

TEXAS ETHICS COMMISSION  
P.O. Box 12070, Austin, Texas 78711-2070  
(512) 463-5800

Randall H. Erben, Chair  
Chris Flood, Vice Chair  
Chad M. Craycraft  
Mary K. “Katie” Kennedy

Patrick W. Mizell  
Richard S. Schmidt  
Joseph O. Slovacek  
Steven D. Wolens

## MEETING AGENDA

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Date and Time: 9:00 a.m., Monday, December 18, 2023  
Location: Room E1.014, Capitol Extension, Austin, Texas

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**INFORMATION ON HOW TO VIEW AND/OR PARTICIPATE IN THE ONLINE  
BROADCAST OF THIS MEETING WILL BE POSTED ON OUR WEBSITE ON THE  
DAY OF THE MEETING HERE:**

[https://www.ethics.state.tx.us/meetings/meetings\\_2020-2024.php#2022](https://www.ethics.state.tx.us/meetings/meetings_2020-2024.php#2022)

1. Call to order; roll call.
2. **Executive session pursuant to Section 551.071, Government Code, Consultation with Attorneys; Section 551.074, Government Code, Personnel Matters, Closed Meeting.**
  - A. Discussion of pending litigation to seek legal advice relating to the following:
    - i. Cause No. D-1-GN-17-001878: *Texas Ethics Commission v. Michael Quinn Sullivan*, in the 250<sup>th</sup> Judicial District Court in Travis County, Texas; Cause No. 03-17-00392-CV: *Michael Quinn Sullivan v. Texas Ethics Commission*, in the Third Court of Appeals at Austin, Texas; Cause No. 03-21-00033, *Michael Quinn Sullivan v. Texas Ethics Commission*, in the Third Court of Appeals at Austin, Texas; and Cause No. 18-0580: *Michael Quinn Sullivan v. Texas Ethics Commission*, in the Supreme Court of Texas.
    - ii. Cause No. D-1-GN-15-004455: *Texas Ethics Commission v. Empower Texans, Inc. and Michael Quinn Sullivan*, in the 345<sup>th</sup> Judicial District Court of Travis County, Texas; and related cases, Cause No. 03-16-00872-CV: *Empower Texans, Inc., and Michael Quinn Sullivan v. Texas Ethics Commission*, in the Third Court of Appeals, Austin, Texas, and Cause No. 22-1064, *Empower Texans, Inc. and Michael Quinn Sullivan v. Texas Ethics Commission*, in the Texas Supreme Court.
    - iii. Cause No. D-1-GN-21-003269: *Michael Quinn Sullivan v. Texas Ethics Commission*, in the 459<sup>th</sup> Judicial District Court in Travis County, Texas;

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For more information, contact J.R. Johnson, Executive Director, at (512) 463-5800.

and related case, Cause No. 03-22-00133-CV: *Michael Quinn Sullivan v. Texas Ethics Commission*, in the Third Court of Appeals, Austin, Texas.

- iv. Case No. 4:23-cv-00808-P, *Institute for Free Speech, a nonprofit corporation and public interest law firm, vs. J.R. Johnson in his official and individual capacities as Executive Director of the Texas Ethics Commission; Mary Kennedy, Chris Flood, and Richard Schmidt in their official capacities as commissioners of the Texas Ethics Commission; and Randall Erben, Chad Craycraft, Patrick Mizell, Joseph Slovacek, and Steven Wolens, in their individual and official capacities as commissioners of the Texas Ethics Commission* in the U.S District Court for the Northern District of Texas, Fort Worth Division.
- v. Cause No. PD-0310-23, *Ex Parte John Morgan Stafford*, in the Texas Court of Criminal Appeals.
- vi. Cause No. D-1-GN-23-008068, *In re Christopher Paddie*, in the District Court for the 419th Judicial District, Travis County, Texas.
- vii. Cause No. 22-CV-1130, *Matt Wiggins v. Texas Ethics Commission*, in the 122nd Judicial District of Galveston County, Texas.
- viii. Cause No. 2023-DCL-01478, *Valleywide Pharmacy and DMI, Inc., vs. Texas Ethics Commission, by and through its Executive Director, J.R. Johnson, in his official capacity*, in the 445 Judicial District of Cameron County, Texas.

- B. Discussion of contemplated litigation and to seek legal advice regarding the collection of imposed penalties.
- C. Discussion of contemplated litigation and to seek legal advice involving Chapter 552 of the Government Code and Sections 571.139, 571.140 of the Government Code.
- D. Legal advice regarding software licensing agreements related to the campaign finance filing application.
- E. Discussion and possible action related to personnel matters.
- F. Reconvene in open session.

3. Recess or continue to “Agenda 2” noticed for the same time and place as this agenda.

**CERTIFICATION:** I certify that I have reviewed this document and that it conforms to all applicable Texas Register filing requirements. Certifying Official & Agency Liaison: J.R. Johnson, Executive Director.

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*For more information, contact J.R. Johnson, Executive Director, at (512) 463-5800.*

**NOTICE:** Under the Americans with Disabilities Act, an individual with a disability must have an equal opportunity for effective communication and participation in public meetings. Upon request, the Texas Ethics Commission will provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, and large print or Braille documents. In determining the type of auxiliary aid or service, the Commission will give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify Margie Castellanos at (512) 463-5800 or RELAY Texas at (800) 735-2989 two days before this meeting so that appropriate arrangements can be made. Please also contact Ms. Castellanos if you need assistance in having English translated into Spanish.

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1. Call to order; roll call.
2. Discussion regarding dates for next quarterly Commission meeting.
3. Approve minutes for the following meetings:
  - Executive Session – September 27, 2023; and
  - Public Agenda – September 27, 2023.

### **RULEMAKING**

#### **Rule Adoption**

4. Discussion and possible action on the adoption or proposal and publication in the Texas Register of amendments to 1 Tex. Admin. Code § 18.10, and the repeal of 1 Tex. Admin. Code § 18.11, regarding substantial compliance for a corrected or amended 8-day pre-election report.

#### **Rule Publication**

5. Discussion and possible action on the proposal and publication in the Texas Register of comprehensive amendments and reorganization of Chapter 12 of Title 1 of the Texas Administrative Code, regarding Sworn Complaints and related procedures.

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*For more information, contact J.R. Johnson, Executive Director, at (512) 463-5800.*

**ADVISORY OPINIONS**

6. Draft Advisory Opinion No. AOR-692: Whether expenditures made by a former legislator for general administration of his own campaign account are “direct campaign expenditures” that trigger the Section 253.007 two-year waiting period before engaging in activity that would require registration as a lobbyist. (AOR-692.)

This opinion construes Section 253.007 of the Election Code.

7. Draft Advisory Opinion No. AOR-694: Whether certain communications with a member of the legislative or executive branch to engender goodwill are communications to “influence legislative or administrative action.” (AOR-694.)

This opinion construes Sections 305.002(a-1) of the Government Code.

8. Draft Advisory Opinion No. AOR-685: Whether the Chapter 572 of the Government Code revolving door provisions apply to a former State Board of Education member’s appearing before the Texas Education Agency, the Texas Commissioner of Education, or the Texas Permanent School Fund Corporation.

This opinion construes Section 572.054 and 572.069 of the Government Code.

9. Draft Advisory Opinion No. AOR-695: Whether a former state employee may provide consulting services to a company with which he participated in a procurement during his state service without violating Section 572.069 of the Government Code. (AOR-695).

This opinion construes Section 572.069 of the Government Code.

10. Draft Advisory Opinion No. AOR-696: Whether Chapter 572 of the Government Code prohibits a former employee of a regulatory agency from accepting certain employment.

This opinion construes Sections 572.054 and 572.069 of the Government Code.

11. Draft Advisory Opinion No. AOR-697: How various provisions of title 15 of the Texas Election Code apply to a Texas “purpose trust” formed under Section 112.121, Texas Property Code.

This opinion construes Subchapter D of Chapter 253 of the Election Code.

