

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
Sean Gorman

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

MEETING AGENDA

Date and Time:	10:00 a.m., Tuesday, December 3, 2024
Location:	Room E2.014, Capitol Extension, Austin, Texas

**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#2024

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 250th Judicial District Court, 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-21-003269: *Michael Quinn Sullivan v. Texas Ethics Commission*, in the 459th Judicial District Court, Travis County, Texas; and related case, Cause No. 03-22-00133-CV: *Michael Quinn Sullivan v. Texas Ethics Commission*, in the Third Court of Appeals, Austin, Texas.
 - iii. 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*

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

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.

- iv. Cause No. PD-0310-23, *Ex Parte John Morgan Stafford*, in the Texas Court of Criminal Appeals.
- v. Cause No. D-1-GN-23-008068, *In re Christopher Paddie*, in the District Court for the 419th Judicial District Court, Travis County, Texas.
- vi. Cause No. 22-CV-1130, *Matt Wiggins v. Texas Ethics Commission*, in the 122nd Judicial District Court, Galveston County, Texas.
- vii. 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 445th Judicial District Court, Cameron County, Texas.
- viii. Civil Action 1:24-CV-500, *LIA Network v. J.R. Johnson, in his official capacity as Executive Director of the Texas Ethics Commission, et al.*, in the United States District Court for the Western District of Texas, Austin Division.
- ix. Cause No. 2024-DCL-03953, *Ruben Cortez, Jr. v. Texas Ethics Commission*, in the 404th Judicial District Court, Cameron County, Texas.
- x. Cause Nos. PD-0522-21, PD-0523-21, PD-0524-21, & PD-0525-21, *Ex Parte Robbie Gail Charette*, in the Court of Criminal Appeals of Texas.

- B. Discussion of contemplated litigation and to seek legal advice regarding the collection of imposed penalties.
- C. Discussion to seek legal advice regarding Chapter 104 of the Texas Civil Practices and Remedies Code and possible action regarding the purchase of directors' and officers' liability insurance.
- D. Discussion to seek legal advice and about anticipated litigation regarding 1 Tex. Admin Code § 20.1(17) and Tex. Elec. Code § 251.001(12).
- 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.

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.

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
Sean Gorman

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

MEETING AGENDA

Date and Time: 10:00 a.m., Tuesday, December 3, 2024
Location: Room E2.014, Capitol Extension, Austin, Texas

**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#2024

1. Call to order; roll call.
2. Discussion regarding dates for next quarterly Commission meeting.
3. Approve minutes for the following meetings:
 - o Executive Session – September 24, 2024; and
 - o Public Agenda – September 24, 2024.

RULEMAKING

4. Discussion and possible action regarding the TEC’s plan to conduct a comprehensive review of existing rules under Section 2001.039 of the Government Code.

Rule Adoption

5. Discussion and possible action on the adoption or proposal and re-publication in the Texas Register of comprehensive amendments and reorganization of Chapter 40 of Title 1 of the Texas Administrative Code, regarding Financial Disclosure for Public Officers.
6. Discussion and possible action on the adoption or proposal and re-publication in the Texas Register of section 50.1 of Title 1 of the Texas Administrative Code, regarding Legislative Per Diem.

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

Rule Publication

7. Discussion and possible action on the proposal and publication in the Texas Register of rules and policies related to referrals to prosecuting attorneys. Chapter 13, Title 1, Texas Administrative Code.
8. Discussion and possible action on the proposal and publication in the Texas Register regarding amendments to Chapter 8 of the TEC Rules, related to Advisory Opinions.
9. Discussion and possible action on the proposal and publication in the Texas Register on the regarding amendments to 1 Tex. Admin. Code § 20.1(17), relating to the principal purpose of a political committee.

ADVISORY OPINIONS

10. Advisory Opinion Request No. 707: Does the rule defining a “principal purpose” of a political committee (TEC Rule § 20.1(17) apply to a nonprofit corporation? If so, what threshold must a nonprofit corporation remain below to avoid becoming a political committee?

This opinion construes Rule 20.1(17) of the Texas Administrative Code.

11. Advisory Opinion Request No. AOR-709: Whether a member of the legislator may accept office space contributed by a Limited Liability Company (LLC). Whether a member of the legislator may continue to use contributed office space for a district office through the moratorium on political contributions prescribed by Section 253.034 of the Election Code.

This opinion construes Section 254.031 of the Election Code.

12. Advisory Opinion Request No. AOR-717-CI. Whether an officer of a state agency meets the definition of an “appointed officer” in Chapter 572 of the Government Code when the officer is not appointed to a term of service fixed in statute or state constitution beyond the default maximum term specified by Article XVI, Section 30(a) of the Texas Constitution.

This opinion construes Chapter 572 of the Government Code.

13. Advisory Opinion Request No. AOR-718: Whether the generally applicable lobby registration and disclosure requirements apply to a person who lobbies on behalf of a tribal nation.

This opinion construes Chapter 305 of the Government Code.

**ADMINISTRATIVE WAIVER OF FINES, TREASURER TERMINATIONS
AND REPORTS MORE THAN 30 DAYS LATE**

14. 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:

Staff Recommendation: Waiver

- A. Barnard, Marialyn (00058189)
- B. DeAyala, Emilio F. (00067768)
- C. Pederson, William (00068478)
- D. Raasch, Wayne (00066256)
- E. Roe, Chelsea, Campaign Treasurer, Fair and Square PAC (00083905)
- F. Tate, Frederick C., Campaign Treasurer, Wilco 100 PAC (00085847)
- G. Virdell, Wesley (00086012)
- H. Welborn, Victoria (00088489)
- I. Winter, Heather, Citgo Petroleum Corp. (00087917)

Staff Recommendation: Reduction

- J. Berlanga, Alena Gutierrez (00086429)
- K. Byrd, J. Christopher, Campaign Treasurer, Conservatives for Law Enforcement & Border Security (00086594)
- L. Childs, Stacy (00086453)

Staff Recommendation: No Further Reduction or Waiver

- M. Louderback, Andrew J. (00088181)
- N. Mays, John, Campaign Treasurer, For the Kids of CH (DISSOLVED) (00086972)
- O. Tinderholt, Tony (00069489)

15. Discussion and possible action regarding the termination of a campaign treasurer appointment for the following inactive political committees:

Political Committees

- 1. Forward Sweetwater, Together, Rodney Foster, Treasurer (00087391)
- 2. GMP Local Union #259, Karen Kirkpatrick, Treasurer (00024965)
- 3. Greenpoint Urban Living Political Association& Resident's Rights group, Nathan Gower, Treasurer (GULP-ARRG)(DECEASED)(00087590)
- 4. Panhandle First, Kimberly Snelgrooes, Treasurer (00087989)
- 5. Vote No MayPearl ISD, Amy Hedtke, Treasurer (00087701)
- 6. Vote No Midlothian ISD, Amy Hedtke, Treasurer (00087702)
- 7. Vote No Red Oak ISD, Amy Hedtke, Treasurer (00087703)
- 8. Vote No Waxahachie ISD, Amy Hedtke, Treasurer (00087704)

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

OTHER MATTERS

16. Discussion and possible action regarding the TEC's biennial report including recommendations for statutory change, as required by Section 571.073 of the Government Code.
17. Discussion and possible action related to Sunset Advisory Commission review of the TEC.
18. Discussion and possible action related to planned renovations to the Sam Houston Building.
19. 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.

