

Wayne Smith  
Chair



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OPINION COMMITTEE

RQ-0626-GA

September 13, 2007

The Honorable Greg Abbott  
Attorney General  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

FILE # ML-45364-07

I.D. # 45364

**PRINCIPAL QUESTION PRESENTED: Whether the Boardmembers of the Tobacco Settlement Permanent Trust Account Investment Advisory Committee must file Personal Financial Statements pursuant to the requirements of chapter 572 of the Texas Government Code**

Dear General Abbott:

I am requesting an opinion from your office regarding the foregoing question, as I believe there exists sufficient confusion on this issue to warrant clarification.

The question relates to the Tobacco Settlement Permanent Trust Account Investment Advisory Committee, (the "Advisory Committee"), which was created by the Texas Legislature following the settlement of the Texas tobacco litigation, particularly those claims raised by certain Texas Counties and Hospital Districts. See, Acts of the 76<sup>th</sup> Legislature Ch. 753 § 1.01, (1999) (formerly H.B. 1161, now codified as Section 403.1042 of the Texas Government Code).

Recently the Advisory Committee has been advised that following a re-examination of the provisions within Chapter 572 of the Government Code by the Texas Ethics Commission, the Advisory Committee members will be required to complete and file Personal Financial Statements with the Texas Ethics Commission. (See letter of May 2, 2007 to Martin A. Hubert, Deputy Comptroller, Texas Comptroller of Public Accounts from Natalia Luna Ashley, General Counsel Texas Ethics Commission, a copy of which is attached hereto).

This finding reversed prior guidance of the Texas Ethics Commission to the effect that the Advisory Committee Boardmembers were not required to file Personal Financial Statements per Chapter 572 of the Government Code, as the Advisory Committee was outside the executive branch of State Government and its duties were advisory in nature. (See, Texas Ethics Commission Request For Determination Of Filing Status, October 19, 1999, copy enclosed).

Please contact my office at (512) 463-1760, if you have any questions regarding this request.

Sincerely,

*Wayne Smith*  
Wayne Smith

MEMBERS:

Valinda Bolton ☆ Garnet Coleman ☆ David Farabee  
Patricia Harless ☆ Joe Heflin ☆ David Leibowitz ☆ Todd Smith

Capitol Extension E2.122  
(512) 463-0760

P.O. Box 2910  
Austin, Texas 78768-2910

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May 2, 2007

Mr. Martin A. Hubert  
Deputy Comptroller  
Texas Comptroller of Public Accounts  
P. O. Box 13528  
Austin, Texas 78711-3528

**Re: Tobacco Settlement Permanent Trust  
Account Investment Advisory Committee**

Dear Mr. Hubert:

I am writing in response to your letter dated April 13, 2007, and received by our office on April 18, 2007. You ask whether the October 1999 decision made by the Texas Ethics Commission stating that members of the Tobacco Settlement Permanent Trust Account Investment Advisory Committee (Advisory Committee) are not required to file a personal financial statement is still valid. At your request, we have reconsidered the October 1999 decision and determined that the Advisory Committee is required to file a personal financial statement for the reasons stated in this letter.

Section 572.002(10) of the Government Code defines "state agency" as any department, commission, board, office, or other agency that:

- (i) is in the executive branch of state government;
- (ii) has *authority* that is not limited to a geographical portion of the state; and
- (iii) was created by the constitution or a statute of this state. (Emphasis added.)

The preliminary issue is whether the Advisory Committee is a "department, commission, board, office, or other agency that is in the executive branch of state government." The October 1999 decision concluding that the Advisory Committee is not in the executive branch appears to have been based on the fact that some Advisory Committee members are appointed by entities that are not in the executive branch of state government.

Based on the reasoning of Ethics Advisory Opinion No. 141 (1993) and Attorney General Opinion Nos. GA-0318 (2005) and JM-58 (1993), a distinction between an executive branch agency and a non-executive branch

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agency can be determined by looking at an agency's enabling statute. In particular, examining the statutory language that specifies who must be appointed to the agency. If the enabling statute requires members to be either from the legislative or judicial branches of state government, then it is not an executive branch agency. If the enabling statute does not require any members to be from the legislative or judicial branches of state government, then it is an executive branch agency. It would be an executive branch agency even if the members were required to be from a political subdivision, or the public, or another agency, just so long as they are not from the other two branches of state government.

The Advisory Committee was statutorily created under the executive branch title of the Government Code, Title 4. The Advisory Committee enabling statute does not require any member to be from the legislative or judicial branches of state government. Therefore, in our opinion, the Advisory Committee is in the executive branch of state government for purposes of Section 572.002(10) of the Government Code.