**ADMINISTRATIVE WAIVER OF FINES AND TREASURER TERMINATIONS**

12. Discussion and possible action on appeals of determinations made under 1 Tex. Admin. Code §§ 18.11, 18.25 and 18.26 relating to administrative waiver or reduction of a fine, for the following filers:

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*For more information, contact J.R. Johnson, Executive Director, at (512) 463-5800.*

**Staff Recommendation: 8-Day Correction Waiver**

1. Eric N. Sawyer, Campaign Treasurer, Lubbock County Republican Party (00055780)

**Staff Recommendation: Waiver**

2. Irma Barron (00086495)
3. James R. Dickey, Jr. (00069834)
4. Daisy J. Garza (00085082)
5. Cheryl A. Neff, Campaign Treasurer, Northwest Austin Republican Women (00015743)

**Staff Recommendation: Reduction**

6. Kenneth K. Biedermann (00080113)
7. Richard Gonzales (00084126)
8. Peter R. Healey, Campaign Treasurer, Bearcats Supporting Greatness 2023 (00087421)
9. Daniel Lee (00086309)
10. Kit Marshall (00085998)
11. Daniel Scarbrough (00086445)
12. Vera Action, Inc. (00085872)
13. Lucy Ortiz Wilke (00055552)

**Staff Recommendation: No Further Reduction or Waiver**

14. Patricia Aronin, Campaign Treasurer, Texas Physicians For Patients PAC (00086025)
  15. Ricardo Turullols-Bonilla (00086487)
  16. Kim A. Cooks (00069299)
  17. Jennifer Ivey (00084512)
  18. Robert S. McKee (00063414)
  19. Melissa N. Ortega (00086332)
  20. Patrick Von Dohlen, Campaign Treasurer, SAFA Committee for Election Integrity (00086051)
13. Discussion and possible action regarding the termination of a campaign treasurer appointment for the following inactive political committees and individuals:

**Political Committees**

1. Galveston County Connects PAC, Sarah M. Dougherty, Treasurer (00086188)
2. Yes on 3 for Liberty, Lori L. Gallagher, Treasurer (00085999)

**OTHER MATTERS**

14. Adjourn.

**CERTIFICATION:** I certify that I have reviewed this document and that it conforms to all applicable Texas Register filing requirements. Certifying Official & Agency Liaison: J.R. Johnson, Executive Director.

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The draft meeting minutes will be available on our website the day before the meeting, at <https://www.ethics.state.tx.us/DraftMinutes>.

If you would like a copy of the draft minutes, please provide your email address below, and return this sheet to Ethics Commission staff at the meeting.

Email address:

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## Exhibit C

### Text of Proposed Rule

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The proposed new language is indicated by underlined text.

The deleted language is indicated by [~~striketrough~~] text.

### CHAPTER 18. GENERAL RULES CONCERNING REPORTS

#### **§18.10. Guidelines for Substantial Compliance for a Corrected/Amended 8-day Pre-election Report.**

(a) A corrected/amended 8-day pre-election report substantially complies with the applicable law and will not be assessed a late fine under §18.9 of this title (relating to Corrected/Amended Reports) if:

(1) The original report was filed in good faith and the corrected/amended report was filed not later than the 14th business day after the date the filer learned of the errors or omissions; and

(2) The only corrections/amendments needed were to correct the following types of errors or omissions:

(A) a technical, clerical, or *de minimis* error, including a typographical error, that is not misleading and does not substantially affect disclosure;

(B) an error in or omission of information that is solely required for the commission's administrative purposes, including a report type or filer identification number;

(C) an error that is minor in context and that, upon correction/amendment, does not result in changed monetary amounts or activity disclosed, including a descriptive change or a change to the period covered by the report;

(D) one or more errors in disclosing contributions that, in total:

(i) do not exceed \$32,000; or

(ii) do not exceed the lesser of 10% of the total contributions on the corrected/amended report or \$10,000;

(E) one or more errors in disclosing expenditures that, in total:

(i) do not exceed \$32,000; or

(ii) do not exceed the lesser of 10% of the total expenditures on the corrected/amended report or \$10,000;

(F) one or more errors in disclosing loans that, in total:

**Exhibit C**

- 1 (i) do not exceed \$~~32~~,000; or
- 2 (ii) do not exceed the lesser of 10% of the amount originally disclosed or
- 3 \$10,000; or

4 (G) an error in the amount of total contributions maintained that:

- 5 (i) does not exceed \$~~3,000~~250; or
- 6 (ii) does not exceed the lesser of 10% of the amount originally disclosed or
- 7 \$~~10,000~~2,500.

8 (H) The only correction/amendment by a candidate or officeholder was to add  
 9 to or delete from the outstanding loans total an amount of loans made from  
 10 personal funds;

11 (I) The only correction/amendment by a political committee was to add the  
 12 name of each candidate supported or opposed by the committee, when each  
 13 name was originally disclosed on the appropriate schedule for disclosing  
 14 political expenditures;

15 (J) The only correction/amendment was to disclose the actual amount of a  
 16 contribution or expenditure, when:

- 17 (i) the amount originally disclosed was an overestimation;
- 18 (ii) the difference between the originally disclosed amount and the  
 19 actual amount did not vary by more than 10%; and
- 20 (iii) the original report clearly included an explanation of the estimated  
 21 amount disclosed and the filer's intention to file a  
 22 correction/amendment as soon as the actual amount was known; or

23 (K) The only correction/amendment was to delete a duplicate entry.

24 (b) The executive director shall determine whether an 8-day pre-election report as originally filed  
 25 substantially complies with applicable law by applying the criteria provided in this section.

26 (c) In this section, "8-day pre-election report" means a report due eight days before an election  
 27 filed in accordance with the requirements of §20.213(d), 20.325(e), or 20.425(d) of this title  
 28 (relating to a candidate, a specific-purpose committee, or a general-purpose committee,  
 29 respectively) and §254.064(c), 254.124(c), or 254.154(c) of the Election Code (relating to a  
 30 candidate, a specific-purpose committee, or a general-purpose committee, respectively).

Exhibit C

1 ~~§18.11 Guidelines for Waiver or Reduction of a Late Fine for a Corrected/Amended 8-day~~  
 2 ~~Pre-election Report.~~

3 ~~(a) A filer who has filed a corrected/amended 8-day pre-election report may request the executive~~  
 4 ~~director to waive or reduce a late fine assessed under §18.9 of this title (relating to~~  
 5 ~~Corrected/Amended Reports) by submitting an affidavit to the executive director. The executive~~  
 6 ~~director shall waive a late fine if the report meets the criteria in subsection (b) of this section and~~  
 7 ~~shall reduce a late fine if the report meets the criteria in subsection (c) of this section.~~

8 ~~(b) A late fine for a correction/amendment to an 8-day pre-election report shall be waived if:~~

9 ~~(1) The corrected report was filed not later than the fourth day after the original report due~~  
 10 ~~date;~~

11 ~~(2) The only correction/amendment by a candidate or officeholder was to add to or delete~~  
 12 ~~from the outstanding loans total an amount of loans made from personal funds;~~

13 ~~(3) The only correction/amendment by a political committee was to add the name of each~~  
 14 ~~candidate supported or opposed by the committee, when each name was originally~~  
 15 ~~disclosed on the appropriate schedule for disclosing political expenditures; or~~

16 ~~(4) The only correction/amendment was to disclose the actual amount of a contribution or~~  
 17 ~~expenditure, when:~~

18 ~~(A) the amount originally disclosed was an overestimation;~~

19 ~~(B) the difference between the originally disclosed amount and the actual amount~~  
 20 ~~did not vary by more than 10%; and~~

21 ~~(C) the original report clearly included an explanation of the estimated amount~~  
 22 ~~disclosed and the filer's intention to file a correction/amendment as soon as the~~  
 23 ~~actual amount was known.~~

24 ~~(c) A late fine for a correction/amendment to an 8-day pre-election report that does not meet the~~  
 25 ~~criteria for a waiver under subsection (b) of this section shall be reduced as follows:~~

