

# Texas Issues New Political Spending Registration and Reporting Rules

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At its recent October 29 meeting, the Texas Ethics Commission (TEC) formally adopted new rules clarifying when an organization has the “principal purpose” of being a “political committee,” such that it is required to register and report its contributions and expenditures with the state, as well as when a political expenditure is considered to be coordinated with a candidate. The political committee rule has been widely portrayed by both supporters and opponents as an attempt by the agency to require more disclosure for so-called “dark money” spending.

As in many other jurisdictions, under Texas law, an organization that accepts more than \$500 in “political contributions” or makes more than \$500 in “political expenditures” must register and file ongoing reports as a “political committee.” Among the information required to be included on public reports are the names and addresses of donors to the organization. The Texas statute defines a “political committee” as an organization “that has as its principal purpose accepting political contributions or making political expenditures.” The terms “political contribution” and “political expenditure” are defined as a contribution or expenditure made “with the intent that it be used in connection with a campaign for elective office or on a [ballot] measure.” Until now, the term “principal purpose” has remained undefined.

The TEC's recent rulemaking provides that an organization has the “principal purpose” of a political committee if more than 25% of the contributions it receives within a calendar year are political contributions. Under the rule, whether a contribution is considered “political” will be determined by an organization's public statements about its fundraising efforts, goals, or actual support of or opposition

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to candidates or ballot measures in practice, as well as the group's government filings, organizational documents, and mission statement.

An organization will also have the "principal purpose" of a political committee if more than 25% of its annual expenses and other resources are spent on political expenditures, including the value of the time spent by the group's employees or volunteers, the amount of money and in-kind donations spent and made by the group, and the proportional share of administrative expenses (including employee salaries and benefits, rent, overhead costs, etc.) attributable to political expenditures. The Texas Supreme Court and Ethics Commission previously have indicated that activities that expressly advocate the election, passage, or defeat of a candidate or ballot measure are considered "political expenditures."

The new Texas rule and existing statute and TEC guidance are unclear as to whether the determination of a group's "principal purpose" is limited to an analysis only of its political activities within the state for the purpose of determining whether it must register as a political committee in Texas. Although it is unlikely that the Texas campaign finance laws could be interpreted as extending to regulate a group's political activity with respect to elections in other states, it remains to be seen how the TEC will address this question.

Relatedly, the Commission's recent rulemaking also clarifies that a political expenditure will be considered to be coordinated with a candidate if there is "cooperation or consultation . . . under an express or implied agreement, to pursue a common activity." The new rule provides that evidence of such coordination shall include use of the same consultants; use of the same media buyer; sharing lists of e-mail and mailing addresses or telephone numbers; exchanging drafts or final proofs of political advertising; discussing with a candidate or candidate's agent or staff campaign talking points, themes, ad schedules, and campaign events; or sharing campaign research or polling data.

The new Texas rules went into effect on November 19, but the Lake Travis Citizens Council has filed a lawsuit in federal court seeking to block the rules on the grounds that the 25% threshold for determining a political committee's "principal purpose" is unconstitutionally low.

Regardless of the lawsuit's outcome, the Texas rulemaking underscores the thicket of different and often contradictory standards that both nonprofit and for-profit corporations and unincorporated organizations must navigate at the state and federal levels. The approach Texas has adopted might be regarded as a middle ground of sorts between some jurisdictions that require political committee registration and reporting only if political contributions or expenditures make up more than half of a group's resources or activities, and other jurisdictions that impose political committee status on groups that receive political contributions or make political expenditures of any amount. Additionally, there is a multitude of different approaches taken by each jurisdiction, as well as by the Internal Revenue Service and Federal Election Commission, as to what specific activities trigger political committee or political organization status. Helping clients navigate this legal minefield is a "principal purpose" (however that phrase is defined) of Wiley Rein's Election Law practice group.