

**AVOIDING VIOLATIONS OF STATE LAW REGULATION  
OF LOBBYING, CAMPAIGN AND ADVOCACY ACTIVITIES  
BY NONPROFIT ORGANIZATIONS AND THEIR SUPPORTERS**

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**14<sup>TH</sup> ANNUAL**  
**GOVERNANCE OF NONPROFIT ORGANIZATIONS COURSE**  
August 25 - 26, 2016  
Austin

**CHAPTER 13**

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# AVOIDING VIOLATIONS OF STATE LAW REGULATION OF LOBBYING, CAMPAIGN AND ADVOCACY ACTIVITIES BY NONPROFIT ORGANIZATIONS AND THEIR SUPPORTERS

## I. INTRODUCTION

Nonprofit organizations increasingly commit their people and resources to advocacy, public policy and political activities to support of their mission. Wise board members, management executives and their consulting professionals must be vigilant in complying with longstanding restrictions on political, campaign and election-related activities. Most attention is paid to complying with the Internal Revenue Code restrictions related to the organization's federal tax-exempt status. However, state government oversight and regulation of advocacy, lobbying, campaign and election activities is growing—in Texas and elsewhere. Heated controversies surrounding advocacy activities of nonprofit entities have occupied committees in the United States Congress and the Texas Legislature. Reviewing and understanding the current Texas regulatory scheme is important.

## II. REGULATION OF LOBBYING, CAMPAIGN AND ADVOCACY ACTIVITIES BY NONPROFIT ORGANIZATIONS

### A. Federal Regulation

Nonprofit organizations pursuing their mission aggressively through advocacy or lobbying activities are most concerned with preserving their federal tax-exempt status and not violating Internal Revenue Code provisions and regulations that define permissible conduct. These federal restrictions on advocacy and lobbying activity by Section 501(c) organizations are beyond the scope of this presentation and have been the subject of previous presentations in this course or other continuing education offerings (available online). See:

- Chris Gober, *Lobbying, Political Campaigns and Candidate Related Campaign Activity*, Texas Bar CLE Governance of Nonprofit Organizations Course, August 2014.
- Tim Delaney, *Politics, Influencing Legislation and Special Interests*, Texas Bar CLE Governance of Nonprofit Organizations Course, August 2011
- Nicola Fuentes Toubia, *Get your Voice Heard: How to Advocate as a Nonprofit*, State Bar CLE

Governance of Nonprofit Organizations Course, August 2011

- Katherine L. Karl and Elizabeth Peters, *Navigating the Lobbying Rules for Effective Advocacy*, University of Texas School of Law 32<sup>nd</sup> Annual Nonprofit Organizations Institute, January 2015
- John Pomeranz, *Making 501(c) Connections for Advocacy*, University of Texas School of Law 33<sup>rd</sup> Annual Nonprofit Organizations Institute, January 2016

With respect to participation in **federal government lobbying activities**, the provisions of the Lobbying Disclosures Act (2 U.S.C. §1601) and related statutes and regulations must be strictly observed.

Participation and reporting of **federal election or campaign activities** is subject to the Federal Election Campaign Act of 1971 as amended, and related laws, and are found in Titles 52 and 26, U.S. Code.

There are numerous online resources available on the federal regulation of these activities. See Part III, Resources.

This presentation is focused only on State of Texas regulation of advocacy, lobbying, and campaign and election activities.

### B. Texas Campaign Finance and Lobby Regulations

#### 1. Current Issues in Texas Campaign Finance Law

Since the 2010 U.S. Supreme Court decision in *Citizens United*,<sup>1</sup> nonprofit corporations have become increasingly popular vehicles for political involvement. However, it is important to recognize that despite the impact of *Citizens United* and subsequent decisions, Texas law still prohibits campaign contributions from corporations – including nonprofits – to candidates or candidate committees. A violation on the prohibition on corporate contributions is a felony. The relevant statute reads:

#### Sec. 253.094. Contributions Prohibited

- (a) A corporation or labor organization may not make a political contribution that is not authorized by this subchapter.
- (b) A corporation or labor organization may not make a political contribution in connection with a recall election,

<sup>1</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

including the circulation and submission of a petition to call an election.

- (c) A person who violates this section commits an offense. An offense under this section is a felony of the third degree.