26 ~~(1) If the corrected/amended report was filed more than four days after the original report~~  
 27 ~~due date but was filed before the election day, the late fine is reduced to \$500;~~

28 ~~(2) If the corrected/amended report was filed after the election and the amount of the~~  
 29 ~~incorrectly reported or unreported activity was more than 10% of the total amount disclosed~~  
 30 ~~on the corrected/amended report but did not exceed the lesser of 25% of the total amount~~  
 31 ~~of activity, or \$5,000, the late fine is reduced to \$1,000; or~~

32 ~~(3) If the amount of the incorrectly reported or unreported activity was more than 40% of~~  
 33 ~~the total amount disclosed in the corrected/amended report and the corrected/amended~~  
 34 ~~report was filed over a year after the election, the late fine is reduced to 10% of the amount~~  
 35 ~~at issue.~~

**Exhibit C**

1 ~~(d) A late fine that is reduced under this section will revert to the full amount originally assessed~~  
2 ~~if the reduced fine is not paid on or before the 30th calendar day after the date of the notice~~  
3 ~~informing the filer of the reduction.~~

4 ~~(e) A filer may appeal a determination made under this section by submitting a request in writing~~  
5 ~~to the commission.~~

6 ~~(1) The request for appeal should state the filer's reasons for requesting an appeal, provide~~  
7 ~~any additional information needed to support the request, and state whether the filer would~~  
8 ~~like the opportunity to appear before the commission and offer testimony regarding the~~  
9 ~~appeal.~~

10 ~~(2) After hearing a request for appeal, the commission may affirm the determination made~~  
11 ~~under this section or make a new determination based on facts presented in the appeal.~~

12 ~~(f) This section does not apply to a civil penalty assessed through the sworn complaint process or~~  
13 ~~facial compliance review process.~~

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# TEXAS ETHICS COMMISSION




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ETHICS ADVISORY OPINION NO. \_\_\_\_

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*[Date]*

## ISSUE

Whether expenditures made by a former legislator for general administration of his own campaign account are “direct campaign expenditures” that trigger the Section 253.007 two-year waiting period before engaging in activity that would require registration as a lobbyist. (*AOR-692*).

## SUMMARY

No. Expenditures made by a candidate or officeholder that benefit only his or her own campaign are not “direct campaign expenditures” and therefore do not trigger the Section 253.007 lobby waiting period.

## FACTS

The requestor is a former legislator who is not running for re-election. The requestor has used campaign contributions he accepted as an officeholder or candidate for small expenditures related to the maintenance of his campaign account or “residual items” from his past political campaigns. Examples of the expenditures include bank fees, paying for storage of campaign assets until they can be disposed of, and paying for the maintenance of campaign email accounts so the emails are not lost.

The requestor has not used his campaign contributions to make contributions to another candidate or committee, or to make direct campaign expenditures supporting other candidates or measures.

## ANALYSIS

Section 253.007 of the Election Code prohibits a person from engaging in activities that require the person to register under Chapter 305 of the Government Code during the two-year period after the date the person knowingly makes or authorizes certain political contributions or makes a “direct campaign expenditure[] from political contributions accepted by the person as a candidate or officeholder.” Tex. Elec. Code § 253.007.

A “direct campaign expenditure” is “a campaign expenditure that does not constitute a campaign

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contribution by the person making the expenditure.” *Id.* § 251.001(8). “A campaign expenditure does not constitute a contribution by the person making the expenditure to a candidate or officeholder if the expenditure is made without the prior consent or approval of the candidate or officeholder on whose behalf the expenditure is made.” *Id.*

An expenditure made by a candidate or officeholder to benefit only his or her own campaign is not a contribution, which seems to fit the first part of the definition of direct campaign expenditure. However, the reference to prior consent or approval from the benefitting candidate in second half of the definition evidences a clear legislative intent that a direct campaign expenditure is an expenditure to benefit someone other than the person making the expenditure.

The relevant part of the definition of “direct campaign expenditure” states that an expenditure is not a contribution to a candidate or officeholder if it is made without the prior consent or approval of the candidate who benefits from the expenditure. *Id.* A candidate cannot knowingly make an expenditure for his or her own benefit without his or her own consent or approval. Therefore, by definition, an expenditure made by a candidate to benefit only him or herself cannot be a direct campaign expenditure. Accordingly, an expenditure by a candidate or officeholder that only benefits that candidate or officeholder’s campaign, including expenditures associated with winding up their own account, would not trigger the Section 253.007 waiting period.

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# TEXAS ETHICS COMMISSION



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ETHICS ADVISORY OPINION NO. \_\_\_\_

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[Date]

## ISSUE

Whether certain communications with a member of the legislative or executive branch to engender goodwill are communications to “influence legislative or administrative action.” (AOR-694).

## SUMMARY

A “communication to influence legislative or administrative action” includes any communication to establish (*i.e.* bring about, effect) goodwill that is made for the purpose of later communicating with the member to influence legislation or administrative action. This is true regardless of whether prior feelings of goodwill exist.

## FACTS

The requestor is a “former legislator who wishes to conduct his activities in a manner that ensures compliance with the Texas lobby law and the Commission’s advisory opinions and rules.” To that end, the requestor asks whether communications to “maintain” goodwill with a state official are considered communications to influence legislative or administrative action for the purpose of Chapter 305 of the Government Code (the lobby law).

## ANALYSIS

The lobby law generally regulates direct communications with “one or more members of the § 305.003(a)(1). executive branch to influence legislation or administrative action.” Tex. Gov’t Code

Since nearly its inception, the Texas Ethics Commission has considered communications to generate goodwill with legislative or executive branch officials to be made to “influence legislation or administrative action.” Tex. Ethics Comm’n Op. No. 4 (1992); *See also* Tex. Ethics Comm’n Op. No. 34 (1992) (weekly “parties are communications to generate goodwill toward the host on the part of members of the legislative branch. Such communications are therefore to influence legislative action”); Tex. Ethics Comm’n Op. No. 46 (1992); Tex. Ethics Comm’n Op. No. 94

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(1992).

The Commission has used different terms to describe communications made to engender or generate goodwill in advisory opinions, including “to create goodwill” or to “generate or maintain” goodwill. Tex. Ethics Comm’n Op. Nos. 467 (2006), 517 (2014), 113 (1993).

In 2015, the 84th Legislature codified the Commission’s interpretation regarding goodwill communications by adding Section 305.002(2-a) to the Lobby Code, which reads:

“Communicates directly with a member of the legislative or executive branch to influence legislation or administrative action” or any variation of the phrase includes establishing goodwill with the member for the purpose of later communicating with the member to influence legislation or administrative action.

Act of May 27, 2015, 84<sup>th</sup> Leg., R.S., ch. 1262, 2015 Tex. Gen. Laws 4272, (codified at Tex. Gov’t Code § 305.002(2-a)).

The requestor contends that by using the word “establishing” with respect to goodwill, the legislature meant to exclude communications made to “maintain” goodwill. To further his argument, the requestor points to a dictionary definition of “establish” to mean “bring about, effect.”

The requestor seems to conceptualize goodwill as a fixed binary where either goodwill exists or does not. In his view, once he has established goodwill with a member of the legislature, a subsequent communication meant to engender further feelings of goodwill is to “maintain,” not establish, goodwill. As a consequence, he contends a communication to “maintain” goodwill is not covered by the lobby law. This is not so.

Goodwill is not a fixed state. Instead, it is an “*attitude*” or “a kindly *feeling* of approval or support.” Merriam-Webster Dictionary Online available at <https://www.merriam-webster.com/dictionary/goodwill>; *See also Oxford English Dictionary* available at <https://www.oed.com/search/dictionary/?scope=Entries&q=Goodwill>. Attitudes and feelings can be fleeting and subject to change in response to changed circumstances or even just the passage of time.

