RECEIVED
By Office of the Commission Secretary at 2:45 pm, Aug 02, 2023

FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 23-19-A
AGENDA ITEM
For meeting of August 10, 2023

August 2, 2023

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson LJS by RMK
Acting General Counsel

Neven F. Stipanovic NFS by RMK
Associate General Counsel

Robert Knop RMK
Assistant General Counsel

Evan R. Christopher ERC
Attorney

Subject: Draft AO 2023-05 (Alamo PAC) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 p.m. (Eastern Time) on August 9, 2023.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to https://www.fec.gov/legal-resources/advisory-opinions-process/.

Attachment

ADVISORY OPINION 2023-05

Jason Torchinsky, Esq. **DRAFT A**
Jessica Furst Johnson, Esq.
Matthew Petersen, Esq.
Holtzman Vogel Baran Torchinsky & Josefiak PPLC
2300 N St. NW, Suite 643
Washington, DC 20037

Dear Counsel:

We are responding to your advisory opinion request on behalf of Alamo PAC (the "Committee") concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101–45 (the "Act"), and Commission regulations to the Committee's proposal to establish a separate account with a separate contribution limit to finance independent expenditures. Because the Committee is a leadership PAC and the Act and Commission regulations provide for only one contribution limit for leadership PACs, the Commission concludes that the Committee may not establish an account with a separate contribution limit.

Background

The facts presented in this advisory opinion are based on your letter received June 16, 2023, and disclosures filed with the Commission.

The Committee is a leadership PAC sponsored by and established, financed, maintained, or controlled by U.S. Senator John Cornyn of Texas.[1] The Committee currently maintains a single account into which the Committee receives funds raised in compliance with the Act's limitations, prohibitions, and reporting requirements and out of which the Committee makes

[1] Advisory Opinion Request ("AOR") at AOR001; *see also* Alamo PAC, Statement of Organization, Amend., FEC Form 1 (Dec. 13, 2021), https://docquery.fec.gov/pdf/764/202112139469842764/202112139469842764.pdf.

contributions to other candidates and candidate committees.[2] You refer to this account as a "contribution account" or "hard-money contribution account."[3]

The Committee proposes to create a second account that would be used exclusively for financing independent expenditures that expressly advocate the election or defeat of candidates other than Senator Cornyn.[4] Importantly, this second account "would be subject to a separate contribution limit"; that is, contributions made to this second account would not be aggregated with contributions made to the first account for purposes of determining whether contributions from a single donor have exceeded the Committee's $5,000 contribution limit.[5] You assert that neither Senator Cornyn nor any of the Committee's agents would solicit funds for this second account "in excess of the $5,000 PAC contribution limit" or ask for donations from corporations, labor organizations, or any other prohibited sources under the Act.[6] You refer to this second account as a "non-contribution account" and a second "hard money" account.[7]

You state that the Committee would implement procedures and safeguards to ensure that the amounts in both accounts would not be commingled, and that all independent expenditures financed out of the second account would not constitute coordinated communications, as that term is defined at 11 C.F.R. § 109.21.[8]

---

2 AOR001.

3 *Id.*

4 *Id.*

5 *Id.*

6 AOR005.

7 AOR001; AOR007.

8 AOR002.

In the alternative, you state that if the Commission does not approve the Committee's proposal to establish a second account as set forth above, the Committee proposes to establish the same second contribution account but administered and overseen by a special committee whose members are appointed without any involvement of, and whose decision-making is not approved by, Senator Cornyn.[9]

Question Presented

May the Committee establish a "non-contribution account" for making independent expenditures that is separate from the Committee's hard-money contribution account and has its own contribution limit, provided that the account is "limited to soliciting and receiving contributions that are subject to the Act's limitations, prohibitions, and reporting requirements"?

Legal Analysis

No, the Committee may not establish a second account with its own contribution limit to finance independent expenditures because the Act and Commission regulations only provide for a single contribution limit for leadership PACs; any funds received in excess of that limit would therefore be outside the limitations set forth in the Act and in violation of 52 U.S.C. § 30125(e).

