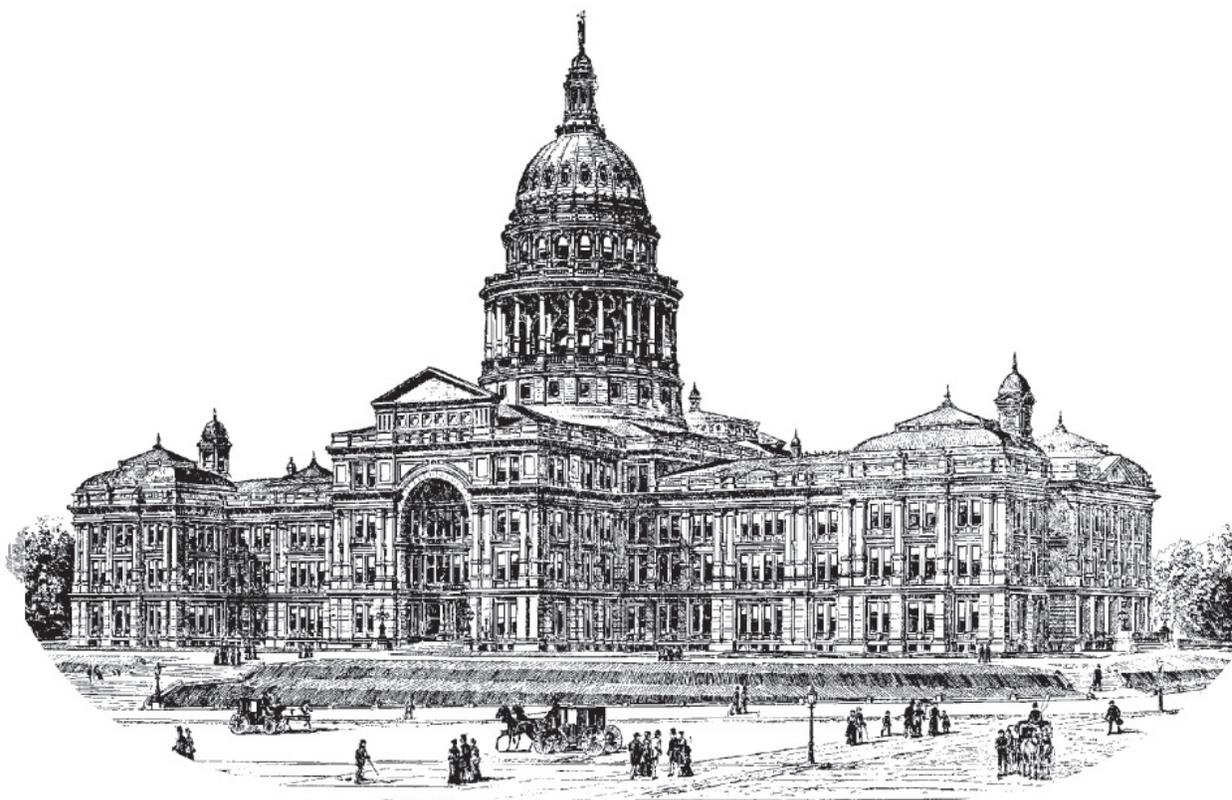




INTERIM REPORT

TO THE 83RD TEXAS LEGISLATURE



HOUSE COMMITTEE ON
GENERAL INVESTIGATING & ETHICS

DECEMBER 2012

**HOUSE COMMITTEE ON GENERAL INVESTIGATING & ETHICS
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2012**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
83RD TEXAS LEGISLATURE**

**CHUCK HOPSON
CHAIRMAN**

**COMMITTEE CLERK
PAUL HANNA**



Committee On
General Investigating & Ethics

December 13, 2012

Chuck Hopson
Chairman

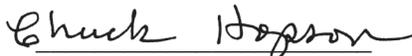
P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Joe Straus
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on General Investigating & Ethics of the Eighty-second Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Eighty-third Legislature.