Goodwill is also not a binary that is either established or not. One can have strong or weak feelings of goodwill toward a person. Even if some feelings of goodwill can be said to be “established,” subsequent communications may “bring about” or “effect” more or stronger positive feelings. If those communications to bring about more feelings of goodwill are made for the purpose of later communicating with the member to influence legislation or administrative action, they are regulated as lobby communications. Tex. Gov’t Code § 305.002(2-a). The idea of goodwill not existing as a binary, but as a feeling that can be added to or subtracted from, is consistent with how the term “goodwill” is used in other contexts. For example, in business, “goodwill” is “a term encompassing all intangible value associated with a business” that is routinely quantified and assigned a monetary value. *See, e.g., Welder v. Green*, 985 S.W.2d 170, 179 (Tex. App.—Corpus Christi 1998, pet. denied).



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Under the plain language of the statute, whether a communication is made to influence legislation or administrative action turns on the lobbyist's purpose in making the communication. As properly understood, a "communication to influence legislative or administrative action" includes any communication to establish (i.e. bring about, effect) goodwill that is *made for the purpose* of later communicating with the member to influence legislation or administrative action. This is true regardless of whether prior feelings of goodwill exist.

DRAFT

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# TEXAS ETHICS COMMISSION



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ETHICS ADVISORY OPINION NO. \_\_\_\_

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*[Date]*

## ISSUE

Whether the Chapter 572 of the Government Code revolving door provisions apply to a former State Board of Education member's appearing before the Texas Education Agency, the Texas Commissioner of Education, or the Texas Permanent School Fund Corporation. (*AOR-685*).

## SUMMARY

A former State Board of Education (SBOE) member must wait two years before appearing before or seeking to influence the Permanent School Fund Corporation on behalf of another because the Corporation board contains SBOE members. Tex. Gov't Code § 572.054(a).

A former SBOE member must wait two years after ceasing service as an officer before appearing before or seeking to influence the Commissioner of Education on behalf of another because the Commissioner is an officer of the SBOE for purposes of Section 572.054(a).

The requestor would be subject to the Section 572.054(a) restriction with respect to Texas Education Agency employees if they were also employees of the SBOE under the common law employee-employer test.

Section 572.054(b) would prohibit a former SBOE member from ever receiving compensation for working on contracts in which they participated as a SBOE member even if the SBOE subsequently amended these contracts to make the Permanent School Fund Corporation a party rather than the SBOE.

## FACTS

The requestor is a former member of the Texas State Board of Education (SBOE). The requestor asks a series of questions involving the revolving door provisions in Chapter 572 of the Government Code and their applicability to the SBOE and three related entities, the Commissioner of Education (Commissioner), the Texas Education Agency (TEA), and the Texas Permanent School Fund Corporation (Corporation).

**STAFF DRAFT; NOT FINAL UNLESS ADOPTED BY COMMISSION****Texas Education Agency**

The Texas Education Agency is comprised of agency staff and the Commissioner. Tex. Educ. Code §§ 5.001, 7.002(a). The Commissioner is the TEA's "executive officer." Tex. Educ. Code § 7.055(b)(1), (2). As TEA's executive officer, the Commissioner is responsible for managing the powers and duties of the TEA laid out in Section 7.021 of the Education Code. The Legislature provides an appropriation for the TEA.

**The Commissioner of Education**

The Commissioner is the "educational leader of the state," appointed to a four year term of office as the "executive officer" of the TEA and the "executive secretary" of the SBOE by the governor, with the advice and consent of the senate. Tex. Educ. Code §§ 7.051, .052, .055(b)(1), (2). The Commissioner is only removable by the governor with the advice and consent of senate. *Id.* § 7.053.

As the executive secretary of the SBOE, the Commissioner both carries out duties imposed by the SBOE and advises and assists the SBOE with carrying out its duties. *See* Tex. Educ. Code §§ 7.055(b)(3), 7.102(b).

**The SBOE**

The SBOE is comprised of 15 elected members. Tex. Educ. Code § 7.101. Under the heading of "officers," the Education Code specifies that the chair of the SBOE is appointed by the governor with the advice and consent of the senate. Tex. Educ. Code § 7.107. The SBOE elects its own vice chair and a secretary. *Id.*

The SBOE has no staff. The Commissioner is its executive secretary and TEA provides staff for the SBOE. The SBOE must carry out the duties assigned to it in the Education Code "with the advice and assistance of the [C]ommissioner." Tex. Educ. Code § 7.102(b).

The Legislature does not provide an appropriation for the SBOE. The SBOE has four standing committees, one of which is the Committee on School Finance/Permanent School Fund. *See* SBOE Operating Rules § 1.2. At issue here is the SBOE's duty to manage and distribute the Permanent School Fund (PSF) through its own control or through a corporation it created to manage the fund. *See* Tex. Educ. Code ch. 43, Tex. Const. art. 7, §§3(b), 5.

**The Corporation**

The PSF was created in 1845 as a perpetual fund to support the state's public schools. Until 2021, the SBOE administered the Texas Permanent School Fund. In 2021, the Legislature authorized the SBOE to form a corporation and delegate to it the authority to manage the PSF. *See* Tex. Educ. Code § 43.052. The SBOE formed the Corporation on December 1, 2021, and effective January 1, 2023, transferred the PSF's assets to the Corporation. The SBOE also transferred all contracts relating to the PSF to the Corporation, which were amended to specify that the contracts were now with the Corporation, despite initially being executed with the SBOE. Finally, the SBOE also delegated the authority to manage the PSF to the Corporation.

A nine-member board of directors governs the Corporation. Tex. Educ. Code § 43.053(a).

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However, the SBOE still exercises some degree of control. Five members of the Corporation’s directors must be SBOE members, appointed by the SBOE. *Id.* § 43.053(a)(1). Any changes to the articles of incorporation or the Corporation’s bylaws must be approved by the SBOE. Tex. Educ. Code § 43.063(a), (b). Currently, the Corporation’s staff is composed of both new hires and individuals who were previously employed by TEA to manage the PSF. The Legislature does not provide an appropriation for the Corporation.

**ANALYSIS**

Chapter 572 of the Texas Government Code contains three different “revolving door” provisions applicable to former state officers or employees. Tex. Gov’t Code §§ 572.054(a), 572.054(b), and 572.069.

**The First Revolving Door Applies to the Requestor**

Section 572.054(a) prohibits a former member of the governing body or former executive head of a regulatory agency, for two years after ceasing to be a member or executive head of a regulatory agency from, “mak[ing] any communication to or appearance before an officer or employee of the agency in which the member or executive head served . . . if the communication or appearance is made: (1) with the intent to influence; and (2) on behalf of any person in connection with any matter on which the person seeks official action.” Tex. Gov’t Code § 572.054(a).

As a former member of the SBOE, the requestor is subject to Section 572.054(a). The requestor asks whether he must wait two years from ceasing to be an SBOE member before making communications or appearing before the Corporation, Commissioner, or TEA employees.

The answer to each depends on the relationship between the SBOE, the Commissioner, the Corporation, and the TEA. The overlapping structure and responsibilities of each make this a novel question. Even the TEA’s own organization chart reflects the ambiguity by placing the SBOE on its organizational chart, level with the Commissioner, but with arrows touching no other part of the chart.<sup>1</sup>

*Communications with the Corporation*

The requestor must wait two years before appearing before or seeking to influence the Corporation on behalf of another because the Corporation board contains SBOE members.

Section 572.054 prohibits certain communications or appearances before “*an officer or employee of the agency in which the member . . . served.*” Tex. Gov’t Code § 572.054(a). Although the SBOE and Corporation are separate entities, five SBOE members sit on the Corporation’s board. Appearing before the Corporation will therefore inevitably require the requestor to appear before “*an officer . . . of the agency in which the member . . . served.*” *Id.*

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<sup>1</sup> <https://tea.texas.gov/about-tea/welcome-and-overview/tea-organization-chart.pdf>.

