implication**

The Sunset review resulted in no fiscal impact to the State.

# VETO PROCLAMATION

## SENATE BILL 219

Pursuant to Article IV, Section 14, of the Texas Constitution, I, Rick Perry, Governor of Texas, do hereby disapprove of and veto Senate Bill No. 219 as passed by the Eighty-Third Texas Legislature, Regular Session, because of the following objections:

S.B. 219 contains several important changes to the state's ethics laws, especially those relating to the sworn complaint process. However, these positive changes are outweighed by several provisions added late in the legislative process without an open and honest discussion.

The last-minute addition of a resign-to-run requirement for members of the Railroad Commission would change the structure of a constitutional agency without the consent of Texas voters. Any effort to amend a constitutional office should go to a vote of the people.

This bill would also strip a journalist's testimonial privilege if the journalist has made direct political expenditures, or is affiliated with entities that make such expenditures.

S.B. 219 also allows the Ethics Commission to set an annual document filing fee for candidates and groups who file campaign finance reports. Candidates should not be charged for participating in a process intended to be transparent, to pay for a state agency. The legislature should continue to set the fee to run for office in a transparent and open way, rather than leave that to a state agency.

The Legislature had an opportunity, through the Sunset review process, to make needed changes to our campaign finance, lobby and financial disclosure laws - changes that are needed to modernize laws while still protecting our rights and providing for transparency. I urge the Legislature to look closely at our ethics laws during the interim in an open, deliberative and transparent way, so that all voices are heard and all proposals are thoroughly discussed.

Since the Eighty-Third Texas Legislature, Regular Session, by its adjournment has prevented the return of this bill, I am filing these objections in the office of the Secretary of State and giving notice thereof by this public proclamation according to the aforementioned constitutional provision.

IN TESTIMONY WHEREOF, I have signed my name officially and caused the Seal of the State to be affixed hereto at Austin, this 14th day of June, 2013.

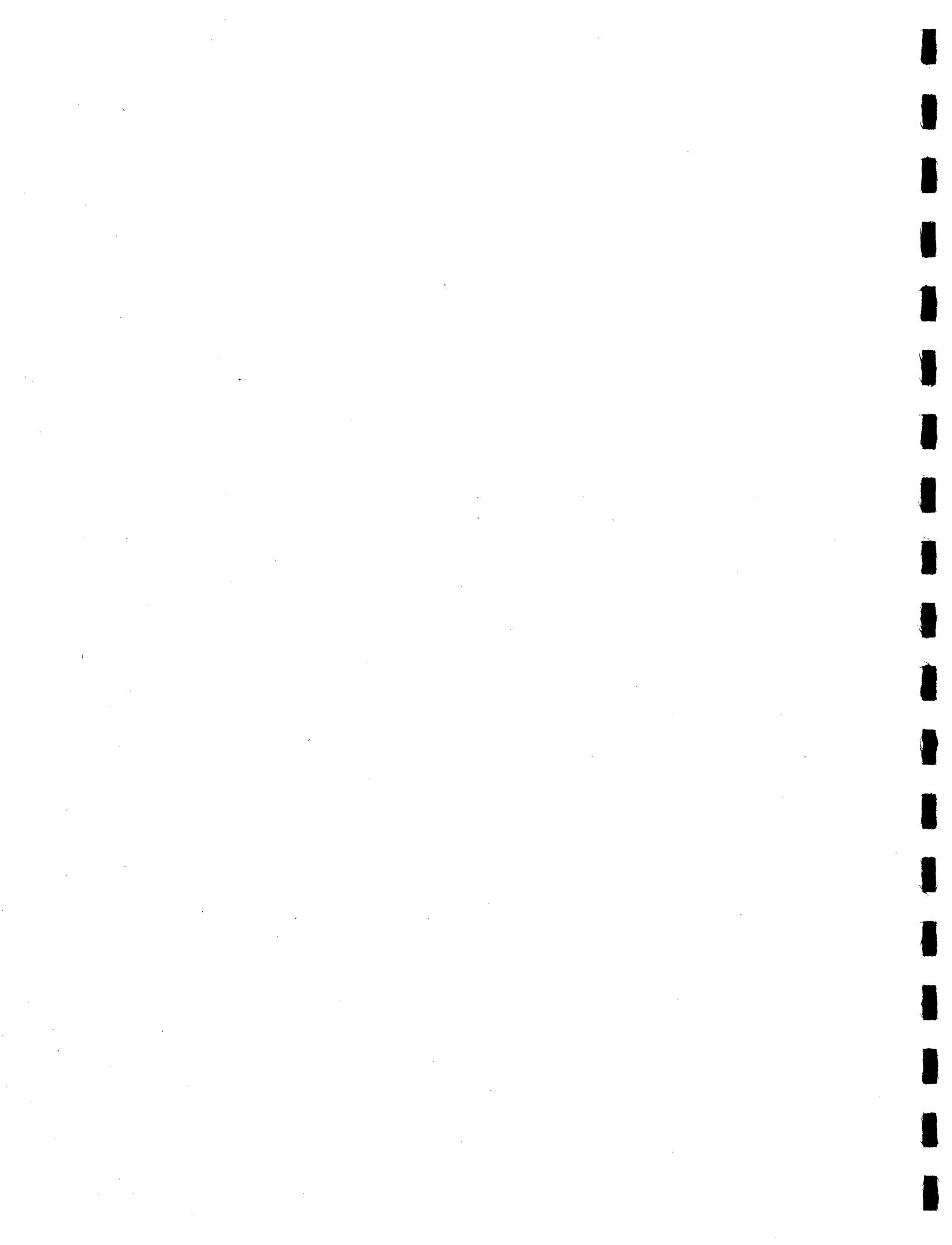
**RICK PERRY**  
Governor of Texas



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**AGENCY AT A GLANCE**  
**MARCH 2012**





# AGENCY AT A GLANCE

The Texas Ethics Commission administers and enforces the state's campaign finance and ethics laws that govern the conduct of state officers and employees, candidates for and officeholders of state and local offices, political committees, political parties, and lobbyists. Created by a constitutional amendment adopted by the voters in 1991, the agency's major functions include:

- maintaining financial disclosure reports and making them available to the public;
- investigating ethics and campaign finance complaints and assessing penalties when warranted;
- issuing advisory opinions interpreting laws under the agency's jurisdiction;
- providing information and assistance to stakeholders to help them understand their obligations under campaign finance and ethics laws; and
- registering persons engaged in lobbying at the state level and requiring periodic lobby activity reports.

## Key Facts

- **Policy board.** The Texas Constitution establishes the Texas Ethics Commission as a state agency, consisting of a bipartisan eight-member Commission: four appointed by the Governor from a list submitted by members of each political party of the House and Senate; two appointed by the Speaker of the House from a list submitted by members of each political party of the House; and two appointed by the Lieutenant Governor from a list submitted by members of each political party of the Senate. The Texas Constitution requires these appointing authorities to split their appointments between each political party required to hold a primary, so the Commission is evenly divided between Republicans and Democrats. The chart, *Texas Ethics Commission*, details the Commission's membership.

***Texas Ethics Commission***

Member	Term Expires	Submitted by	Appointed by
Tom Ramsay, Chair	2013	House Democrats	Governor
Jim Clancy, Vice Chair	2013	House Republicans	Governor
Hugh C. Akin	2013	Senate Republicans	Lt. Governor
Tom Harrison	2011	Senate Democrats	Governor
Paul W. Hobby	2015	House Democrats	Speaker
Bob Long	2015	Senate Republicans	Governor
Paula M. Mendoza	2007	Senate Democrats	Lt. Governor
Chase Untermeyer	2013	House Republicans	Speaker

- Funding.** The Texas Ethics Commission has operated with an annual budget of about \$2 million in both fiscal years 2011 and 2012. About 99 percent of the agency’s budget is supported by general revenue with the remainder supported by miscellaneous charges, such as copying fees. For the 2012–13 biennium, the Legislature reduced the agency’s general revenue appropriation and offset most of the reduction by appropriating \$375,000, contingent on increased lobby registration fees, which became effective November 1, 2011.
- Staffing.** The agency had authority to employ 33 staff in fiscal year 2011 and has authority to employ 36 staff in fiscal year 2012. Due to budget restrictions, the agency maintains about 33 full-time staff in fiscal year 2012.

- Disclosure filings.** Candidates and officeholders, certain state officers and employees, certain local officers, political committees, political parties, and lobbyists are required to submit periodic reports to the agency disclosing their expenditures and contributions, as well as personal financial information. The agency assists filers in fulfilling disclosure reporting requirements, organizes and archives reports, and makes reports available to the public. The agency does not evaluate or audit these reports. In fiscal year 2011, the agency received 30,837 reports from 9,539 filers, detailed in the accompanying chart. Approximately 87 percent of all reports are filed electronically, with the remaining filed on paper.

**Texas Ethics Commission Filings\* – FY 2011**

Report Type	Number of Filers	Number of Reports
Campaign Finance Reports	3,976	18,076
Personal Financial Statements**	3,607	2,920
Lobby Activity Reports	1,956	9,841
<b>Total</b>	<b>9,539</b>	<b>30,837</b>

\* The table includes only filers who submit reports to the Texas Ethics Commission.

\*\* The number of personal financial statement filers exceeds the number of reports because of statutory requirements on when individuals submit these documents.

- Lobbyist registration.** Persons who engage in certain lobbying efforts with the legislative and executive branches must register with the agency and file lobbying activity reports as noted above. With some exceptions, persons must register as lobbyists if they receive more than \$1,000 in a calendar quarter as compensation or reimbursement to lobby, or if they spend more than \$500 in a calendar quarter for certain purposes. In 2011, the number of registered lobbyists was 1,956.
- Complaints.** The Texas Ethics Commission investigates and rules on complaints against candidates, political committees, state officers and employees, officers and employees of political subdivisions, and lobbyists. Any Texas resident or individual owning real property in the state may file a sworn complaint of an alleged violation with the agency. The agency may also initiate a complaint with an affirmative record vote of at least six Commissioners. Most complaints allege violations of campaign finance and political advertising laws. The number of sworn complaints is increasing and in fiscal year 2011, the agency received 374 complaints.
- Enforcement.** The Texas Ethics Commission may enforce all laws under its jurisdiction except those in the Penal Code, such as bribery, improper influence, and abuse of office. The agency’s enforcement authority extends to candidates, officeholders, and their supporters filing with local filing authorities, as well as those filing with the agency. The agency is authorized to investigate complaints, hold enforcement hearings, issue orders, impose civil penalties, refer issues for criminal prosecution, and take action against a lobbyist’s registration. The agency may also impose an

administrative fine on late filers of certain reports. In fiscal year 2011, the agency assessed \$136,980 in fines through the sworn complaint process and \$523,335 through the late filing administrative process.

- **Advisory opinions.** The agency issues advisory opinions about relevant laws, including campaign finance, political advertising, lobbyist activities, financial disclosure, standards of conduct of government officials, bribery of public servants, and the misuse of public resources. An advisory opinion provides a defense to prosecution or imposition of civil penalty for a person who has relied on such opinion in a substantially similar fact situation. Since 1992, the Texas Ethics Commission has issued approximately 500 advisory opinions, though the number issued has remained relatively constant at about five to 10 per year during the last decade. In 2011, the Commission issued six advisory opinions.
- **Education.** Statute directs the Texas Ethics Commission to provide ethics training for new and returning members of the Legislature at the start of the legislative session, and to provide ethics training for state employees in cooperation with state agencies. Additionally, the agency may provide information and documents about laws within its jurisdiction to anyone who contacts it. In 2011, the Legislature eliminated appropriations for the education program, but the agency continues providing training when possible.





ISSUES



# ISSUE 1

## *The State's Ethics Enforcement Process Unnecessarily Focuses on Minor Reporting Infractions.*

### **Background**

The Texas Ethics Commission oversees the system of disclosure laws for state and local elected officials and candidates, executive directors and officers of most state agencies, and persons lobbying state government. This disclosure system is at the core of Texas' approach to ethics, relying on full, timely, and accurate information to the public to achieve accountability from people responsible for directing and running the government. Key to this system are enforcement provisions to help ensure timely and accurate reporting by filers. In this system, the Commission exercises civil enforcement authority while authority to apply criminal sanctions rests with county and district attorneys. The Commission's primary enforcement mechanism relies on citizen-driven sworn complaints alleging violation of any of the state's disclosure laws. The agency's statutes authorize any Texas resident or property owner, as well as the Commission itself, to initiate such complaints.<sup>1</sup>

The nature of enforcement in a disclosure-based ethics system is that almost any error, regardless of how small or insignificant, is a potential violation. The Commission and its staff seek to balance the specific facts of the case with the nature and seriousness of the error, but will generally take action upon a determination that credible evidence of a violation exists. The Commission seeks to resolve matters through a settlement process with respondents, which may result in agreed orders for voluntary compliance involving minor violations or for other, more significant matters. The Commission may also initially conduct a preliminary and later a formal hearing before determining a final action.

The Commission's principal enforcement tool for violations of the law, other than late reporting, is civil penalties issued through the sworn complaint process. Statute caps these penalties at \$5,000 or triple the amount at issue, whichever is more, for a violation of a law the agency enforces.<sup>2</sup> Through the sworn complaint process, in fiscal year 2011 the Commission assessed penalties ranging from \$100 to \$31,470, and assessed a total of about \$137,000 in fines.<sup>3</sup> The table on the following page, *Top Five Disclosure Provisions Violated*, describes the most frequent violations receiving Commission penalties through the sworn complaint process in fiscal year 2011.

**Top Five Disclosure Provisions Violated – FY 2011**

Description of Violation	Election Code Section or Commission Rule Violated
Filer did not properly report expenditures of more than \$50.* The filer may not have included or incorrectly reported the full name and address of the recipient of the expenditure; and/or the amount, date, or purpose of the expenditure.	254.031(a)(3)
Filer did not properly report contributions of more than \$50. The filer may not have included or incorrectly reported the name and address of the donor and/or amount of the contribution.	254.031(a)(1)
Filer did not properly report the total amount of contributions and/or expenditures.	254.031(a)(6)
Filer incorrectly reported the payee of a political expenditure. When a staff member or campaign worker makes such an expenditure on behalf of a candidate or officeholder, the name of the actual payee must be disclosed instead of the name of the staff member or campaign worker.	Texas Ethics Commission Rule 20.62
Filer incorrectly reported the total amount of contributions accepted as of the last day of a reporting period.	254.031(a)(8)

\* This amount was increased to \$100 in fiscal year 2012.

## Findings

### **Texas' enforcement system can brand candidates and officials as ethics violators for minor reporting mistakes.**

An effective enforcement process works to ensure compliance with the requirements for certain action or behavior. It also seeks to relate the enforcement action taken to the nature and seriousness of the violation so that the public can make informed judgments about the behavior of those subject to sanctions.

For the Texas Ethics Commission, enforcement of sworn complaints is intended to make sure that required disclosure occurs by the threat of sanctioning those who do not comply. By relating the enforcement action to the nature and seriousness of the violation, the process should seek to distinguish between simple, honest mistakes and more significant matters, to ensure that filers are treated fairly and the public understands the nature of the wrongdoing.

Despite recent efforts by the Commission to deal with minor violations, the agency's sworn complaint process still does not allow for making this kind of distinction about the seriousness of a violation. The general practice remains that those found in violation of the state's disclosure laws may be stigmatized as an ethics violator, regardless of the seriousness of the violation in question. The consequences of such a judgment can be serious for the filer who is a candidate or officeholder. This blurring of the Commission's actions threatens to confuse the public regarding the official's or candidate's true behavior and ultimately can distort the agency's enforcement process out of all proportion to the harm that occurred. The stigma of an ethics violation, used in a campaign, can affect votes and potentially influence the outcome of elections.

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*Those found in violation of the state's disclosure laws may be stigmatized as an ethics violator.*

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A series of factors contributes to the potential misalignment of violations with their proper characterization as to their nature and seriousness.

- **Lack of guidance as to severity of violations.** Clear guidance as to the severity of a violation does not exist in law. Currently, statute establishes two categories for violations: Category One violations are those that are “generally not difficult to ascertain whether the violation occurred”; and Category Two violations are defined as “not a Category One violation.”<sup>4</sup> These categories only refer to the complexity of evaluating a violation, not its seriousness. As a result, agency processes generally do not group violations by their seriousness.

In addition, such a determination of whether a violation is an innocent mistake or indicates deeper unethical behavior can be difficult without investigation or analysis of related disclosure reports and other financial documents. The difficulty of making such determinations creates room for the public and political opponents to misinterpret a filer’s innocent mistake as a serious ethical breach.

- **Limited discretion in dealing with violations.** Statute is fairly prescriptive in directing action against ethics violations. In addition, the lack of clear statutory guidance regarding a violation’s severity, the difficulty of judging true unethical behavior, and the political environment all conspire to discourage the Commission from freely exercising discretion to avoid any appearance of partisanship or favoritism. Despite such concerns, the Commission recently adopted rules for dealing with minor errors judged to be technical, clerical, or *de minimis* and delegated authority to staff to resolve such issues.

