



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 554

June 19, 2020

ISSUE

Whether a contribution from a federal political committee to a federal “Super PAC”¹ is a political expenditure made “in connection with elections voted on in Texas.”² (AOR-632)

SUMMARY

In our opinion, a contribution from a federal political committee to a federal Super PAC is a political expenditure made in connection with elections voted on in Texas only if the federal political committee intends for the contribution to be used to support or oppose a candidate or measure in an election voted on in Texas. Conversely, a contribution to a Super PAC for a general or unspecified purpose is not a political expenditure made in connection with elections voted on in Texas.

FACTS

The requestor of this opinion is a federal political committee (“the committee”) that files reports with the Federal Election Commission (“the FEC”). The committee states that it makes contributions to state and local candidates in Texas as an out-of-state political committee and that it complies with reporting requirements under the Texas Election Code and Ethics Commission Rules by sending a letter to the Texas Ethics Commission (“the Commission”) specifying where the committee’s reports may be found.³ The committee would like to make contributions to

¹ The FEC describes a “Super PAC,” which is also known as an “independent expenditure only committee,” as, in part, a political committee that makes only independent expenditures that may solicit and accept unlimited contributions from individuals, corporations, labor organizations and other political committees. *See* Fed. Election Comm’n Advisory Opinion 2010-11 (July 22, 2010).

² *See* 1 Tex. Admin. Code § 20.13(c)(2).

³Section 254.1581 of the Texas Election Code requires an out-of-state political committee that accepts political contributions and makes political expenditures to file with the Commission a copy of reports filed with the FEC or other filing authority, as applicable. Tex. Elec. Code § 254.1581. Section 20.13 of the Ethics Commission Rules states that an out-of-state political committee that files electronically in another jurisdiction may comply with

certain federal political committees, informally known as Super PACs, which are required to file reports with the FEC and are functionally identical to direct campaign expenditure-only committees under Title 15 of the Texas Election Code.⁴ The committee states that it does not know with certainty whether or how much of its contributions to a Super PAC will be spent on elections voted on in Texas. The recipient Super PACs may support or oppose candidates in only one election or in multiple elections and states. The recipient Super PACs may focus on Presidential candidates in elections that will be voted on in all 50 states or on United States House and Senate candidates in elections that will be voted on in any state.

The committee states that it has no control over a Super PAC's use of any contribution from the committee and receives no binding assurance on how or where a Super PAC will spend the contributions. The committee acknowledges that it may have an expectation as to what a Super PAC is likely to do based on past actions or public statements, but states that those expectations are neither enforceable nor certain to be fulfilled. The committee asserts that its contributions to Super PACs should not be considered political expenditures made in connection with elections voted on in Texas for purposes of calculating whether the committee is an out-of-state political committee.

ANALYSIS

The question addressed by this advisory opinion is whether a contribution from a federal political committee to a federal Super PAC—which could ultimately make political expenditures to support or oppose Texas candidates or measures—is considered a political expenditure made “in connection with elections ... voted on in Texas.”⁵ This question concerns the definition of “out-of-state political committee” and how a contribution made by the committee to a Super PAC affects the committee's status as an out-of-state political committee.⁶ A political committee's status as an out-of-state political committee determines whether the committee may accept political contributions or make political expenditures in connection with a state or local election

Section 254.1581 of the Texas Election Code by sending a letter to the Commission specifying where its electronic reports may be found on the other filing authority's website. 1 Tex. Admin. Code § 20.13(a).

⁴ A direct campaign expenditure-only committee is a political committee authorized to accept political contributions from corporations and labor organizations under Section 253.105(a) of the Texas Election Code if the committee: (1) is not established or controlled by a candidate or officeholder; (2) makes or intends to make direct campaign expenditures; (3) does not make political contributions to a candidate, an officeholder, a specific-purpose committee established or controlled by a candidate or officeholder, or a political committee that makes or intends to make political contributions to a candidate, an officeholder, or a specific-purpose committee established or controlled by a candidate or an officeholder; and (4) has filed an affidavit with the commission stating the committee's intention to operate as described by Subdivisions (2) and (3). *See* Tex. Elec. Code § 253.105(a).

⁵ *See* 1 Tex. Admin. Code § 20.13(c).

⁶ In order to maintain out-of-state status, a political committee must make 80% or more of its total political expenditures “in connection with elections not voted on in Texas.” 1 TEX. ADMIN. CODE § 20.13(c).

in Texas without appointing a campaign treasurer who is required to file campaign finance reports under Title 15 of the Texas Election Code.