**STAFF DRAFT; NOT FINAL UNLESS ADOPTED BY COMMISSION***Communications with the Commissioner*

The requestor must wait two years before appearing before or seeking to influence the Commissioner on behalf of another because the Commissioner is an officer of the SBOE.

Chapter 572 of the Government Code defines a “state officer” as “an elected officer, an appointed officer, a salaried appointed officer, an appointed officer of a major state agency, or the executive head of a state agency.” Tex. Gov’t Code § 572.002(12).

An appointed officer is, in relevant part, “an officer of a state agency who is appointed for a term of office specified by the Texas Constitution or a statute of this state.” Tex. Gov’t Code § 572.002(1).

In our opinion, the Commissioner is an officer of the SBOE for purposes of Chapter 572 because he is appointed to a term of service as the “executive secretary” of the SBOE. Tex. Educ. Code § 7.055(b)(2); *see also* Tex. Ethics Comm’n Op. No. 381 (1997) (EAO 381) (finding a salaried, solitary gubernatorial appointee who serves for a specific term pursuant to statute and oversees an agency’s daily operation is an “appointed officer”). As executive secretary, the Commissioner plays an integral role for the SBOE. The Commissioner provides staff for the SBOE through the TEA and the SBOE is required to carry out its duties “with the advice and assistance of the [C]ommissioner.” Tex. Educ. Code § 7.102(b). Similar to the appointed official in EAO 381, the Commissioner is an officer of the SBOE.

*Communications with TEA employees*

As noted above, Section 572.054(a) prohibits certain communications or appearances “before an officer or *employee* of the agency in which the member or executive head served.” Whether Section 572.054(a) would apply to communications or appearances before TEA employees turns on whether some or all TEA employees can be considered employees of the SBOE.

The SBOE does not have staff. Instead, the TEA provides administrative staff to the SBOE. However, in interpreting the terms “employee” or “employed,” in Chapter 572, we have applied the common law test of employment. Tex. Ethics Comm’n Op. No. 545 (2017). Generally, an employer’s right or ability to control the manner and means by which an individual renders services is sufficient to establish an employment relationship. *See id.*

An individual also may be the employee of more than one employer. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 538 (Tex. 2002). An individual is an employee of two or more joint employers if: (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers each control or supervise such rendering of services. Restatement (Third) of Employment Law: Employees of Two or More Employers § 1.04(b) (2015).

The requestor would be subject to the Section 572.054(a) restriction with respect to TEA employees if they were also employees of the SBOE under the common law employee-employer test. Whether TEA employees are also employees of the SBOE depends on specific facts not provided in the advisory opinion request. We are not able to resolve disputed facts in an advisory opinion. 1 Tex. Admin. Code § 8.3(d).

**STAFF DRAFT; NOT FINAL UNLESS ADOPTED BY COMMISSION****Revolving Door #2**

The requestor next asks whether the revolving door prohibition that generally prohibits a former state officer or employee from receiving compensation for working on the same particular matter in which the officer or employee participated as a state officer applies to contracts that were originally entered into by the SBOE, but amended to be contracts with the Corporation. The requestor specifically asks:

Does Texas Government Code § 572.054(b) prohibit former SBOE members from ever receiving compensation under contracts in which they participated when the contracts were with the SBOE if the contracts were subsequently amended to be contracts with the Corporation?

For the reasons stated below, Section 572.054(b) would prohibit such activity.

Section 572.054(b) prohibits *all* former state officers and employees of regulatory agencies from receiving any compensation for services rendered on behalf of any person “regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer’s or employee’s official responsibility.” Tex. Gov’t Code § 572.054(b).

The statutory definition of “particular matter” is “a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest, or judicial or other proceeding.” Tex. Gov’t Code § 572.054(h)(2). We have previously opined that the “term ‘particular matter’ refers to a particular proceeding rather than to a particular subject matter ...” Tex. Ethics Comm’n Op. No. 496 (2011). Similarly, former state employees are not prohibited from working in subject areas or for employers with which they became familiar in the course of their state employment. *Id.* (citing Tex. Ethics Comm’n Op. No. 364 (1997)). Furthermore, in Ethics Advisory Opinion No. (“EAO”) 397, we determined that “[s]eparate contracts are separate ‘matters’ for purposes of the revolving door provision in Government Code section 572.054(b).” Tex. Ethics Comm’n Op. No. 397 (1998).

The facts provided by the requestor presume that the requestor participated in the contracts that the SBOE later transferred to the Corporation. In this case, it is irrelevant whether the original contract with the SBOE and the amended contract with the Corporation are different particular matters. Even if the amended contract is a different particular matter, the SBOE member would have participated in that matter by effecting the transfer as a board member. Therefore, the requestor would be prohibited from receiving compensation under contracts in which they participated as a SBOE member regardless of whether the contract was subsequently transferred to the Corporation.

**Revolving Door #3**

Finally, the requestor asks whether the third revolving door provision, related to procurements and contract negotiations, applies to previously executed investment transactions conducted by the Corporation that were ratified by the SBOE.

Section 572.069 prohibits all former state officers and employees who “participated on behalf of a state agency in a procurement or contract negotiation” from accepting employment from a

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“person” involved in that procurement or contract negotiation for two years after the contract is signed or the procurement is terminated or withdrawn. Tex. Gov’t Code § 572.069.

The Government Code does not define procurement or contract negotiation. However, we have looked to the State of Texas Procurement and Contract Management Guide, published by the Texas Comptroller of Public Accounts, which identifies “common characteristics between all procurements,” including “defin[ing] the business need,” “select[ing] the vendor that provides the best value to the State,” and “ensur[ing] that the awarded contract complies with applicable procurement law and contains provisions that achieve the procurement objectives.” Tex. Ethics Comm’n Op. No. 571 (2022).<sup>2</sup> We have emphasized that a procurement involves an agency’s acquisition of goods and services. *Id.*

Although Section 572.069 does not define the word “participated,” we have previously applied the definition found in a companion revolving door law prohibition, Section 572.054. *See* Tex. Ethics Comm’n Op. Nos. 568 (2021), 586 (2023). We apply that same definition here. “Participated” means “to have taken action as an officer or employee through *decision, approval, disapproval, recommendation, giving advice, investigation, or similar action.*” Tex. Gov’t Code § 572.054(h)(1) (emphasis added).

The requestor asks whether ratification by the SBOE of previously executed investment transactions constitutes participation in a procurement under Section 572.069. The SBOE often votes to ratify the purchase and sale of investments executed by the PSF staff. The requestor asserts that the SBOE never engaged in contract negotiations for these purchases and sales before voting to ratify the transactions.

The purchase or sale of investments clearly constitutes a procurement or contract negotiation. Ratification is a form of approval by the SBOE of these procurements or contract negotiations. *See* 572.054(h)(1) (participation includes decision, approval, or disapproval). Therefore, regardless of the involvement in the contract negotiations before ratification, the requestor participated in a procurement for each transaction subject to a ratification vote for purposes of Texas Government Code § 572.069.

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<sup>2</sup> <https://comptroller.texas.gov/purchasing/docs/96-1809.pdf>

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# TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. \_\_\_\_

*[Date]*

## ISSUE

Whether a former state employee may provide consulting services to company with which he participated in a procurement during his state service without violating Section 572.069 of the Government Code. (*AOR-695*).

## SUMMARY

The requestor may provide consulting services to a company with which he participated in a procurement during his state service without violating Section 572.069 provided he does not become an employee of the company as defined by the common law employee-employer test.

## FACTS

The requestor is a former employee of a state agency, who during his state employment, participated in procurements involving several businesses. The requestor is now part-owner of a consulting business. The consulting business seeks to contract with one or more businesses that were involved in procurements in which the requestor participated in during his state service.<sup>1</sup>

The requestor asks whether he may provide consulting services to a covered business through his consulting company.

## ANALYSIS

Chapter 572 of the Government Code includes three revolving door prohibitions applicable to certain former state employees. At issue in this request is Section 572.069, which states:

A former state officer or employee of a state agency who during the period of state service or employment participated on behalf of a state agency in a procurement or contract negotiation involving a person may not accept

<sup>1</sup>For the sake of brevity, a business with which the requestor participated in a procurement as a statement employee will be referred to as a “covered business.”



