



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 623

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ISSUE

A corporation may not finance fundraising efforts for its connected political committee except from its “members . . . or the families of its . . . members.” Tex. Elec. Code § 253.100(d)(5).

Who qualifies as a “member” of a nonprofit corporation for purposes of the Section 253.100(d)(5) corporate-funded solicitation exception? (AOR-724)

SUMMARY

To be a member of nonprofit for purposes of Section 253.100(d)(5), an individual must 1) satisfy the requirements for membership as specified by the organization’s governing documents; 2) affirmatively accept the organization’s invitation to become a member; and 3) be conferred some rights in the organization.

FACTS

The requestor represents an entity organized as a nonprofit corporation (“the Nonprofit”) under Texas law and is a tax exempt social welfare organization under Section 501(c)(4) of the Internal Revenue Code.

The Nonprofit established and administers a Texas general-purpose political committee under Section 253.100 of the Election Code (the “Connected GPAC”).

Under the Nonprofit’s bylaws “any person interested in advancing the purposes of the organization may become a non-voting member of [the Nonprofit] by paying dues to support the general purpose of the organization or signing a statement in support of [the Nonprofit’s] goals.”

The requestor asks if the Nonprofit can use its corporate funds to solicit contributions and accept contributions for the Connected GPAC from an individual who is informed by the Nonprofit’s website of the Nonprofit’s goals, checks a box indicating support of the Nonprofit’s goals, and then provides contact information to the corporation.¹

¹ The requestor also asked under what circumstance the Connected GPAC may accept contributions from a non-member. However, the law provides no restrictions on accepting contributions from individuals who are non-members.

ANALYSIS

A corporation may make expenditures “to finance the establishment or administration of a general-purpose committee.” Tex. Elec. Code § 253.100(a). A corporation may also make expenditures to solicit contributions to that committee only from its “stockholders or members, as applicable, or the families of its stockholders or members.” Tex. Elec. Code § 253.100(d)(5). “The effect of this proviso is to limit solicitation by nonprofit corporations to those persons attached in some way to it by its corporate structure.” *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 202 (1982) (analyzing the federal analog to Section 253.100(d)).

A Texas nonprofit corporation does not have stockholders but may have members. Tex. Bus. Org. Code § 22.151; *see also* Tex. Ethics Comm’n Op. No. 447 (2003).

The relevant question for this request is who qualifies as a member of a nonprofit corporation eligible to be the subject of fundraising efforts for the corporation’s connected political committee.

A “member” of a nonprofit corporation is not defined in title 15 of the Election Code. However, the Texas Business Organizations Code defines a “member” of a nonprofit organization as “a person who has membership rights in the nonprofit corporation under its governing documents.” Tex. Bus. Org. Code § 1.002(53)(B). The TBOC provides a nonprofit wide discretion to define the rights of its members with its governing documents. *E.g.*, Tex. Bus. Org. Code §§ 22.151, .160 (allowing but not requiring members to have voting rights).

Following the definition in the TBOC, to be a member of nonprofit for purposes of Section 253.100(d), an individual must 1) satisfy the requirements for membership as specified by the membership’s organizational documents; 2) affirmatively accept the organization’s invitation to become a member; and 3) be conferred *some* rights in the organization.

The Federal Election Commission took a similar approach to define “member” for purposes of the federal corporate solicitation statute. 11 CFR 114.1(e)(2)(i) through (iii); *see also* 11 CFR 100.134. In addition to requiring a person to satisfy the requirements for membership established in the membership organization’s governing documents and affirmatively accepting the organization’s invitation to become a member, a member must also have “direct participatory rights in the governance of the organization.” 11 CFR 100.134(f)(3). Such rights in the governance of the organization include:

- The right to vote directly or indirectly for at least one individual on the membership organization’s highest governing board;
- The right to vote directly for organization officers;
- The right to vote on policy questions where the highest governing body is obligated to abide by the results;
- The right to approve the organization’s annual budget; or
- The right to participate directly in similar aspects of the organization’s governance.

The restriction is specific to whom be the subject of corporate-funded solicitations for a political committee.

11 CFR 114.1(e)(2)(i) through (iii); *see also* 11 CFR 100.134. The federal approach has been criticized as too restrictive as it relates to requiring governance rights in an organization to confer membership. *Chamber of Commerce v. FEC*, 314 U.S. App. D.C. 436, 69 F.3d 600, 605 (1995) (finding a former, but similar version of the federal regulation too restrictive).

Under Texas law, any of the above-listed rights in governance are sufficient to be conferred some membership rights in the organization. But none of the specific rights listed in the FEC regulation are required to confer membership in an organization. Texas law does not prescribe a specific form of *governance* rights to be a member. Instead, a member must have “membership rights” prescribed by the organization’s governing documents. Therefore, any membership right conferred by governing documents is sufficient to confer membership for purposes of Section 253.100(d).

Under the bylaws of the Nonprofit, any person who signs a statement indicating the person’s support of the nonprofit’s goals may be a member. Therefore, the Nonprofit may use its general treasury funds to solicit political contributions to its Connected GPAC from individuals who check the box on its website, provided the check box indicates support for the Nonprofit’s goals and an affirmative assent to become a member. The organization’s governing documents must also provide some rights in the organization to a person for that person to be considered a member.