Corporations wishing to be involved in the campaign process can now make "direct" political expenditures made in connection with a political campaign. (Whereas federal law uses the phrase "independent expenditures," Texas refers to such activity as "direct expenditures.") The Texas Legislature has responded by modifying Title 15 of the Election Code to provide for the direct reporting of direct corporate expenditures:

**Sec. 254.261. Direct Campaign Expenditure Exceeding \$100**

- (a) A person not acting in concert with another person who makes one or more direct campaign expenditures in an election from the person's own property shall comply with this chapter as if the person were the campaign treasurer of a general-purpose committee that does not file monthly reports under Section 254.155.
- (b) A person is not required to file a report under this section if the person is required to disclose the expenditure in another report required under this title within the time applicable under this section for reporting the expenditure.
- (c) This section does not require a general-purpose committee that files under the monthly reporting schedule to file reports under Section 254.154.
- (d) A person is not required to file a campaign treasurer appointment for making expenditures for which reporting is required under this section, unless the person is otherwise required to file a campaign treasurer appointment under this title.

The Ethics Commission has used its rulemaking authority in an attempt to provide guidance as to when a politically active corporation crosses the line and becomes a political committee. (If an entity qualifies as a political committee, it must appoint a campaign treasurer, file regular reports, and – most importantly – disclose its financial supporters). These regulatory efforts stem from the definition of "political committee":

"[A] group of persons that has as a principal purpose accepting political contributions or making political expenditures."<sup>2</sup>

Why the focus on determining when a corporation becomes a political committee? The advent of nonprofit involvement in campaign spending has generated controversy in part because nonprofit corporations are not required to disclose their contributors, whereas political committees must disclose those who provide financial support. This ability to obscure contributors whose money makes its way into political campaigns has led to continuing debate over so-called "dark money" and attempts to require disclosure of those making "political" contributions though nonprofits. Since its creation, the Texas Ethics Commission has never been vested with significant unilateral enforcement authority, instead acting as a transparency clearinghouse. With the advent of "dark money," that mission – to provide a transparent glimpse into the funding of political campaigns – faces significant challenges. Consequently, the regulated community should expect the Commission to continue utilizing its rulemaking authority to attempt to illuminate the post-*Citizens United* political universe.

In Texas, these regulatory tensions have involved administrative efforts to determine when a politically active corporation becomes a political committee. The Commission has adopted two relevant rules, the first dealing with an entity's "principal purpose" and the second attempting to define what it means for two people (remember – the definition of a "person" includes a corporation) to act in concert.

**2. Principal Purpose**

The Commission, via rule, has determined that a "group has a principal purpose of accepting political contributions or making political expenditures, including direct campaign expenditures, when that activity is an important or a main function of the group."<sup>3</sup> The rule goes on to unequivocally state that a group may have more than one principal purpose.

The rule presupposes that a group's principal purpose has a principal purpose of accepting political contributions if the proportion of the political contributions to the entity's total contributions is more than 25 percent within a calendar year. The rule then goes on to parse a contributor's intent by stating that a:

"contributor intends to make a political contribution if the solicitations that prompted

<sup>2</sup> Tex. Elec. Code 251.001(12).

<sup>3</sup> Tex. Ethics Comm'n R. 20.1(20).

the contribution or the statements made by the contributor about the contribution would lead to no other reasonable conclusion than that the contribution was intended to be a political contribution.”

The group may, according to the rule, maintain specific evidence of contributions related only to political contributions or only to nonpolitical contributions. For example, the group may ask the contributor to make an indication when the contribution is made that the contribution is only a nonpolitical contribution.

A group has as a principal purpose making political *expenditures*, including direct campaign expenditures, if the group expends more than 25 percent of its annual expenses to make political expenditures within a calendar year. Again, a group may maintain specific evidence of administrative expenses related only to political expenditures or only to nonpolitical expenditures.

### 3. Acting in Concert

When the legislature required the disclosure of direct campaign expenditures, it imposed the requirement on a person (including a corporation) not acting in concert with another. Through its rulemaking process<sup>4</sup>, the Commission has attempted to provide examples of what it means to act in concert with another person. Generally, “acting in concert” means acting in cooperation or consultation with another, or under an express or implied agreement, to pursue a common activity. Specifically enumerated examples of “acting in concert” include using the same consultants, using the same person to purchase media, sharing mailing lists, sharing email lists, sharing telephone lists, exchanging drafts or final proofs of political advertising, sharing research on candidates or measures, sharing polling data, or meeting with a candidate, or a candidate’s agent or staff regarding campaign communications, including but not limited to talking points, campaign themes, campaign communication schedules, and campaign events.

