



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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ADVISORY OPINION 2022-06

Chris Gober, Esq.
Eric Wang, Esq.
The Gober Group
1501 Wilson Blvd., Suite 1050
Arlington, VA 22209

Dear Messrs. Gober and Wang:

We are responding to your advisory opinion request on behalf of the Hispanic Leadership Trust (“HLT”), concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to HLT’s status as a nonconnected committee in light of involvement of Members of Congress on its board of directors and as its officers. HLT asks five questions about whether discrete elements of its structure, activities, and leadership would result in HLT becoming a leadership PAC or affiliated with the leadership PACs of two officers (the chair and vice chair) and other Members of Congress. HLT further asks whether any of three alternative draft bylaw provisions governing its officers’ fundraising activities would allow it to remain unaffiliated with those officers’ and Members’ leadership PACs.

The Commission concludes that under the facts presented, HLT would not be a leadership PAC of either the proposed chair or proposed vice chair or Members of Congress on its board of directors, nor would it be affiliated with existing leadership PACs of those individuals, under the draft bylaws’ Alternative C, assuming that no Member of Congress or current candidate for federal office represents more than 33% of the seats required for a quorum of HLT’s board of directors.

Background

The facts presented in this advisory opinion are based on your letters received on April 19 and May 3, 2022, your email received on May 5, 2022, the supplemental material you submitted on June 21, 2022, the comment you submitted on July 11, 2022, your representations at the Commission’s open meeting of July 14, 2022, and the comment you submitted on July 25, 2022.

HLT registered with the Commission in March 2022 as a nonconnected political committee; it states that it has a “mission of electing and re-electing Hispanic Republican

candidates to Congress.”¹ HLT represents that it is a “hard money” committee and that it is not an independent expenditure-only political committee (Super PAC) or a Hybrid PAC. AOR001. HLT represents that the “formation of HLT was initiated and managed by Susan Lilly of Lilly & Company” and that HLT’s counsel “will be HLT’s incorporators and intend to appoint HLT’s initial board members.” Advisory Opinion Request Supplement (June 21, 2022) (“AOR Supp.”) at 2-4, n.3.

HLT states that it would like to name Representatives Mario Diaz-Balart and Tony Gonzales as its Chair and Vice Chair, respectively. AOR014. Representative Diaz-Balart sponsors the Maintaining All Republicans in Office PAC (“MARIO PAC”), a leadership PAC, and Representative Gonzales sponsors the Honor Courage Commitment PAC (“HCC PAC”), also a leadership PAC.² HLT reported receiving \$5,000 contributions from both MARIO PAC and HCC PAC.³

HLT submitted draft bylaws which vest its powers in a board of directors. AOR015-17; AOR Supp. at 2-3. The request does not indicate a set number of directors on the board, but HLT proposes that, if the number of eligible board members falls below two or three, and if that “affects the Commissioners’ analysis of the ‘affiliation’ question,” HLT’s bylaws could include a provision allowing non-Congressional Hispanic Conference members to be eligible to be directors. AOR015-16; AOR Supp. at 2. AOR015-16. The “draft bylaws [] provide for a Board of Directors consisting of incumbent members of the Congressional Hispanic Conference who: (i) consent to serve as a Director; and (ii) are elected by the existing Directors.” AOR Supp. at 1; AOR016. HLT states that it expects its initial board to consist of approximately eight directors, *i.e.*, all current members of the Congressional Hispanic Conference except one representative who is retiring at the end of his current term. AOR Supp. at 1-2. HLT also states, however, that it “has not adopted bylaws yet because the final bylaw provisions addressing the extent to which Members of Congress may participate in HLT’s governance will depend on how the Federal Election Commission responds to the questions HLT has posed in its advisory opinion request.” AOR015. At the Commission’s open meeting of July 14, 2022, counsel for the requestor

¹ Advisory Opinion Request (“AOR”) at AOR001; *see* Hispanic Leadership Trust (“HLT”), Statement of Organization (Mar. 21, 2022), <https://docquery.fec.gov/pdf/068/202203219495794068/202203219495794068.pdf>.

² *See* AOR014; Maintaining All Republicans in Office PAC, Statement of Organization at 3 (July 2, 2014), <https://docquery.fec.gov/pdf/857/14031251857/14031251857.pdf>; Honor Courage Commitment PAC, Amended Statement of Organization at 5 (Aug. 2, 2021), <https://docquery.fec.gov/pdf/756/202108029465820756/202108029465820756.pdf>. HLT states that Susan Lilly provides consulting services for, *inter alia*, Tony Gonzales for Congress, HCC PAC, and Mario Diaz-Balart for Congress though further represents that Lilly “did not form HLT while acting as an ‘agent’ to these entities” or any candidate. AOR Supp. at 3-4. HLT further represents that “Representatives Gonzales and Diaz-Balart did not have any role in the legal formation of HLT.” AOR Supp. at 3.

³ HLT, April 2022 Report (“Rep.”) at 6 (Apr. 14, 2022), <https://docquery.fec.gov/pdf/074/202204149496137074/202204149496137074.pdf> (HCC PAC contribution); HLT, May 2022 Rep. at 6 (May 20, 2022), <https://docquery.fec.gov/pdf/509/202205209512424509/202205209512424509.pdf> (MARIO PAC contribution).

indicated that the structure of HLT's board will be finalized based on the outcome of this request.⁴

Under the draft bylaws, the board of directors selects HLT's two officers, which are the "Chair/President" and the "Vice Chair/Vice President," who must both also be members of the board of directors.⁵ The "Chair/President" acts as HLT's chief executive officer and has responsibilities that include:

(i) establishing and maintaining an effective organization and structure with clearly defined roles, responsibilities, and reporting relationships; (ii) establishing and maintaining a process for open and consistent communication with the Board of Directors to ensure effective governance of the Corporation; and (iii) retaining and terminating Committee contractors in consultation with the Vice Chair and other Directors.