Because statute limits the Commission’s ability to further separate ethics matters according to their nature and seriousness, the Commission itself still resolves many issues that are “paperwork” errors or other lesser violations. Full Commission involvement in lesser violations may add to the appearance of their importance when in fact, violations were minor. Several commissioners have publicly suggested too much of their time is spent resolving paperwork reporting issues.<sup>5</sup> However, given the current statutory framework and politically sensitive nature of the arena it operates in, the Commission seems to have reached its limits of what it can reasonably delegate to staff.

- **Nature of violation not clear from appearance of agreed order.** Agency agreed orders and other complaint resolution documents have a highly legalistic look and use formal legal language for relatively minor, as well as more serious, violations. Lack of distinguishing characteristics implies a level of seriousness not necessarily appropriate in every case.
- **Nature of politics.** In the world of electoral politics where public perception is of paramount importance to candidates and officeholders, the factors above allow potentially minor reporting errors to be labeled ethics

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violations and used against opponents in elections, further perpetuating the ethics violation stigma.

**Other entities avoid inappropriately stigmatizing filers by conducting preliminary staff reviews of disclosure reports.**

Sunset staff surveyed 13 states selected for their similarity to Texas in having few campaign finance limits or similar ethics agency structures.<sup>6</sup> Of the 13 states, 12 have developed disclosure systems that have less potential for candidates and public officials to be inappropriately stigmatized. All but one state, Oklahoma, perform some type of “facial” review to check reports for obvious errors, or more in-depth audits of reports. These states then allow filers to correct reports within a given timeframe without being subject to enforcement action.

The Federal Elections Commission also has a review and correction process for all campaign finance reports. The agency’s Reports Analysis Division reviews all reports for facial compliance and completeness and works with filers to correct any mistakes. Then, if filers do not make corrections or a problem is systemic, enforcement action becomes necessary and the agency uses different processes to resolve the matter depending on the violation’s severity and dollar amount at issue.

These types of systems weed out technical and other minor reporting errors, leaving only more serious violations to the formal enforcement process and reducing the opportunity to unfairly label filers as ethics violators.

**The Texas Ethics Commission lacks adequate resources to regularly check or audit filers’ reports to promote compliance and accurate disclosure and focus on more significant ethics matters.**

Statute requires the agency to randomly review disclosure reports for facial compliance and gives it authority to perform complete audits.<sup>7</sup> While the agency has done facial reviews of randomly selected filers’ reports in the past, it currently performs no reviews or complete audits due to lack of funds and resources. The agency’s filing software provides filers limited prompts for ensuring complete reports, but this software that was once state of the art has been outpaced by internet-based programs that can work interactively with filers to achieve greater accuracy and may also help flag potential violations for further staff review after filers submit reports.

The lack of agency compliance check and audit functions may adversely affect the state’s disclosure system in two ways. At the front end, the lack of a compliance check deprives the system of a tool to assist filers in preparing complete reports. After reports have been filed, the lack of an audit mechanism deprives the state of a means of assuring that reports are, in fact, true and correct and free of possible deception.

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*The agency’s filing software has been outpaced by internet-based programs that can work interactively with users.*

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Currently, a major incentive to comply ends up being the possible stigma that may be attached to an ethics violation, which, as discussed previously, is a clumsy and uneven way to deal with disclosure errors. The Legislature has enacted laws over time allowing limited periods for correcting reports without consequences, which may reduce the errors that can stigmatize filers.<sup>8</sup> However, dealing with the stigma associated with ethics violations by relaxing the law in this way threatens to further erode the integrity of the reporting and disclosure system without the balance of facial compliance checks and full audits to encourage accurate reporting.

Obtaining compliance with disclosure requirements is particularly important in a state like Texas, which places few limits on sources and amounts of political contributions and expenditures. For example, individual candidates and non-judicial officeholders may accept unlimited amounts of money from legitimate sources, which do not include corporations, labor unions, and foreign nationals; and candidates and officeholders may expend any amount of money for authorized purposes. In such a system, accurate disclosure information substitutes for contribution and expenditure limits to inform the public about the full range of financial activity.

The Commission may also be missing the opportunity to focus on matters of greater ethical significance. By largely relying on a citizen-driven sworn complaint process, the agency generally does not pursue its own complaints. Aside from the resource issues that prevent the agency from conducting the audits to provide the basis for initiating complaints, the agency is also constrained by its cautious approach to enforcement and the desire to avoid any appearance of partisanship in how it operates. Regardless of the reason, the state is deprived of a bigger view of potential unethical behavior and the expertise of the agency established to deal with such issues.

## Recommendations

### *Change in Statute*

#### **1.1 Develop a system for resolving complaints that aligns enforcement actions with the seriousness of violations.**

This recommendation would overhaul the agency's current statutory enforcement process to create a system to match the action taken to sanction an ethical breach with the seriousness of the violation. The recommendation is intended to accomplish this goal by revising language associated with simple complaints to be less legalistic and suggestive of ethics violations; directing alleged violations into three different outcomes according to seriousness after investigation by staff; and giving the Commission clear authority to delegate more complaint processing to staff, with final action still subject to Commission approval except in very minor cases. The recommendation would work hand-in-hand with the recommendations in Issue 2 of this report that would revise the agency's process for considering and hearing complaints to provide for greater separation of staff and Commission roles.

The new enforcement process would feature the following basic elements.

- **Initiate action with a reporting inquiry form.** The form that the public uses to initiate an action would be styled as an “inquiry form” rather than a “sworn complaint” to lessen the negative perception attached to the current terminology. Individuals would still be required to sign an affidavit with the inquiry swearing to its content and submit the form to the agency, as is currently required.
- **Establish levels of violation.** The new system would eliminate the current statutory Category One and Category Two violations and instead require Commission staff, upon receipt of an inquiry, to open a matter under review. Based on review of an inquiry and necessary investigation, and after appropriately notifying the parties involved in the matter as statute currently requires, staff would propose to the respondent resolution of apparently valid allegations according to one of three outcomes escalating according to seriousness.

Letter of Acknowledgment. This outcome would be reserved for those violations deemed technical, clerical, or *de minimis*, as defined by the Commission in rule. The Commission could use its current rule defining technical or *de minimis* violations as a starting point, or could work with stakeholders to expand it. Matters eligible to receive a letter of acknowledgment would carry no dollar penalty and would remain confidential.

Notice of Administrative or Filing Error. This notice would be reserved for filing or other administrative errors, as defined by the Commission in rule. These violations would be considered more serious than those eligible to be resolved using a letter of acknowledgment and would carry a fine. If the respondent agrees to the notice of administrative or filing error, it would be made public and be available on the agency’s website.

Notice of Violation. This notice would be used in matters where a violation was most serious. The Commission would define in rule which violations would be subject to a notice of violation. As with a notice of administrative or filing error, a notice of violation would carry a fine and be made publicly available on the agency’s website.

If a person alleges multiple violations in a single inquiry, staff would proceed with the matter under review according to the most serious allegation staff believes is valid. If staff determines the matter to be a lesser or more serious violation during the process, it would proceed according to the appropriate outcome level as described above. Commission staff would have flexibility to separate allegations in an inquiry into separate actions or keep them grouped together.

- **Development of penalty guidelines.** The Commission would develop penalty guidelines in rule and within the bounds of the Commission’s current statutory penalty authority to assist staff in proposing fines based on the level of violation and filer’s compliance history.

## **Management Action**

### **1.2 Direct the agency to strengthen systems to verify the completeness and accuracy of disclosure information.**

The Texas Ethics Commission is required to review filers’ disclosure reports and personal financial statements for facial compliance with the law based on a random selection process, but has not done so recently because of resource constraints.<sup>9</sup> Issue 3 recommends an additional funding source that may be used for this purpose.



The agency should set up a system to regularly perform facial compliance checks using either the random process currently laid out in statute or through an improved electronic filing system. An improved electronic system, also discussed in Issue 3, could potentially assist a much broader range of filers than random manual compliance reviews since filer information could be electronically checked for incomplete information and potential mistakes before submission, much like software individuals use in filing their personal income taxes. Such a system could also flag potential errors after filers report for staff to review.

In addition to the facial compliance check discussed above, the agency should exercise its existing authority to develop a system of audits for reviewing filers' disclosure information in more depth, comparing the information with bank statements, contacting third parties, or performing other investigatory functions. As one approach for such audits, the agency could select randomly from targeted areas, based on risk factors determined by the Commission, such as filers reporting large amounts of contributions or expenditures, lobby reports indicating substantial activity, or specific types of reports considered crucial for disclosure. Violations found during a complete audit would subject filers to enforcement action as described in the previous recommendation.

These systems would simplify filing, help reduce the number of reporting errors, and reduce the number of complaints stemming from reporting mistakes. These benefits would help eliminate the stigma attached to filers who commit minor reporting errors while still ensuring compliance and full disclosure.

## Fiscal Implication

This recommendation would likely have a cost to pay for improved systems for verifying the completeness and accuracy of disclosures, including new electronic filing systems to provide facial compliance checks and an enhanced audit system. Issue 3 of this report recommends establishment of a new reporting fee to help fund such improved technology and a system of audits. Implementation of the recommendations above would be contingent on the receipt of revenue generated from this new funding source or any other source of funds directed by the Legislature for this purpose.

1 Section 571.122(b-1), Texas Government Code.

2 Section 571.173, Texas Government Code.

3 Fines referenced include Assurance of Voluntary Compliance (AVOC) orders. The Commission issues AVOCs when the violation is considered technical or *de minimis* under 1 T.A.C. Section 12.81. Fines associated with AVOCs can be up to \$500, but these orders typically result in no fine.

4 Sections 571.1211(2) and (3), Texas Government Code.

5 Texas Ethics Commission, January 17, 2012, workshop.

6 Sunset staff contacted California, Georgia, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, Oklahoma, South Carolina, and Tennessee in its state survey.

7 Section 571.069, Texas Government Code.

8 Section 254.0405, Texas Election Code; Section 571.0771, Texas Government Code.

9 Section 571.069(a), Texas Government Code.



# RESPONSES TO ISSUE 1

## Overall Agency Response to Issue 1

The Texas Ethics Commission agrees with the recommendations. The agency understands that the state's enforcement process unintentionally creates an environment whereby filers wanting to fully comply with the reporting laws are subject to accusations and the resulting stigma of "ethics" violations for minor reporting infractions. (David A. Reisman, Executive Director – Texas Ethics Commission)

## Recommendation 1.1

*Develop a system for resolving complaints that aligns enforcement actions with the seriousness of the violations.*

### Agency Response to 1.1

The Commission agrees with this recommendation.

- **Initiate action with a reporting inquiry form.** Initiating an action with an "inquiry form" rather than a "sworn complaint" would lessen the negative perception as an inquiry into a matter that does not from its face appear to jump to a presumption of wrongdoing.
- **Establish levels of violation.** Replacing the Category One and Category Two violations, as currently defined and set out in statute, with levels of violations set out in statute that initiate and offer resolution by a Letter of Acknowledgement for technical or *de minimis* violations defined by current rule; a Notice of Administrative or Filing Error, for example, late filings, non-filings, and administrative types of errors; and Notices of Violation for more serious types of violations, such as actual conflicts, material omissions, and abuse of office through campaign finance, would allow the staff flexibility to group inquiries by level and allow for more efficient processing of actions. Those technical or *de minimis* allegations and administrative filing errors could be processed more efficiently by staff by allowing more time for the Commissioners and staff to investigate and resolve more serious violations.

(David A. Reisman, Executive Director – Texas Ethics Commission)

### For 1.1

Helen Carvell – League of Women Voters of Texas

John Cobarruvias, Houston

Matt Glazer, Executive Director – Progress Texas, Austin

Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin

Conor Kenny, Austin

Fred Lewis, President – Texans Together Education Fund, Austin

Phillip Martin, Research and Policy Director – Texas Research Institute, Austin

Craig McDonald, Director – Texans for Public Justice, Austin

Bee Moorhead – Texas IMPACT, Austin

Joanne Richards, President – Coffee Party Austin, Austin

Shannon Smith, Student Legislative Counsel – Laney Center for Public Service, Austin

Tom “Smitty” Smith, Director – Public Citizen Texas, Austin

Laurie Vanhooose – Common Cause Texas

Liz Wally – Clean Elections Texas

### **Against 1.1**

None received.

### **Modifications**

1. Require staff to thoroughly investigate the few major alleged serious violations which involve credible allegations of Class A misdemeanors (a political committee failing to file a campaign treasurer) or Class 3 felonies (making or receiving illegal corporate or union contributions). (Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhooose – Common Cause Texas; and Liz Wally – Clean Elections Texas)
2. Include in the trifurcated system in the Sunset report the removal of criminal penalties for violations of any provision of the Lobby Law, except issues identified in the “Notice of Violation” category. Criminal penalties would be available only for serious matters that do not include administrative errors, such as knowing failure to register, failure to correct after notification, and violation of the contingent fee prohibition. These criminal penalties would range from minor criminal penalties (Class C misdemeanors) to Class A misdemeanors, and a single felony level violation for the contingent fee statute. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)

*Staff Comment:* The Sunset staff recommendation intended for the infraction categories, including the most serious Notice of Violation category, to apply to civil penalties and not to criminal penalties. The staff recommendation relies on the Commission’s expertise to develop rules to determine what infractions go into each category and guide what action the Commission could take under its civil authority. Criminal penalties must be specified in statute for enforcement by local prosecutors. To tailor criminal penalties in law to the most serious Notice of Violation category would require specifying in law these violations and assigning the actual penalty level to each. The testimony did not identify the specific violations and penalty levels that would be listed in statute.

**Recommendation 1.2**

*Direct the agency to strengthen systems to verify the completeness and accuracy of disclosure information.*

**Agency Response to 1.2**

The Commission agrees with this recommendation.

Contingent on sufficient funding, the statutory authorization for facial compliance audits on all reports in addition to random in-depth audits would serve a dual purpose of weeding out facial problems with disclosure reports while enabling the Commission to perform intensive selective audits in high risk areas that a facial audit would not disclose. Enabling the Commission to randomly perform these complete intensive selective audits, through bank record review, third party interviews, and other intensive investigation methods, with the ability to subject filers to the enforcement process, could enhance the reporting process by providing an incentive for full and accurate disclosure. (David A. Reisman, Executive Director – Texas Ethics Commission)

**For 1.2**

Helen Carvell – League of Women Voters of Texas, Austin

John Cobarruvias, Houston

Matt Glazer, Executive Director – Progress Texas, Austin

Conor Kenny, Austin

Fred Lewis, President – Texans Together Education Fund, Austin

Phillip Martin, Research and Policy Director – Texas Research Institute, Austin

Mary Nell Mathis, Board Member – Common Cause, Austin

Craig McDonald, Director – Texans for Public Justice, Austin

Bee Moorhead – Texas IMPACT, Austin

Joanne Richards, President – Coffee Party Austin, Austin

Tom “Smitty” Smith, Director – Public Citizen Texas, Austin

Laurie Vanhooose – Common Cause Texas

Liz Wally – Clean Elections Texas

**Against 1.2**

None received.

**Modifications**

3. Require the staff to perform a certain, specified number of random audits in order to enhance voluntary compliance. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)
4. Require the agency to hire well trained paralegals or clerks to review report filings before filing deadlines and send suggested corrections to filers. (Diane Mosier, President; Muffie Mosier, Board Member and Legal Counsel; and Martha Heubel, Board Member – River Oaks Area Democratic Women, Houston)



# COMMISSION DECISION ON ISSUE 1

(June 2012)

Adopted Recommendation 1.1, with a modification to require the Ethics Commission to adopt rules to implement the recommendation by December 1, 2013. Adopted Recommendation 1.2.

# FINAL RESULTS ON ISSUE 1

(July 2013)

## ***Legislative Action***

**Recommendation 1.1** — The Governor vetoed S.B. 219, which contained this recommendation, as modified by the Legislature. Senate Bill 219 would have revised the agency's enforcement process to better distinguish between minor infractions and major violations. The bill had created three broad categories of violations according to their seriousness: a technical, clerical, or *de minimis* violation; administrative or filing violation; and a more serious violation. Senate Bill 219 would have authorized the Commission to define these categories in rule and to develop penalty guidelines to assist commissioners and staff in proposing fines based on the level of violation. The bill had also revised language associated with complaints to be less legalistic and reduce the potential to stigmatize filers as "ethics violators." The bill would have required the Commission to adopt rules by December 1, 2013 and provided that changes only apply to inquiries filed on or after that date.

The Legislature added a related provision that would have required the Commission to post on the Internet its finding that a person has not committed a violation within the agency's jurisdiction or its notice of dismissal of an inquiry or motion if the person requests the posting and waives confidentiality.

