

TEXAS ETHICS COMMISSION

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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, state and local candidates and officeholders, political committees, political parties, and lobbyists. Created by a constitutional amendment adopted by the voters in 1991, the Texas Ethics Commission does not terminate but is subject to review under the Sunset Act. 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.

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. 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.

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. The Sunset Commission found access to electronic disclosure information, a more contentious political climate, and greater amounts of money in races for public office heighten the potential and temptation to use disclosure less for illumination than for political opportunism. Further,

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

enforcement procedures different from those of many regulatory agencies may also affect the role and effectiveness of the Texas Ethics Commission.

The Sunset Commission also found the agency lacks an efficient and modern reporting system for filers and administers disclosure provisions under laws containing outdated, inefficient, or unclear requirements. The following material summarizes the Sunset Commission's recommendations on the Ethics Commission.

Issue 1

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

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 audits to encourage compliance.

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 form used to initiate an action would be styled as an "inquiry form" rather than a "sworn complaint." Individuals would still sign an affidavit with the inquiry swearing to its content and submit the form to the agency, as is currently required. Upon receipt of an inquiry, Commission staff would review the matter and propose to the respondent a resolution of apparently valid allegations according to one of three outcomes escalating according to seriousness.

A *Letter of Acknowledgment* would cover those violations deemed technical, clerical, or de minimis, as defined by the Commission in rule. These violations would carry no dollar penalty and would remain confidential. A *Notice of Administrative or Filing Error* would address more serious filing or other administrative errors, as defined by the Commission in rule, 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. A *Notice of Violation* would address the most serious violations. The Commission would define in rule which violations would be subject to this sanction, and these violations would carry a fine and be made publicly available on the agency's website.

The Commission would develop penalty guidelines in rule and within the bounds of the Commission's current statutory penalty authority.

Management Action

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

Statute requires the Texas Ethics Commission to review filers' disclosure reports and personal financial statements for facial compliance with the law based on a random selection process, but the agency has not done so recently because of resource constraints. Contingent on funding, the agency should perform this check using either the random process currently laid out in statute or through an improved electronic filing system. An improved electronic system, discussed in Issue 3, would assist a much broader range of filers because the system could electronically flag incomplete information and potential mistakes for filers and agency staff.

The agency should also 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. Violations found during a complete audit would subject filers to enforcement action as described in the previous recommendation.

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 judge to take final action on sworn complaints. This process could bias Commissioners as to the outcome of a complaint because 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.

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.

Removing Commissioners from the preliminary review of a complaint would require staff to make any initial proposals to respondents and to continue gathering 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. 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.

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.

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

Making contested case hearings subject to appeal under the substantial evidence rule rather than the requirement of a new trial would ensure the appropriate weight is given to the Commission's process. Additionally, a respondent would be required to exhaust the Commission's administrative remedies and not allowed to bypass agency hearings before taking a case to court.

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 mentions, but does not specifically authorize the agency's use of the State Office of Administrative Hearings, and this recommendation would eliminate the current ambiguity in its wording.

Issue 3

The Agency's Electronic Reporting System and Information Management Have Not Kept Pace With Its Workload and Changing User Needs.

The Texas Ethics Commission's computer systems supporting filing of reports and public accessibility have not kept pace with needs or the march of technology. The agency does not have a user-friendly, adequate reporting system to check disclosure documents for facial compliance after submission, or a system to conduct complete audits at a later point, reducing assistance and incentives to achieve accurate reporting and compliance. Also, the agency has not analyzed information that could help it maintain its high level of customer service while potentially reducing telephone inquiries and filer reporting errors and possibly reducing its workload.

Recommendations

Management Action

3.1 The Texas Ethics Commission should 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 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 by agency staff, the new system would replace the current system based on fixed reporting dates with a new "rolling date" system of contribution and expenditure activity; allow filers to enter information shortly after it occurs; warn filers of clearly mistaken entries and flag possible errors for agency attention; and be available to the public soon after uploading. 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 should 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.

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

To improve customer service, the agency should better track and analyze incoming calls and technical requests as well as allegations made in sworn complaints and their final disposition.

Issue 4

Antiquated Filing Requirements Waste Agency Resources and Do Not Promote Efficient 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 transparent and efficient disclosure.

Recommendations

Change in Statute

4.1 Require personal financial statements to be submitted electronically.

This recommendation would require personal financial statements to be submitted to the agency electronically in a format prescribed by the Commission. The agency already has software that could be modified to allow filers to electronically submit the statements.

4.2 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.

4.3 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 principal 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.
- Provide 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.
- Clarify that the statutory exemption for filing electronic 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 to handle notification and correspondence for all filer types and reports.
- Align the reporting period with the entire month, instead of the 25th of the month, for political committees reporting campaign finance information monthly.
- Clarify that a candidate, officeholder, or political committee receiving a contribution has until the report is filed or due to accept or reject the contribution, instead of making the decision by the end of the reporting period, which typically is not when the scrutiny occurs.

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.

Recommendation

Change in Statute

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.

Issue 6

Certain Requirements for Lobbyist Registration, Disclosure, and Reporting Are Unclear or Insufficiently Defined, Hampering Compliance and Transparency.

Persons who attempt to influence members of the legislative or executive branches of Texas government must register with the Ethics Commission as lobbyists and file lobby activity reports with the agency. However, the Lobby Law does not clearly outline the thresholds triggering registration as a lobbyist, hampering a consistent and clear understanding of who is required to register. Other provisions of the law do not clearly or adequately address situations in which a lobbyist makes a joint expenditure with a non-lobbyist; a lobbyist makes a lump-sum expenditure for certain events; or legislative advertising is distributed by legislators.

Recommendations

Change in Statute

6.1 Place in statute and clarify certain provisions related to registration as a lobbyist.

This recommendation would clearly lay out in law who must register as a lobbyist according to the following provisions:

- codify in statute provisions found in Texas Ethics Commission rules requiring registration as a lobbyist if 5 percent or more of a person's compensated time during a calendar quarter is spent lobbying;
- clarify in statute that the 5 percent time calculation is based on a standard workday of eight hours, which amounts to 3.25 days in a calendar quarter; and
- codify 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.

6.2 Clarify 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.

This recommendation would ensure the non-registrant's portion of the joint expenditure made with a registered lobbyist would not affect the lobbyist's existing protection under the bribery statute.

6.3 Add categories to the Lobby Law provision related to reporting lump sum expenditures for certain events.

This recommendation would simplify lobby reporting by adding categories for registered lobbyists to report expenditures for events to include committee parties, all House members and staff, all Senate members and staff, or all staff invited.

6.4 Provide an exception from the legislative advertising disclaimer for material distributed by a legislator on the floor of the House or Senate.

This recommendation would add an exception from this disclosure requirement for material distributed by legislators while on the floor of either chamber. Instead, distribution and disclosure requirements would fall under the rules and procedures of the House and Senate.

Fiscal Implication Summary

Overall, these recommendations would have a savings to General Revenue of \$3,500 per year, as summarized below.

Issue 1 — Strengthening the electronic filing and audit systems would be contingent on the receipt of revenue generated from any source of funds directed by the Legislature for this purpose.

Issue 4 — Removing prescriptive mailing requirements from statute and allowing staff to determine the appropriate method for sending late notices and sworn complaint correspondence would result in annual savings to General Revenue of about \$3,500.

Texas Ethics Commission

| Fiscal Year | Savings to the General Revenue Fund |
|--------------------|--|
| 2014 | \$3,500 |
| 2015 | \$3,500 |
| 2016 | \$3,500 |
| 2017 | \$3,500 |
| 2018 | \$3,500 |

