

- SUBJECT:** Functions and duties of the Texas Ethics Commission
- COMMITTEE:** Elections — committee substitute recommended
- VOTE:** 7 ayes — Morrison, Miles, Johnson, Klick, R. Miller, Simmons, Wu
0 nays
- SENATE VOTE:** On final passage, April 17 — 31-0
- WITNESSES:** (*On House companion HB 2737*)
For — Jim Clancy; Fred Lewis; Craig McDonald, Texans for Public Justice; Tom “Smitty” Smith, Public Citizen; Stewart Snider, League of Women Voters of Texas; (*Registered, but did not testify*: Brent Connett, Texas Conservative Coalition; JC Dufresne, Common Cause Texas; Jack Gullahorn, Professional Advocacy Association of Texas)

Against — None

On — Steve Bresnen; Ashley Fischer, Secretary of Texas; Tim Sorrells, Texas Ethics Commission; (*Registered, but did not testify*: John Jackson, Republican Party of Texas; Karl Spock, Sunset Commission)
- 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’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.

TEC consists of a bipartisan eight-member commission, four appointed by the governor, two appointed by the speaker of the House, and two appointed by the lieutenant governor. The members are appointed from lists submitted by members of each political party of the House and Senate. The Constitution requires the appointments to be divided between each political party required to hold a primary. The commission maintained about 33 full-time staff in fiscal 2012.

The commission operated with an annual budget of about \$2 million in fiscal 2011 and 2012 and is supported almost entirely by general revenue.

TEC underwent its last sunset review in 2003. It is subject to sunset review, but, as a constitutional agency, may not be abolished.

DIGEST:

CSSB 219 would make changes to TEC procedures primarily in four major categories, including investigation and enforcement, personal financial reporting, campaign finance reporting, and lobbying.

Investigation and enforcement activities. The bill would amend provisions relating to complaints filed with the commission, investigation of violations, and enforcement of ethics rules.

Violation categories. The bill would repeal the current “Category One” and “Category Two” violation categories and replace these with three categories of violations:

- technical, clerical, or de minimis violations;
- administrative or filing violations; and
- more serious violations.

The bill would require TEC to adopt rules defining what violations were included in each category. The bill would replace the term “sworn complaint” with “inquiry.”

Response to an inquiry. The process for response to an inquiry by a respondent would be the same as the process for response to a sworn complaint. Technical, clerical, and de minimis violations would follow the existing rules for Category One violations, while administrative or filing violations or more serious violations would need to follow the existing rules for Category Two violations.

Preliminary review and resolution of an inquiry. TEC would need to adopt procedures by rule for the conduct of preliminary review of each category of violation. If an inquiry alleged more than one violation, the commission could choose to conduct a single preliminary review of all violations or a separate review of each violation. If an inquiry alleged violations of different categories, TEC staff would need to conduct a review according to the procedure for the most serious category alleged. If TEC determined that an inquiry was initially categorized incorrectly, it would continue the review according to the procedure for the correct category.

After conducting a preliminary review of an inquiry or motion, TEC staff would propose a resolution to the inquiry. The bill would provide the following resolutions for the violation categories:

- a letter of acknowledgement for technical, clerical, or de minimis violations;
- a notice of administrative or filing error for administrative or filing violations;
- a notice of violation for an inquiry or motion alleging a more serious violation.

TEC staff would need to resolve an inquiry or motion in the form corresponding to the most serious category of violation alleged in the inquiry or motion. Except as provided by other law, if the respondent accepted the resolution, TEC staff would submit the resolution letter or notice to TEC for approval.

TEC would need to adopt procedures for review of a submitted resolution letter or notice, and procedures for disposition of an inquiry if the respondent did not respond to the resolution.

If the respondent rejected the resolution or requested a hearing in writing, TEC would set a preliminary review hearing. This hearing would be conducted by a panel of two members of the commission. TEC would adopt rules for the selection of this panel. The rules would ensure that the panel was composed of two members of the commission and each member of the panel was a member of a different political party.