## ***Management Action***

**Recommendation 1.2** — The Sunset Commission recommended the Commission strengthen systems to verify the completeness and accuracy of disclosure information, linked to the receipt of additional revenue generated from a reporting fee or other funds directed by the Legislature. Senate Bill 219 had provided for a new reporting fee, discussed further in Issue 3, to help strengthen these systems, but was vetoed by the Governor. Reflecting the finding of the Sunset Commission, S.B. 1, the appropriations bill, does provide an additional \$3.5 million in the 2014-2015 biennium to update the Commission's electronic filing system to help it verify the completeness and accuracy of reports.





# ISSUE 2

## *The Hearings Process for Ethics Complaints Weakens the Commission’s Effectiveness in Enforcing Disclosure Laws.*

### Background

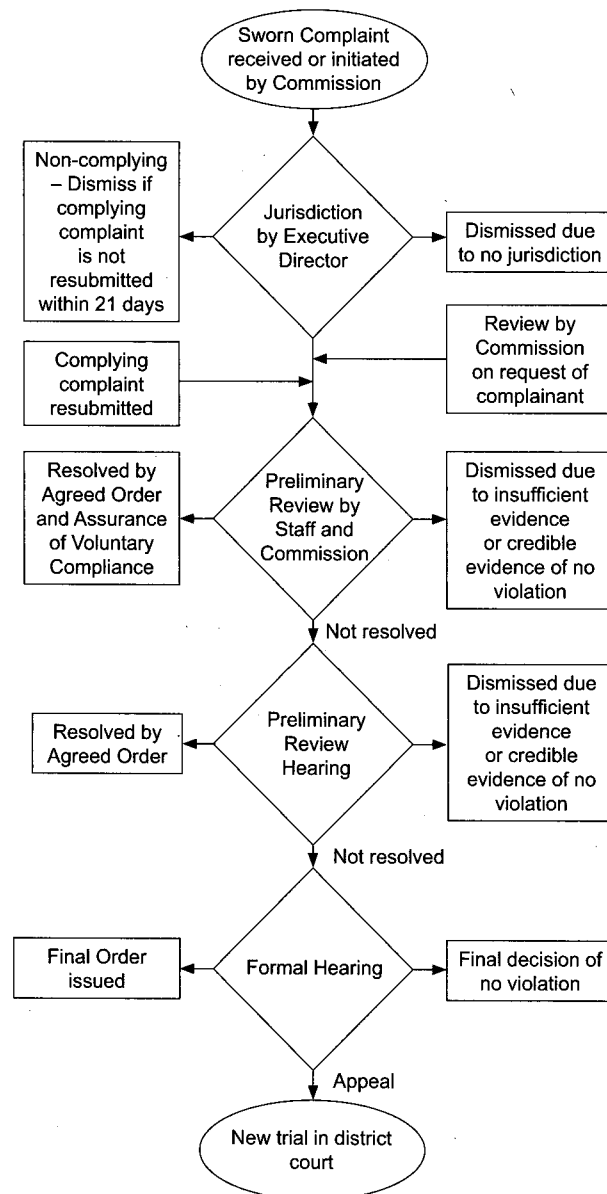
Any Texas resident or property owner can file a sworn complaint with the Texas Ethics Commission alleging violation of a law enforced by the agency.<sup>1</sup> As shown in the chart, *Texas Ethics Commission Sworn Complaints Process*, a sworn complaint can pass through several stages before reaching resolution.

The process begins with the executive director determining whether the Commission has jurisdiction over the matter and assessing the completeness of the complaint.<sup>2</sup> As shown in the table on the following page, *Processing of Sworn Complaints*, the executive director dismissed about one-third of complaints at this initial step. The executive director may resolve certain minor cases through an “assurance of voluntary compliance,” as occurred in another 33 cases at this early stage.<sup>3</sup>

For the remaining complaints, staff prepares a report for the full Commission for its consideration with staff in a closed preliminary review session. The preliminary review can result in various actions, including the Commission dismissing the complaint, authorizing staff to propose an agreed order to the respondent, resolving the complaint through an assurance of voluntary compliance, or directing staff to get more information.

If a complaint is not resolved at the preliminary review stage, it may continue to a preliminary review hearing and, finally, a formal hearing, both before the full Commission. In fiscal year 2011, nine complaints progressed to the preliminary hearing stage and none graduated to a formal hearing. Commission decisions may be appealed to district court, but no case progressed to that point in fiscal year 2011.

**Texas Ethics Commission Sworn Complaints Process**



**Processing of Sworn Complaints – FY 2011**

Stage of Complaint Resolution	Action	Number of Complaints	Percent Resolved at This Step	Complaints Remaining After Action
Jurisdiction by ED	Dismissed	123	33%	249
Before Preliminary Review by Staff and Commission	AVOC*	33	9%	216
Preliminary Review by Staff and Commission	Dismissed	74	20%	142
	Agreed Order	111	30%	31
	AVOC*	22	6%	9
Preliminary Hearing with Commission	Agreed Order	2	1%	7
	Final Order – Default Hearings	7	2%	0
Formal Hearing	Final Order	0	N/A	N/A
<b>Total</b>		<b>372</b>	<b>100%</b>	

\* Assurance of Voluntary Compliance

**Findings**

**Statute does not structure the agency’s hearings process for sworn complaints to ensure optimum fairness.**

The Commission is set up to be the ultimate judge of sworn complaints under its jurisdiction. However, when it involves itself in the preliminary review of complaints, the Commission not only spends its valuable time on what is usually a staff function in many agencies, but also potentially impairs its ability to fairly judge and decide these matters.

In the preliminary review, the Commission meets with agency staff in executive session without the respondent in attendance. The Commission hears information about the case and may direct aspects of the investigation or work with staff to propose an agreed order for the respondent to consider. If the respondent rejects the proposed order, the complaint may progress to a preliminary hearing and, potentially to a formal hearing, both before the same Commission members that proposed the order in the first place without hearing from the respondent. As a result, the Commission may be biased toward a particular set of facts it helped develop without hearing all sides and may not be impartial decision makers.

Further, the Commission must consider as many as 40 such cases at each of its meetings, combing through hundreds of pages of documents for what is essentially a ministerial function. The Commission has recognized this and begun to delegate more authority to its staff to act on lesser matters found to be technical, clerical, or *de minimis* violations.

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*The Commission’s involvement in the preliminary review of complaints potentially impairs its ability to fairly judge them.*

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The involvement of an agency's full governing body at these early stages of complaint investigation and resolution is not typical of most state agency hearings processes, which the Sunset Commission staff has observed over many years of reviewing state agencies. Such a process typically starts with staff developing a proposed agreed order without full governing board involvement if, after investigation, staff believes that grounds exist for enforcement action. If the respondent rejects the proposal, an agency may hold informal discussions with the respondent, including, in some cases, holding an informal settlement conference. These discussions may occur at the agency staff level, or may involve a subset of agency board members. For example, informal settlement discussions held by the Public Utility Commission and Texas Commission on Environmental Quality occur at the staff level, while settlement conferences of the Texas Medical Board often involve one or more board members.

For most state agencies, a disputed matter usually progresses to a formal hearing before the State Office of Administrative Hearings (SOAH). SOAH hears the case and develops a Proposal for Decision for the originating agency. The agency's governing body then accepts, modifies, or rejects the proposal within certain limits defined by law. Such a formal process for conducting hearings is important in ensuring needed independence in weighing applicable facts and law, and in ensuring a complete record to document the decision-making process. This record is especially important in matters appealed to court. Statute does not specifically authorize SOAH's use by the Texas Ethics Commission, although the agency has used its services at least twice since its creation.

**Statute and agency rules set up court appeals of the Commission's contested cases in a way that weakens its role in enforcing disclosure laws.**

Statute requires that an appeal from a Commission decision be resolved through a new trial in district court in Travis County or in the county in which the respondent resides.<sup>4</sup> Texas Ethics Commission rules allow a respondent to waive the right to hearing, in which case the Commission may still issue a final order imposing a civil penalty.<sup>5</sup> The respondent may appeal the order under the *de novo* standard, causing the court to hear the matter anew and not based on the record of the Commission's decision, even if a record was developed.

Requiring a new trial on appeal threatens to undermine the Commission's enforcement of disclosure requirements that are at the heart of the state's ethics laws. Because trial *de novo* requires the court to try each issue of fact and law and "not to admit in evidence the fact of prior action by the commission or the nature of that action," such a review potentially renders moot the decisions made by the agency, especially on the larger, more significant matters most likely to require formal Commission action.<sup>6</sup> Allowing respondents to skirt the agency's hearings process in favor of a court trial further weakens

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*The involvement of an agency's full governing body at early stages of complaint investigation is not typical.*

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*Requiring a new trial on appeal threatens to undermine the Commission's enforcement of disclosure laws.*

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the agency's role by eliminating procedural steps in which the Commission exercises the quasi-judicial authority for which it was established. Waiving the right to a Commission hearing has occurred in at least two high profile cases in the recent past.

Certainly, the potential to delve into matters with significant political overtones requires extra caution in how the state sets up an "ethics" agency. It is, in fact, different from an occupational licensing agency. However, the assumption must be that the state's voters, in approving the creation of the agency, intended for it to be effective in its charge. The careful balance in the Commission's composition reflects this interest in having the Commission accommodate the sometimes difficult political issues that may come before it. By diminishing the Commission's role in enforcement matters, the current appeals process affects the agency's ability to meet its basic responsibility and ultimately challenges the state's commitment to a meaningful process in which the agency and Commission have the expertise and the authority to adequately enforce the laws entrusted to them.

A more common standard for a trial on appeal in contested cases before administrative agencies is for judicial review based on the "substantial evidence rule," whereby statute directs a court not to substitute its judgment for that of the state agency on questions left to the agency's discretion. Instead, the court may affirm all or part of the agency decision; or may reverse or remand the case if, among other issues, agency decisions violate law or procedure, are arbitrary or exceed agency authority or discretion, or are not reasonably supported by substantial evidence. General state law also suggests review under the substantial evidence rule as a standard by defaulting to this rule if the law does not define the scope of judicial review.<sup>7</sup>

Respondents in contested cases subject to the substantial evidence rule on appeal typically must exhaust all administrative remedies before appealing to court, and thus may not bypass agency hearings procedures. This requirement is necessary since appeal under the substantial evidence rule is based on examination of the record developed by the agency.

## Recommendations

### *Change in Statute*

#### **2.1 Eliminate Commissioner involvement in the preliminary review of a sworn complaint and restructure the preliminary hearing to include only two Commissioners.**

Under this recommendation, Commissioners would not be involved in the preliminary review of a complaint. Staff would make any initial proposals to respondents and continue to gather information, as necessary. Rejection of a proposal made by staff would move the case to the preliminary hearing phase, where all possible actions remain on the table for consideration.

Commissioner involvement in the preliminary hearing phase of a complaint would be limited to two instead of the full Commission, as is currently the case. The Commission would decide by rule how

the two commissioners representing each political party would be selected. The preliminary hearings could be held in conjunction with regular Commission meeting dates or at other times as the agency decides. Several preliminary hearings could occur simultaneously, if needed, with all Commission members having the opportunity to serve on the preliminary hearing panels. A tie vote on an action in a preliminary hearing, or rejection of a proposal by the respondent, would promote the case to the formal hearing stage. A respondent's rejection of a proposal from a preliminary hearing would not preclude the possibility of higher sanctions resulting from a formal hearing.

The Commission would adopt rules as necessary defining the preliminary review and preliminary hearing procedures, in compliance with broad statutory directives. Unless specifically delegated in rule or statute, the Commission would still need to approve all agreed orders arising through any preliminary processes. Other powers of the Commission, such as subpoena power, would remain unchanged.

Elimination or reduction of Commissioner involvement in preliminary review and preliminary hearing stages reduces any potential or appearance of bias when the full Commission sits as judge in the formal stage of complaint resolution. The recommendation, which reflects a more standard hearings process used by state agencies, would enable Commission members to focus on more significant cases while not affecting staff workload substantially. Providing a mechanism for Commission approval of agreed orders would offer the needed high level of assurance that decisions made at these preliminary stages are made appropriately.

## **2.2 Provide for judicial review of Commission decisions based on substantial evidence of the record and decisions made by the Commission.**

Contested case hearings would be subject to appeal under the substantial evidence rule rather than the requirement of a new trial. Additionally, a respondent would be required to exhaust the Commission's administrative remedies and not be allowed to bypass agency hearings before taking a case to court. This recommendation would still allow the respondent to seek such an appeal either in a district court in Travis County or in the respondent's county of residence, as is currently provided in law. These changes would ensure the Texas Ethics Commission's role in deciding sworn complaints is not diminished beyond the role typically played by most other state agencies.

## **2.3 Clearly establish that the Texas Ethics Commission has the choice of holding formal hearings itself or delegating this responsibility to the State Office of Administrative Hearings.**

The agency's statute does not specifically authorize the agency's use of SOAH, and this recommendation would eliminate the current ambiguity in its wording.

## **Fiscal Implication**

These recommendations would not have a significant fiscal impact to the State. The agency could incur additional expense if it changes current procedures to hold formal hearings at SOAH.

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1 Section 571.122(b-1), Texas Government Code.

2 Section 571.123, Texas Government Code.

3 1 T.A.C. Section 12.81(c).

4 Sections 571.133(a) and (d), Texas Government Code.

5 1 T.A.C. Section 12.25.

6 Section 571.133(d), Texas Government Code.

7 Section 2001.174, Texas Government Code.

## RESPONSES TO ISSUE 2

### Overall Agency Response to Issue 2

The Commission agrees with the recommendations. Elimination or reduction of Commission involvement in the preliminary review of a complaint would allow both the staff and Commission more time to focus on more significant cases. Additionally, the Commission agrees that the current statutes weaken the Commission's role in enforcing disclosure laws by requiring a new trial, trial *de novo*, on appeal. Finally, the Commission agrees that the relevant statutes could be clarified to show that the Commission has the choice of holding the formal hearing itself or delegating the responsibility to the State Office of Administrative Hearings (SOAH). (David A. Reisman, Executive Director – Texas Ethics Commission)

### Recommendation 2.1

*Eliminate Commissioner involvement in the preliminary review of a sworn complaint and restructure the preliminary hearing to include only two Commissioners.*

#### Agency Response to 2.1

The Commission agrees with this recommendation.

While there is no current evidence of bias, the attempt to standardize the review process by adopting a process similar to that of other state agencies, may reduce a perception that early involvement and decision making in a matter makes a difference in the outcome. Additionally, the full Commission is currently involved in all three stages of the sworn complaint process. Removing the Commission from involvement in certain stages would result in better efficiency in the sworn complaint process. (David A. Reisman, Executive Director – Texas Ethics Commission)

#### For 2.1

Helen Carvell – League of Women Voters of Texas

John Cobarruvias, Houston

#### Against 2.1

None received.

#### Modifications

1. Remove the commission board from involvement in the implementation of the agency's enforcement process so that the board would no longer be involved in deciding whether to initiate a complaint, conduct audits, hold hearings, or determine violations. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom "Smitty" Smith, Director – Public Citizen Texas, Austin)

2. Require that probable cause reports immediately be made public after being approved by order of the executive director and that all administrative hearings and evidence be public as in any other contested case or matter. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)
3. Create an enforcement division and director with separate attorneys and investigators, and full authority, including subpoena power, to oversee all investigations and enforcement actions. (Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhoose – Common Cause Texas; and Liz Wally – Clean Elections Texas)
4. Change the Commission’s administrative hearings process for sworn complaints as follows:
  - a. require a complainant to attend the hearing so that the filer may confront the accuser; and
  - b. require the Ethics Commission lawyers to report and acknowledge to the administrative hearing officers all good faith efforts of a filer to amend or correct a filing so that the hearing officers may judge the intent of the filer when making an effort for compliance.

(Diane Mosier, President; Muffie Mosier, Board Member and Legal Counsel; and Martha Heubel, Board Member – River Oaks Area Democratic Women, Houston)

## **Recommendation 2.2**

*Provide for judicial review of Commission decisions based on substantial evidence of the record and decisions made by the Commission.*

### **Agency Response to 2.2**

The Commission agrees with this recommendation.

Current law allows a respondent to appeal a decision made by the Commission to district court where the district court must hear that case as a trial *de novo*, a new trial. The entire administrative record of the matter may not be introduced at the new trial. The Commission agrees that this atypical standard is inefficient as it creates a necessity to duplicate the case record and ultimately weakens the Commission’s enforcement effectiveness. (David A. Reisman, Executive Director – Texas Ethics Commission)

### **For 2.2**

John Cobarruvias, Houston

Matt Glazer, Executive Director – Progress Texas, Austin

Conor Kenny, Austin



Fred Lewis, President – Texans Together Education Fund, Austin

Phillip Martin, Research and Policy Director – Texas Research Institute, Austin

Craig McDonald, Director – Texans for Public Justice, Austin

Bee Moorhead – Texas IMPACT, Austin

Joanne Richards, President – Coffee Party Austin, Austin

Tom “Smitty” Smith, Director – Public Citizen Texas, Austin

Laurie Vanhooose – Common Cause Texas

Liz Wally – Clean Elections Texas

### **Against 2.2**

None received.

