



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 557

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ISSUE

Whether an apparel company may contract with candidates, political parties, and political committees to design, manufacture, market, and fulfill sales of campaign merchandise in return for a portion of the sales proceeds, and, if so, whether such a business model involves any reportable campaign contributions. (AOR - 636)

SUMMARY

Because the Commission's rules exclude from the definition of "contribution" any "transfer for consideration of anything of value pursuant to a contract that reflects the usual and normal business practice of the vendor,"¹ an apparel company providing goods and services to candidates, political parties, and political committees before receiving payment from those purchasing the campaign apparel does not make a political contribution if the company offers the same terms "to political and non-political entities alike." *See* Tex. Ethics Comm'n Op. No. 533 (2015); Tex. Ethics Comm'n Op. No. 143 (1993).

However, the apparel company's customers *are* making political contributions when they purchase the campaign merchandise. Accordingly, any participating candidate, party, or committee would need the apparel company to keep a record of all reportable activity necessary for filing the required reports.

FACTS

The requestor seeks to create "an apparel ecommerce company [that] serves as a profit-share marketplace for political candidates, parties, and other entities." The requestor explains that the apparel company would accept payment for merchandise directly from the customer, retain a portion of that money, and send another portion to the candidate, party, or other entity for fundraising.

According to the requestor, the hypothetical apparel company would design, manufacture, advertise, and fulfill the sales of apparel that feature the logos and messages of the candidates, parties, and other entities it contracts with. The apparel company would "not charge for shirt design

¹ 1 Tex. Admin. Code § 20.1(3).

and website setup” or, for that matter, any manufacturing or advertising costs, and those expenditures would be made with the prior authorization of the participating candidates, parties, and committees. Instead, the apparel company would hope to recoup its costs by keeping a portion of the sales price of each item.

As an example, the requestor asks the commission to imagine that the apparel company creates shirts using the logos and designs of a political party, sells each shirt for \$20, of which it keeps \$15. At the end of the month, the apparel company would send \$5 for each shirt sold during the month to the political party. When asked for more information by commission staff, the requestor stated that these were typical of the commercial terms that the apparel company would offer to political and non-political entities alike. The requestor also confirmed that the apparel company would—through its website—notify its customers that profits from the sale of apparel would be transferred to the corresponding participating candidate, party, or committee.

The requestor asks the commission whether such a business model is permitted under the Texas Election Code and, if so, whether reporting would be required.

ANALYSIS

The Election Code defines “contribution” as any “direct or indirect transfer of money, goods, services, or any other thing of value” and expressly includes “an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer.” Tex. Elec. Code § 251.001(2).

Here, there are two separate transactions to consider. First, the apparel company provides services (design, manufacturing, marketing, and fulfillment) and perhaps goods (apparel or material) to a candidate, party, or political committee before any purchase is made. Second, the apparel company transfers money (a portion of the sales proceeds) from its customer to a candidate, party, or political committee after a purchase is made.

Provision of Goods and Services by the Company to Candidates, Parties, or Committees

The requestor’s hypothetical apparel company would provide goods and services to a candidate or political committee before receiving payment from those purchasing the items. This would include materials and time used in creating the designs, manufacturing and marketing the apparel, and fulfilling the sales. As such, the apparel company will be advancing or, in effect, loaning funds to assist the candidates or committees in fundraising. In answering similar requests, the Federal Election Commission (“FEC”) has repeatedly stated that such funds are contributions, and remain contributions to the extent that the apparel company remains unpaid. *See, e.g.*, Fed. Elec. Comm’n Advisory Op. Nos. 1989-21 and 1976-50.

However, our rules expressly exclude from the definition of contribution any “transfer for consideration of anything of value pursuant to a contract that reflects the usual and normal business practice of the vendor.” 1 Tex. Admin. Code § 20.1(3). In such a case, the terms of the transaction “must also be typical of the terms the commercial party offers to political and non-political entities alike.” Tex. Ethics Comm’n Op. No. 533 (2015); *see also* Tex. Ethics Comm’n Op. No. 143 (1993). The Federal Election Commission recognizes this same exclusion. 11 C.F.R. § 100.52(d)(1); Fed. Elec. Comm’n Advisory Op. No. 2019-12 (“The sale of goods or services at

a discount does not result in a contribution when the discount is offered in the ordinary course of business and made available on the same terms and conditions as to the vendor's customers that are not federal candidates or political committees.”).