AOR016. The "Vice Chair/Vice President" assists the "Chair/President" with those duties. *Id.* HLT does not expect federal officeholders or candidates to be involved in its day-to-day operations; it expects that consultants will perform HLT's day-to-day operations "at the direction of the HLT's officers and directors." AOR018.

HLT wants to give members of Congress selected as HLT officers the "Chair" and "Vice Chair" titles "to signify their fundraising role with HLT." AOR002, 5, 8, 9, 12, 16, 17. HLT's draft bylaws present three alternative provisions governing fundraising for, and contributions by, HLT. Under Alternative A, the Chair "shall determine [HLT's] fundraising activities and contributions to candidates and other committees in consultation with the Vice Chair and other Directors." AOR016. Under Alternative B, "[t]he Chair and Vice Chair shall jointly determine [HLT's] fundraising activities and contributions to candidates and other committees in consultation with the other Directors." AOR017. Under Alternative C, HLT's "fundraising activities and contributions to candidates and other committees shall be determined by a vote of the Directors." *Id.*

HLT states that it "is likely that HLT will solicit contributions from existing contributors to the leadership PACs and the authorized committees of Members of Congress who serve as HLT[s] directors and officers" and "also may" solicit contributions from contributors who have not already given to those leadership PACs and authorized committees. AOR015. HLT states that it is "possible" that members of Congress and federal candidates may contribute to HLT from their leadership PACs, their authorized committees, and their personal funds. AOR014. HLT represents, however, that these sources of contributions to HLT are "not expected to be a significant source of funding for HLT" or "comprise more than five percent (if even that much) of HLT's total funding over the long term." *Id.*

⁴ Federal Election Commission, Video of July 14, 2022 Open Meeting at 18:32, *available at* <https://www.fec.gov/updates/july-14-2022-open-meeting/>.

⁵ AOR015-16. HLT represents that it "does not contemplate having any other officer positions." AOR Supp. at 3.

HLT states that, to date, it has received sixteen contributions totaling \$48,500. AOR Supp. at 4. HLT has reported no contributions to candidates or committees and one disbursement for \$218.64.⁶ The first contribution, which HLT reported receiving on March 21, 2022, a week after HLT registered as a committee, was from HCC PAC.⁷ HLT reported receiving its next two leadership PAC contributions on April 29, 2022; one of these contributions was from MARIO PAC.⁸ On its third report, HLT reported receiving three additional contributions, one from a leadership PAC of a Congressional Hispanic Conference member and two from individuals, including Susan Lilly.⁹ HLT states that it will refund contributions received to date from leadership PACs if “the Commission is inclined to conclude that HLT is [established, financed, maintained, or controlled (“EFMC’d”)] by Members on this basis.”¹⁰

Questions Presented

1. *Would HLT’s use of the titles “Chair” and “Vice Chair,” in and of themselves, result in HLT becoming either (i) a leadership PAC of the members of Congress in those positions or (ii) “affiliated” with those members’ existing leadership PACs?*
2. *If so, would HLT’s use of the titles “Honorary Chair” and “Honorary Vice Chair” have the same consequences?*
3. *Will HLT become a leadership PAC or affiliated with the existing leadership PACs of members of Congress if those members engage in one or more of the following activities: (i) serve on HLT’s board of directors; (ii) hold officer positions with HLT; (iii) direct HLT to contribute to certain candidates; (iv) direct HLT’s fundraising strategy; and/or (v) hire and/or fire HLT employees and consultants?*
4. *Will HLT become a leadership PAC or affiliated with the existing leadership PACs of members of Congress if those members are responsible for raising a large percentage of contributions to HLT?*
5. *Will HLT become a leadership PAC or affiliated with the existing leadership PACs of members of Congress if there are similar patterns of contributions to, or disbursements by, HLT and those members’ leadership PACs?*

⁶ See HLT, Amended June 2022 Rep. (June 15, 2022).

⁷ HLT, April 2022 Rep. at 6.

⁸ HLT, May 2022 Rep. at 6 (reporting contributions from MARIO PAC and Point Action PAC, Inc.); see also Point Action PAC, Inc., Amended Statement of Organization at 6 (Nov. 15, 2021), <https://docquery.fec.gov/pdf/851/202111159468500851/202111159468500851.pdf> (listing Anderson Drew Ferguson IV as the leadership PAC sponsor).

⁹ See HLT, Amended June 2022 Rep. at 7; AOR Supp. at 4.

¹⁰ AOR Supp. at 6; and see *id.* at 4 (representing that HLT has received five \$5,000 contributions from leadership PACs, including one since HLT’s last regularly filed report from Representative Buchanan’s Vern PAC). The analysis below addresses whether HLT’s officers or directors establish, finance, maintain, or control, *i.e.*, “EFMC,” HLT.

Legal Analysis

A. Leadership PACs

The Act and Commission regulations define a “leadership PAC” as a political committee “that is directly or indirectly established, financed, maintained or controlled by” a candidate or federal officeholder “but which is not an authorized committee” of the candidate or federal officeholder “and which is not affiliated with an authorized committee” of the candidate or federal officeholder.¹¹ Like other nonconnected committees, leadership PACs may receive contributions up to \$5,000 per year and make contributions to candidate committees of \$2,900 per election (in the 2021-2022 election cycle) or \$5,000 per election if qualified as a multicandidate committee.¹²

The Act and Commission regulations do not define when a candidate or federal officeholder directly or indirectly EFMC’s a committee for purposes of the “leadership PAC” definition at 11 C.F.R. § 100.5(e)(6). Moreover, the Commission has not previously considered when a nonconnected committee that is not registered as a leadership PAC is, in fact, directly or indirectly EFMC’d by a candidate and is, therefore, a leadership PAC under 11 C.F.R. § 100.5(e)(6). It is helpful, however, that the terms “established,” “financed,” “maintained,” and “controlled” are not uncommon in the law.

