



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 518

*August 21, 2014*

*Whether a nonprofit organization that plans to make direct campaign expenditures from its general treasury funds to expressly advocate for the election or defeat of clearly identified candidates for state and local offices in Texas is required to appoint a campaign treasurer as a political committee. (AOR-586)*

### Main Statement of Law

**A group of persons that has a principal purpose of accepting political contributions or making political expenditures must appoint a campaign treasurer before it accepts political contributions of more than \$500 or makes political expenditures of more than \$500.**

### Question Presented

The Texas Ethics Commission (“commission”) has been asked whether a nonprofit organization, under the facts presented, would be required to register with the commission as a political committee. The requestor states that the organization is organized under section 501(c)(4) of the Internal Revenue Code and plans to make direct campaign expenditures from its general treasury funds and use other resources to expressly advocate for the election or defeat of clearly identified candidates for state and local offices in Texas.

### Facts Presented

The requestor has presented the following additional facts:

1. The Organization’s expenditure budget for Fiscal Year 2014 is entirely dependent on the Organization’s fundraising success; however, the Organization will at all times operate within the parameters set forth in the Internal Revenue Service’s Letter 5228 (Rev. 9-2013). The Organization plans to spend exactly 20% of its total expenditures and total time (measured by the Organization’s employee and volunteer hours and the Organization’s use of equipment and resources) in Fiscal Year 2014 to make direct campaign expenditures.<sup>1</sup>
2. The Organization currently maintains \$8,118.62 in its bank account, although it intends to engage in aggressive fundraising activities to raise additional funds for its activities. The Organization does not intend to solicit funds for the express purpose of making direct campaign expenditures on behalf of (or in opposition to) any specific state or local candidate for public office in Texas; however, the Organization does intend to inform donors that it may engage in political intervention to the extent that such expenditures and activities do not jeopardize the Organization’s 501(c)(4) status.
3. Although the Organization intends to make direct campaign expenditures on behalf of (or in opposition to) state and local candidates for public office in Texas, the vast majority of the Organization’s public statements regarding its fundraising efforts, goals, and activities will be focused on promoting and advocating for economic and legislative solutions that will cut wasteful

government spending, lower the tax burden on the American people, and reduce the excessive regulations that unnecessarily encumber businesses in our country.

4. The Organization has not made, and does not intend to make, political contributions to candidates, political committees, or political party committees.

5. The Organization is organized and operates for the purposes of promoting the social welfare within the meaning of section 501(c)(4) of the Internal Revenue Code.

6. The mission of the Organization is to promote and advocate for economic and legislative solutions that will cut wasteful government spending, lower the tax burden on the American people, and reduce the excessive regulations that unnecessarily encumber businesses in our country. The Organization engages in grassroots advocacy and issues-oriented educational campaigns to further its goals.

### Relevant Law

A **political committee** is “a group of persons that has as a principal purpose accepting political contributions or making political expenditures.” Elec. Code § 251.001(12). The commission has defined a group as “[t]wo or more persons.” 1 Tex. Admin. Code § 20.1(14).

A **political contribution** is a campaign contribution or an officeholder contribution. Elec. Code § 251.001(5). A campaign contribution is a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. *Id.* § 251.001(3).

A **political expenditure** is a campaign expenditure or an officeholder expenditure. *Id.* § 251.001(10).

A **campaign expenditure** is an expenditure made by any person in connection with a campaign for an elective office or on a measure. *Id.* § 251.001(7).

A **direct campaign expenditure** is a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure. *Id.* § 251.001(8). However, a campaign expenditure made with the prior consent or approval of the candidate benefitted is not a direct campaign expenditure, but is a contribution to the candidate. 1 Tex. Admin. Code § 20.1(5).<sup>2</sup>

A **campaign treasurer** must be appointed before a political committee accepts political contributions totaling more than \$500 or makes political expenditures totaling more than \$500. Elec. Code § 253.031(b). Thus, to the extent that a group constitutes a political committee, that group must file a campaign treasurer appointment before exceeding \$500 in either political contributions or political expenditures.

