



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: July 26, 2022

SUBJECT: AO 2022-06 (Hispanic Leadership Trust) Comment on Draft B

The following is a comment on AO 2022-06 (Hispanic Leadership Trust) Draft B.

This matter will be discussed on the Open Meeting of July 28, 2022.

Attachment

RECEIVED

By Office of the Commission Secretary at 11:24 am, Jul 26, 2022



July 25, 2022

Attn: Jennifer Waldman
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

**Re: Comments on Advisory Opinion 2022-06 (Hispanic Leadership Trust)
Draft B**

Dear Commissioners:

On behalf of the Hispanic Leadership Trust (“HLT”), we submit these comments on Draft B of the above-referenced advisory opinion.

We respectfully ask the Commission to reject Draft B’s conclusion that Members of Congress and federal candidates may not comprise a majority of HLT’s board members¹ in order for: (i) Reps. Mario Diaz-Balart and Gonzales to serve as HLT’s Chair and Vice-Chair under “Alternative C” of the request; and (ii) HLT not to be considered a leadership PAC or “affiliated” with the leadership PACs of any Members of Congress who serve as HLT officers or board members.

Draft B: (i) does not provide a good rationale for this condition; (ii) is internally inconsistent on this point; and (iii) is inconsistent with the Commission’s precedents and EFMC and affiliation rules. Draft B’s condition might be appropriate if the question here were whether HLT, as a whole, is EFMC’d by federal officeholders or candidates for the purposes of the “soft money” ban under 52 U.S.C. § 30125(e)(1); however, the “soft money” ban is not implicated here.

Rather, the questions presented here are primarily whether HLT is EFMC’d by any of the Members of Congress who would be HLT’s officers or board members in such a way that: (i) HLT would be affiliated with any of their leadership PACs; or (ii) if HLT itself would be a leadership PAC. For both questions, Draft B seems to examine whether, *collectively*, Members of Congress “control” HLT; however, in this context, “control”

¹ Draft B at 26, li. 18-22.

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should be evaluated for both questions on an individual basis with respect to each Member of Congress who would be an HLT officer or director.

1. Whether HLT is affiliated with any of its officers'/board members' leadership PACs should not depend on whether federal officeholders/candidates comprise a majority of its board.

Under the Commission's EFMC and affiliation rules, the relevant question here is whether HLT is "controlled" by "[t]he same person or group of persons" as the leadership PACs of HLT's proposed Chair, Vice-Chair, and board members.² Although this is often thought of as a "*per se* affiliation" issue,³ there are contexts such as the one here where analysis under the additional EFMC and affiliation factors is required to determine whether two committees are actually "controlled" by "[t]he same person or group of persons." This is evident in Draft B's note 13, which cites to both the multi-factor test under subparagraph (g)(4)(ii) of 11 C.F.R. § 100.5 and the question of whether committees are controlled by "the same person or group of persons" under subparagraph (g)(3).

We agree with the conclusion in both Drafts A and B that, under HLT's proposed "Alternative C" draft bylaw provisions, Reps. Diaz-Balart and Gonzales would not control HLT as its Chair and Vice-Chair because their powers would be "diluted by the requirement that fundraising activities and contributions to candidates and committees be determined by a vote of the board of directors."⁴ Draft B should have followed Draft A by ending the "control" analysis there.

However, Draft B continues: "Accordingly, the composition of the board is relevant to whether the Chair or Vice Chair may be said to control the organization through its board."⁵ This does not logically follow. To help illustrate this point, let's assume that eight Members Congress—Representative A, Representative B, Representative C, Representative D, Representative E, Representative F, Representative G and Representative H—each have their own leadership PAC as follows:

² 11 C.F.R. § 100.5(g)(3)(v).

³ See Draft B at 20, li. 3-4. While Draft B specifically cites 11 C.F.R. § 100.5(g)(3)(i) as an example of *per se* affiliation, the entirety of paragraph (g) is typically regarded as addressing *per se* affiliation.

⁴ Draft B at 15, li. 14-16; see also Draft A at 22, li. 3-5 ("if the Chair or Vice Chair's exercising of their powers is contingent on a vote of the full board, then Representatives Diaz-Balart and Gonzales do not 'control' HLT when their powers are so diluted.").

⁵ Draft B at 15, li. 16-18.