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.

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:

TEXAS ETHICS COMMISSION



MEMORANDUM

TO: Commissioners, Texas Ethics Commission

FROM: Jim Tinley, General Counsel

DATE: November 21, 2024

Re: Texas Ethics Commission Rule Review Plan

I. The TEC is conducting a comprehensive review of its rules.

The Texas Administrative Procedure Act (Gov't Code, Ch. 2001) requires every state agency to conduct a periodic review of its rules. The law requires a state agency to review and readopt, readopt with amendments, or repeal on the fourth anniversary of the date on which the rule takes effect and every four years after that date. Tex. Gov't Code § 2001.039. A state agency's review of a rule must include an assessment of whether the reasons for initially adopting the rule continue to exist. *Id.*

This memo is meant to provide guidance to commission staff and to inform the public of the TEC's plan to conduct a comprehensive review of its rules.

A. The Plan, Generally.

The TEC is conducting a chapter-by-chapter comprehensive review of its rules rather than conducting a piecemeal review organized by last adoption date of each rule.

The TEC rules are organized into chapters by subject matter. A comprehensive review conducted by chapter allows the TEC to re-adopt, amend, or repeal rules in a way that takes into consideration how that rule operates in the context of the chapter. This holistic approach should minimize the risk of unintended consequences from changing a single rule in isolation.

In order to make the review manageable for the commissioners, staff, and public, about two of the 16 chapters will be up for consideration at each quarterly commission meeting. The review cycle will take about two years to complete under this schedule. Once complete, the TEC

will update its plan for the next comprehensive review and begin it again so that each chapter will be subject to review again within four years.

B. The Plan, Specifically.

1. Completed Reviews.

The review began in September 2023 with a repeal and readoption with amendments of Chapter 18 (General Rules Concerning Reports). During its review of Chapter 18, the TEC repealed and replaced its rules related to requests for a waiver or reduction of a civil penalty. The revisions simplified a complex and cumbersome process and also fit with the TEC's technology plan by crafting rules that allow for the initial waiver or reduction decision to be automated in the electronic filing system. The filing system improvements are in progress.

The review proceeded to Chapter 6 (General Provisions) and Chapter 12 (Sworn Complaint Rules). Both chapters were repealed and replaced with amendments. The amendments simplified the rules related to sworn complaints, removed redundant and unnecessary rules, and ensured that the rules were in sync with the statutory commands. The TEC adopted the rules repealing and replacing of Chapters 6 and 12 at the September 2024 TEC meeting.

2. In Progress Reviews.

Rules related to Chapter 40 (Financial Disclosure for Public Officers) were proposed at the September 2024 TEC meeting and are eligible for adoption at the December 2024 meeting. Proposed rules amending Chapter 8 (Advisory Opinions) will be available for potential publication in the Register at the December 2024 meeting.

3. Future Reviews.

Below is a tentative schedule for the review of the remaining chapters:

Chapter 10 (Ethics Training Programs). *Spring 2025.*

Chapter 13 (Referrals to Prosecutors) *Currently under consideration for amendments.*

Chapter 16 (Facial Compliance Reviews and Audits). *Spring 2025.*

Chapter 20 (Reporting Political Contributions and Expenditures). *Winter 2025.*

Chapter 22 (Restrictions on Contributions and Expenditures). *Fall 2025.*

Chapter 24 (Restrictions on Contributions and Expenditures Applicable to Corporations and Labor Organizations). *Fall 2025.*

Chapter 26 (Political and Legislative Advertising). *Winter 2025.*

Chapter 28 (Reports by a Candidate for Speaker of the House of Representatives). *Spring 2025*

Chapter 34 (Regulation of Lobbyists). *Summer 2025.*

Chapter 45 (Conflicts of Interest). *Spring 2026.*

Chapter 46 (Disclosure of Interested Parties). *Winter 2025.*

Chapter 50 (Legislative Salaries and Per Diem). *Reviewed biennially with per diem adjustment.*

II. General Considerations for the Review.

The rule publication and adoption will follow the Administrative Procedure Act, the TEC rules, and other applicable law. Once staff completes its review of each chapter, it will present recommendations to the chair and vice chair. Upon approval from the chair and vice-chair, the recommendations will be considered at a public meeting for possible publication in the Texas Register. After publication and public comment, the commissioners may vote to readopt, readopt with amendments, or repeal each chapter.

Staff's review of rules should be guided by the questions below:

- Is the rule authorized by law?
- Does the rule conflict with law?
- Is there a law that requires rulemaking for this subject?
- Have there been legislative, judicial, or other legal developments that necessitate a change to existing rules?
- Is the rule necessary?
- Do the reasons the TEC stated for the rule's initial adoption still apply? If no, is there another reason for the rule?
- Is the rule written in a clear and concise manner?
- Can the rule be simplified?
- Before recommending non-substantive changes to a rule, does the benefit of changing the rule outweigh any reliance interest in the particular words and phrases used in the rule?
- Does the rule fit with the overall objective of the law?

Sec. 2001.039. AGENCY REVIEW OF EXISTING RULES.

(a) A state agency shall review and consider for readoption each of its rules in accordance with this section.

(b) A state agency shall review a rule not later than the fourth anniversary of the date on which the rule takes effect and every four years after that date. The adoption of an amendment to an existing rule does not affect the dates on which the rule must be reviewed except that the effective date of an amendment is considered to be the effective date of the rule if the agency formally conducts a review of the rule in accordance with this section as part of the process of adopting the amendment.

(c) The state agency shall readopt, readopt with amendments, or repeal a rule as the result of reviewing the rule under this section.

(d) The procedures of this subchapter relating to the original adoption of a rule apply to the review of a rule and to the resulting repeal, readoption, or readoption with amendments of the rule, except as provided by this subsection. Publishing the Texas Administrative Code citation to a rule under review satisfies the requirements of this subchapter relating to publishing the text of the rule unless the agency readopts the rule with amendments as a result of the review.

(e) A state agency's review of a rule must include an assessment of whether the reasons for initially adopting the rule continue to exist.