The resolution of a preliminary hearing would proceed in the same way it currently does except that:

- if the respondent refused the proposed resolution the panel would need to order a formal hearing;
- if the panel could not issue a decision because of a tie vote, the panel would need to order a formal hearing;
- if the respondent accepted a resolution, the panel would need to submit it to TEC for approval.

Formal hearings. The commission could hold formal hearings as it currently does or could delegate them to the State Office of Administrative Hearings. The final decision stating the resolution of a formal hearing would need to be in the form corresponding to the category of violation that was the subject of the hearing.

Judicial review. A respondent who had exhausted all administrative remedies could seek judicial review of the final decision by pursuing an appeal. It would be conducted in the manner provided for judicial review of a contested case and would be governed by the substantial evidence rule. The provision for bringing a trial de novo would be repealed.

Confidentiality and access by the public. Under the bill, a notice of administrative or filing error or a notice of violation that had been approved by the commission would not be confidential. An approved letter of acknowledgement would be confidential.

TEC would need to make a copy of a notice of administrative or filing error or notice of violation approved or issued by the commission available on the Internet as soon as practicable after a preliminary review, preliminary review hearing, or formal hearing. A notice of dismissal or decision that there was no violation could be made available on the Internet at the request of the respondent and upon a waiver of confidentiality.

Civil penalties. TEC would adopt guidelines for imposition of a civil penalty. The guidelines would need to take into account the same factors as when assessing a sanction. TEC would be required to impose a civil penalty on a respondent who was issued a notice of administrative or filing error or a notice of violation, but could not impose a civil penalty on a respondent who was issued a letter of acknowledgement. When imposing a civil penalty, TEC would not need to consider any penalties previously proposed to the respondent.

TEC would need to adopt any rules necessary in this section not later than December 1, 2013. The changes made in this section would apply only to complaints or motions after that date.

The bill would make conforming amendments to reflect terminological and procedural changes.

Personal financial reporting. The bill would add a requirement that any personal financial statement filed by a state officer, candidate for an office as an elected officer, or party chairman would need to be filed by computer diskette, modem, or other means of electronic transfer, using computer software that met TEC specifications or was provided by the TEC. TEC would be required to develop or approve this software as soon as practicable after the effective date of the act. This software would need to conform with the requirements for other e-filing software. TEC would be required to design forms that could be used for filing a financial statement with an authority other than the commission.

The following individuals, if required to file financial statements, would be able to do so via e-mail:

- municipal officers and candidates for municipal office;
- county officers and candidates for a county office;
- justices of the peace and candidates for justice of the peace; and
- county officers, precinct officers, county judicial officers, candidates for these offices, and county employees.

The authority receiving these statements could prescribe guidelines for filing by e-mail. The current timeliness provisions would apply to those who did not file by e-mail.

The bill would repeal or modify references and requirements relating to mailing notices and statements, the U.S. Post Office and common or contract carriers, and postmarks. Affected requirements would be conformed to comply with e-filing, and providing electronic notice instead of mailing.

The bill would repeal the defense to prosecution for failing to file a financial statement if a person did not receive mailed copies of the financial statement form. This repeal would apply only to an offense committed on or after the effective date of the bill.

Home address on a personal financial statement. The bill would require TEC to remove the home address of a district attorney from a personal financial statement before permitting a member of the public to view the statement or providing a copy to a member of the public. This would apply to any financial statement that TEC maintained on file and that was accessible to the public on or after the effective date of the act.

Once TEC determined that the computer software required for e-filing included features that allowed TEC to easily and quickly redact information in the statement, the bill would require TEC to remove the home address of any person from a personal financial statement from that date forward before permitting a member of the public to view the statement or providing a copy to a member of the public.

Campaign finance. The bill would create e-filing requirements for campaign finance reporting. It would amend the kinds of parties required to file reports and procedures for filing and would create a user fee for filers.

User fee. CSSB 219 would require an annual fee from each candidate, officeholder other than the secretary of state, or political committee that was required to file a financial statement under campaign regulations. The fee requirement would not apply to:

- a candidate, officeholder, or specific-purpose committee who filed reports with an authority other than TEC; or
- a candidate or officeholder who filed a petition in lieu of the filing fee with the person's application for a place on the ballot.