### **Recommendation 2.3**

*Clearly establish that the Texas Ethics Commission has the choice of holding formal hearings itself or delegating this responsibility to the State Office of Administrative Hearings.*

#### **Agency Response to 2.3**

In an attempt to alleviate some ambiguity found in the law, the Commission adopted a rule stating that, when the Commission orders a formal hearing, the Commission shall decide whether the formal hearing will be held before the Commission or before the State Office of Administrative Hearings. (Ethics Commission Rule § 12.117. Formal Hearing: Venue). It would give helpful guidance if relevant statutes were clarified to specifically state that the Commission has a choice of holding a formal hearing or delegating this responsibility to SOAH. (David A. Reisman, Executive Director – Texas Ethics Commission)

#### **For 2.3**

John Cobarruvias, Houston

#### **Against 2.3**

None received.

#### **Modification**

5. Require the State Office of Administrative Hearings (SOAH) to hear the Texas Ethics Commission's contested cases. (Helen Carvell – League of Women Voters of Texas; Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public

Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhoose – Common Cause Texas; and Liz Wally – Clean Elections Texas)

## COMMISSION DECISION ON ISSUE 2

(June 2012)

Adopted Recommendations 2.1 through 2.3.

## FINAL RESULTS ON ISSUE 2

(July 2013)

### ***Legislative Action***

**Recommendation 2.1** — The Governor vetoed S.B. 219, which had included this recommendation to eliminate commissioner involvement in the preliminary review of a sworn complaint and restructured the preliminary hearing to include only two commissioners.

**Recommendation 2.2** — The Legislature did not adopt this recommendation to require judicial review of Commission decisions based on substantial evidence of the record and decisions made by the Commission.

**Recommendation 2.3** — The Governor vetoed S.B. 219, which had contained the recommended provision clearly establishing the Commission’s choice of holding formal hearings itself or delegating this responsibility to the State Office of Administrative Hearings.

# ISSUE 3

## *The Agency's Technology and Information Management Have Not Kept Pace With Its Workload and Changing User Needs.*

### Background

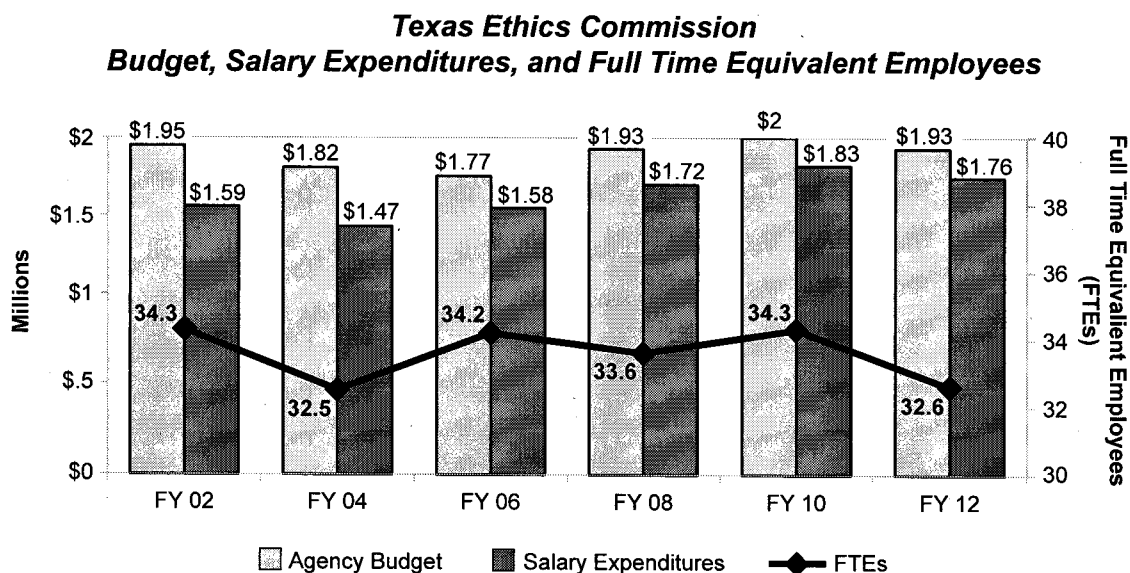
The Texas Ethics Commission's responsibilities include receiving financial disclosure information from applicable filers and making it available to the public; enforcing financial disclosure laws, including processing sworn complaints from individuals alleging disclosure irregularities; preparing advisory opinions interpreting the state's disclosure-related statutes; and educating disclosure filers and the public as to the requirements of the law. The Legislature funds these activities almost entirely from General Revenue, with about 1 percent of the agency's fiscal year 2011 budget of \$1.9 million comprising miscellaneous receipts such as copying services.

Statute directs the Texas Ethics Commission to collect lobby registration fees, which are deposited to General Revenue and help support, but do not cover, total appropriations from that fund. Lobby registration receipts amounted to \$811,550 in fiscal year 2011. A statutory provision dating to 1987 currently prohibits the agency from charging a fee for filing campaign finance disclosure reports, another potential source of revenue.<sup>1</sup> Fines assessed by the agency accrue to General Revenue as well, but are not considered to support agency operations.

### Findings

**The agency's funding and resources have not kept up with needed technological changes, legislative mandates, and an increasing workload, reducing the agency's effectiveness.**

- **Stagnant funding.** The graph below provides historical budget and staffing information for the Texas Ethics Commission.



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*The agency is operating on about \$18,000 less in fiscal year 2012 than in fiscal year 2002.*

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The agency is operating on about \$18,000 less in fiscal year 2012 than in fiscal year 2002, without considering inflation. If inflation is factored in, the shortfall increases to more than \$500,000.<sup>2</sup> Staffing also has declined by about two employees from fiscal year 2002 through fiscal year 2012. Salary costs, however, have increased overall, and take a greater portion of operating expenses, reducing the agency's non-salary operating expenses by about \$196,000 (54 percent) from what it had in fiscal year 2002.

Recognizing the agency's developing funding issues, the Legislature helped offset standard budget cuts experienced by the Texas Ethics Commission for the current 2012–13 biennium. The Legislature increased the registration fee for most lobbyists from \$500 to \$750 per year and appropriated an additional \$375,000 to the agency contingent on these additional funds being realized.<sup>3</sup> These additional appropriations are included in the budget above but still fell short of bringing the agency back to its funding level for the 2010–11 biennium.

- **Growing demand for information technology.** The agency relies heavily on information technology to serve filers and the public. Since fiscal year 2000, state law requires most Texas Ethics Commission campaign finance filers to submit reports electronically and requires the agency to make resulting data available online.<sup>4</sup> In fiscal year 2003, the Legislature extended electronic filing requirements to lobbyists filing lobby activity reports.<sup>5</sup> The agency now receives about 87 percent of filed reports electronically and the number of reports it receives is increasing. Between fiscal years 2002 and 2011, reports submitted climbed from nearly 19,000 to just under 31,000, an increase of about 63 percent. The agency must also make information from these reports and other information about sworn complaints and advisory opinions easily available online to the public.
- **Outdated filing software.** The agency has been unable to stay on the cutting edge of innovation and user friendliness with its filing software. The agency makes downloadable software available as the primary means for filers to complete and submit campaign finance and lobby activity reports. Downloadable software is available for personal computer (PC) users, but not for filers using Mac computers, a source of numerous complaints. The agency has developed a web-based program as a workaround for campaign finance filers using Macs, but this workaround is designed mainly for small reporting needs and lacks features available in the downloadable version for PCs. None of this software provides extensive and instant feedback for clearly wrong entries, a feature common in tax filing software that would help reduce filing errors.

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*The agency's filing software does not provide extensive feedback for clearly wrong entries.*

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The agency experiences problems in managing this software. Downloadable filing software for campaign finance filers is now outdated, having been first programmed in 1999. Agency programmers have to make patchwork updates to old software code that creates errors when used with newer user software and equipment.

The Texas Ethics Commission has considered ways to replace its patchwork system with electronic filing software that would work well for PC and Mac users alike, and that would be easy to update with additional features. In January 2012, agency staff presented to its Commission information about an electronic disclosure reporting design that would allow filers to submit financial information immediately or shortly after expenditures, contributions, or other financial transactions occurred.<sup>6</sup> Although untested, such a system could have the following benefits:

- eliminating the current tangle of filing dates for different reports with reporting “as you go”;
  - simplifying reporting to reflect basic activities comparable to a bank statement, thereby reducing opportunities for errors;
  - flagging late filings electronically in real time and providing an automated process for dealing with them;
  - providing fast online access to data and increased transparency for the public; and
  - being potentially less expensive than other replacement systems considered by the agency.
- **Outdated hardware.** In fiscal year 2009, the agency put its plan to replace aging computer servers on indefinite hold due to lack of funds. The agency also has been unable to renew maintenance contracts on this equipment due to increased contract costs associated with maintaining the older equipment. The loss of a key computer server could prevent the agency from being able to accept electronically filed campaign finance and lobby activity reports and restrict public access to the agency’s database, crippling agency services.
  - **Loss of resources for website development.** As a main source of information for many, the website needs to be easy to navigate and make the most important information readily available to filers and the general public. Because of budget cuts and reductions in staff, however, the agency no longer has a full-time website administrator. Current website maintenance is assigned to software programmers who also are experiencing increased responsibilities for technical support to the public. The lack of resources devoted to website support reduces the agency’s ability to improve website design through researching new ideas, trends, and applications. As an example, the agency would like to explore adding connectivity for mobile devices to its website but does not have the resources to dedicate to this type of project.
  - **Increasing number of sworn complaints.** Workload from sworn complaints has increased dramatically, with complaints filed escalating from 168 in fiscal year 2004 to 374 in fiscal year 2011. Because of the substantial increase in the number of sworn complaints received, the

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*The agency is researching a new electronic disclosure reporting design that would allow “as you go” reporting.*

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processing time to resolve them has also gone up from an average of 44 days in fiscal year 2004 to an average of 139 days in fiscal year 2011. Delay in processing sworn complaints can have serious implications for candidates or elected officials who may be branded with unconfirmed allegations. Slow complaint resolution also affects the public, which lacks timely enforcement information about candidates or officeholders.

- **Inability to check or audit reports.** Statute requires the Texas Ethics Commission to review for facial compliance randomly selected reports filed with the Commission.<sup>7</sup> In addition to these facial reviews for completeness, statute authorizes the Commission to initiate a complete audit of reports by vote of the Commission.<sup>8</sup> The agency is unable to perform either of these functions systematically, primarily due to lack of funds and pressing workload in other areas. As discussed in Issue 1, the inability to perform these functions deprives the state of an assistance tool at the front end to help ensure that filers' reports are properly completed and an assessment mechanism at the back end to see that reports are accurate and not deceptive. In turn, the inability to check or audit reports could potentially reduce the availability of complete information for the public to accurately assess the accountability of filers.
- **Loss of ethics education funding.** Although directed to provide education and training to state agencies and elected officials, the agency had its education budget for the 2012–13 biennium eliminated.<sup>9</sup> While the agency continues offering training as time allows, lack of training funds hampers its efforts to help filers understand their responsibilities and reduce filing errors.

### **The agency's use of information to manage and support efficient operations needs improvement.**

Emphasis on efficient operation is especially important for agencies with constrained budgets, and agency administrators should develop, analyze, and manage information to support this goal. The agency seeks to manage the increasing workload with limited resources. For example, the agency schedules its attorneys' work so they have uninterrupted time away from the large number of telephone inquiries to work on sworn complaints. However, the agency could take additional steps to better manage information that could help allocate resources more efficiently.

The agency has not systematically analyzed the topics of telephone calls or complaint allegations to objectively determine areas of greatest interest to callers. This information could help guide the development of explanatory information, either for use by attorneys answering calls, for training purposes, or for publication and prominent placement on the agency's website. Well targeted materials, in turn, could help the agency maintain its high level of customer service while potentially reducing telephone calls and filer reporting errors and possibly reducing its workload.

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*The agency could take additional steps to better manage information.*

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**Many state agencies in Texas, as well as some agencies administering disclosure laws in other states, assess fees to help support agency operations.**

Statute requires the agency to collect lobby registration fees, which help defray the state's cost of agency licensing functions, but prohibits charging reporting fees to help cover the cost of processing disclosure reports and providing that information online.

The Legislature often requires agencies to collect fees to support some or all agency operations. Examples include the Texas Railroad Commission, the Texas Commission on Environmental Quality, the Texas Alcoholic Beverage Commission, and many occupational licensing agencies. In addition, the Secretary of State charges a filing fee for candidates for certain offices to get on the ballot. The Secretary of State avoids any constitutional issue that might arise from a fee potentially obstructing a person's candidacy by providing a petition process allowing the petitioner to get on the ballot without having to pay a filing fee.

Agencies dealing with financial disclosure in several other states require filers to pay fees to supplement agency expenditures for providing services. For example, the Oklahoma Ethics Commission requires a \$50 annual fee from all political committees for appropriation to the agency. The Louisiana Board of Ethics and Tennessee Ethics Commission both charge political committees a \$100 annual registration fee to supplement operating expenses. The Kansas Governmental Ethics Commission charges various filing fees for candidates and sliding scale registration fees for political committees depending on contributions received.

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*Several other states require filers to pay fees to supplement agency expenditures.*

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## **Recommendations**

### ***Change in Statute***

**3.1 Require candidates, elected officeholders, and political committees filing disclosure reports with the Texas Ethics Commission to pay an annual fee to help support the agency's operations.**

This recommendation would charge annual fees to candidates, elected officials and political committees filing disclosure reports with the Texas Ethics Commission, but would not add to the fee already charged to lobbyists and would not apply to individuals only required to file personal financial statements. Because of the novelty of such a fee, it should be capped in statute. Setting the fee cap at \$100 and requiring the Texas Ethics Commission to set the specific fee in rule would enable the agency to establish the fee at a level to support the agency's funding needs, as discussed, and provide some room for additional revenue in the future without having to amend the statute.

Fee revenue would be deposited in the General Revenue Fund, subject to appropriation to the agency by the Legislature, as indicated in the following recommendation. The appropriations process would serve as an additional check on the agency setting the fee too high. To help ensure the fee does not create any financial hardship to running for office, candidates filing petitions to be placed on a ballot

rather than pay a filing fee to the Secretary of State would be exempt from paying this reporting fee to the Texas Ethics Commission.

Estimates suggest that about 4,000 filers would be subject to the fee each year. While the number of required reports may fluctuate a little from election to non-election years, the anticipated number of filers subject to the fee should remain fairly constant. A reporting fee of \$50 would generate \$200,000 a year, a reasonable amount to initiate these improvements.

New fee revenues, used as the next recommendation indicates, would benefit the agency, filers, and the general public without reducing existing General Revenue funds. This funding would allow the agency to research software that could help filers avoid potential mistakes as disclosure reports are filed electronically, simplifying and streamlining disclosure reporting, reducing the number of sworn complaints the agency receives resulting from filing mistakes, and improving disclosure. Additional funding would also allow the agency to consider an auditor position to focus on more detailed audits or investigations, when needed.

### ***Change in Appropriations***

#### **3.2 Add rider language to the General Appropriations Act that provides additional funding to the Texas Ethics Commission contingent on collection of sufficient revenue from the new reporting fee.**

This recommendation would specify the purposes for the new funds resulting from Recommendation 3.1, and make the appropriation contingent on receipt of sufficient fee revenue to cover it. Rider language should indicate priority uses for the fund, which could include the following:

- improving the electronic filing system, including ways to make the system easily accessible to all filers, simple to use, able to assist filers in accurately completing reports, and flexible to meet future demands;
- keeping computer servers and other hardware necessary to serve the public and filers up to date;
- keeping the agency's website up to date and easy to use;
- initiating an audit function for disclosure reports; and
- funding statutory education requirements.

This approach is similar to that used for appropriating \$375,000 by rider to the agency for the current biennium, contingent on collection of additional lobby registration fees required in statute. Using a rider to control the appropriation gives the Legislature flexibility to change the amount of the appropriation and its underlying fee, subject to the statutory cap, over time as needs warrant.

### ***Management Action***

#### **3.3 The Texas Ethics Commission should evaluate and report to the Legislature on an electronic reporting system that allows filers to upload disclosure information soon after any activity occurs.**

The agency should fully evaluate the feasibility of a new electronic, web-based reporting system that allows filers to enter disclosure information "as you go" as activity occurs. As suggested and visualized by agency staff, the new system could:



- replace the current system based on fixed reporting dates with a new “rolling date” system of contribution and expenditure activity, comparable to a bank statement;
- allow filers to enter information shortly after it occurs, up to some cut-off period such as 30 days, after which information would be flagged as late, with a threshold for allowable late entries before agency action is warranted;
- warn filers of clearly mistaken entries and flag possible errors for agency attention;
- be available to the public soon after uploading; and
- use current agency technical capabilities to the maximum to reduce cost of the new system.