Member of Congress	Rep. A	Rep. B	Rep. C	Rep. D	Rep. E	Rep. F	Rep. G	Rep. H
Member's Leadership PAC	Alpha PAC	Bravo PAC	Charlie PAC	Delta PAC	Echo PAC	Foxtrot PAC	Golf PAC	Hotel PAC

There would be common “control” by “the same person” if any of these Members of Congress individually and solely controls both their respective leadership PAC and HLT, and therefore their leadership PAC would be “affiliated” with HLT. Likewise, there would be common “control” by the same “group of persons” if all these Members collectively controlled both a hypothetical “Zulu PAC” and HLT, for example, by having a majority vote on the boards of both Zulu PAC and HLT.

Now suppose that Representatives A, B, C, D, E, F, G, and H each serve on the board of Zulu PAC, and that Zulu PAC’s bylaws require that major decisions on the PAC’s core activities—including fundraising and making contributions—be determined by a majority vote of the board. As Drafts A and B both correctly recognize, Zulu PAC would not “controlled” by “the same person or group of persons” as any of the Representative’s respective leadership PACs (Alpha PAC, Bravo PAC, Charlie PAC, Delta PAC, Echo PAC, Foxtrot PAC, Golf PAC, or Hotel PAC). Although Representatives A, B, C, D, E, F, G, and H may individually control their respective leadership PAC, none of the Representatives would “control” Zulu PAC because his or her individual authority as a Zulu PAC officer or board member is “diluted” by the votes of the other board members.

Next, suppose that the individuals at issue were neither Members of Congress nor federal candidates, and the PACs at issue were not the leadership PACs of federal officeholders or candidates as follows:

Individual	A	B	C	D	E	F	G	H
PAC	Alpha PAC	Bravo PAC	Charlie PAC	Delta PAC	Echo PAC	Foxtrot PAC	Golf PAC	Hotel PAC

In each of the scenarios above, the “control” and “affiliation” analyses and conclusions should not change under the Commission’s EFMC and affiliation rules. Simply put, “control” and “affiliation” are not dependent on whether a PAC’s board members are federal officeholders or candidates.

The only authority Draft B cites for its conclusion that the officeholder/candidate status of HLT's board members matters is AO 2021-06 (Kelly). The issue in that AO was whether Rep. Kelly could be the chair of a state party committee with a non-federal account. The Commission concluded that, under the statute's ban on federal officeholders and candidates EFMC-ing any "soft money" entity, the state party had to establish a special committee comprised of individuals who were not federal officeholders or candidates, and Rep. Kelly could have "no role in the appointment of any member of the special committee."

Draft B appears to suggest that the Kelly AO is relevant here because the "soft money" EFMC rule that was at issue in the Kelly AO, like the leadership PAC definition, both cast a "wider net" by incorporating the concept of federal officeholders and candidates "indirectly" EFMC-ing committees.⁶ Be that as it may, this is wholly irrelevant to the question of whether HLT would be affiliated with the leadership PACs of any of its officers and directors. As Draft B itself concedes: (i) "Board oversight and approval significantly reduces the Chair and Vice Chair's control over HLT" and "dilute[s]" their power;⁷ and (ii) "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."⁸

Draft B already unconditionally concludes that this "diluted authority" means "HLT will not be EFMC'd by either its Chair or Vice Chair" or by any other HLT board member.⁹ It makes no sense for Draft B to then tack on an additional condition that HLT will not be "controlled" by its Chair or Vice Chair only if a majority of the board members are not federal officeholders or candidates. Even if this condition in Draft B is rooted in the concept of "indirect" control—and it is unclear that it is so rooted—"indirect" control is simply not part of the affiliation rule for a "hard money" PAC like HLT, as Draft B acknowledges.¹⁰

⁶ Draft B at 8, li. 14; 9, li. 1-2 (emphasis in the original); *see also* 11 C.F.R. § 100.5(e)(6).

⁷ *Id.* at 18, li. 8-9, 15, li. 15.

⁸ *Id.* at 18, li. 17-18.

⁹ *Id.* at 18, li. 12-14, 17-18.

¹⁰ *Id.* at 8, li. 11-14; 9, li. 1-2. *See also* 11 C.F.R. §§ 100.5(g)(3)(v), (4), 110.3(a)(2)(v), (3); *compare id.* with *id.* § 300.2(c).

On a more general level, the Kelly AO simply is not applicable here. While both matters involve the EFMC concept, the similarity ends there:

- The Kelly AO was concerned about a single federal officeholder not having “indirect” control over a state party committee’s “soft money” activities by having the sole power to appoint members of a “special committee” overseeing those activities. In other words, members of the committee would still be accountable to one individual. Here, the governance structure under “Alternative C” is exactly the opposite: No board members would be accountable to any one individual and no board member would have the sole power to take any major action on behalf of HLT.
- If Draft B is attempting to apply by analogy the concern in the Kelly AO about Rep. Kelly not having “indirect control” over the state party’s non-federal account by “appoint[ing] even a minority of the members of the special committee,”¹¹ then it should follow that Members of Congress and federal officeholders may not even have minority control over HLT’s board. However, that is not what Draft B concludes.