Added by Acts 1999, 76th Leg., ch. 1499, Sec. 1.11(a), eff. Sept. 1, 1999.

1 **EXHIBIT A**

2 **Text of Proposed Rule Amendment**

3
4 The proposed new language is indicated by underlined text. Deleted language is indicated by
5 ~~strikethrough~~ text.
6

7
8 **CHAPTER 40. FINANCIAL DISCLOSURE FOR PUBLIC OFFICERS**

9 **§40.1. Financial Statement.**

10 (a) The Texas Ethics Commission adopts by reference the financial statement form prescribed by
11 the commission on January 13, 1992. This form is available from the Texas Ethics Commission,
12 P.O. Box 12070, Austin, Texas 78711-2070.

13 (b) The form adopted under subsection (a) of this section may be revised by the executive
14 director under §18.1 of this title (relating to Adoption and Revision of Forms), and if so revised
15 shall be deemed to have been adopted by the commission under this section.

16 **§40.2. Disclosure of Financial Activity.**

17 For purposes of §572.023 of the Government Code, a filer’s personal financial statement must
18 include:

19 (1) the filer’s financial activity in which the filer held an ownership interest, including but
20 not limited to community property; and

21 (2) the financial activity of the filer’s spouse and dependent children if the filer exercised
22 ~~[or held the right to exercise]~~ any degree of ~~[legal or]~~ factual control over the activity,
23 notwithstanding a partition agreement.

24 **40.3. PFS Required for Each Year of Service**

25 (a) A state officer who serves for any portion of a calendar year must file a PFS the following
26 year covering financial activity that occurred during the portion of the year the state officer held
27 office.

28 (b) A member of the legislature who retires at the end of the member’s term in January is not
29 required to file a PFS covering the last calendar year of service.

30 (c) Comments:

31 (1) For example, under subsection 40.3(a) of this section, if a state officer ceases to be a state
32 officer in October 2024, the state officer is required to file a PFS in by the deadline provided by
33 §572.026(a) of the Government Code in calendar year 2025, covering financial activity that
34 occurred through October 2024, provided the state officer does not holdover.

1

2

Text of Proposed Amendment

3 The proposed new language is indicated by underlined text.

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

5

CHAPTER 50. LEGISLATIVE SALARIES AND PER DIEM

6

§ 50.1. Legislative Per Diem

7

(a) The legislative per diem is \$267 [~~\$224~~]. The per diem is intended to be paid to each member of the legislature and the lieutenant governor for each day during the regular session and for each day during any special session.

8

9

10

(b) If necessary, this rule shall be applied retroactively to ensure payment of the \$267 [~~\$224~~] per diem for 2025 [~~2024~~].

11

35 (2) Under subsection 40.3(b) of this section, a member of the legislature who retires at the end of
36 the member's term in January 2025 is required to file a PFS in 2025 covering calendar year
37 2024. The member is not required to file a PFS in calendar year 2026 covering calendar year
38 2025 by virtue of service from January 1 to January 6 of 2025, before the member's successor is
39 sworn into office.

40 **§ 40.5. Assets and Liabilities of Business Associations**

41 Assets and liabilities of business associations that must be reported under §572.023(b)(9) of the
42 Government Code shall be reported as though they are the assets and liabilities of the individual
43 filer.

44 **§ 40.9. Exchange Traded Funds and Real Estate Investment Trusts**

45 Ownership interests in exchange-traded funds and real estate investment trusts shall be reported
46 under §572.023(b)(2) of the Government Code as though they were shares of stock.

47 **§ 40.11. Publicly Traded Corporation as Source of Income [over \$500].**

48 For purposes of §572.023(b)(4), Government Code, a publicly traded corporation is identified as
49 a source of income by disclosing its full name in addition to the category of the amount of
50 income.

51 **§ 40.13. Beneficial Interest in Real Property Includes Real Property Held in a Trust**

52 (a) Except as provided in subsection (b), a filer must disclose real property held in a trust for the
53 benefit of the filer as a beneficial interest in real property under §572.023(b)(6) of the
54 Government Code.

55 (b) A filer is not required to disclose real property held in a blind trust that complies with
56 §572.023(c) of the Government Code only if the filer does not have actual knowledge of the
57 property held in a trust for the filer's benefit.

58 **§ 40.15. Identification of the Source of Rents Derived from Rental Property**

59 An identification of the source of rents derived from a rental property must include the name of
60 the lessee and the address of the rental property.

1 **Text of Proposed Rule Amendment**

2
3 The proposed new language is indicated by underlined text.

4
5 **CHAPTER 13. REFERRALS TO PROSECUTORS.**

6
7 **§ 13.1. Referral to Prosecuting Attorney.**

8
9 (a) Under section 571.171 of the Government Code, the commission may vote to
10 refer a matter related to a sworn complaint to the appropriate prosecuting attorney
11 for criminal prosecution upon the commission accepting jurisdiction over the
12 sworn complaint.

13
14 (b) A vote to make a referral under subsection (a) shall be delayed in accordance with
15 section 571.134 of the Government Code.

1 **EXHIBIT A**

2
3 **Text of Proposed Rules**

4
5 The proposed new language is indicated by underlined text.
6 The deleted language is indicated by ~~[strikethrough]~~ text.

7
8 **CHAPTER 8. ADVISORY OPINIONS**

9 **§8.1. Definitions.**

10 The following words and terms, when used in this chapter, shall have the following
11 meanings, unless the context clearly indicates otherwise: AOR number--An advisory
12 opinion request file number assigned by the executive director to a pending advisory
13 opinion request in accordance with this chapter.

14 **§8.3. Subject of an Advisory Opinion.**

15 ~~[(a) The commission may only issue a written advisory opinion on the application~~
16 ~~of any of the following laws:~~

17 ~~(1) Government Code, Chapter 302 (concerning Speaker of the House of~~
18 ~~Representatives);~~

19 ~~(2) Government Code, Chapter 303 (concerning Governor for a Day and~~
20 ~~Speaker's Reunion Day Ceremonies);~~

21 ~~(3) Government Code, Chapter 305 (concerning Registration of Lobbyists);~~

22 ~~(4) Government Code, Chapter 572 (concerning Personal Financial~~
23 ~~Disclosure, Standards of Conduct, and Conflict of Interest); (5) Government Code,~~
24 ~~Chapter 2004 (concerning Representation Before State Agencies);~~

25 ~~(6) Local Government Code, Chapter 159, Subchapter C, in connection with~~
26 ~~a county judicial officer, as defined by Section 159.051, Local Government Code,~~
27 ~~who elects to file a financial statement with the commission;~~

28 ~~(7) Election Code, Title 15 (concerning Regulating Political Funds and~~
29 ~~Campaigns);~~

30 ~~(8) Penal Code, Chapter 36 (concerning Bribery and Corrupt Influence);~~

31 ~~(9) Penal Code, Chapter 39 (concerning Abuse of Office).~~

32 (10) Government Code, §2152.064 (concerning Conflict of Interest in Certain
33 Transactions); and

34 (11) Government Code, §2155.003 (concerning Conflict of Interest).]

