

Commission Recommendations

The Commission is directed by statute to make recommendations to the Governor and Legislature. It recognizes that any major piece of legislation periodically needs revision, modification, and in some cases, major changes. To that end, the Commission makes the following recommendations:

1. **Formal Executive Session Open Meetings Exemption** - The Kansas Governmental Ethics Commission is subject to strict confidentiality statutes ensuring that an individual under investigation or a respondent to a complaint is protected until such time that the Commission determines that probable cause for a violation exists. The Commission utilizes broader confidentiality authority in statute and regulation for discussions regarding sufficiency and probable cause in executive session, but would benefit from a specific agency exemption to the Kansas Open Meetings Act. This exception would ensure the Commission's ability to protect confidentiality of accused parties as well as maintain that the Commission remain informed on current investigations, audits, inquiries, and complaints.

Legislative Status: There is no current bill for this recommendation.

2. **Electronic Filing for State Candidates** - K.S.A. 25-4148 permits state and local candidates, other than for statewide office, to file their campaign finance reports on paper or electronically. Candidates for statewide office must file all forms electronically. Requiring electronic campaign finance reporting would provide a wide variety of benefits, including but not limited to:

- Cost and efficiency savings for the state data entry reductions and more rapid report processing;
- Cost savings from decreased numbers of Errors and Omissions notices sent due to errors that could be prevented by filling fields in an electronic form, such as calculation errors and blank required fields;
- Decreased costs for printing forms and reports;
- Increased accuracy of data presented to the public as it would reduce avenues for errors;
- Increased transparency and decreased time delay in presenting campaign finance data to the public.

Due to these benefits and others, the Commission believes that significant benefits warrant requiring electronic submission of all campaign finance reports for state office.

The Commission supports the granting of exemptions for good cause shown, determined by the discretion of the Executive Director.

Legislative Status: 2019 HB 2170, in its current form, fully reflects this recommendation. Recognizing that the 2020 election cycle is ongoing, the Commission does not oppose adding language that delays implementation until after January 2021.

3. **Adding the Only Reasonable Interpretation Test to Express Advocacy** – K.S.A. 25-4143(h) defines “expressly advocate the nomination, election, or defeat of a clearly identified candidate” with specificity. The statute defines the phrase as “any communication which uses phrases including, but not limited to:
- "Vote for the secretary of state";
 - “re-elect your senator”;
 - “support the democratic nominee”;
 - "cast your ballot for the republican challenger for governor”;
 - “Smith for senate”;
 - "Bob Jones in '98”;
 - "vote against Old Hickory”;
 - "defeat" accompanied by a picture of one or more candidates; or
 - "Smith's the one."

Express advocacy is utilized frequently in the Campaign Finance Act and is often a touchstone of whether an organization is required to provide transparency regarding the funding of the communication to Kansas citizens. Express advocacy also affects coordination of candidates with organizations that do not disclose their donors, as a communication is not an “independent expenditure” under Kansas law unless it contains “express advocacy.”

The statute does indicate that express advocacy is not necessarily limited to these exact phrases by noting that this definition is “not limited to” the provided examples; however, the Commission currently follows guidance from a 1999 District of Kansas decision that ruled against “taken as a whole” interpretations of express advocacy.

The Federal Election Commission has a codified model for communications that are clearly express advocacy but avoid the specific “buzz” words in statute. 11 CFR 100.22(b) provides that a communication is express advocacy if “reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s)...” Since that time, the Supreme Court of the United States has appeared to support the disclosure requirement.

This addition, utilizing language identical or similar to the strict and narrow language utilized by the FEC, is a critical step in ensuring transparency for Kansas citizens by guaranteeing that organizations cannot avoid disclosure requirements solely because they altered the specific words they utilized in an advertisement.

Legislative Status: 2019 HB 2169, in its current form, fully reflects this recommendation. The Commission takes no stance regarding the deletion of Treasurer from paid-for attribution, which is also included in this legislation.

4. **Lobbyist and Statement of Substantial Interest Late Filing** – K.S.A. 46-280 provides that the Commission shall send a notice to any lobbyist who has not timely filed a report and any individual who has not timely filed a Statement of Substantial Interest form. The statute, as amended by 2018 HB 2642, increased the civil penalties for lobbyist expenditure reports and shortened the applicable grace period to file the form without penalty. The amended statute creates a potential conflict in the notice provision regarding whether the grace period begins from receipt of the notice or from the sending of the notice. Since lobbyists and individuals subject to filing Statements of Substantial Interest are aware of the relevant deadlines and in order to create consistency with similar statutory provisions in other areas, the Commission recommends a procedural amendment so that the grace period provided in statute begins running from the time the Commission sends the notice of failure to file, rather than from the time of receipt.

Legislative Status: 2019 HB 2172, in its current form, fully reflects this recommendation.

5. **Other social media attribution** - K.S.A. 25-4156(b)(1)(E) defines corrupt political advertising as any person making (or causing to be made) any website, e-mail or other type of internet communication which expressly advocates the nomination, election or defeat of a clearly identified candidate for a state or local office to follow such matter with a statement which states: "Paid for" or "Sponsored by" followed by the name of the chairperson or treasurer of the political or other organization sponsoring the same or the name of the individual who is responsible therefor. Appending such attributions to e-mails is analogous to printed matter and compliance with the attribution requirement is simple and straightforward. Compliance for some websites and some social media websites can be difficult or impossible.

The Commission believes that the rigid formats of certain websites or other internet communications make appending the required attributions problematic or impossible. The Commission believes the Legislature should consider methods to require open and obvious attribution on social media platforms.

Legislative Status: 2019 HB 2171, in its current form, fully reflects this recommendation. The Commission takes no stance regarding the deletion of Treasurer from paid-for attribution, which is also included in this legislation.

New recommendations for 2019:

6. **Federal Investigation Coordination** – Investigations undertaken by the Commission are confidential; only investigatory documents presented at a public hearing are considered public information. The statutes providing this confidentiality consider the fact that ethics or campaign finance investigations may impact laws under the jurisdiction of other state agencies or may require the expertise of another state agency. Despite this recognition, federal officials are not included in either confidentiality statute. Both K.S.A. 25-4165 and K.S.A. 46-259 include substantially similar language:

K.S.A. 25-4165. All records, complaints, documents, reports filed with or submitted to or made by the commission, and all records and transcripts of any investigations, inquiries or hearings of the commission under the campaign finance act shall be confidential and shall not be open to inspection by any individual other than a member of the commission, an employee of the commission, or a state officer or employee designated to assist the commission, except as otherwise specifically provided in the campaign finance act.

The ability to communicate with federal officials about an investigation can be critical to ensure proper resolution of an issue, much in the same way that communication with state officials can be critical. Additionally, if a federal subpoena were issued, Commission staff would be in a difficult position regarding whether to potentially violate the state confidentiality statute or risk noncompliance with the subpoena. Accordingly, the Commission recommends adding federal officials to the KGEC confidentiality statutes.

7. **Bonuses for Legislative Assistants** – K.S.A. 46-235 provides that “No state officer or employee shall accept compensation for performance of official duties, other than that to which such person is entitled for such performance. No person shall pay or offer to pay any state officer or employee any compensation for performance of official duties...” Legislative assistants, as state employees, are subject to this prohibition. Some legislators have provided bonuses to their legislative assistants in the past, either from their campaign fund or personally. It is the view of the Commission that these bonus payments may be a violation of the law, but under these circumstances do not raise significant concerns about corruption or improper favor. As a result, the Commission would not oppose a legislative exemption for this highly specific case.