

SESSION OF 2023

**SUPPLEMENTAL NOTE ON SUBSTITUTE FOR HOUSE
BILL NO. 2391**

As Recommended by House Committee on
Elections

Brief*

Sub. for HB 2391 would amend provisions in the Campaign Finance Act on topics including procedures of the Kansas Governmental Ethics Commission (Commission).

***Governmental Ethics Commission (New Section 1 and
Section 2)***

The bill would state the provisions of the Kansas Administrative Procedure Act (KAPA), the Kansas Code of Civil Procedure, and the Kansas Judicial Review Act (KJRA) would apply to actions by the Commission or Commission staff. This would include, but not be limited to, investigative and enforcement actions of the Commission and applications to the Commission. The bill would apply provisions of the Kansas Public Speech Protection Act to all actions filed by the Commission in district court pursuant to this act.

The bill would establish the statute of limitations for bringing any action before the Commission at five years after the first act giving rise to the cause of action or complaint.

The bill would require the Commission to provide through rules and regulations the standards by which any member of the Commission, the Executive Director, or other person employed or engaged by the Commission must recuse themselves from any matter before the Commission

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

for a reason affecting the ability of the Commission to neutrally and fairly enforce the Campaign Finance Act (Act).

Continuing law prohibits a member of the Commission from being a candidate for or holder of any partisan political office. The bill would also, for the purposes of the qualifications of Commission members, add a definition of "partisan political office" to mean any office for which any candidate is nominated or elected as representing a party whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected. The definition would exclude any office or position within a political party including, but not limited to, precinct, congressional district, or state party committee member.

Commission Hearings, Procedures, and Findings

Respondent Rights (New Section 1)

The bill would state no action by the Commission shall require a respondent to waive any civil or legal rights to judicial recourse in any manner, and no person shall be held responsible for any action on behalf of another individual or entity subject to the provisions of this act, unless that person is an agent as defined in the bill.

Hearing Procedures (Sections 13, 14, 18, and 19)

The bill would require all hearings conducted under the Act to be conducted in accordance with the provisions of KAPA and the Kansas Code of Civil Procedure. The bill would authorize the respondent to request any hearing and pre-hearing procedure under this act be removed for hearing before a presiding officer from the Office of Administrative Hearings and conducted as prescribed by KAPA. The bill would prohibit the Commission from conducting another hearing on the matter and would require the Commission to make its final determination based on the record.

The bill would also clarify any appeal to district court by a person aggrieved by an order of the Commission would be a trial *de novo*, and the bill would require the trial *de novo* to be an evidentiary hearing at which issues of law and fact are determined anew.

Commission Procedures (Sections 12, 13, and 15)

The bill would remove the Commission's authority to issue subpoenas and require the Commission to apply to the Shawnee County District Court for an order to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any documents or records that the Commission deems relevant or material to the investigation. The bill would require all applications for a court order to be made under the seal of the court. The bill would require a 2/3, rather than 3/4, majority vote to issue such an application and would remove the requirement that the commissioners must be physically present in order to vote. The bill would require any subpoena or other process issued by the Commission pursuant to the section on subpoenas to be served upon any person unless an application has been filed in the district court of Shawnee County.

The bill would state the court may issue the order after review of the sufficiency of the written findings of fact and conclusions of law provided by the Commission, the Commission record, and the reasonableness and scope of the subpoena. The bill would require any subpoena or subpoena *duces tecum* issued by the presiding officer to be subject to the provisions of KAPA, the Kansas Code of Civil Procedure Act, and all other laws applicable to issuance and quashing of subpoenas. The bill would allow a person responding to a subpoena to apply to a court for relief from a subpoena.

The bill would require every subpoena so issued to include notices regarding the rights of the person to whom the

subpoena was issued. The bill would require any person ordered to testify or produce documents to be informed that the person has a right to be advised by counsel and may not be required to make any self-incriminating statement. The bill would direct the judge to appoint counsel if the person is indigent and requests counsel. The bill would authorize counsel to be present while the witness is testifying and interpose objections on behalf of the witness, but would not authorize counsel to examine or cross-examine any witness.

The bill also would require the Commission to take reasonable steps to avoid imposing undue burden or expense on a person subject to subpoena and require the court to enforce this duty against the Commission and impose an appropriate sanction.

The bill would also prohibit any attorney or staff member representing the complainant before the Commission from engaging in *ex parte* communication with the Commission, as well as advising, representing, or assisting the Commission regarding the same or related matter before the Commission. The bill would require the Commission to obtain separate independent legal counsel when needed to comply with these requirements.

The bill would authorize the Commission to enter into a contract with the Office of Administrative Hearings and provide reimbursement for actual and necessary expenses and compensation for such person serving as a presiding officer, and would add duties of confidentiality for hearings to members of the Commission, the Executive Director, or any person employed or engaged by the Commission.

