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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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

August 2, 2023

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by RMK*
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Subject: Draft AO 2023-05 (Alamo PAC) Draft B

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

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

1 ADVISORY OPINION 2023-05

2

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10 Dear Counsel:

DRAFT B

11 We are responding to your advisory opinion request on behalf of Alamo PAC (the
12 “Committee”) concerning the application of the Federal Election Campaign Act, 52 U.S.C.
13 §§ 30101–45 (the “Act”), and Commission regulations to the Committee’s proposal to establish,
14 in addition to its existing hard-money contribution account, a second contribution account with a
15 separate contribution limit to finance independent expenditures. The Commission concludes that
16 nothing in the Act or Commission regulations prohibits the Committee from establishing a
17 second account, for the sole purpose of making independent expenditures, that is limited to
18 soliciting and receiving contributions not exceeding \$5,000 per contributor per year from
19 federally permissible sources.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received June 16,
22 2023, and disclosure reports filed with the Commission.

23 The Committee is a leadership PAC sponsored by and established, financed, maintained,
24 or controlled by U.S. Senator John Cornyn of Texas.¹ The Committee currently maintains a
25 single account into which the Committee receives funds raised in compliance with the Act’s

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>.

1 limitations, prohibitions, and reporting requirements and out of which the Committee makes
2 contributions to other candidates and candidate committees.² You refer to this account as a
3 “contribution account” or “hard-money contribution account.”³

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

14 You state that the Committee would implement procedures and safeguards to ensure that
15 the amounts in both accounts would not be commingled, and that all independent expenditures

² AOR001.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ AOR005.

⁷ AOR001; AOR007.

1 financed out of the second account would not constitute coordinated communications, as that
2 term is defined at 11 C.F.R. § 109.21.⁸

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

8 ***Question Presented***

9 *May the Committee establish a “non-contribution account” for making independent*
10 *expenditures that is separate from the Committee’s hard-money contribution account and has its*
11 *own contribution limit, provided that the account is “limited to soliciting and receiving*
12 *contributions that are subject to the Act’s limitations, prohibitions, and reporting*
13 *requirements”?*

14 ***Legal Analysis***

15 Yes, the Committee may establish a second account, for the sole purpose of making
16 independent expenditures, that is limited to soliciting and receiving contributions not exceeding
17 \$5,000 per contributor per year from federally permissible sources because nothing in the Act or
18 Commission regulations proscribes leadership PACs from operating such an account for that
19 purpose. Furthermore, our conclusion follows from relevant judicial precedent permitting
20 nonconnected political committees to engage in unlimited independent expenditure activities

⁸ AOR002.

⁹ AOR006–7.

1 from separate accounts, notwithstanding the Act’s limits and restrictions on contributions, in
2 light of the substantial constitutional protections afforded to those activities by the First
3 Amendment.

4 The Act and Commission regulations define a leadership PAC as a “political committee
5 that is directly or indirectly established, financed, maintained or controlled by . . . an individual
6 holding Federal office” and that is not the individual’s authorized committee, is not affiliated
7 with the individual’s authorized committee, and is not a political party committee.¹⁰ The Act
8 limits contributions by any person to any political committee other than authorized candidate
9 committees and national and state party committees to \$5,000 per calendar year.¹¹ Because they
10 are not authorized committees of federal candidates or national or state party committees,
11 leadership PACs are considered nonconnected committees for purposes of the Act’s contribution
12 limits and subject to the \$5,000 annual limit on contributions per donor.¹² Furthermore, national
13 banks, corporations, labor organizations, federal contractors, and foreign nationals are generally
14 prohibited from making any contribution to leadership PACs.¹³

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

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

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

¹² 11 C.F.R. §§ 106.6(a), 110.1(d).

¹³ 52 U.S.C. §§ 30118(a), 30119, 30121. Certain nonconnected committees may establish a separate account for the purpose of making independent expenditures, and such an account may receive unlimited contributions from individuals, corporations, and labor organizations. *See Carey v. FEC*, 791 F. Supp. 2d 121, 131–32 (D.D.C. 2011).