Respectfully submitted,

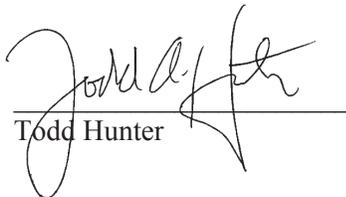


Chuck Hopson



Brandon Creighton

Pete Gallego



Todd Hunter



Larry Phillips

Brandon Creighton
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Members: Pete Gallego, Todd Hunter, Larry Phillips

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INTRODUCTION

On October 20, 2011, Texas House Speaker Joe Straus instructed the House Committee on General Investigating and Ethics to:

Study and determine whether all appointees to state entities should be required to sign additional governance documents prior to serving in an official state capacity.

SCOPE OF CHARGE

This section of the Interim Report focuses on a review of the requirements to serve as an appointee to a state entity found in Chapter 572 of the Texas Government Code and the enabling statutes of major state entities' boards and commissions to determine whether additional governance document should be signed by state appointees prior to serving in an official state capacity.

BACKGROUND

Section 572.003 of the Texas Government Code provides a list of major state entity positions held by appointed officers. The list of appointed officers to major state entities encompasses nine appointed chief executive positions as well as forty non-higher education related appointed state entity boards or commissions. Each of the forty non-higher education related boards and commissions consist of a varying number of board and commission members. The non-higher education boards and commissions listed in section 572.003 range from three appointed board or commission members to eight appointed board or commission members. Forty-four public senior college or university governing boards are also included among the list of officers appointed to major state entities found in section 572.003. In total, this list encompasses more than two hundred fifty appointees to state entities.

The Texas Legislature, in section 571.001 of the Texas Government Code, articulates an interest in maintaining a government whose actions are free from undue influence. The justification for that articulated interest is to ensure the public's trust and confidence in official state actions. In furtherance of that interest, the Texas Legislature created the Texas Ethics Commission and the Texas Legislature granted the Commission the authority to enforce and administer state disclosure requirements found in Chapter 572 of the Texas Government Code. All appointed state officials listed in section 572.003 must comply with the Chapter 572 disclosure requirements and the rules promulgated by the Commission.

Governance documents signed by appointees to state entities provide transparency as it relates to identifying actual and potential conflicts of interest; establish a duty to uphold the laws of the state of Texas; and provide an opportunity to affirm knowledge of and compliance with certain ethics requirements. For example, personal financial disclosures, mandated by Chapter 572,

provide an opportunity to discover if appointees have a direct or indirect interest, including financial and other interests, or engage in business transactions or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer's duties in the public interest. Official oaths of office, such as the dual affirmation found in art. XVI, § 1 of the Texas Constitution, serve to establish a duty to uphold the responsibilities of the office and the laws of the state as well as to affirm that the appointment was awarded in the absence of undue influence.

The following is a review of the statutorily required governance documents signed by appointees prior to and during appointment and recommendations to the 83rd Legislature for statutory changes.

HOUSE COMMITTEE ON GENERAL INVESTIGATING & ETHICS
INTERIM STUDY CHARGES AND SUBCOMMITTEE ASSIGNMENTS

GENERALLY APPLICABLE REQUIREMENTS
FOR OFFICERS APPOINTED TO STATE ENTITIES

Constitutional Oath of Office

Article XVI, section 1, of the Texas Constitution places two requirements on appointees to state entities which must be complied with prior to their taking part in the duties of their appointed offices. First, the appointee must sign and file with the Secretary of State a sworn statement affirming that they did not directly or indirectly pay, offer, promise to pay, contribute, or promise to contribute any money or thing of value, or promise any public office or employment for the giving or withholding of a vote as a reward to secure the appointment or confirmation. Upon signing the sworn statement, the appointed officer takes the official oath. The official oath establishes a duty to faithfully execute the duties of the office in which they are appointed and to preserve, protect, and defend the Constitution and laws of the United States and the state of Texas.

Personal Financial Statement

Section 572.021 of the Texas Government Code, relating to personal financial disclosure, standards of conduct, and conflict of interest, requires appointed state officers listed in sec. 572.003 to file a comprehensive financial statement with the Texas Ethics Commission. The personal financial statement consists of a detailed account of the financial activity of the appointed individual, but it does not require the appointee to account for the financial activity of the appointee's spouse or dependent children unless the appointee had actual control over that activity for the previous year. For a list of financial activity accounted for in the financial statement see Table 1 below.