35 [(b)] (a) The commission may not issue an advisory opinion that concerns the
36 [subject matter] same or substantially similar facts of pending litigation known to
37 the commission.

38 [(e)] (b) For purposes of this section, the term litigation includes a sworn complaint
39 proceeding before the commission [~~only if the Government Code Subchapters C-H,~~
40 ~~Chapter 2001, applies to the proceeding~~] if the request is made by a respondent or
41 complainant or the agent of a respondent or complainant of pending sworn
42 complaint.

43 [(d)] (c) An advisory opinion cannot resolve a disputed question of fact.

44 **§8.5. Persons Eligible To Receive an Advisory Opinion.**

45 A person who is subject to one of the laws described in [~~§8.3(a) of this chapter~~
46 ~~(relating to Subject of Advisory Opinions)~~] §571.091, Gov't Code may request an
47 opinion that advises how the law applies to that person in a specific real or
48 hypothetical factual situation. Opinions may only address how the law applies to the
49 requestor, not any other real or hypothetical person.

50 **§8.7. Request for an Advisory Opinion.**

51 (a) A request for an advisory opinion shall describe a specified factual situation. The
52 facts specified may be real or hypothetical. The request must provide sufficient detail
53 to permit the commission to provide a response to the request, including the name
54 of the person making the request and, if applicable, the name of the person on whose
55 behalf the request is made.

56 (b) A request for an advisory opinion shall be:

57 (1) in writing; and

58 (2) mailed or hand-delivered to the commission at the agency office or
59 emailed to the commission's email address designated for receiving requests.

60

61 **§8.9. Commission Initiated Opinion.**

62 When a majority of the commission determines that an opinion would be in the
63 public interest or in the interest of any person or persons within the jurisdiction of
64 the commission, the commission may on its own motion issue an advisory opinion.

65 **§8.11. Review and Processing of a Request.**

66 (a) Upon receipt of a written request for an advisory opinion, the executive director
67 shall determine whether the request:

68 (1) pertains to the application of a law specified under [~~§8.3 of this chapter~~]
69 §571.091, Gov't Code;

70 (2) meets the standing requirements of §8.5 of this chapter; and

71 (3) meets the form requirements of §8.7 of this chapter. [~~and~~]

72 [~~(4) cannot be answered by written response under § 8.17 of this chapter by~~
73 ~~reference to the plain language of a statute, commission rule, or advisory opinion.~~]

74 (b) If the executive director determines that a request for an opinion meets the
75 requirements of this chapter as set forth in subsections (a)(1)-(3) of this [~~section and~~
76 ~~that the request cannot be answered by written response under §8.17 of this chapter~~],
77 the executive director shall assign an AOR number to the request. The executive
78 director shall notify the person making the request of the AOR number and of the
79 proposed wording of the question to be answered by the commission.

80 (c) If the executive director determines that a request for an opinion does not meet
81 the requirements of this chapter as set forth in subsections (a)(1)-(3) of this section
82 [~~or that the request can be answered by written response under §8.17 of this chapter~~],
83 the executive director shall notify the person making the request of the reason the
84 person making the request is not entitled to an advisory opinion in response to the
85 request.

86 (d) A person who requests an opinion may withdraw the request prior to its inclusion
87 on a meeting agenda filed by the Commission pursuant to the Open Meetings Law.
88 Once a request is included on such an agenda, it may not be withdrawn by the
89 requestor.

90 (e) The executive director may submit written questions to the requestor to clarify
91 the real or hypothetical facts submitted with the request.

92 (f) The executive director may invite comments regarding an advisory opinion
93 request from individuals or entities that may have expertise or an interest in the
94 subject of the request.

95 **§8.13. Time Period.**

96 (a) The commission shall issue an advisory opinion in response to a request that
97 meets the requirements of this chapter not later than the 60th day after the date the
98 commission receives the request.

99 (b) The time available to issue an advisory opinion in response to a written request
100 is automatically extended for 60 days pursuant to §571.092(b), Government Code.

101 **§8.15. Publication in Texas Register; Comments.**

102 (a) Each request assigned an AOR number under this chapter shall be published in
103 summary form in the Texas Register.

104 (b) Any person may submit written comments to the commission concerning an
105 advisory opinion request. Comments submitted should reference the AOR number.

106 ~~**§8.17. Request Answered by Written Response.**~~

107 ~~If the executive director determines that a request can be answered by reference to~~
108 ~~the plain language of a statute, commission rule, or advisory opinion:~~

109 ~~(1) the executive director shall provide a written response to the person~~
110 ~~making the request that cites the language of the statute, rule, or advisory opinion,~~
111 ~~as applicable; and~~

112 ~~(2) the person making the request is not entitled to an advisory opinion in~~
113 ~~response to the request.]~~

114 **§8.18. No Defense to Prosecution or Civil Penalty.**

115 A person who requests an advisory opinion does not obtain a defense to prosecution
116 or to imposition of a civil penalty by requesting the opinion if any of the following
117 apply:

118 (1) the commission is not authorized to answer the request because it does not
119 pertain to the application of a law specified under ~~[§8.3 of this chapter]~~ §571.091,
120 Gov't Code;

121 (2) the request does not meet the standing requirements of §8.5 of this chapter;
122 or

123 (3) the request does not meet the form requirements of §8.7 of this chapter. ~~];~~
124 ~~or]~~

125 ~~[(4) the executive director responds to the request by written response under~~
126 ~~§8.17 of this chapter.]~~

127 **§8.19. Confidentiality.**

128 (a) The name of a person who requests an advisory opinion is confidential.

129 (b) The original request for an advisory opinion shall be placed in a confidential file.

130 (c) Confidentiality under subsection (a) of this section may be waived only if the
131 person making the request for an advisory opinion provides a verified, written
132 waiver of confidentiality to the executive director.

133 (d) If a request for a copy of an advisory opinion request is received, the executive
134 director shall prepare a redacted version of the advisory opinion request by deleting
135 any information that is likely to identify the person making the request. The redacted
136 version of the request shall be provided to the person who requested a copy of the
137 advisory opinion request.

138 **§8.21. Compilation of Advisory Opinions.**

139 The executive director shall number and categorize each advisory opinion issued and
140 publish the opinion on the commission's website [~~and shall annually compile a~~
141 ~~summary of advisory opinions in a single reference document.~~] The executive
142 director may publish and provide copies of advisory opinions in other formats as
143 may be in the public interest.

