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By Office of General Counsel at 7:08 pm, Jun 16, 2023

June 16, 2023

Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: Request for Advisory Opinion

Dear Commissioners:

Alamo PAC ("the Committee"), through the undersigned counsel, submits this request for an advisory opinion pursuant to 52 U.S.C. § 30108 of the Federal Election Campaign Act of 1971, as amended (the "Act"). The Committee—a leadership PAC that maintains a hard-money "contribution account"—seeks to establish a separate "non-contribution account" with its own contribution limit. This account would be used exclusively for financing independent expenditure activities and would only solicit and receive contributions that comply with the Act's limitations, prohibitions, and reporting requirements. The Committee requests that the Commission confirm the legality of this proposal, which is supported by Court and Commission precedent.

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 the account is limited to soliciting and receiving contributions that are subject to the Act's limitations, prohibitions, and reporting requirements?

Factual Background

The Committee is the leadership PAC of Senator Cornyn of Texas and first registered with the Commission in 2003.[1] The Committee currently maintains a single account that raises funds that comply with the Act's limitations, prohibitions, and reporting requirements and out of which the Committee *inter alia* makes contributions to other candidates and committees. This account will hereinafter be referred to as the "contribution account."

The Committee proposes to create a second account—a "non-contribution account"—that would be subject to a separate contribution limit and used exclusively for financing independent expenditures that expressly advocate the election or defeat of candidates other than Senator Cornyn. As with the contribution account, all solicitations related to the non-contribution

[1] *See* FEC Form 1: Statement of Organization, Alamo PAC (Jun. 4, 2003), https://docquery.fec.gov/pdf/607/23038094607/23038094607.pdf.

account made by Senator Cornyn or any other Committee agent would be limited to asking for funds in amounts and from sources that comply with the Act. The non-contribution account would similarly only accept funds that met these same requirements. Finally, the Committee would put in place procedures and safeguards to ensure that the amounts in the contribution and non-contribution accounts would not be commingled, and that all independent expenditures financed out of the non-contribution account would not constitute coordinated communications, as that term is defined at 11 C.F.R. § 109.21.

Legal Background

The Act and Commission Regulations

The Act defines a "leadership PAC" as "a political committee that is directly or indirectly established, financed, maintained, or controlled ['EFMC'd'] by" a federal candidate or officeholder "but which is not an authorized committee of the candidate or" officeholder.[2] Despite being sponsored by a candidate, a leadership PAC is still a type of nonconnected PAC.[3] As a nonconnected PAC, a leadership PAC may receive up to $5,000 per donor per year and may contribute up $5,000 per candidate per election.[4] However, a leadership PAC may not be used to support the campaign activities of its sponsoring candidate.

The Act places restrictions on the fundraising activities of federal candidates and entities EFMC'd by those candidates. Under § 30125(e)(1)(A) of the Act, a federal candidate and any entity EFMC'd by a candidate "shall not … solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office … unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act." Since a leadership PAC is, by definition, EFMC'd by a federal candidate, it is subject to the requirements described above.

Court Precedent

Court precedent confirms that nonconnected PACs may maintain different accounts with separate contribution limits to finance distinct types of activities. For instance, *Carey v. FEC* involved a nonconnected PAC that sought to raise funds to (1) make direct contributions to federal candidates and (2) make independent expenditures in federal elections. Towards this end, the PAC "propose[d] to keep these two distinct pools of funds segregated by maintaining separate banking accounts" and brought a declaratory judgment action against the Commission enjoin it from enforcing the Act's contribution limits against the PAC.[5] Rather than approving the proposal to create separate accounts for contributions and independent expenditures,

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[2] 52 U.S.C. § 30104(i)(8)(B); *see also* 11 C.F.R. § 100.5(e)(6).

[3] *See* Types of Nonconnected PACs, Fed. Election Comm'n, https://www.fec.gov/help-candidates-and-committees/registering-pac/types-nonconnected-pacs/#:~:text=A%20leadership%20PAC%20is%20defined,an%20authorized%20committee%20of%20a (describing different categories of nonconnected PACs, including leadership PACs).