Upon submission of the personal financial statement, there is no statutory requirement for the disclosures to be reviewed for potential conflicts of interest by the Texas Ethics Commission or a requirement for the Texas Ethics Commission to review the past official actions of an appointee to determine if 572.058(a) disclosure requirements were complied with. Similarly, there is no statutory requirement for the personal financial statement to be transmitted to or to be reviewed for potential conflicts of interest by the state entity to which the filer has been appointed. Furthermore, there is no requirement for state entities to review an appointee's personal financial statement to determine if the statutory qualifications/eligibility requirements particular to the board or commission continue to be met.

The general public may access personal financial statements by requesting to view them at the Texas Ethics Commission's physical office in Austin, Texas, and the general public may use them as a basis for filing a sworn complaint upon discovery of an appointee's failure to disclose an interest or failure to meet eligibility requirements.

Table 1. Financial Activity Disclosures

Sec. 572.023. CONTENTS OF FINANCIAL STATEMENT IN GENERAL. (a) A financial statement must include an account of the financial activity of the individual required by this subchapter to file a financial statement and an account of the financial activity of the individual's spouse and dependent children if the individual had actual control over that activity for the preceding calendar year.

(b) The account of financial activity consists of:

(1) a list of all sources of occupational income, identified by employer, or if self-employed, by the nature of the occupation, including identification of a person or other organization from which the individual or a business in which the individual has a substantial interest received a fee as a retainer for a claim on future services in case of need, as distinguished from a fee for services on a matter specified at the time of contracting for or receiving the fee, if professional or occupational services are not actually performed during the reporting period equal to or in excess of the amount of the retainer, and the category of the amount of the fee;

(2) identification by name and the category of the number of shares of stock of any business entity held or acquired, and if sold, the category of the amount of net gain or loss realized from the sale;

(3) a list of all bonds, notes, and other commercial paper held or acquired, and if sold, the category of the amount of net gain or loss realized from the sale;

(4) identification of each source and the category of the amount of income in excess of \$500 derived from each source from interest, dividends, royalties, and rents;

(5) identification of each guarantor of a loan and identification of each person or financial institution to whom a personal note or notes or lease agreement for a total financial liability in excess of \$1,000 existed at any time during the year and the category of the amount of the liability;

(6) identification by description of all beneficial interests in real property and business entities held or acquired, and if sold, the category of the amount of the net gain or loss realized from the sale;

(7) identification of a person or other organization from which the individual or the individual's spouse or dependent children received a gift of anything of value in excess of \$250 and a description of each gift, except:

(A) a gift received from an individual related to the individual at any time within the second degree by consanguinity or affinity, as determined under Subchapter B, Chapter 573;

(B) a political contribution that was reported as required by Chapter 254, Election Code; and

(C) an expenditure required to be reported by a person required to be registered under Chapter 305;

(8) identification of the source and the category of the amount of all income received as beneficiary of a trust, other than a blind trust that complies with Subsection (c), and identification of each trust asset, if known to the beneficiary, from which income was received by the beneficiary in excess of \$500;

(9) identification by description and the category of the amount of all assets and liabilities of a corporation, firm, partnership, limited partnership, limited liability partnership, professional corporation, professional association, joint venture, or other business association in which 50 percent or more of the outstanding ownership was held, acquired, or sold;

(10) a list of all boards of directors of which the individual is a member and executive positions that the individual holds in corporations, firms, partnerships, limited partnerships, limited liability partnerships, professional corporations, professional associations, joint ventures, or other business associations or proprietorships, stating the name of each corporation, firm, partnership, limited partnership, limited liability partnership, professional corporation, professional association, joint venture, or other business association or proprietorship and the position held;

(11) identification of any person providing transportation, meals, or lodging expenses permitted under Section 36.07(b), Penal Code, and the amount of those expenses, other than expenditures required to be reported under Chapter 305;

(12) any corporation, firm, partnership, limited partnership, limited liability partnership, professional corporation, professional association, joint venture, or other business association, excluding a publicly held corporation, in which both the individual and a person registered under Chapter 305 have an interest;

(13) identification by name and the category of the number of shares of any mutual fund held or acquired, and if sold, the category of the amount of net gain or loss realized from the sale; and