Section 30125(e) of the Act and implementing regulations prohibit federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, or controlled by them, or acting on their behalf, from soliciting, receiving, directing, transferring, or

[9] AOR006–7.

spending funds "in connection with an election for Federal office, unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act."[10]

Commission regulations define a leadership PAC as a "political committee that is directly or indirectly established, financed, maintained or controlled by . . . an individual holding Federal office" and that is not the individual's authorized committee, is not affiliated with the individual's authorized committee, and is not a political party committee.[11] The Act limits contributions by any person to any political committee other than authorized candidate committees, and national and state party committees, to $5,000 per calendar year.[12] Furthermore, national banks, corporations, labor organizations, federal contractors, and foreign nationals are prohibited from making any contribution in connection with any federal election.[13]

The Committee was established by Sen. Cornyn in 2003.[14] It is neither Sen. Cornyn's authorized committee, nor affiliated with that committee, nor is it a committee of a political party.[15] The Commission agrees with the Committee's self-stated conclusion that it is a leadership PAC.[16] From that conclusion naturally flows the rest of the Commission's analysis: under the plain language of the Act and Commission regulations, no person may contribute to the

---

[10] 52 U.S.C. § 30125(e)(1)(A); *see also* 11 C.F.R. § 300.61.

[11] 11 C.F.R. § 100.5(e)(6).

[12] *See* 52 U.S.C. § 30116 (a)(1)(C); *see also* 11 C.F.R. §§ 110.1(d), 110.2(b)(1).

[13] 52 U.S.C. §§ 30118(a), 30119, 30121.

[14] AOR001.

[15] Alamo PAC, Statement of Organization, Amend., FEC Form 1 (Dec. 13, 2021), https://docquery.fec.gov/pdf/764/202112139469842764/202112139469842764.pdf.

[16] AOR001.

Committee — nor may the Committee receive — more than $5,000 per contributor per calendar year, regardless of the account in which the contribution is stored or the use to which it is put. As proposed, the Committee could receive $5,000 from one individual into the account it uses to make direct contributions to federal candidates *and* $5,000 from that exact same individual into its separate account for independent expenditures. The proposal would allow the Committee to, in effect, receive double the amount of contributions that it's allowed to under the Act. The Commission finds no authority in the Act or Commission regulations to conclude that the Committee may receive $10,000 from a single contributor in a single calendar year when the Act plainly states that it can receive no more than $5,000.

This straightforward analysis is not altered by the Committee's self-imposed limitations on the funds received into the Committee's proposed second account. It is irrelevant that the Committee would limit itself to receiving no more than $5,000 from only non-prohibited sources in this account;[17] the Committee is still asking permission to receive as much as $10,000 from a single contributor in a single calendar year, just deposited in two accounts.[18] That is permission the Commission cannot give because it would directly violate the language of the Act. That language, as relevant here, is concerned with only one factor: the amount of funds a leadership PAC may receive from a given contributor in a given calendar year which is expressly limited to a total of $5,000.

---

[17] AOR005 ("Senator Cornyn and Committee agents would not solicit any funds [for the second account] in excess of the $5,000 PAC contribution limit, nor would they ask for donations from . . . prohibited sources.").

[18] The Committee has stated that it does not intend to aggregate contributions made to both accounts from a single contributor for the purpose of Committee's statutorily imposed limit of $5,000 per calendar year. As a result, a single contributor could contribute up to $10,000 to the Committee, under the Committee's self-imposed limits on contributions to the proposed second account.

The Commission's reasoning in Advisory Opinion 2011-21 (Constitutional Conservatives Fund PAC) aligns with this conclusion. There, a leadership PAC sponsored and established, financed, maintained, and controlled by Senator Michael Lee of Utah maintained a single "Federal account" into which it received contributions that were subject to the limitations, prohibitions, and reporting requirements of the Act.[19] The leadership PAC sought to establish a "separate Federal account," which it referred to as a "non-contribution account," into which it would receive unlimited contributions from individuals, corporations, and labor organizations. The leadership PAC proposed to use its one account to make direct contributions to candidates' authorized committees and to use its separate account as proposed to finance independent expenditures.