[4] 52 U.S.C. § 30116(a); 11 C.F.R. §§ 110.1(d), 110.2(b)(1).

[5] 791 F. Supp. 2d 121, 125 (D.D.C. 2011).

respectively, the Commission's Office of General Counsel took the position that the PAC should establish a second committee for independent expenditure activity.[6] *Id*. The court rejected the Commission's argument and instead granted the PAC's motion for preliminary injunction.[7]

Shortly after issuing the injunction, the court issued a Stipulated Order and Consent Judgment in which the Commission agreed not to enforce the Act's contribution limits against the PAC, provided it maintained separate accounts for its hard-money contribution activities and for its independent expenditures.[8]

Commission Precedent

In Advisory Opinion 2011-21 (Constitutional Conservatives Fund PAC), the Commission considered whether a leadership PAC may establish a separate non-contribution account for independent-expenditure activity. However, unlike the Committee here, the leadership PAC in Advisory Opinion 2011-21 sought to receive unlimited contributions from individuals, corporations, and labor organizations into the separate account.

The Commission concluded the leadership PAC could not receive such funds into the separate account, reasoning that even after the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Act's restrictions on federal candidate's soliciting or receiving soft money remain in force. Therefore, since a leadership PAC is, by definition, EFMC'd by a federal candidate, it "must comply with section [30125(e)] of the Act, and the funds that the Committee receives in connection with an election for Federal office must be subject to the limitations, prohibitions, and reporting requirements of the Act."[9] Not considered or discussed in the advisory opinion was a scenario under which a leadership PAC establishes a separate non-contribution account that is limited to raising money that complies with the Act's limits and prohibitions.

Analysis

Per the *Carey* decision, it is firmly established that a nonconnected PAC is entitled to have a non-contribution account separate from its contribution account. Since the *Carey* decision, so-called hybrid PACs have become common features of the federal election landscape.[10] As a species of nonconnected PAC, a leadership PAC should be able to establish a non-contribution account, as explained in greater detail below.

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6 *Id.*

7 *Id*. at 135.

8 *Carey v. FEC*, Civ. No. 11-259-RMC (D.D.C. Aug. 19, 2011).

9 Advisory Op. 2011-21 (Constitutional Conservatives Fund PAC) at 4.

10 The Commission's website lists more than 1,000 committees registered as hybrid PACs. Fed. Election Comm'n, Committees (Jun. 12, 2023), https://www.fec.gov/data/committees/?committee_type=V&committee_type=W.

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Since shortly after *Citizens United* was handed down, federal candidates have been permitted to raise funds for independent expenditure-only political committees ("IEOPCs"), subject to the Act's contribution limits and source prohibitions.[11] Furthermore, the Commission has previously determined that federal candidates enjoy the same right as other persons to engage in independent expenditure activity.[12] So clearly, federal candidate involvement in fundraising for independent expenditure activities does not run afoul of § 30125(e) of the Act, provided the funds are raised in amounts and from sources that comply with the Act.

It is worth mentioning that leadership PACs—as unauthorized, nonconnected committees—have interests and purposes that are distinct from the campaigns of the PACs' sponsoring candidates. The Commission discussed this point in Advisory Opinion 2008-17 (KITPAC), which examined whether a leadership PAC could make payments for certain expenses related to a book co-authored by a candidate. In approving the request, the Commission noted the leadership PAC's representation "that its interest would exist even in the absence of the [the candidate's] candidacy for reelection or his campaign, and even if the campaign did not share [the leadership PAC's] interest."[13] Therefore, according to the Commission, the proposed payments were permissible "[b]ecause the book would advance the leadership PAC's goals and the leadership PAC would pay for the book and the co-author's expenses irrespective of the campaign."[14] Leadership PACs, thus, have their own particular objectives and agendas, which they may legitimately advance through independent expenditure activity.