The next issue is whether the Advisory Committee has *authority* that is not limited to a geographical portion of the state. The Texas Ethics Commission has said that if an entity does not wield actual "authority," it does not fall within the definition of a "state agency" for purposes of Section 572.002(10) of the Government Code. Ethics Advisory Opinion Nos. 26 (1992) and 243 (1995). Section 403.1042 of the Government Code provides that except as provided by Section 403.1041(h), the Advisory Committee serves in an advisory capacity only. Section 403.1041(h) provides that, "A rule adopted by the comptroller under this subsection must be submitted to the advisory committee and may not become effective before the rule is approved by the advisory committee." In our opinion, the fact that a rule adopted by the comptroller may not become effective unless the Advisory Committee approves it confers "authority" upon the Advisory Committee. Additionally, the authority is not limited to a geographical portion of the state. Therefore, in our opinion, the Advisory Committee has authority that is not limited to a geographical portion of the state for purposes of Section 572.002(10) of the Government Code.

The remaining issue, and the easiest of the three, is whether the constitution or a statute of this state created the Advisory Committee. As previously stated, Section 403.1042 of the Government Code statutorily created the Advisory Committee.

In summary, the Advisory Committee is a state agency for purposes of Section 572.002(10) of the Government Code and therefore, each member of the committee is required to file a personal financial statement.

If you will provide to me a list of the Advisory Committee members, we will send them a notice to file the 2007 personal financial statement. Because we failed to provide notice of the April 30 deadline, we will extend the deadline to September 15, 2007. Please call me if you have any questions.

Sincerely,

Natalia Luna Ashley  
General Counsel

c: David A. Reisman, Executive Director  
Texas Ethics Commission

NLA:my

April 13, 2007

Ms. Becky L. Levy  
Director, Disclosure Filings  
Texas Ethics Commission  
P.O. Box 12070  
Capitol Station  
Austin, Texas 78711-2070

Dear Ms. Levy:

This letter is a request for advice or an opinion regarding compliance with Texas Government Code Sec. 572 for members of the Tobacco Settlement Permanent Trust Account Investment Advisory Committee.

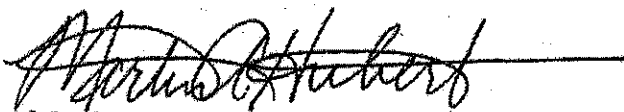
On Oct. 19, 1999, the Ethics Commission determined that members of the advisory committee are not required to file personal financial statements under Sec. 572 based on several factors<sup>1</sup>.

- 1) The committee was found to be outside the executive branch, thus not subject to Sec. 572.
- 2) The committee was found to be advisory. Although the conclusion is not stated, such a finding typically means an entity is not a "state agency" for purposes of Sec. 572, and members need not file personal financial statements.

As part of a review of the filing requirements for all persons appointed to state entities by the Texas Comptroller of Public Accounts, this office seeks a determination of whether that 1999 determination is still valid, and whether members of the Tobacco Settlement Permanent Trust Account Investment Advisory Committee must file personal financial statements under Sec. 572.

Thank you for your consideration of this matter.

Sincerely,

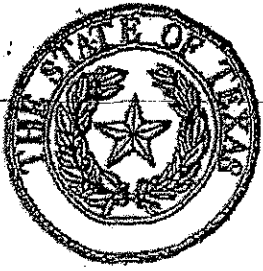


Martin A. Hubert  
Deputy Comptroller

Enclosure

<sup>1</sup> The record of this finding is attached. It is in the form of an internal determination, not a publicly available Advisory Opinion





**CHAPTER 572, GOVERNMENT CODE  
REQUEST FOR DETERMINATION OF FILING STATUS**

**Date of Request:** October 19, 1999

**Agency Name:** Tobacco Settlement Permanent Trust Account Investment Advisory Committee

This agency is not a major state agency. Please determine whether this agency meets the definition of "state agency" and whether the members of its governing body and its executive head are required to file personal financial statements.

**REQUIRED TO FILE:** No

**PREPARED BY:** Betsy Tait

**REVIEWED BY:** KL 1-30

**EXPLANATION:**

Executive Branch - No. The comptroller appoints one member and the commissioners courts of certain counties appoint the rest of the 11 members of the committee to serve for staggered six year terms. Section 403.1042, Government Code and Section 1.01, HB 1161.

The committee has statewide jurisdiction to advise the comptroller on managing the assets of the tobacco settlement permanent trust account. Section 403.1042, Government Code and Section 1.01, HB 1161.

The committee is advisory, and serves to provide guidance to the comptroller with respect to investment philosophy to maximize growth or earnings. Section 403.1042, Government Code and Section 1.01, HB 1161.

**Comments:**  
1161 (Ch. 753, Art. 1, 76<sup>th</sup> Legis. Session).  
Sections 403.1041 through 403.1043