SUBJECT: Texas Ethics Commission sunset; state officeholder/employee ethics

COMMITTEE: Select Committee on Ethics — committee substitute recommended

VOTE: 6 ayes — Wolens, Dukes, Denny, Gallego, Hope, Kolkhorst

0 nays

1 absent — Isett

WITNESSES: For — Maxine Barkan, League of Women Voters of Texas; Allen Gwinn; Craig McDonald, Texans for Public Justice; Tom "Smitty" Smith, Public Citizen Inc.; Suzy Woodford and Robert W. Schmidt, Common Cause of Texas; *(Registered, but did not testify:)* Khelan Bhatia, AARP; Ken Whalen, Texas Daily Newspaper Association

Against — Rene Diaz, Republican Party of Texas; Tom Haughey, Texas Republican County Chairmen's Association; Frank Sturzl, Texas Municipal League; Jim Allison, County Judges and Commissioners Association of Texas; *(Registered, but did not testify:)* Raymond McNeel, Texas Democratic County Chairs Association

On — Karen Lundquist and Sarah Woelk, Texas Ethics Commission; Jack Gullahorn, Professional Advocacy Association of Texas; Fred Lewis, Campaigns for People; Thomas Ratliff

BACKGROUND: The Texas Ethics Commission (TEC) was created in 1991 by voter approval of an amendment to the Texas Constitution (Art. 3, sec. 24a). The commission assumed some duties of the secretary of state and the defunct State Ethics Advisory Commission and began operations in 1992. TEC and its staff administer and enforce state laws governing the conduct of state officers (including legislators) and employees, state and local candidates, political committees, lobbyists, and certain district and county judicial officers.

TEC comprises eight members, four appointed by the governor and two each by the lieutenant governor and House speaker. Appointees are selected from lists submitted by both houses and equally represent each major political party

(four Democrats, four Republicans). Members serve staggered four-year terms and cannot seek elective public office for 12 months after leaving the commission. A majority of members (five) must be present, but many decisions require six affirmative votes for actions to be valid.

TEC's major functions include:

- maintaining and making public required campaign finance and officeholder and appointee financial-disclosure reports;
- enforcing compliance with ethics laws by investigating complaints;
- issuing advisory opinions interpreting laws under TEC jurisdiction; and
- providing ethics training and producing educational materials for state officers, employees, and others.

TEC considers advisory opinion drafts and assessment of late reporting penalties. It adjudicates enforcement proceedings through a multistage process that may culminate in a closed formal hearing. Staff handle late-filing issues administratively. TEC may recommend the salaries of legislators and the lieutenant governor, subject to voter approval, although it has never exercised this authority. The Constitution also requires TEC to set per-diem pay for legislators and the lieutenant governor while the Legislature is in session.

For fiscal 2003, the agency has 35 full-time equivalent employees working in its Austin office. The executive director oversees five divisions: computer services, administration, disclosure filing, enforcement, and advisory opinions and education. The fiscal 2002-03 budget is $4.1 million, about 98 percent of which comes from general revenue. The remainder comes from standard charges, lobbyist registration fees (almost $450,000 in fiscal 2001), and penalties assessed on violations.

TEC is subject to review every 12 years but not abolition. It had not undergone sunset review before 2002.

Texas Constitution, Art. 3, sec. 22 requires state legislators to disclose to their respective houses their personal or private interests in any measure and to recuse themselves from voting. Government Code, ch. 572 sets forth

requirements for personal financial disclosure, standards of conduct, and conflict of interest for state officers and employees. Sec. 572.053 precludes legislators from voting on measures that would benefit directly specific business transactions of business entities in which they have controlling interests, unless the measure would affect entire classes of business entities.

DIGEST:

CSHB 1606 consists of two main parts spread across six major articles: TEC sunset provisions and changes in ethics and campaign finance requirements.

TEC Functions and Duties

Governance and general provisions. Lobbyists could not serve as TEC members. To be valid, TEC actions or recommendations would have to be approved by record votes. Decisions on complaints, violation reports, issue settlements, and final determinations of violations would require five votes instead of the current six.

TEC would have to develop and implement a policy encouraging use of negotiated rulemaking procedures for adoption of TEC rules and appropriate alternative dispute resolution (ADR) procedures to resolve internal and external disputes, other than preliminary reviews or preliminary review hearings. ADR procedures would have to conform to model guidelines issued by the State Office of Administrative Hearings. A trained person would be designated to coordinate policy implementation, serve as a training resource, and collect data on effectiveness.

TEC would have to develop and distribute plain-language materials describing the TEC and its processes, including conduct constituting violations; sanctions; complaint investigation and resolution policies and procedures; and the duties of complainants.

Electronic filing software and online solutions. TEC computer programs provided or approved for electronic filing of reports would have to be capable of confirming receipt of reports. The bill would remove a provision specifying types of operating systems. TEC could provide software on the Internet and could charge for providing it on compact discs or diskettes. TEC executive director and staff would have to research and propose cost-effective ways to

improve Internet access to TEC information and services. Complaint forms and copies or summaries of determinations of violations (other than technical or de minimis) would have to be available on the Internet.

