TEXAS ETHICS COMMISSION

IN THE MATTER OF	§	SC-3150250
	§	
DONALD ZIMMERMAN,	§	
	§	
RESPONDENT	§	
	§	

Respondent's Legal Memorandum Regarding Complaint as to Section 253.041(a)

Respondent Zimmerman, through the undersigned counsel, submits this legal memorandum to assist the Commission in resolving this sworn complaint. As described herein, there is no credible evidence of a violation of section 253.041(a); in fact, the evidence, including bank statements, affirmatively establish that there was no violation under Texas law as provided in the statues and interpreted and applied by this Commission.

I. Factual Background

Zimmerman opened his Austinites for Zimmerman campaign account in July 2014. The initial deposit consisted of $10,000 from Zimmerman's personal funds on July 24. Zimmerman loaned another $10,000 from personal funds to the campaign on September 8, 2014.

Zimmerman stated in his original response to the notice of sworn complaint that his wife Jennifer was "urgently" needed to work for the campaign. (Response letter dated Feb. 26, 2015.) She worked tirelessly at various critical tasks including fundraising, volunteer organizing, producing flyers and proofreading, block walking, and phone banking. *Id.* Zimmerman estimates the value of her work for the campaign at a minimum of $10,000. *Id.* Zimmerman wrote a check to Jennifer Zimmerman on December 30, 2014 for $2,000 for campaign work.

After the initial deposit in July 2014 ($10,000 personal funds), the lowest balance that ever existed in the account prior to the payment to Jennifer Zimmerman was $2,926.39 (ending daily

balance on November 5, 2014). The balance in the account on the date the check was written (December 30, 2014) was $4,333.83. However, the check did not clear the bank until January 20, 2015. Before Jennifer's check cleared, the balance was $4,282.81; after it cleared, the balance was $2,282.81.

Zimmerman's two $10,000 loans to the campaign were properly and timely reported. (See 30-Day Report filed Oct. 5, 2014 (covering 7/21/14 – 9/28/14)). Zimmerman also properly reported the $2,000 payment to Jennifer, just as with all other campaign expenditures. In fact, Zimmerman's political opponent Bill Aleshire became aware of the payment because it was listed on Zimmerman's campaign finance report. Of course, Mr. Aleshire did not have access to Zimmerman's bank account statements, so he had no way of knowing whether Zimmerman had personal funds remaining in his account at the time of the payment. However, Mr. Aleshire, and the general public, did know that Zimmerman had loaned $20,000 to his campaign.

In addition to his written responses (Feb. 26, 2015 and April 12, 2016), Zimmerman has provided the Commission financial documentation, including (1) "Austinites for Zimmerman" campaign-account bank statements reflecting all transactions in the campaign account from its inception to several months beyond the relevant activity here; (2) copies of the two canceled checks from Zimmerman's personal funds (for $10,000 each) that were deposited into the campaign account; (3) a copy of the canceled check from Austinites for Zimmerman to Jennifer Zimmerman for $2,000; and (4) copies of the statements from Zimmerman's personal account reflecting the origin of the two $10,000 loans.

II. Review of Relevant Law

A. Separate-account requirement and deposits of personal funds

Texas law requires candidates to keep all campaign and officeholder contributions in one or more accounts separate from any other accounts maintained by the candidate, except that the candidate may deposit his or her personal funds into the political account(s). Tex. Elec. Code § 253.040(a).

The provision contemplating deposits from a candidate's personal funds provides, in relevant part, that

> A candidate or officeholder who deposits personal funds in an account in which political contributions are held shall report the amount of personal funds deposited as a loan and may reimburse the amount deposited as a loan from political contributions or unexpended personal funds deposited in the account. The reimbursement may not exceed the amount reported as a loan. Personal funds deposited in an account in which political contributions are held are subject to Section 253.035 and must be included in the reports of the total amount of political contributions maintained required by Sections 254.031(a)(8) and 254.0611(a).

Tex. Elec. Code § 253.0351(c).