### General Application of Law

The question is whether, under the facts presented, the organization is a group that has a principal purpose of accepting political contributions or making political expenditures. The Texas Election Code does not prescribe the method of creation or the organizational structure of a political committee.<sup>3</sup> However, the applicable definitions provide that a political committee exists as “a group of persons” or “two or more persons.” We have stated that two or more persons acting in concert to make political expenditures, including direct campaign expenditures, constitute a political committee.<sup>4</sup> We have also stated that two or more persons who act in concert by collecting funds to be used to make political expenditures constitute a political committee.<sup>5</sup> Accordingly, if the organization solicits and accepts political contributions from other persons, then the organization and the political contributors constitute a group with a purpose of accepting political contributions. Similarly, if the organization acts in concert with another person to make political expenditures, then the organization and the other person constitute a group with the purpose of making political expenditures.<sup>6</sup> If the group has a principal purpose of accepting political contributions or making political expenditures, then the group would be a political

committee. Whether a purpose of a group is a “principal purpose” depends upon factors that the legislature has not specified.

The Election Code does not define the term “principal purpose,” nor has the commission precisely determined when a group has a principal purpose of accepting political contributions or making political expenditures. In construing statutory language, we must determine the legislature’s intent, which is primarily discerned from the plain meaning of the words used in the statute.<sup>7</sup> Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Gov’t Code § 311.011(a).

A political committee is defined as a group with “*a* principal purpose,” as opposed to *the* principal purpose, of accepting political contributions or making political expenditures.<sup>8</sup> In addition, political committees are classified as either general-purpose committees or specific-purpose committees, according to whether the committee has “among its principal purposes” supporting, opposing, or assisting certain candidates, officeholders, or measures.<sup>9</sup> The specific language of the pertinent definitions suggests the legislature contemplated that a political committee could have one or more principal purposes. See Elec. Code § 253.092 (providing that a political committee the only principal purpose of which is accepting political contributions and making political expenditures is not considered to be a corporation for purposes of title 15 if it incorporates for liability purposes only); 1 TEX. ADMIN. CODE §§ 24.1(c), (d) (providing that certain restrictions on corporations do not apply to a political committee that incorporates for liability purposes only, as provided by rule and provided that its sole principal purpose is accepting political contributions and making political expenditures). *See also* Ethics Advisory Opinion Nos. 168 (1993), 131 (1993) (recognizing that a political committee may have other purposes besides accepting political contributions and making political expenditures).

The requestor represents that the organization will not accept political contributions. Therefore, we assume that the organization does not have a principal purpose of accepting political contributions. The remaining question is whether the organization has a principal purpose of making political expenditures.

In determining whether a group has a principal purpose of making political expenditures, we must consider all the facts and circumstances concerning the group’s actual and planned activities related to making political expenditures.<sup>10</sup> These factors include:

1. The proportion of the group’s total expenditures that constitute political expenditures;
2. The amount of the group’s staff or volunteer time, equipment, or other resources allocated to making political expenditures;
3. The content of the group’s public statements regarding its goals or support of or opposition to candidates, officeholders, or measures;
4. The group’s government filings and organizational documents, including mission statements; and
5. The group’s other activities that are unrelated to making political expenditures.<sup>11</sup>

### **Fact-Specific Application of Law**

The requestor has stated that exactly 20% of the organization’s resources (including staff, volunteer time, and equipment) and funds (including the proportional share of administrative expenses) will be used to make direct campaign expenditures. Therefore, under the facts presented, the organization does not have as a principal purpose making political expenditures.

## CONCLUSION

A group that does not accept or intend to accept political contributions and does not use or intend to use more than 20 percent of its funds and other resources to make political expenditures is not a political committee.

<sup>1</sup> The requestor notes that if the organization raises \$100,000, then it will make direct campaign expenditures totaling \$20,000.