(14) identification of each blind trust that complies with Subsection (c), including:

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- (A) *the category of the fair market value of the trust;*
(B) *the date the trust was created;*
(C) *the name and address of the trustee; and*
(D) *a statement signed by the trustee, under penalty of perjury, stating that:*
 (i) *the trustee has not revealed any information to the individual, except information that may be disclosed under Subdivision (8); and*
 (ii) *to the best of the trustee's knowledge, the trust complies with this section.*
- (c) *For purposes of Subsections (b)(8) and (14), a blind trust is a trust as to which:*
 (1) *the trustee:*
 (A) *is a disinterested party;*
 (B) *is not the individual;*
 (C) *is not required to register as a lobbyist under Chapter 305;*
 (D) *is not a public officer or public employee; and*
 (E) *was not appointed to public office by the individual or by a public officer or public employee the individual supervises; and*
 (2) *the trustee has complete discretion to manage the trust, including the power to dispose of and acquire trust assets without consulting or notifying the individual.*
- (d) *If a blind trust under Subsection (c) is revoked while the individual is subject to this subchapter, the individual must file an amendment to the individual's most recent financial statement, disclosing the date of revocation and the previously unreported value by category of each asset and the income derived from each asset.*

Disclosure of Personal or Private Interests

In addition to the personal financial disclosure statement required by section 572.021 of the Texas Government Code, appointees to state entities who are a member of a board of commission having policy direction over a state agency and who have a personal or private interest in a measure, proposal, or decision before the commission are required to disclose the personal or private interest to the board or commission on which they serve under sec. 572.058(a) of the Texas Government Code.

According to section 572.058(f) the meaning for "personal or private interest," used in the context of the preceding paragraph, is the same meaning as used in article III, section 22 of the Texas Constitution. Article III, section 22 requires members of the Texas Legislature to disclose personal or private interests in a bill before the Texas Legislature, but it does not provide a concrete definition for the terms. The Attorney General and the Texas Ethics Commission, through advisory opinions issued by their respective agencies, acknowledge that personal and private interests are issues of fact. To determine if a personal or private interest exists and whether disclosure is required the interest of the appointee must be evaluated in relation to the matter at issue before the state entity on a case by case basis. TEC - EAO 218, 298 and AGO H-1319.

In addition to disclosure of personal or private interests in a measure, proposal, or decision pending before the board or commission during a meeting held in compliance with the open meetings provisions of Chapter 551, appointees may not vote on the matter or participate in the decision. To comply with Chapter 572, an appointee's disclosure of a personal or private interest must also be recorded in the minutes, but the appointee does not have to submit the disclosure to the board or commission in writing.

Failure to disclose a personal or private interest or participation in the decision despite the existence of a personal or private interest subjects the appointee to possible removal from office

on the petition of the attorney general or a member of the board or commission to the appropriate district court. (572.058(b)). The Texas Ethics Commission may also levy a civil penalty against the board of commission member for failing to comply with sec. 572.058(a).

Standards of Conduct and State Agency Ethics Policies

Section 572.051(a) of the Texas Government Code provides a list of generally applicable standards of conduct which state appointees "should not" violate. (Table 2.). However, appointees are not civilly or criminally liable for violating the standards of conduct found in 572.051(a) unless the violation also constitutes a violation of another statute or rule.

Table 2. Standards of Conduct

Sec. 572.051. STANDARDS OF CONDUCT; STATE AGENCY ETHICS POLICY. (a) A state officer or employee should not:

(1) accept or solicit any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or that the officer or employee knows or should know is being offered with the intent to influence the officer's or employee's official conduct;

(2) accept other employment or engage in a business or professional activity that the officer or employee might reasonably expect would require or induce the officer or employee to disclose confidential information acquired by reason of the official position;

(3) accept other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties;

(4) make personal investments that could reasonably be expected to create a substantial conflict between the officer's or employee's private interest and the public interest; or

(5) intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer's or employee's official powers or performed the officer's or employee's official duties in favor of another.

