

# Legal Memorandum

To: Jennifer Cawley, Texas Association of Life & Health Insurers  
From: Andrew Cates  
Date: November 5, 2019  
Re: Use of Corporate Money in Texas

I have been asked to answer the following question based on the specific fact pattern presented:

The Texas Association of Life & Health Insurers (TALHI) would like legal guidance on the use of corporate money in Texas politics. Specifically, what can a corporate entity and its controlled political action committee do with corporate money and what are the restrictions on use of corporate money?

## *Summary:*

Texas law permits TALHI and LIPAC to accept corporate contributions from TALHI's corporate members and use the contributions in specific ways. There are a number of prohibitions on how the PAC can use donated money but LIPAC *is legally authorized* to collect corporate contributions from TALHI members and use them for administrative and operational purposes.

## *Background and Analysis:*

For better or worse, since the U.S. Supreme Court decision in *Citizens United* and subsequent clarifying cases, corporate money is now a mainstay in U.S. politics. The Supreme Court has cemented its decision that a corporation is a "person" under the law and enjoys the same First Amendment protections to spend its own capital to support candidates for public office in limited circumstances.

As is usually the case when federal law changes, states then struggle to adapt their own laws to fit the federal regulatory model. Texas was slow to respond statutorily but through court challenges and Texas Ethics Commission edicts, the law in the state has increasingly become clearer over the past nine years since *Citizens United*.

THIS IS A LEGAL MEMORANDUM PREPARED EXCLUSIVELY FOR THE TEXAS ASSOCIATION OF LIFE AND HEALTH INSURERS. ALL LEGAL ADVICE IN THIS MEMORANDUM IS SPECIFIC TO THE ISSUE(S) ADDRESSED HEREIN ONLY AND SHOULD NOT BE CONSIDERED ADVICE ON ANY OTHER TOPIC OR HYPOTHETICAL SCENARIO.

THIS MEMORANDUM IS CONSIDERED A CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT WORK PRODUCT.

There are a number of issues to discuss regarding the use of corporate money in elections in Texas for TALHI:

1. What is considered corporate money?
2. The use of corporate money for a PAC
3. The use of corporate money for corporate activities
4. Specific insurer issues – Pay-to-Play

### **Corporate Money**

In Texas, almost all entities formed under the Texas Business Corporation Act, the Texas For-Profit Corporation Law, the Texas Non-Profit Corporation Act, and the Texas Nonprofit Corporation Law are considered corporations for the purpose of determining whether or not money from the coffers of the business is “corporate” money.<sup>1</sup> Additionally, all of the following are considered corporations for the sake of Title 15 of the Election Code, whether incorporated or not, and all members of the groups below are considered “stockholders”:

- banks
- trust companies
- savings and loan association or companies
- insurance companies
- reciprocal or interinsurance exchanges
- railroad companies
- cemetery companies
- government-regulated cooperatives
- stock companies
- abstract and title insurance companies.<sup>2</sup>

While not explicitly stated in the law, there are exceptions to this blanket corporate treatment. The law does not list professional corporations, partnerships, and limited liability companies in the corporate status blanket. Thus, as long as none of the partners/owners of those entities are corporate entities themselves, they are not treated as corporations under the Election Code.<sup>3</sup>

Therefore, TALHI as a 501(c)(6) membership association organized under the Texas Non-Profit Corporation Act and each insurance company member of TALHI will be treated as corporations under Texas law. This is an important starting point since there are very clear

---

<sup>1</sup> §253.091, Election Code, 1 Tex. Admin. Code §24.1 – Corporations and Certain Associations Covered

<sup>2</sup> §253.093, Election Code

<sup>3</sup> See Texas Ethics Advisory Opinion 383 – LLC owned in whole or in part by a corporation.

THIS IS A LEGAL MEMORANDUM PREPARED EXCLUSIVELY FOR THE TEXAS ASSOCIATION OF LIFE AND HEALTH INSURERS. ALL LEGAL ADVICE IN THIS MEMORANDUM IS SPECIFIC TO THE ISSUE(S) ADDRESSED HEREIN ONLY AND SHOULD NOT BE CONSIDERED ADVICE ON ANY OTHER TOPIC OR HYPOTHETICAL SCENARIO.

