



TEXAS ETHICS COMMISSION



****Overruled, Modified, Clarified, or Superseded****

ETHICS ADVISORY OPINION NO. 28

June 4, 1992

Financial disclosure statements: who must file, what information must be included, and related questions. (AOR-41)

The Texas Ethics Commission has been asked a number of questions about the financial disclosure statement required by article 6252-9b, V.T.C.S.

Question No. 1 - State Officers

The first question is whether members of the State Committee of Examiners for Speech-Language Pathology and Audiology, the Texas State Board of Examiners of Professional Counselors, the Texas State Board of Examiners of Dietitians, the Advisory Board of Athletic Trainers, and the Texas Medical Disclosure Panel are required to file 1992 financial statements for financial activities that occurred in 1991. The initial issue is whether the officers of these bodies are "state officers" who must file financial disclosure reports.¹ Included in the definition of "state officer" are appointed, nonsalaried officers. V.T.C.S. art. 6252-9b, § 2(1).² To fit within this definition, the officers of these bodies must hold their positions in a "state agency." If these entities are not state agencies for purposes of article 6252-9b, then their officers are not "state officers" required to file financial disclosure reports.

Section 2(8) of article 6252-9b defines state agency. If an entity does not wield some type of actual "authority," it does not fall within the article 6252-9b, section 2(8)(A), definition of a state agency. See [Ethics Advisory Opinion No. 26](#) (1992) (discussing the difference between "advisory" bodies and state agencies). Advisory bodies with no actual "authority" are not state agencies for purposes of article 6252-9b. The State Committee of Examiners for Speech-Language Pathology and Audiology, the Texas State Board of Examiners of Professional Counselors, the Texas State Board of Examiners of Dietitians, the Advisory Board of Athletic Trainers, and the Texas Medical Disclosure Panel all have actual authority and are state agencies for purposes of article 6252-9b.³ The members of these boards are "state officers" for purposes of the article 6252-9b financial disclosure requirement. See [Ethics Advisory Opinion No. 1](#) (1992).

Question No. 2 - Financial Activities of Previous Year

The Ethics Commission has also been asked to consider whether officers of nonmajor state agencies must file a statement that contains information about 1991 financial activities. Section 3(a) of article 6252-9b, V.T.C.S., requires "state officers" to file annual statements disclosing certain financial information. The commission has issued an advisory opinion explaining that because of changes in article 6252-9b that became effective on January 1, 1992, the requirement to file a financial disclosure statement now applies to officers of all state agencies, not just officers of major state agencies as was previously required. See [Ethics Advisory Opinion No. 1](#) at 1-2.

The requirement that certain state officers and employees file financial disclosure statements regarding the previous year's financial activity has existed in article 6252-9b since 1973 when the act was first adopted. Acts

1973, 63d Leg., ch. 421, § 3, at 1089. In 1973 the attorney general determined that the requirement to file a financial statement for the year before the effective date of the filing requirement is not unconstitutional. Attorney General Opinion H-190 (1973). The requestor suggests, however, that there is statutory language indicating that officers of nonmajor state agencies, who were not subject to the article 6252-9b filing requirements before 1992, are not required to file financial disclosure statements containing information now required by section 4 of article 6252-9b. The requestor bases this suggestion on the language in Senate Bill 1 that provided for the effective date of amendments to article 6252-9b.⁴ S.B. 1, Acts 1991, 72d Leg., ch. 304, at 1290. The effective date provision states, in part, as follows:

(a) Except as provided by Subsection (d) of this section, this Act takes effect January 1, 1992, and applies only to a gift, contribution, expenditure, honorarium, compensation, reimbursement, benefit, or other thing of value offered, made, received, or accepted on or after that date.

(b) A gift, contribution, expenditure, honorarium, compensation, reimbursement, benefit, or other thing of value offered, made, received, or accepted before the effective date of this Act is governed by the law in effect on the date that it was offered, made, received, or accepted, and that law is continued in effect for that purpose.

Id. § 8.01 at 1337.

The requestor's argument is that the changes to article 6252-9b made by Senate Bill 1 do not apply to things of value received in 1991 and, thus, that the new information required to be reported by article 6252-9b need not be reported in regard to things of value received in 1991. We do not adopt the requestor's argument, and we note that even if we adopted this argument it would not serve to relieve any state officer of the filing requirement. State officers would still have to file, but the financial statements would not include the information newly required by Senate Bill 1.⁵ Also, if we were to adopt the requestor's position, the reporting requirements set out in Senate Bill 1 would be inapplicable to anyone required to file a financial disclosure statement in 1992, not just officers of nonmajor state agencies. *See* V.T.C.S. art. 6252-9b, § 1 (statement of the public policy behind the financial disclosure provisions). In any case, we think that the language of that provision makes clear that the consequences of an offer, making of an offer, receipt, or acceptance of things of value are governed by the law in effect at the time of such offer or acceptance. It does not mean the disclosure of such financial activity is not required.

