



TEXAS ETHICS COMMISSION
RECOMMENDATIONS FOR STATUTORY CHANGES



TEXAS ETHICS COMMISSION
STEVEN D. WOLENS, CHAIR

DECEMBER 2018

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86TH TEXAS LEGISLATURE

PURSUANT TO GOVERNMENT CODE § 571.073

TEXAS ETHICS COMMISSION

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DECEMBER 2018

RECOMMENDATIONS

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RECOMMENDATIONS

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**Texas Ethics Commission
Recommendations for Statutory Changes
86th Legislative Session
(Adopted December 13, 2018)**

The following recommendations from the Texas Ethics Commission (the “TEC”) are made pursuant to Section 571.073(3) of the Texas Government Code. The relevant statutes have been attached as exhibits where applicable.

I. RECOMMENDATIONS TO REPEAL UNCONSTITUTIONAL STATUTES

Recommendation No. 1: Repeal Statute that Prohibits Use of Legislatively Produced Materials in Political Advertising

Repeal Section 306.005 of the Texas Government Code, which states that a person may not use in political advertising any audio or visual materials produced by or under the direction of the legislature or of a house, committee, or agency of the legislature.

Reason: On November 29, 2016, the TEC was permanently restrained and enjoined from enforcing Section 306.005 of the Texas Government Code following a final judgment issued in Cause No. 2016-27417, *Briscoe Cain v. Untermeyer, et al.*, in the 270th District Court of Harris County, Texas (no appeal). The trial court held that the statute violated the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution. This amendment would conform the statute to be consistent with the trial court’s final judgment.

A draft amendment to Chapter 306 of the Government Code is found at Exhibit A, page 5.

Recommendation No. 2: Repeal Portion of Statute that Prohibits Corporations and Labor Organizations from Contributing to Direct Campaign Expenditure Only Committees

Amend Chapter 253 of the Texas Election Code to allow a corporation or labor organization to make a political contribution to a political committee that intends to act exclusively as a “direct campaign expenditure only committee,” also known as a “SuperPac.”

Reason: On October 16, 2013, in *Texans for Free Enterprise v. Texas Ethics Commission*, 732 F.3d 535 (5th Cir. 2013)(no appeal), the United States Court of Appeals for the Fifth Circuit affirmed a preliminary injunction enjoining the TEC from enforcing Sections 253.094(a) and 253.003(b) of the Election Code, which were declared unconstitutional under the First Amendment to the United States Constitution. A permanent injunction was issued by the trial court on December 20, 2013 (See *Texans for Free Enterprise v. Texas Ethics Commission*, 2013 U.S. Dist. LEXIS 187379). This amendment would conform the statute to be consistent with the Court’s opinion and the final judgment entered by the trial court.

A draft amendment to Title 15 of the Election Code is found at Exhibit B, page 6.

Recommendation No. 3: Repeal Statute that Requires 60-Day Waiting Period and 10-Contributor Requirements for General-Purpose Committees

Repeal Section 253.037(a) of the Texas Election Code relating to the 60-day and 10-contributor requirements applicable to general-purpose committees. In addition, repeal Section 253.037(c) of the Election Code, which merely provides an exception to Section 253.037(a).

Reason: On August 12, 2014, in *Catholic Leadership Coalition of Texas v. Reisman*, 764 F.3d 409 (5th Cir. 2014) (no appeal), the United States Court of Appeals for the Fifth Circuit struck down as unconstitutional portions of the Texas Election Code that required a general purpose committee to collect contributions from ten contributors and wait sixty days before exceeding \$500 in contributions and expenditures in an election. This amendment would conform the statute to be consistent with the Court’s opinion.

A draft amendment to Title 15 of the Election Code is found at Exhibit C, page 7.

Recommendation No. 4: Repeal Statute Requiring Contribution and Expenditure Limits for Speaker Election

Repeal Sections 302.017 and 302.019 of the Texas Government Code relating to contribution and expenditure restrictions for speaker elections.

Reason: On August 21, 2008, in *Free Market Foundation v. Reisman*, 573 F. Supp. 2d 952 (Dist. Court, WD Texas 2008) (no appeal), the United States District Court for the Western District of Texas, Austin Division, found that the contribution and expenditure restrictions for speaker elections in the Texas Government Code violated the First Amendment to the United States Constitution. This amendment would conform the statute to be consistent with the trial court’s final judgment.