Thus, while personal funds deposited into the campaign account are required to be reported as a loan and are subject to the personal use restriction, they do not lose their character as personal funds simply by virtue of being deposited in the account. Advisory Op. No. 389 (1998) ("Nor does a candidate make a loan to himself or herself by transferring funds from a 'personal' account to a 'political' account. Such a transfer does not effect a change in the personal nature of the funds and is not, by itself, an 'expenditure.'"); *accord* Advisory Op. No. 391 (1998). Also, the statute expressly requires that such personal funds be included in the figure for the "total political contributions maintained," reported on line 5 of Form C/OH. The Ethics Commission has made clear that the total political contributions maintained should be the actual balance in the account as of the end of the reporting period, without regard to whether funds in the account have already

been obligated by outstanding checks written on the account. 1 Tex. Admin. Code § 20.5; *see also Campaign Finance Guide for Candidates and Officeholders Who File with Local Filing Authorities* at 14 (revised Jan. 1, 2017) (hereinafter "Local Candidate Guide").[1]

The Sworn Complaint alleges a violation of section 253.041, providing that

> A candidate or officeholder…may not knowingly make or authorize a payment from a political contribution if the payment is made for personal services rendered by the candidate or officeholder or by the spouse or dependent child of the candidate or officeholder to…(2)…the spouse or dependent child of the candidate or officeholder.

Tex. Elec. Code § 253.041(a). A violation of this statute requires that one (1) "knowingly" make or authorize a payment (2) "from a political contribution" (3) "for personal services" (4) rendered by the candidate or officeholder or by his or her spouse or dependent child; and (5) such payment is made to the spouse or dependent child.

B. Texas law includes no requirement or guidance as to accounting for funds *within* political account(s).

> *"As to the reporting of loans, please note that reporting under the Texas Campaign Finance Law is not subject to generally accepted accounting principles."* Paul Hobby, Chair, Tex. Ethics Com'n (Dec. 31, 2014).[2]

Former Chair Hobby was right. While the Election Code requires candidates to keep political contributions in one or more accounts separate from other accounts (with an exception permitting deposits of the candidate's personal funds), there is nothing in Texas law or any guidance provided by the Ethics Commission governing the method of accounting for (or "tracing") funds *within* the political account. The lack of any requirement or guidance in Texas law can be more readily understood when compared to Federal law.

[1] *Available at* https://www.ethics.state.tx.us/guides/coh_local_guide.pdf.

[2] *Available at* https://www.ethics.state.tx.us/whatsnew/TexasEthicsCommission-LetterToHardhattersTeam.pdf.

Federal statute requires that "[t]he treasurer of a political committee shall keep an account of" information required for reporting, such as, *inter alia*, "(1) all contributions received by or on behalf of such political committee" and "(2) the name and address of any person who makes any contribution in excess of $50, together with the date and amount of such contribution," and shall preserve records for three years. 52 U.S.C. § 30102(c) ("Recordkeeping"). The Federal Election Commission adopted regulations fleshing out these requirements, directing that "[a]n account shall be kept by *any reasonable accounting procedure* of all contributions received by or on behalf of the political committee." 11 C.F.R. § 102.9(a). The FEC has recognized that "[n]either the Act nor Commission regulations specify a particular accounting method" to track contributions in the account, and recognized that the "last in-first out" (LIFO) method may be used because "LIFO is a generally accepted accounting principle" and thus a reasonable procedure as required under the regulation. FEC Adv. Op. 2004-45 (Salazar) (holding Salazar Committee may use LIFO "for the purpose of determining whether its remaining cash-on-hand after the election contains any excess contributions"). While FEC regulations require "any reasonable accounting procedure" for recordkeeping purposes in general, where a non-federal committee with money in the bank registers as a federal political committee, the regulations specifically require that the "first in-first out" (FIFO) method be used to determine the source of the funds in the account at the time of registration. *See* FEC Adv. Op. 2000-25 (Minnesota House DFL Caucus) (citing 11 C.F.R. § 104.12).