THIS MEMORANDUM IS CONSIDERED A CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT WORK PRODUCT.

federal and state prohibitions on direct contributions to candidates by corporations and labor organizations.<sup>4</sup>

### **Using Corporate Money for a PAC**

Under Texas law corporations may spend corporate money to set up and administer a political action committee (PAC).<sup>5</sup> Most membership associations in the state take advantage of this ability and expend corporate funds to create a PAC to engage in political speech via campaign contributions. In fact, it is no wonder that the largest associations in the state with the greatest perceived power (Texas Medical Association and Texas Association of Realtors are two notable examples) also have some of the largest PACs in the state and give generously to elected officials by way of campaign contributions.

The customary purpose of a PAC is to fundraise contributions from non-corporate sources and use them for political expenditures which the corporation would otherwise be prohibited from making. All money lawfully contributed to the PAC from individuals and non-corporate partnerships/LLCs is considered non-corporate money. This money has no restriction in how it can be used and, practically speaking, non-corporate money is considered to be gold for that reason. Non-corporate money should always be prioritized and set aside only for political purposes whenever possible.

On the other hand, under Texas law organizations can spend corporate money only in specific ways in the operation of a PAC<sup>6</sup>:

1. office space maintenance and repairs
2. telephone and Internet services
3. office equipment
4. utilities
5. general office and meeting supplies
6. salaries for routine clerical, data entry, and administrative assistance necessary for the proper administrative operation of the committee
7. legal and accounting fees for the committee's compliance needs
8. routine administrative expenses incurred in establishing and administering a general-purpose political committee
9. management and supervision of the committee, including expenses incurred in holding meetings of the committee's governing body to interview candidates and make endorsements relating to the committee's support
10. the recording of committee decisions
11. expenses incurred in hosting candidate forums in which all candidates for a particular office in an election are invited to participate on the same terms

---

<sup>4</sup> 52 U.S.C. §30118(a) and §253.094, Texas Election Code

<sup>5</sup> §253.100, Election Code

<sup>6</sup> §253.100(a) and (b)

THIS IS A LEGAL MEMORANDUM PREPARED EXCLUSIVELY FOR THE TEXAS ASSOCIATION OF LIFE AND HEALTH INSURERS. ALL LEGAL ADVICE IN THIS MEMORANDUM IS SPECIFIC TO THE ISSUE(S) ADDRESSED HEREIN ONLY AND SHOULD NOT BE CONSIDERED ADVICE ON ANY OTHER TOPIC OR HYPOTHETICAL SCENARIO.

THIS MEMORANDUM IS CONSIDERED A CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT WORK PRODUCT.

12. expenses incurred in preparing and delivering committee contributions
13. creation and maintenance of the committee's public Internet web pages that do not contain political advertising.
14. expenditures to finance the solicitation of contributions to the PAC from the corporation stockholders, employees, or families of stockholders or employees (this includes the employees/stockholders/families for corporate members of the corporation)

Here, you see in #7, 8, and especially 14 the most widespread and important uses of corporate money by an organization that sets up a PAC. The ability to defray common expenses like legal fees, administrative costs and fundraising expenses with corporate money will free up the important non-corporate money that is raised from fundraising to be used for its intended purpose – political contributions to candidates and elected officials.

The law restricts associations in fundraising only to the extent that they are only able to use corporate funds to solicit contributions to the PAC from their **restricted class** – their members/stockholders and the families of members/stockholders. For TALHI this means that LIPAC can use corporate money from TALHI to solicit all of its company members and their employees/employees families.