As we noted in our request,¹² the Commission precedent that is far more on point here is AO 1984-36 (American Health Capital). In that AO, American Health Capital had a wholly owned subsidiary, AHC Ventures, which entered into a joint venture partnership. AHC Ventures owned 40 percent of the joint venture partnership’s equity, appointed a minority of its board of directors, and served as the joint venture partnership’s managing partner. As managing partner, AHC Ventures “manages the day-to-day affairs of the partnership and has authority to bind the partnership, act in its name, and execute contracts on its behalf.”

Notwithstanding AHC Ventures’ powers as the managing partner, it could only “take certain major actions with the consent of the governing board.” Because AHC Ventures “does not own a controlling interest in the partnership” and appointed only a minority of the partnership’s board members, the Commission concluded AHC Ventures did not EFMC the joint venture partnership and therefore its parent company American Health Capital was not affiliated with the joint venture partnership.

¹¹ Draft B at 17, li. 6-7.

¹² AOR009.

Here, the roles of HLT's proposed Chair and Vice Chair are analogous to the role of the managing partner in AO 1984-36. And, just as the AHC Ventures managing partner had to obtain consent from the partnership's board for "major actions," "Alternative C" of HLT's proposal would require the Chair and Vice Chair to obtain consent from HLT's board for major PAC functions like fundraising strategy and making contributions. Lastly, like the AHC Ventures managing partner, which had less than 50 percent control over the partnership's board, each of HLT's officers and directors would individually have far less than 50 percent control over HLT's board.

For the same reasons that the Commission determined AHC Ventures' parent company would not be affiliated with the joint venture partnership in AO 1984-36, it should conclude that HLT will not be affiliated with the leadership PACs of any of its officers and board members, regardless of whether federal candidates and officeholders comprise a majority of its board.

2. Whether HLT is itself a leadership PAC should not depend on whether federal officeholders/candidates comprise a majority of its board.

As Draft B correctly notes, "leadership PACs are definitionally EFMC'd by only a single candidate or officeholder."¹³ As Draft B also correctly notes, under HLT's proposed "Alternative C" and the rest of its governance structure, any "control" that any individual officer or board member exercises, whether "directly" or "indirectly," is "diluted" and therefore no individual EFMCs HLT.¹⁴ It makes no sense for Draft B to then analyze whether HLT, as a whole, is "controlled" by federal officeholders or candidates in a collective sense based on whether they comprise a majority of HLT's board. Again, EFMC in the leadership PAC context must be evaluated on an individual level, not on the collective level that Draft B appears to apply.

3. BOLD PAC's board appears to be comprised entirely of federal officeholders/candidates.

As HLT has noted repeatedly in its request and supplemental materials, it is simply seeking to replicate on the Republican side what BOLD PAC is doing on the

¹³ Draft B at 18, li. 11-12.

¹⁴ *Id.* at 18, li. 12-14, 17-18; *see also id.* li. 6-7, 10-11 ("conclud[ing] that the 'vote dilution' considerations that were disregarded in Advisory Opinion 2021-06 (Kelly) have greater force here" and putting aside "consideration of 'indirect' control as in the soft money context of Advisory Opinion 2021-06 (Kelly)").

Democratic side. As HLT's request documented, BOLD PAC does not appear to be operating as though it is affiliated with its Chair's leadership PAC, and BOLD PAC itself is not registered as a leadership PAC.¹⁵

BOLD PAC appears to have a board comprised entirely of Members of Congress, as well as a Chair who is a Member of Congress.¹⁶ Under Draft B, BOLD PAC does not appear to be operating permissibly.

* * *

For the reasons discussed above, we respectfully ask the Commission not to adopt Draft B's conclusion that the EFMC and affiliation analyses depend upon whether federal officeholders and candidates comprise a majority of HLT's board. Instead, the Commission should adopt a "Draft C" that combines Draft A's "control" analysis with Draft B's "finance" analysis. With regards to the "establish" and "maintain" prongs, both Drafts A and Draft B reach the right conclusion, although the analysis in Draft B is better-reasoned.

Sincerely,



Chris K. Gober

Eric Wang

Counsel to Hispanic Leadership Trust

cc: Ms. Jessica Selinkoff

¹⁵ AOR007.

¹⁶ See <https://www.boldpac.com/#MEMBERS>.