The Texas Election Code requires recordkeeping with language analogous to the federal *statute*: "Each candidate…shall maintain a record of all reportable activity," and "[t]he record must contain the information that is necessary for filing the reports required by [chapter 254]." Tex. Elec. Code § 254.001(a), (c); *cf.* 52 U.S.C. § 30102(c). While Texas law requires candidates to

keep records of information required for reporting, there is no requirement that any particular accounting procedure be used for general recordkeeping, *cf.* 11 C.F.R. § 102.9 (requiring any reasonable accounting procedure be used for general recordkeeping), nor is there any provision requiring a specific accounting method for tracing contributions in the account in particular circumstances. *Cf. id.* § 104.12 (requiring a specific accounting method (FIFO) in a specific circumstance). The lack of any guidance in the Election Code or TEC regulations is particularly noteworthy in light of the fact that, in another context, the Texas Legislature has provided more specificity regarding permissible accounting methods. *See* Tex. Spec. Dist. Local Laws Code § 21.351 ("The district shall keep complete and accurate accounts of its business transactions in accordance with generally accepted methods of accounting.").

Thus, in contrast to federal campaign finance law, and in contrast to other parts of Texas law outside the political-activity context, there is no Texas statute, Ethics Commission rule, or advisory opinion requiring candidates to designate, identify, choose, or use a particular accounting method, either in general or in any specific circumstance. It is simply not addressed.[3] The omission of any specific accounting requirement means there is no requirement. *See Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) ("When the Legislature has carefully employed a term in one section of a statute, and has excluded it in another, it should not be implied where excluded.").

Accordingly, the Local Candidate Guide on the TEC's website—which the TEC publishes to assist candidates as to their responsibilities regarding campaign accounts and activities—does

[3] The word "accounting" appears only once in Election Code title 15, as "accounting fees" are included in the list of illustrative general-purpose committee administrative expenses for which corporate funds may be used. Tex. Elec. Code § 253.100(a)(7). It appears only once in the Commission's Rules, at Rule 20.61(a)(1)(B) (listing "accounting/banking" as an acceptable category of expenditure).

not address accounting whatsoever, much less require candidates to choose or use any particular accounting method.

In fact, the TEC has several times recognized that the campaign finance reporting rules do not establish or constitute an accounting method. A TEC webpage regarding "Reporting Expenses From Personal Funds" advises readers to "[k]eep in mind that this reporting system is not an accounting system[.]"[4] Former TEC Chair Paul Hobby chastised the "Hardhatters Team" because—just like Bill Aleshire here—they filed complaints based on assumptions drawn from information appearing on the face of a report without recognizing that the reports do not reflect any accounting method, including when it comes to accounting for personal funds deposited in a campaign account. Hobby wrote that "[a]s to the reporting of loans, please note that reporting under the Texas Campaign Finance Law is not subject to generally accepted accounting principles." Letter from P. Hobby to Hardhatters Team (Dec. 31, 2014). *See also* Order in SC-2812386, p. 17 (recognizing that "the campaign finance reporting system is not an accounting system")

III. The Texas Ethics Commission Is a Legislative Agency and Thus Lacks Any Enforcement Authority.

The TEC has recently represented and acknowledged in court filings that it is a legislative agency. *See TEC Plea to the Jurisdiction* at 5-6, filed Oct. 21, 2016 in *Tex. Ethics Com'n v. Empower Texans, Inc.*, No. D-1-GN-15-004455 (345th Jud. Dist., Travis Cnty.). As such, under principles of separation of powers under the Texas Constitution, the TEC can have no enforcement authority. Tex. Const. art. II, § 1. Respondent states this objection to jurisdiction here for the

[4] https://www.ethics.state.tx.us/whatsnew/tips_personal_funds.html (revised September 2011), last visited March 11, 2017.

record. Nonetheless, even if the TEC overrules this objection and proceeds to consider this sworn complaint on the merits, there was no violation, as described below.