The agency should report its analysis of such a system to the Legislature by February 1, 2013, in time for consideration by the 83rd Legislature. The report would address costs and benefits of the system; statutory changes needed for possible implementation; possible application to other filings, such as lobby activity reports and personal financial statements; and a plan for its rollout, including the possibility of a pilot project, if the Commission deems such a system to be feasible. Funding for a feasible system should be considered as the Legislature evaluates uses for the new fee revenue recommended above.

While involving development cost, a reporting process of this nature has the potential for streamlining and simplifying reporting, reducing careless errors and resulting complaints, allowing for expansion, and increasing transparency of disclosed information soon after activity occurs.

#### **3.4 The agency should better track and analyze information such as call volume detail and sworn complaint allegations.**

The agency should improve its tracking and analysis of incoming calls and technical requests as well as allegations made in sworn complaints and their final disposition. Systematically analyzing this information would give the agency a better understanding of common questions and typical problems that could be used to help target explanatory materials and appropriately staff its customer assistance functions. For example, ongoing review of frequently asked questions could assist in developing updated information databases to make question answering more efficient and consistent.

### **Fiscal Implication**

The recommendations call for additional appropriations to the Texas Ethics Commission. However, these appropriations would be offset by new fee collections from reporting fees charged to certain filers. Based on the number of campaign finance filers in fiscal year 2011, a fee of \$50 would generate \$200,000 in annual revenue to the General Revenue Fund.

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- 1 Section 251.003, Texas Election Code.
  - 2 Source of inflation rate data is: "Historical Inflation," InflationData.com, accessed January 31, 2012, [http://inflationdata.com/Inflation/Inflation\\_Rate/HistoricalInflation.aspx](http://inflationdata.com/Inflation/Inflation_Rate/HistoricalInflation.aspx).
  - 3 Rider 3, page I-41, Article I (H.B. 1), Acts of the 82nd Legislature, Regular Session, 2011 (the General Appropriations Act).
  - 4 Sections 254.036(b) and 254.0401, Texas Election Code.
  - 5 Section 305.0064, Texas Government Code.
  - 6 Texas Ethics Commission, January 17, 2012, workshop minutes.
  - 7 Section 571.069(a), Texas Government Code.
  - 8 Section 571.069(b), Texas Government Code.
  - 9 Item A.2.1, page I-40, Article I (H.B. 1), Acts of the 82nd Legislature, Regular Session, 2011 (the General Appropriations Act).

# RESPONSES TO ISSUE 3

## Overall Agency Response to Issue 3

The Commission agrees with these recommendations. While the agency has maintained a high level of customer satisfaction with limited funds, an investment in information technology would allow the agency to implement electronic filing systems capable of improving the usability and accuracy of disclosure while also improving the public transparency of reported data. Establishing a continuing investment in information technology would also assist the agency in developing the recommended electronic audit process, as well as improvements to electronic databases to improve the staff's ability to track and analyze incoming calls and technical requests. (David A. Reisman, Executive Director – Texas Ethics Commission)

## Recommendation 3.1

*Require candidates, elected officeholders, and political committees filing disclosure reports with the Texas Ethics Commission to pay an annual fee to help support the agency's operations.*

### Agency Response to 3.1

The Commission agrees with this recommendation.

While the Commission acknowledges that funding sources are a policy decision for consideration by the Legislature, it agrees that improved information technology would benefit filers and the public in that it would allow the agency to pursue improved filing and disclosure methods, improved audit and investigation processes, and funding of ethics education for filers including candidates and officeholders, would also benefit the ethics and disclosure system. (David A. Reisman, Executive Director – Texas Ethics Commission)

### For 3.1

Helen Carvell – League of Women Voters of Texas

John Cobarruvias, Houston

### Against 3.1

Mary Nell Mathis, Board Member – Common Cause, Austin

### Modifications

1. Provide for an increase in general appropriations and the creation of a reasonable user fee paid by filers and dedicated to technological upgrades, audits and training, with exemptions for committees and candidates who raise or maintain relatively small amounts of contributions. (Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald,

Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhooose – Common Cause Texas; and Liz Wally – Clean Elections Texas)

**Staff Comment:** Exempting entities that raise or maintain relatively small amounts of contributions would increase the fee for non-exempt entities to raise the same amount of funds, with the amount of that increase depending on the definition of “small.” For example, about 1,332 of 1,668 (about 80 percent) general-purpose political committees have limited activity, receiving contributions or making expenditures of less than \$3,000. An exemption for these committees alone would increase the fee for remaining filers from \$50 to \$75 to raise the \$200,000 annually envisioned in the staff recommendation.

2. Require that any reporting fee be in effect only long enough to pay for the software and infrastructure to modernize the Commission’s filing and enforcement capabilities, with metrics to determine when a particular level of efficiency has been reached. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)
3. Pursue a legislative commitment to provide adequate general revenue funding without reliance on user fees or fine revenue. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin; Mary Nell Mathis, Board Member – Common Cause, Austin)

### **Recommendation 3.2**

*Add rider language to the General Appropriations Act that provides additional funding to the Texas Ethics Commission contingent on collection of sufficient revenue from the new reporting fee.*

#### **Agency Response to 3.2**

The Commission agrees with this recommendation.

Should the Legislature approve a new funding source based on a reporting fee, specifying the purpose and amount of those funds by rider would provide an effective means of controlling those funds. (David A. Reisman, Executive Director – Texas Ethics Commission)

#### **For 3.2**

Helen Carvell – League of Women Voters of Texas

John Cobarruvias, Houston

#### **Against 3.2**

Mary Nell Mathis, Board Member – Common Cause, Austin

**Recommendation 3.3**

*The Texas Ethics Commission should evaluate and report to the Legislature on an electronic reporting system that allows filers to upload disclosure information soon after any activity occurs.*

**Agency Response to 3.3**

The Commission agrees with this recommendation.

Commission staff recently presented an electronic reporting concept to the Commission that has the possibility of streamlining and simplifying the reporting process. The concept is a departure from the current "downloadable" report style of reporting, to an online system of reporting transactions as they occur.

Given the high costs and lack of available funding to modernize the current electronic reporting system, the staff began exploring alternate ideas based on current technology and information reporting capabilities. With the expanding ability of everyday internet users to provide information using an online format, one idea is to provide a simple online method to report transactions, i.e. contributions and/or expenditures, as they occur rather than by set reporting deadlines. The data would be captured, stored, and presented online instantaneously, thus alleviating the need for software downloads and periodic deadlines. (David A. Reisman, Executive Director – Texas Ethics Commission)

**For 3.3**

John Cobarruvias, Houston

**Against 3.3**

None received.

**Modifications**

4. Exclude lobby reporting from the consideration for any proposal to establish a rolling deadline reporting system. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)
5. Encourage development of a web-based software system that keeps all data on the Commission's server/cloud and not the filer's computer; is Mac friendly; and enhances reporting, transparency, and facilitates facial audits. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)

**Recommendation 3.4**

*The agency should better track and analyze information such as call volume detail and sworn complaint allegations.*

**Agency Response to 3.4**

The Commission agrees with this recommendation.

The Commission staff receives approximately 60,000 telephone calls annually. Many callers request information or assistance on a wide variety of topics under filing, technical assistance, or legal guidance. To maintain its high customer satisfaction levels, the staff has implemented various internal methods to more efficiently and effectively handle these calls. Improved tracking and analysis of incoming calls would give the agency an even better understanding of the common questions asked, which would lead to better methods of assisting callers in a consistent and efficient manner.

The Commission staff also compiles and presents some data on the frequency of sworn complaint allegations, which it presents on its website and by its "Filer Tips" created to address commonly asked questions, distributed with notices to file. However, improved tracking of data would assist in better education of customers on areas of frequent sworn complaint infractions. (David A. Reisman, Executive Director – Texas Ethics Commission)

**For 3.4**

John Cobarruvias, Houston

**Against 3.4**

None received.



## COMMISSION DECISION ON ISSUE 3

(June 2012)

Adopted Recommendations 3.3 and 3.4.

## FINAL RESULTS ON ISSUE 3

(July 2013)

### *Legislative Action*

**Recommendation 3.1** — Although the Sunset Commission did not adopt staff's recommendation to require campaign finance filers reporting to the Commission to pay an annual fee to help support the agency's operations, the Legislature included this requirement in S.B. 219, effective September 1, 2015. However, the bill was vetoed by the Governor.

**Recommendation 3.2** — The Sunset Commission's rejection of Recommendation 3.1 rendered moot this recommendation to the appropriative committees to appropriate fee revenues to the Ethics Commission by rider. However, as noted above, the Legislature did adopt the new reporting fee effective September 1, 2015, but a rider in the current appropriations bill was not needed for that future action and, regardless, the Governor's veto makes a future rider unnecessary.

### *Management Action*

**Recommendation 3.3** — The Sunset Commission directed the Ethics Commission to evaluate and report to the 83rd Legislature on an electronic reporting system that allows filers to upload disclosure information soon after any activity occurs. The Commission presented its proposed new electronic filing system at its January 2013 meeting.

**Recommendation 3.4** — The Sunset Commission directed the Ethics Commission to better track and analyze information such as call volume detail and sworn complaint allegations.





# ISSUE 4

## *Antiquated Filing Requirements Waste Agency Resources and Do Not Promote Meaningful Disclosure.*

### Background

The Texas Ethics Commission serves as the state's repository for certain campaign finance, lobby activity, and personal financial information. State law requires candidates, state officers and employees, certain local officers, caucuses, political committees, and lobbyists to submit periodic reports to the agency in an effort to fully disclose campaign and personal information to provide a measure of accountability for their actions and help ensure the public's confidence and trust in government.

Technology has changed the way the agency manages reports as well as the way the public expects information. Since 2000, law requires most candidates, officeholders, and political committees to submit campaign finance reports electronically; and since 2004, lobbyists must submit activity reports electronically unless they meet the statutory exemption threshold.<sup>1</sup> In fiscal year 2011, of nearly 31,000 reports filed with the agency, 87 percent were filed electronically. The remaining 13 percent primarily consists of personal financial statements, for which statute does not authorize electronic filing.<sup>2</sup> The agency organizes, archives, and makes most reports available online within two business days of receiving them, allowing the public to readily access and search submitted information.

To help ensure full and accurate reporting, statute sets up two types of civil penalties the Commission can assess. Statute sets fines for late or corrected reports from \$500 to \$10,000, although the Commission may waive or reduce these amounts. Fines resulting from formal sworn complaints are statutorily capped at \$5,000 or up to three times the amount at issue, whichever is greater.<sup>3</sup>

### Findings

#### **Statutory requirements limit the accessibility of information available to the public and do not ensure full disclosure.**

The purpose of disclosure reporting is to help ensure and strengthen the public's confidence in state government, yet statutory requirements for various reports impede full and transparent disclosure.

- **Personal financial statements.** These statements are intended to disclose any financial or other interests public officials and candidates may have that conflict with fulfilling their duties in the public interest. However, several personal financial statement provisions limit accessibility to that information or are inconsistent with other disclosure reports.

Not submitted electronically. Unlike campaign finance and lobby activity reports, statute does not authorize personal financial statements to be submitted electronically. With the emergence of the Internet and electronic filing, a clear trend is emerging to eliminate paper filing. The Legislature has recognized this in its own recent enactments, requiring

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*Statutory requirements for various reports impede full and transparent disclosure.*

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state agencies to make their reports available to its members in an electronic format.<sup>4</sup> Continuing to adhere to paper filing requirements for the statements does not conform to common practices today.

Not available online. Personal financial statements are public records and subject to disclosure under the Public Information Act.<sup>5</sup> Statute does not authorize the agency to post these documents online. Instead, statute requires persons to request the statement and requires the agency to place the requesting party's name, address, affiliation, and date of the request in the public official's file.<sup>6</sup> Such a provision effectively prevents online posting, requiring an interested party to go to the Texas Ethics Commission to see a statement or request that a statement be provided through fax or email.

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*By not authorizing personal financial statements to be viewable online, statute impedes the public's ease of access to disclosure information.*

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By not authorizing the statements to be viewable online, statute impedes the public's ease of access to information about the officials who serve it. Requiring a viewer's name to be placed in the official's file is a disincentive to individuals seeking information about public officials and does not serve the public interest. Finally, lack of online posting requires the agency to handle most requests to view statements through emails, which is an administrative burden. In the past five fiscal years, the agency has received nearly 2,400 requests for copies of the statements.

In the past, different media sources have made officials' statements available online. Most recently, in 2010, the Texas Tribune requested all 3,070 statements filed that year and posted them in a searchable online database. These sources are useful alternatives to the agency in providing statement information, but should not take the place of the state agency responsible for collecting it in the first place. Moreover, members of the public might first expect statement information to be available and most accessible through the Texas Ethics Commission and may not be immediately aware of, or as confident in, other sources.

Sensitive information not protected. The inexorable push for greater electronic access to personal financial statements, however, raises countervailing concerns about too much disclosure in this era of security threats, identity theft, and loss of privacy. Taking as a given the need for this disclosure to help prevent conflicts of interest by certain officials and to promote public trust, concerns have been raised about the one-size-fits-all approach that applies to all filers regardless of the risk of potential conflict or harm. Interest is growing to deal with the outdated, vague, and intrusive requirements that may discourage people from serving in government positions, but the more comprehensive assessment that is needed is beyond the scope of this review.

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*Several states take steps to protect filers' personal information by redacting sensitive items.*

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One area that can be addressed, however, relates to the agency's requirement for filers to provide their address and telephone number for identification and future correspondence purposes. Although statute requires the agency to redact the home address of a judge or justice from

the statement before providing it to a requestor, no such requirement exists for other filers, leading the agency to infer that it cannot redact their information. This type of information does not help identify potential conflicting interests that public officials or candidates may have, and could put them at risk because of the sensitive nature of their positions.

Of the 44 states with comprehensive personal financial disclosure laws, 13 states either require or provide filers the option to submit personal financial disclosure reports electronically.<sup>7</sup> Another 13 states make personal financial disclosure reports of both elected and appointed officials available online and eight of these also provide for electronic submission of the reports.<sup>8</sup> Several states also take steps to protect filers' personal information by redacting sensitive items, such as address, telephone number, email, and signature lines required on financial disclosure forms.

- Limited activity committee reports.** Unlike other filers, general-purpose committees submitting reports showing limited activity are exempt from civil penalties for campaign finance-related reporting violations.<sup>9</sup> The textbox, *General-Purpose Committees Exempt From Certain Penalties*, describes which committees qualify for the statutory exemption. The exemption creates a disincentive for these committees to submit timely reports, reducing compliance with reporting requirements and diminishing the usefulness of data available to the public for timely analysis before an election.

In fiscal year 2011, general-purpose committees qualified for the exemption for nearly 3,800 of about 9,000 reports required to be submitted. The graph, *Percent Late Reports Submitted by General-Purpose Committees*, shows in fiscal year 2011, the percent of reports submitted late by committees qualifying for the exemption increased about 1 percent since fiscal year 2007 — the last year before the exemption took effect. This increase is compared to about a 3 percent decrease in the percent of reports submitted late by committees not eligible to receive the exemption.

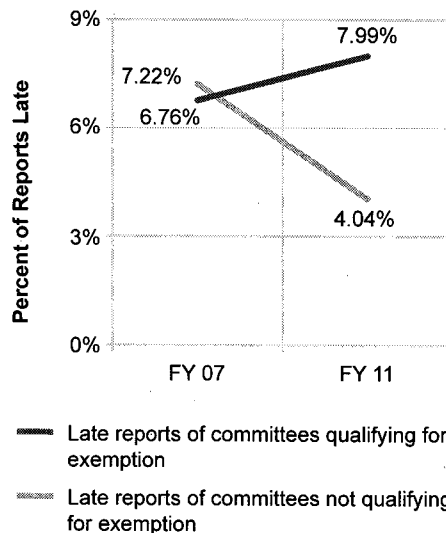
In addition to serving as a disincentive by these committees to file reports on time, the decrease in compliance also reduces money to the State from penalties that would have been applied for these late filings. In fiscal year 2011, the exemption to committees with qualifying reports would have

**General-Purpose Committees Exempt From Certain Penalties**

Statute prohibits the Commission from imposing a penalty on a general purpose committee if, during the reporting period covered or either of the two preceding reporting periods, the committee did not:

- accept political contributions totaling \$3,000 or more;
- accept political contributions from a single person totaling \$1,000 or more; or
- make or authorize political expenditures totaling \$3,000 or more.

**Percent Late Reports Submitted by General-Purpose Committees**



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*The penalty exemption for certain general-purpose committees with limited activity creates a disincentive to submit timely filed reports.*

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accounted for about \$189,000 in associated late-filing penalty revenue. While actual amounts collected would be less if civil penalties were available as an incentive to timely file, the exemption is likely causing the State to lose revenue.