Prima facie reviews (facial audits). The bill would require, rather than allow, TEC staff to review randomly selected statements and reports on file and to return those deemed not in compliance with the law. Statements and reports returned for resubmission would not be considered late if resubmitted within seven business days of receipt and in compliance. TEC could initiate preliminary reviews if information showing compliance was not received within 31 days of the original due date, if the resubmission was late, or if at least six TEC members voted that resubmissions, corrections, and other documentation were not in compliance.

Biennial reports. Before the end of each even-numbered year, TEC would have to report to the Legislature and governor on its activities during the previous two years, including the number of sworn complaints filed, resolved through agreed order, resulting in violations and penalties, and dismissed for noncompliance as to form, lack of jurisdiction, no credible evidence of violations, and lack of sufficient evidence to determine violations.

Expediting complaint resolution. CSHB 1606 would create a two-tiered enforcement process, based on the types of violations alleged in complaints, and would set shorter deadlines for notices, responses, and other procedures. "Category One violations," those generally not difficult to ascertain, would include failure to:

- timely file required reports and statements;
- make required disclosures in political advertisements;
- include right-of-way notices on political advertisements visible from roadways;
- respond to a notice letter from TEC; and
- pay a required filing fee or an affidavit of inability to pay.

All other violations would be considered "Category Two," including Category One violations that, in the executive director's judgment:

- arose out of the same fact situations as Category Two violations and

should be resolved together in the interests of justice and efficiency; or

- the facts and law related to allegations or the defense against them were so complex as to prevent resolution through the Category One preliminary review procedures.

The executive director, rather than the commission, would have to issue written determinations to complainants and respondents on the TEC's jurisdiction over violations alleged in complaints within five business days after complaints were filed, instead of 14. The bill would repeal the current requirement that the TEC notify complainants and respondents within five days of making a jurisdictional determination. Notices of jurisdiction would have to categorize the alleged violation and specify deadlines by which respondents must respond (seven business days for Category One, 20 business days for all other matters), noting that failure to respond timely would be a separate violation. Allegations of Category One violations not resolved by agreement within 20 business days of receipt of notice would be set for preliminary review hearings at the next TEC meeting. All other allegations would be set for preliminary review hearings if not resolved by agreement within 60 business days of receipt of notice. Both parties would have to be notified promptly of hearing dates, places, and times.

TEC could extend or toll (hold in abeyance) deadlines that were unworkable or that would compromise investigations or respondents' rights in complex matters.

In addition to challenging jurisdiction, respondents could acknowledge violations, deny the allegations and provide supporting evidence, or agree to comply or cease and desist voluntarily.

TEC staff could submit written questions to both complainants and respondents during preliminary reviews, but complainants would not be considered parties to that stage of the process. Procedures for the reviews and hearings would have to include reasonable response times to questions and subpoenas, including deadline extensions. Preliminary hearings would have to be conducted if preliminary reviews did not produce agreement on disposition of complaints or if respondents requested hearings in writing. At or after the time hearing notice was given, TEC could submit questions to complainants and respondents to be answered under oath within a reasonable time.

Procedures now followed during preliminary reviews and informal hearings would apply to preliminary review hearings. Upon completion, TEC would have to decide whether there was credible evidence of a violation and whether it was technical or *de minimis*. The informal hearing stage would be eliminated.

Complainants could request TEC reviews of determinations of no jurisdiction within 30 days of receipt. At least six TEC members would have to vote to reverse such a determination. The TEC would have five business days to notify complainants and respondents in writing of its decision.

Notices of formal hearings would have to state the nature of alleged violations, describe the evidence, and contain copies of complaints or TEC review motions, TEC rules of procedure, and respondents' rights. The burden of proof at formal hearings would be a preponderance of, rather than clear and convincing, evidence. The TEC's 30-day deadline to reach a final decision on the resolution of matters considered in formal hearings would begin when the State Office of Administrative Hearings (which currently conducts formal and informal hearings) issues proposals for decisions.

On staff request, and by a vote of at least six members, TEC could subpoena documents and witnesses during preliminary reviews for good cause. Subpoenas would have to seek specific information likely to determine whether a violation had been committed. TEC would have to believe reasonably that the documents or witnesses could produce the information sought and that the information could not be obtained less intrusively. People providing subpoenaed documents would be entitled to reimbursement for reasonable costs.

Criminal referral. The executive director could refer matters arising from complaints to prosecutors based on a reasonable belief that violations of bribery, corrupt influence, or abuse of office statutes had occurred (Penal Code, chs. 36 and 39).

Confidentiality. During investigations, a TEC employee could disclose to complainants, respondents, or witnesses otherwise confidential information relating to complaints, if the employee in good faith determined that disclosure was necessary to the investigation; if the employee disclosed only

information necessary to conduct the investigation; and if the executive director authorized the disclosure.

Unauthorized disclosure of confidential information would be reduced from a Class A to a Class C misdemeanor (maximum fine of $500) but would be grounds for automatic termination. Employees whose disclosures complied with the bill's provisions would not be subject to criminal or civil penalties or termination.

