

## **BILL ANALYSIS**

C.S.H.B. 1606  
By: Wolens  
Ethics, Select  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

In 1991, the Legislature proposed a constitutional amendment, which was adopted by the voters, to create the Texas Ethics Commission (commission). Since that time, the commission's responsibilities and authority have remained essentially unchanged. The commission is subject to review under the Texas Sunset Act this year.

On January 30, 2003, Tom Craddick, Speaker of the House, issued a proclamation creating the House Select Committee on Ethics. The Speaker's proclamation vested the committee with jurisdiction over all matters pertaining to the ethics of government officers and employees, including the regulation of lobbying and personal financial disclosure, the commission, and the statutes under the jurisdiction of the commission.

C.S.H.B. 1606 responds to the Speaker's proclamation by making changes to existing laws related to ethics in three general areas: the functions and duties of the Texas Ethics Commission; the regulation of political contributions, political advertising, lobbying, and the conduct of public servants; and the reporting of political contributions and personal financial information. In addition, the bill incorporates recommendations of the Sunset Advisory Commission.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that the bill expressly grants rulemaking authority to the Texas Ethics Commission in the following sections:

Art. 2, Section 2.03 (Section 252.0131, Election Code);

Art. 3, Section 3.02 (Section 302.013(e), Government Code); and

Art. 4, Section 4.05 (Section 305.0064, Government Code).

### **ANALYSIS**

#### **ARTICLE 1. FUNCTIONS AND DUTIES OF TEXAS ETHICS COMMISSION**

C.S.H.B. 1606 amends the Government Code to subject the Texas Ethics Commission to review, but not abolishment, under the Texas Sunset Act in 2015 and sets forth Sunset Advisory Commission across the board and agency-specific recommendations including those regarding conflicts of interest provisions applicable to commission members, grounds for removal of commission members, training for commission members, separation of the commission's policymaking duties from the agency's management functions, and those requiring the executive director to provide information on standards of conduct to members and employees of the commission, to maintain an equal employment policy and program, and to provide commission employees with information and training on the State Employee Incentive Program, as well as provisions requiring non-discriminatory appointments to the commission, the development and implementation of a policy for the effective use of technology, the development and implementation of a policy to encourage the use of negotiated rulemaking procedures and alternative dispute resolution for disputes under the commission's jurisdiction, excluding confidential hearing processes, and requiring the

maintenance of information on written complaints and notification to complainants and respondents about commission policies for complaints and quarterly status reports regarding complaints. C.S.H.B. 1606 also requires the commission to perform facial audits of randomly selected reports and statements, and provides procedures for the handling of these facial audits.

C.S.H.B. 1606 also amends Chapter 571 of the Government Code to ensure more timely resolution of matters addressed by the commission. First, the bill creates a two-tiered enforcement process to provide for faster resolution of complaints that allege violations that are generally not difficult to ascertain (“Category One”). The violations identified as generally not difficult ascertain include a failure to timely file required reports and statements, failure to make required disclosures in political advertising and failure to include a required right of way notice, a failure to timely respond to a notice letter from the commission, and failure to pay a filing fee required by the bill. The bill provides that the executive director shall deem what would otherwise be a Category One violation as a Category Two violation where the facts warrant.

Second, C.S.H.B. 1606 provides specific deadlines to effectuate more timely resolution of complaints submitted to the commission. Specifically, the bill requires the commission to send a notice letter (and specifies the contents of the letter) to the complainant and the respondent not later than 5th business day after a legally sufficient sworn complaint is received by the commission. In addition, C.S.H.B. 1606 requires a response to a notice of a Category 1 offense within 7 business days of receipt of notice and a response to a notice letter in all other matters within 20 business days of receipt of notice. Category 1 violations not resolved by agreement within 20 business days of receipt of notice shall be set for preliminary review hearing at the next commission meeting, and all other allegations not resolved by agreement within 60 business days of receipt of notice shall be set for preliminary review hearing at the next commission meeting. To accommodate instances in which the deadlines are not workable or would interfere with the just adjudication of a matter, C.S.H.B. 1606 directs the commission to adopt rules to include allowing the extension or tolling of the otherwise applicable deadlines under specified circumstances.