The Commission noted that the leadership PAC was "[b]y definition . . . directly or indirectly established, financed, maintained, or controlled by a candidate for Federal office, or a Federal officeholder."[20] Therefore, the Commission concluded, the leadership PAC must comply with section 30125(e) of the Act, and the funds received in connection with a federal election must be subject to the limitations, prohibitions, and reporting requirements of the Act. As such, the leadership PAC could not receive unlimited funds from individuals or any funds from corporations or labor organizations because such funds would not be subject to the $5,000 per contributor per year limit in the Act. The Commission noted that the leadership PAC's proposed use of the funds solely to finance independent expenditures supporting or opposing the election of federal candidates or officeholders other than Senator Lee was irrelevant, as was the

---

[19] Advisory Opinion 2011-21 (Constitutional Conservatives PAC) at 2.

[20] *Id.* at 4 (citing 11 C.F.R. § 100.5(e)(6) (defining "leadership PAC")).

leadership PAC's proposal to deposit funds into a separate federal account, because the only relevant factor is the amount of funds a leadership PAC can receive per contributor per year.[21]

This conclusion is also consistent with the Commission's past statements concerning the intersection of leadership PACs and the Act's per contributor per year contribution limits. In an advisory opinion predating the leadership PAC rule, Advisory Opinion 2003-12 (Stop Taxpayer Money for Politicians Committee), the Commission treated the requesting committee "as it has historically treated leadership PACs for affiliation purposes" and concluded that the committee was not affiliated with the principal campaign committee of its chair, a federal officeholder.[22] Importantly, the Commission further concluded that, under the Act, the leadership PAC "may raise up to a *total* of $5,000 per calendar year from any particular permissible source[.]"[23] Later that year, the Commission's Explanation and Justification for adopting the rule defining "leadership PACs" was consistent with its thinking expressed in Advisory Opinion 2003-12:

> The Commission determined . . . that BCRA does not allow a Federal candidate or officeholder to raise up to $5,000 separately for the Federal and non-Federal accounts of leadership PACs directly or indirectly established, financed, maintained, or controlled by that Federal candidate or officeholder. *Rather, for*

---

[21] The Commission went on to explain that, in *McConnell v. FEC*, "[n]o party seriously question[ed] the constitutionality of [section 30125(e)]'s ban on donations of 'soft money' made directly to federal candidates and officeholders, their agents, or entities established or controlled by them." *Id.* at 3 (citing 540 U.S. 93, 182 (2003)). Section 30125(e) was necessary to "prevent the corruption or the appearance of corruption of federal candidates and officeholders" by "severing the most direct link between the soft-money donor and the federal candidate." *Id.* (citing *McConnell*, 540 U.S. at 182) (emphasis removed). According to the Commission, neither section 30125(e) nor the Supreme Court's reasoning in *McConnell* upholding and interpreting the provision had been disturbed by more recent court decisions in *Citizens United v. FEC*, 558 U.S. 310 (2010); *EMILY's List v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010); or *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011).

[22] Advisory Opinion 2003-13 (Stop Taxpayer Money for Politicians Committee) at 8.

[23] *Id.* (emphasis in original).

their leadership PACs, they are limited to raising a total of $5,000 from any one source, per election cycle.[24]

Further, the Committee's proposal is distinguishable from those presented in Advisory Opinion 2006-24 (NRSC, *et al*.) and Advisory Opinion 2009-24 (Franken), in which the Commission permitted separate accounts with their own contribution limits to be set up for recount purposes. In those advisory opinions, the Commission permitted separate accounts because recount funds are not considered "contributions" under the Act and therefore were not required to be aggregated with contributions from the same contributors to the committee's other accounts. Nor does Advisory Opinion 2011-11 (Majority PAC and House Majority PAC) — which permitted federal candidates or officeholders to raise limited funds for independent expenditure-only committees — apply to this question because the committees in that opinion were not established, financed, maintained, or controlled by federal candidates or officeholders and thus were not subject to section 30125(e) at all.

Lastly, this conclusion comports with court decisions in *Citizens United v. FEC*,[25] *EMILY's List v. FEC*,[26] *SpeechNow.org v. FEC*,[27] or *Carey v. FEC*,[28] which in various ways expanded the ability of certain entities to raise or spend funds for independent expenditures, but which did not address the activity of an entity directly or indirectly established, financed, maintained, or controlled by a federal candidate or officeholder. While the court in *Carey* held

---

[24] Leadership PACs, 68 Fed. Reg. 67013, 67015 (Dec. 1, 2003) (emphasis added).

[25] 558 U.S. 310 (2010).

[26] 581 F.3d 1, 12 (D.C. Cir. 2009).