Waiver or reduction of late filing penalty. Upon consideration of affidavits stating reasons for waivers or reductions, TEC could affirm, reduce, or waive civil penalties in the public interest or in the interests of justice based on:

- the facts and circumstances involved;
- the seriousness of the violation and the amount of the penalty;
- the person's history of previous violations;
- the person's demonstrated good faith;
- the penalty necessary to deter future violations; or
- any other matter justice might require.

CSHB 1606 would add standard sunset language about nondiscriminatory appointments; grounds for removing a board member; providing members and employees with information on standards of conduct; member training; separation of member and staff functions; maintaining complaint information; equal employment opportunity policy; and information on the State Employee Incentive Program.

Campaign Finance and Political Advertising

Reporting requirements. CSHB 1606 would require treasurers of general-purpose committees to identify money spent by corporations or labor organizations to establish or administer the committees or on raising political contributions. The bill would repeal the statute absolving such expenditures from reporting. Candidates for major political party chairs in counties with a population of 400,000 or more would have to file the same campaign reports as required of candidates for public office. TEC would have to adopt by rule a process for terminating appointments of campaign treasurers of inactive

candidates or political committees or, for candidates, those who were not elected and had not filed final or dissolution reports. The rules would have to include definitions and written notice before and after termination.

Contributions. Statewide officeholders, legislators, legislative caucuses, and specific-purpose committees that supported, opposed, or assisted statewide officeholders or legislators could not receive political contributions until 20 days after final legislative adjournment, instead of immediately thereafter.

Fees and penalties. Candidates, officeholders, former candidates and officeholders, and political committees subject to semiannual reporting requirements that annually report prior-year unexpended funds would have to pay either an annual $100 filing fee or file by January 15 an affidavit of inability to pay. The bill would include those who became subject to the filing fee after January 1 and would provide for mailed fees accompanying reports filed electronically. Other than for eight-day reports, the late-filing civil penalty for reports due on or after September 1, 2003, would rise to $500. Currently, the penalty that TEC determines by rule may not exceed $100 per day that a report is late. The civil penalty for late eight-day reports due on or after September 1, 2003, would be $500 for the first late day and $100 for each day it was late thereafter. Currently, the penalty may not exceed $100 per late day as set by TEC rule.

Miscellaneous provisions. Political expenditures charged to credit cards would be readily determinable and, therefore, reportable, by those making the expenditures on the date they received credit-card statements denoting the expenditures. Information posted on an Internet website would be included in the definition of political advertising. The bill would prohibit knowing use of political advertising not containing requisite disclosures identifying it as such and stating who purchased it, or whom they represented.

Electronic filing. The bill would change the exemption from the requirement to file reports electronically beginning September 1, 2003. Candidates, officeholders, and committees would have to submit affidavits attesting that they did not use computers for record-keeping and that their annual aggregate contributions and expenditures did not exceed $50,000, respectively. The current exemption requires either an affidavit of noncomputerized record-keeping or annual aggregate contributions and expenditures not exceeding

$20,000. The bill would repeal the $20,000 threshold and the exemption applying to district judges and attorneys and to multicounty statutory county court judges.

TEC would have to post all electronic reports on the Internet within two business days of their filing. The bill would repeal current law requiring all candidate and committee reports (other than telegraphic or facsimile) to be filed prior to any Internet posting.

Selection of House Speaker

Candidates for House speaker would have to file written declarations with TEC indicating for which legislative session they sought the office. The candidate would have to file a declaration before knowingly accepting loans, contributions, or promises of contributions or making or authorizing campaign expenditures. Declarations would terminate upon election or notification by candidates. By September 1, 2004, TEC would have to implement, and candidates would have to use, an electronic filing system for speaker candidate reports, including effective dates for reporting.

Political contributions made other than to a speaker's campaign, interest earned on such contributions, and assets purchased with such contributions could not be donated or spent on speaker's races.

Former speaker candidates, including an elected speaker, whose declarations had expired could pay off debts incurred when the declarations were valid. Any unexpended speaker campaign funds would have to be reported annually to TEC. Former candidates could retain unexpended funds, earned interest, and purchased assets for up to six years after their candidacies ended. Funds could be returned to contributors (in amounts not exceeding contributions they made) or could be donated to recognized tax-exempt, educational, religious, or scientific charities. Disposition of funds also would have to be reported to TEC.

Active and former speaker candidates who knowingly failed to file declarations; accepted contributions or authorized expenditures without valid declarations; accepted donations of non-speaker-race political contributions,

earned interest, or purchased assets; retained unexpended campaign funds for more than six years or failed to report unexpended campaign funds; and donors giving or spending political contributions, earned interest, or purchased assets in speaker's races would commit a Class A misdemeanor, punishable by up to one year in jail and/or a maximum fine of $4,000.

Lobbying

Fees and registration. CSHB 1606 would increase the annual lobbyist registration and renewal fees for non-tax-exempt entities from $300 to $600. Quasi-governmental agencies, other than higher education institutions, that engaged in activities similar to those of trade associations or public utilities would be subject to lobbyist registration requirements. The civil penalty for late reports or registration would rise to $500.

Electronic filing. TEC would have to develop an electronic filing system (including appropriate software) for lobbyists by December 1, 2004, including effective dates, applicable reporting periods, and rules for paper filing for good cause only. TEC could increase lobbyist registration fees in calendar 2004 and 2005 only (over and above the one-time $300 increase) to cover development and implementation costs.