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employment from that person before the second anniversary of the date the contract is signed or the procurement is terminated or withdrawn.

Tex. Gov't Code § 572.069.

The requestor states that he participated in a procurement with a business to which he now seeks to provide consulting services through a company he owns. Therefore, the revolving door prohibition would apply if he accepts “employment” from the business to which he provides consulting services.

We have interpreted the term “employment” in Chapter 572 consistent with the common law test of employment. Tex. Ethics Comm'n Op. No. 545 (2017) (“When a statute uses the terms ‘employee’ or ‘employed,’ or otherwise refers to an ‘employment’ relationship, courts [and the Commission] will use the common law test of employment unless the statute dictates otherwise.”).

Under the common law test, generally, an individual renders services as an employee of an employer if:

- (1) The individual acts, at least in part, to serve the interests of the employer;
- (2) The employer consents to receive the individual's services; and
- (3) The employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson.

Restatement (Third) of Employment Law: Conditions for Existence of Employment Relationship § 1.01(a) (2015). Under the “right to control” test, an employer's right or ability to control the manner and means by which an individual renders services is sufficient to establish an employment relationship. *See* Tex. Att'y Gen. Op. No. GA-0292 at 4 (2005) (test to determine whether a person is an employee rather than independent contractor is whether the employer has a right to control the progress, details, and methods of operations of the work); *see also* Tex. Att'y Gen. Op. No. DM-409, at 5 (1996) (considering whether employer has right to control details of work).

In applying this test, we have looked to the actual relationship between the former state employee and the potential employer. In Ethics Advisory Opinion No. 572, a former state agency employee was employed by a staffing company. The former state agency employee sought to be placed by the staffing company with a business with which he had participated in a procurement as a state employee. Like this request, the requestor in EAO 572 sought to provide “consulting services” to the business. We held that even though the requestor was an employee of the staffing company, he would be an employee of the business where he was placed as well, because that business would have the right or ability to control the manner and means by which the requestor would render services.

In this case, regardless of whether the business contracts with a company owned by the requestor, the requestor will be subject to the Section 572.069 restriction if he enters into an employment relationship with a covered business. The facts the requestor provided indicate that he would not be employed by the covered business. The requestor stated that the “clients do not control the manner and means by which the services are rendered as they do not prescribe the specific methods,

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techniques, processes, or approaches used to deliver the services.” For the purpose of this opinion we assume those facts to be true. *See* Tex. Ethics Comm’n Op. No. 582 (2022).

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# TEXAS ETHICS COMMISSION




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ETHICS ADVISORY OPINION NO. \_\_\_\_

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*[Date]*

## ISSUE

Whether Chapter 572 of the Government Code prohibits a former employee of a regulatory agency from accepting certain employment. (*AOR-696*).

## SUMMARY

The requestor is not a member of the governing body or the executive head of a regulatory agency, so Section 572.054(a) does not apply. The requestor is not proposing to participate in any particular matter in which he participated as a state employee, so Section 572.054(b) would not prevent the requestor from engaging in his proposed employment. Merely reviewing a contract for conformity with certain form requirements, such as naming the correct party, does not constitute participating in the contract negotiation for purposes of Section 572.069. However, if the requestor gave approval, advice, or recommendation on whether to enter into a contract at all, or a substantive term of the contract such as how many employees to station at a given facility, he participated in that contract negotiation. If he participated in the contract negotiation, he would have to wait two years from when the contract was signed before accepting employment from any other person involved in that contract negotiation under Section 572.069.

## FACTS

The requestor currently works in a supervisory role in the Outstationed Worker Program (OWP) of the Texas Health and Human Services Commission. The OWP provides staff to healthcare facilities to make determinations as to whether patients of the healthcare facilities qualify for benefits administered by the state. The state then invoices the healthcare facilities for the cost of the workers provided by the state. The requestor described his role as it relates to OWP contracts as follows:

[S]ince these are Revenue Generating contracts and the fact they are boilerplate contracts and all the contract managers do is fill in the name of the contractor (recipient) and list the contractor's Primary, Legal, Signatory and IT

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Representatives. It is not like we are negotiating the terms. The terms are all set and every contractor receives the same template and the same wording. No negotiation take place by the contract managers or myself as to content of the contract but only the names and how many units and the facilities that we will cover. . . . I see every contract. Before sending them my boss has to approve on HHSC side along with five others in Senior Leadership. The contract managers under me draw up the contracts and I check them for accuracy but we never change the terms of the contract since legal, program and 10 other areas must approved the template prior to legal approving it for us. Once approved, we use the same template for all the contractors. There price is also constant for all 220 contracts. . . . No negotiations are done by the contract manager. I touch them all but just to make sure they have not been changed and all the contractor's information is listed correctly.

The requestor plans on leaving the Texas Health and Human Services Commission to be employed by a company that operates several medical facilities that has several existing OWP contracts. The requestor states the company wants his help in expanding. He expects to "help to manage the payments to the state each month as well as the vast work involved with the determination of eligibility at all their sites and quality control of the work each day." The requestor states that the functions he would perform for the company "are completely different from what I work with daily [at HHSC] in writing and delivering services to the contractors by managing the contracts and collecting the funds." He further stated, "I will not be handling the [OWP] contracts at all for them."

**ANALYSIS**

Chapter 572 of the Texas Government Code contains three different "revolving door" provisions. *See* Tex. Gov't Code §§ 572.054(a), 572.054(b), and 572.069. The first of these provisions, section 572.054(a), applies only to "[a] former member of the governing body or a former executive head of a regulatory agency." Tex. Gov't Code § 572.054(a). Because the requestor is neither a member of HHSC's governing body nor the agency's executive head, this provision does not prohibit him from accepting any potential employment.

The second revolving door provision prohibits *all* former state officers and employees of regulatory agencies from receiving any compensation for services rendered on behalf of any person "regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility." Tex. Gov't Code § 572.054(b).

This law prohibits a former state employee from working on a "particular matter" the former state employee "participated" in as an employee of the state agency.

"Particular matter" is defined as "a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest, or judicial or other proceeding." Tex. Gov't Code § 572.054(h)(2).

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Former state employees are not prohibited from working in subject areas or for employers with which they became familiar in the course of their state employment. *Id.* See also Tex. Ethics Comm'n Op. No. 364 (1997). Instead, the "term 'particular matter' refers to a particular proceeding rather than to a particular subject matter . . ." Tex. Ethics Comm'n Op. No. 496 (2011). Furthermore, in Ethics Advisory Opinion ("EAO") No. 397, the Commission determined that "[s]eparate contracts are separate 'matters.'" Tex. Ethics Comm'n Op. No. 397 (1998).

Based on the facts presented by the requestor, he would not be prohibited by Section 572.054(b) from accepting prospect employment. The requestor states he would not work on existing OWP contracts. Rather, he would be helping with the company's operations and expansion. These are not the same particular matters that he worked on as an HHSC employee. Nor would the requestor be prohibited by Section 572.054(b) in helping the prospective employee secure new contracts with the state because different contracts are different particular matters. Tex. Ethics Comm'n Op. No. 397 (1998).

The third revolving door provision, section 572.069, prohibits all former state officers and employees who "participated on behalf of a state agency in a procurement or contract negotiation" from accepting employment from "a person" involved in that procurement or contract negotiation for two years after the date the contract is signed or the procurement is terminated or withdrawn. Tex. Gov't Code § 572.069.

Unlike section 572.054(b), this provision does not merely prohibit former state agency employees from working on particular matters in their new employment. Instead, it prohibits former state agency employees from accepting *any* employment from certain persons for two years, even if the private employment is unrelated to anything they worked on during their state service.