Here, the request states that the proposed apparel company would serve as “a profit-share marketplace for political candidates, parties, and **other entities**.” (emphasis added). The requestor also confirmed that his apparel company would offer the same commercial terms to political and non-political entities alike. Assuming that is true, the apparel company's advances of goods and services to candidates, committees, and parties would reflect the “usual and normal business practice of the vendor” and thus would be excluded from our definition of “contribution.” 1 Tex. Admin. Code § 20.1(3); Tex. Ethics Comm'n Op. No. 533 (2015).

Transfer of Sales Proceeds from Company's Customers to Candidates, Parties, or Committees

Under the requestor's model, the apparel company collects the entire purchase price when a customer purchases an item and then later transfers a percentage of those proceeds to participating candidates, parties, or committees. Unlike the apparel company, the company's customers are not “vendors,” and their purchases are therefore not reflective of a “usual and normal business practice.” See 1 Tex. Admin. Code § 20.1(3). Instead, the customers are making “indirect transfer[s] of money”—through the apparel company—to participating candidates, parties, and committees. See Tex. Elec. Code § 251.001(2) (defining “contribution”). Moreover, because the apparel company would notify its customers that profits from the sale of apparel would go to benefit the campaigns of participating candidates, parties, and committees, its customers would have the intent to make reportable political contributions.² See Tex. Elec. Code § 251.001(3)-(5). Consequently, the apparel company must obtain the name and address of each person actually making the contribution and provide that information to the recipient to make the proper disclosure. Tex. Elec. Code § 253.001(a) (“a person may not knowingly make or authorize a political contribution in the name of or on behalf of another unless the person discloses in writing to the recipient the name and address of the person actually making the contribution....”).

Furthermore, to meet their reporting requirements, participating political candidates, parties, and committees would need the apparel company to collect certain information from any contributor whose contribution exceeds the applicable reporting thresholds. Section 254.031(a)(1) of the Election Code requires each campaign finance report to include the amount of political contributions from each person that in the aggregate exceed \$90³ and that are accepted during the reporting period⁴ by the person or committee required to file a report, the full name and address of

² While the requestor here has confirmed that he will provide such notice to his customers, the Commission will presume—even absent express notice—that a purchaser of apparel or other merchandise with the names, campaign slogans, or other identifiable information of a candidate, party, or committee has the intent to make a political contribution to that candidate, party, or committee.

³ Pursuant to Section 571.064 of the Texas Government Code, this threshold is adjusted annually by Commission rule 18.31.

⁴ A political contribution that is received but not accepted must be returned to the contributor not later than the 30th day after the deadline for filing a report for the reporting period during which the contribution is received. Tex. Elec. Code § 254.034(c). Accordingly, if a participating candidate, party, or committee refuses to accept a contribution from a customer of the apparel company, the contribution must be returned to the apparel company's customer. This is one more reason why it will be essential for participating candidates, parties, and committees to require the apparel company to collect and provide the name and address of the contributors.

the person making the contributions, and the dates of the contributions, and Section 254.031(a)(1-a) of the Election Code requires the itemization of all political contributions that are made and accepted electronically, regardless of amount. In addition, participating candidates, parties, and committees would need the apparel company to keep a record of the principal occupation, job title, and other employer information for each contributor who makes a contribution that, when aggregated with all other political contributions from that contributor during a reporting period, exceeds the applicable threshold. *See* Tex. Elec. Code §§ 254.0611, 254.0612, 254.1211, 254.1212, 254.151; 1 Tex. Admin. Code § 18.31.

When keeping those records, the apparel company should understand that the full amount paid by a purchaser—not just the portion that the apparel company forwards to a candidate, party, or committee—would be a contribution by the purchaser subject to the limitations and prohibitions of the Election Code. The Commission has held that a candidate who accepts a political contribution by credit card must report as a political contribution the full amount that a donor intends to contribute, not merely the amount that is ultimately received by the candidate after deducting credit card processing fees. Tex. Ethics Comm’n Op. No. 514 (2013). The same is true of the costs of creating a piece of fundraising merchandise; the full purchase price is a contribution, and the costs of creating that merchandise are reported separately as a political expenditure. *Id.* In this case, the participating candidate, party, or committee would report the portion of the sales proceeds retained by the apparel company as a political expenditure. This conclusion is again consistent with federal authorities. *See* 11 C.F.R. § 100.53; Fed. Elec. Comm’n Advisory Op. No. 2019-09.