1 EXHIBIT F

2
3 Text of Proposed Rules

4
5 The proposed new language is indicated by underlined text.
6 The deleted language is indicated by [~~striketrough~~] text.

7
8 Chapter 20. REPORTING POLITICAL CONTRIBUTIONS AND
9 EXPENDITURES.

10
11 Subchapter A. GENERAL RULES.

12 § 20.1. Definitions.

13 ...

14 (17) Principal purpose--A group has as a principal purpose of accepting political
15 contributions or making political expenditures, including direct campaign expenditures,
16 when that activity is an important or a main function of the group.

17 (A) A group may have more than one principal purpose. When determining
18 whether a group has a principal purpose of accepting political contributions or
19 making political contributions, the Commission may consider the full range of
20 activities by the group and its members, including, but not limited to:

21 (i) public statements;

22 (ii) fundraising appeals;

23 (iii) government filings;

24 (iv) organizational documents; and

25 (v) the amount of political expenditures made and political contributions
26 accepted by the group and its members.

27 (B) [~~A group has as a principal purpose accepting political contributions if the~~
28 ~~proportion of the political contributions to the total contributions to the group is~~
29 ~~more than 25 percent within a calendar year. A contributor intends to make a~~
30 ~~political contribution if the solicitations that prompted the contribution or the~~
31 ~~statements made by the contributor about the contribution would lead to no other~~
32 ~~reasonable conclusion than that the contribution was intended to be a political~~
33 ~~contribution.] A group is presumed to be a political committee if the proportion of
34 the group's political contributions to the total contributions to the group is 50
35 percent or more.~~

36 (C) The group may maintain specific evidence of contributions related only to
37 political contributions or only to nonpolitical contributions. For example, the
38 group may ask the contributor to make an indication when the contribution is
39 made that the contribution is only a nonpolitical contribution.

40 (D) ~~[A group has as a principal purpose making political expenditures, including~~
41 ~~direct expenditures, if the group expends more than 25 percent of its annual~~
42 ~~expenses to make political expenditures within a calendar year.]~~ A group is
43 presumed to be a political committee if the proportion of the group's political
44 expenditures to the total expenditures of the group is 50 percent or more. The
45 following shall be included for purposes of calculating the ~~threshold~~ proportion of
46 a group's political expenditures to all other spending:

47 (i) the amount of money paid in compensation and benefits to the group's
48 employees for work related to making political expenditures;

49 (ii) the amount of money spent on political expenditures; and

50 (iii) the amount of money attributable to the proportional share of administrative
51 expenses related to political expenditures. The proportional share of administrative
52 expenses is calculated by comparing the political expenditures in clause (ii) with
53 nonpolitical expenditures. (For example, if the group sends three mailings a year
54 and each costs \$10,000, if the first two are issue-based newsletters and the third is
55 a direct advocacy sample ballot, and there were no other ~~outside~~ expenditures,
56 then the proportion of the administrative expenses attributable to political
57 expenditures would be 33%.) Administrative expenses include:

58 (I) fees for services to non-employees;

59 (II) advertising and promotion;

60 (III) office expenses;

61 (IV) information technology;

62 (V) occupancy;

63 (VI) travel expenses;

64 (VII) interest; and

65 (VIII) insurance

66 (E) The group may maintain specific evidence of administrative expenses related
67 only to political expenditures or only to nonpolitical expenditures. Specifically
68 identified administrative expenses shall not be included in the proportion

69 established by subparagraph (D)(iii) but allocated by the actual amount of the
70 expense.

71 (F) In this section, the term "political expenditures" includes direct campaign
72 expenditures.

ETHICS ADVISORY OPINION NO. ____

[Date]

ISSUE

Does the rule defining a “principal purpose” of a political committee (TEC Rule § 20.1(17)) apply to a nonprofit corporation? If so, what threshold must a nonprofit corporation remain below to avoid becoming a political committee? (AOR-707).

SUMMARY

By definition, two or more persons must act in concert with a principal purpose of making political expenditures or accepting political contributions to form a political committee. If a group of persons form a nonprofit corporation that has as a principal purpose accepting political contributions or making political expenditures, the corporation is a political committee.

To determine whether a group has a principal purpose of making political expenditures, the TEC will consider all the facts and circumstances concerning the group’s actual and planned activities related to making political expenditures.

FACTS

The requestor is a Texas resident who wants to establish a nonprofit corporation to make direct campaign expenditures. However, requestor states he is “reticent” to do so without knowing whether or not the political committee formation requirements would apply to his contemplated nonprofit corporation. The requestor did not specify what, if any, activities the nonprofit corporation plans to engage in beyond making political expenditures.

The request presents two questions: 1) whether a nonprofit corporation is a single person and therefore cannot be a political committee if it acts alone; and 2) if a corporation can be a political committee, what threshold of activity would determine political committee status.

ANALYSIS

Background.

In 2014, the TEC was asked to issue an advisory opinion to determine whether a nonprofit corporation would be subject to regulation as a political committee if it made political expenditures but did not accept political contributions. Tex. Ethics Comm’n Op. No. 518 (2014). The TEC held that a “group that does not accept or intend to accept political contributions and does not use or intend to use more than 20 percent of its funds and other resources to make

STAFF DRAFT. NOT FINAL UNLESS ADOPTED BY COMMISSION.

political expenditures is not a political committee.” *Id.* Although EAO 518 found that the nonprofit corporation would not be a political committee under the facts presented, the opinion indicates a nonprofit corporation that exceeds 20 percent of its overall spending on electoral advocacy *could* be a political committee. *Id.*

After issuing EAO 518, the TEC adopted a rule defining a group’s “principal purpose.” 1 Tex. Admin Code § 20.1(17). The rule states that “a group has as a principal purpose accepting political contributions if the proportion of the political contributions to the total contributions to the group is more than 25 percent within a calendar year.” *Id.* § 20.1(17)(B). Likewise, “a group has as a principal purpose making political expenditures, including direct expenditures, if the group expends more than 25 percent of its annual expenses to make political expenditures within a calendar year.” *Id.* § 20.1(17)(D).

After adopting the rule, the TEC was sued by nonprofit corporations in two separate lawsuits seeking to invalidate the rule defining “a principal purpose.” *Tex. Home Sch. Coalition Ass’n v. Tex. Ethics Comm’n*, No. 03-17-00167-CV, 2018 Tex. App. LEXIS 9075, at *10 n. 4 (Tex. App.—Austin Nov. 7, 2018, no pet.); *Lake Travis Citizens Council v. Ashley*, No. 1:14-CV-994-LY, 2016 U.S. Dist. LEXIS 151797, at *1 (W.D. Tex. 2016). The TEC argued that the plaintiff corporations did not have standing to sue because a corporation is a single person and the definition of a political committee requires “a group of persons” acting in concert. *Id.* Accepting the TEC’s contention, the trial court dismissed the cases for lack of standing. *Id.*

A corporation is a group of people and will meet the definition of political committee if it has as a principal purpose accepting political contributions or making political expenditures.