<sup>2</sup> For example, a person who pays for a billboard supporting a candidate by making a payment directly to the owner of the billboard, without obtaining prior consent or approval from the candidate, would make a direct campaign expenditure. If the candidate gives prior consent or approval to the offer to pay for the billboard, the person has made (and the candidate has accepted) a campaign contribution to the candidate. *See* Ethics Advisory Opinion No. 331 (1996).

<sup>3</sup> Ethics Advisory Opinion No. 404 (1998).

<sup>4</sup> *See, e.g.*, Ethics Advisory Opinions No. 331 (1996) (several individuals acting together to make a direct campaign expenditure to support a candidate are a political committee); 116 (1993) (an individual and others acting in concert to spend funds to solicit campaign contributions to be made to a candidate constitute a political committee); 77 (1992) (two or more individuals acting in concert to pay for political advertising postcards are a political committee); 74 (1992) (expenditures for political advertising made by individual members of a political committee acting in concert are attributable to the committee).

<sup>5</sup> In Ethics Advisory Opinion No 320, we addressed a precinct chairperson who intended to collect and spend funds in connection with the campaigns of the candidates representing his political party. Ethics Advisory Opinion No. 320 (1996). We stated that the chairperson would necessarily be working in concert with contributors to accept political contributions and make political expenditures, and that the chairperson and the contributors would thus constitute a political committee. *Id.* We also addressed a situation in which various benefactors intended to fund the costs of printing an officeholder's newsletter by establishing a nonprofit corporation for that purpose. Ethics Advisory Opinion No. 242 (1995). We determined that the benefactors appeared to constitute a political committee and that, due to the prohibition on corporations making political contributions to officeholders, the benefactors would be permitted to fund the newsletter by incorporating solely for liability purposes. *Id. See also* Ethics Advisory Opinion Nos. 332 (1996) (an individual collecting contributions for an officeholder's retirement party would, along with the contributors, constitute a specific-purpose committee); 177 (1993) (individual contributors pooling their resources to produce brochures regarding a general-purpose committee constitute a separate general-purpose committee).

<sup>6</sup> A political committee consists of "persons," which are entities as well as individuals. 1 Tex. Admin. Code § 6.1(13) (defining "person," in part, as "an individual, representative, corporation, association, or other entity;" Gov't Code § 311.005(2) (Code Construction Act defining "person" to include a "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.")

<sup>7</sup> *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

<sup>8</sup> *See, e.g., Sherwin-Williams Co. v. New York State Teamsters Conf. Pension & Retirement Fund*, 158 F.3d. 387, 395 (6th Cir. 1998) (interpreting "a principal purpose" in employment law statute to mean an employer may have more than one principal purpose in conducting a transaction); *Comm'r v. Kelley*, 293 F.2d. 904, 911-12 (5th Cir. 1961) (interpreting "a substantial part" in federal tax statute to mean there may be two or more substantial parts).

<sup>9</sup> A political committee is either a general-purpose committee or a specific-purpose committee. A general-purpose committee is a political committee that has among its principal purposes supporting or opposing two or more candidates who are unidentified or are seeking offices that are unknown, or one or more measures that are unidentified; or assisting two or more officeholders who are unidentified. Elec. Code § 251.001(14). A specific-purpose committee is a political committee that does not have among its principal purposes those of a general-purpose committee but does have among its principal purposes supporting or opposing one or more candidates, all of whom are identified and are seeking offices that are known; or measures, all of which are identified; assisting one or more officeholders, all of whom are identified; or supporting or opposing only one candidate who is unidentified or who is seeking an office that is unknown. *Id.* § 251.001(13).

**10** Black's Law Dictionary defines a "purpose" as "[a]n objective, goal, or end; specif., the business activity that a corporation is chartered to engage in." Black's Law Dictionary 1271 (8th ed. 2004).

**11** The Federal Election Commission has historically applied a case-by-case analysis considering similar factors to determine whether an entity or group is a political committee under federal law. *See* 72 Fed. Reg. 5595-606.