

Disposition by Commission

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### **Recommendations to the Oklahoma Legislature for Reformation of the Political Subdivisions Ethics Act**

The Political Subdivisions Act (“PSEA”), 51 O.S. §§ 301-325, was enacted in 1995, based essentially on campaign finance and financial disclosure law that was already two decades old<sup>1</sup> and has hardly been touched since. During the more than 35 years that have passed since these concepts were first placed in the statutes, the entire nature of campaign finance and financial disclosure has changed dramatically. Creation of the Ethics Commission, first by statute and later in the Constitution, established a new entity to regulate campaign finance for state campaigns and ethical standards for state officers and employees. The amount of money spent on political campaigns grew exponentially. Campaign practices required new names, e.g., “electioneering communications.” Other practices, most notably “independent expenditures,” that were scarcely evident at the federal level even 20 years ago have now emerged at the local level. Landmark court cases gave corporations campaign latitude in political campaigns that had previously been prohibited for years.

Few would dispute that the PSEA needs to be revisited and overhauled.

Unprecedented expenditures in municipal elections in 2011 dramatically exposed the inadequacies of the PSEA. While the Legislature may not be able to assuage all of the concerns of those frustrated by the PSEA’s shortcomings, it can clarify and streamline the regulation of campaign finance for local elections. The Ethics Commission recommends the fullest disclosure possible under a conservative reading of applicable federal court decisions.

The following recommendations should not be construed in any way to be negative criticism of the Legislature, but rather should be viewed as suggestions for consideration by our state’s policymakers in shaping campaign finance and financial disclosure requirements for Oklahoma’s political subdivisions. Laws that may have been sufficient 15 or 25 years ago are no longer adequate or even relevant.

In making these recommendations, the Ethics Commission recognizes that the Legislature faces many overriding priorities and operates under rigorous time constraints.

However, at a minimum, the PSEA needs to be amended to make certain of its provisions Constitutional and to clarify responsibility for administration and enforcement. Ideally, the entire Act should be amended or repealed as more fully discussed below.

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<sup>1</sup> Many provisions of the PSEA drew heavily on state laws enacted in 1974 following the Watergate scandal.

## **Constitutional Issues**

The United States Supreme Court, in *Citizens United v. Federal Election Commission*, \_\_\_\_ U.S. \_\_\_\_; 130 S. Ct. 876; 175 L. Ed. 2d 753 (2010), and the District of Columbia Circuit Court of Appeals, in *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010),<sup>2</sup> held that (1) corporations cannot be prohibited from making unlimited independent expenditures or electioneering communications and (2) contributions to entities making independent expenditures or electioneering communications cannot be limited. While the Court does not explicitly include labor unions, it is generally believed that they are included along with corporations in the *Citizens United* decision. Generally, references to corporations in that context herein should be considered to include labor unions. Because these holdings are based on federal Constitutional law, they are applicable to Oklahoma statutory law regulating county, municipal and school district election campaigns.

The law should reflect that (1) corporations and labor unions may make unlimited independent expenditures or electioneering communications, (2) contributions to entities for the purpose of making independent expenditures or electioneering communications are unlimited.

Currently, the PSEA does not define or even mention either independent expenditures or electioneering communications, and current law prohibits corporate expenditures on campaigns. (See 21 O.S. § 187.2).

In addition, enforcement of the PSEA may be vulnerable to Constitutional challenges. It is vague, it is internally inconsistent to the extent that one cannot always discern what conduct is lawful and what conduct is not and it may be overly broad. While it appears that the Legislature intended for the PSEA to be enforced by the District Attorney (or, in some situations, by the Attorney General), the language may be insufficiently clear to be enforceable.

The statutory language should be amended to make crystal clear the officers responsible for enforcement.

## **Structural Issues**

Generally, statutes regulating municipalities are found in Title 11 (Cities and Towns), statutes regulating counties are found in Title 19 (Counties and County Officers) and statutes regulating school districts and boards of education are found in Title 70 (Schools). The PSEA, however, is codified in Title 51, which otherwise applies to “Officers.” (Other provisions in Title 51 include terms of office, procedures for impeachment and other methods of removal from office, the Governmental Tort Claims Act, and the Oklahoma Open Records Act.) In addition, there are some applicable provisions in Title 21 (Crimes and Punishments) and, following passage in 2011 of House Bill 1776, in Title 74 (State Government).

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<sup>2</sup> While District of Columbia Circuit Court of Appeals cases are not binding on Oklahoma authorities, many commentators and the Federal Election Commission agree that the *SpeechNow.org* case foreshadows a decision by the United States Supreme Court on the same issues. This is especially so because *SpeechNow.org* bases its conclusions on the *Citizens United* case.

Not only is the PSEA codified in an unlikely location, it also provides for inconsistent administration of the Act. The PSEA understandably places administration of municipal campaigns exclusively in the hands of municipal officials, i.e., municipal clerks (at least that was the case prior to passage of HB 1776 last year) and the administration of school district campaigns exclusively in the hands of school district officials, i.e., clerks of boards of education.