To further facilitate the more timely processing and resolution of complaints filed with the commission, C.S.H.B. 1606 amends Chapter 571 by shifting from the commission to the executive director the initial determination of whether a complaint is within the jurisdiction of the commission, and shifts from the commission to the staff the responsibility to promptly conduct a preliminary review on receipt of a sworn complaint that complies with statutorily prescribed requirements. In addition, the bill transfers processes from the current informal hearing stage to the preliminary review hearing stage, thereby eliminating an unnecessary bureaucratic step in the process, while preserving for the commission and the respondent the opportunity to resolve complaints without resort to a formal public hearing.

C.S.H.B. 1606 also amends the Government Code to address the commission’s investigative processes. First, the bill allows commission staff to pose written questions to the complainant and respondent during a preliminary review. Second, the bill allows the commission to submit written questions in connection with a preliminary review hearing and require those questions to be answered under oath. C.S.H.B. 1606 also extends the Commission’s current authority to subpoena witnesses and documents at formal hearings, to the preliminary review stage, but only for good cause and if the following additional criteria are satisfied: (1) the subpoena must be approved by 6 of the 8 members of the commission; (2) the subpoena must be for the purpose of attempting to obtain from the witness specifically identified information, and therefore cannot be used as a “fishing expedition;” (3) and must be based on the commission members’ objectively reasonable belief that: (i) the specifically identified information is likely to be determinative of whether the subject of an investigation has committed a violation of a law the commission is charged with enforcing; (ii) the specifically identified information can be determined from the documents sought or is known by the witness; and (iii) the information is not reasonably available through a less intrusive means. Thus, the subpoena process will be available as an aid to the commission and to witnesses who cannot or would prefer to not come forward voluntarily, but could never be used against a person who cooperated in a request for the same information from the commission or its staff. The bill also provides that a person who provides subpoenaed documents to the commission is entitled to reimbursement from the commission for the reasonable costs of producing the documents.

The third way in which C.S.H.B. 1606 addresses the commission's investigative processes is by amending the Government Code to allow commission staff to disclose otherwise confidential information for the purpose of investigating a complaint only if (1) the employee makes a good faith determination that the disclosure is necessary to the investigation; (2) the employee's determination is objectively reasonable; (3) the employee obtains the approval of the executive director; and (4) the employee discloses only the information necessary to the investigation. Under C.S.H.B. 1606, a commission staff member who disclosed confidential information other than as allowed would be subject to termination of his or her employment, prosecution for a Class C misdemeanor, and the current civil liability in an amount equal to the greater of \$10,000 or the amount of actual damages.

To make information filed with the commission and commission forms more accessible, the bill encourages the commission to make electronic filing software available on internet and requires the commission to make its complaint form available on the Internet, requires the commission to inform the public of all enforcement orders that are not confidential by posting the orders or summaries of the orders finding violations on the Internet, and requires the commission to include in its bi-annual a summary of commission activities, including the number of sworn complaints filed, dismissed, settled through an agreed order, and the number resulting in an order finding a violation.

C.S.H.B. 1606 also makes some changes regarding commission decision-making. First, the bill requires the commission to find that a preponderance of the evidence supports a finding of a violation. Second, the bill requires the agreement of five of the commission's eight members to render decisions on complaints, reports of violations, to agree to the settlement of issues, and to make a final decision regarding whether a violation was committed. The bill also makes all commission votes record votes.

C.S.H.B. 1606 allows the executive director to refer a matter to a prosecuting attorney if the executive director reasonably believes that the person who is the subject of the complaint has violated Chapter 36 or 39, Penal Code. In making the referral, the executive director or commission may disclose otherwise confidential information.

The bill also provides procedures for requesting a waiver or reduction of a late filing penalty, and identifies criteria for the commission to consider before acting to waive or reduce a civil penalty.

## ARTICLE 2. CAMPAIGN FINANCE AND POLITICAL ADVERTISING

The bill directs the commission to adopt by rule a process by which the commission may terminate the campaign treasurer appointment of an inactive candidate or political committee. The bill also extends until the 20th day after final adjournment of a legislative session the ban on political contributions to a statewide officeholder, a member of the legislature, and to a specific-purpose committee for supporting, opposing, or assisting a statewide officeholder or a member of the legislature. The bill makes the same amendment to the ban on contributions to a legislative caucus.