To arrive at the position that a corporation is a single person, the TEC relied on the Code Construction Act, which defines a corporation as a person. Tex. Gov’t Code § 311.005(2). But the same logic would also exempt a political committee, because a political committee also meets the Code Construction Act’s definition of a “person.” This is, of course, absurd.

The Code Construction Act definition of “person” includes an “organization,” “association,” “and any other legal entity.” *Id.* A political committee is an organization, which is “a group of people who work together in an organized way for a shared purpose.” Cambridge Dictionary Online.¹ A political committee is also a “legal entity” as it can sue and be sued in its own name. Tex. Elec. Code § 253.132. Moreover, Title 15 expressly allows a political committee to incorporate without losing all the rights and responsibilities of a political committee. *Id.* § 253.032. In reality, a political committee is a group of two or more persons that is treated as a single legal person in some contexts. The same is true of a corporation.²

¹ *Political Committee* Definition, CAMBRIDGE DICTIONARY ONLINE, <https://dictionary.cambridge.org/us/dictionary/english/organization>.

² A corporation is group of persons that is treated as a single person for certain purposes (e.g. shielding individuals from personal liability, taxation at the entity level). But individuals will always comprise a Texas nonprofit corporation. A nonprofit corporation is managed by a board of directors, which is defined as “the *group of persons* vested with the management of the affairs of the corporation.” Tex. Bus. Org. Code § 22.001(1). A nonprofit must have at least three people on its board of directors. *Id.* § 22.204. In addition, a nonprofit corporation must have at least a president and secretary as officers. *Id.* § 22.231.

STAFF DRAFT. NOT FINAL UNLESS ADOPTED BY COMMISSION.

In holding that a corporation can be a political committee, the TEC harmonizes its interpretation of the definition of a political committee with the Federal Election Commission's interpretation of a similar federal statute, and that of several other states. The federal definition of a political committee includes "any committee, club, association, or other group of persons." 52 U.S.C. § 30101(4). Despite the federal statute requiring a "group of persons" to make a political committee, federal courts have routinely analyzed whether a corporation would meet the definition of a political committee under the FEC and other states' definitions. *E.g.*, *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555-556 (4th Cir. 2012); *see also N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 286 (4th Cir. 2008) (applying North Carolina's definition of a political committee, which requires "a combination of two or more individuals" to a nonprofit corporation); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 997 (9th Cir. 2010) (rejecting a challenge to Washington state's political committee registration regulations brought by a nonprofit corporation). Washington's definition of political committee included: "any person (except a candidate or individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." Wash. Rev. Code § 42.17.020(39). Outside of Texas, the TEC has found no instance of a court finding a corporation cannot be a political committee because it is a single person rather than a group.

The Principal Purpose Test.

Having established that a nonprofit corporation can be treated as a political committee, we turn to the requestor's next question: at what threshold will a nonprofit corporation be considered a political committee?

Under the TEC's current rule, a group, including a nonprofit corporation, will have a "principal purpose [of] accepting political contributions if the proportion of the political contributions to the total contributions to the group is more than 25 percent within a calendar year." 1 Tex. Admin. Code § 20.1(17)(B). The same is true for spending; "a group has as a principal purpose making political expenditures, including direct expenditures, if the group expends more than 25 percent of its annual expenses to make political expenditures within a calendar year." *Id.* § 20.1(17)(D).

In light of this opinion, the TEC intends to engage in rulemaking to potentially amend the rule defining what is a group's "principal purpose." The effect of an advisory opinion is to provide those who reasonably rely on the opinion with a defense in a criminal prosecution or an action to impose a civil remedy. Tex. Ethics Comm'n Op. No. 147 (1993); Tex. Gov't Code § 571.097. We do not think a group that exceeds 25 percent of its overall spending on political expenditures or for which political contributions make up more than 25 percent of its incoming funds is necessarily a political committee. Instead, the TEC will determine whether a group is a political committee on a case-by-case basis in a fashion similar to the FEC. *See Political Committee Status*, 72 Fed. Reg. 5595, 5595-606 (Feb. 7, 2007) (to be codified at 11 C.F.R. 100); *see also Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 557-58 (4th Cir. 2012) (finding the FEC's case-by-case determination of whether a group is a political committee constitutional); *see also Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77, 82 (D.D.C. 2016).

STAFF DRAFT. NOT FINAL UNLESS ADOPTED BY COMMISSION.

In making its determination whether a group has as a principal purpose of making political expenditures or accepting political contributions the TEC will be guided by the factors laid out in Tex. Ethics Comm'n Op. No. 518 (2014):

1. The proportion of the group's total expenditures that constitute political expenditures;
2. The amount of the group's staff or volunteer time, equipment, or other resources allocated to making political expenditures;
3. The content of the group's public statements regarding its goals or support of or opposition to candidates, officeholders, or measures;
4. The group's government filings and organizational documents, including mission statements; and
5. The group's other activities that are unrelated to making political expenditures.

ETHICS ADVISORY OPINION NO. 6xx

[Date]

ISSUE

Whether a member of the legislature may accept office space contributed by a Limited Liability Company (LLC).

Whether a member of the legislature may continue to use contributed office space for a district office through the moratorium on political contributions prescribed by Section 253.034 of the Election Code. (AOR-709)

SUMMARY

A member of the legislature may accept the use of office space contributed by an LLC, provided the contributing LLC is not engaged in a business specified by Section 253.093, the contributing LLC is not owned in whole or in part by a corporation, and the donation meets the definition of an “officeholder contribution.”

As long as a person subject to Section 253.034 of the Election Code accepts and receives a political contribution in the form of office space before the beginning of the legislative moratorium, the person may continue to use the office space during the period covered by the moratorium.

FACTS

The requestor is a member of the legislature who asks whether he may accept the donation of office space from an LLC. The requestor states that the office space would be used for official state business only and would not be used for campaign purposes.

ANALYSIS

As a general matter, a member of the legislature may accept a political contribution from an LLC. Tex. Ethics Comm’n Op. No. 383 (1997).

The definition of “political contribution” includes an “officeholder contribution.” Tex. Elec. Code § 251.001(5). An officeholder contribution is “a contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that: A) are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office; and (B) are not reimbursable with public money.” *Id.* § 251.001(4).

STAFF DRAFT. NOT FINAL UNLESS ADOPTED BY COMMISSION.