1 directing, transferring, or spending funds “in connection with an election for Federal office,
2 unless the funds are subject to the limitations, prohibitions, and reporting requirements of the
3 Act.”¹⁴ Although leadership PACs are a kind of nonconnected committee, they are also, by
4 definition, “directly or indirectly established, financed, maintained or controlled by” a candidate
5 or officeholder, and they must comply with the restrictions and requirements of section
6 30125(e).¹⁵

7 The Committee was established by Sen. Cornyn in 2003.¹⁶ As it is neither Sen. Cornyn’s
8 authorized committee, nor affiliated with that committee, nor is it a committee of a political
9 party, the Commission agrees with the Committee’s self-stated conclusion that it is a leadership
10 PAC.¹⁷ Although the Act and Commission regulations do limit leadership PACs from soliciting
11 or receiving contributions exceeding \$5,000 per contributor per year, neither source of law
12 addresses how or whether that limit is impacted by changes in how the funds received by
13 leadership PACs are deposited (in an account that is separate and distinct from any existing hard-
14 money account) or used (for independent expenditures unrelated to the federal officeholder that
15 established the PAC). The Act and Commission regulations do not specify whether a leadership
16 PAC is prohibited from establishing and maintaining a second account of the kind the Committee
17 proposes—one that would receive only funds subject to the limits, prohibitions, and reporting
18 requirements of the Act.

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

¹⁵ *See* Advisory Opinion 2011-21 (Constitutional Conservatives PAC) at 4.

¹⁶ AOR001.

¹⁷ AOR001; *see also* Alamo PAC, Statement of Organization, Amend., FEC Form 1 (Dec. 13, 2021), <https://docquery.fec.gov/pdf/764/202112139469842764/202112139469842764.pdf>.

1 However, in *Carey v. FEC*, the U.S. District Court for the District of Columbia issued a
2 preliminary injunction barring the Commission from enforcing the Act’s contribution limits
3 against a nonconnected political committee that sought to solicit and accept unlimited
4 contributions into a separate account used exclusively for making independent expenditures
5 while still maintaining a “hard money” account that would remain subject to the Act’s
6 contribution limits and source restrictions, and through which the committee would continue to
7 make contributions directly to federal candidates.¹⁸ The court explained that the Act “fails to
8 distinguish between contributions to unconnected political action committees conducting
9 independent expenditure activities, and contributions to unconnected political action committees
10 for direct contributions to candidates,” and found that, irrespective of the statutory limit on
11 contributions to political committees under 52 U.S.C. § 30116(a)(1)(C), “[t]he former must be
12 permitted without limitation; the latter remains subject to the limitations of the statute.”¹⁹ The
13 ruling in *Carey*, which precipitated the creation of so-called hybrid PACs, necessarily followed
14 from both Supreme Court and D.C. Circuit precedent recognizing that “neither contribution nor
15 expenditure limitations involving independent expenditure activities are constitutional under the
16 First Amendment.”²⁰

¹⁸ 791 F.Supp.2d 121, 135-36 (D.D.C. 2011).

¹⁹ *Id.* at 132. In dicta, the *Carey* court noted that contributions “directed toward a federal candidate’s personal coffers or his or her own political action committee” may be subject to limits “because of the strong governmental interest in combating corruption and the appearance thereof.” *Id.* at 125 (quoting *Emily’s List v. FEC*, 581 F.3d 1,8 (D.C. Cir. 2009)). However, that language from *Carey* is understood to refer to contributions made to a candidate’s authorized committee, a term which, by definition, excludes leadership PACs, and nothing in the *Carey* decision otherwise confines its reasoning only to nonconnected committees that are not leadership PACs.

²⁰ *Id.* at 135.

1 In accordance with *Carey*, the Commission has approved the formation of hybrid PACs
2 and issued guidance consistent the decision’s guidelines.²¹ Therefore, under *Carey* and the
3 Commission’s related guidance, the requestor here—as a nonconnected PAC—may also
4 establish and solicit funds for a non-contribution account that is maintained separately from its
5 “hard money” contribution account and that is used exclusively for independent expenditures,
6 irrespective of the \$5,000 limit on contributions to nonconnected committees at 52 U.S.C.
7 § 30116(a)(1)(C) .