The bill would amend various provisions to reflect changes to the subpoena process and the application of KAPA, the Kansas Code of Civil Procedure Act, and all other general laws applicable to the issuance and quashing of subpoenas.

The bill would apply duties of confidentiality of complaints and allegations therein only to members of the Commission, Executive Director, or any person employed or engaged by the Commission. The confidentiality statute on records, complaints, documents, reports filed with or submitted to the Commission, and all transcripts of any investigation, inquiries, or hearings of the Commission would apply only to members of the Commission, the Executive Director, or any person employed or engaged by the Commission.

Penalties and Fines (Sections 7 and 17)

The bill would cap the fine the Commission could impose to not exceed an amount double the applicable fine for a single violation of the matter. The bill would state its provisions would not prevent a court from imposing a separate fine in a criminal proceeding. Further, the bill would direct fines assessed to the State General Fund instead of the Governmental Ethics Commission Fund.

The bill would also prohibit the Commission from:

- Ordering community service or any other specified performance in lieu of a civil fine as part of a consent decree or final order; and
- Entering into any agreement with any person that legally binds the Commission from enforcing any law against that person in exchange for the person's cooperation with or assistance of the Commission in any matter unless that person has received immunity from criminal prosecution in the matter from a county or district attorney or the Attorney General.

The bill would state these provisions would not prohibit the Commission from requiring training regarding or compliance with any provision of the Act as part of a consent decree or final order.

Campaign Finance

Definitions (Sections 3, 6, 10, 11, and 16)

The bill would add multiple definitions to the Act:

- “Agent” would mean an individual who is a candidate; a chairperson of a candidate, political, or party committee; a treasurer; or any director, officer, employee, paid consultant, or other person authorized in writing to act on behalf of a person previously listed;
- “Coordination” or “coordinated” would be defined in terms of an express advocacy communication. A communication that is coordinated would be one that is paid for, in whole or in part, by a person other than the candidate or party committee, and meets a Federal Election Commission definition of “coordination communication”; it would exclude any action where reasonable efforts are taken to prohibit information passing from a candidate or candidate’s agent to a political committee;
- “Primary purpose” would mean the entity in question meets at least one of the following standards:
 - The entity publicly states in its articles of incorporation, bylaws, or resolutions by the board of directors that its primary purpose is to expressly advocate the nomination, election, or defeat of a clearly identified candidate for state or local office or to make contributions to or expenditures for the same purpose; or
 - The entity spends at least 50 percent of the entity’s total spending on contributions or expenditures reportable under this act during a two-year general or local election cycle;

- “Contribution in the name of another” would mean a contribution given to another individual or entity for the purpose of concealing the original source of any funds reported under this act. The bill would provide a section regarding knowingly making or accepting a contribution in the name of another would not apply to contributions, expenditures, or transfers subject to the Act made by an individual or committee otherwise reporting the contribution, expenditure, or transfer on a report or statement filed under the Act;
- “Restricted to uses for a specific purpose” would mean only a legally enforceable limitation on the manner in which a contribution may be used, and would not include suggestions, advice, requests, or other non-binding statements.

The bill would amend two definitions:

- “Independent expenditure” would mean an expenditure made without the coordination, rather than the cooperation or consent, of the candidate or agent of the candidate; and
 - “Total spending” to amend the term to “total program spending,” exclude volunteer expenses as well as volunteer time, and specify that the term includes all disbursements other than those for fundraising and administrative expenses but includes costs of fundraising communications that expressly advocate the nomination, election, or defeat of a candidate for state or local office. To determine total program spending regarding grants:
 - The bill would require a grant made to a political committee or an organization organized under section 527 of the Internal Revenue Code to be counted in total program

- spending, unless expressly designated for use outside of Kansas or federal elections;
- If the entity making a grant takes reasonable steps to ensure the transferee does not use the funds to make a contribution or expenditure in Kansas, the bill would require the grant to be counted in total program spending but not as a contribution or expenditure; and
 - If the entity making a grant expressly earmarks a portion of the grant for a contribution or expenditure in Kansas, the grant would be counted in total spending, and the earmarked portion would count as a contribution or expenditure.

The bill would also amend the definition of “excessive campaign contribution” to clarify nothing in the definition would prohibit a contribution, expenditure, or transfer of money between party or political committees and candidates and candidate committees made in compliance with the statute regarding campaign contributions given in the name of another and the statute regarding permitted campaign fund use.

Filing Fees and Requirements (Sections 4 and 5)

The bill would create a new category of registration by a political committee and change the thresholds for annual registration fees for political committees. A political committee anticipating receiving within a calendar year:

- More than \$10,000, a new category, would be required to pay a \$500 registration fee;
- At least \$2,501 and less than \$10,001 would be required to pay a \$300 registration fee;

- At least \$500 and less than \$2,501 would be required to pay a \$100 registration fee; and
- Less than \$500 would be required to pay a \$50 registration fee.