The commission would need to adopt rules to implement the fee and determine the amount of the annual fee necessary for the administration of campaign finance reporting in an amount not to exceed \$100.

Legislative caucuses. Each legislative caucus would be required to appoint a caucus chair and file the appointment with TEC not later than September 15, 2013. The appointment would need to be in writing and include the caucus's name, address, and telephone number, the chair's name, and the name of the person making the appointment. The caucus would need to notify TEC in writing of any change of its mailing address within 10 days. The chair would be responsible for filing the caucus's reports.

The chair would need to file a report of contributions and expenditures under the current reporting requirements by October 1, 2015 that would cover the period between July 1, 2013 and September 15, 2013. The chair would need to file a report by January 15, 2013 under the bill's requirements that would cover the period between September 15, 2013 and December 31, 2013. Caucus chairs would not be responsible for reporting or maintaining records of activity before September 15, 2013.

Principal political committees. Candidates and officeholders required to file a campaign treasurer appointment would be allowed to designate a specific-purpose committee as their principal political committee with the responsibility of filing any required reports. This designation would need to be in writing and filed with TEC. A candidate or officeholder could designate only one specific-purpose committee and a specific-purpose committee could be designated by only one candidate or officeholder under this provision.

A candidate who exercised this option would not be required to appoint a campaign treasurer under the existing provisions. A candidate who exercised this option would not be required to file a report during a reporting period if their principal political committee reported all of the activity that would otherwise be required, including:

- the amount of any political contribution, including a loan, made by the candidate to the principal political committee; and
- the amount of any political expenditure made by the candidate from personal funds and whether the candidate intended to seek reimbursement.

E-filing. Under the bill, a candidate, officeholder, or committee who had exceeded the threshold requiring e-filing once would be required to e-file permanently.

A legislative caucus could opt out of e-filing if:

- the caucus chair filed an affidavit stating that the caucus, an agent of the caucus, or a person with whom the caucus contracted did not use computer equipment to keep the current records of contributions and expenditures; and
- the caucus had never, in a calendar year, accepted contributions or

made expenditures that exceeded \$20,000.

The affidavit would need to be filed with each report filed and would need to include a statement that the caucus understood the conditions that would disqualify it from opting out.

Reporting schedule. The schedule for a general purpose committee that was required to file reports monthly would be amended. Reports would cover the period from the first calendar day to the last calendar day of each month rather than the 26th day through the 25th day. They would need to be filed no later than the 10th day rather than the fifth day of the month.

The bill would make an amendment to conform with the Judicial Campaign Fairness Act to specify that a contribution made by a spouse of an individual would not be considered a contribution by the individual. This would apply only to a contribution made on or after the effective date of the bill.

Changes to reporting requirements would apply only to reports required to be filed on or after the effective date of the act.

Lobbying. The bill would amend provisions relating to lobbying registration and lobbyist expenditure reports.

Threshold to require registration. Under the bill, a person would not be required to register as a lobbyist if the person was compensated or reimbursed for no more than 26 hours in a calendar quarter engaging in activity to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action. If a person spent more than eight hours in one day engaging in such activity, they would be considered to have engaged in that activity for only eight hours during that day. TEC would be able to determine an amount of time, other than the 26 hours specified, spent engaging in this activity to trigger registration requirements.

The bill would specify that the definition of “communicates directly with a member of the legislative or executive branch to influence legislation or administrative action” included establishing goodwill with the member for the purpose of later communicating with the member to influence legislation or administrative action.

The registration requirements would apply only to a registration or renewal to be filed on or after the effective date of the bill.

“Legislative advertising” would not include material that was printed or published by a member of the legislative branch and that was only disseminated by a member of the Legislature on the floor of either house.

A person who was not a registrant who made a portion of a joint expenditure on another person’s behalf would not be considered to have made an expenditure for purposes of bribery offenses. The bill would state that this was intended to clarify, rather than change, existing law.