Even if these smaller committees were no longer exempt from penalty provisions, they may be able to have penalty assessments reduced or waived, as currently happens for committees with comparatively more activity that are not exempt from penalties. In fiscal year 2011, the Commission either waived or reduced late penalties associated with 78 such late reports.

- **Major party candidate reports.** Unlike other campaign finance reports filed with the agency, statute prohibits the agency from making certain campaign finance reports filed by major party candidates and related committees available online until all candidates and related committees for a particular office have filed their reports, up to certain time limits.<sup>10</sup> The purpose of this posting requirement is to make sure all reports are available at the same time and thereby ensure no filer can manipulate the filing system to his or her advantage by filing outside the report due date.

As currently structured, the provision has several drawbacks. First, the delay thwarts the public's access to information for a particular election in a timely manner if a single candidate or committee fails to submit a report. This issue is particularly critical for reports due close to an election when contributions typically increase. Second, because they are public documents, reports must be released, if requested, before the delayed online posting, making the provision ineffective in accomplishing its intent. Third, filers themselves may supply their reports when asked by the media or others, even though the agency has not yet posted them. Finally, this requirement forces the agency to go through a tedious manual process of cross referencing all filed reports with a list from the Office of the Secretary of State naming all candidates in the primary and general elections before determining if reports may be posted online.

**Several statutory filing requirements result in inefficiencies, are inconsistent in their application, or are confusing for the public and filers.**

Several provisions throughout the Ethics Commission's statutes reflect an assortment of duplicative or onerous provisions that bog down agency operations and waste its resources or that treat certain filers differently from others.

- **Duplicative reporting.** Candidates and officeholders sometimes create specific-purpose committees to assist in fundraising and provide campaign and disclosure reporting. In these cases, statute requires both candidates and officeholders and their associated specific-purpose committees to file campaign treasurer appointments and campaign

finance reports even if candidates and officeholders have no expenditures and contributions to report because this information is disclosed on their associated committee's report.

This requirement results in unnecessary duplicative reporting as the committee and the candidate or officeholder must file two different reports, though only the committee report actually contains campaign finance information. This duplication can be confusing to the public and other interested parties who may reasonably believe that candidate and officeholder reports will have campaign finance information. When that is not the case, such reports can be misleading if someone searching for information is unaware of the existence of the associated specific-purpose committee. Further, the system may be confusing to potential contributors who may not know whether to make contributions to individuals or their political committees.

- **Costly and prescriptive mailing requirements.** In 2009, the Legislature authorized the agency to send notices regarding upcoming filing deadlines to campaign finance filers by email rather than regular mail.<sup>11</sup> However, statute does not provide the agency similar flexibility to more efficiently and inexpensively provide other notices.

Personal financial statements. Unlike campaign finance reports, statute requires the agency to mail notice of upcoming filing deadlines to personal financial statement filers. In fiscal year 2011, the agency mailed 1,347 notices to these filers.

Late reports. Statute requires the agency to mail notices to individuals, committees, and registered lobbyists who fail to submit required reports on time. Statute further specifies that for filers delinquent in their reporting by more than 30 days, notice must be sent using registered mail.

Sworn complaint correspondence. The agency incurs additional postage costs when sending initial notices to complainants and respondents regarding a sworn complaint because statute requires the agency to use registered, certified, restricted delivery, or return receipt mail services for these notices.<sup>12</sup> In an effort to provide information about the complaint to the parties in a flexible and more cost-efficient manner, the agency allows respondents and complainants to request that the initial notice be sent through less expensive means, including first class mail or email. In fiscal year 2011, however, fewer than one-quarter of about 830 respondents and complainants made such a request, so that most initial notices are sent by more expensive mail services.

The graph on the following page, *Ethics Commission Postage Costs*, depicts the agency's postage costs over the past five fiscal years.<sup>13</sup> From fiscal year 2007 through 2011, the agency's spending on postage has more than doubled. The cost to mail sworn complaint notices and other correspondence to complaint parties has increased dramatically over the past five fiscal years as a result of increased numbers of sworn complaints.

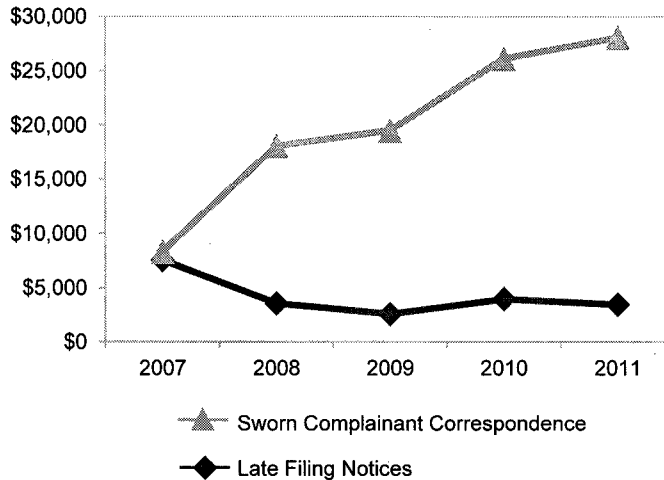
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*Statute does not provide the agency flexibility to more efficiently and inexpensively provide filing notices.*

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In contrast to sworn complaints, the costs for late filing notices depend on the number of late filers and have remained relatively stable over the past five fiscal years.<sup>14</sup>

**Texas Ethics Commission Postage Costs  
FYs 2007–2011**



- No electronic filing exemption for caucuses.** Except for legislative caucuses, statute requires all campaign finance filers and lobbyists to file reports electronically unless they meet the statutory exemption threshold, in which case they may file hard copy reports. The textbox, *Electronic Filing Exemption*, describes the threshold filers must meet to qualify for the exemption. Because this statutory exemption does not apply to legislative caucuses, by law, they are only allowed to file electronically. However, the Commission has allowed them to claim the same exemption as campaign finance filers for filing hard copy reports. Although in fiscal year 2011 only three of the 40 caucuses filed hard copy reports with the agency, no reason exists why statute should not provide the same exemption from electronic filing enjoyed by other filers.

**Electronic Filing Exemption**

Statute exempts candidates, officeholders, and political committees from electronically filing campaign finance reports if they:

- accept less than \$20,000 in contributions or expend less than \$20,000, and
- do not use a computer to maintain records.

Rule also exempts lobbyists from electronically filing activity reports if they:

- do not intend to be compensated or reimbursed more than \$10,000 for activity in a calendar year and have not been reimbursed at more than that level in either of the past two years;
- do not intend to make more than \$1,000 in lobby expenditures during a calendar year and did not make more than that amount in either of the last two years; and
- do not use a computer to keep current records of lobby clients/employers.

Additionally, statute does not specify an individual who is legally responsible for filing required reports for legislative caucuses, which is also different from how statute treats individual filers and political committees. Statute clearly indicates that individual filers submit reports for themselves and campaign treasurers file for political committees.

- **Unclear electronic filing exemption.** The provision defining the statutory electronic filing exemption is unclear about whether a filer who meets the threshold for filing electronically must submit all future reports in that manner, even if falling below the threshold later. In the face of this ambiguity, the agency treats the threshold as a one-time occurrence such that once a candidate, officeholder, or committee files electronically, they must always do so in the future. The agency has not been challenged on this interpretation, but clarifying the statute would better set the expectation for subsequent electronic filing.

## Recommendations

### *Change in Statute*

#### **4.1 Require personal financial statements to be submitted electronically and made available online after sensitive personal information is redacted.**

This recommendation would require personal financial statements to be submitted to the agency electronically in a format prescribed by the Commission. The agency would make the statements available online within 10 days of being filed. The agency already has software that could be modified to allow filers to electronically submit the statements and currently maintains copies of them as PDF files, which could be made viewable online at no additional cost to the agency. However, if the agency receives additional appropriations to improve its electronic filing system, as recommended in Issue 3 of this report, it should incorporate electronic receipt and online availability of personal financial statements into the upgraded system.

The law should provide for redacting filers' home addresses in this online format, as it currently provides when releasing statements for judges and justices, and the redaction should be extended to include all filers' telephone numbers. The recommendation would also remove the statutory requirement that the name, address, and affiliation of an individual requesting to view a personal financial statement be placed in the statement's file, which would no longer be practical with the statements readily accessible online. These changes would modernize the filing of statements, improve transparency, and allow the public easier access to information about filers while still maintaining their privacy.

#### **4.2 Eliminate the civil penalty exemption for smaller general-purpose committees.**

This recommendation would eliminate the exemption from late filing and other penalties limited activity general-purpose committees receive. Eliminating this exemption would increase compliance with reporting requirements, ensure information is available to the public in a timely manner, and ensure penalties are assessed consistently across filers. The Commission could continue exercising its discretion to waive or reduce civil penalties for violations involving general-purpose committees with limited activity as it currently does for other report filers.

#### **4.3 Remove the statutory prohibition on posting reports of major party candidates whose opponents have not yet filed.**

This recommendation would eliminate the waiting period for posting reports filed by major party candidates, allowing the agency to make these reports available online within two business days as statute requires for other campaign finance reports. Eliminating this requirement would give the filers full control over when their reports are available within established deadlines and provide the public earlier access to candidates' campaign finance information.

#### **4.4 Modify statutory filing provisions to streamline the agency's campaign finance filing processes.**

Statute should be changed to accomplish the following.

- Authorize a candidate or officeholder to designate a specific-purpose committee as the principle committee responsible for filing campaign finance and other reports, relieving the candidate or officeholder from having to file separate reports.
- Require legislative caucuses to file a notice of appointment of caucus chair with the Commission and require that the chair be responsible for filing campaign finance reports.
- Authorize legislative caucuses to be exempt from having to electronically file campaign finance reports if they meet the same statutory threshold as currently exists for candidates, officeholders, and political committees.
- Clarify that the statutory electronic exemption for filing campaign finance reports and lobby activity reports is a one-time threshold, such that once filers meet the threshold, they must always file electronically.
- Remove prescriptive and expensive mailing requirements from statute and require the Commission to adopt rules prescribing how notification and correspondence will be handled for all filer types and reports.

These changes would clarify several statutory filing provisions, ensure consistency among filers, and streamline the agency's filing operations.

### **Fiscal Implication**

Overall, these recommendations would have a positive fiscal impact to the State.

Requiring filers to submit personal financial statements electronically and requiring the agency to make them available online would not have a significant fiscal impact to the State because the agency already has software that could be modified to allow filers to electronically submit the statements. Additionally, the agency already maintains copies of the statements as PDF files, so they could be made viewable online at no additional cost.

Removing the exemption from civil penalties for certain general-purpose committees would result in additional revenue to the State. Assuming late-filing penalties assessed in fiscal year 2011 are comparable to those assessed for similar general-purpose committee reports in fiscal year 2007, before the exemption took effect, the annual revenue gain to the State would be about \$67,550.<sup>15</sup>



Allowing staff to determine the appropriate method for sending late notices and sworn complaint correspondence would result in savings to the State by reducing the number of expensive registered and certified letters that would be sent. Due to the varying nature and complexity of sworn complaints, which can require several mailings per case, exact savings cannot be calculated. Using figures from fiscal year 2011, if the agency used delivery confirmation services at a rate of \$5.45 per piece, rather than registered and certified services, the savings would be at least \$3,500 annually.<sup>16</sup> This savings is based on the agency's mailing of 208 late filing notices and 639 initial letters to respondents and complainants in fiscal year 2011. Additional savings would result if the agency used regular first class mail or electronic notice for all report deadlines and certain sworn complaint correspondence.

The table below shows the overall fiscal impact resulting from these recommendations.

***Texas Ethics Commission***

<b>Fiscal Year</b>	<b>Gain to the General Revenue Fund</b>	<b>Savings to the General Revenue Fund</b>
2014	\$67,550	\$3,500
2015	\$67,550	\$3,500
2016	\$67,550	\$3,500
2017	\$67,550	\$3,500
2018	\$67,550	\$3,500

- .....
- <sup>1</sup> Section 254.036, Texas Election Code; Sections 305.0063 and 305.0064, Texas Government Code.
  - <sup>2</sup> Section 572.030, Texas Government Code.
  - <sup>3</sup> Section 571.173, Texas Government Code.
  - <sup>4</sup> S.B. 1618, 82nd Texas Legislature, Regular Session, 2011.
  - <sup>5</sup> For personal financial statements submitted to the agency, the full statement is subject to disclosure unless the report belongs to a judge or justice, in which case statute requires the agency to remove the home address before providing the statement to anyone.
  - <sup>6</sup> Section 572.032(b), Texas Government Code.
  - <sup>7</sup> The 13 states include: Alabama, Alaska, Arkansas, Connecticut, Delaware, Indiana, Maryland, Massachusetts, Minnesota, Missouri, New York, Pennsylvania, and Washington.
  - <sup>8</sup> The 13 states include: Georgia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Mississippi, Nevada, New Jersey, New Mexico, South Carolina, and Tennessee. The eight states include: Georgia, Iowa, Kansas, Mississippi, Nevada, New Jersey, South Carolina, and Tennessee. In 2011, Georgia removed its requirement that board members and executive directors file personal financial disclosure statements. Instead, the state required that these individuals sign an affidavit swearing they took no official action from which they derived personal gain.
  - <sup>9</sup> Section 254.164, Texas Election Code.
  - <sup>10</sup> Section 254.0401, Texas Election Code. The prohibition applies only to candidates nominated by, or seeking nomination of, a political party required to nominate candidates by a primary election. The prohibition has time limits. Regardless of whether all filers for a particular office have submitted a report, the Commission may post online semiannual reports and 30-day before-the-election reports on the twenty-first day after the reporting deadline; and 8-day before-the-election reports on the fourth day after the deadline.
  - <sup>11</sup> H.B. 3922, 81st Texas Legislature, Regular Session, 2009.
  - <sup>12</sup> Section 571.032, Texas Government Code.
  - <sup>13</sup> These figures do not include staff time spent preparing notices and correspondence for mailing.
  - <sup>14</sup> The number of late filings decreased after 2007 as a result of H.B. 2589, 80th Legislature, providing filers a 14-day grace period after becoming aware of the error before most corrected reports are considered late.
  - <sup>15</sup> In addition to exemptions from penalties for late filing, committees submitting reports showing limited activity are also exempt from fines resulting from sworn complaints. Some additional fine revenue may accrue to the State by removing the exemption, but the amount cannot be reasonably estimated because the number of complaints with valid allegations and level of fines are unknown.
  - <sup>16</sup> The savings is based only on the rate for the specified postage services and excludes the additional regular postage cost, which is based on weight.

# RESPONSES TO ISSUE 4

## Overall Agency Response to Issue 4

The Commission agrees with the recommendations. The Sunset Advisory Commission Staff Report identifies key areas whereby statutory modification or clarification would enhance filer understanding and compliance, as well as agency administrative efficiency and effectiveness. (David A. Reisman, Executive Director – Texas Ethics Commission)

## Recommendation 4.1

*Require personal financial statements to be submitted electronically and made available online after sensitive personal information is redacted.*

### Agency Response to 4.1

The Commission agrees with the recommendation.

The Commission agrees that electronic filing of personal financial statements would improve filing efficiency for both the filer and the agency. If new software is created for filing the statements electronically, sensitive information, such as the filer's home address, could automatically be redacted.

The Commission also recognizes that personal financial statement requirements, such as asset classes, evolve over time and there are other areas in personal financial statement reporting that need to be addressed. (David A. Reisman, Executive Director – Texas Ethics Commission)

### For 4.1

Helen Carvell – League of Women Voters of Texas

Matt Glazer, Executive Director – Progress Texas, Austin

Conor Kenny, Austin

Fred Lewis, President – Texans Together Education Fund, Austin

Phillip Martin, Research and Policy Director – Texas Research Institute, Austin

Craig McDonald, Director – Texans for Public Justice, Austin

Bee Moorhead – Texas IMPACT, Austin

Joanne Richards, President – Coffee Party Austin, Austin

Shannon Smith, Student Legislative Counsel – Laney Center for Public Service, Austin

Tom “Smitty” Smith, Director – Public Citizen Texas, Austin

Laurie Vanhooose – Common Cause Texas

Liz Wally – Clean Elections Texas

### **Against 4.1**

None received.

### **Modification**

1. Require that information submitted in personal financial statements be available in a database-compatible format. (Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhooose – Common Cause Texas; and Liz Wally – Clean Elections Texas)

## **Recommendation 4.2**

*Eliminate the civil penalty exemption for smaller general-purpose committees.*

### **Agency Response to 4.2**

The Commission agrees with the recommendation.