Question No. 3 - Requirement to File Statement

The Ethics Commission has been asked to consider the point at which the article 6252-9b, section 3(a), requirement to file a financial disclosure statement arises. Article 6252-9b contains no express language as to the exact time at which the requirement arises. Section 3(a) of article 6252-9b provides:

On or before April 30th of each year, every state officer and every party chairman shall file with the commission a financial statement complying with the requirements of Section 4 of this Act.⁶

It has been suggested that this requirement applies only to persons who hold an office on April 30 of a particular year. We disagree.

The financial disclosure statement is to be filed "on or before" April 30. The Ethics Commission is generally required to send notices to "each individual required to file" at least 30 days before that filing deadline. V.T.C.S. art. 6252-9b, § 3(a), (e). These statutory provisions suggest that for the annual filing, any service as a state officer during the period between and including January 1 to April 30 of the year in which the statement has to be filed gives rise to the filing requirement. Therefore, for 1992, a person who served as a state officer for any period between and including January 1, 1992, to April 30, 1992, would be subject to the financial disclosure requirement. This was the interpretation of the Secretary of State's Office when that office handled the annual financial disclosure statements, and we adopt that interpretation.⁷

The requestor also asks about the article 6252-9b disclosure requirement in the case of a state officer who has resigned but who holds over in office. The "holdover" provision, which is set out in article XVI, section 17, of the Texas Constitution provides:

All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.

Under this article, an officer cannot divest himself of an office until his successor qualifies.⁸ *Plains Common Consol. School Dist. No. 1 v. Hayhurst*, 122 S.W.2d 322 (Tex. Civ. App.--Amarillo 1938, no writ); Attorney General Opinions DM-2 (1991); JM-636 (1987). The article 6252-9b requirement to file a financial statement applies to any state officer, which includes an officer holding over under article XVI, section 17, of the constitution.

Question No. 4 - Commission Authority to Adopt Form

The requestor has also asked about the commission's authority to adopt a financial disclosure form. Section 4(e) of article 6252-9b states:

The [commission] shall design forms on which financial statements may be made, covering only the items required to be reported by this section, and shall furnish them to all persons required by this Act to file financial statements.

The financial disclosure form adopted by the commission asks for information called for by several different provisions of the Penal Code, but not specifically called for in article 6252-9b.⁹ The relevant provisions of the Penal Code refer to information about financial activities to be reported on a financial statement filed under article 6252-9b. Certain financial transactions that are otherwise prohibited under the Penal Code are not prohibited if reported by a state officer on a financial disclosure form. Thus the Penal Code requires reporting of such activity on a statement filed under article 6252-9b. Penal Code § 36.10(a)(3); *see also* Penal Code § 36.10(3), (5) (Vernon 1989) (provisions in effect in 1991). Consequently, the commission has a duty to include space for such information.

The commission's duty to include space for information required by the Penal Code appears to be in conflict with the requirement set out in section 4(e) of article 6252-9b, i.e. that forms adopted by the commission should cover only the items required to be reported in section 4. However, the import of section 4(e) is to make clear that the commission has no discretion to require financial information other than that required by the legislature. Because the legislature required the Penal Code information to be disclosed, the commission's adoption of forms that cover the required information is not inconsistent with section 4(e) of article 6252-9b.

Question No. 5 - Financial Activity of Spouse and Dependents

Another question raised is whether a filer must include the financial activity of his spouse and dependent children in regard to certain categories of financial information. *See generally* Attorney General Opinion H-269 (1974) (registrant must report on financial activities of spouse and children where he has authority to exercise control over such activities). Section 4(a) of article 6252-9b states:

The financial statement required herein shall include the account of the financial activity of the person required to file the statement by this Act and the financial activity of his spouse and dependent children over which he had actual control for the preceding calendar year as hereinafter provided.

In most of the categories of financial information outlined in article 6252-9b, the annual statement asks for information about the financial activity of a filer's spouse and dependent children if the filer has actual control over such activity.