8 Our conclusion is also consistent with the Commission’s determination in Advisory
9 Opinion 2011-21 (Constitutional Conservatives Fund PAC). There, a leadership PAC sponsored
10 and established, financed, maintained, and controlled by Senator Michael Lee of Utah
11 maintained a single “Federal account” into which it received contributions that were subject to
12 the limitations, prohibitions, and reporting requirements of the Act.²² The leadership PAC
13 sought to establish a separate non-contribution account into which it would receive unlimited
14 contributions from individuals, corporations, and labor organizations; the leadership PAC
15 proposed to use its first account to make direct contributions to candidates’ authorized
16 committees and its proposed second account to make independent expenditures.²³ In concluding
17 that the leadership PAC could not “receive unlimited contributions from individuals nor receive
18 any contributions from corporations and labor organizations for the purpose of financing

²¹ *See also, e.g.*, FEC Statement on *Carey v. FEC* (Oct. 5, 2011), <https://www.fec.gov/updates/fec-statement-on-carey-fec>; Registering as a Hybrid PAC, <https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/registering-hybrid-pac>.

²² Advisory Opinion 2011-21 (Constitutional Conservatives PAC) at 2.

²³ *Id.*

1 independent expenditures” because of 52 U.S.C. § 30125(e)’s continued applicability to the
2 leadership PAC, the Commission did not reach the question of whether a second account would
3 be permissible under different circumstances.²⁴ The material distinctions between that request
4 and the Committee’s proposal here, particularly the Committee’s assurances that all funds it
5 receives into its separate non-contribution account will comply with the Act’s source and amount
6 limitations pursuant to 52 U.S.C. § 30125(e), mean that opinion takes us only so far. It does not
7 disturb that opinion’s reasoning to now decide that the Committee, which proposes to observe
8 hard-money limits on the amounts and sources of contributions it receives as a committee
9 established, financed, maintained, or controlled by a federal officeholder, may deposit those
10 contributions into a second account solely for use in financing independent expenditures.

11 Lastly, this conclusion comports with the constitutional principles announced in *Citizens*
12 *United v. FEC*,²⁵ *EMILY’s List v. FEC*,²⁶ and *SpeechNow.org v. FEC*,²⁷ which in various ways
13 have expanded the ability of certain entities to raise or spend funds for independent expenditures
14 on First Amendment grounds. While no court has directly addressed whether, consistent with the
15 First Amendment, the Act and Commission regulations may prohibit a leadership PAC
16 established, financed, maintained, or controlled by a federal officeholder from establishing a
17 second, hard-money account used to finance independent expenditures, it is enough for our
18 purposes that this opinion is consistent with the courts’ permissive treatment of independent

²⁴ *Id.* at 4.

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).

1 expenditures under the First Amendment and that no controlling authority prevents us from
2 approving the Committee's proposal.

3 In sum, the Committee may establish a second account, for the sole purpose of making
4 independent expenditures, that is limited to soliciting and receiving contributions not exceeding
5 \$5,000 per contributor per year from federally permissible sources because nothing in the Act or
6 Commission regulations proscribes leadership PACs from operating such an account for that
7 purpose.

8 In the alternative, you ask whether the Commission's conclusion would be different if the
9 Committee established the same separate account proposed in the request but that is administered
10 and overseen by a special committee whose members are appointed without any involvement of,
11 and whose decision-making is not approved by, Senator Cornyn. In light of the Commission's
12 determination that nothing in the Act or Commission regulations prevents the Committee from
13 proceeding as outlined in its primary advisory opinion request, we deem the second, alternative
14 request moot.

15 This response constitutes an advisory opinion concerning the application of the Act and
16 Commission regulations to the specific transactions or activities set forth in Alamo PAC's
17 request.²⁸ The Commission emphasizes that, if there is a change in any of the facts or
18 assumptions presented, and such facts or assumptions are material to a conclusion presented in
19 this advisory opinion, then the requestor may not rely on that conclusion as support for its
20 proposed transactions or activity. Any person involved in any specific transaction or activity
21 which is indistinguishable in all its material aspects from the transaction or activity with respect

²⁸ See 52 U.S.C. § 30108.

1 to which this advisory opinion is rendered may rely on this advisory opinion.²⁹ Please note that
2 the analysis or conclusions in this advisory opinion may be affected by subsequent developments
3 in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.
4 Any advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

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Dara Lindenbaum,

11

Chair

²⁹ See *id.* § 30108(c)(1)(B).