An expense is “reimbursable with public money” when a reimbursement from public funds would be lawful. Tex. Ethics Comm’n Op. No. 495 (2010). Reimbursement is lawful if the respective governmental body has the authority to reimburse the officeholder for the expense and, at the time the expense is incurred, allows the reimbursement of “the particular category of expense.” *Id.* “Whether a particular governmental body has the authority to make an expense depends upon the laws applicable to that body and the specific facts surrounding the expense.” *Id.* Specific fact questions cannot be resolved in an advisory opinion. *Id.*

Renting office space for a district office would be an expense incurred in performing an activity in connection with the office. However, whether the expense is reimbursable with public funds is unclear from the facts presented with this request.

This precise question was addressed in prior opinion in which the TEC assumed without deciding that a donation of office space for a district would be an “officeholder contribution.” Tex. Ethics Comm’n Op. No. 239 (1994).

If the expense is reimbursable with public funds, then the donation is not an “officeholder contribution” and will be regulated as a gift to a public servant under Chapter 36 of the Penal Code¹ and the law related lobby expenditures under Chapter 305 of the Government Code.² Conversely, if the expense is not reimbursable with public funds, then the gift of office space for a district office is an “officeholder contribution” and would not be subject to the \$500 annual limit applicable to gifts from lobbyists. *Id.* § 305.025(6).

To summarize, if the donation of office space is an officeholder contribution, a member of the legislature may accept the use of office space contributed by the LLC, provided the LLC is not engaged in a business specified by Section 253.093 of Election Code and not owned in whole or in part by a corporation. Tex. Ethics Comm’n Op. No. 383 (1997).

The requestor next asks whether the general prohibition on the acceptance of a political contribution during and following a regular legislative session, known as the “legislative moratorium,” would affect his ability to use the contributed office space as a district office. During the period beginning on the 30th day before the date a regular legislative session

¹ Under the Penal Code, a member of the legislature may not solicit, accept, or agree to accept “any benefit from any person,” absent an exception. Tex. Penal Code §§ 36.08(f), 36.10 (listing exceptions).

² The only applicable exceptions to the general prohibition of a member accepting a benefit are the exceptions for benefits that meet the definition of a political contribution or “a gift, award, or memento to a member of the legislative or executive branch that is required to be reported under Chapter 305, Government Code.” Tex. Penal Code § 36.10(b)(4), (5). An expenditure made “to communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action” is a lobby expenditure. Tex. Gov’t Code § 305.003(a)(1). The term includes expenditures made to “establish[] goodwill with the member for the purpose of later communicating with the member to influence legislation or administrative action.” *Id.* § 305.002(2-a). Providing for the use of office space for a member of the legislature would be a gift to the member. A lobbyist is prohibited from making “an expenditure or series of expenditures for gifts that in the aggregate exceed \$500 in a calendar year.” Tex. Gov’t Code § 305.024(a)(2)(C). Therefore, a lobbyist would be prohibited from offering and a member of the legislature would be prohibited from accepting the gift of office space if the value of the office space exceeded \$500.

STAFF DRAFT. NOT FINAL UNLESS ADOPTED BY COMMISSION.

convenes and continuing through the 20th day after the date of final adjournment, a member of the legislature may not knowingly accept a political contribution and shall refuse *a political contribution* that is received during that time. Tex. Elec. Code § 253.034(b) (emphasis added). Therefore, the answer to this question also depends whether the donation is an officeholder contribution. If the donation of office space is not an officeholder contribution, then the legislative moratorium would not apply. But if it is an officeholder contribution, then the question becomes whether the use of office space during the legislative moratorium constitutes an acceptance of an in-kind political contribution during the legislative moratorium.

The TEC addressed this question in Ethics Opinion No. 239 (1994) and concluded that as long as a person subject to Section 253.034 of the Election Code accepts and receives a political contribution in the form of office space before the beginning of the legislative moratorium, the person may continue to use the office space during the period covered by the moratorium. Tex. Ethics Comm'n Op. No. 239 (1994). We see no reason to deviate from this long-held position.

DRAFT

ETHICS ADVISORY OPINION NO. 6xx

[Date]

ISSUE

Whether an officer of a state agency meets the definition of an “appointed officer” in Chapter 572 of the Government Code when the officer is not appointed to a term of service fixed in statute or state constitution beyond the default maximum term specified by Article XVI, Section 30(a) of the Texas Constitution. (AOR-717-CI)

SUMMARY

When the Constitution or statute does not fix a term of service for a particular officer of a state agency, the officer nevertheless serves a default term of not more than two years. Such an officer of a state agency is required to file a personal financial statement. Therefore, the TEC overrules prior advisory opinions to the extent they are inconsistent with this opinion.

FACTS

A recently issued Attorney General Opinion has called into question the TEC’s long-standing interpretation of the definition of “appointed officer,” as that term is used in Chapter 572 of the Government Code. Whether an individual is an “appointed officer” will affect whether several provisions of Chapter 572 apply to the individual, including the obligation to file a personal financial statement.

ANALYSIS

A “state officer” must file a personal financial statement (PFS). Tex. Gov’t Code § 572.026.

Included in the definition of “state officer” is “appointed officer,” which is also a defined term. *Id.* § 572.002(1), (12).

Chapter 572 defines an appointed officer to include, “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.”¹ *Id.* § 572.002(1)(C).

¹ The definition of appointed officer also includes the secretary of state, an individual appointed with the advice and consent of the senate to the governing board of a state-supported institution of higher education and certain ex officio members of state boards and commissions. Tex. Gov’t Code § 572.002(1).

STAFF DRAFT. NOT FINAL UNLESS ADOPTED BY COMMISSION.

At times state offices are created in statute or the Texas Constitution with a specific term of service. For example, the Constitution expressly states that TEC commissioners are appointed to a four year term. Tex. Const. art. II, § 24(a). Other times, the Constitution and statutes are silent as to an express term of service. *E.g.*, Tex. Gov't Code § 403.503. Still other agencies have appointed officers that serve at the pleasure of the appointing authority. *E.g.*, *id.* § 481.005(a).

The TEC has consistently held that if the Constitution or statute does not set a specific term of service for a particular officer of a state agency, that officer is not an “appointed officer” for purposes of Chapter 572 because they do not serve for a “term of service.” *See* Tex. Ethics Comm'n Op. Nos. 124 (1993), 138 (1993), 180 (1994). Under this interpretation, such an officer would not be required to file a PFS. *See* Tex. Ethics Comm'n Op. Nos. 124 (1993), 138 (1993), 180 (1994).

This year, the Office of the Attorney General held that even if the statute or the Constitution do not provide an express term of service for a particular office “the Texas Constitution does by default.” Tex. Att’y Gen. Op. No. KP-0466 (2024) at *4 citing Tex. Const. art. XVI, § 30(a). The Constitution states “the duration of all offices not fixed by this Constitution shall never exceed two years.” Tex. Const. art. XVI, § 30(a). The Office of Attorney General (OAG) relied on this provision to find that “a court would likely conclude” that voting members appointed to the Texas Opioid Abatement Fund Council are “appointed officers” despite not having a particular term of service fixed in statute or the Constitution, beyond the default two-year maximum term. Tex. Att’y Gen. Op. No. KP-0466 (2024).