Sections 4(c)(12) and 4(f), however, specifically ask for information about the "state officer." Thus, neither section requires that such information be provided about the financial activity of the filer's spouse and dependent children. The filer could, of course, choose to provide such information. There are no prohibitions in article 6252-9b against providing more financial information than specifically required.

Question No. 6 - Reporting of Employment Position

The requestor also asks about the 1992 disclosure form's question concerning the job position a filer holds with an employer. The statute calls for a list of all sources of occupational income, and the identity of the employer. V.T.C.S. art. 6252-9b, § 4(c)(1). However, section 4(e) of article 6252-9b states that the Texas Ethics Commission is to design financial disclosure forms that require only the information "to be reported by this section." The requestor questions why the filer is asked to list his position.

We think the limitation in section 4(e) of article 6252-9b goes to the type of financial information that is to be covered on a form. We do not interpret this provision to prevent the commission from asking for information that serves merely to clarify the nature and source of the occupational income. *See* V.T.C.S. art. 6252-9d.1, § 1.11(a) (2) (the Ethics Commission has authority to prescribe forms for reports required to be filed with the commission). Consequently, the commission has not exceeded its authority in providing space on the 1992 financial disclosure form for a description of the position held by the filer with an employer who is the source of the filer's occupational income.

Question No. 7 - Noncompliance with Statutory Code of Conduct

Another question is whether there are criminal or civil penalties for noncompliance with section 8 of article 6252-9b. This section provides:

- (a) No state officer or state employee should accept or solicit any gift, favor, or service that might reasonably tend to influence him in the discharge of his official duties or that he knows or should know is being offered him with the intent to influence his official conduct.
- (b) No state officer or state employee should accept employment or engage in any business or professional activity which he might reasonably expect would require or induce him to disclose confidential information acquired by reason of his official position.
- (c) No state officer or state employee should accept other employment or compensation which could reasonably be expected to impair his independence of judgment in the performance of his official duties.
- (d) No state officer or state employee should make personal investments which could reasonably be expected to create a substantial conflict between his private interest and the public interest.
- (e) No state officer or state employee should intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised his official powers or performed his official duties in favor of another.

Section 8 does not contain civil or criminal penalties for violation of these standards. *See* Attorney General Opinion JM-578 at 5 (1986).

Question No. 8 - Failure to Timely File Statement

The requestor's final question is about the civil penalty for failure to timely file a financial statement. The commission has the authority to impose a fine of up to \$100 per day upon individuals who do not timely file a financial statement. V.T.C.S. art. 6252-9b, § 12A(b). The commission can levy a fine of up to \$10,000. *Id.* The commission by rule has approved a \$100 fine for "failure to timely file" this annual statement.¹⁰ Tex. Ethics Comm'n, 17 Tex. Reg. 3329 (1992) (to be codified at title 1, section 7.1, of the Texas Administrative Code).¹¹

While a \$100 fine is the civil penalty if a statement is not timely filed, a failure to file a statement can carry criminal penalties. Section 10(a) of article 6252-9b states that a failure to file a financial statement, which is "knowingly and willfully" done, is a Class B misdemeanor.

SUMMARY

Members of the State Committee of Examiners for Speech-Language Pathology and Audiology, the Texas State Board of Examiners of Professional Counselors, the Texas State Board of Examiners of Dieticians, the Advisory Board of Athletic Trainers, and the Texas Medical Disclosure Panel are "state officers" who must file financial disclosure reports pursuant to article 6252-9b, V.T.C.S.

Financial disclosure statements that are filed in 1992 must include information about the previous year's financial activity, but no penalty attaches to any activity that was not prohibited under the law in effect at the time that activity occurred. Any service as a state officer during the period between and including January 1 to April 30 of the year in which the statement has to be filed triggers the filing requirement.

The Ethics Commission is authorized to adopt a financial disclosure form, which must include information required by the legislature. It is immaterial that the information required is set out in the Penal Code rather than article 6252-9b, V.T.C.S. Where the statute specifically requests information only about the "state officer," he is not required to provide similar information concerning his spouse or dependent children. A person filing a financial disclosure statement must include a description of his employment position on the form.

Article 6252-9b, V.T.C.S., does not contain civil or criminal penalties for violations of the code of conduct set out in section 8 of the act. Failure to timely file a financial disclosure statement is punishable by a fine of the commission. Failure to file a statement at all is a Class B misdemeanor.

¹ Section 3(a) of article 6252-9b, V.T.C.S., states:

On or before April 30th of each year, every *state officer* and every party chairman shall file with the commission a financial statement complying with the requirements of Section 4 of this Act. (Emphasis added.)