Equally important, the concept of committees associated with federal candidates or political parties having separate accounts subject to separate contribution limits is not a foreign one in campaign finance law. For instance, authorized committees of candidates may permissibly establish recount funds that have their own separate limits. The Commission approved this proposal in Advisory Opinion 2006-24 (NRSC, *et al*.) because donations to the recount fund would be subject to the Act's limitations, prohibitions, and reporting requirements. National political party committees, which are subject to similar fundraising restrictions as candidates, may also establish recount funds subject to separate limits, per Advisory Opinion

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11 *See* Advisory Op. 2011-12 (Majority PAC) at 1 (concluding that "Federal officeholders and candidates … may attend, speak at, and be featured guests at fundraisers for [] Committees at which unlimited individual, corporate, and labor organization contributions are solicited, so long as they restrict any solicitation they make to funds subject to the limitations, prohibitions and reporting requirements of the Act."); *see also* Advisory Op. 2015-09 (Senate Majority PAC) at 8–9.

12 *See* Factual & Legal Analysis at 10 (Feb. 25, 2015), MUR 6405 (Friends of John McCain) (noting the Supreme Court's holding in *Citizens United* that "'independent expenditures … do not give rise to corruption or the appearance of corruption,' and thus cannot constitutionally be limited" before concluding that, post-*Citizens United*, "[i]t is unlikely that independent spending by authorized committees would be deemed more potentially corrupting than independent expenditures by individuals, political parties, or corporations, each of which has been found to have a constitutional right to make unlimited independent expenditures.").

13 Advisory Op. 2008-17 (KITPAC) at 4.

14 *Id*.

2009-04 (Franken).[15] Thus, while § 30125(e)(1) of the Act restricts how much, and from whom, federal candidates and parties may solicit and raise funds, it does not necessarily preclude such candidates and parties from maintaining more than one account, provided that such accounts receive only contribution-limited and source-restricted funds.

Taken together, (1) *Carey*'s holding that nonconnected committees may establish both contribution and non-contribution accounts, (2) the principle that a federal candidate has a right to raise and spend funds to engage in independent expenditures, and (3) precedents permitting candidates and parties to establish separate accounts with separate limits lead to the conclusion that leadership PACs may lawfully set up non-contribution accounts for financing independent expenditures. This is consistent with the Commission's reasoning in Advisory Opinion 2011-21. There, the Commission's concern was not that a leadership PAC sought to create a second non-contribution account; rather, it was that the second account proposed to receive funds in amounts and from sources that did not comply with the Act's contribution limits and source prohibitions.[16] That was the animating reason for the Commission to deny the request made by the leadership PAC.

Here, no such concern arises because all funds raised for the non-contribution account would be fully compliant with the Act's limitations, prohibitions, and reporting requirements. Senator Cornyn and Committee agents would not solicit any funds in excess of the $5,000 PAC contribution limit, nor would they ask for donations from corporations, labor organizations, or any other prohibited sources. In other words, the Act's limits and prohibitions would be observed, and no unlimited money from individuals, corporations, or labor organizations would flow into an entity EFMC'd by Senator Cornyn. Therefore, the Committee's proposed creation of a non-contribution account accords with the rationale underlying Advisory Opinion 2011-21.

It is important, though, to clarify certain language from Advisory Opinion 2011-21 regarding leadership PACs having second accounts. Near the end of the advisory opinion, there is a parenthetical description of *Carey* that says the case "affirm[s] the 'two-account' approach only for those political committees that are '*wholly separate from federal candidates*.'"[17] To be correctly understood, this statement must be read in the proper context. In *Carey* (as well as Advisory Opinion 2011-21), the non-contribution account under consideration sought to receive unlimited funds from individuals, corporations, and labor organizations. Under those facts, a PAC must, of course, be separate from a candidate in order to receive such funds.

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[15] Following the passage of the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2772-73 (2014), the national party committees may also establish accounts, subject to enhanced contribution limits, with respect to presidential nomination conventions, election recounts and other legal proceedings, and headquarters buildings.

[16] *See* Advisory Op. 2011-21 at 2 ("[T]he Committee may neither receive unlimited contributions from individuals nor receive any contributions from corporations or labor organizations for the purpose of financing independent expenditures because section [30125(e)(1)(A)] prohibits the Committee from doing so.").

[17] *Id*. at 4.