However, the PSEA also places administration of county campaigns and the filing of county financial disclosure not in the hands of county officials, but inexplicably in the hands of the Ethics Commission, a state agency.

The Oklahoma Constitution, art. 29, § 3, gives the Oklahoma Ethics Commission authority to promulgate rules for ethical conduct of campaigns for state offices and for ethical conduct of state officers and employees. If it were not for the PSEA, that would be the Commission's exclusive authority for administration of campaign finance and financial disclosure laws.

It is well-documented that the Ethics Commission historically has believed that it has been underfunded and understaffed to perform its Constitutional functions, much less additional statutory duties. The staff of the Ethics Commission has a span of responsibility for state campaigns and state ethics laws greater than its ability to effectively administer today without serving simultaneously as a repository for county campaign finance and financial disclosure filings.

HB 1776 further complicates the PSEA by requiring candidates for municipal offices in Oklahoma City and Tulsa and candidates for county offices in Oklahoma, Tulsa and Cleveland Counties<sup>3</sup> to search in at least four different places to determine the law with which they must comply. See 21 O.S. § 187.1; 51 O.S. § 314F; 74 O.S. § 4260 and Ethics Rule 257:10-1-14(a), codified at 74 OS. Ch. 62 Appendix. Unlike municipal candidates in every other municipality and county candidates in every other county, candidates in these two cities and three counties now must file electronically with the Ethics Commission and on forms that are identical to those required for campaigns for state offices rather than on the forms prescribed by the PSEA for all other municipal and county campaigns.

Of equivalent concern is the accessibility of campaign finance information to the public.

Under current law, in every municipality except Oklahoma City and Tulsa, citizens may find campaign finance reports in the office of the municipal clerk. In every school district, citizens may find campaign finance reports in the office of the clerk of the board of education. In contrast, except for Oklahoma, Tulsa and Cleveland Counties, citizens may find campaign finance reports for county offices at the Ethics Commission offices in Oklahoma City. For citizens of Oklahoma, Tulsa and Cleveland Counties and of Oklahoma City and Tulsa, future county and municipal campaign finance reports presumably will be available on the Ethics Commission's website.

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<sup>3</sup> Until the 2010 census, the population floor of 250,000 in 21 O.S. § 187.1 applied to only Oklahoma and Tulsa Counties, but Cleveland County's growth between the 2000 and 2010 census was sufficient that it now crosses the 250,000 population barrier.

The Legislature should consider repealing the PSEA (and 74 O.S. § 4260) in its current form and replacing it with statutes governing campaigns for county offices and financial disclosure for county officers in Title 19, statutes governing campaigns for municipal offices in Title 11 and statutes governing campaigns for boards of education in Title 70. Administration of those laws should be at the county, municipal and school district levels, respectively.<sup>4</sup> Any additional duties imposed at the county level would be minimal, considering that only a handful of candidates typically seek office in any given year, whereas the current statewide system requires the Ethics Commission to keep records for hundreds of county candidates and county officers.

Citizens in any county then would have access to the records at the county courthouse. Citizens in any municipality would have access to the records at the municipal clerk's office. Citizens in any school district would have access to the records at the board of education office.

If Internet accessibility is desired for the five large political subdivisions (as appears to be one of the purposes of HB 1776), it should be noted that each of them has a website<sup>5</sup> that could be used for display of all reports filed with the county clerk or municipal clerk. Current law requires public bodies, as defined by the Oklahoma Open Meeting Act at 25 O.S. § 304(1), to post notices and agendas of meetings if the public body has a website. (74 O.S. § 3106.2). A similar requirement could be imposed statutorily for campaign finance documents.

The Legislature may wish to explicitly state that regulation of municipal campaigns is a matter of statewide concern to prevent a proliferation of different standards in cities with home rule charters. At least one municipality apparently has adopted its own campaign finance law.

A second structural issue is the one-size-fits-all prescription of the PSEA.

Until passage of HB 1776 in 2011, every candidate for county office used precisely the same forms, and every candidate for municipal office used precisely the same forms. As previously noted, HB 1776 distinguishes Oklahoma, Tulsa and Cleveland Counties and the cities of Oklahoma City and Tulsa from all others.

But among the other 74 counties, the hundreds of other municipalities and hundreds of school districts, the PSEA makes no distinctions between the largest and the smallest. All counties are treated the same, all municipalities are treated the same and all school districts are treated the same.

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<sup>4</sup> To be consistent, documents for campaigns for county offices and for financial disclosure for county officers should be filed with the county clerk. Those duties would be consistent with other duties of the office. See, e.g., 19 O.S. § 286 [maintenance of records] and would require very little additional work (and presumably no greater expense) in any county. The PSEA currently reposes campaign finance reports with municipal clerks and clerks of the board of education.

<sup>5</sup> See [www.oklahomacounty.org](http://www.oklahomacounty.org); [www.tulsacounty.org](http://www.tulsacounty.org); [www.okc.gov](http://www.okc.gov); [www.cityoftulsa.org](http://www.cityoftulsa.org) and [www.ci.norman.ok.us](http://www.ci.norman.ok.us).