Requirements for Out-of-state Political Committees

Generally, a political committee must file a campaign treasurer appointment before accepting more than \$870 in political contributions, or making or authorizing more than \$870 in political expenditures, in connection with a state or local elective office or a measure in Texas.⁷ Once a political committee files a campaign treasurer appointment, the person appointed as campaign treasurer must subsequently file campaign finance reports to disclose the political committee's political contributions and political expenditures.⁸

However, an out-of-state political committee is not required to file a campaign treasurer appointment under Title 15 of the Texas Election Code.⁹ Section 251.001(15) of the Texas Election Code defines an "out-of-state political committee" as:

[A] political committee that:

(A) makes political expenditures outside this state; and

(B) in the 12 months immediately preceding the making of a political expenditure by the committee inside this state (other than an expenditure made in connection with a campaign for a federal office or made for a federal officeholder), makes 80 percent or more of the committee's total political expenditures in any combination of elections outside this state and federal offices not voted on in this state.

Tex. Elec. Code § 251.001(15).

Section 20.13(c) of the Ethics Commission Rules paraphrases the Texas Election Code using similar language, stating that a political committee is an out-of-state political committee only if

⁷ Tex. Elec. Code § 253.031(b); 1 Tex. Admin. Code §§ 18.31(a), 20.301(a), 20.401(a) (before January 1, 2020, the threshold requiring a campaign treasurer appointment was \$500). *See also* Tex. Ethics Comm'n Op. No. 513 (2013) (Title 15 of the Texas Election Code regulates political contributions and political expenditures made in connection with a state or local office or a measure in Texas) (citing additional opinions).

⁸ *See generally* Tex. Elec. Code Ch. 254.

⁹ Tex. Elec. Code §§ 251.005(a), 253.031(e). If an out-of-state political committee decides to file a campaign treasurer appointment, the out-of-state political committee becomes subject to the requirements of Title 15 to the same extent as a political committee that is not an out-of-state political committee. *Id.* § 251.005(b). If an out-of-state political committee performs an activity that removes the committee from out-of-state status, the committee must file a campaign treasurer appointment before exceeding \$870 in political contributions or political expenditures in connection with a state or local election in Texas. *See id.* §§ 251.005(c), 253.031(b).

80% or more of its total political expenditures during the past 12 months were made in connection with elections not voted on in Texas.¹⁰

Contributions to Super PACs

The committee states that it has been acting as an out-of-state political committee that makes contributions to candidates in Texas and other states. Except for its contributions to Super PACs, we assume that the committee would otherwise qualify as an out-of-state political committee. The question here is whether the committee's contributions to Super PACs, which may ultimately use the contributions to make expenditures in connection with elections voted on in Texas, are political expenditures made in connection with elections voted on in Texas for purposes of determining whether the committee is an out-of-state political committee.

Neither Title 15 of the Texas Election Code nor the Ethics Commission Rules clarifies when a political expenditure is "inside this state," as provided by Section 251.001(15) of the Texas Election Code, or "in connection with elections ... voted on in Texas," as provided by Section 20.13(c) of the Ethics Commission Rules. The Commission has not addressed this question before.

In our opinion, whether the committee's political contribution to a Super PAC is a political expenditure in connection with elections voted on in Texas depends not on how the recipient Super PAC ultimately uses the contribution, but rather on the committee's intent in making the contribution.

The laws of other jurisdictions have recognized that contributions to political committees may be "earmarked" for a particular use.¹¹ In our opinion, a political committee would intend that a contribution to a Super PAC be used in connection with elections voted on in Texas if the committee were to earmark or otherwise designate the contribution to be used in connection with an election voted on in Texas.

¹⁰ Section 20.13(c) of the Ethics Commission Rules uses the phrase "political expenditures . . . in connection with elections not voted on in Texas" to interpret Section 251.001(15) of the Texas Election Code, which uses the phrase "political expenditures in any combination of elections outside this state and federal offices not voted on in this state." See 1 Tex. Admin. Code § 20.13(c); Tex. Elec. Code § 251.001(15). For purposes of this opinion, we use the phrase provided in the rule.

¹¹ Under federal law, "earmarked" means "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 C.F.R. § 110.6(b)(1). Similarly, under Montana law, an "earmarked contribution" is "a contribution made with the express, implied, oral, written, direct, or indirect designation or instruction, that all or part of it be transferred to or expended on behalf of a specified candidate, ballot issue committee, political party committee, independent committee or petition for nomination. An earmarked contribution is the same as a designated contribution." Mont. Admin. R. 44.11.404(1). For additional definitions of "earmark," see Cal. Gov't Code § 85704(b); Colo. Rev. Stat. § 1-45-103(7.5); Wash. Rev. Code § 42.17A.460.

Examples of such an earmarking or designation include: (1) the committee contributes to a Super PAC in response to a solicitation from the Super PAC for a contribution to be used to support or oppose a candidate or measure in an election voted on in Texas; or (2) the committee contributes to a Super PAC subject to a condition or agreement between the committee and the Super PAC, or subsequently agrees with the Super PAC after the contribution is made, that all or a portion of the contribution would be used to support or oppose a candidate or measure in an election voted on in Texas.

Conversely, a contribution not earmarked or designated to be used by the Super PAC to support or oppose a candidate or measure in an election voted on in Texas, such as a contribution to a Super PAC for a general or unspecified purpose, is not a political expenditure made in connection with an election voted on in Texas.