Moreover, the Commission has delineated EFMC in other contexts — specifically, regulations governing affiliation and non-federal funds (also known as “soft money”). First, Commission regulations at 11 C.F.R. §§ 100.5(g)(4) and 110.3(a)(3)(ii) lay out ten non-exhaustive factors the Commission will examine, “in the context of the overall relationship between committees or sponsoring organizations,” to determine whether one has EFMC’d another such that they are affiliated.¹³ These regulations are designed to give effect to the Act’s

¹¹ 52 U.S.C. § 30104(i)(8)(B) (defining “leadership PAC” for purposes of bundling and travel provisions in Honest Leadership and Open Government Act of 2007); 11 C.F.R. § 100.5(e)(6) (defining “leadership PAC” for generally applicable purposes); *see also* Honest Leadership and Open Government Act of 2007, Pub. L. No. 110–81, 121 Stat. 735 (Sept. 14, 2007); *and see* Leadership PACs, 68 Fed. Reg. 67,013, 67,016 (Dec. 1, 2003) (explaining that no leadership PAC is affiliated with its sponsoring candidate’s authorized committee).

¹² 52 U.S.C. § 30116(a)(1)(C), (a)(2)(A); 11 C.F.R. §§ 110.1(d), 110.2(b); *see also* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,107 (July 29, 2002) (explaining that leadership PACs may not solicit, receive, direct, transfer, or spend non-federal funds, *i.e.*, “soft money”); *cf.* Leadership PACs, 68 Fed. Reg. at 67,016 (explaining, in context of 11 C.F.R. § 100.5(g)(5), that the Act’s “hard money” limits apply to unauthorized committees controlled by candidates). HLT represents that it will raise only “hard money.”

¹³ 11 C.F.R. §§ 100.5(g)(4)(ii), 110.3(a)(3)(ii). As used in 11 C.F.R. § 100.5(g)(4), a “sponsor” is “(i) a single corporation and/or its subsidiaries; (ii) a single national or international union and/or its local unions or other subordinate organizations; (iii) an organization of national or international unions and/or all its State and local central bodies; (iv) a membership organization (other than political party committees) including trade or professional associations and/or related State and local entities of that organization or group; or (v) the same person or group of persons.” 11 C.F.R. § 100.5(g)(3) (internal citations omitted); *and see* 11 C.F.R. § 110.3(a)(2) (same).

anti-proliferation provision: subject to certain exceptions, Committees EFMC'd by the same actor (*i.e.*, affiliated committees) are subject to a single contribution limit.¹⁴

Second, Commission regulations at 11 C.F.R. § 300.2(c) define EFMC for purposes of the soft money restrictions on political party committees, candidates, and federal officeholders and any “entity directly or indirectly established, financed, maintained or controlled by” one of those persons.¹⁵ Notably, the Act’s soft money provisions cast a wider net than its anti-proliferation provision does, expressly contemplating entities directly *or indirectly* EFMC'd by regulated actors. The Commission has explained that the EFMC definition at 11 C.F.R. § 300.2(c) uses the same non-exhaustive affiliation factors found at 11 C.F.R. § 100.5(g)(4)(ii) “recast in the terminology demanded by the [soft money] context.”¹⁶ As it does when assessing affiliation, the Commission considers the regulatory factors in a soft money EFMC determination “in the context of the overall relationship between the sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor directly or indirectly established, finances, maintains, or controls the entity.”¹⁷

In addition to the ordinary meaning of the terms “establish,” “finance,” “maintain,” and “control,” the factors in the affiliation and soft money EFMC regulations provide a useful framework for considering whether HLT is a leadership PAC.¹⁸ Like in the affiliation and soft money contexts, the Commission will consider these factors in the context of the overall relationship between HLT and the Chair and Vice Chair, as akin to sponsors, to determine whether the presence of any factor or factors is evidence that Representative Diaz-Balart or Representative Gonzales EFMC'd HLT.

¹⁴ See, e.g., 52 U.S.C. § 30116(a)(5) (providing that, subject to certain exceptions, for purposes of the contribution limits at 52 U.S.C. § 30116(a)(1) and (2), “all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee....”); Leadership PACs, 68 Fed. Reg. 67,013 (“Under the Commission’s regulations, committees that are affiliated, that is, committees that are established, financed, maintained, or controlled by the same corporation, labor organization, person or group of persons, *et al.*, share a single limitation on the amount they can accept from any one contributor.”) (citing 11 C.F.R. §§ 100.5(g), 110.3(a)(1), 110.3(a)(3)(ii)); 11 C.F.R. § 110.3(a)(1); Advisory Opinion 2016-02 (Enable) at 5; Advisory Opinion 2004-12 (Democrats for the West) at 4.

¹⁵ 52 U.S.C. § 30125(a)(2), (b)(1), (d), (e)(1); *and see* 11 C.F.R. part 300.

¹⁶ Soft Money E&J, 67 Fed. Reg. at 49,084. As used in 11 C.F.R. § 300.2(c), a “sponsor” is a national, state, district, or local committee of a political party; candidate; federal officeholder; or an officer, employee, or agent of any of the foregoing persons. 11 C.F.R. § 300.2(c)(1).

¹⁷ 11 C.F.R. § 300.2(c).

¹⁸ To the extent that the factors address the “sponsor” or the “sponsored organization” only as a corporation (with or without stock or securities), labor organization, membership organization, cooperative, or trade association, those factors do not apply here and are not analyzed. See, e.g., Advisory Opinion 2012-21 (Primerica) at 8, 11. To the extent the language can be adapted to apply to committees sponsored by individuals, it is and is analyzed as such.