### 4. Corporations Working Together as Super PACs

Another recent development<sup>5</sup> that is relevant to nonprofit corporations is the advent of “direct campaign expenditure” committees, referred to by the Commission as DCE’s and by the larger community as “Texas Super PACs.” Corporations may now act in concert to make direct political expenditures, provided that the corporations form a DCE, register with the

Ethics Commission, and appoint a treasurer who swears that the entity will not make political *contributions*. DCE’s are required to report their activity – including contributions and expenditures – in the same manner as a general purpose political committee.<sup>6</sup>

### 5. Utilizing a General Purpose Committee

Irrespective of the changes wrought by *Citizens United*, utilization of a general purpose committee (“GPAC”) remains the most common mechanism for campaign involvement, and is supported by 20 years of guidance via ethics advisory opinions (the reasonable reliance on which can serve as a defense to prosecution or civil penalty).

In establishing an affiliated general purpose committee, a person must identify the corporation with which the new GPAC is affiliated. Additionally, the formation documents must also identify those individuals who will be responsible for making decisions regarding the acceptance of contributions and the making of expenditures.

The relationship between a corporation and its GPAC requires a degree of awareness when it comes to the use of corporate resources in supporting the political committee. A corporation may only use corporate resources to raise funds from its solicitable class, which includes its employees, its members, and the families of each. If a GPAC receives a contribution from a corporate source, the GPAC must segregate the corporate contribution and use it only for administrative purposes; corporate funds may not make their way to candidates. Use of corporate resources (including staff time and equipment) used to administer a GPAC must be tracked, valued, and reported as in-kind contributions to the GPAC from the corporation. The Election Code<sup>7</sup> provides a list of expenditures that are clearly “administrative” in nature, including: office space maintenance and repair; telephone and internet services; office equipment; utilities; general office and meeting supplies; salaries for administrative support; legal and account fees for committee compliance; expenses involved in holding and recording committee meetings; holding a candidate forum open to all candidates for a particular office; and expenses incurred in preparing and delivering committee contributions.

For nonprofits interested in engaging in political activity, the legal landscape is shifting relatively quickly. The issues set forth above represent the current regulatory environment, but are subject to

<sup>4</sup> Tex. Ethics Comm’n R. 22.6.

<sup>5</sup> *Texans for Free Enterprise v. Texas Ethics Commission*, 732 F.3d 535 (5<sup>th</sup> Cir. 2013).

<sup>6</sup> Tex. Ethics Comm’n R. 22.5.

<sup>7</sup> Tex. Elec. Code 253.100.

change by the legislature, administrative agencies, or the courts.

6. An Overview of the Texas Lobby Law

For nonprofits that wish to engage in policymaking at the state capitol, it is necessary to possess an understanding of Texas rules governing advocacy before the legislative or executive branches of government.

In Texas, statutory lobby regulations are found in Chapter 305 of the Government Code and in rules adopted by the Texas Ethics Commission (collectively, “the lobby law”). The lobby law does not define – or even use – the term “lobbyist” (although it is strewn throughout other statutes) but instead uses the term “registrant” for those required to register with the Ethics Commission pursuant to Chapter 305.

Generally speaking, a person is required to register if that person *receives or spends* money to directly communicate with a member of the legislative or executive branch to influence official action. The relevant definitions are broad, with the term “member” encompassing employees of the legislative or executive branch. Further, the executive branch includes all administrative agencies.

There are, however, numerous exceptions to registration found within the lobby law.<sup>8</sup> For example, a person is not required to register if he or she spends less than 26 hours of “compensated time” in a calendar quarter communicating (or preparing to communicate) with a member of the legislative or executive branch. Similarly, a person who simply provides testimony at a public hearing is likewise not required to register with the Commission.

If a nonprofit corporation retains a lobbyist to advocate on the entity’s behalf, the lobbyist must register on behalf of the nonprofit. (Unlike many other states, Texas law does not require the lobby client to register or file reports; only the lobbyist is required to register.) When a lobbyist registers, he or she will not only list the entity as a client, but is also required to report other information about the company organization, including:

- The entity’s directors;
- Those who own more than 10% of the entity;
- The entity’s shareholders (if applicable);
- The person responsible for lobby strategy and decision-making.<sup>9</sup>

It is important to note that just because a nonprofit may engage a contract advocate does not necessarily mean that an employee of the organization will not have to register. Any person implicating the registration requirement is required to register with the Commission.