IV. Under LIFO, Sufficient Personal Funds Remained in Zimmerman's Campaign Account at the Time the Check to Jennifer Zimmerman Was Written and Cleared.

The LIFO method can be illustrated by imagining stacking money on a table. Zimmerman's initial $10,000 deposit, for example, would be placed on the table first. Subsequent receipts are placed on top of the stack. The "last" money in is the "first" out, so disbursements can be imagined as taking money off the top of the stack. After Zimmerman's initial deposit of personal funds, the account never dipped below $2,926.39 (ending daily balance, Nov. 5, 2014). Applying last in-first out, that $2,926.39 was composed entirely of Zimmerman's personal funds from the initial deposit. Political contributions were received and the balance increased, but when Zimmerman wrote the check to Jennifer on December 30, and when it cleared on January 20, 2015, that approximately $2,900 in personal funds remained available in the account.

The TEC's Order and Agreed Resolution claims that "[c]redible evidence indicates that the respondent did not have any remaining personal funds in his campaign account at the time the $2,000 payment to his spouse was made." (Order and Agreed Resolution, p. 3, ¶4.) This conclusion lacks any basis in law. This conclusion is premised on first in-first out accounting, which is clear from the method of calculation although it is not expressly stated. But there is no basis for imposing first in-first out accounting, nor is there a basis for applying *any* generally acceptable accounting method, because Texas law does not require that any method be identified, designated, chosen, or used by candidates, in general or in any specific instance. The TEC has recognized this—in fact, Former Chair Hobby wrote this in a public letter the same month Zimmerman made the payment at issue, and the TEC's own website explains this—and yet the proposed order proceeds as if FIFO is required by Texas law.

There can be no finding that Zimmerman "knowingly" paid his wife "from political contributions" by arbitrarily applying FIFO, where sufficient personal funds remained in the account under another accounting method (LIFO). Texas law is silent as to accounting method, and the TEC is not free to choose a particular method and apply it retroactively. This conclusion is further supported by the fact that the TEC has already held, in a previous advisory opinion, that where no rule existed regarding the characterization of a certain type of activity, "the appropriate characterization is a matter for the candidate and the committee to determine." Advisory Op. No. 271 (1995).[5]

V. Even If All Personal Funds Had Been Expended, Zimmerman's Payment to His Wife Was Permissible Because He Had a Personal Claim On the Account for $20,000.

Zimmerman had loaned his campaign $20,000 and properly reported the loans, so he was entitled to reimbursement of $20,000. The account balance was $4,333.83 on the date he wrote the check to Jennifer. Instead of writing that check to Jennifer, Don Zimmerman could have written a check to "Don Zimmerman" on that date for the entire $4,333.83 in partial repayment of his loan and deposited it into his personal account. Or, instead of depositing it into his own account, he also could have immediately endorsed the check with the words "pay to Jennifer Zimmerman," for campaign work, or as a gift, or for any other reason at all. Any of this would have been perfectly legal. To hold that Zimmerman "knowingly" violated § 253.041(a) by writing a check directly to Jennifer Zimmerman—in a transparent manner—rather than putting the funds into his own pocket, or endorsing the check over to her, would elevate form over substance.

[5] Advisory Opinion 271 recognized that, when a candidate with an SPAC uses personal equipment for campaign purposes, "it may be difficult to determine whether the use of the candidate's personal equipment…should be characterized as the candidate transferring personal equipment to the committee or as the candidate himself using [it] for campaign purposes," and therefore "[t]he appropriate characterization is a matter for the candidate and the committee to determine." Similarly here, "it may be difficult to determine" whether a particular expenditure is from personal or political funds commingled in an account, and this characterization must be left up to the candidate because there is no accounting rule applicable.