(b) A state employee who violates Subsection (a) or an ethics policy adopted under Subsection (c) is subject to termination of the employee's state employment or another employment-related sanction. Notwithstanding this subsection, a state officer or employee who violates Subsection (a) is subject to any applicable civil or criminal penalty if the violation also constitutes a violation of another statute or rule.

Under section 572.051(c), state agencies must adopt a written ethics policy for agency employees consistent with the subchapter. Distribution of the written ethics policy to new appointees is to take place by the third day on which the appointee qualifies for office. To assist in the development of the written ethics policy, the office of the attorney general is charged with adopting a model ethics policy, but state agencies are not required to adopt the policy developed by the office of the attorney general. The model ethics policy developed by the office of the attorney general does not require or recommend signing additional governance documents relating to standards of conduct.

There is a statutory requirement that appointees receive a copy of the standards of conduct found in section 572.051(a) and the agency's written ethics policy not later than the third business day after the date the person qualifies for office. However, there is no requirement that appointees demonstrate acknowledgement of the duties imposed on them by section 572.051(a) and the agency's written ethics policy through a signed statement.

ENABLING STATUTES OF APPOINTED STATE

BOARDS AND COMMISSIONS

Common Elements

A review of the enabling statutes governing major state entity boards and commissions with appointed officers reveals several common statutory appointee requirements and appointee prohibitions. The following section of the interim report provides a review of the common elements found in appointed board and commission enabling statutes that are relevant to the question of whether additional governance documents should be signed by appointees.

1) Disqualifying Characteristics

Several enabling statutes contain a "lobbyist prohibition." Lobbyist prohibitions restrict membership on a board or commission if the person is required to register as a lobbyist under Chapter 305 of the Government Code because of the person's activities for compensation on behalf of a profession related to the operation of that board or commission.

Generally, "eligibility for membership" or "qualifications of members" sections are found in the enabling statutes of a board or commission. Eligibility requirements in this context disqualify individuals from becoming an appointee to a board or commission or disqualify a member from continuing to serve as an appointee to the board or commission. In most instances, eligibility requirements disqualify an individual from serving as an appointee because of current employment with or an ownership interest in an entity regulated by that commission.

While several components of the "eligibility for membership" sections found in one board or commission's enabling statutes are identical to those found in the enabling statutes of another board or commission, many "eligibility for membership" sections contain prohibitions and requirements specifically tailored by the Texas Legislature to meet the needs of a particular agency. Table 3 provides an example of eligibility requirements.

Table 3. Eligibility Requirements

Sec. 2306.027. ELIGIBILITY. (a) The governor shall appoint to the board public members who have a demonstrated interest in issues related to housing and community support services. A person appointed to the board must be a registered voter in the state and may not hold another public office.

(b) Appointments to the board shall be made without regard to the race, color, disability, sex, religion, age, or national origin of the appointees and shall be made in a manner that produces representation on the board of the different geographical regions of this state. Appointments to the board must broadly reflect the geographic, economic, cultural, and social diversity of the state, including ethnic minorities, persons with disabilities, and women.

(c) A person may not be a member of the board if the person or the person's spouse:

- (1) is employed by or participates in the management of a business entity or other organization regulated by or receiving money from the department;*
- (2) owns or controls, directly or indirectly, more than a 10 percent interest in a business entity or other organization regulated by or receiving money from the department; or*
- (3) uses or receives a substantial amount of tangible goods, services, or money from the department other than compensation or reimbursement authorized by law for board membership, attendance, or expenses.*

No "eligibility for membership" or "qualifications of members" sections found in the enabling statutes of the appointed boards and commissions listed in section 527.003 require appointees to periodically acknowledge or affirm continued compliance. No "eligibility for membership" or "qualifications of members" sections found in the enabling statutes of the appointed boards and commissions listed in section 527.003 require agency staff to periodically confirm their board member or commissioners continued eligibility in light of information obtained through a review of the board or commission member's personal financial statement.

Appointees and their spouses are generally prohibited from serving on a board or commission if they are an officer, employee, or paid consultant of a Texas trade association in an industry regulated by the commission. Texas trade association means a cooperative and voluntarily joined association of business or professional competitors in this state designed to assist its members and its industry or profession in dealing with mutual business or professional problems and in promoting their common interest. Prohibitions of this kind are typically found in a section titled "conflict of interest." No "conflict of interest" sections found in the enabling statutes of the appointed boards and commissions listed in section 527.003 require appointees to acknowledge or affirm compliance with trade association prohibitions prior to taking office or at any point while the appointee holds office.