A draft amendment to Chapter 302 of the Government Code is found at Exhibit D, page 8.

II. RECOMMENDATIONS TO IMPROVE ENFORCEMENT EFFICIENCIES

Recommendation No. 5: Authorize Disclosure of Confidential Information Showing Possible Criminal Violations to Texas Rangers Public Integrity Unit

Authorize the Commission to disclose to law enforcement agencies, including the Texas Rangers Public Integrity Unit, information relating to a sworn complaint.

Reason: Section 571.171, Texas Government Code, authorizes the TEC to refer certain matters to the appropriate prosecuting attorney for criminal prosecution without violating the confidentiality restriction under Section 571.140. Prior to 2014, the TEC referred allegations of criminal violations to the Travis County District Attorney’s Public Integrity Unit. After that office was disbanded in 2014, the Texas Rangers’ Public Integrity Unit took over the criminal investigation of public officials. That unit now handles the referral of these matters to the appropriate prosecuting attorney for criminal prosecution. There is no provision in Chapter 571 that allows the TEC to disclose or refer matters to the Texas Rangers for criminal investigation. In order to protect the public, the TEC must be authorized to disclose information to the Texas Rangers, local law enforcement authorities, and federal law enforcement authorities.

A draft amendment to Chapter 571 of the Government Code is found at Exhibit E, page 9.

Recommendation No. 6: Amend Statutes to Provide Consistency to Records Retention Requirements for Campaign Finance Reports, Lobby Reports, and Personal Financial Statements

Amend Title 15 of the Texas Election Code and Chapter 572 of the Texas Government Code to require filers to maintain records related to information disclosed in campaign finance reports, personal financial statements, and lobby reports for a consistent period of time sufficient to take into account the applicable statute of limitations for enforcement of potential violations. The TEC recommends a four-year retention period.

Reason: Recordkeeping requirements for the various reports filed with the TEC and local filing authorities range from two years (for campaign finance reports) to four years (for lobby reports). There is no record retention requirement for personal financial statements. Pursuant to TEC Rule 12.5, the TEC cannot accept jurisdiction over a sworn complaint if the alleged violation is also a criminal offense and is barred from criminal prosecution by the applicable statute of limitations, which in many cases is two years. The TEC is barred from investigating alleged violations that are not criminal offenses if the conduct occurred more than three years before the complaint was filed. Having a uniform records retention requirement for all reports that could be the subject of a sworn complaint and ensuring the retention requirement is sufficient in length to prevent records from being destroyed before the statute of limitations has expired would improve the TEC's ability to enforce election laws under its jurisdiction.

A draft amendment to Chapter 572 of the Government Code is found at Exhibit F, page 10.

III. RECOMMENDATIONS FOR COST SAVINGS EFFICIENCIES

Recommendation No. 7: Authorize the TEC to Provide Certain Notices via Email

Amend Section 571.032 of the Texas Government Code to allow the TEC to send certain notices electronically, including notice that a sworn complaint does not comply with the form requirements or that the TEC has no jurisdiction over a sworn complaint.

Reason: Section 571.032, Texas Government Code, requires the TEC to send all initial notices, decisions, and reports to complainants and respondents using certified mail, restricted delivery, return receipt requested. The additional cost for this method of service is \$10.05 and the average delivery time (assuming the intended recipient accepts delivery) is three to five business days. This includes notices that a sworn complaint does not comply with form requirements or that the TEC does not have jurisdiction over the alleged violation. In FY 2018, the TEC dismissed 187 sworn complaints that did not comply with the form requirements or were not within the TEC's jurisdiction. In each instance, the TEC was required to send notice of the determination to both the complainant and the respondent by certified mail, restricted delivery, return receipt requested at a cost of regular mail plus \$10.05. The TEC estimates that it spends an additional \$2,500 annually to comply with the requirement that complainants and respondents must personally sign for delivery of the written notice that a sworn complaint was not accepted by the TEC. It is neither cost-effective nor efficient to use this method to provide notice of dismissals in these instances. Authorizing the TEC to send these notices by regular mail or electronic delivery would reduce costs and provide a more efficient method of communicating this information.