Filing of reports and registration. Expenditure reports filed by lobbyists would need to include events to which:

- a legislative committee and the staff of the committee were invited;
- all state senators and their staff were invited;
- all state representatives and their staffs were invited;
- all legislative staff were invited.

This would be required only for reports filed on or after the effective date of the bill.

A person who had ever used the e-filing system to file registration or activity reports would not be allowed to file a paper registration or report.

An amended registration during the legislative session would only need to require the names and addresses, subject matter of the legislation or administrative action that was the subject of the communication, and amount of compensation paid.

General procedures. *Notice.* The bill would require TEC to adopt rules prescribing how it would notify any person or provide any notice required under its governing statutes. It would repeal requirements relating to mailing notice by registered or certified mail, and modify other notice requirements to conform with this requirement.

Confidentiality of electronic data. The requirements for e-filing software would be amended to specify that electronic report data saved in a temporary storage location for later retrieval and editing before the report was filed would be confidential and could not be disclosed. After the

report was filed, the information would be subject to the law requiring the filing of the report.

Effective date. The bill would take effect September 1, 2013.

**SUPPORTERS
SAY:**

CSSB 219 would make progress in correcting inefficiencies that currently exist in the Texas Ethics Commission's operations. By providing for e-filing, the bill would bring the commission's reporting statutes into the 21st century, reducing postage costs and making reporting easier and more efficient for the parties reporting and the entities receiving reports. The user fee that TEC may charge for certain e-filers would help TEC maintain its software without requiring constant budget appropriations. Updates in the violation categories and review procedures would fix some of the uncertainties, obscurities, and conflicts in the review and enforcement process. The three-tier violation system and updated resolution options would help the public and the parties involved distinguish between minor infractions and more serious violations and would help to mitigate abuse of the review process.

Additionally, the Legislative Budget Board's fiscal note indicates that the bill would have a positive fiscal impact to the general fund of \$212,500 a year, based on a campaign finance fee that TEC could impose on the estimated 4,250 reports it receives a year. (In this example, TEC would set the filing fee at \$50; the bill would set a \$100 limit.)

Concerns that the bill should do more are misplaced. Sunset review is not the appropriate venue for changing underlying rules that an agency enforces or for making policy choices. The Sunset process is intended only to improve the operation and efficiency of an agency, in this case TEC. Changes in policy revolving door provisions, disclosure of certain political contributions, audit requirements, and public judicial campaign funding, among other ideas, should be implemented via the legislative process in stand-alone bills. Many of these issues in fact have been proposed in separate legislation and the Legislature has had the opportunity to consider them independently. Other changes that should be implemented could be determined by an interim study.

Lobbyist registration trigger. Changes in lobbyist oversight would clarify and codify some of the existing rules to give registrants better notice of when they needed to register and what they needed to report. The 26-hours-in-a-calendar-quarter time trigger is consistent with the current

rule that exempts from registration a person who spends less than 5 percent of a normal full-time work schedule in a quarter lobbying. A shift to a compensation trigger or other rule would be a policy change and would be more appropriate to address in a stand-alone bill.

OPPONENTS
SAY:

CSSB 219 should go further. TEC is an ineffectual agency that does not accomplish its intended constitutional purposes. This bill should make stronger changes in order to ensure that the commission has the power and the directive to enforce Texas campaign finance and ethics rules.

The bill should implement several additional changes. It should institute provisions to prevent legislators from cycling through the revolving door of leaving public office, lobbying, and then re-running for office. It should require TEC to perform random, in-depth audits of financial reports to ensure compliance and incentivize more careful reporting. It also should require political contributions by certain non-profit organizations to be publicly disclosed. It also should provide for public financing for judicial campaigns. Judges should not need to rely on their ability to raise funds to effectively run for office. These funds could be raised through a surcharge on State Bar of Texas dues.

Lobbyist registration trigger. The bill would impose an ineffective and unenforceable 26-hours-a-quarter trigger for lobbyist reporting. By providing for a time trigger, the bill would ensure that a person who wanted to lobby without registering could circumvent the registration process. Proving how a person spent their time and whether it qualified under the language in the bill would be more difficult than providing a compensation or earnings trigger, which could be investigated more easily.