C.S.H.B. 1606 requires candidates, officeholders, and political committees who are subject to semi-annual reporting requirements and an annual report of unexpended funds, to either pay an annual filing fee of \$100 or file an affidavit of inability to pay the filing fee not later than January 15. The bill also refines the applicable reporting requirements. The bill allows a candidate, officeholder, or committee to avoid electronic filing on or after September 1, 2003, if the filer submits an affidavit that it does not use a computer to keep records *and* that it does not accept or spend more than \$50,000 in a year. The bill also requires the treasurer of a general purpose committee to identify any expenditures made by a corporation or a labor organization to establish or administer the committee or to finance the solicitation of political contributions to the committee. The bill requires candidates for county chairs in counties with more than 400,000 people to file reports of campaign contributions and expenditures, and repeals the current exemption from the electronic filing requirement for district judges, district attorneys, and judges of multi-county statutory county courts subject to electronic filing requirements. Finally, the bill requires the commission to post all electronic reports on the internet within 2 business days of the filing of the report.

C.S.H.B. 1606 amends the Government Code provisions regarding penalties for late-filed reports that are

required to be filed on or after September 1, 2003. The bill changes the civil penalty assessed for late filing of a report (other than an 8 day report) from an amount to be determined by commission rule, but not more than \$100 per day for each late day, to a \$500 penalty, and changes the civil penalty assessed for late-filed 8 day reports from an amount to be determined by commission rule, but not more than \$100 per day for each late day, to \$500 for the first day it is late and \$100 each day thereafter. The bill does not change current law that provides for a warning letter from the commission if any report is more than 30 days late, and a civil penalty of not more than \$10,000 if the penalty is not paid within 10 days of receipt of the warning letter.

C.S.H.B. 1606 provides that the amount of a political expenditure is readily determinable on the date the person receives the credit card that includes the expenditure. The bill also expands the definition of political advertising to include information posted on an internet website.

#### ARTICLE 3. SPEAKER'S RACE

C.S.H.B. 1606 requires speaker candidates to declare their candidacies and generally prohibits accepting donations or making campaign expenditures except when a declaration of candidacy is in effect. The bill also prohibits contributions to a speaker candidate from non-speaker campaign or officeholder contributions or interest earned on or assets purchased with such contributions. C.S.H.B. 1606 requires a former speaker candidate to dispose of unexpended campaign funds within 6 years, and limits the disposition of such funds to the retirement of debt incurred in connection with the speaker candidacy, the return of the funds to donors, or the donation of the funds to charity, and requires the speaker candidate to report the disposition of the funds.

The bill also requires the commission to implement an electronic filing system for speaker candidates and requires speaker candidates to use that system.

#### ARTICLE 4. LOBBYING

C.S.H.B. 1606 increases the lobbyist registration fee for non-tax exempt entities from \$300 to \$600. The bill requires the commission to develop an electronic filing system for lobbyists by December 1, 2004, and to develop rules that allow paper filing for good cause only. The bill also allows the commission to increase the registration fee for lobbyists in calendar years 2004 and 2005 by an amount determined by the commission to be sufficient to recover the cost of developing and implementing the electronic filing system for lobbyists, and restricts the use of these fees to the development and implementation of the electronic filing system.

C.S.H.B. 1606 generally prohibits a lobbyist from representing a client in communications to influence a legislative subject matter or administrative action if (1) the representation of that client involves a substantially related matter in which that client's interests are materially and directly adverse to the interests of another client of the lobbyist, the lobbyist's employer, or another client of a "person associated with the lobbyist" (defined as a partner, or other person professionally associated with the registrant through a common business entity, other than a client, that reimburses, retains, or employs the registrant), or (2) the representation reasonably appears to be adversely limited by the lobbyist's, the lobbyist's employer's, or an associated person's responsibilities to another client or the lobbyist's or lobbyist's employer's own interests, or an associated person's own business interests. The bill allows the lobbyist to represent a client under these circumstances only if (1) the lobbyist reasonably believes the representation of each client will not be materially affected; (2) the lobbyist provides notice to each affected client within 2 days of becoming aware of the conflict; and (3) the lobbyist provides notice to the commission within 10 days of becoming aware of the conflict, stating the name and address of each affected client and that the lobbyist has notified the clients.

