



# TEXAS ETHICS COMMISSION



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## ETHICS ADVISORY OPINION NO. 562

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*June 17, 2021*

### ISSUE

*Whether section 305.006(c) of the Texas Government Code requires registered lobbyists to disclose expenditures on social media advertising.*

*Whether a mass media communication can, for purposes of Section 305.006(c)(2), “support or oppose pending legislation” even if it does not expressly state “support/oppose this legislation.” (AOR-645)*

### SUMMARY

Communications published on social media websites are “mass media communications” for purposes of Section 305.006(c) of the Texas Government Code. Consequently, lobbyists registered under Chapter 305 of the Texas Government Code must report their expenditures for advertisements on social media (sometimes called social media “boosts”) if the communications support or oppose or encourage another to support or oppose pending legislation or administrative action.

A mass media communication can support or oppose pending legislation even if it does not include the phrase “support/oppose this legislation” or similar words or phrases such as “vote for,” “vote against,” “defeat,” or “reject.” A communication supports or opposes pending legislation if, when viewed as a whole, it would lead one to reasonably believe that its purpose was to support or oppose the pending legislation.

### FACTS

The requestor is an employee of an organization that also employs a person registered as a lobbyist under Chapter 305 of the Texas Government Code. The registered lobbyist files on behalf of both himself and the organization.

The requestor seeks answers to two questions regarding the application of Chapter 305. First, the requestor asks whether registered lobbyists must disclose how much they spend on advertising on social media, even if the communication is not directed at a lawmaker or elected official. Second, and assuming the first question is answered in the affirmative, the requestor asks

whether expenditures for social media advertising would need to be disclosed by a registered lobbyist even if the communications did not explicitly say “support/oppose this legislation.”

## ANALYSIS

Section 305.006 of the Texas Government Code requires registered lobbyists to file reports with the Texas Ethics Commission (“Commission”) and defines the required contents of those reports. Subsection (b) requires lobbyists to report their expenditures “made to communicate *directly* with a member of the legislative or executive branch to influence legislation or administrative action ....” Tex. Gov’t Code § 305.006(b) (emphasis added). In addition, Subsection (c) requires registered lobbyists to report expenditures for certain communications that are *not made directly* to members of the legislative or executive branch:

(c) The report must also list the total expenditures made by the registrant or by others on the registrant’s behalf and with the registrant’s consent or ratification for broadcast or print advertisements, direct mailings, and other mass media communications if:

- (1) the communications are made to a person other than a member, employee, or stockholder of an entity that reimburses, retains, or employs the registrant; and
- (2) the communications support or oppose or encourage another to support or oppose pending legislation or administrative action.

Tex. Gov’t Code § 305.006(c).

Chapter 305 expressly includes broadcast or print advertisements and direct mailings as types of “mass media communications.” *Id.* The question addressed by this opinion is whether communications published on social media websites are “mass media communications” for purposes of the lobby law. *See id.*

In our opinion, the answer is yes, posts to social media are mass media communications for purposes of the lobby law, and expenditures for such communications must be reported by registered lobbyists if the remaining conditions of Subsection 305.006(c) apply. In this context, the Commission sees no good reason to distinguish between communications that are published in print and those that are published on social media.

However, registered lobbyists are only required to report these expenditures if the other conditions of Section 305.006(c) apply. First, the communication must be “made to a person other than a member, employee, or stockholder of an entity that reimburses, retains, or employs the registrant”. Tex. Gov’t Code § 305.006(c)(1). For example, a public post on Twitter would satisfy this requirement because it is broadcast to the general public, but a private message to another employee of the lobbyist’s employer would not.

Second, the communication must “support or oppose or encourage another to support or oppose pending legislation or administrative action.” Tex. Gov’t Code § 305.006(c)(2). Chapter 305

does not define “support or oppose,” so we look to our prior opinions interpreting similar language from the Texas Election Code.

Section 251.001(16) of the Texas Election Code defines “political advertising” as certain “communication[s] *supporting or opposing* a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure . . .” Tex. Elec. Code § 251.001(16) (emphasis added). Several of the Commission’s prior opinions have stated that, “[t]he critical issue in determining whether an advertisement is ‘political advertising’ is whether it is a communication supporting or opposing a candidate or a public officer.” Tex. Ethics Comm’n Op. No. 476 (2007) (citing Tex. Ethics Comm’n Op. No. 102 (1992)).

When the Commission is asked to consider whether a communication supports or opposes a candidate, public officer, or measure for purposes of the Texas Election Code, it views the communication “as a whole.” *See, e.g.* Tex. Ethics Comm’n Op. Nos. 559, 560 (2021). “Whether a particular communication supports or opposes a measure is a fact question.” Tex. Ethics Comm’n Op. No. 559 (2021) (citing Tex. Ethics Comm’n Op. No. 476 (2007)).

The Commission has opined that the inclusion of “express advocacy” as defined by Rule 20.1(18)—words or phrases such as “vote for,” “support,” “vote against,” “defeat,” or “reject”—would indicate that a communication supports or opposes a candidate, official, or measure for purposes of Section 255.003(a) of the Election Code. Tex. Ethics Comm’n Op. No. 559 (2021). However, the Commission has also determined that express advocacy is *not required* for a communication to support or oppose a candidate, official, or measure. *Id.*; *see also* Tex. Ethics Comm’n Op. Nos. 560 (2021) (concluding that a communication was political advertising despite not including any express advocacy). Instead, like other jurisdictions, the Commission views the communication as a whole and considers it within the broader context in which it is distributed. *See, e.g. Vargas v. City of Salinas*, 205 P.3d 207, 209 (Cal. 2009) (Rejecting an “express advocacy” standard and finding, “under some circumstances it may be necessary to examine the ‘style, tenor and timing’ of a communication in order to determine whether it should be characterized as permissible or impermissible.”).

A significant factor in determining whether a particular communication supports or opposes a measure is “whether the communication provides information” without promoting the measure. *Id.* (citing Tex. Ethics Comm’n Op. No. 476 (2007)). Even if the information would affect whether certain voters or elected officials would support or oppose a measure, a communication does not support or oppose a measure if it merely provides factual information. Tex. Ethics Comm’n Op. No. 559 (2021). “However, no matter how much factual information about the purposes of a measure election is included in a communication, *any amount* of advocacy” urging a person to take a particular action transforms the communication into one that supports or opposes. Tex. Ethics Comm’n Op. No. 559 (2021).

The Commission’s prior opinions interpreting the phrase “supporting or opposing” in the Texas Election Code inform our interpretation of the phrase “support or oppose” in the Texas Government Code. In short, a communication supports or opposes pending legislation if it “would lead one to reasonably believe that the purpose of the communication” was to advocate for or against the pending legislation. *See* Tex. Ethics Comm’n Op. No. 560 (2021) (internal quotation removed).