Section 572.069 does not define the term "participated." However, we have relied on the meaning of "participated" in Section 572.054 when construing Section 572.069, and apply that meaning here. *See* Tex. Ethics Comm'n Op. No. 568 (2021). "Participated" means "to have taken action as an officer or employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action." Tex. Gov't Code 572.054(h)(1).

The requestor stated he was a supervisor in the OWP, which entered into contracts with healthcare providers. Unlike typical state contracts where the state pays for goods or services, with the OWP contracts, the state receives revenue for providing services to a private business. Although it is not clear whether these arrangements are "procurements," they are contracts and therefore covered by Section 572.069.

We have not addressed in an advisory opinion the scope of the term "participation" in contract negotiation that was not also a procurement. However, we have held that a supervisor did not "participate" in a procurement on behalf of a state agency merely by keeping informed of the status of agency procurements. Tex. Ethics Comm'n Op. No. 568 (2021). But scoring and evaluating a bid proposal is participating in a procurement. Tex. Ethics Comm'n Op. No. 545 (2017).

The term "contract negotiation" is not defined in Chapter 572. To "negotiate" is "to confer with another so as to arrive at the settlement of some matter." Merriam Webster Dictionary Online available at <https://www.merriam-webster.com/dictionary/negotiate>. A state employee does not

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need to have personal contact with the counterparty to participate in a contract negotiation. A state employee participates in a negotiation by providing, among other things, approval, disapproval, or recommendation. *See* Gov't Code § 572.054(h)(1).

The requestor states his only involvement in the contract was to ensure that it was in the correct form, named the correct parties, and included the correct contact information. The facts do not indicate that he made contact with or discussed the terms of the contract with the counterparty. Nor did the requestor have the authority to change the terms of the contract. Merely reviewing a contract for conformity with certain form requirements, such as naming the correct party, does not constitute participating in the contract negotiation. As such, Section 572.069 would not prohibit the requestor from accepting immediate employment with a company if he only conducted a form review for a contract with HHSC.

However, it is not clear from the request whether the requestor gave approval, advice, or a recommendation on whether to enter into a contract with a given facility or the number of employees to station at a given facility. If the requestor gave approval, advice, or recommendation on whether to enter into a contract at all, or a substantive term of the contract such as how many employees to station at a given facility, he participated in that contract negotiation. As a consequence, he would have to wait two years from when the contract was signed before accepting employment from any person involved in that contract negotiation under Section 572.069.

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# TEXAS ETHICS COMMISSION



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ETHICS ADVISORY OPINION NO. \_\_\_\_

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*[Date]*

## ISSUE

How various provisions of title 15 of the Texas Election Code apply to a Texas “purpose trust” formed under Section 112.121, Texas Property Code. (AOR-697).

## SUMMARY

A purpose trust comprised entirely of funds from an individual is not subject to the corporate contribution ban under Section 253.093 of the Election Code and may make political contributions to candidates, officeholders, and political committees.

A purpose trust that incorporates for liability purposes only, and is not also a political committee, will be subject to the Election Code, Chapter 253 corporate contribution restriction.

A trust is not a separate legal entity and therefore not a distinct “person” for purposes of the political committee definition. Therefore, a trust may be treated as a political committee if it is comprised of a group of persons acting in concert with a principal purpose of accepting political contributions or making political expenditures.

## FACTS

The requestor asks various questions relating to the application of campaign finance rules to an unincorporated Texas “purpose trust.”

Texas law defines a trust as:

a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property:

(A) for the benefit of another person; or

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(B) for a particular purpose, in the case of a [purpose trust].

Tex. Prop. Code § 111.004(4) (defining “express trust”); *see also Ray Malooly Tr. v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006).

A “purpose trust” is a unique type a trust created by the 88th Legislature. Acts 2023, 88th Leg. R.S., Ch. 112 (H.B. 2333), Sec. 2., codified as Subchapter F of Chapter 112, Tex. Property Code. Typically, a trust requires an identifiable beneficiary to be effective. However, a “purpose trust” may be “created for a noncharitable purpose without a definite or definitely ascertainable beneficiary.” Tex. Prop. Code § 112.121(a).

Under Texas law, a purpose trust has the following characteristics:

- It is enforced by one or more trust enforcers named in the trust instrument;
- Its trust enforcers are fiduciaries required to enforce the purpose and terms of the trust;
- Its trust enforcers are entitled to reasonable compensation;
- The trust instructions may provide for successor trust enforcers;
- If a purpose trust ends up with no trust enforcer, a court properly exercising jurisdiction shall appoint one.

*See* Tex. Prop. Code § 112.121 *et seq.*

The requestor is considering creating a purpose trust under Section 112.121 of the Property Code. He plans to use at least some trust assets to make political contributions to Texas candidates and officeholders. The requestor states the trust’s only source of funds and assets would be “[the requestor’s] personal funds and assets, including shares of stock in corporations that are held by [the requestor] personally, as well as any investment income the trust may earn from its funds and assets” and would not accept any corporate funds.

The purpose of the requestor’s trust would be “bringing about civic betterments and social improvements.” The requestor believes it would “qualify as a social welfare entity under Section 501(c)(4) of the Internal Revenue Code.”

### ANALYSIS

**Under the facts presented, a purpose trust would not be subject to the ban on corporate contributions.**

Corporations are generally prohibited from making political contributions to candidates. *See* Tex. Elec. Code § 253.094 (“[a] corporation or labor organization may not make a political contribution that is not authorized by [Subchapter D, of Chapter 253]”). Subchapter D does not authorize corporate or labor organization contributions to candidates or officeholders and allows corporations or labor organizations to contribute to political committees in only limited circumstances.

The corporate contribution restriction does not apply to all business forms. Instead, it “applies only to corporations that are organized under the Texas Business Corporation Act, the Texas For-Profit



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Corporation Law, the Texas Non-Profit Corporation Act, the Texas Nonprofit Corporation Law, federal law, or law of another state or nation.” Tex. Elec. Code § 253.091.

A trust is not a corporation organized under one of the laws specified in Section 253.091. Therefore, a purpose-trust consisting of only the funds of an individual and not accepting any corporate funds would not be considered a corporation under Section 253.091.

The corporate contribution restriction also applies to certain associations, whether incorporated or not, including “trust companies.” *Id.* § 253.093(a). However, a trust is different from a “trust company.” A trust company is a company that acts as a trustee. *See* Trust Company Definition, Black’s Law Dictionary (11th ed. 2019); *see also* 10 Am. Jur. 2d Banks § 11 (defining a trust company as “a corporation, usually engaged in a general banking business, and in particular as a compensated trustee of funds or property. A bank for purposes of regulation.”).

A trust company acts as a trustee on behalf of a trust, but it is not itself a trust. A trust is therefore not considered organized as a corporation under 253.091 and is not one of the types of associations subject to the contribution restriction regardless of organization. As a consequence, a purpose trust comprised entirely of funds from an individual is not subject to the corporate contribution ban under Section 253.093 and may make political contributions to candidates, officeholders and political committees.<sup>1</sup>

**A purpose trust that incorporates will be subject to the corporate contribution prohibition.**

The requestor asks next whether the purpose trust would still be able to make contributions to candidates and unrestricted contributions to political committees if it incorporates for liability purposes only.

The requestor proposes stating in the trust’s Certificate of Formation “that it is incorporating for liability purposes only, and that its principal purpose is to bring about civic betterments and social improvements (which may, in some instances, entail making political contributions pursuant to the purpose and terms of the trust).”

The Election Code allows a “political committee the only purpose of which is accepting political contributions or making political expenditures” to incorporate for liability purposes only without being subject to the restriction on corporate contributions. Tex. Elec. Code § 253.092. A political committee may avail itself of this exception by “providing in its official incorporation documents that it is a political committee that is incorporating for liability purposes only, and that its only principal purpose is to accept political contributions and make political expenditures.” Tex. Admin. Code § 24.1(d).

A political committee is, in relevant part, “two or more persons acting in concert with a principal purpose of accepting political contributions or making political expenditures.” *Id.* § 251.001(12). Political committees are generally subject to registration and periodic reporting obligations to disclose all political contributions accepted by the political committee and spent by the political committee. *See generally*, Tex. Elec. Code, Chapters 252, 254.

