July 5, 2023

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Federal Election Commission
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Re: Advisory Opinion Request 2023-05 (Alamo PAC)

Dear Ms. Stevenson:

Campaign Legal Center ("CLC") respectfully submits this comment on Advisory Opinion Request 2023-05 (the "Request"), in which a leadership PAC proposes to create a separate, additional "non-contribution" account with its own contribution limit.[1] We respectfully urge the Commission to deny this Request.

The requestor is a leadership PAC — "a political committee that is directly or indirectly established, financed, maintained, or controlled by" a federal candidate or officeholder, "but which is not an authorized committee of the candidate" or officeholder.[2] The requestor proposes to create a second account "that would be subject to a separate contribution limit and used exclusively for financing independent expenditures."[3] The Request asserts that this second account would only solicit or accept "funds in amounts and from sources that comply with" the Federal Election Campaign Act (the "Act"), and that any expenditures made from the second account "would not constitute coordinated communications" under Commission regulations.[4]

Approving the Request would effectively establish a mechanism for federal candidates and officeholders to use their leadership PACs to circumvent the Act's contribution limits — which for PACs is currently $5,000 per year — and the

1 Advisory Op. Request 2023-05 (June 26, 2023), https://www.fec.gov/files/legal/aos/2023-05/202305R_1.pdf.

2 52 U.S.C. § 30104(i)(8)(B).

3 Request at 1.

4 *Id.* at 2.

Request identifies no judicial or Commission precedent that supports its proposal. Instead, the Request primarily asserts that its proposal is not foreclosed by *Carey v. FEC* or Advisory Opinion 2011-21, extrapolating from these two precedents that a nonconnected PAC should be permitted to create an additional "non-contribution" account.[5] But the Request misreads these precedents to reach an erroneous conclusion.

Carey involved a nonconnected PAC creating a separate account to be used exclusively for independent expenditures, which would accept unlimited contributions and contributions from corporations and labor unions.[6] But the nonconnected PAC in *Carey* was *not* a leadership PAC or any other entity established, financed, maintained, or controlled by a federal candidate or officeholder — a crucial difference. *Carey* therefore did not raise or address the question of whether a leadership PAC, as an entity sponsored by a federal candidate, could raise additional money through a separate additional account, as the Request proposes. Indeed, the decision expressly reaffirmed the government's anticorruption interest in regulating, through the Act's contribution limits, money provided to candidates' authorized committees and PACs.[7] *Carey* thus provides no support for the Request.

Advisory Opinion 2011-21 is similarly unhelpful to the Request. In that opinion, the Commission *rejected* a leadership PAC's proposal to create an additional, "non-contribution" account. The requestor had proposed to solicit and accept unlimited contributions, as well as contributions from corporate and labor unions, and, like here, represented that the account would be used exclusively to make independent expenditures. The Commission reasoned that the proposal would violate the Act's soft money prohibition, which bars federal candidates, their agents, and any entities that they establish, finance, maintain, or control — a category that clearly includes

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[5] *See Carey v. FEC*, 791 F. Supp. 2d 121, 125 (D.D.C. 2011); Advisory Op. 2011-21 (Constitutional Conservatives Fund PAC).

[6] *Carey* and the Commission's consent agreement pursuant to that decision effectively approved the creation of so-called "hybrid" PACs, which are not connected to or EFMC'd by any federal candidate or officeholder, and can therefore maintain an additional, separate "non-contribution" account, which can accept unlimited contributions, and may only be used to finance independent expenditures.