1. *Established*

Black’s Law Dictionary defines “establish” as “[t]o make or form; to bring about or into existence.”¹⁹ Thus, an individual establishes a leadership PAC if they or their agent “form” it or “bring it into existence.” The Commission has found that a sponsor directly or indirectly “established” an entity where they “had an active and significant role in the formation” of the entity.²⁰ In Advisory Opinion 2003-12 (Flake), the Commission concluded that Representative Flake established a state ballot committee because he “formed” the committee, “signed the documents filed with the Arizona Secretary of State,” and served as the “first chairman,” while his campaign consultant “aided the [committee] with its [S]tate filings and establishing its bank account.”²¹ Similarly, in Advisory Opinion 2012-23 (Snake River Sugar Company), in the context of an affiliation analysis of an agricultural cooperative and seven sugarbeet growers’ associations, the Commission concluded that the associations established the cooperative because the associations “participated in the formation of” the cooperative and all but three of the cooperative’s original 24 directors were officers of the associations.²²

Like Representative Flake was his ballot committee’s “first chairman,” Representative Diaz-Balart would be HLT’s first Chair and President. Comparably, Representative Gonzales will be HLT’s first Vice Chair and Vice President, with the powers and duties of the Chair/President when the Chair is unavailable. AOR016. But more importantly (and unlike Representative Flake) Representatives Gonzales and Diaz-Balart “did not have any role in the legal formation of HLT.” AOR Supp. at 3. They will not be the incorporators of HLT and, unlike the sugarbeet growers, will not otherwise participate in its formation. *Id.* at 2, n.3. Nor, it appears, will their agents: “formation of HLT was initiated and managed by Susan Lilly” who, though a consultant to HCC PAC, did not form HLT as an agent of HCC PAC. AOR Supp. at 3-4. On these facts, the Commission concludes that neither Representative Diaz-Balart nor Representative Gonzales established HLT within the meaning of the leadership PAC definition.

2. *Financed*

The Commission has stated that a sponsor “finances” a committee by providing funds “in a significant amount or on an ongoing basis” to the committee.²³ The Commission has determined what constitutes a “significant amount” on a case-by-case basis in “view of all the

¹⁹ *Establish*, BLACK’S LAW DICTIONARY (11th ed. 2019).

²⁰ *See* 11 C.F.R. § 300.2(c)(2)(ix); Factual and Legal Analysis (“FLA”) at 4, MUR 5367 (Issa) (Feb. 20, 2004) (finding reason to believe Representative Issa violated soft money provisions via a state ballot committee that the Commission determined Issa established); *see also* Vote Certification, MUR 5367 (Issa, *et al.*) (Nov. 3, 2005) (taking no further action against Representative Issa); Second Gen. Counsel’s Rpt., MUR 5367 (Issa, *et al.*) (Oct. 28, 2005) (recommending no further action in light of subsequent developments in non-EFMC areas of the law (concerning ballot committees and candidates’ personal funds)).

²¹ AO 2003-12 (Flake) at 7.

²² AO 2012-23 (Snake River Sugar Company) at 7; *see also* 11 C.F.R. § 100.5(g)(4)(ii)(I).

²³ *See* 11 C.F.R. §§ 100.5(g)(4)(ii)(G)-(H), 110.3(a)(3)(ii)(G)-(H), 300.2(c)(2)(vii)-(viii).

relevant circumstances.”²⁴ “[A]mounts that are so large or . . . that comprise such a substantial percentage of the organization’s receipts would be considered ‘financing’ a committee.”²⁵

While considered under the “established” prong of the EFMC standard, MUR 5367 (Issa, *et al.*) supports this analysis. There, the Commission concluded that Representative Issa established a state ballot initiative committee because he “provided [the committee] with ‘seed money.’”²⁶ More particularly, Representative Issa, through a company that he controlled, “provided the first donation reported by [the committee] in the amount of \$100,000,” the week before the committee registered with the California Secretary of State.²⁷

Representative Gonzales provided HLT with \$5,000 — HLT’s first receipt — the first week that HLT was registered with the Commission,²⁸ and Representative Diaz-Balart provided HLT with \$5,000 five weeks after HLT’s registration.²⁹ Just as the Commission concluded that Representative Issa provided funds via an entity he controlled, Representatives Diaz-Balart and Gonzales provided funds to HLT through MARIO PAC and HCC PAC, their respective leadership PACs that, as a matter of law, they directly or indirectly EFMC.³⁰ In MUR 5367, however, Representative Issa provided, in the first three months of the ballot committee’s formation, “more than 60% of [the committee’s] total funds,”³¹ while, here, Representatives Diaz-Balart and Gonzales have each contributed only 10% of HLT’s total receipts to date.³² While these funds were provided early in HLT’s existence, HLT has not spent any of the funds received in this initial operating period, other than a negligible amount to a check company for printing. The Commission concludes that, under the circumstances presented, ten percent of the total amount of contributions HLT has received in this initial operating period, as distinct from

²⁴ Advisory Opinion 2006-04 (Tancredo) at 3.

²⁵ *Id.* at 4 (analyzing 11 C.F.R. § 300.2) (internal quotations omitted).

²⁶ FLA at 4-5, MUR 5367 (Issa).

²⁷ *Id.*; *see also id.* at 5 (detailing Representative Issa’s control of his company), 6 (detailing the committee’s \$3 million total receipts over the course of its activity, 60% of which were provided by Representative Issa or his company).

²⁸ HLT, April 2022 Rep. at 6.

²⁹ HLT, May 2022 Rep. at 6.

³⁰ *See* 52 U.S.C. § 30104(i)(8)(B) (defining “leadership PAC” as a political committee “that is directly or indirectly established, financed, maintained or controlled by” a candidate or federal officeholder “but which is not an authorized committee” of the candidate or federal officeholder).

³¹ FLA at 6, MUR 5367 (Issa).

³² *See* AOR Supp. at 4 (detailing HLT’s receipts to date); *cf. id.* at 6 (stating that “HLT has not solicited contributions in earnest up to now in large part because of its pending advisory opinion request and the uncertainty over the extent to which Members of Congress may be involved in HLT’s activities”).

the majority of funds provided in MUR 5367 (Issa), is not a significant enough amount to be considered “seed money.”³³

At the time of Representative Gonzales’s contribution, through his leadership PAC, to HLT, the contribution amount was 100% of HLT’s then-reported receipts and Representative Diaz-Balart’s contribution, through his leadership PAC, was 33% of HLT’s total receipts on the date it was received. Though each of those contributions was a substantial percentage of HLT’s total receipts *at the time*,³⁴ that is no longer the case only a comparatively short time later, and HLT has to date spent only a negligible amount of funds. Making this determination on a case-by-case basis in “view of all the relevant circumstances,”³⁵ the Commission concludes that these contributions do not result in either Representative Gonzales or Representative Diaz-Balart’s having “financed” HLT for purposes of the leadership PAC definition.