Conflict of interest. The bill would define "client" as a person or entity for which a lobbyist was registered or required to do so. It would define "person associated with the registrant" as a partner or other professional associate with a common business entity, other than a client, that reimburses, retains, or employs the lobbyist. The bill would remove references to potential conflicts of interest about which lobbyists must advise clients.

In general, a lobbyist could not represent a client in communications to influence legislative subject matter or administrative action if:

- the representation involved a substantially related matter in which that client's interests were materially and directly adverse to the interests of another client of the lobbyist, the lobbyist's employer, or a person associated with the lobbyist; or

- the representation reasonably appeared to be limited adversely by the lobbyist's, the lobbyist's employer's, or an associated person's responsibilities to another client, or by the lobbyist's or lobbyist's employer's own interests or an associated person's business interests.

Under such circumstances, lobbyists could represent clients only if they notified affected clients within two days, and TEC within 10 days, of learning of the conflict. Lobbyists would have to report to TEC the names and addresses of each affected client notified. Lobbyists would have to sign such reports under oath, affirming compliance with conflict-of-interest provisions to the best of the lobbyists' knowledge.

TEC could assess a civil penalty of up to $2,000 for violating conflict-of-interest provisions in addition to any other enforcement, civil, or criminal action pursued for the same conduct. CSHB 1606 would repeal the Class B misdemeanor penalty for knowingly violating conflict-of-interest provisions.

Personal Financial Disclosure and Standards of Conduct for State Officers and Employees

Reporting requirements. CSHB 1606 would require real estate to be identified in personal financial statements by its street address or the county in which it is located. Mutual funds held or acquired would have to be identified and reported, including number of shares and, if sold, the category of the amount of net gain or loss. The bill would replace outdated references to types of business structures with more commonly used terms and would apply each reporting requirement to each business form equally.

Blind trusts. The bill would set forth specific criteria for blind trusts, including:

- trustees would have to be disinterested parties with complete management discretion;
- identification of blind trusts in financial disclosure statements, including their fair market value category and each asset they contained; and
- statements signed under penalty of perjury that trustees had not

disclosed information to officers or employees impermissibly and that trusts comply with requirements, to the best of trustees' knowledge.

Late fees. Statements filed late would incur a civil penalty of $500, as opposed to an amount set by TEC not to exceed $100 per each day late.

Prohibited conduct. CSHB 1606 would prohibit expressly, rather than discourage, various types of misconduct by state officers and employees.

Officers and employees could not intentionally or knowingly solicit, accept, or agree to accept any economic benefit (other than those excepted by Penal Code, sec. 36.10), compensation, or contract from governmental or other entities that would not have been offered were it not for the officer's or employee's state positions. Legislators violating this provision would be subject to constitutionally authorized disciplinary measures by the house to which they belonged. Other state officers in violation would be subject to removal from state office for official misconduct. Employees would be subject to termination. Civil or criminal penalties still would apply.

Legislative conflicts of interest. A legislator could not represent another person for compensation before state executive and some judicial agencies after September 1, 2003. The bill would except representation in court and continued administrative representation that originated as criminal representation arising out of the same-fact situation.

The bill would remove existing recusal criteria based on legislation directly benefitting specific transactions by individual businesses in which legislators have controlling interests (more than 10 percent). It would establish a two-tiered legislator recusal system to be used in limited circumstances and would require disclosure of legislators' interests in other circumstances.

A legislator could not introduce, sponsor, or vote on measures or bills, other than measures affecting an entire class of business entities, if:

- it was reasonably foreseeable that the measures or bills would affect economically business entities or real property in which the legislator had substantial interests (fair market value of at least $2,500 for real estate) in a way distinguishable from its effect on the public; or

- the legislator's close relatives (immediate family plus aunts, uncles, cousins) or business entities employing the legislator or his or her close relatives were registered to lobby on the subject matter of the measures or bills.

If the reasonably foreseeable effects of a bill or measure would be the same for business entities or real property in which the legislator had substantial interests as for an entire class of business entities or real property, or if the bill or measure would affect a contract between the legislator and a governmental entity, the legislator would have to disclose such facts in writing to the appropriate administrative officer of the legislative house and to TEC before introducing, sponsoring, or voting on the bill or measure. Required notices would be included in each house's journals and would have to identify legislators, the measures or bills, and whether the legislators were recusing themselves or disclosing. Relatives of legislators or business entities employing legislators or their relatives who were registered lobbyists regarding the subject matter would have to file similar notices with TEC. Legislators contracting with governmental entities could satisfy reporting requirements by filing notices for each bill or by filing lists at the beginning of each legislative session delineating their contracts. New contracts would have to be added to the lists within 10 days of execution. Violators would be subject to constitutionally authorized discipline by their respective houses, instead of the current penalty of a Class A misdemeanor.

Legislative continuances. CSHB 1606 would abolish all legislative continuances (postponements of civil or criminal proceedings in which a legislator is involved, either as an attorney or as a party, until 30 days after legislative session adjournment). It would repeal the provision in the Civil Practice and Remedies Code allowing such continuances, along with references to them in the Family Code (protective orders), Government Code (declaratory judgments on public securities), and Code of Criminal Procedure (court appointments of elected officials). By September 15, 2003, the Texas Supreme Court would have to repeal any existing rules requiring courts to grant legislative continuances. The Supreme Court also could not adopt or amend any such rules.