The bill requires lobbyists to sign each report to the commission under oath affirming that the lobbyist has complied with the conflict of interests provisions, to the best of the lobbyist's knowledge. The bill allows the commission to assess a civil penalty in an amount not to exceed \$2000 for a violation of the lobbyist

conflict of interests provision, in addition to any other enforcement, civil, or criminal action the commission or another person may take against the lobbyist for the same conduct, and repeals the provision of the Government Code that makes a knowing violation of the conflict of interests provision a Class B misdemeanor.

C.S.H.B. 1606 defines quasi-governmental agency as an agency, other than an institution of higher education, that has as one of its primary purposes engaging in an activity normally engaged in by a non-governmental agencies, including acting as a trade association and competing in the public utility business with private entities. The bill makes quasi-governmental agencies subject to lobbyist registration requirements.

#### ARTICLE 5. PERSONAL FINANCIAL DISCLOSURE BY AND STANDARDS OF CONDUCT FOR STATE OFFICERS AND EMPLOYEES

C.S.H.B. 1606 amends the financial reporting requirements contained in Chapter 572 of the Government Code, and the civil penalty provisions for late filing. These changes include requiring the identification in financial statement of real estate held by the address of the real estate, if available, and the identification and reporting of mutual funds held or acquired. In connection with financial disclosure requirements, the bill changes outdated references to business organizations in current law to include forms of business organizations now commonly used (i.e., limited partnership, limited liability partnership, professional corporation, professional association, and joint ventures), and harmonizes the reporting requirements so that each reporting requirement applies equally to each form of business organization.

C.S.H.B. 1606 allows the use of blind trusts only if specific criteria are satisfied, including that the trustee is a disinterested party and has complete discretion to manage the trust. The bill requires the identification of blind trusts in financial disclosures, as well as a statement signed by the trustee under penalty of perjury that the trustee has not impermissibly disclosed information to the individual and that the trust complies with the requirements for a blind trust, to the best of the trustee's knowledge.

The bill also clarifies that the civil penalty for a late-filed statement is \$500. The bill does not change current law that provides for a warning letter from the commission if any report is more than 30 days late, and a civil penalty of not more than \$10,000 if the penalty is not paid within 10 days of receipt of the warning letter.

C.S.H.B. 1606 also amends the Government Code to make a requirement of the directive standards of conduct already applicable to state officers and employees and provides that a member of the legislature who violates the standards is subject to discipline under Section 11, Article III of the Texas Constitution and any other state officer or employee is subject to removal from office or termination of employment, in addition to any criminal penalties that may follow from the offending conduct. The bill prohibits a state officer or employee from intentionally or knowingly soliciting, accepting, or agreeing to accept any economic benefit, other than those permitted under Section 36.10, Penal Code, compensation, or contract from a governmental or other entity that the officer or employee knows or should know would not have been offered or paid to or made with the officer or employee but for the officer's or employee's position as a state officer or employee.

C.S.H.B. 1606 amends the current prohibition against a member of the legislature representing another person for compensation before a state agency in the executive branch of government by (1) eliminating the existing exceptions to the prohibition and adding instead a new exception allowing for the continued representation of another person for compensation in an administrative proceeding that arises out of the same facts from which a criminal proceeding in which the member represented the person arose; and (2) extending the prohibition to include agencies in the judicial branch of government, other than a court, if that agency receives state funds and conducts adjudicative proceedings that are not open to the public. The bill would make the new law applicable to representation before a state agency in regard to a matter that, as to which, the member is hired on or after September 1, 2003.

C.S.H.B. 1606 also amends the Government Code to clarify when a member of the legislature is restricted from voting or taking other actions on certain bills or measures. Under the bill, a member may not introduce, sponsor, or vote on a measure or a bill, other than a measure that will affect an entire class of business entities, if: (1) it is reasonably foreseeable that the measure or bill will have an economic effect distinguishable from its effect on the public on a business entity or real property in which the member has a substantial interest; or (2) a person related to the member in the second degree by consanguinity or affinity, or a business entity that employs the member or a person related to the member in the second degree by consanguinity or affinity, is registered as a lobbyist under Chapter 305, with respect to the subject matter of the measure or bill.