3. *Maintained*

The Commission has not previously analyzed when an actor “maintains” an entity such that it EPMC’s that entity for purposes of the leadership PAC definition. According to Black’s Law Dictionary, “maintain” means, *inter alia*, “[t]o continue (something),” “[t]o care for (property) for purposes of operational productivity or appearance; to engage in general repair and upkeep,” and “[t]o support (someone) financially.”³⁶ “Maintenance” in the context presented in the request may also fairly be described as providing overhead or ongoing support at a sufficient level to permit an organization’s continued functioning.

None of the facts in the request indicate that either Representative Diaz-Balart or Representative Gonzales “maintains” HLT. To the contrary, contributions from members of Congress and federal candidates (including their leadership PACs, their authorized committees, and their personal funds) are “not expected to . . . comprise more than five percent (if even that much) of HLT’s total funding over the long term.” AOR014. Thus, the Commission finds no indication that either Representative Diaz-Balart or Representative Gonzales “maintains” HLT within the meaning of the leadership PAC definition.

4. *Controlled*

The law understands “control” as “[t]he direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee[.]”³⁷ In the

³³ Cf. AO 2006-04 at 3 (Tancredo) (examining what defines a “significant amount on a case-by-case basis in view of all the relevant circumstances”).

³⁴ Cf. *id.* at 8.

³⁵ *Id.* at 3.

³⁶ *Maintain*, BLACK’S LAW DICTIONARY (11th ed. 2019).

³⁷ *Control*, BLACK’S LAW DICTIONARY (11th ed. 2019).

context of a corporation, control means “ownership of more than 50% of the shares in a corporation” or “[t]he power to vote enough of the shares in a corporation to determine the outcome of matters that the shareholders vote on.”³⁸ Applying this principle, the Commission concludes that Representatives Gonzales and Diaz-Balart would each “control” HLT, within the meaning of the leadership PAC definition under draft bylaw provisions Alternative A and Alternative B, but would not necessarily do so under Alternative C.

Under all three alternatives, Representatives Diaz-Balart and Gonzales serve as members of HLT’s initial board of directors, which is responsible for the “direction and management of [HLT’s] affairs, as well as the control and disposition of its assets.” AOR015. Moreover, under all three alternatives, Representative Diaz-Balart, as Chair, and Representative Gonzales, as Vice Chair, would be empowered to “determine” HLT’s “contributions to candidates and other committees,” although the means for doing so would vary substantially: (A) the Chair consulting with the Vice Chair as he determines, or (B) the Chair and Vice Chair jointly determining, or (C) the Chair and Vice Chair determining, by voting with the other directors. AOR016-17. The Commission concludes that, under Alternative A or B, Representatives Diaz-Balart and Gonzales would “control” HLT within the meaning of the leadership PAC definition, as they would have independent authority to determine HLT’s contributions to candidates and committees (decisions representing the core of HLT’s “mission of electing and re-electing Hispanic Republican candidates to Congress”³⁹) and otherwise personally direct HLT’s activities.

Under Alternative C, however, the power of Representatives Diaz-Balart and Gonzales is diluted by the requirement that fundraising activities and contributions to candidates and committees be determined by the majority vote of a quorum of the board of directors. HLT represents that the board of directors could have a quorum to vote on fundraising decisions with as few as two directors present.⁴⁰ Thus, even if HLT adopts Alternative C, HLT’s Chair or Vice Chair could control HLT within the meaning of the leadership PAC definition unless neither the proposed chair nor proposed vice chair represent more than 33% of the seats required for a quorum of HLT’s board of directors. Absent such a requirement, HLT would risk a situation where, with only two board members, one member could exercise effective control over the organization by acting unilaterally and preventing board oversight by voting “no.” This would allow a single Member of Congress or federal candidate to “control” HLT within the meaning of the Act and, accordingly, become a leadership PAC thereof.⁴¹ Under the assumptions in this

³⁸ *Id.*

³⁹ AOR001.

⁴⁰ *Cf.* AOR Supp. at 2-3 (suggesting that there could be as few as two or three members of the board of directors and that board would have a quorum to vote with more than 50% of directors present).

⁴¹ *See* 11 C.F.R. § 100.5(e)(6) (“Leadership PAC means a political committee that is directly or indirectly established, financed, maintained or controlled by *a candidate* for Federal office or *an individual* holding Federal office but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that leadership PAC does not include a political committee of a political party.”) (emphasis added); 52 U.S.C. § 30104(i)(8)(B) (“The term ‘leadership PAC’ means,

paragraph, however, Representatives Diaz-Balart and Gonzales would not “control” HLT within the meaning of the leadership PAC definition.

While dealing with a different context, Advisory Opinion 2021-06 (Kelly) supports this conclusion. There, the Commission examined “control” in the context of a soft-money EFMC analysis of Representative Kelly’s role as chair of a state party committee. The committee’s draft bylaws provided that “the Chair is the chief executive officer” and has “full authority to exercise the executive powers” of the party committee. As part of these powers, the Chair could “appoint and dismiss ‘any and all personnel or staff,’” serve as “ex-officio on all” sub-committees, “determine the number of appointments,” and “appoint the members of such committees.”⁴² The party committee proposed alternative governance structures for administering its non-federal account so that it could continue to raise and spend soft money for non-federal elections without Representative Kelly’s position as chair violating the Act’s soft-money restrictions. Under each of the three proposed alternatives, Representative Kelly would have “no role” with respect to nonfederal fundraising or spending and would not exercise “oversight or influence” over the nonfederal account’s management or governance.⁴³

Applying the EFMC factors in 11 C.F.R. § 300.2(c)(2)(ii)-(iii), the Commission concluded that if the party committee amended its bylaws so that its non-federal account were administered by a special committee “without the review or approval of Congresswoman Kelly and Congresswoman Kelly has no role in the appointment of any member of the special committee” then the non-federal account would not be directly or indirectly EFMC’d by Representative Kelly.⁴⁴ Specifically, the Commission concluded that, given the Representative’s “control over the state party generally,” the governance factor weighs against “control” of the non-federal account if she “has no role” in the appointment of any member of the special committee administering that account, including the authority to appoint even a minority of members of that committee; similarly, she would not control the committee so long as she was “restricted from supervising or taking adverse personnel actions” against any officer or employee working on that account.⁴⁵ The Commission specified that if Representative Kelly retained

with respect to a candidate for election to Federal office or an individual holding Federal office, a political committee that is directly or indirectly established, financed, maintained or controlled by *the candidate* or *the individual* but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that such term does not include a political committee of a political party.”) (emphasis added).