County and Municipal Officers' Personal Financial Disclosure

Filing requirements. Municipal officers (mayors, governing body members, municipal attorneys, and city managers), including appointees, and candidates for elective municipal office in municipalities with a population of 200,000 or more would have to file personal financial statements with municipal clerks or secretaries. Candidates would have to file by the 20th day after the election filing deadline or five days before the election, whichever was earlier. Officers and appointees could request filing extensions of up to 60 days, which would have to be granted if timely filed or in cases of physical or mental incapacity. Only one extension could be granted per year, except for good cause. The bill would set forth requirements on forms, mailing copies, and duplicate and supplemental statements.

Municipal clerks and secretaries in affected municipalities would have to maintain records of requests to view statements up until one year after they were filed. Statements would be subject to destruction two years after the officer left office. Municipal clerks and secretaries, as well as county clerks in applicable counties, would have to submit to appropriate prosecutors (municipal, county, or district attorneys) lists of officers required to file statements and whether or not they complied or obtained extensions.

Penalties. Municipal officers or candidates who knowingly failed to file statements would commit a Class B misdemeanor, punishable by up to 180 days in jail and/or a maximum fine of $2,000. Not receiving copies of the requisite forms would be a defense to prosecution. People who failed to file statements within 30 days of notice of failure to file timely from municipal attorneys would be subject to a civil penalty of up to $1,000, to be deposited into municipalities' general funds. Third parties could notify municipal attorneys in writing of other people's failure to file.

Effective date. This bill would take effect September 1, 2003, except for the provisions regarding annual filing fees, additional requirements for personal financial statements, and municipal officer financial disclosure, all of which would apply beginning January 1, 2004.

SUPPORTERS SAY:

CSHB 1606 would balance three important considerations: the inherent dangers of ethics violations, the potential harm of ethics allegations, and the public's right to know how election campaigns are conducted and public

decisions are influenced. The bill would streamline TEC investigations, enhance TEC's oversight and enforcement functions, clarify its confidentiality protection, and update electronic filing policy affecting officeholders, candidates, and lobbyists. The bill would increase campaign finance disclosure by political committees and candidates for House speaker, county chairs, and municipal officers. It would clarify lobby-client conflicts of interest, create a mechanism for identifying legislators' financial conflicts of interest regarding legislation, and abolish legislative continuances.

TEC sunset provisions. Along with the across-the-board recommendations, CSHB 1606 would incorporate almost all of recommendations of the Sunset Advisory Commission and its staff.

TEC has limited staff and resources in comparison to the plethora of laws, candidates, and disclosure filings it must enforce, monitor, and maintain. Enabling it to do more is imperative, but expectations that it should police all state electoral campaign activity and fully prosecute every allegation of governmental misconduct aggressively are unrealistic. Allowing the commission unfettered subpoena and auditing power could have negative ethical and fiscal implications. Nevertheless, CSHB 1606 would enhance the tools at TEC's disposal to better fulfill its mission. Staff could initiate subpoenas at the outset of complaint investigations, rather than having to wait until the formal hearing stage, and could submit written questions to both parties. Specific guidelines and the requisite six-vote approval of the commission would ensure a fair and orderly process for issuing subpoenas. In these ways, the bill would maximize compliance while minimizing public shaming. It would allow allegations to be more fully investigated without requiring the accused to prove their innocence.

Changes such as reducing the requisite TEC majority vote from six to five, in most instances; allowing the director to determine complaint jurisdiction; eliminating the informal hearing stage; setting deadlines for notices and responses; and dividing complaints into routine (Category One) and serious (Category Two) violations should speed up decision-making and enforcement. Lowering the burden of proof in formal hearings to the level of civil proceedings would be more appropriate for ethical matters. It should allow TEC to pursue violators more aggressively and make cases more quickly.

Criminal referral authority would ensure that the most egregious violations were subjected to the full force of the law. The bill would neither allow the TEC to treat officeholders like criminals, nor would it create a new ethics police force.

The new confidentiality guidelines would be a reasonable compromise between enforcement powers and individual rights. Given the adversarial nature of political campaigns, care should be taken to avoid unnecessarily disclosing information about unsubstantiated allegations. On the other hand, TEC staff must be freed from its investigatory paralysis brought on by the fear of violating confidentiality. The bill would reduce the penalty for unauthorized disclosure to a level commensurate with the violations being investigated.

Several provisions would enhance TEC's online capabilities, including a mandated in-house improvement review; online software and forms; and an electronic filing system for lobbyists, paid for with a temporary fee increase. These and other measures should improve TEC's public access and disclosure functions.

Campaign finance/political advertising. CSHB 1606 would give the public more information about the activities of corporate and labor political action committees (PACs), which would have to disclose expenditures on overhead and fund-raising. Party county chairs in metropolitan areas wield significant influence over campaigns and elections. They should have to report their contributions and expenditures like candidates for public office. The high population threshold would prevent this requirement from placing undue burdens on small and rural county chair candidates.