The TEC has already indicated, in a similar context, that no personal use would have resulted from using political contributions for personal expenses to the extent that an officeholder had a reimbursement claim on his political contributions. Advisory Op. No. 230 (1994) ("[W]e assume the officeholder was not *entitled* to reimburse his personal funds $800 from political contributions in accordance with section 253.035(h) of the Election Code. If the officeholder had been *entitled* to do so, no conversion to personal use would have occurred in the situation described.") (emphasis added). At the time of this advisory opinion, the Election Code already required candidates to properly report expenditures of personal funds as intended for reimbursement in order to be entitled to reimbursement for those expenditures. *See* 1991 Tex. Sess. Law Serv. Ch. 304 (S.B.1) § 5.06 (amending § 253.035). Notably, the Commission did <u>not</u> condition the above-quoted statement on the premise that the officeholder had already reported the reimbursement to his personal funds and then made the personal expenditure in a separate transaction; the Commission simply said if he was *entitled* to reimbursement, then there would be no violation for using political contributions for personal expenditures.

Similarly here, Zimmerman properly reported his loans and was entitled to reimbursement for them. Even if all funds in his campaign account were political contributions (and under LIFO, they were not), his check to Jennifer must be deemed permissible as indicated in Advisory Opinion 230.

This is particularly true in this context, where the candidate is in full control over the "campaign" account. There was no separate entity akin to a corporate person; "Austinites for Zimmerman" is simply an account for holding political contributions as required by statute. The candidate maintains sole title and control over the account. Therefore, even if no deposit of "personal funds" remained in the account under *any* accounting method, Zimmerman had personal

legal entitlement to all "political contributions" deposited into the account (up to $20,000) such that they were effectively his personal funds, eligible to be repaid at his sole discretion. A candidate cannot be held to have "knowingly" made an expenditure "from political contributions" where he and the general public both know that he is entitled to $20,000 in reimbursements from the account, and particularly where a previous advisory opinion endorses that very principle.

VI. To the Extent There Is Any Ambiguity, Due Process Requires the Commission To Interpret the Law In Respondent's Favor.

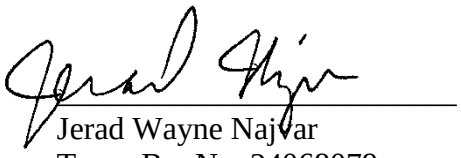
As discussed above, Texas law's silence as to any accounting method in the political activity context, particularly where the Legislature has provided specificity in another context (regarding special district accounting), *necessarily means* that there are *no* accounting requirements applicable to campaign accounts under title 15. The Commission has already recognized this. Even if this point were ambiguous, it would still be illegal for the TEC to impose FIFO and find a violation where sufficient personal funds remained under LIFO. This would be the conclusion of any court of law, particularly given the rule of lenity applicable to criminal provisions (section 253.041(a) is a criminal statute). And the TEC has already recognized that it must interpret laws under its jurisdiction in light of principles of due process. Advisory Op. No. 72 (1992) ("The due process clause of the United States Constitution requires that a penal statute define a criminal offense with sufficient definiteness that an ordinary person can understand what conduct is prohibited…This commission, therefore, will recommend to the legislature that it clarify the provision."); *see also* Advisory Op. No. 44 (1992) (recognizing that due process required an exception to statute in some circumstances). The Commission applied this principle again in 2005, holding that the attorney-referral-income reporting requirement in the Government Code was "so vague as to be unenforceable," and that was a provision applicable only to *attorneys* who were *state officers*. Advisory Op. No. 466 (2005). Certainly this Commission, which

previously held that a simple reporting provision applicable *only to well-placed lawyers* was void for vagueness, can recognize that it cannot retroactively apply a specific method of accounting (which would apply to *all* candidates, most of whom are not lawyers) where no method of accounting is contemplated or required in the law.

VII. Conclusion

Zimmerman objects to the sworn complaint and the application of the statute and relevant laws for additional reasons, including but not limited to the fact that the term "personal services" is ambiguous in context. However, it is not necessary to elaborate on all arguments here. It is clear there was no violation for the reasons given above. Zimmerman respectfully requests that the Commission so find and dismiss the complaint.

Respectfully submitted,



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