A draft amendment to Chapter 571 of the Government Code is found at Exhibit G, page 11.

IV. RECOMMENDATIONS TO ASSIST FILERS

Recommendation No. 8: Allow Filers to Verify Reports Filed with the TEC with a Declaration

Amend Section 571.077 of the Texas Government Code to allow filers who are eligible to file personal financial statements with the TEC on paper to verify the report by completing a written unsworn declaration subscribed by the filer as true under penalty of perjury.

Reason: H.B. 791 (effective 5/29/17) amended Section 572.0291 of the Texas Government Code to allow appointed officers to file personal financial statements with the TEC by certified mail. The personal financial statement form requires the filer to verify the report before a notary public. The TEC has been advised by filers that it can be costly and inconvenient to locate a notary in time to meet the statutory filing deadline. Section 132.001 of the Texas Civil Practice and Remedies Code authorizes the use of a written unsworn declaration in lieu of an affidavit. An unsworn declaration is signed by the affiant, who swears under penalty of perjury that the information contained in the document is true. Because there is no notary requirement with an unsworn declaration, filers would have a more convenient and less expensive way to verify the report in order to meet the filing deadline. The declaration would have the same force of law as a notarized affidavit. Amending Section 571.077 of the Texas Government Code to allow for the use of an unsworn declaration would make the statute consistent with Section 132.001 of the Texas Civil Practice and Remedies Code.

A draft amendment to Chapter 571 of the Government Code is found at Exhibit H, page 12.

Recommendation No. 9: Allow Certain Campaign Finance Reports to be Filed in Black or Blue Ink or, Alternatively, Remove the Requirement

Amend Section 254.036 of the Texas Election Code to allow TEC filers exempt from electronic filing of campaign finance reports to complete and file reports using blue or black ink. Alternatively, remove the requirement regarding ink color altogether.

Reason: Section 254.036 of the Texas Election Code requires paper reports filed with the TEC to be written or typed in black ink. The TEC has received repeated inquiries seeking clarification about whether paper reports printed in blue ink would be accepted and has been advised that local filing authorities are rejecting attempts to file paper reports printed in blue ink. It makes no difference to the TEC's administration of law whether a report is filed using black or blue ink.

Draft amendments to Chapter 254 of the Government Code are found at Exhibit I, page 13.

EXHIBIT A

Repealed text is indicated by ~~[strikethrough]~~ text.

CHAPTER 306 OF THE GOVERNMENT CODE

1 ~~[Sec. 306.005. USE OF LEGISLATIVELY PRODUCED AUDIO OR VISUAL MATERIALS~~
2 ~~IN POLITICAL ADVERTISING PROHIBITED. (a) A person may not use audio or visual~~
3 ~~materials produced by or under the direction of the legislature or of a house, committee, or~~
4 ~~agency of the legislature in political advertising.~~
5 ~~(b) After a formal hearing held as provided by Subchapter E, Chapter 571, the Texas Ethics~~
6 ~~Commission may impose a civil penalty against a person who violates this section. The amount~~
7 ~~of the penalty may not exceed \$5,000 for each violation.~~
8 ~~(c) Subsection (a) does not prohibit describing or quoting the verbal content of the audio or~~
9 ~~visual materials in political advertising.~~
10 ~~(d) Subsection (a) does not apply to a photograph of a current or former member of the~~
11 ~~legislature obtained from a house, committee, or agency of the legislature that is used in~~
12 ~~accordance with terms and conditions established by the entity from which the photograph was~~
13 ~~obtained.~~
14 ~~(e) In this section:~~
15 ~~(1) "Political advertising" has the meaning assigned by Section 251.001, Election Code.~~
16 ~~(2) "Visual materials" means photographic, video, or other material containing a still or moving~~
17 ~~recorded image or images.]~~

EXHIBIT B

Proposed language is indicated by underlined text.

TITLE 15 OF THE ELECTION CODE

1 Sec. 253.105. POLITICAL CONTRIBUTIONS TO DIRECT CAMPAIGN EXPENDITURE
2 COMMITTEES

3
4 (a) A corporation or labor organization may make a political contribution from its own property
5 to a political committee that intends to act exclusively as a direct campaign expenditure only
6 committee.