County candidates in Comanche County (population: 124,098) must submit the same reports as county candidates in Cimarron County (population: 3,148).

Candidates for municipal offices in Broken Arrow (population: 81,405) must comply with the same campaign finance laws as candidates for municipal office in Butler (population: 287).

Candidates for board of education in the Oklahoma City school district must file the same reports as candidates in the Balco school district, although the average daily attendance figures for those two districts are widely disparate.

There is no distinction between dependent and independent school districts or between cities and towns. The PSEA is silent on the Oklahoma Town Meeting Act, 11 O.S. §§ 16-301 – 16-315. This is true despite the fact that individuals serving on municipal and school district bodies in the vast majority of these smaller municipalities and districts are volunteers who do not campaign for office in the common sense of the word.

The Legislature long ago acknowledged the differences between campaigns in the state's metropolitan areas and those in non-metropolitan areas. See 21 O.S. § 187.1 (setting higher maximum campaign contribution limits for counties and municipalities with populations in excess of 250,000). HB 1776 recognized the same population criteria.

The Legislature should consider establishing population criteria for campaign reporting in municipalities and school districts, exempting from any reporting candidates in smaller municipalities and school districts. Similarly, the Legislature may wish to require more sophisticated reporting for candidates in larger counties, municipalities and school districts, as is now required in certain instances by 74 O.S. § 4260.

### **Practical Considerations**

Many of the provisions of the PSEA are unworkable or create other practical problems, making compliance difficult and enforcement all but impossible.

Some provisions call for simple clarification. For example, the definition of “political action committee” at 51 O.S. § 304 excludes PACs that are required to file with the Federal Election Commission (“FEC”) or with the Ethics Commission. That appears to be consistent with an intention to exclude those PACs from filing duplicate reports. Yet the definition of “organization” in the same section appears broad enough to include these PACs. Section 304 also defines “committee” to include “a candidate committee, political action committee, political party, or organization.” Furthermore, all “committees” are required to register with the Ethics Commission under 51 O.S. § 311, even though “administration” for municipal and school district elections is reserved for municipal clerks and board of education clerks. That creates the anomalous requirement that a “committee” register with the Ethics Commission but file campaign contributions and expenditures reports with local officials who have no notice that the “committee” existed. Carried to its literal extreme, the PSEA thus would require an individual to file for office with the Secretary of the County Election Board to become a candidate for municipal or school district office, but would require the candidate's campaign committee to

register with the state Ethics Commission and thereafter file campaign reports with municipal or school board clerks.

What the PSEA actually intended was likely logical: (1) PACs that report with to the FEC and the Ethics Commission are entitled to make contributions to local candidates, but should not be required to “double report.” Since those local contributions are listed on reports filed by the PACs with either the FEC or the Ethics Commission, public disclosure should not require that they be duplicated by filing reports with local officials as well. (This does not even consider the massive documents some of these federal and state PACs would be required to file with municipal or school board clerks.); and (2) federal committees should register and file reports with the FEC; state committees should register and file reports with the state Ethics Commission; local committees should register and file reports with local officials.

Unfortunately, the PSEA tries to do too much and, as a result, winds up doing too little.

Among the other provisions of the PSEA that the Legislature should consider amending or repealing are the following:

§ 303 (administration), as previously discussed.

§ 304 (definitions), in serious need of updating to incorporate modern and easily-understood campaign finance vernacular and court decisions.

§ 305 (powers and responsibilities of Ethics Commission), which - only for the sake of uniformity - should be limited to designing campaign finance and financial disclosure forms required by the statutes and making those forms available to county clerks, municipal clerks and school district clerks (as well as candidates and officers) through its website.

§ 306 (promulgation of rules), which would be rendered unnecessary and should be repealed.

§ 307 (complaints), which should be repealed and replaced with language making clear that enforcement is in the hands of the District Attorney (or, when facts warrant, the Attorney General through a multi-county grand jury).

All other sections (§§ 308-322) should be reviewed and either amended or repealed entirely.

§§ 307, 309 and 317B impose incredibly complicated and expensive proceedings to assess and collect late filing fees. § 307 is Constitutionally suspect and should be repealed in its entirety.

§ 309 provides penalties potentially 10 times more severe for filing a frivolous complaint against a candidate for county office than for knowing and willful violation of the PSEA under § 317.

§ 311, 314 and 321 not only specify information to be included in forms to be filed, but include the forms themselves, an administrative duty that should not be specified in the statutes.

§ 313 calls for the appointment of a “designated agent,” complete with a form for doing so, even though “treasurer” and “deputy treasurer” replaced “designated agent” long ago.

§ 317 provides criminal penalties, making convictions less likely than if there was a mechanism for either an administrative fine or judicially-imposed fine.

### **Conclusion**

Whatever its efficacy may have been in the past, the PSEA in 2012 clearly is in need of thoughtful reevaluation. Parts of the PSEA clearly violate the Constitution. Other parts just as clearly are unworkable.

Until the campaign finance laws for counties, municipalities and school districts are subjected to rigorous examination and modernization, the PSEA will continue to produce the frustration and bewilderment that has resulted in this report.

Submitted by

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Commissioner Long