⁴² AO 2021-06 (Kelly) at 2.

⁴³ *Id.* at 3-4. Additionally, Representative Kelly would not make contributions or transfers to the non-federal account from her personal funds or her congressional campaign account and would not solicit or receive funds on behalf of the non-federal account. *Id.* at 3, 8.

⁴⁴ *Id.* at 7 (further specifying that this conclusion applies only to the election of a federal officeholder to serve as the chair of a state party and does not apply to the activities of other types of committees or entities).

⁴⁵ *Id.* at 7-8.

authority over appointment of persons on the special committee, she would retain indirect control and would EFMC the non-federal account.⁴⁶

HLT's draft bylaws vest many of the same powers in HLT's Chair and, in their absence, its Vice Chair as the state party gave Representative Kelly. HLT's draft bylaws state that the board of directors "shall elect the committee's officers." AOR015. The Chair, "in consultation with the Vice Chair and other Directors" retains and terminates contractors. AOR016. However, unlike the proposal in Advisory Opinion 2021-06 (Kelly) that the Commission concluded would not result in the chair's control over the committee's non-federal special committee, HLT does not propose to remove the relevant governance powers from its Chair and Vice Chair. Even under Alternative C, the most restrictive of HLT's alternative draft bylaws, HLT's Chair and Vice Chair would continue to directly control HLT's governance in all respects except spending and fundraising; with respect to spending and fundraising under Alternative C, HLT's Chair and Vice Chair would retain only their votes as members of the board.

Nonetheless, because HLT, unlike the state party committee in Advisory Opinion 2021-06 (Kelly), is a "hard money" committee that will neither raise nor spend non-federal funds, the Commission concludes that the "vote dilution" considerations that were disregarded in Advisory Opinion 2021-06 (Kelly) have greater force here.⁴⁷ Moreover, subjecting spending and fundraising decisions, the core of a political committee's activities, to Board oversight and approval significantly reduces the Chair and Vice Chair's control over HLT. Given the diluted authority HLT proposes to give its officers, and the commitment of core functions to direct Board approval, the Commission concludes that HLT will not be EFMC'd by either its Chair or Vice Chair assuming that neither the proposed Chair nor proposed Vice Chair represent more than 33% of the seats required for a quorum of HLT's board of directors.

Because the Commission concludes that, subject to the factual information and assumptions set forth herein, HLT's proposed Chair or Vice Chair would not directly or indirectly EFMC HLT within the meaning of the leadership PAC definition, the same analysis would apply to any other HLT board member who is regulated by the Act as a sitting Member of Congress or current candidate for federal office.

* * *

B. Affiliation

For purposes of the contribution limits at 52 U.S.C. § 30116(a)(1) and (2), subject to exceptions not relevant here, "all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation,

⁴⁶ *Id.* at 9.

⁴⁷ *See id.* at 7-8 & n.7 (stating that Representative Kelly, as a federal officeholder, is prohibited from raising and spending non-federal funds and thus distinguishing the need, in state party governance structure, for *no* control rather than the indirect control permissible in some corporate affiliation analysis).

labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee.”⁴⁸ As noted above, to give effect to this “anti-proliferation” provision, Commission regulations set out the multi-factor EFMC test for affiliation. While Congress was explicit that the Act’s soft money provisions cover committees “directly or indirectly established, financed, maintained, or controlled by” regulated actors,⁴⁹ it did not include committees “indirectly” EFMC’d by regulated actors in the anti-proliferation provision.⁵⁰

The Commission has also determined that, as a matter of law, a leadership PAC is not affiliated with an authorized committee of the candidate sponsoring the leadership PAC, even though (by definition) that candidate EFMCs the leadership PAC.⁵¹ Nonetheless, while “leadership PACs are not exposed to the consequences of affiliation with authorized committees, leadership PACs may still be deemed affiliated with other unauthorized committees.”⁵²

Commission regulations identify certain committees that are *per se* affiliated, such as those EFMC’d by a single corporation and its subsidiaries.⁵³ HLT and the leadership PACs of HLT’s proposed Chair and Vice Chair — HCC PAC and MARIO PAC — are not *per se* affiliated.⁵⁴ In the absence of *per se* affiliation, the Commission examines “the relationship between organizations that sponsor committees, between the committees themselves, [and] between one sponsoring organization and a committee established by another organization to

⁴⁸ 52 U.S.C. § 30116(a)(5).

⁴⁹ 52 U.S.C. § 30125(a)(2), (b)(1), (d), (e)(1).

⁵⁰ 52 U.S.C. § 30116(a)(5); *see also, e.g.*, Soft Money E&J, 67 Fed. Reg. at 49,083 (“11 CFR 300.2(c) defines ‘directly or indirectly establish, finance, maintain, or control,’ a term that is used in several provisions of BCRA. The term appears in BCRA in the context of national party committees (*see* [52 U.S.C. § 30125]), of State, district, and local political party committees (*see, e.g.*, [52 U.S.C. § 30125]), and of Federal candidates and Federal officeholders (*see, e.g.* [52 U.S.C. § 30125]). The phrase ‘established, financed, maintained, or controlled,’ without the modifier ‘directly or indirectly,’ was already used in the anti-proliferation provisions of the FECA and in the Commission’s ‘affiliation’ regulation. *See* [52 U.S.C. § 30116(a)(5)]; 11 CFR 100.5(g), and 110.3.”).