[7] *Carey*, 791 F. Supp. 2d at 125–126 ("If contributions are directed toward a federal candidate's personal coffers or his or her own political action committee, such contributions are subject to statutory limits because of the "strong governmental interest in combating corruption and the appearance thereof. . . . If, however, a non-connected political action committee is making independent expenditures, *wholly separate from federal candidates or parties* . . . there is not that same governmental interest in protecting *quid pro quo* corruption.") (emphasis added). The Request asserts that this language in *Carey* does not foreclose its proposal: "[W]hen a PAC's non-contribution account would only accept funds subject to the Act's contribution limits and source prohibitions . . . the PAC need not be "wholly separate" from a candidate because the [hard money] requirements in § 30125(e)(1)(A) are being met." Request at 6. However, this argument fails to explain why a leadership PAC — which, unlike a super PAC or the non-contribution account of a hybrid PAC, is subject to the Act's contribution limits — should be allowed to raise money, beyond those limits, to finance independent expenditures.

leadership PACs — from raising or spending money that does not comport with the Act's requirements. But soft money is not the only legal barrier at issue: while the Request asserts that its second account would only solicit or accept money that complies with the Act's requirements, the Request raises a different concern that the Commission did not need to address in Advisory Opinion 2011-21: the circumvention of the Act's contribution limits.

Under the Act's contribution limits, a leadership PAC can solicit or accept up to $5,000 per year from any contributor. While a federal candidate or officeholder can, in theory, establish and sponsor multiple leadership PACs, these committees would be "affiliated" and would therefore share a contribution limit,[8] thus preventing any candidate or officeholder from circumventing the Act's limits by simply creating multiple committees.[9] The Request proposes circumventing the $5,000-per-year contribution limit in a different way, by creating a second *account* — rather than a second *committee* — with a separate limit. This is a distinction without a difference and it would, thus, violate the basic anticircumvention principle of affiliated committees, *i.e.*, that multiple committees organized or sponsored by the same person are subject to a single contribution limit. The Request would therefore undermine the Act's contribution limits in much the same way as creating multiple separate PACs would, absent the Commission's affiliation rules. Accordingly, the Request's basic premise that its proposed "non-contribution" account would comply with the Act is inherently flawed, as this account would effectively violate the Act's anticircumvention provision and thus violate its contribution limits.[10]

Perhaps anticipating this concern, the Request suggests that "the concept" of allowing political committees to maintain multiple accounts with separate contribution limits is "not a foreign one in campaign finance law."[11] The examples and precedents that it relies on for this point, however, are inapposite.

For starters, the Request contends that leadership PACs are "a species of nonconnected PAC" and should therefore "be able to establish a non-contribution

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[8] *See* 52 U.S.C. § 30116(a)(5); 11 C.F.R. § 100.5(g)(2) (All committees . . . established, financed, maintained or controlled by the same corporation, labor organization, person, or group of persons . . . are affiliated."); 11 C.F.R. § 110.3(a)(1) ("For the purposes of the contribution limitations of [11 C.F.R. §§ 110.1 and 110.2], all contributions made or received by more than one affiliated committee . . . shall be considered to be made or received by a single political committee.").

[9] *See also* Leadership PACs, 68 Fed. Reg. 67,013, 67,017 ("Although such leadership PACs are not exposed to the consequences of affiliation with authorized committees, leadership PACs may still be deemed affiliated with other unauthorized committees.").

[10] *See* Advisory Op. 2022-06 at 5-6 (Hispanic Leadership Trust) (noting that the Commission's affiliation regulations "are designed to give effect to the Act's anti-proliferation provision" such that generally, "[c]ommittees EFMC'd by the same actor (*i.e.*, affiliated committees) are subject to a single contribution limit"); *see, e.g.*, Advisory Op. 2011-21 at 1-2 (Constitutional Conservatives Fund PAC) (noting that the requestor, a leadership PAC, "is affiliated with Lead Encourage Elect PAC (a/k/a "LEE PAC"), another leadership PAC sponsored by Senator Lee").

[11] Request at 4.

account,"[12] but this contention elides the crucial difference, noted above, that a leadership PAC is established, financed, maintained, or controlled by a federal candidate. The Request further contends that federal candidates have a recognized "right . . . to engage in independent expenditure activity,"[13] and that leadership PACs "have their own particular objectives and agendas, which they may legitimately advance through independent expenditure activity,"[14] but fails to explain why the right or ability to make independent expenditures supports being allowed to separately fundraise, through an additional account with its own contribution limit, to finance those independent expenditures. The fact that federal candidates and leadership PACs can make independent expenditures in no way supports the conclusion that they must be allowed to raise additional money to do so, beyond the relevant contribution limits the Act prescribes.