The bill would make technical amendments to continue requiring a political committee that receives more contributions than anticipated to pay the difference between the fee owed and the amount of the fee accompanied by current registration. Continuing law states this does not apply to political committees registered in the \$2,501 to \$10,001 range of anticipated contributions.

Campaign Solicitation (Sections 8 and 9)

The bill would state no solicitation from January 1 through *Sine Die* is a violation if it is a general public solicitation and accompanied with a disclaimer that it is not intended for lobbyists, political committees, or persons other than individuals.

The bill would prohibit any member of or candidate for the Legislature from serving as the treasurer or chairperson of a political committee.

Campaign Expenditures and Contributions (Section 11)

The bill would expand allowable personal use of moneys received by any candidate or candidate committee to include:

- Expenses, compensation, or gifts provided to any volunteer, staff member, or contractor of the candidate's campaign or provided to any volunteer or staff of the candidate's political office, provided that the total amount provided from all sources does not exceed the total fair market value of services provided;

- Payment of any civil penalty imposed by the Commission pursuant to the Act; and
- Payment of legal fees related to any matter under the Act.

The bill would state nothing from the section regarding personal use of campaign funds would prohibit a candidate or candidate campaign from contributing moneys to a party committee, and the party committee would not be prohibited from accepting said contributions, provided it is not restricted for a specific purpose.

The bill would also make technical amendments to update language referring to the Kansas Commission on Governmental Standards and Conduct and to make conforming amendments to provisions of the bill.

Effective Date

The bill would be in effect upon publication in the *Kansas Register*.

Background

The bill was introduced by the House Committee on Elections at the request of Representative Waggoner.

House Committee on Elections

In the House Committee hearing, representatives of Kreigshauser Ney Law Group and the Institute for Free Speech and private citizens provided **proponent** testimony. The proponents generally stated the Commission currently controls all parts of the process of handling a complaint and violation through determining the penalty, and the bill would place appropriate checks on the Commission's authority.

Written-only proponent testimony was submitted by a representative of Fleeson Gooing, Attorneys at Law.

The Executive Director of the Commission provided **opponent** testimony. The opponent testimony raised numerous concerns, including that the bill would undermine ongoing investigations, make extensive changes to political committee registration, allow candidates to give to political committees, change requirements for membership on the Commission and of staff; remove Commission authority regarding hearings and other requirements, and otherwise weaken the Campaign Finance Act and the Commission's ability to enforce it.

Written-only opponent testimony was provided by the Chairperson and Vice-chairperson of the Commission and private citizens.

Written-only neutral testimony was provided by the Attorney General, which expressed support for amendments to the definition of "political committee."

The House Committee amended the bill to establish the statute of limitations for bringing any action before the Commission as five, rather than two, years; define "coordination" or "coordinated"; specify how a political committee establishes its primary purpose; add revisions to a statute regarding reporting of certain contributions; add a limitation of fair market value of services provided on gifts to a campaign worker; revise requirements related to a consent decree or final order; require a trial *de novo* on appeal to a district court include an evidentiary hearing at which issues of law and fact are determined; and make technical changes.

On February 22, 2023, the bill, as amended by the House Committee, was withdrawn from the House Calendar and referred to the House Committee on Appropriations. On March 1, 2023, the bill was withdrawn from the House Committee on Appropriations and rereferred to the House Committee on Elections.

On March 14, 2023, the House Committee amended the bill to replace the contents of the bill, as introduced, with the above-described contents and recommended a substitute bill.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the Commission estimates additional expenditures of \$200,659 from the State General Fund (SGF) and an additional 3.0 FTE positions in both FY 2024 and FY 2025 would be required to implement the bill's provisions. Of that amount, \$170,976 would be for salaries and wages for the FTE positions and \$29,683 would be for other operating expenditures. The Commission also estimates a loss of revenue to the Governmental Ethics Commission Fee Fund of \$80,671 in FY 2024 and \$75,971 in FY 2025 from the reduction of fees and changes to the disposition of fines and penalties.

The Office of Judicial Administration states any fiscal effect of the enactment of the bill cannot be estimated until the Judicial Branch has had an opportunity to operate under the bill's provisions.

The Office of the Attorney General estimates additional expenditures of \$91,914 SGF, along with an additional 0.25 attorney FTE position and a 0.50 investigator FTE position in FY 2024 if the bill is enacted. Of that amount, \$72,407 would be for salaries and wages and \$19,507 would be for other operating expenditures. The agency states the bill's provisions regarding investigations would increase the workload for the Office of the Attorney General.

The Office of Administrative Hearings estimates any additional workload resulting from the enactment of the bill would be absorbed within existing resources.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2024 Governor's Budget Report*.

Kansas Governmental Ethics Commission; Campaign Finance Act; subpoena; campaign expenditures; candidate committees; political committees; express advocacy; campaign contributions; Kansas Administrative Procedures Act; Kansas Code of Civil Procedures