⁵¹ 11 C.F.R. § 100.5(e)(6), (g)(5); Leadership PACs, 68 Fed. Reg. at 67,016 (explaining that 11 C.F.R. § 100.5(g)(5) “clarifies the relationship between an authorized committee and a leadership PAC by removing the possibility that a candidate’s authorized committee can be affiliated with an entity that is not an authorized committee, even if the candidate established, financed, maintained, or controlled that entity”); *see also* 11 C.F.R. § 100.5(f)(2) (defining “unauthorized committee” as one that “has not been authorized in writing by a candidate to solicit or receive contributions or make expenditures on behalf of such candidate”).

⁵² Leadership PACs, 68 Fed. Reg. at 67,016 (citing 11 C.F.R. § 100.5(g)(2)-(4); Advisory Opinion 1990-16 (Thompson)).

⁵³ *See* 11 C.F.R. §§ 100.5(g)(3)(i), 110.3(a)(2)(i); Advisory Opinion 2016-02 (Enable) at 5.

⁵⁴ *See* 11 C.F.R. § 100.5(g)(3).

determine whether committees are affiliated,” under the factors in the regulation, and mindful that the underlying affiliation statute does not contemplate “indirect” control.⁵⁵

1. *Governance*

This factor asks whether a sponsor “has the authority or ability to direct or participate in the governance of” both committees “through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures.”⁵⁶ HLT’s draft bylaws vest HLT’s powers and duties in the board of directors as a governing body and afford the Chair/President the power and responsibility to establish and maintain “an effective organization and structure” and “establish[] and maintain[] a process for open and consistent communication.” AOR016. Representative Gonzales, as the Vice Chair/Vice President, is vested with the power to assist the Chair. *Id.* These are HLT’s only two officers though, as directors, the Chair’s and Vice Chair’s votes are diluted, as discussed above, among other board members.

In light of Representatives Diaz-Balart and Gonzales’s participation in HLT’s governance through their officer positions and their positions on the board, and their EFMC of their respective leadership PACs, this factor could weigh in favor of finding affiliation as to each representative’s leadership PAC. But HLT “does not expect federal officeholders or candidates to be involved in the day-to-day operations of the committee,” rather, “consultants will perform that function at the direction of HLT’s officers and directors.” AOR018. Moreover, the Chair and Vice Chair’s votes on the board are diluted by those of disinterested persons if — as described above — HLT adopts draft bylaw Alternative C and neither the proposed Chair nor the proposed Vice Chair represents more than 33% of the seats required for a quorum of HLT’s board of directors.

Under these circumstances, both the Chair and Vice Chair’s “authority or ability to direct or participate in the governance of” HLT would be limited significantly and this factor would weigh against affiliation.

2. *Hiring Authority*

This factor considers whether a sponsor has the authority or ability to hire, appoint, demote, or otherwise control the officers or other decision-making employees of both committees.⁵⁷

⁵⁵ 11 C.F.R. §§ 100.5(g)(4), 110.3(a)(3). To the extent that the factors address the “sponsor” or the “sponsored organization” only as a corporation (with or without stock or securities), labor organization, membership organization, cooperative, or trade association, those factors do not apply here and are not analyzed. *See, e.g.*, Advisory Opinion 2012-21 (Primerica) at 8, 11. To the extent the language can be adapted to apply to committees sponsored by individuals, it is and is analyzed as such, consistent with the Act’s explicit application to “persons” and “groups” of persons.

⁵⁶ 11 C.F.R. §§ 100.5(g)(4)(ii)(B), 110.3(a)(3)(ii)(B).

⁵⁷ 11 C.F.R. §§ 100.5(g)(4)(ii)(C), 110.3(a)(3)(ii)(C).

As discussed above, HLT's draft bylaws vest in the board the power to elect HLT's officers, retain and terminate contractors in consultation with the Chair and Vice Chair, and, with HLT officers, direct consultants' performance of HLT's day-to-day operations. AOR015-018. But the Chair and Vice Chair must consult with the board on hiring and demoting decisions, and their powers are further diluted and subject to approval of disinterested persons where neither the proposed Chair nor the proposed Vice Chair represents more than 33% of the seats required for a quorum of HLT's board of directors. Thus, this factor weighs against affiliation.

3. *Common Officers or Employees*

This factor concerns whether the committees have common or overlapping officers or employees, indicating a formal or ongoing relationship between the committees.⁵⁸

Representatives Diaz-Balart and Gonzales each have leadership PACs, though the Commission does not have information about the officers and employees of those leadership PACs other than the presumed roles of the representatives themselves as persons who EFMC those committees. Representatives Diaz-Balart and Gonzales will be officers of HLT. AOR014. Because of the lack of information concerning the leadership PACs, this factor weighs neutrally and cannot be used to determine affiliation.

4. *Former Officers or Employees*

This factor examines whether either committee has any members, officers, or employees who previously were members, officers, or employees of the other committee, indicating a formal or ongoing relationship or the creation of a successor entity.⁵⁹

With the information provided by the requestor, the Commission is unable to determine if there will be former members, officers, or employees in common between HLT and either leadership PAC. Accordingly, this factor weighs neutrally and cannot be used to determine affiliation.

5. *Providing, or Arranging for the Provision of Funds or Goods*

This factor considers whether one committee provides, or arranges for the provision of, funds or goods in a significant amount or on an ongoing basis to the other committee.⁶⁰ In the context of HLT's relative receipts and spending to date, we conclude that one contribution of \$5,000 each to HLT from MARIO PAC and HCC PAC does not amount to "significant" funding,⁶¹ nor, given contribution limits, may these PACs contribute a greater share of HLT's funding in the future. Moreover, because contributions from members of Congress and federal

⁵⁸ 11 C.F.R. §§ 100.5(g)(4)(ii)(E), 110.3(a)(3)(ii)(E).

⁵⁹ 11 C.F.R. §§ 100.5(g)(4)(ii)(F), 110.3(a)(3)(ii)(F).