A corporation may not use corporate money in a PAC to pay for<sup>8</sup>:

1. political consulting to support or oppose a candidate
2. telephoning or telephone banks to communicate with the public
3. brochures and direct mail supporting or opposing a candidate
4. partisan voter registration and get-out-the-vote drives
5. political fundraising other than from its stockholder or members, or the families of its stockholders or members
6. voter identification efforts, voter lists, or voter databases that include persons other than its stockholders/members/families
7. polling of anyone but its own stockholders/members/families which is designed to support or oppose a candidate
8. recruiting candidates

Bills passed in 2019 now clarify and explicitly allow PACs to accept corporate money from any source (not just from its controlling corporation) as long as the money is designated as a corporate contribution to the PAC for the purpose of establishment, administration, maintenance or operation of the PAC.<sup>9</sup> However, the statute does not go so far as to allow corporate contributions from sources other than the controlling corporation to finance solicitation of the corporation's members for contributions.

\*For TALHI's purposes, all of this means that TALHI can directly fund its PAC with corporate contributions for all of the allowable purposes listed above, but if the PAC

---

<sup>8</sup> §253.100(d), Election Code

<sup>9</sup> §253.100(a), Election Code

THIS IS A LEGAL MEMORANDUM PREPARED EXCLUSIVELY FOR THE TEXAS ASSOCIATION OF LIFE AND HEALTH INSURERS. ALL LEGAL ADVICE IN THIS MEMORANDUM IS SPECIFIC TO THE ISSUE(S) ADDRESSED HEREIN ONLY AND SHOULD NOT BE CONSIDERED ADVICE ON ANY OTHER TOPIC OR HYPOTHETICAL SCENARIO.

THIS MEMORANDUM IS CONSIDERED A CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT WORK PRODUCT.

accepts corporate contributions from others (its members, for instance) the PAC can only use that money to offset or pay for the administration and operation of the PAC, but not for fundraising expenses to solicit contributions to the PAC.

### **Using Corporate Money for Corporate Activities**

You may notice a distinct pattern in these lists of allowable and prohibited activities with corporate money. There is a clear differentiation between how an association can communicate with the public vs. how it can communicate with its own members. In fact, §253.100(e) goes a step further to remove any doubt and states that none of the prohibitions listed above regarding the use of corporate money apply when a corporation uses corporate money to communicate with its own members, stockholders, or families of members/stockholders.

Associations like TALHI are always permitted to spend corporate funds to communicate with their own members, and such expenditures are not reportable to the Texas Ethics Commission.<sup>10</sup> It does not matter if the association actively supports a candidate and sends out a voter guide on who the association recommends for election, as long as the communication is solely to its restricted class (its members and their families), it is not reportable.

In contrast, associations can make corporate expenditures to fund nonpartisan voter registration drives and get-out-the-vote efforts as long as they are truly for civic participation and do not favor any candidate or measure specifically.<sup>11</sup> Additionally, associations may create and maintain websites providing unbiased information about candidates as long as all candidates on the ballot for a given election are included and no preference for a particular candidate is stated.<sup>12</sup>

### **Pay-to-Play Issues**

The Securities and Exchange Commission passed pay-to-play regulations in 2010 to apply to investment advisers and their covered associates making contributions to officials of a government entity to which the investment adviser is providing or seeking to provide investment advisory services.<sup>19</sup> In its most basic form, the rule provides a two year layout period between the time an investment advisor last made a contribution in connection with an election and the time that he or she is able to be paid for investment advice to a government entity.

---

<sup>10</sup> §253.098, Election Code

<sup>11</sup> §253.099, Election Code, 1 Tex. Admin. Code §24.17 – Corporate Expenditures for Get-Out-The-Vote Campaigns Permitted

<sup>12</sup> See Texas Ethics Advisory Opinion 327

<sup>19</sup> 17 C.F.R. §275.206(4)-5(a)

THIS IS A LEGAL MEMORANDUM PREPARED EXCLUSIVELY FOR THE TEXAS ASSOCIATION OF LIFE AND HEALTH INSURERS. ALL LEGAL ADVICE IN THIS MEMORANDUM IS SPECIFIC TO THE ISSUE(S) ADDRESSED HEREIN ONLY AND SHOULD NOT BE CONSIDERED ADVICE ON ANY OTHER TOPIC OR HYPOTHETICAL SCENARIO.

THIS MEMORANDUM IS CONSIDERED A CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT WORK PRODUCT.