The Request also points out that federal candidates' authorized committees and national party committees are permitted to establish recount fund accounts that have a separate contribution limit, suggesting that its proposal is on similar footing.[15] It is not. The Commission concluded long ago that recount accounts are allowed to have a separate contribution limit because donations to these accounts are not "contributions" under the Act,[16] a rationale that simply does not apply in the context of leadership PACs making independent expenditures. In marked contrast to recount funds, the separate, additional account that the Request proposes to create would clearly be soliciting and accepting "contributions" — "money or anything of value" provided "for the purpose of influencing" federal elections[17] — under the Act. The Commission's prior approval of recount accounts thus provides no support for the Request's proposed circumvention of contribution limits.

Backstopping its arguments based on precedent, the Request also asserts that its proposal to create a separate account with its own contribution limit "does not raise corruption concerns for either the candidates receiving contributions" or the leadership PAC's sponsor.[18] But these arguments do not address the corruption concern presented by allowing leadership PACs to circumvent contribution limits,

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[12] *Id.* at 3.

[13] *Id.* at 4.

[14] *Id.*

[15] *Id.*

[16] *See* Advisory Op. 2006-24 at 6 (NRSC) ("[A] Federal candidate's recount fund must not receive or solicit donations in excess of the Act's amount limitations. . . . Thus, by operation of [52 U.S.C. § 30125(e)], any recount fund established by a Federal candidate may not receive donations that in the aggregate exceed [the Act's prevailing candidate contribution limits]. However, *because* section [30125(e)(1)(A)] does not convert the donations into "contributions" for purposes of [the Act], donations to a Federal candidate's recount fund will not be aggregated with contributions from those persons to the Federal candidate for the general election.") (emphasis added); *see also* Advisory Op. 1978-92 at 2 (Miller for Senate) ("[G]ifts, or loans or payments of money or anything of value that are made solely for the purpose of defraying the expenses of a Federal election recount are not contributions or expenditures under the Act and Commission regulations.").

[17] 52 U.S.C. § 30101(8)(A).

[18] Request at 6.

thus allowing contributors to a leadership PAC to give twice the amount they are currently allowed to give. Indeed, *Carey* provided a clear reminder that when "contributions are directed toward a federal candidate's personal coffers *or his or her own political action committee*," the Act's contribution limits apply because the government has a "strong governmental interest in combating corruption and the appearance thereof."[19]

Nor does the Request's alternative proposal — to establish an additional, separate account for independent expenditure 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" the leadership PAC's sponsor[20] — resolve the circumvention problem. Regardless of how the additional account is administered, approving the Request would allow the leadership PAC to circumvent the Act's contribution limits and thus raise twice the funds it can currently raise, undermining the anticorruption interest that those limits advance.

Beyond these fundamental legal problems, granting this Request would be very bad policy. Leadership PACs are notorious for being abused as vehicles for federal candidates' and officeholders' personal enrichment. Indeed, such abuse is well-documented. A 2021 report authored by CLC and Issue One found that 92% of members of Congress have a leadership PAC, and documented numerous examples of leadership PACs being used as slush funds for candidates to pay for personal expenses.[21] A 2018 report contained similar findings.[22] The Commission originally permitted the creation of leadership PAC for the purpose of making contributions to other federal candidates;[23] however, they increasingly have been (and continue to be) misused to pay for, *e.g.*, family vacations, personal legal expenses, golf trips, tickets to sporting events and Broadway shows, and luxury meals and hotel stays.[24]

The abuse of leadership PACs is no accident; the Commission has long failed to rein in this practice by maintaining the flawed and problematic position that the Act's personal use prohibition — which forbids the use of any "contribution accepted by a candidate" to defray expenses that would exist irrespective of a candidate's

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[19] *Carey*, 791 F. Supp. 2d at 125 (emphasis added).