The governor considers and, in some cases, vetoes bills up to 20 days after legislative adjournment. Special sessions often are announced during that period. Political contributions during this period are unseemly. Waiting three weeks after the regular session ends would create no hardships on those who make or receive contributions.

Requiring credit-card expenditures by candidates and campaigns to be reportable when statements are received makes sense from a bookkeeping standpoint. Doing so would clarify ambiguity about when such data must be

reported.

The bill would tighten the electronic filing exemption by requiring candidates to meet both criteria, not one or the other. Raising the threshold for aggregate contributions and expenditures would have less impact on the number of exemptions than if it were the only criterion to be met.

Speaker's race. The House speaker is one of the three most powerful offices in Texas state government. Even though speakers are not chosen by voters, they conduct campaigns and exert tremendous influence over legislation and policy. This race always involves officeholders and their accounts and should be subject to enhanced disclosure and public scrutiny.

Lobbying. Lobbyists have become an integral part of the legislative process, but their dealings with clients largely were unregulated until 2001. To protect clients' interests further, CSHB 1606 would refine the definition of client and lobbyist associate. It would broaden unlawful conflicts to include both those arising between lobbyists' clients and those between clients and lobbyists' employers, associates, or the lobbyists themselves. The bill would not de-criminalize lobbyist conflict-of-interest violations altogether; criminal acts still could be prosecuted under other statutes. Clients would retain the ability to seek redress in civil courts. Quasi-governmental agencies, such as the State Bar of Texas and the Lower Colorado River Authority, function much like trade associations and utilities. Because they seek to influence legislation, they should have to register as lobbyists like their private counterparts.

State officials' personal financial disclosure and standards of conduct. As long as Texas has a part-time legislature, personal and professional conflicts of interest will arise. They cannot be eradicated, but they can be better identified and neutralized. The constitutional standards for legislator recusal from voting on legislation that benefits them are drawn so broadly and the statutory language is so narrow that they are ineffective and unenforceable. Rarely, if ever, do legislators invoke them. CSHB 1606 would prohibit introduction and sponsorship of bills, not only voting, but would emphasize economic effects on legislators' business interests that are reasonably expected and different from the effects on the public. The bill would add relatives lobbying on the same legislative subject matter as grounds for recusal, but it would require disclosure only in cases in which legislation

would affect a legislator's government contracts. The over-10 percent "controlling interest" criterion would be replaced with "substantial interest," defined as at least $2,500 in fair market value for real estate. Adding these important distinctions would go more to the heart of genuine conflicts and of potential self-dealing without penalizing legislators and their families for earning a living.

Legislative continuances no longer should be tolerated. Court delays should be granted for legitimate reasons, not because a legislator has been hired or added as counsel to a pending case before a legislative session. This blatant manipulation of the judicial system is unfair to parties who cannot or will not engage in it, and it cheapens legislative office. It also discriminates against other professions that do not enjoy similar privileges as attorneys. Making personal gain by virtue of one's office unlawful would extend the same principle to nonlawyers.

Legislators decide state policy and approve state agencies' budgets. Prohibiting them from representing paying clients before agencies they oversee would remove a means of undue influence that could intimidate state agency officials and be unfair to opposing parties.

Municipal officials' personal financial disclosure. Candidates for municipal office should have to face the same level of scrutiny as those who seek state and party chair offices. At the city level, challengers have an unfair advantage because, unlike incumbents, they need not disclose their personal finances. People who believe that they deserve public office should give voters the opportunity to review their financial holdings and assess what conflicts of interest they might have if elected. This is especially true at the local level, where elected officials' decisions can have a more direct impact on voters, as well as the officials themselves.

The 200,000 population threshold is a compromise level absolving smaller cities and towns that often do not pay their elected officials and for whom compliance might create an undue hardship.

OPPONENTS SAY:

Although CSHB 1606 would make some marginal improvements in TEC functions, it would do little to move the agency toward the level of scrutiny and enforcement needed to bring campaigns and officeholders into full

compliance with disclosure and election laws.

TEC sunset provisions. TEC is the only state investigative/regulatory agency whose board, not staff, must issue subpoenas. This requirement renders meaningful investigations virtually impossible in view of the fundamental structural deficiencies represented by the five-vote minimum and six votes required for subpoenas. Not surprisingly, the TEC never has issued a subpoena or initiated an investigation; only one complaint ever has reached the final hearing stage. CSHB 1606 would not rectify this situation, leaving the staff and public thwarted from pursuing full compliance with campaign and ethics laws. The bill should create a new enforcement division or authorize the attorney general or a local law enforcement agency to help the TEC conduct investigations.

The bill's confidentiality provisions would obscure the extent to which TEC is bound up in partisan politics. The attorney general has determined (Opinion GA-0036, March 13, 2003) that providing information to one respondent, under a TEC-initiated complaint, that originated in a complaint against another respondent would not violate TEC's confidentiality statute (Government Code, sec. 571.140). It follows that staff interviews with witnesses regarding complaints do not violate confidentiality prohibitions either. If TEC is not going to issue subpoenas, the commission at least should free its staff to fulfill its charge.

