



## Update on Campaign Regulations

By: Gardner Pate

At its August 21 meeting, the Texas Ethics Commission issued an advisory opinion and proposed two rules that reversed a long-standing trend at the commission. The advisory opinion (and the proposed rules, assuming they are adopted at a later meeting) provide safe harbors for certain entities to engage in corporate political speech without disclosing their donors.

### Background

Under Texas law, a group of persons with a principal purpose of making campaign expenditures or accepting campaign contributions is a political committee. Political committees must file regular campaign finance reports, which include disclosing all contributions to the committee. However, the term “a principal purpose” is undefined in the statutes, Commission rules, advisory opinions, and case law. The lack of a clear definition meant there was little to no guidance on what level of campaign activities would make a group of persons become a political committee.

### Advisory Opinion

The Ethics Commission issued [Advisory Opinion 518](#) at its meeting. A nonprofit corporation asked the Ethics Commission a single question: if the entity spent no more than 20 percent of its total expenditures in a calendar year on campaign activities, would the corporation become a political committee. In the advisory opinion, the Ethics Commission answered in the negative, finding that spending 20 percent of your annual expenditures on campaign activities does not make you a political committee. The opinion did not discuss what level of political contributions would be permissible, as the requestor stipulated it would not accept any political contributions.

This advisory opinion has a large impact. All advisory opinions provide a full legal defense to the imposition of civil or criminal penalties for any person who reasonably relies on the opinion. This opinion, in effect, establishes a floor on the level of permissible political expenditures for entities that are not political committees, a first in Texas law. As long as an entity does not spend more than 20 percent of its annual expenditures on campaign activities, it will not have a principal purpose of making campaign expenditures.

### Proposed Rules

After adopting the advisory opinion, the Ethics Commission discussed two proposed rules. The first rule would create a new definition defining the term “a principal purpose”, and the second rule would define what “acting in concert” means.



### A Principal Purpose

Texas law says you are a PAC if you have “a principal purpose” of making campaign expenditures or accepting campaign contributions. While the advisory opinion provides some guidance on what the term “principal purpose” is, the guidance only establishes a floor on permissible political expenditures, and had no discussion on political contributions. The **proposed rule** would clear up much of the ambiguity. Generally, the proposed rule says a principal purpose requires more than 25 percent of a group’s activity in a calendar year. If adopted—and it is important to stress this is not a final rule—this proposal would allow groups to spend up to 25 percent of their annual expenditures on campaign activities without needing to report their contributors to the Ethics Commission, provided no more than 25 percent of their contributions in a calendar year are political contributions.

### Acting in Concert

Texas law establishes a reporting mechanism for persons who make third party expenditures independent of candidates. These reports are required only if the person is not “acting in concert” with another person. The Ethics Commission has **proposed a rule** to more clearly define what types of activities would constitute acting in concert. As with the proposed rules on “a principal purpose,” this is only a proposed rule; the Commission must still adopt the rule at a future meeting before it carries the force of law.

### What This Means

The advisory opinion (and the proposed rules, assuming they are adopted) provide what appears to be a safe harbor to those wishing to get active in the political process without disclosing their donors. While the expenditure and contribution limits of the safe harbor may be low compared to other jurisdictions, the advisory opinion, and proposed rules if adopted, do provide useful guidance. As a result, the advisory opinion and proposed rules are likely to lead to an increase in third party spending in elections, with an emphasis on so-called “dark money” spending, where donors are not disclosed to the public.

### About Locke Lord

Locke Lord has experience working with campaign finance laws and regulations, ranging everywhere from local and state wide political campaigns to groups providing pure issue advertising. The firm currently represents political campaigns, political committees, and prominent consultants and lobbyists. In addition to working with our clients to comply with the campaign finance laws, Locke Lord also monitors activities at the Texas Ethics Commission to keep our clients updated on proposed rules. During the legislative session, Locke Lord monitors campaign finance legislation, letting our clients know of potential statutory changes they may wish to comment on.

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