

SESSION OF 2023

**SUPPLEMENTAL NOTE ON HOUSE SUBSTITUTE FOR
SENATE BILL NO. 208**

As Recommended by House Committee on
Elections

Brief*

House Sub. for SB 208 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)

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 deadline 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 to recuse themselves from any matter before the Commission for a

*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>

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

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.

Hearing Procedures (Sections 7, 8, and 11)

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.

Commission Procedures (Sections 6, 7, and 9)

The bill would authorize 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 a subpoena or subpoena *duces tecum* and would remove the requirement that the commissioners must be physically present in order to vote. The bill would require that no subpoena or other process issued by the Commission

pursuant to this section shall be served upon any person unless an application has been filed in the district court of Shawnee County pursuant to this section and would require the Commission to provide a copy of written findings of fact and conclusions of law to the persons under investigation (this section pertains to investigation by the Commission, KSA 25-4158 amendments).

The bill would state the court shall issue the order requiring appearance 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 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 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 (Section 10)

The bill would cap the fine the Commission could impose to not exceed an amount triple the applicable fine for a single violation of the matter. If the respondent derived pecuniary gain from the specific violations, the bill would authorize a larger fine but not to exceed double the pecuniary gain derived from the violation. 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 civil fines assessed by the Commission 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 (Section 2)

The bill would define "agent" to 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.

Filing Fees and Requirements (Section 3)

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 \$15,001, a new category, would be required to pay a \$750 registration fee;

- At least \$7,500 and less than \$15,001 would be required to pay a \$500 registration fee;
- At least \$2,500 and less than \$7,501 would be required to pay a \$250 registration fee; and
- Less than \$2,500 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, up to \$7,501, to pay the difference between the fee owed and the amount of the fee accompanied by current registration.

Campaign Solicitation (Section 4)

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.

Campaign Expenditures and Contributions (Section 5)

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 related to the candidate's campaign and that is incurred by the

candidate, candidate committee, treasurer, or other agent of the candidate; and

- Payment of legal fees related to any matter under the Act.

Effective Date

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

Background

The House Committee on Elections recommended a substitute bill incorporating provisions pertaining to the Campaign Finance Act from HB 2391, as amended by the House Committee on Elections.

SB 208, as recommended by the Senate Committee of the Whole, would have created law prohibiting the use of ballot boxes for the return of advanced voting ballots, defining “remote ballot box,” and requiring the Secretary of State to adopt rules and regulations to implement and enforce the provisions in the bill. These provisions were not retained in the substitute bill.

HB 2391 – Campaign Finance Act Reform

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 Goong, 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 deadline for bringing any action before the Commission at 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 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 HB 2391, 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 HB 2391 is not reflected in *The FY 2024 Governor's Budget Report*.

No fiscal note for House Sub. for SB 208 was available when the House Committee took action on the bill.

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