The bill would leave the complaint process too lengthy and cumbersome. TEC should conduct one hearing and make one decision, allowing some type of administrative appeal, like most other regulatory agencies do. Speed is of the essence during political campaigns and elections, and this bill would not speed up the process enough.

The TEC should be allowed to share confidential information developed during complaint investigations with the Commission on Judicial Conduct, State Bar of Texas, and law enforcement agencies. This would allow proper coordination and improve public protection, especially when allegations arise against people overseen by all three agencies.
Ethics allegations are serious matters that can impair people's ability to govern and can ruin their reputations. The burden of proof in such cases should not be lowered but should remain clear and convincing evidence.

To be effective, TEC needs full auditing capability, not simply the authority to review documents for compliance. Also, to reduce costs, TEC should give filers the option of receiving forms electronically rather than by mail.

Campaign finance and political advertising. The bill's requirement of a $50,000 candidate fund-raising threshold for electronic filing is too high, and the proposed exception for nonuse of computers is not justifiable. Computers are as ubiquitous as automobiles and telephones. The threshold should be lowered to allow fewer candidates to claim the exception. Better yet, the exception should be eliminated altogether to speed public disclosure of campaign fund-raising and spending.

The proposed 20-day post-adjournment moratorium on political contributions is superfluous and at best symbolic. It should not apply to legislators whose votes already have been cast.

Too many delays are built into the campaign finance reporting process. Expenditures should be reported when they are made, regardless of the form of payment. Allowing filers to wait until they receive statements could invite deliberate delay in reporting significant expenditures if they were charged late in a campaign so as not to have to be reported until after an election.

House speaker's race. The House speaker is chosen by House members, not by the voters. Because there is no public campaign to be disclosed, subjecting speaker candidates to TEC regulation and disclosure is unnecessary.

Lobbying. Lobbyist-client conflicts of interest already are prohibited by law. Additional legislation is not needed.

Tacking an electronic filing system fee hike, even temporary, on top of doubling the basic lobby registration fee would be overkill. Lobbyists are not elected officials, do not campaign, and have no public constituencies. They should not be subject to the same electronic filing requirements as officeholders and candidates.

A lobbying contract is a private matter. There is no compelling reason for state government to regulate a business relationship simply because it may affect public policy.

Quasi-governmental agencies may seek to have input into decisions affecting them, but that does not make them lobbyists. Requiring them to register as such would be inappropriate.

State officials' personal financial disclosure and standards of conduct. The proposed recusal system would be unwieldy and unnecessary. Legislators would have no guidelines as to what impact bills must have to warrant recusal or, in the case of government contracts, disclosure. The Constitution and state law already preclude voting on measures that further legislators' specific business interests by rightly tying them to transactions. The proposed $2,500 threshold is too low and would encompass too many minor business activities.

Precluding lawyers and other legislators from practicing their professions by representing others before state agencies and abolishing legislative continuances would put the state on a slippery slope toward a legislative plutocracy. If Texas does not pay its citizen lawmakers a living wage, serving in the Legislature will become a hobby for the rich. The state should not interfere with part-time legislators' legitimate ability to provide financially for themselves and their families. Singling out lawyers or any other profession for employment restrictions would set a bad precedent and would penalize those who earn their living trying lawsuits.

Municipal officials' personal financial disclosure. City elections are a local, not a state, matter. Their regulation should be left to local discretion, not foisted on cities by the state. Requiring municipal candidates to disclose their personal finances would have a chilling effect on participatory democracy at the local level. It could discourage well-qualified citizens, especially in smaller, close-knit communities, from seeking public office. Allowing city and county recordkeepers to make the equivalent of criminal referrals to prosecutors would be tantamount to granting them police power for an administrative function.

OTHER OPPONENTS SAY:

TEC sunset provisions. CSHB 1606 would not lead to more ethics investigations or issuance of any subpoenas, because doing so still would require a vote of six members. Issuing subpoenas, like any other TEC decision, should require a simple majority of the members present, not a supermajority of the membership.

The bill's easing of subpoena restrictions would move the TEC a step closer to conducting political witch hunts, something it has avoided thus far. Neither the TEC nor its staff should have any subpoena power whatsoever.

Campaign finance and political advertising. The bill should go beyond requiring more disclosure of PAC spending and should restrict the types of expenditures PACs can make solely to political activities, rather than allow unbridled overhead and fund-raising expenses.

Officeholders and candidates should have to disclose timely their cash balances on hand, including during campaigns. The public is entitled to know how and when those seeking office are spending money.

The bill should limit individual campaign contributions, prohibit repayments of loans candidates make to themselves with political funds, ban contributions between elections and the start of the legislative session, and require disclosure of contributors' employers and occupations.

The state should prohibit campaign advertisements masquerading as "issue ads" or "voter education," especially those paid for with unregulated contributions. Voters and candidates deserve to know who is behind the political messages they hear and to which they must respond during races.

House speaker's race. The bill should require secret balloting to protect House members from potential intimidation. Making noncompliance with reporting requirements a Class A misdemeanor would create too stiff a penalty for a presiding officer.