If it is reasonably foreseeable that the measure or bill will have the same affect on a business entity or real property in which a member has a substantial interest as it will have on an entire class of business entities or real property, or if the measure or bill will have an affect on a contract the member has with a governmental entity, the bill requires the member to make a disclosure, prior to voting, sponsoring, or authoring a bill or measure. The required disclosure must identify the member, the measure or bill, and whether the disclosure is required in connection with the recusal provision or the disclosure-only provision, and be filed both with the House to which the member belongs and with the Texas Ethics Commission. The bill also requires a person related to the member in the second degree by consanguinity or affinity, or a business entity that employs the member or a person related to the officer in the second degree by consanguinity or affinity, who is registered as a lobbyist under Chapter 305 regarding a particular bill or measure to file a disclosure with the commission. The bill allows a member required to file a disclosure because of a contract with a governmental entity to satisfy the provision by filing either a disclosure for each bill or measure for which disclosure would be required, or to file a list at the beginning of each legislative session identifying each contract the member has with a governmental entity and, during the legislative session, amend the list if it changes.

C.S.H.B. 1606 bans legislative continuances.

#### ARTICLE 6. FINANCIAL DISCLOSURE BY MUNICIPAL OFFICERS

C.S.H.B. 1606 requires municipal officers (mayors, members of governing bodies, municipal attorneys, and city managers) in municipalities with a population of 200,000 or more to file financial statements with the clerk or secretary of the municipality, and establishes filing deadlines and procedures. The bill provides that the financial statements are public records and provides procedures for maintenance and retention of the statements.

C.S.H.B. 1606 requires the clerk or secretary of each municipality and county subject to the filing requirement to maintain a checklist of the names of the persons required to file financial statements and, not later than the 10th day after each applicable filing deadline, to provide to the municipal attorney that list, showing whether each person named timely filed a statement as required, timely requested and was granted an extension of time in which to file, or failed to timely file or seek and receive an extension of time.

The bill also provides civil liability in an amount not to exceed \$1,000 for any person who fails to file the required statement within 30 days of receiving notice of a failure to timely file a required statement, and provides that a penalty paid under this provision shall be deposited to the credit of the general fund of the municipality. The bill also provides that it is a Class B misdemeanor for a candidate for municipal office filled by election to knowingly fail to file the required financial statement.

#### **EFFECTIVE DATE**

Section 254.002, Election Code, as added by this Act, applies beginning January 1, 2004.

Sections 572.022 and 572.023, Government Code, as amended by this Act, apply only to a financial statement required to be filed under Subchapter B, Chapter 572, Government Code, on or after January 1, 2004. A financial statement required to be filed under Subchapter B, Chapter 572, Government Code,

before January 1, 2004, is governed by the law in effect at the time the financial statement was required to be filed, and the former law is continued in effect for that purpose.

Chapter 145, Local Government Code, as added by this Act, applies beginning January 1, 2004.

This Act takes effect September 1, 2003.

## COMPARISON OF ORIGINAL TO SUBSTITUTE

### ARTICLE 1. FUNCTIONS AND DUTIES OF TEXAS ETHICS COMMISSION

C.S.H.B. 1606 restores the requirement deleted by the bill, as introduced, that software developed by the commission be capable of being used by a person with basic computing skills.

The substitute changes the requirements for some commission votes and makes all commission votes record votes.

The substitute adds a requirement and procedures for the commission to perform facial audits of randomly selected reports and statements.

The substitute adds particularity to the contents of the commission's bi-annual report to the governor and legislature.

C.S.H.B. 1606 adds provisions relating to the recommendations of the Sunset Advisory Commission, including across the board recommendations.

The substitute includes provisions creating a two-tier enforcement process for the commission.

The substitute requires the commission to make its complaint form available on the internet.

The substitute establishes specific deadlines for the commission enforcement process.

The substitute shifts from the commission to the commission staff the duty to promptly conduct a preliminary review and shifts from the commission to the executive director the duty to determine whether the commission has jurisdiction over the violation alleged in a sworn complaint. The substitute also includes a process for a complainant to challenge the executive director's determination that the commission does not have jurisdiction over a complaint.

The substitute specifies the contents of the notice letter sent to complainants and respondents.