The TEC’s past opinions concerning when an officer of a state agency serves without a fixed term are in conflict with the OAG’s recent opinion. TEC must “rely” on opinions issued by the attorney general. Tex. Gov’t Code § 571.096(c). The attorney general’s opinion is reasonable and has the effect of broadening the number of state officers who must disclose potential conflicts, furthering the purpose of Chapter 572. *Id.* § 572.001. We therefore embrace the logic of KP-0466, and find that when the Constitution or statute do not fix a term of service for a particular officer of a state agency, the officer nevertheless serves a default term of not more than two years. Such an officer of a state agency is therefore required to file a personal financial statement, provided they meet the other elements of the definition of an “appointed officer.” Therefore, the TEC overrules prior advisory opinions to the extent they are inconsistent with this opinion. *E.g.*, Tex. Ethics Comm’n Op. Nos. 124 (1993), 138 (1993), 180 (1994).

This opinion has prospective application.

The TEC recognizes that this change of position prompted by the OAG opinion will impact a class of officers of state agencies that have not filed a PFS in reliance on past determinations of the TEC.

The Texas Supreme Court embraced the three-factor test adopted by the U.S. Supreme Court to determine if a decision should have only prospective application. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 518 (Tex. 1992) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971)). In issuing its opinions, the OAG has also applied the test employed

STAFF DRAFT. NOT FINAL UNLESS ADOPTED BY COMMISSION.

by courts to determine whether its opinion should apply only prospectively. *E.g.*, Tex. Att’y Gen. Op. No. JM-1179 (1990). We do the same here. For the reasons stated below, we believe this opinion should apply prospectively.

The test for determining whether a new or novel decision should apply prospectively only is as follows:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . , or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Second, . . . [the court] must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Finally, [the court must] weigh the inequity imposed by retroactive application, for where a decision of [the court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 518 (Tex. 1992) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971)).

First, this opinion overrules past ethics advisory opinions. The TEC is also required to “conduct a continuing survey to determine whether all individuals required to file financial statements under [Chapter 572] have filed statements . . .,” send those individuals notice to file a PFS, impose a civil penalty on those who file late, and notify the appropriate prosecuting attorney of those who have failed to file. Tex. Gov’t Code § 572.030, .031. Following past advisory opinions, when conducting its survey of individuals required to file a PFS, the TEC has found officers of a state agency without an express fixed term of service were not required to file a PFS. Consequently, such officers were not provided notice of an obligation to file a PFS and were not assessed late filing civil penalties for not filing. These state officers reasonably relied on the TEC’s past interpretation of law, which weighs in favor of non-retroactive application.

Second, prospective application will not substantially impede the effect of the disclosure statute. The stated legislative intent of Chapter 572 of the Government Code is to prevent a state officer or state employee from having financial, business, or other interests in substantial conflict with the proper discharge of the officer’s or employee’s duties in the public interest. *Id.* § 572.001(a). Retroactive application requiring the filing of PFSs for former state officers would not substantially benefit public disclosure.

Finally, Chapter 572 is also meant to provide “a basis of discipline of those who *refuse* to abide by its terms.” *Id.* § 572.001(c) (emphasis added). In terms of enforcement, it cannot be said a person “refused to abide” by the terms of Chapter 572 by not filing a PFS when they were acting

STAFF DRAFT. NOT FINAL UNLESS ADOPTED BY COMMISSION.

in reliance of a TEC interpretation of law. A retroactive application would potentially subject state officers to civil and criminal penalties, working an injustice on state officers who did not file a PFS in reliance on TEC guidance. Therefore, retroactive application would produce substantial inequitable results.

DRAFT

ETHICS ADVISORY OPINION NO. 6xx

[Date]

ISSUE

Whether the generally applicable lobby registration and disclosure requirements apply to a person who lobbies on behalf of a tribal nation. (AOR-718)

SUMMARY

The generally applicable lobby registration and disclosure requirements apply to a person who lobbies on behalf of a tribal nation.

FACTS

The requestor receives compensation from the tribal nation for making lobby communications in excess of the compensation threshold set by Section 305.003(a)(2) of the Government Code and Sections 18.31 and 34.43 of the Texas Ethics Commission rules.

ANALYSIS

A person is required to register as a lobbyist with the TEC if the person receives, or is entitled to receive compensation or reimbursement of more than a threshold amount “*from another person to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.*” Tex. Gov’t § 305.003(a)(2) (emphasis added).

The registration must include, among other things, the full name of each “person who reimburses, retains, or employs” the registrant to make a lobby communication. *Id.* § 305.005(f)(3).

“Person” is defined in Chapter 305 as “an individual, corporation, association, firm, partnership, committee, club, organization, or group of persons who are voluntarily acting in concert.” *Id.* § 305.002(8)

The requestor asks the TEC to assume that she crossed the compensation threshold for making lobby communications on behalf of a tribal nation. Consequently, the requestor is required to register as a lobbyist if a tribal nation meets the Chapter 305 definition of a “person,” absent another exemption in law.

STAFF DRAFT. NOT FINAL UNLESS ADOPTED BY COMMISSION.

The term “person” is broad enough to include a tribal nation or other unit of government. A government meets common definitions of an “organization” or “association,” which are included in the definition of a “person” *Id.* For example a dictionary definition of an “association” is “an organization having a common interest.” MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/association>. The Texas Penal Code’s definition of “association” includes “a government.” Tex. Penal Code § 1.07(6). Moreover, Chapter 305 carves out a registration exemption for members of the “judicial, legislative, or executive branch of state government or an officer or employee of a political subdivision of the state to register.” Tex. Gov’t Code § 305.003(b-1). Such an exemptions would be unnecessary if the term “person” did not reach governments. *In re Tex. Educ. Agency*, 619 S.W.3d 679, 688 (Tex. 2021) (a court “endeavor[s] to afford meaning to all of a statute’s language so none is rendered surplusage”).

It is a common practice in Texas and other states for lobbyists to disclose tribal nations as clients on state lobby disclosures or for tribal nations and related entities to file lobby registrations. *See* Frederick J. Boehmke & Richard Witmer, *State lobbying registration by Native American tribes*, 3 Pol., Groups, and Identities 1, 7 (2015) (identifying 506 registrations by tribal and tribal-related entities in a 50-state survey of lobby registrations). The requestor presented no authority and the TEC has found none that would clearly exempt a person who is employed or compensated by a tribal nation from the generally applicable lobby registration and disclosure regulations.