



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 614

December 3, 2024

ISSUE

Does the rule defining a “principal purpose” of a political committee (TEC Rule § 20.1(17)) apply to a nonprofit corporation? If so, what threshold must a nonprofit corporation remain below to avoid becoming a political committee? (AOR-707).

SUMMARY

By definition, two or more persons must act in concert with a principal purpose of making political expenditures or accepting political contributions to form a political committee. If a group of persons form a nonprofit corporation that has as a principal purpose accepting political contributions or making political expenditures, the corporation is a political committee.

To determine whether a group has a principal purpose of making political expenditures, the TEC will consider all the facts and circumstances concerning the group’s actual and planned activities related to making political expenditures.

FACTS

The requestor is a Texas resident who wants to establish a nonprofit corporation to make direct campaign expenditures. However, requestor states he is “reticent” to do so without knowing whether or not the political committee formation requirements would apply to his contemplated nonprofit corporation. The requestor did not specify what, if any, activities the nonprofit corporation plans to engage in beyond making political expenditures.

The request presents two questions: 1) whether a nonprofit corporation is a single person and therefore cannot be a political committee if it acts alone; and 2) if a corporation can be a political committee, what threshold of activity would determine political committee status.

ANALYSIS

Background.

In 2014, the TEC was asked to issue an advisory opinion to determine whether a nonprofit corporation would be subject to regulation as a political committee if it made political expenditures but did not accept political contributions. Tex. Ethics Comm’n Op. No. 518 (2014). The TEC held that 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.” *Id.* Although EAO 518 found that the

nonprofit corporation would not be a political committee under the facts presented, the opinion indicates a nonprofit corporation that exceeds 20 percent of its overall spending on electoral advocacy *could* be a political committee. *Id.*

After issuing EAO 518, the TEC adopted a rule defining a group’s “principal purpose.” 1 Tex. Admin Code § 20.1(17). The rule states that “a group has as a principal purpose accepting political contributions if the proportion of the political contributions to the total contributions to the group is more than 25 percent within a calendar year.” *Id.* § 20.1(17)(B). Likewise, “a group has as a principal purpose making political expenditures, including direct expenditures, if the group expends more than 25 percent of its annual expenses to make political expenditures within a calendar year.” *Id.* § 20.1(17)(D).

After adopting the rule, the TEC was sued by nonprofit corporations in two separate lawsuits seeking to invalidate the rule defining “a principal purpose.” *Tex. Home Sch. Coalition Ass’n v. Tex. Ethics Comm’n*, No. 03-17-00167-CV, 2018 Tex. App. LEXIS 9075, at *10 n. 4 (Tex. App.—Austin Nov. 7, 2018, no pet.); *Lake Travis Citizens Council v. Ashley*, No. 1:14-CV-994-LY, 2016 U.S. Dist. LEXIS 151797, at *1 (W.D. Tex. 2016). The TEC argued that the plaintiff corporations did not have standing to sue because a corporation is a single person and the definition of a political committee requires “a group of persons” acting in concert. *Id.* Accepting the TEC’s contention, the trial court dismissed the cases for lack of standing. *Id.*

A corporation is a group of people and will meet the definition of political committee if it has as a principal purpose accepting political contributions or making political expenditures.

To arrive at the position that a corporation is a single person, the TEC relied on the Code Construction Act, which defines a corporation as a person. Tex. Gov’t Code § 311.005(2). But the same logic would also exempt a political committee, because a political committee also meets the Code Construction Act’s definition of a “person.” This is, of course, absurd.

The Code Construction Act definition of “person” includes an “organization,” “association,” “and any other legal entity.” *Id.* A political committee is an organization, which is “a group of people who work together in an organized way for a shared purpose.” Cambridge Dictionary Online.¹ A political committee is also a “legal entity” as it can sue and be sued in its own name. Tex. Elec. Code § 253.132. Moreover, Title 15 expressly allows a political committee to incorporate without losing all the rights and responsibilities of a political committee. *Id.* § 253.032. In reality, a political committee is a group of two or more persons that is treated as a single legal person in some contexts. The same is true of a corporation.²

¹ *Organization* Definition, CAMBRIDGE DICTIONARY ONLINE, <https://dictionary.cambridge.org/us/dictionary/english/organization>.

² A corporation is group of persons that is treated as a single person for certain purposes (e.g. shielding individuals from personal liability, taxation at the entity level). But individuals will always comprise a Texas nonprofit corporation. A nonprofit corporation is managed by a board of directors, which is defined as “the *group of persons* vested with the management of the affairs of the corporation.” Tex. Bus. Org. Code § 22.001(1). A nonprofit must have at least three people on its board of directors. *Id.* § 22.204. In addition, a nonprofit corporation must have at least a president and secretary as officers. *Id.* § 22.231.

In holding that a corporation can be a political committee, the TEC harmonizes its interpretation of the definition of a political committee with the Federal Election Commission's interpretation of a similar federal statute, and that of several other states. The federal definition of a political committee includes "any committee, club, association, or other group of persons." 52 U.S.C. § 30101(4). Despite the federal statute requiring a "group of persons" to make a political committee, federal courts have routinely analyzed whether a corporation would meet the definition of a political committee under the FEC and other states' definitions. *E.g.*, *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555-556 (4th Cir. 2012); *see also N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 286 (4th Cir. 2008) (applying North Carolina's definition of a political committee, which requires "a combination of two or more individuals" to a nonprofit corporation); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 997 (9th Cir. 2010) (rejecting a challenge to Washington state's political committee registration regulations brought by a nonprofit corporation). Washington's definition of political committee included: "any person (except a candidate or individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." Wash. Rev. Code § 42.17.020(39). Outside of Texas, the TEC has found no instance of a court finding a corporation cannot be a political committee because it is a single person rather than a group.

The Principal Purpose Test.

Having established that a nonprofit corporation can be treated as a political committee, we turn to the requestor's next question: at what threshold will a nonprofit corporation be considered a political committee?

Under the TEC's current rule, a group, including a nonprofit corporation, will have a "principal purpose [of] accepting political contributions if the proportion of the political contributions to the total contributions to the group is more than 25 percent within a calendar year." 1 Tex. Admin. Code § 20.1(17)(B). The same is true for spending; "a group has as a principal purpose making political expenditures, including direct expenditures, if the group expends more than 25 percent of its annual expenses to make political expenditures within a calendar year." *Id.* § 20.1(17)(D).

In light of this opinion, the TEC intends to engage in rulemaking to potentially amend the rule defining what is a group's "principal purpose." The effect of an advisory opinion is to provide those who reasonably rely on the opinion with a defense in a criminal prosecution or an action to impose a civil remedy. Tex. Ethics Comm'n Op. No. 147 (1993); Tex. Gov't Code § 571.097. We do not think a group that exceeds 25 percent of its overall spending on political expenditures or for which political contributions make up more than 25 percent of its incoming funds is *necessarily* a political committee. Instead, the TEC will determine whether a group is a political committee on a case-by-case basis in a fashion similar to the FEC. *See Political Committee Status*, 72 Fed. Reg. 5595, 5595-606 (Feb. 7, 2007) (to be codified at 11 C.F.R. 100); *see also Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 557-58 (4th Cir. 2012) (finding the FEC's case-by-case determination of whether a group is a political committee constitutional); *see also Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77, 82 (D.D.C. 2016).

In making its determination whether a group has as a principal purpose of making political expenditures or accepting political contributions the TEC will be guided by the factors laid out in Tex. Ethics Comm'n Op. No. 518 (2014):

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.