**III. ONLINE RESOURCES**

- Texas Ethics Commission, [www.ethics.state.tx.us](http://www.ethics.state.tx.us)
- Center for Lobbying in the Public Interest, [www.clpi.org](http://www.clpi.org)
- National Council of Nonprofits, [www.councilofnonprofits.org](http://www.councilofnonprofits.org)
- Independent Sector, [www.independentsector.org](http://www.independentsector.org)
- Alliance for Justice, [www.afj.org](http://www.afj.org)
- Nonprofit Vote, [www.nonprofitvote.org](http://www.nonprofitvote.org)
- Stand for your Mission, [www.standforyourmission.org](http://www.standforyourmission.org)
- Council of Foundations, [www.cof.org](http://www.cof.org)
- Internal Revenue Service, [www.irs.gov](http://www.irs.gov)

<sup>8</sup> Tex. Gov’t Code §§ 305.004-305.0041. See also Tex. Gov’t Code § 305.003(b-3) – (b-4).

<sup>9</sup> Tex. Gov’t Code § 305.005.

# Questions From "The Street"—and Some Answers

Ross Fischer    Richard W. Meyer  
 THE OBER GROUP

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▶ Successful and robust nonprofit organizations that aggressively pursue their stated mission inevitably become engaged in public policy, legislative, regulatory, or political issues that require or compel their involvement at some level. This is true of Section 501(c)(3), (c)(4), (c)(6), or other tax-exempt entities. Following are situations that reflect inquiries commonly received by attorneys, accountants, and regulators.

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▶ My 501(c)(3) charity has been asked by our statewide organization to come to Austin to testify for a proposed bill during the legislative session. There can't be any harm in doing this, right?

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▶ Actually, our charitable organization has been involved for some months in teleconferences to draft the bill and we expect to have one or more people in Austin several times during the legislative session, with overnight stays, to follow "our" bill. We have a right to do this, don't we?

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▶ Our 501(c)(3) organization has been asked to join an alliance with 20 other interested groups, add it to a letterhead, website, and social media postings, all intended to push our bill during the legislative session. No harm, right?

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▶ Our 501(c)(3) has been asked to join a statewide coalition of like-minded groups and contribute time and \$500 to the 501(c)(6) that will be pushing this bill during the legislative session, among other activities. We can spend this money and participate, right? It aligns with our mission.

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▶ Our group has a "champion" in the legislature and we intend to work intensely with the legislator's staff during the session to push our bills. Lobbying?

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▶ The legislator has promised to post tweets or re-tweet our support of the bill and also post his position on our Facebook page. We are excited about this.

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▶ Why bother with following or supporting other advocacy groups. We have been told it's common for a 501(c)(3) to establish a "parallel" 501(c)(4) organization. Separating the charitable side from the advocacy side makes sense, right?

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▶ To fund our 501(c)(6) activities, can our charitable side just include a voluntary check-off box on its annual dues statement permitting the supporter or donor to designate \$\_\_\_ of the annual membership dues for the (c)(4) advocacy activities?

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▶ During the legislative session, I've admired those big tents on the capitol grounds where merry-makers arrive in big busses and gather for good food, networking, and visits to legislators' offices. This is just "good business," right? We only intend to raise the public awareness of our cause and its stakeholders.

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▶ During our "legislative day," our group intends to visit ten legislators who have supported us, present an appreciation plaque, and leave a gift box of goodies for the office staff. Does someone report this as a gift?

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▶ Our organization's board intends to attend a legislative candidate's fundraiser together and each hand him a personal check for the campaign while discussing our interests? No harm?

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▶ Scores of (c)(3) organizations hire paid professional lobbyists, right? Why shouldn't we?

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▶ If our organization complies as strictly as you have suggested and ends up with five or six registered lobbyists on file, doesn't that look bad? Are we in trouble with the IRS?

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▶ A wise person well connected in Austin says the real players have a PAC and that it's the best way to get attention and real support for our cause. What's a PAC and do I need one?

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▶ Our organization's board members are 'all in' for a PAC and may do it with or without a board vote or other coordination. Why should they be discouraged if they want to advance our mission on their own?

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▶ Our organization will support a proposition on the statewide ballot in the next election. Will there be reporting requirements?

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▶ You've mentioned the Ethics Commission several times. How can they harm our organization if we stay below the radar?

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▶ But I've heard the comment that all the Ethics Commission ever does is issue small fines to violators. Not much real risk from the Commission, right?

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