That is not the case, however, when a PAC's non-contribution account would only accept funds subject to the Act's contribution limits and source prohibitions. In such instances, the PAC need not be "wholly separate" from a candidate because the requirements in § 30125(e)(1)(A) are being met. Thus, neither *Carey* nor Advisory Opinion 2011-21 can be reasonably read to foreclose the two-account approach where, as here, the non-contribution account of a leadership PAC would only receive funds that comply with the Act's limitations, prohibitions, and reporting requirements. These two precedents—when read together—bear on the question of *what* (if any) funding restrictions may be placed on the non-contribution account of a nonconnected PAC, not *whether* such a non-contribution account can be established. The latter question is answered in *Carey*.

* * *

The Committee's proposal to create a separate non-contribution account also does not raise corruption concerns for either the candidates receiving contributions from the Committee or the Committee's sponsoring candidate. Because the Committee's non-contribution account would be strictly segregated from its contribution account, the non-contribution account would not be a vehicle for funneling excessive contributions to other candidates.

Neither would approving the Committee's request increase corruption risks for the Committee's sponsoring candidate. As noted earlier, none of the funds received into either the contribution or non-contribution accounts could be used to further the sponsoring candidate's own election. And any corruption-related concerns regarding a leadership PAC establishing a non-contribution account are mitigated by the fact that such account would abide by the Act's limitations, prohibitions, and reporting requirements.

In sum, the Committee is a leadership PAC, which is a type of nonconnected PAC that is neither affiliated with, nor authorized by, Senator Cornyn. Court precedent has established that nonconnected PACs may have non-contribution accounts separate from their contribution accounts. Therefore, leadership PACs should be able to have non-contribution accounts with separate limits, so long as such accounts only receive funds that comply with the Act's limitations, prohibitions, and reporting requirements.

* * *

In the alternative, if the Commission does not approve the proposed course of action described above, the Committee asks whether it may establish a non-contribution account that is administered and overseen by a special committee whose members are appointed without any involvement of, and whose decision-making is not reviewed or approved by, Senator Cornyn. This proposal appears to be consistent with Advisory Opinion 2021-06 (Kelly), where the Commission considered whether a state party committee whose chair was a Member of Congress could, consistent with § 30125(e)(1) of the Act, continue to raise funds into its non-federal account in amounts and from sources that were consistent with state law but prohibited by the Act. The Commission concluded that the state party's non-federal account could continue to raise such funds, provided "the non-federal account is administered by a special committee

without the review or approval of [the Member of Congress] and [the Member] has no role in the appointment of any member of the special committee."[18] Under those circumstances, the Commission determined that "the non-federal account is not an entity directly or indirectly established, financed, maintained or controlled by, or acting on behalf of, [the Member]."[19]

Advisory 2021-06, thus, establishes the precedent that an entity controlled by a federal candidate may nevertheless have an account that is considered not to have been EFMC'd by that candidate, so long as the conditions described above are met. That would support the alternative proposed by the Committee. Admittedly, the advisory opinion states that "[t]his advisory opinion does not address and is not applicable to the activities of other types of committees or entities, including, but not limited to, federal hybrid political action committees."[20] By specifically mentioning hybrid PACs, though, this language seems primarily designed to address candidate involvement with entities that raise non-federal funds. As made clear above, the non-contribution account that the Committee seeks to create would only raise funds that comply with the Act's limitations, prohibitions, and reporting requirements. Therefore, in the alternative, the Committee asks the Commission to confirm that the Committee may establish a non-contribution account that would be administered and overseen by a special committee, as described above.

Conclusion

For the reasons set forth above, we ask that the Committee confirm that a leadership PAC may establish a non-contribution account with its own contribution limit as long as the account only receives contributions that are subject to the Act's limitations, prohibitions, and reporting requirements. Just as a nonconnected PAC without an association to a federal candidate may accept soft money into a *Carey* account, a leadership PAC should be able to accept hard money into a non-contribution account—a "Cornyn Account," if you will.

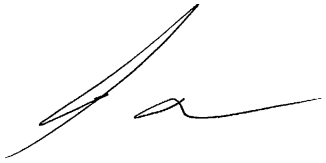
Please feel free to contact us if you have any questions regarding this request.

18 Advisory Op. 2021-06 (Kelly) at 7.

19 *Id.*

20 *Id.*

Sincerely,



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