The substitute allows the commission staff to submit written questions during the preliminary review.

The substitute requires the commission to adopt procedures for the conduct of preliminary reviews and preliminary review hearings.

The substitute shifts the commission's power to submit written questions and to require the questions to be answered under oath from during the preliminary review hearing to a time at or after the time the commission provides notice of a preliminary review hearing.

The substitute modifies the grant to the commission of subpoena power in the preliminary review stage by including the power to subpoena witnesses, in addition to documents, and imposing a detailed criteria for the issuance of a subpoena for either documents or witnesses and provides that the witness is entitled to the reasonable cost of producing subpoenaed documents.

The substitute includes provisions amending current law governing the disclosure by commission employees of otherwise confidential information in the course of an investigation.

The substitute requires the commission to post orders or summaries of order on the internet in which the commission has determined that a person committed a violation.

The substitute allows the executive director, under certain circumstances, to refer a matter to a prosecuting attorney and to disclose otherwise confidential information in connection with the referral.



## ARTICLE 2. CAMPAIGN FINANCE AND POLITICAL ADVERTISING

The substitute deletes the language included in the original that expanded the definition of political advertising to include electronic mail.

The substitute adds a provision allowing the commission to terminate a campaign treasurer appointment.

The substitute changes from 30 to 20 the number of days after adjournment of the legislative session that certain political contributions are restricted.

The substitute provides that the amount of a political expenditure is readily determinable on the date the person receives the credit card that includes the expenditure.

The substitute allows a candidate, officeholder, or committee to avoid electronic filing if filer submits an affidavit that it does not use a computer to keep records *and* that it does not accept or spend more than \$50,000 in a year, and adds to the repeal contained in the original version of the bill the exemption from the electronic filing requirement for district attorneys.

The substitute deletes the word “political” from the description of expenditures by corporations or labor unions to establish or administer political committees, or to finance the solicitation of political contributions to the committee, that must be identified and reported.

The substitute limits the campaign finance reporting requirements imposed on county chairs by the original version of the bill to candidates for election to the office of county chair in counties with more than 400,000 people.

## ARTICLE 3. SPEAKER’S RACE

The Speaker’s race section contained in the substitute was not in the bill as originally filed.

## ARTICLE 4. LOBBYING

The substitute adds the provisions regarding lobbyist conflict of interests and the regulation as lobbyists of certain quasi-governmental agencies.

The substitute expressly provides that the revenue generated by a fee assessed by the commission against lobbyist registrants may be used only to develop and implement the electronic filing system.

## ARTICLE 5. PERSONAL FINANCIAL DISCLOSURE BY AND STANDARDS OF CONDUCT FOR STATE OFFICERS AND EMPLOYEES

The substitute adds the requirement that disclosures regarding real estate identify the real estate by address, if available.

The substitute increases the scope of the reporting requirements to reach investments held through a greater variety of business associations.

The substitute defines a permissible blind trust and specifies the reporting requirements applicable to a blind trust.

The substitute amends the standards of conduct applicable to a state officer or employee.

The substitute deletes the prohibition in the original bill against representing another person for compensation before a political subdivision, creates an exception to the prohibition for representation of certain persons the member represented in a criminal proceeding, and adds to the prohibition certain

agencies in the judicial branch of government.

The substitute includes an amendment to the current prohibition against members voting on certain matters and establishes a two-tier test providing for the member's recusal in limited circumstances and for disclosure of the member's interest in other matters, prior to the member's continued participation in the matter.

The substitute deletes the provisions in the original bill prohibiting state officers from contracting with a governmental entity.

The substitute deletes the provision in the original bill prohibiting the employment of a state officer by a business entity engaged in lobbying.

#### ARTICLE 6. FINANCIAL DISCLOSURE BY MUNICIPAL OFFICERS

The substitute limits the applicability of the bill to municipalities with a population of more than 200,000.

The substitute adds the requirement that the clerk or secretary of each affected municipality and the clerk of each affected county maintain a checklist of candidates required to file a financial statement and shall provide the checklist to the prosecuting attorney.

The substitute restores Section 159.001, Local Government Code, repealed by H.B. 1606, to limit the financial reporting requirements to counties with a population of 100,000 or more.