7
8 (b) For purposes of this section, a “direct campaign expenditure only committee” is a political
9 committee that makes direct campaign expenditures and does not make or intend to make
10 political contributions to any candidate, officeholder, or specific-purpose committee established
11 or controlled by a candidate or officeholder.

12
13 (c) A direct campaign expenditure only committee’s acceptance of a political contribution from a
14 corporation or labor organization does not constitute a violation of section 253.003(b) or
15 253.094(a) of the Election Code if, before accepting the contribution, the committee files with
16 the commission an affidavit stating:

17
18 (1) the committee intends to act exclusively as a direct campaign expenditure only
19 committee; and

20
21 (2) the committee will not use its political contributions to make political contributions to
22 any candidate for elective office, officeholder, or political committee that makes a
23 political contribution to a candidate or officeholder.

EXHIBIT C

Repealed text is indicated by ~~text~~ text.

TITLE 15 OF THE ELECTION CODE

1 Sec. 253.037. RESTRICTIONS ON CONTRIBUTION OR EXPENDITURE BY GENERAL-
2 PURPOSE COMMITTEE

3
4 ~~[(a) A general purpose committee may not knowingly make or authorize a political contribution~~
5 ~~or political expenditure unless the committee has:~~

6
7 ~~(1) filed its campaign treasurer appointment not later than the 60th day before the date the~~
8 ~~contribution or expenditure is made; and~~

9
10 ~~(2) accepted political contributions from at least 10 persons.]~~

11
12 (b) A general-purpose committee may not knowingly make a political contribution to another
13 general-purpose committee unless the other committee is listed in the campaign treasurer
14 appointment of the contributor committee.

15
16 ~~[(c) Subsection (a) does not apply to a political party's county executive committee that is~~
17 ~~complying with Section 253.031 or to a general purpose committee that accepts contributions~~
18 ~~from a multicandidate political committee (as defined by the Federal Election Campaign Act)~~
19 ~~that is registered with the Federal Election Commission, provided that the general purpose~~
20 ~~committee is in compliance with Section 253.032.]~~

21
22 (d) A person who violates this section commits an offense. An offense under this section is a
23 Class A misdemeanor.

EXHIBIT D

Repealed text is indicated by ~~text~~.

CHAPTER 302 OF THE GOVERNMENT CODE

1 ~~[Sec. 302.017. CONTRIBUTIONS AND LOANS FROM ORGANIZATIONS~~

2
3 ~~(a) Except as provided by Subsection (b), a corporation, partnership, association, firm, union,~~
4 ~~foundation, committee, club, or other organization or group of persons may not contribute or~~
5 ~~lend or promise to contribute or lend money or other things of value to a speaker candidate or to~~
6 ~~any other person, directly or indirectly, to aid or defeat the election of a speaker candidate.~~

7
8 ~~(b) This section does not apply to a loan made in the due course of business to a speaker~~
9 ~~candidate for campaign purposes by a corporation that is legally engaged in the business of~~
10 ~~lending money and that has continuously conducted the business for more than one year before~~
11 ~~making the loan to the speaker candidate.]~~

12
13 ~~[Sec. 302.019. INDIVIDUAL CONTRIBUTIONS; CAMPAIGN EXPENDITURES~~

14
15 ~~(a) Except as provided by Section 302.017 or 302.018, an individual other than the speaker~~
16 ~~candidate may contribute personal services and traveling expenses to aid or defeat a speaker~~
17 ~~candidate.~~

18
19 ~~(b) An individual other than the speaker candidate may expend a total of not more than \$100 for~~
20 ~~the cost of correspondence to aid or defeat the election of a speaker candidate.~~

21
22 ~~(c) Except as provided by Subsections (a) and (b), all campaign expenditures must be made by~~
23 ~~the speaker candidate from campaign funds.]~~

EXHIBIT E

Proposed language is indicated by underlined text.

CHAPTER 571 OF THE GOVERNMENT CODE

1 Sec. 571.1401. CERTAIN DISCLOSURE OF INFORMATION

2
3 (a) To protect the public interest, the commission may disclose to a law enforcement agency
4 information that is confidential under Section 571.140(a).

5
6 (b) The commission may disclose information under this section only to the extent necessary for
7 the recipient of the information to perform a duty or function that is in addition to the
8 commission's duties and functions.