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<sup>1</sup> The request does not ask and we do not reach the applicability of the corporate contribution restriction to trusts other than a purpose trust comprised entirely of funds from an individual.

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The plain text of the statute applies the exception to only (1) “a political committee” (2) “the only principal purpose of which is accepting political contributions and making political expenditures.” *Id.* It is not clear that the requestor’s proposed trust would meet either requirement. The stated purpose of the trust is civil and social improvement, which may entail making some political contributions. On its face, the trust appears to have as at least one of its principal purposes something other than making political expenditures.

We decline to extend the statutory exception beyond entities expressly identified by the legislature. Therefore, under the facts presented, the purpose trust would not be able to incorporate for liability purposes only and still make political contributions to candidates and officeholders or unrestricted political contributions to political committees.

However, if the trust instrument establishes the trust to have as its only principal purpose accepting political contributions and making political expenditures, and the trust is, in fact, a political committee, it would be able to incorporate for liability purposes only and continue to make political contributions under Section 253.092.

**Whether a recipient of a purpose trust’s political contribution should disclose the trust donor or trust as the contributor depends on the degree of control the trust instrument, donor, or trustee exercises over the political contribution recipients.**

The requestor asks whom should be identified as the contributor by a recipient of a political contribution from the trust.

A candidate, officeholder, or political committee must report the “full name” of political contributions made by electronic transfer in any amount or made by other means above a threshold amount. Tex. Elec. Code § 254.031(a)(1), (1-a). The law prohibits a person from making a contribution in the name of or on behalf of another unless the person discloses in writing to the recipient the name and address of the person actually making the contribution. *Id.* § 253.001. Therefore, the identity of the contributor is not only an important fact the recipient must know for proper disclosure, but also information the trust must know to follow the law.

In the context of a trust, there are three basic scenarios that would alter to whom a contribution is attributed. The most important consideration of each is who has control over the ultimate recipient of the funds.

The first scenario is where the trust instrument designates with specificity the particular recipients of political contributions from the trust such as to a named individual, “a particular party committee or [a particular party’s] nominee in a particular district or state.” *Cf.* FEC Adv. Op. No. 2022-24 (Allen Blue); FEC Adv. Op. No. 2004-02 (National Committee for an Effective Congress). In such a case, the founder of the trust is controlling with specificity the ultimate recipient of political contributions. This is true of either *inter vivos* or testamentary purpose trusts. In this scenario, the person actually making the contribution is the trust founder and it should be reported accordingly.

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The second scenario is where the trust instrument provides broad criteria to the trustees to select recipients such as candidates and committees that further the founder's support for candidates of a particular ideology or support particular issues or policies. In such a case, the founder is providing broad criteria for the trustee to follow, but does not direct the ultimate recipient with a degree of particularity to be the person actually making the contribution. In this scenario, the trust is the person actually making the contribution and should be identified accordingly.

The last reporting scenario is where an individual is the sole beneficiary, trustee, and trustor, and signs the trust checks. In such a case, the individual forming, controlling, and holding the beneficial interest in the trust property would be using the trust as a pass-through for contributions. When the individual controlling trust recipients is also funding the trust, the actual contributor is the individual, not the trust.<sup>2</sup>

**Unlike a corporation, a trust is not a separate legal entity and may be treated as a political committee if its principal purpose is making political expenditures or accepting political contributions.**

Finally, the requestor asks if the trust becomes a political committee if making Texas political contributions comprises more than 25 percent of its annual expenses. A political committee is “two or more persons acting in concert with a principal purpose of accepting political contributions or making political expenditures.” Tex. Election Code § 251.001(12).

The proposed level of political spending relative to other trust spending would give the trust a “principal purpose” of making political expenditures. See 1 Tex. Admin. Code § 20.1(17) (defining “principal purpose” in part when “the group expends more than 25 percent of its annual expenses to make political expenditures within a calendar year.”); see also *id.* §20.18(A)(iv) (defining a political expenditure, in part, as making a political contribution to a candidate officeholder or political committee). Therefore, whether the trust (or its constituent parts of donor, trustee, and trust enforcers, or others acting together) would be considered a Texas political committee turns on whether a trust and its agents is a single entity or “two or more persons.”

The Third Court of Appeals has held that a corporation acting alone and not as part of a group did not have standing to challenge the law related to political committees because the corporation was a single person, not a group of persons. *Tex. Home Sch. Coal Ass'n v. Tex. Ethics Comm'n*, No. 03-17-00167-CV, 2018 Tex. App. LEXIS 9075, at \*10 (Tex. App.—Austin Nov. 7, 2018, no pet.) (mem. op.). A federal district court reached the same conclusion. *Lake Travis Citizens Council v. Ashley*, No. 1:14-CV-994-LY, 2016 U.S. Dist. LEXIS 151797, at \*4-5 (W.D. Tex. 2016) (“[TEC] argues that a [nonprofit corporation] is not at risk of regulation as a political committee because it is a nonprofit corporation and therefore treated as a singular person, not a group of persons, under the Texas Election Code. See Tex. Gov't Code § 311.005(2). The court agrees.”).

Both courts turned to the Texas Code Construction Act's definition of “person” to reach the conclusion that a corporation is a singular person. *Tex. Home Sch. Coal. Ass'n*, 2018 Tex. App. LEXIS 9075, at \*10; *Lake Travis Citizens Council*, 2016 U.S. Dist. LEXIS 151797, at \*4-5. Subsequent to these opinions, the 86th Legislature amended the statutory political committee definition reviewed by the courts by deleting the phrase “group of persons” and replacing it with

<sup>2</sup> The requestor insists the last reporting scenario would not apply to the trust he is considering forming because neither he nor any other individual would be designated as the trust beneficiary.

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“two or more persons.” Acts 2019, 86th Leg., R.S., Ch. 1127 (H.B. 2586), Sec. 1, *codified at* Tex. Elec. Code § 251.001(11). The amendment does not substantively affect the analysis.

As defined by the Code Construction Act, “‘person’ includes corporation, organization, government or governmental subdivision or agency, business trust, estate, *trust*, partnership, association, and any other legal entity.” Tex. Gov’t Code § 311.005(2) (emphasis added). The requestor asserts that just like a “corporation,” a “trust” is a “person” under the Code Construction Act and therefore cannot meet the political committee definition of “two or more persons” when acting alone.

However, the Texas Supreme Court has stated that in Texas, “the term ‘trust’ refers not to a separate legal entity but rather to the fiduciary relationship governing the trustee with respect to the trust property.” *Juhl*, 186 S.W.3d at 570 (citing *Huie v. DeShazo*, 922 S.W.2d 920, 926 (Tex. 1996) (holding that treating trust rather than trustee as attorney’s client “is inconsistent with the law of trusts”)).

In *Juhl*, the Court expressly rejected the argument that a trust should be treated a separate legal entity because the Code Construction Act definition of “person” includes a “trust.” *Juhl*, 186 S.W.3d at 570. The Court opined:

The definitions in the Code Construction Act apply unless other statutes or contexts require a different definition. Tex. Gov’t Code § 311.005(2). The most relevant code - the Texas Trust Code - explicitly defines a trust as a relationship rather than a legal entity. *See* Tex. Prop. Code § 111.004(4).

*Id.* Not only is a trust defined as a relationship rather than an entity in the Property Code, “trust” does not appear in the definition of a “person” in the Property Code. Tex. Prop. Code § 111.004(10). The definitions in the Property Code, as interpreted by the Texas Supreme Court, require a different definition of “trust” than that in the Code Construction Act. *See Juhl*, 186 S.W.3d at 570. A trust is not a separate legal entity and therefore not a distinct “person” for purposes of the political committee definition. Therefore, a trust may be treated as a political committee if it is comprised of two or more persons acting in concert with a principal purpose of accepting political contributions or making political expenditures.