Currently, certain general-purpose committees with limited activity are exempt from late filing penalties. This exemption negatively affects compliance with filing requirements. Additionally, the Commission must spend additional resources sending late letters and initiating the fine collection process for late reports that are then exempt from penalty at some point in time when the general-purpose committee ultimately decides to file the report. Eliminating this exemption would assist in better filing compliance and improve administrative efficiency. (David A. Reisman, Executive Director – Texas Ethics Commission)

### **For 4.2**

Matt Glazer, Executive Director – Progress Texas, Austin

Conor Kenny, Austin

Fred Lewis, President – Texans Together Education Fund, Austin

Phillip Martin, Research and Policy Director – Texas Research Institute, Austin

Craig McDonald, Director – Texans for Public Justice, Austin

Bee Moorhead – Texas IMPACT, Austin

Joanne Richards, President – Coffee Party Austin, Austin

Tom "Smitty" Smith, Director – Public Citizen Texas, Austin

Laurie Vanhoose – Common Cause Texas

Liz Wally – Clean Elections Texas

#### **Against 4.2**

None received.

#### **Recommendation 4.3**

*Remove the statutory prohibition on posting reports of major party candidates whose opponents have not yet filed.*

#### **Agency Response to 4.3**

The Commission agrees with the recommendation.

Statute currently prohibits the Commission from making certain campaign finance reports filed by major party candidates and related committees available online until all candidates and related committees for a particular office have filed their reports, or after a certain time limit. This delays public access to that information. Additionally, this results in Commission staff having to manually cross reference filed reports to ensure opposing candidate information has been received prior to posting the reports. The Commission agrees that a change in statute in this area would both improve public transparency and administrative efficiency. (David A. Reisman, Executive Director – Texas Ethics Commission)

#### **For 4.3**

Helen Carvell – League of Women Voters of Texas

Matt Glazer, Executive Director – Progress Texas, Austin

Conor Kenny, Austin

Fred Lewis, President – Texans Together Education Fund, Austin

Phillip Martin, Research and Policy Director – Texas Research Institute, Austin

Craig McDonald, Director – Texans for Public Justice, Austin

Bee Moorhead – Texas IMPACT, Austin

Joanne Richards, President – Coffee Party Austin, Austin

Shannon Smith, Student Legislative Counsel – Laney Center for Public Service, Austin

Tom "Smitty" Smith, Director – Public Citizen Texas, Austin



Laurie Vanhooose – Common Cause Texas

Liz Wally – Clean Elections Texas

### **Against 4.3**

None received.

### **Recommendation 4.4**

*Modify statutory filing provisions to streamline the agency's campaign finance filing processes.*

#### **Agency Response to 4.4**

The Commission agrees with the recommendations under this section.

- Modifying the law to remove the duplication of reporting that occurs when candidates and officeholders create special-purpose committees would both relieve the candidate or officeholder from filing separate reports and result in less confusion to the public reviewing those reports.
- Clarifying that legislative caucuses must specify an individual who is legally responsible for filing required reports for legislative caucuses and clarifying that legislative caucuses are authorized to be exempt from electronic filing if they meet the same statutory threshold as currently exists for candidates, officeholders, and political committees would assist the Commission in maintaining a consistent enforcement process and add clarity to the law for legislative caucuses and caucus chairs.
- Modifying the law to state that once a filer meets a threshold for filing electronically they must always do so will clarify the filing expectations to the regulated community. This recommended clarification would be consistent with current Commission interpretation.
- The Commission has been making strides in reducing postage costs and increasing communication efficiency over the past few years through a variety of methods and statutory changes. However, escalating postage rates and the rising number of sworn complaints has still resulted in an overall increase in postage costs to the agency. The recommended changes to required notices for personal financial statement filers, late notices to individuals, committees, and registered lobbyists, and sworn complaint correspondence will reduce these increasing operating costs to the agency.

(David A. Reisman, Executive Director – Texas Ethics Commission)

#### **For 4.4**

Matt Glazer, Executive Director – Progress Texas, Austin

Conor Kenny, Austin

Fred Lewis, President – Texans Together Education Fund, Austin

Phillip Martin, Research and Policy Director – Texas Research Institute, Austin

Craig McDonald, Director – Texans for Public Justice, Austin

Bee Moorhead – Texas IMPACT, Austin

Joanne Richards, President – Coffee Party Austin, Austin

Tom “Smitty” Smith, Director – Public Citizen Texas, Austin

Laurie Vanhooose – Common Cause Texas

Liz Wally – Clean Elections Texas

**Against 4.4**

None received.

# COMMISSION DECISION ON ISSUE 4

(June 2012)

Adopted Recommendation 4.1, as modified to only require personal financial statements be submitted to the agency electronically in a format prescribed by the Commission. The recommendation would not provide for other elements of Recommendation 4.1, including making statements available online or changing the current requirement for persons to submit their name, address, and affiliation to view a personal financial statement. Adopted Recommendations 4.3 and 4.4.

# FINAL RESULTS ON ISSUE 4

(July 2013)

## *Legislative Action*

**Recommendation 4.1** — The Governor vetoed S.B. 219, which had contained a modified version of this recommendation, as discussed in the following material. Sunset staff had recommended that personal financial statements be filed with the Commission electronically and placed online with home addresses redacted. The Sunset Commission and the Legislature adopted online filing, but did not adopt online access to personal financial statements. The Legislature expanded the concept of electronic filing of personal financial statements to authorize those at the local level to be filed electronically and authorized the local entity to prescribe guidelines for electronic filing. The bill also would have clarified the circumstances under which local filers' personal financial statements that are not filed by electronic mail are considered timely filed.

The Legislature also adopted staff's recommendation to redact the home addresses of filers before making the statements publicly available. For statements filed by district attorneys, the bill would have required such redaction immediately from statements it currently has on file and those filed in the future. For all other statements, the bill would have required the Commission to redact the information once it has filing software capable of doing so quickly and easily.

**Recommendation 4.3** — The Governor vetoed S.B. 219, which included this recommendation to eliminate the prohibition on posting reports of major party candidates whose opponents have not yet filed by repealing the appropriate section of law.

**Recommendation 4.4** — As vetoed, S.B. 219 contained several statutory filing provisions to streamline the agency's campaign finance filing processes. The bill would have authorized a candidate or officeholder to designate a specific-purpose committee as the principal committee responsible for filing campaign finance and other reports, relieving the candidate or officeholder from having to file separate reports. The bill would have required legislative caucuses to file a notice of appointment of caucus chair with the Commission and required that the chair be responsible for



filing campaign finance reports. The bill would have provided for exempting legislative caucuses from filing electronic campaign finance reports if they meet the same statutory threshold as currently exists for candidates, officeholders, and political committees. The exemption for filing electronic campaign finance reports and lobby activity reports would have been a one-time threshold, such that once filers meet the threshold, they must always file electronically. Prescriptive and expensive mailing requirements would have been removed from statute and subject to Commission rules for how to handle notification and correspondence for all filer types and reports.



# ISSUE 5

## *The Texas Ethics Commission's Statute Complies With Standard Elements Analyzed During Sunset Reviews.*

### Background

Over the years, Sunset reviews have come to encompass an increasing number of standard elements either from direction traditionally provided by the Sunset Commission, from statutory requirements added by the Legislature to the Criteria for Review in the Sunset Act, or from general law provisions typically imposed on state agencies. The finding below addresses the Sunset Commission's mandate to recommend the abolition or continuation of an agency's reporting requirements.

- **Reporting Requirements.** The Texas Sunset Act establishes a process for state agencies to provide information to the Sunset Commission about reporting requirements imposed on them by law and requires the Commission, in conducting reviews of state agencies, to consider if each reporting requirement needs to be continued or abolished.<sup>1</sup> The Sunset Commission has interpreted these provisions as applying to reports that are specific to the agency and not general reporting requirements that extend well beyond the scope of the agency under review. Reports required by rider to the General Appropriations Act are included as a matter of law, but under a presumption that the appropriations committees have vetted these requirements each biennium. Reporting requirements with deadlines or that have expiration dates are not included, nor are routine notifications or notices, or posting requirements.

### Finding

#### **The Texas Ethics Commission's single reporting requirement to produce a biennial report serves a useful purpose.**

The biennial report is the Legislature's primary source of information about the agency's activities and serves a useful purpose. The agency's report, which also is available on its website, must include the following information:<sup>2</sup>

- each advisory opinion issued;
- certain sworn complaint data;
- certain data related to the number and amount of civil penalties the Commission issued; and
- recommendations for any necessary statutory changes.

### Recommendation

#### **5.1 Continue requiring the Commission to submit its biennial report to the Legislature.**

This recommendation would continue the existing requirement in law for the Commission's biennial report to the Legislature, though no statutory change would be needed to continue this reporting

requirement. This report is the Legislature's only formal opportunity to hear from the Commission regarding its activity over the preceding two years as well as necessary changes to statutes under the Commission's jurisdiction. To comply with a recent change in law, the report should be provided to the Legislature in an electronic format only.

## **Fiscal Implication**

This recommendation would not have a fiscal impact to the State.

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<sup>1</sup> Sections 325.0075, 325.011(13) and 325.012(a)(4), Texas Government Code.

<sup>2</sup> Section 571.073, Texas Government Code.

## RESPONSES TO ISSUE 5

### Recommendation 5.1

*Continue requiring the Commission to submit its biennial report to the Legislature.*

#### Agency Response to 5.1

The Commission agrees with this recommendation.

The Commission's biennial report to the Legislature provides relevant and useful data on advisory opinions, sworn complaints, and civil penalties assessed. Additionally, the biennial report provides the Commission with an opportunity to provide the Legislature with statutory recommendations, many of which are considered and/or ultimately adopted by the Legislature. (David A. Reisman, Executive Director – Texas Ethics Commission)

#### For 5.1

None received.

#### Against 5.1

None received.

## COMMISSION DECISION ON ISSUE 5 (June 2012)

Adopted Recommendation 5.1.

## FINAL RESULTS ON ISSUE 5 (July 2013)

### *Legislative Action*

**Recommendation 5.1** — The existing requirement for the Commission's biennial report to the Legislature was not affected by the veto of S.B. 219.



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**NEW ISSUES**





# NEW ISSUES

The following issues were raised in addition to the issues in the staff report. These issues are numbered sequentially to follow the staff's recommendations.

## Agency Structure and Operations

6. Modify the qualifications and composition of the Commission to include:
  - a. three members with law enforcement experience;
  - b. three members with professional expertise teaching or serving as an ethics officer at a state institution or corporation;
  - c. two members who have served as enforcement officers in state agencies;
  - d. the Secretary of State as ex-officio chairman; and
  - e. the requirement that lobbyists and former elected officials may not serve on the Commission for a period of four years.

(Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)

7. Establish new criteria for TEC Commissioners that include previous experience in law enforcement, ethics enforcement or other similar regulatory or professional backgrounds. (Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhoose – Common Cause Texas; and Liz Wally – Clean Elections Texas)
8. Require that all fulfilled information requests be posted on the Texas Ethics Commission website. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)
9. Require the agency to bring in programmers to update its website. (Mary Nell Mathis, Board Member – Common Cause, Austin)
10. Require that a complainant be officially warned and receive the same fine as would have been assessed the filer if: the complainant has filed a frivolous complaint, having not made a sincere effort to report true misdeeds and misappropriations; or is deemed to have used the Ethics Commission and its staff inappropriately. (Diane Mosier, President; Muffie Mosier, Board Member and Legal Counsel; and Martha Heubel, Board Member – River Oaks Area Democratic Women, Houston)

**Staff Comment:** Statute defines a frivolous complaint as one that is groundless and brought in bad faith or is groundless and brought for the purpose of harassment. A person filing a frivolous complaint is civilly liable to the respondent for the greater of \$10,000 or the amount of actual damages incurred by the respondent, including court costs and attorney fees.

11. Require the agency to clarify and inform filers as to which information source — the agency's website or its legal staff — is the final authority regarding filing questions. If it is determined to be the website, require the agency to have technical advisors who are also lawyers to assist filers. (Diane Mosier, President; Muffie Mosier, Board Member and Legal Counsel; and Martha Heubel, Board Member – River Oaks Area Democratic Women, Houston)

### Campaign Finance

12. Change the ending date for PACs reporting monthly to report on the last calendar day of the month instead of the 25th of the month. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)
13. Require the agency to develop a unique identifier system for contributors, or require that the street names of contributors be provided as part of online disclosure data. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)
14. Require sponsored GPACs to disclose SIC codes. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)
15. Change the statute so that a contribution may be accepted or rejected by the time the relevant disclosure report is due, not by the end of the reporting period. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)
16. Allow a campaign treasurer 30 days to amend a campaign finance report without being subject to a fine or penalty in response to a sworn complaint if the complaint does not question dollar amounts or is not filed late. These matters are:
  - a. reporting correct information in the wrong place;
  - b. failure to report complete addresses or occupation information on a contributor's form; or
  - c. failure to report complete addresses or correct designation for expenses on an exhibitor's form.

(Diane Mosier, President; Muffie Mosier, Board Member and Legal Counsel; and Martha Heubel, Board Member – River Oaks Area Democratic Women, Houston)

17. Require the agency to notify the boards of political action committees or organizations of filing problems. (Diane Mosier, President; Muffie Mosier, Board Member and Legal Counsel; and Martha Heubel, Board Member – River Oaks Area Democratic Women, Houston)

**Staff Comment:** Currently, agency staff send all filing correspondence to whomever is legally responsible for the report filing, which is typically the appointed campaign treasurer. If the campaign treasurer signs up to receive email notices to file, they may request that notices also be emailed to other persons.

18. Establish reasonable limits on campaign contributions to candidates and committees, as well as aggregate limits on individual contributions in each election cycle. (Helen Carvell – League of Women Voters of Texas; Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhooose – Common Cause Texas; and Liz Wally – Clean Elections Texas)

*Staff Comment:* The testimony did not provide sufficient detail to draft statutory language on this recommendation.

19. Establish campaign contribution limits at all levels and give the Commission authority to enforce sanctions. (David E. Jones – Clean Elections Texas, Dallas)

*Staff Comment:* The testimony did not provide sufficient detail to draft statutory language on this recommendation.

20. Establish alternative campaign financing mechanisms such as voluntary public financing. (Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhooose – Common Cause Texas; and Liz Wally – Clean Elections Texas)

*Staff Comment:* The testimony did not provide sufficient detail to draft statutory language on this recommendation.

21. Establish a voluntary public financing system for all election levels, including legislative, judicial, and municipal. (Nick Lee, Board Member – Clean Elections Texas, San Antonio)

*Staff Comment:* The testimony did not provide sufficient detail to draft statutory language on this recommendation.

22. Replace the current system for financing judicial campaigns by establishing a Texas Judicial Campaign Fund, which would be funded by:

- a. increasing annual State Bar dues by \$50;
- b. diverting a percentage of late-filing fines into the Fund; and
- c. diverting a percentage of court fees to the Fund.

(Joanne Richards, President – Coffee Party Austin)

23. Require that penalties imposed for converting campaign funds to personal use be paid by personal funds. (Shannon Smith, Student Legislative Counsel – Laney Center for Public Service, Austin)



## Lobby Law

24. Repeal the “5 percent of compensation threshold” that partly defines when a person must register as a lobbyist. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)

*Staff Comment:* Lobby registration is required if a person meets either of two thresholds: a “compensation threshold” or an “expenditure threshold.” Regarding the compensation threshold, Texas Ethics Commission rules provide that a person must register as a lobbyist if the person earns more than \$1,000 in a calendar quarter for lobbying. An exception to this rule is that a person is not required to register under the compensation threshold if lobbying constitutes no more than five percent of the person’s compensated time during a calendar quarter (1 T.A.C. § 34.43(b)). Because the 5 percent compensation threshold does not exist in statute, repealing it would likely require amending the Lobby Law to clarify that the requirement that persons register may not be based on a compensable time threshold.

25. Statutorily codify and revamp or modify the 5 percent exception rule for lobby registration by clarifying that the 5 percent threshold calculation:
- Is based on the hours in that individual’s standard work day, not exceeding 12 hours per day.
  - Applies to entities that do not have registrants reporting on the entity’s behalf. In other words, if an entity has no one registered on its behalf, the thresholds apply to the entity.
  - Does not require that the compensation be in addition to the amount that the individual is otherwise paid by a client or entity.
  - Applies only to the client for whom the communication was made, and not to all the time spent communicating or preparing for communicating for multiple clients, unless the communication was in the form of goodwill communications that was attributed to all the clients.
  - Applies only to the initial registration requirement for an individual. Once registered for any client, additional registration is triggered for other clients only by the direct communication.

(Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)

26. Augment the subject matter disclosure by requiring disclosure of specific issues and bill numbers (require monthly updates of subject/bill disclosure). (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)

*Staff Comment:* Statute requires a filer to disclose the subject matters and docket numbers of administrative matters on which a lobbyist will be lobbying. The lobby registration form requires the filer to check off from a subject matter list the topics, such as “energy” or “human services,” on which he or she will be lobbying. The form also requires the registrant to indicate the docket numbers of administrative matters that will be the subject of lobby efforts. Specific issues and bill numbers currently are not required to be disclosed.