² The definition of "state officer" includes "appointed officer." Section 2(3) of article 6252-9b states that "appointed officer" means:

(A) The secretary of state;

(B) an individual appointed with the advice and consent of the senate to the governing board of any state-supported institution of higher education;

(C) an officer of a state agency who is appointed for a term of office specified by the constitution or a statute of this state, excluding a person appointed to fill a vacancy in an elective office; or

(D) a person who is not otherwise within the definition of elected officer, appointed officer, or executive head of a state agency, but who holds a position as a member of the governing board or commission of a state agency acquired through a method other than appointment.

All of the officers of the entities being discussed in this opinion are nonsalaried officers appointed to their positions by the governor with the advice and consent of the senate, are appointed for a term specified by statute, or hold their positions through a method other than appointment. These officers therefore hold their positions through one of the methods outlined in section 2(3) of article 6252-9b. *See* V.T.C.S. arts. 4512d, § 2; 4512g, § 4(b); 4512h, § 3(c); 4512j, § 3(a); 4509i, § 6.03(c).

³ *See* V.T.C.S. arts. 4512j, § 5 (powers and duties of the State Committee of Examiners for Speech-Language Pathology and Audiology include rulemaking, testing, and licensing powers and authority to conduct hearings); 4512g, § 6 (the Licensed Professional Counselor Act lists as part of the powers of the Texas State Board of Examiners of Professional Counselors licensing, rulemaking, and authority to conduct examinations and hearings); 4512h, § 6 (the Licensed Dietician Act includes among the powers of the Texas State Board of Examiners of Dieticians rulemaking and licensing authority, and power to reprimand licensees); 4512d, § 5 (the Advisory Board of Athletic Trainers has rulemaking and licensing power, and can hold proceedings to revoke or suspend licenses); 4590i, § 6 (the Medical Liability and Insurance Improvement Act authorizes the Texas Medical Disclosure Panel to determine the degree of disclosure required in

regard to medical procedures and the form in which the disclosure will be made; failure to make disclosures in accordance with the panel's determinations raises a rebuttable presumption of negligent failure to disclose).

⁴ Senate Bill 1 is the legislation that amended article 6252-9b as well as other "ethics" laws. The amendments expanded the class of people required to file annual financial statements to include officers of nonmajor state agencies. The amendments also expanded the types of financial information required to be reported.

⁵ Senate Bill 1 expanded the type of financial activity required to be reported by article 6252-9b. Certain categories of financial reporting were expanded to include extra information, and entirely new categories of financial disclosure were added. Part of the information now required includes disclosure of financial dealings with those who are required to be registered under chapter 305 of the Government Code, the lobbying statute. S.B. 1, Acts 1991, 72d Leg., ch. 304, § 3.05, at 1317-18.

⁶ Section 4 requires the reporting of financial activity that occurred during the previous calendar year.

⁷ References to the secretary of state in article 6252-9b are considered to be references to the Texas Ethics Commission. S.B. 1, Acts 1991, 72d Leg., ch. 304, § 1.39(b), at 1303.

⁸ However, the attorney general has noted:

A person can divest himself of an office by qualifying for and entering upon the duties of another office that he cannot lawfully hold at the same time. Pruitt v. Glen Rose Indep. School Dist. No. 1, 84 S.W.2d 1004 (Tex. 1935); see also Attorney General Opinion JM-423 (1986) (officer does not hold over when appointment rejected by Senate).

Attorney General Opinion DM-2, at 2 n.2 (1991).

⁹ The financial statement due in 1992 covers 1991 financial activity. The form itself contains space to enter information that the 1991 Penal Code required to be reported on a financial activity report. Penal Code § 36.10(3), (5) (Vernon 1989). The Penal Code also was amended by Senate Bill 1, with those amendments having a January 1, 1992, effective date. S.B. 1, Acts 1991, 72d Leg., ch. 304, §§ 4.01-4.05, 8.01, at 1321-23, 1337.

¹⁰ Although the statements were due April 30, 1992, the commission is directed to grant extensions for filing of up to 60 days to "every state officer and every party chairman" who requests such an extension prior to that filing deadline. V.T.C.S. art. 6252-9b, § 3(a), (h). When the commission mailed annual financial statements to those required to file, included in the filing packet were forms to request an extension. All extensions timely requested were granted by the commission.

¹¹ The rules of the Ethics Commission that were proposed for codification at chapter 7 of title 1 of the Texas Administrative Code actually should have been proposed for codification at chapter 30 of that title. For purposes of this opinion, we have cited to the rules as published.