9
10 (c) Information disclosed to a law enforcement agency under this section remains confidential,
11 and the agency must take appropriate measures to maintain that confidentiality.

12
13 (d) A person commits an offense if the person discloses confidential information obtained under
14 this section. An offense under this subsection is a Class C misdemeanor.

EXHIBIT F

Repealed text is indicated by ~~text~~ text.
Proposed language is indicated by text text.

**CHAPTER 572 OF THE GOVERNMENT CODE;
TITLE 15 OF THE ELECTION CODE**

1 **Sec. 572.0292. RETENTION OF RECORDS**

2 (a) An individual required to file a personal financial statement shall maintain a record of the
3 information that is necessary for filing the personal financial statement for at least four years
4 beginning on the filing deadline for the personal financial statement containing the information.

5 AND

6 Sec. 254.001. RECORDKEEPING REQUIRED.

7 (d) A person required to maintain a record under this section shall preserve the record for at least
8 four ~~two~~ years beginning on the filing deadline for the report containing the information in the
9 record.

EXHIBIT G

Proposed language is indicated by underlined text.

CHAPTER 571 OF THE GOVERNMENT CODE

1 Sec. 571.032. MAILING OF NOTICES, DECISIONS, AND REPORTS. (a) Except as
2 provided by Subsection (b) or (c), each written notice, decision, and report required to be sent
3 under this chapter shall be sent by registered or certified mail, restricted delivery, return receipt
4 requested.

5 (b) After written notice under Section 571.123(b) regarding the filing of a sworn complaint has
6 been sent to a person in the manner required by Subsection (a), the commission may send the
7 person any additional notices regarding the complaint by regular mail or electronic delivery
8 unless the person has notified the commission to send all notices regarding the complaint by
9 registered or certified mail, restricted delivery, return receipt requested.

10 (c) Written notice under Section 571.123(c) that a sworn complaint does not comply with the
11 form requirements or that the commission does not have jurisdiction under Section 571.124(f)
12 may be sent by regular mail or electronic delivery.

EXHIBIT H

Proposed language is indicated by underlined text.

CHAPTER 571 OF THE GOVERNMENT CODE

- 1 Sec. 571.077. STATEMENTS, REGISTRATIONS, AND REPORTS CONSIDERED TO BE
2 VERIFIED. (a) A statement, registration, or report that is filed with the commission is
3 considered to be under oath by the person required to file the statement, registration, or report
4 regardless of the absence of or defect in the affidavit of verification, including a signature.
5 (b) A person required to file a statement, registration, or report with the commission is subject to
6 prosecution under Chapter 37, Penal Code, regardless of the absence of or defect in the affidavit
7 of verification.
8 (c) This section applies to a statement, registration, or report that is filed with the commission
9 electronically or otherwise.
10 (d) An unsworn declaration, in the format prescribed by Section 132.001 of the Texas Civil
11 Practice and Remedies Code, may be used in lieu of an affidavit of verification when filing a
12 paper report with the commission.
13

EXHIBIT I

Repealed text is indicated by ~~strikethrough~~ text.
Proposed language is indicated by underlined text.

CHAPTER 254 OF THE ELECTION CODE

1 Sec. 254.036. FORM OF REPORT; AFFIDAVIT; MAILING OF FORMS. (a) Each report filed
2 under this chapter with an authority other than the commission must be in a format prescribed by
3 the commission. A report filed with the commission that is not required to be filed by computer
4 diskette, modem, or other means of electronic transfer must be on a form prescribed by the
5 commission and written in black or blue ink or typed with black or blue typewriter ribbon or, if
6 the report is a computer printout, the printout must conform to the same format and paper size as
7 the form prescribed by the commission.

8 **OR**

9 Sec. 254.036. FORM OF REPORT; AFFIDAVIT; MAILING OF FORMS. (a) Each report filed
10 under this chapter with an authority other than the commission must be in a format prescribed by
11 the commission. A report filed with the commission that is not required to be filed electronically
12 [~~by computer diskette, modem, or other means of electronic transfer~~] must be on a form
13 prescribed by the commission [~~and written in black or blue ink or typed with black or blue~~
14 ~~typewriter ribbon~~] or, if the report is a computer printout, the printout must conform to the same
15 format and paper size as the form prescribed by the commission.

16