[27] 599 F.3d 686, 696 (D.C. Cir. 2010).

[28] 791 F. Supp. 2d 121 (D.D.C. 2011).

that, consistent with the First Amendment, a nonconnected political committee that is "wholly separate" from a federal candidate or officeholder must be permitted to receive unlimited funds into a separate bank account for the purpose of financing independent expenditures, the court stressed that contributions "directed toward a federal candidate's personal coffers or his or her own political action committee . . . are subject to statutory limits because of the 'strong governmental interest in combating corruption and the appearance thereof.'"[29]

In its request, the Committee acknowledges that it is not "wholly separate" from Senator Cornyn but asserts that leadership PACs "have interests and purposes that are distinct from the campaigns of the PACs' sponsoring candidates," and that there is no increased risk of corruption because "none of the funds received into either the contribution or non-contribution accounts could be used to further the sponsoring candidate's own election."[30] This assertion is against the weight of Commission and court precedent. The Commission stated in Advisory Opinion 2011-21 (Constitutional Conservatives PAC) that the "fact that the Committee would use the funds solely to finance independent expenditures supporting or opposing the election of Federal candidates and officeholders other than [the sponsoring candidate] does not alter [its] conclusion."[31] The Act prohibits leadership PACs from receiving more than $5,000 per contributor per calendar year, regardless of how those excess funds would be spent. Moreover, the Supreme Court has also made clear that, regarding contributions to federal candidates or officeholders or entities established, financed, maintained, or controlled by them, a threat of

---

[29] *Id*. at 125–26 (quoting *Emily's List*, 581 F.3d at 8).

[30] AOR004, 6.

[31] Advisory Opinion 2011-21 (Constitutional Conservatives PAC) at 4.

corruption comes from who the money is given to, "regardless of the ends to which those funds are ultimately put."[32] Your proposal would still allow contributors who have already given up to $5,000 to Sen. Cornyn's leadership PAC to give up to another $5,000 to Sen. Cornyn's leadership PAC, which would be contrary to the plain language of the Act.

* * *

In the alternative, you ask whether the Commission's conclusion would be different if the Committee established the same separate account proposed in the request but that is administered and overseen by a special committee whose members are appointed without any involvement of, and whose decision-making is not approved by, Senator Cornyn. In support of this proposal, you cite Advisory Opinion 2021-06 (Kelly), in which the Commission permitted a state party committee chaired by a Member of Congress to raise funds into a non-federal account from potentially federally prohibited sources, provided the committee chair was walled off from any aspect of how the alternate funds were raised or spent.

The Commission's reasoning in Advisory Opinion 2021-06 (Kelly) does not apply here because the committee at issue there was not established by the chair and federal officeholder. As a result, the committee was able to comply with the express terms of section 30125(e) by ensuring that the chair and federal officeholder also did not "finance[], maintain[] or control[]" the special committee making decisions concerning the non-federal funds.[33] Because Sen. Cornyn in fact established the Committee that would hold the proposed second account, even if he were screened from "financ[ing], maintain[ing], or control[ing]" that account, he still

---

[32] *Id*. at 3 (quoting *McConnell*, 540 U.S. at 182) (emphasis removed).

[33] *See* Advisory Opinion 2021-06 (Kelly) at 5–6.

"established" the Committee for purposes of section 30125(e).[34] This alternative arrangement therefore would not change that the Committee is subject to section 30125(e) and may not receive funds that are outside of the Act's limitations, prohibitions, and reporting requirements. As the Commission concludes in this advisory opinion, a separate account with its own contribution limit to fund independent expenditures fails that test.

For the reasons stated above, the Commission concludes that the Committee may not establish a separate account with its own contribution limit to finance independent expenditures.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transactions or activities set forth in Alamo PAC's request.[35] 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 transactions or 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.[36] Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments

[34] *See* Advisory Opinion 2003-12 (Stop Taxpayer Money for Politicians Committee) at 7 ("Having concluded that Representative Flake 'established' [the committee], it is not necessary to determine whether he will finance, maintain, or control [the committee]. As such, the Commission concludes that [the committee] is an entity 'established, financed, maintained or controlled by' Representative Flake").

[35] *See* 52 U.S.C. § 30108.

[36] *See id.* § 30108(c)(1)(B).

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,

Dara Lindenbaum,
Chair