Lobbying. Lobbyists cannot be expected to police themselves when it comes to client conflicts of interest, as they have little or no incentive to do so. The bill would remove a disincentive by reducing conflict-of-interest violations enforceable by the TEC from a misdemeanor to a civil offense. Lobbyist-client conflicts of interest corrupt the process and should not be allowed to exist, even after client notification. Allowing lobbyists to invoke the "best of my knowledge" caveat would render the affirmation of compliance virtually meaningless.

State officials' personal financial disclosure and standards of conduct.

The two-tiered recusal system would introduce new criteria no more specific than current statutes. Without defining "reasonably foreseeable" or "distinguishable" economic effects, the bill would be difficult to enforce. Legislators could continue to work for lobbying firms, contract with governmental entities, and represent others before political subdivisions for compensation. These conflicts would allow legislators to continue to parlay their influence for personal gain. Regardless of the pay scale, legislators have a sworn duty to protect and act in the public interest first and foremost. The bill should curtail their ability to use their offices to enhance their incomes, or at least include income tests for determining financial conflicts of interest.

The bill would perpetuate an inherently flawed self-policing approach by replacing the criminal penalty with discipline by legislators' colleagues. Neither house would have an incentive to pursue violators for fear of setting precedents with which other legislators would have abide. The bill should authorize TEC, the Travis County district attorney's Public Integrity Unit, or some other independent entity to evaluate legislative conflicts of interest, enforce the law, and punish violators.

Legislators should be barred from lobbying or representing clients before local governments as well as before state agencies. Legislators often must vote on bills that affect municipalities and counties. Local officials' decisions should not be influenced by concerns over where legislators' loyalties and priorities lie.

Municipal officials' personal financial disclosure. The population threshold is artificial and should be removed. Voters in small cities, towns, and villages have an equal need to know whether candidates have potential conflicts of interest and how they would deal with them.

NOTES:

The author plans to offer a floor amendment changing several provisions on legislative recusal for conflicts of interest. The amendment would apply the recusal criteria for lobbying conflicts only to legislators' immediate families; clarify the definition of lobbyist employment and its relationship to legislators; and narrow the criterion for lobby registration from subject matter to specific legislation.

Specifically, the proposed amendment would:

- narrow the circumstances in which legislators would have to recuse themselves from authoring, sponsoring, or voting on legislation by (1) specifying that "passage or defeat" would have a "substantially beneficial" economic effect on legislators' interests, (2) reducing the scope of applicable familial relationships between legislators and lobbyists to spouses, children, or parents, (3) restricting lobbyists' applicable activities to specific bills or measures, and (4) specifying that grounds for recusal would include legislators' employers and their other employees, partners, associates, shareholders, and counsel who are lobbyists and whom legislators know, or should know, are communicating directly with legislators on measures or bills;
- raise the threshold for a "substantial interest" in real property from $2,500 to $10,000;
- remove the notice requirement pertaining to legislation that affects legislators' holdings to the same degree as an entire class; and
- specify when notices must be filed by affected legislators and lobbyists.

The committee substitute incorporated most of the provisions contained in the original TEC sunset bill, HB 795 by Solomons. The substitute also made numerous changes to HB 1606 as filed.

The substitute would reduce some requisite TEC votes from six to a majority (five); create a two-tier enforcement process at TEC to eliminate the informal hearing stage and set specific deadlines; modify subpoena power during preliminary review and impose detailed criteria for subpoena issuance; set conditions under which staff could disclose confidential information during complaint investigations; and allow referral of matters to prosecutors.

The substitute also would prohibit political contributions until 20 days after legislative adjournment; add provisions on the House speaker's race; set up a two-tiered recusal and disclosure test pertaining to legislators' or relatives' financial or personal interests in pending legislation; modify the prohibition against legislator representation before state agencies; delete a prohibition against state officers contracting with governmental entities; delete a prohibition against employment of state officers by businesses

engaged in lobbying; and add lobbyist-client conflict-of-interest provisions and regulation of quasi-governmental agency lobbying.

Further, the substitute would limit reporting requirements on candidates for county political party chairs and add a population limit to the municipal financial disclosure requirements.

The 78th Legislature has considered several other bills addressing ethics and campaign finance. On March 31, the House passed HB 999 by Madden, eliminating the electronic filing exemption for nonusers of computers. The bill has been referred to the Senate State Affairs Committee.

HB 51 by Hill, which would eliminate the exception allowing legislators to represent parties before state executive agencies, was reported favorably, without amendment, by the House State Affairs Committee on March 31. The companion bill, SB 254 by Bivins, was reported favorably, without amendment, by the Senate State Affairs Committee on April 25.

HB 3149 by Wilson, relating to conflicts of interest involving lobbyists, passed the House on the Local and Consent Calendar on April 25 and has been referred to the Senate Administration Committee. The companion bill, SB 1449 by Harris, passed the Senate on the Local and Uncontested Calendar on April 25 and was considered in a public hearing by the House Elections Committee on April 30 but left pending.

SB 244 by West, which would extend until the governor’s regular-session veto deadline the prohibition against making or accepting political contributions to statewide officeholders, legislators, or their political committees, passed the Senate by 30-0 on April 14 and was left pending after a public hearing before the House Elections Committee on April 30. Its companion, HB 283 by Puente, also is pending in Elections.