⁶⁰ 11 C.F.R. §§ 100.5(g)(4)(ii)(G)-(H), 110.3(a)(3)(ii)(G)-(H).

⁶¹ *See supra*, nn. 6-9, and related text; Part A.2.

candidates (from their leadership PACs, their authorized committees, and their personal funds) are “not expected to . . . comprise more than five percent (if even that much) of HLT’s total funding over the long term,” AOR014, the Commission concludes that this factor will not be satisfied on an “ongoing” basis with respect to HCC PAC and MARIO PAC. Though Representatives Diaz-Balart and Gonzales will fundraise for HLT, they will conduct these activities as individuals, thus, their respective leadership PACs, as committees, will not be providing or arranging for the provision of funds in a significant amount or on an ongoing basis to HLT, another committee. Thus, this factor weighs against affiliation.

6. *Formation*

As relevant here, this factor considers whether a committee or its agent had an active or significant role in the formation of the other committee.⁶² As described above, “formation of HLT was initiated and managed by Susan Lilly” who, though a consultant to HCC PAC, among others, did not form HLT as an agent of HCC PAC. AOR Supp. at 3-4. Moreover, HLT’s counsel, not MARIO PAC or HCC PAC, will be HLT’s incorporators and appoint HLT’s initial board members. AOR Supp. at 2-3. This weighs against affiliation.

7. *Contribution Similarities*

This factor concerns whether the committees have similar patterns of contributions or contributors that indicate a formal or ongoing relationship between the committees.⁶³

Analysis of this factor requires information about contributors to HLT and the leadership PACs, in order to make a comparison and identify overlap. But HLT is a new committee, with few reported receipts. Accordingly, the Commission is unable to weigh this factor.

* * *

The Commission examines the context of the overall relationship between the committees, including the foregoing circumstantial factors, to determine whether they are affiliated under Commission regulations.⁶⁴

For both the relationship between MARIO PAC and HLT and the relationship between HCC PAC and HLT, the only factor that might weigh in favor of affiliation is governance. Absent any limit on the Chair or Vice Chair’s exercise of governance authority, this factor would weigh in favor of affiliation. But, if HLT adopts Alternative C, and if neither the proposed Chair nor the proposed Vice Chair represents more than 33% of the seats required for a quorum of HLT’s board of directors, then this factor would weigh against affiliation.

⁶² 11 C.F.R. §§ 100.5(g)(4)(ii)(I), 110.3(a)(3)(ii)(I).

⁶³ 11 C.F.R. §§ 100.5(g)(4)(ii)(J), 110.3(a)(3)(ii)(J).

⁶⁴ See 11 C.F.R. §§ 100.5(g)(4)(i)-(ii), 110.3(a)(3)(i)-(ii).

There are three factors for which the Commission has insufficient information to make a determination: common officers or employees, former officers or employees, and contribution similarities. The other factors (hiring authority, financing, and formation) weigh against affiliation. Thus, on balance, the affiliation factors weigh against finding affiliation, but only under Alternative C, and only subject to the assumptions in the previous paragraph.

Because the Commission concludes that, subject to those assumptions, HLT would not be affiliated with either MARIO PAC or HCC PAC, the same analysis would apply to the leadership PAC of any other board member who is regulated by the Act as a sitting Member of Congress or current candidate for federal office.

Conclusions

The Commission concludes as follows with respect to each question presented, under the facts presented in this request:

1. *Would HLT's use of the titles "Chair" and "Vice Chair," in and of themselves, result in HLT becoming either (i) a leadership PAC of the members of Congress in those positions or (ii) "affiliated" with those members' existing leadership PACs?* No. Such nominal designations "in and of themselves" do not factor into the leadership PAC definition or the affiliation analysis.

2. *If so, would HLT's use of the titles "Honorary Chair" and "Honorary Vice Chair" have the same consequences?* Having answered Question 1 in the negative, the Commission does not reach Question 2.

3. *Will HLT become a leadership PAC or affiliated with the existing leadership PACs of members of Congress if those members engage in one or more of the following activities: (i) serve on HLT's board of directors; (ii) hold officer positions with HLT; (iii) direct HLT to contribute to certain candidates; (iv) direct HLT's fundraising strategy; and/or (v) hire and/or fire HLT employees and consultants?* Not under Alternative C of the proposed bylaws, assuming that neither the proposed Chair nor the proposed Vice Chair nor any Member of Congress represents more than 33% of the seats required for a quorum of HLT's board of directors. This is because, under these assumptions, no Member of Congress will EFMC HLT for purposes of the affiliation analysis, nor will they directly or indirectly EFMC HLT for purposes of the leadership PAC definition.

4. *Will HLT become a leadership PAC or affiliated with the existing leadership PACs of members of Congress if those members are responsible for raising a large percentage of contributions to HLT?* The provision of funds by Representatives Diaz-Balart and Gonzales as described in the request does not amount to EFMC'ing HLT for purposes of the affiliation analysis, nor does it amount to directly or indirectly EFMC'ing HLT for purposes of the leadership PAC definition.

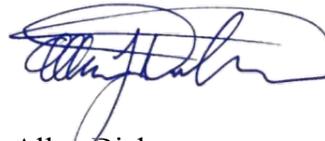
5. *Will HLT become a leadership PAC or affiliated with the existing leadership PACs of members of Congress if there are similar patterns of contributions to, or disbursements by, HLT and those members' leadership PACs?* Not under Alternative C of the proposed bylaws, assuming that no sitting Member of Congress nor current candidate for federal office

represents more than 33% of the seats required for a quorum of HLT's board of directors. This is because, under these assumptions, no Member of Congress will EFMC HLT for purposes of the affiliation analysis, nor will they directly or indirectly EFMC HLT for purposes of the leadership PAC definition.

* * *

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request.⁶⁵ The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion.⁶⁶ Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,



Allen Dickerson
Chairman

⁶⁵ See 52 U.S.C. § 30108.

⁶⁶ See *id.* § 30108(c)(1)(B).