[20] Request at 6.

[21] *See* CLC and Issue One, *All Expenses Paid: Another Look at Congressional Leadership PACs' Outlandish Spending* (Oct. 1, 2021), https://campaignlegal.org/sites/default/files/2021-10/All%20Expenses%20Paid%20-%20Another%20Look%2010-01-21.pdf.

[22] *See* CLC and Issue One, *All Expenses Paid: How Leadership PACs Became Politicians' Preferred Ticket to Luxury Living* (July 19, 2018), https://campaignlegal.org/sites/default/files/2018-07/All%20Expenses%20Paid%20-%20How%20Leadership%20PACs%20Became%20Politicians%27%20Preferred%20Ticket%20to%20Luxury%20Living_0.pdf ("2018 CLC and Issue One Report").

[23] *See* Advisory Op. 1978-12 (Waxman).

[24] *See* 2018 CLC and Issue One Report; *see, e.g.*, John Bresnahan, *Watchdog: Duncan may have used $100k in donations on family*, Politico (Apr. 4, 2018), https://www.politico.com/story/2018/04/04/jimmy-duncan-ethics-campaign-donations-502112; Chris Marquette, *Vail: Where leadership PAC money goes to play,* Roll Call (Mar. 12, 2020), https://rollcall.com/2020/03/12/vail-where-leadership-pac-money-goes-to-play/.

campaign or official duties[25] — does not apply to leadership PACs, despite the fact that these PACs are, by definition, established, financed, maintained, or controlled by a federal candidate or officeholder.[26] Consequently, federal candidates openly abuse leadership PACs for personal gain, a fact most likely known to sophisticated leadership PAC donors seeking to curry favor with candidates and officeholders. Against this unfortunate backdrop, it is deeply troubling that the Request effectively proposes allowing these vehicles for personal enrichment to raise twice the money they can currently raise. Permitting leadership PAC donors to give double the funds they can currently give would serve to further heighten the potential for corruption and the appearance thereof.

In sum, the Request lacks support in any FEC or judicial precedent; on the contrary, it seeks to circumvent the Act's contribution limits on the amount a leadership PAC can raise. It is also bad policy. Accordingly, we respectfully urge the Commission to deny the Request.

Respectfully submitted,

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[25] 52 U.S.C. § 30114(a), (b); 11 C.F.R. § 113.1(g).

[26] In 2018, CLC and Issue One, along with three Republican and two Democratic former members of Congress, filed a rulemaking petition asking the Commission to revise and amend its regulations to explicitly clarify that the personal use rules apply to leadership PACs. *Petition for Rulemaking to Revise and Amend Regulations Relating to the Personal Use of Leadership PAC Funds* (July 24, 2018), https://campaignlegal.org/sites/default/files/2018-07/07-24-18%20CLC-IO%20Leadership%20PAC%20Personal%20Use%20petition.pdf. Not only is that rulemaking languishing, but the Commission's analysis in MUR 7961 rested on the opposite conclusion: that the personal use rules do *not* apply to leadership PACs because they are not authorized candidate committees. *See* Factual and Legal Analysis at 9, MUR 7961 (LOU PAC, *et al.*), https://www.fec.gov/files/legal/murs/7961/7961_15.pdf; Statement of Reasons of Chairman Allen Dickerson and Comm'rs Sean J. Cooksey and James E. "Trey" Trainor III at 2, MUR 7657 (IRL PAC, *et al.*), https://www.fec.gov/files/legal/murs/7657/7657_16.pdf; *see also* Shanna Ports, *FEC Waves the White Flag on Yet Another Issue: Leadership PAC Abuse* (Mar. 9, 2023), https://campaignlegal.org/update/fec-waves-white-flag-yet-another-issue-leadership-pac-abuse.