The rule is written broadly to cover any state, state agency or political subdivision of a state in the definition of “government entity”. It is also broad in the definition of a “contribution” which is any gift, loan, advance, or deposit of money or anything of value made for the purpose of influencing any election for Federal, State or local office, payment of debt for an election, or transition or inaugural expenses for a successful candidate.<sup>20</sup>

These regulations also apply to contributions from any political action committee controlled by:

- The investment adviser;
- The investment adviser’s covered associates, including any general partner, managing member, executive officer, or other individual with a similar status or function; or
- Any employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee<sup>21</sup>

There is a further prohibition which states, in short, that advisers and covered associates are prohibited from coordinating or soliciting any person or PAC to make a contribution to an official of a government entity to which the adviser is or is trying to provide services, or a contribution to a political party in an area where the adviser is or is trying to provide services to a government entity.<sup>22</sup>

### **Recommendation**

After careful analysis of this rule, the Texas Election Code and the application of both to TALHI, LIPAC, and TALHI’s company members, it is my interpretation that contributions of corporate money by TALHI members to LIPAC would not violate this rule or any Texas law if the contributions are designated to be used for administrative or operational purposes.

As stated earlier in this memorandum, it is both a state and federal crime to convert corporate money into a direct monetary contribution to a candidate. Therefore, any contribution from an insurance company member of TALHI would be usable by LIPAC only for the following two purposes:

1. Administration and operation of the PAC; or
2. Direct campaign expenditures in support or opposition of a candidate or measure.

Neither LIPAC nor TALHI currently engage in direct campaign expenditures and have stated that there is no intention to do so, so I will not address that here. But it is important

---

<sup>20</sup> 17 C.F.R. §275.206(4)-5(f)(1) & (5)

<sup>21</sup> 17 C.F.R. §275.206(4)-5(f)(2)

<sup>22</sup> 17 C.F.R. §275.206(4)-5(a)(ii)

THIS IS A LEGAL MEMORANDUM PREPARED EXCLUSIVELY FOR THE TEXAS ASSOCIATION OF LIFE AND HEALTH INSURERS. ALL LEGAL ADVICE IN THIS MEMORANDUM IS SPECIFIC TO THE ISSUE(S) ADDRESSED HEREIN ONLY AND SHOULD NOT BE CONSIDERED ADVICE ON ANY OTHER TOPIC OR HYPOTHETICAL SCENARIO.

THIS MEMORANDUM IS CONSIDERED A CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT WORK PRODUCT.

to note that the SEC rule above prohibits corporate pay-to-play contributions when the money is specifically used “in connection with an election.”

Administration and operation expenses of the PAC would not be considered a contribution to a candidate even by the most liberal interpretation of the definition of “contribution” in this rule and in Title 15 of the Texas Election Code.

Additionally, as stated on page four of this memorandum, bills passed in 2019 in Texas explicitly allow corporately-controlled PACs to collect corporate money from any source (and not just from the connected corporation), as long as the corporate money is used solely for administrative and operations expenses. This money may not be used for fundraising efforts to solicit from the association’s members.

Therefore, it is my interpretation that as long as all corporate money collected from TALHI members for LIPAC is used for administrative and operations purposes only, neither Texas law nor SEC pay-to-play regulations would prohibit such an action.

If you have any questions on anything contained in this memo, please let me know. I can be reached at [txethics@gmail.com](mailto:txethics@gmail.com) or on my cell phone, 512-426-4593.

THIS IS A LEGAL MEMORANDUM PREPARED EXCLUSIVELY FOR THE TEXAS ASSOCIATION OF LIFE AND HEALTH INSURERS. ALL LEGAL ADVICE IN THIS MEMORANDUM IS SPECIFIC TO THE ISSUE(S) ADDRESSED HEREIN ONLY AND SHOULD NOT BE CONSIDERED ADVICE ON ANY OTHER TOPIC OR HYPOTHETICAL SCENARIO.

THIS MEMORANDUM IS CONSIDERED A CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT WORK PRODUCT.