2) Removal of Board or Commission Members

Enabling statute sections addressing the removal of board or commission members consist of two components. The first component outlines the actual grounds for removal. Generally speaking the grounds for removal relate to the eligibility or qualification requirements particular to membership as an appointee to the agency's board or commission. Some removal sections explicitly state that failure to comply with conflict of interest statutes is a ground for removal.

The second component of removal sections relate to the process whereby the executive director or member of the board or commission must notify the presiding officer of any existing potential grounds for removal that come to their attention. Presiding officers are then charged with notifying the governor and the attorney general that a potential ground for removal exists. None of the removal sections mandating governor and attorney general notification of potential grounds for removal require that such notification be made in writing or recorded during an open meeting of the board or commission.

3) Training Requirements for Board or Commission Members

Most enabling statutes require appointees who qualify for office to participate in a training program prior to voting, deliberating, or being counted a member in attendance at a meeting of the board or commission. Required training programs in statutes of this kind include training on the operation, role, and functions of the board or commission as well as any applicable ethics policies adopted by the commission or the Texas Ethics Commission.

FINDINGS

The governor's appointment office and respective personnel in other state offices with appointment power tailor searches for appointees based on the eligibility requirements found in each state agency's enabling statutes. The appointee confirmation process provides an opportunity to confirm that the appointee meets eligibility requirements at the time when the appointee is to take office.

Prior to taking office appointees to state entities are required to sign a sworn statement affirming that they did not directly or indirectly pay, offer, promise to pay, contribute, or promise to contribute any money or thing of value, or promise any public office or employment for the giving or withholding of a vote as a reward to secure the appointment or confirmation. Subsequently, appointees are required to take the official oath. The official oath establishes a duty to faithfully execute the duties of the office in which they are appointed and to preserve, protect, and defend the Constitution and laws of the United States and the state of Texas.

In addition to the requirements listed above, appointees to state entities are required to file a detailed personal financial statement in compliance with Chapter 572 of the Texas Government Code.

Should a board or commission consider a matter in which an appointee has a personal or private interest, the appointee is required to disclose the personal or private interest during a meeting held in compliance with Chapter 551 of the Texas Government code and refrain from voting or taking part in deliberations on the matter.

Appointees are not required, prior to serving or at any time while serving on a board or commission, to sign an affirmation which acknowledges their responsibilities to disclose and refrain from participation in matters in which they have a personal or private interest. Similarly, there are no statutory provisions which require appointees to acknowledge their duty to conform to the standards of conduct found in 572.051 of the Texas Government Code. Although each agency is required to provide appointees with training on when it is appropriate to disclose personal and private interests and training on the standards of conduct, that training is only required at the point when the appointee qualifies for office.

Because the Texas Ethics Commission does not have the necessary resources to review each of the official actions taken by the hundreds of appointed officers each year, the state should consider enacting statutory provisions which encourage each appointee's knowledge of and compliance with the Texas Government Code 572.058 disclosure requirements and the 572.051 standards of conduct. This could be accomplished by requiring appointees to state entities to sign an annual acknowledgment of their duties under 572.058 and 572.051 during each year of their respective tenures in office.

Furthermore, accountability could be encouraged by requiring state appointees to disclose annually reasonably anticipated OR known potential conflicts of interests and affirm continued compliance with the particular eligibility requirements unique to their agency to the executive director, general counsel, or compliance officer of the agency. If, based on a review of the personal financial statement of the appointee, it is discovered that the appointee failed to disclose a personal or private interest in compliance with 572.058 or no longer meets the eligibility

requirements particular to the office, the reviewing party should notify the presiding officer of the board or commission.

RECOMMENDATIONS

The Texas Legislature should consider requiring appointees to state entities to annually acknowledge the duties required of them by section 572.051 and 572.058 through a signed statement.

The Texas Legislature should consider requiring appointees to annually disclose reasonably anticipated OR known potential conflicts of interest and affirm compliance with their official office's eligibility requirements