### Against New Issue 26

Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin

27. Require a lobby registrant filer to disclose agencies and branches of the legislature lobbied. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)
28. Update agency visitor sign-in sheets and file in a searchable electronic database with the clerk of the agency. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)
29. Require a lobbyist to disclose former governmental employment/public offices held. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)
30. Clarify in Sec. 305.0021(b), Texas Government Code, that the registrant does not lose any protection under the Lobby Law if reporting a portion of a joint expenditure made by a non-registrant. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)

**Staff Comment:** Under current law, the amount of a joint expenditure by a non-registrant is not considered an expenditure made and reported in accordance with the Lobby Law for purposes of the bribery and gift statute in the Penal Code. This change would ensure that the non-registrant’s portion of the joint expenditure would not affect the registrant’s protection under the bribery statute.

31. Amend the definition of “direct communication” in the Lobby Law by inserting the term “including goodwill communications” in the statute when defining “direct communication.” Define goodwill communications as communications made with the intent to create goodwill with the recipient for possible future communications to influence. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)

**Staff Comment:** The Lobby Law currently defines “communicates directly with” as contact in person or by other means such as telephone or email. The concept of “goodwill communications” is not included in statute or rule, but is discussed in several Texas Ethics Commission advisory opinions. Goodwill communications do not involve lobbying on a specific topic but involve communicating generally to create goodwill to influence future actions, and thus can be considered lobbying.

32. Add categories to the Lobby Law provision relating to reporting lump sum expenditures for events to which all legislators are invited to include committee parties, all House members and staff, all Senate members and staff, or all staff invited. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)

**Staff Comment:** The Lobby Law (Sec. 305.0062, Texas Government Code) currently requires that expenditures directly attributable to members of the legislative or executive branch must be reported using only the following categories: state senators; state representatives; elected or appointed state officers, other than senators or representatives; legislative agency employees; executive agency employees; the immediate family of a member of the legislative or executive branch; invited guests other than the immediate family; and events to which all legislators are invited.

33. Amend the Lobby Law (Sec. 305.0061, Texas Government Code) relating to detailed reporting to include food/beverage given to a spouse of a member of the legislative or executive branch as a gift that should be reported. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)

**Staff Comment:** The Lobby Law requires a lobbyist to report an expenditure for food or beverages with a value of \$50 or less if intended as a gift for a member of the legislative or executive branch and is delivered outside the Capitol Complex by mail or other carrier. The lobbyist does not need to be present for the acceptance of such a gift. This change would allow for such gifts to be given to a spouse under the same reporting requirements without the lobbyist having to be present.

34. Amend the Lobby Law (Sec. 305.0071, Texas Government Code) relating to the inclusion of an expenditure in a report, to allow registrants who charge to an account (at places like the Austin Club) and receive a monthly statement, to be able to report like expenditures made by credit card. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)

**Staff Comment:** Lobbyists using credit cards may report expenditures in the reporting period when the expenditure is made or in the reporting period when the lobbyist receives the credit card bill. This flexibility is not extended for other situations in which a lobbyist receives a periodic bill. These expenditures must be disclosed only in the reporting period when the bill is received.

35. Amend the Lobby Law (Sec. 305.027, Texas Government Code) relating to the legislative advertising disclaimer to provide an exception for material distributed by a legislator on the floor of the House or Senate. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)

**Staff Comment:** The Lobby Law currently provides exceptions to the required disclosure provisions for legislative advertising. This provision would add an exception from this disclosure requirement for material distributed by legislators while on the floor of either chamber under the rules and procedures of the House and Senate instead of the statutory disclosure provisions overseen by the Ethics Commission.

36. Specify that a reimbursement by a reportable person to a lobby registrant should not be limited to less than \$200, as is currently provided in the Texas Ethics Commission's rules. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)

**Staff Comment:** Rules of the Commission specify that lobbyists do not need to report expenditures they make to members of the legislative or executive branches as long as those expenditures are less than \$200 and reimbursed in full before the date the lobbyists would otherwise be required to report the expenditures. This change would specify in statute that any expenditures would not need to be reported if reimbursed in full. It does not, however, provide a timeframe by which the reimbursement must be made or the consequences if the reimbursement is never made.



## Personal Financial Statements

37. Change the statute to update personal financial statements in the following ways:

- a. Require the disclosure of all sources of earned income of \$200 or more.
- b. All fee, income and & value categories should be expanded and graduated up to “\$5,000,000 or more” from the current cap of \$25,000 or more.
- c. In Parts 2, 3, & 4 add a section disclosing the number of shares or value of assets sold and/or retained.
- d. Disclose fair market value of gifts worth more than \$100.
- e. Disclose the identity of lobbyists with business interests in common with filers.
- f. Require disclosure of future private business agreements and future employment arrangements with a lobbyist by state officials still covered by state ethics laws, modeled after federal disclosure requirements.
- g. Disclose partnership details and identities of partners who own more than 10 percent of the partnership.

(Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhose – Common Cause Texas; and Liz Wally – Clean Elections Texas)

38. Require the purchase price of a gift to be reported on a Personal Financial Statement for gifts already required to be disclosed. (Conor Kenny, Austin)
39. Require the disclosure of type of client matters and percentage of income by matter by attorneys, consultants, and contractors above \$15,000 or 10 percent of income, whichever is less. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)
40. Repeal the automatic 60-day deadline extension for Personal Financial Statements. Substitute “need” standard. (Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)

## Conflicts of Interest

41. Modify “revolving door” provisions by:

- a. Expanding those covered to include more agency staff that have adjudicatory or contracting discretion, as well as key staff of the Governor, Lieutenant Governor, and members of the Legislature; and

- b. Prohibiting covered staff from serving as a consultant or contractor for any agency that does business before their former agency.

(Craig McDonald, Director – Texans for Public Justice, Austin; and Tom “Smitty” Smith, Director – Public Citizen Texas, Austin)

**Staff comment:** The revolving door provisions enforced by the Texas Ethics Commission cover most executive branch agencies but do not apply to former officers or employees of the legislative or judicial branches of state government. Former board members and executive directors of covered agencies are prohibited from communicating with board members or employees of the agency *for two years* after their departure if the intent of the communication is to influence agency action. Former officers and upper-level employees, not just the executive director, *may* never represent a person or get paid to work on a “particular matter” they participated in while at the agency.

42. Strengthen and apply “revolving door” prohibitions to legislative and statewide officeholders and key staff members. (Helen Carvell – League of Women Voters of Texas; Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhooose – Common Cause Texas; and Liz Wally – Clean Elections Texas)
43. Restrict “pay to play politics” by:
- a. Prohibiting any contributor of more than \$100 from being appointed to any board commission or office or contracting with the state for two years after the contribution is made; and
- b. Prohibiting state agencies from contracting or giving grants to contributors of the Governor, Lieutenant Governor, or Speaker of the House.

(Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhooose – Common Cause Texas; and Liz Wally – Clean Elections Texas)

44. Make changes to remove conflicts of interest from Texas courtrooms and restore faith in an independent judiciary. (Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhooose – Common Cause Texas; and Liz Wally – Clean Elections Texas)



*Staff Comment:* The testimony did not provide sufficient detail to draft statutory language on this recommendation.

### **Laws in General**

45. Provide that no penalty be assessed on any reports (including eighth day before election reports) where the original was filed in good faith and any error is corrected within certain time frames. (Jack Gullahorn, President/Counsel – Professional Advocacy Association of Texas, Austin)

*Staff Comment:* The provision gives no further detail as to what the time frames for correcting errors or whether corrections can be made after a sworn complaint has been filed. Statute currently provides some latitude for correcting most reports, as long as the original was filed in good faith and any error is corrected within certain time frames, and as long as a sworn complaint has not been filed.

46. Revoke state pension benefits to legislators convicted of a felony. (Matt Glazer, Executive Director – Progress Texas, Austin; Conor Kenny, Austin; Fred Lewis, President – Texans Together Education Fund, Austin; Phillip Martin, Research and Policy Director – Texas Research Institute, Austin; Craig McDonald, Director – Texans for Public Justice, Austin; Bee Moorhead – Texas IMPACT, Austin; Joanne Richards, President – Coffee Party Austin, Austin; Tom “Smitty” Smith, Director – Public Citizen Texas, Austin; Laurie Vanhoose – Common Cause Texas; and Liz Wally – Clean Elections Texas)

## COMMISSION DECISION ON NEW ISSUES (June 2012)

Adopted New Issue 12.

Adopted New Issue 15, with a modification to clarify that a contribution may be accepted or rejected when the report is filed, if before the report due date.

Instead of New Issue 25, adopted a new issue to place in statute the following provisions related to the "5 percent of compensated time" threshold for lobby registration:

- Codify the 5 percent threshold currently found in Texas Ethics Commission Rule 34.43(b) as part of the statutory requirement related to lobby registration. (That rule currently reads, in part, that "...a person is not required to register if no more than 5 percent of the person's compensated time during a calendar quarter is time spent engaging in lobby activity".)
- Codify into the Lobby Law statute the concept of "goodwill communications" by adding to the definition of direct communication those communications made with the intent to create goodwill with the recipient for possible future communications to influence legislation or administrative action.
- Clarify in statute that the 5 percent time calculation is based on a standard workday of eight hours.

Adopted New Issue 30.

Adopted New Issue 32, with a modification clarifying that the new categories for reporting lump sum expenditures do not relate to an event to which all legislators are invited.

Adopted New Issue 35.

## FINAL RESULTS ON NEW ISSUES (July 2013)

### ***Legislative Action***

The Governor vetoed S.B. 219, which included all Sunset Commission-recommended new issues below in original or modified form, with the exception of New Issue 15, which as noted below, was not included by the Legislature in the vetoed bill.

**New Issue 12** — The bill would have aligned the reporting period with the entire month, instead of the 25th of the month, for general-purpose political committees reporting campaign finance information monthly. To conform a related statutory provision to this change, the Legislature

had modified the due date for monthly reports and for a report covering the month preceding an election from the fifth to the 10th day of the month following the reporting period.

**New Issue 15** — The Legislature did not adopt the Sunset Commission's recommendation providing that a candidate, officeholder, or political committee receiving a contribution has until the report is filed or due to accept or reject the contribution.

**New Issue 25** — The Legislature modified the Sunset provision related to requirements for lobby registration. Senate Bill 219 would have specified that a person is exempted from the compensation threshold requiring lobby registration if no more than 26 hours, or another amount of time determined by the Commission, of the person's compensated time during a calendar quarter is spent engaging in an activity, including preparatory activity as defined by the Commission, to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action. Under the bill, such communication would have included establishing goodwill for the purpose of later communicating to influence legislation or administrative action. In addition, a person could only have counted up to eight hours per day spent engaging in lobby activity for purposes of calculating the time threshold.

**New Issue 30** — Senate Bill 219 had clarified that a lobby registrant does not lose any protection under the Lobby Law if reporting a portion of a joint expenditure made by a non-registrant. This provision was enacted separately in House Bill 2984.

**New Issue 32** — Senate Bill 219 would have added categories to the Lobby Law provision related to reporting lump sum expenditures for events to which the following are invited: a legislative committee and the committee staff; all state senators and their staff; all state representatives and their staff; and all legislative staff. The Legislature modified the provision to ensure the new categories are treated the same as events to which all legislators are invited and for which lobbyists would not have to itemize expenditures by type.

**New Issue 35** — Senate Bill 219 would have provided an exception from the legislative advertising disclaimer for material distributed by a legislator on the floor of the House or Senate.



————— **PROVISIONS ADDED BY THE  
LEGISLATURE**



# PROVISIONS ADDED BY THE LEGISLATURE

## **Legislative Action — S.B. 219**

The Governor vetoed S.B. 219, which contained the following provisions added by the Legislature.

- **Study regarding the Public Integrity Unit.**

Senate Bill 219 would have required the Commission, in consultation with the Supreme Court of Texas and the Court of Criminal Appeals, to conduct a study to determine whether law enforcement functions of the Public Integrity Unit of the Travis County district attorney's office should be transferred to a law enforcement entity to maintain separation of powers between judicial and executive branches, as well as other matters. The Commission was to report by September 1, 2014, the results of the study to the Lieutenant Governor, the Speaker of the House of Representatives, and the presiding officers of the standing committees of the Senate and House with jurisdiction over attorneys and the judiciary.

- **Resign-to-run provision for Railroad Commission.**

Senate Bill 219 would have provided that a railroad commissioner who announces or becomes a candidate in any general, special, or primary election for an office other than railroad commissioner automatically resigns from the Railroad Commission.

- **Lobbyist expenditures by former candidate or officeholder.**

Senate Bill 219 would have prohibited a lobbyist from knowingly making a political contribution or expenditure from political contributions accepted as a former candidate or officeholder for two years after leaving office. Exceptions were provided for a person who lobbies without compensation other than actual expenses on behalf of nonprofit organizations, low-income individuals, or a group of individuals with disabilities. The bill would have created a Class A misdemeanor for violation of the provision.

- **Lobby registration amendments.**

Senate Bill 219 would have clarified the contents of a lobby registration amended during a regular legislative session to include the full name and address of each person who reimburses, retains, or employs the registrant; the amount of compensation or reimbursement paid to the registrant; and the subject matter of the legislation the registrant is communicating about.

- **Judicial campaign contributions.**

Senate Bill 219 would have removed language so a political contribution from the spouse of an individual contributing to a person subject to the Judicial Campaign Fairness Act would not be considered a contribution from that individual.



- **Exemption from certain reporting activity.**

Senate Bill 219 would have exempted county executive committees of political parties from reporting activity related to a contribution from a corporation or labor organization if the party has less than \$250 in an account in which such contributions are deposited; has not accepted such contributions; and has not made expenditures from such contributions.

- **Actions “in concert” with another for reporting direct campaign expenditures.**

Senate Bill 219 would have specified a person would not be considered as acting “in concert” with another for purposes of reporting direct campaign expenditures if the person is a nonprofit membership association subject to Subchapter D, Chapter 253 of the Election Code (Corporations and Labor Organizations); is part of a multi-tiered local, state, and national nonprofit membership association structure; and communicates with any entity within the multi-tiered association structure to make a direct campaign expenditure.

- **Approval to use candidate’s name.**

Senate Bill 219 would have provided that the name of a specific-purpose committee may not include the name of any candidate the committee supports if the candidate has not previously consented to and approved the committee’s formation. The bill had also established that violation of the provision is a deceptive trade practice under the Business and Commerce Code.

- **Clarifying journalistic privilege for certain persons involved in a campaign.**

Senate Bill 219 would have specified that the privilege extended to journalists and communication service providers in the Civil Practice and Remedies Code of not being compelled to disclose information or sources of information does not extend to:

- a person reporting direct campaign expenditures under Section 254.261, Election Code, a person who controls a political committee, or a corporation making expenditures to establish or administer a general-purpose committee;
- a person considered related to any person described above; or
- a person who is an employee or contractor of, who acts under the control of, or who acts on behalf of a person described above.

- **Changes related to “political advertising.”**

Senate Bill 219 would have added to the definition of “political advertising” a communication that is transmitted by an automated dial announcing device.

The bill also would have required that radio advertising approved by the candidate include an audio statement made by the candidate indicating approval of the communication. Television advertising approved by the candidate was to include a written statement indicating the candidate’s approval, as well as additional requirements.

The bill would have required that radio advertising not authorized by the candidate include an audio statement of the name of the person who paid for the advertising. Television advertising



not authorized by the candidate was to include a written statement that contains the name of the person who paid for the advertising, as well as additional requirements.

The bill would have prescribed other disclosure requirements for websites that contain political advertising. Political advertising disclosure requirements would not have applied to text messages.

- **Confidentiality of data in Commission temporary storage.**

Senate Bill 219 would have specified that electronic data saved in Commission temporary storage before a filer submits a report is confidential and not subject to disclosure.



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# APPENDIX



# APPENDIX A

## ***Staff Review Activities***

During the review of the Texas Ethics Commission, Sunset staff engaged in the following activities that are standard to all Sunset reviews. Sunset staff worked extensively with agency personnel; attended Commission meetings and met with commissioners; met with staff from key legislative offices; conducted interviews and solicited written comments from interest groups and the public; reviewed agency documents and reports, state statutes, legislative reports, previous legislation, and literature; and performed background and comparative research using the Internet.

In addition, Sunset staff also performed the following activities unique to this agency.

- Attended special work sessions of the Commission about agency reporting and about specific concerns related to its disclosure filing and enforcement processes.
- Surveyed individuals and organizations who file campaign finance, personal financial statement, or lobby activity reports with the Commission; individuals who filed sworn complaints with the Commission; and individuals who have had sworn complaints filed against them.
- Surveyed 13 states' ethics and campaign disclosure agencies, selected for their similarity to Texas in having few campaign finance limits or similar agency structures.
- Interviewed staff at the Texas Legislative Council, State Office of Administrative Hearings, Secretary of State, Office of the Attorney General, Texas Medical Board, Public Utility Commission, Texas Commission on Environmental Quality, Texas Department of Licensing and Regulation, Office of the Comptroller of Public Accounts, and the Texas State Board of Dental Examiners.



# Sunset Staff Review of the *Texas Ethics Commission*

————— *Report Prepared By* —————

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