FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADVISORY OPINION 2023-09
(SENATOR CATHERINE CORTEZ MASTO)

CONCURRING STATEMENT OF CHAIRMAN SEAN J. COOKSEY

The Commission's advisory opinion concludes that Senator Catherine Cortez Masto may establish a state-level political committee in Nevada, and that funds raised by that committee are not "contributions" and would not be aggregated with contributions made by the same source to Senator Cortez Masto's federal leadership PAC under a shared limit. The state committee will raise only federally permissible funds and will engage solely in non-federal election activity, "including activities such as contributing to state and local candidates running for office in Nevada and spending in connection with state ballot initiatives."[1] As a result, the proposal complies with the soft-money restrictions in the Federal Election Campaign Act of 1971, as amended (the "Act").[2] The advisory opinion—especially the Commission's legal interpretation of "contribution"—offers important new guidance to the regulated community on federal candidates' ability to raise and spend non-federal funds.[3]

I agreed with the advisory opinion's conclusion and its analysis with respect to committee affiliation. But my agreement is premised upon the limits of that affiliation analysis, as set out by the Office of General Counsel ("OGC') during the Commission's public deliberations.

First, Senator Cortez Masto's federal leadership PAC and her proposed non-federal committee are "affiliated" under 11 C.F.R. § 110.3 for the purposes of contribution limits only. They are not affiliated for any other purposes under the Act, nor is the proposed non-federal committee otherwise regulated under the Act as a political committee. For example, Commission regulations provide that a political committee's Statement of Organization must include information about "any connected organization or affiliated committee."[4] The regulation further provides, however, that an affiliated committee "includes any committee defined in 11 CFR

[1] AOR 2023-09 (Cortez Masto) at 1.

[2] Advisory Op. 2023-09 (Cortez Masto) at 2; 52 U.S.C. § 30125(e).

[3] *Compare* Advisory Op. 2023-09 (Cortez Masto) at 4 ("[B]ecause Requestor's proposed nonfederal committee will not raise funds for the purpose of influencing any election for federal office, whatever funds Requestor does raise for her proposed nonfederal committee would not be considered 'contributions' under the Act and would not have to be aggregated with contributions made to Requestor's federal leadership PAC from the same source."), *with* Explanation and Justification, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49107 (July 29, 2002) ("[A] Leadership PAC that comes within the definition of 11 CFR 300.2(c) can raise up to a total of $5,000 from any particular person or entity, regardless of whether the funds are contributed to the PAC's Federal account, donated to its non-Federal account, or allocated between the two.").

[4] 11 C.F.R. § 102.2(a)(1)(ii).

100.5(g), 110.3(a) or (b), or 110.14(j) or (k)."[5] Because non-federal committees are not "defined" by any provision of the Act or Commission regulations—much less in the specific regulatory provisions listed in 11 C.F.R. § 102.2(b)(1)—they fall outside of that regulation's express scope. Consequently, federal political committees are not required to list any non-federal committees as affiliates on their Statements of Organization, even if they are formed or controlled by the same candidate or organization.

Second, the advisory opinion's affiliation analysis would not apply if, rather than a non-federal committee, the requestor had instead proposed to establish a non-committee organization, such as an issue-advocacy organization under § 501(c)(4) of the Internal Revenue Code. The advisory opinion concludes that the requestor's proposed non-federal committee is a "committee" within the meaning of 11 C.F.R. § 110.(3)(a), even if it is not otherwise defined as such under the Act.[6] But because the regulation is limited to "committee[s]," it therefore does not apply in situations where a federal committee and a *non-committee* organization are established, financed, maintained, or controlled by the same individual or organization. Under those circumstances, there is no shared contribution limit between the two entities.

These points are critical clarifications to the limited application of the Commission's affiliation regulations to the facts presented in this advisory opinion. As colleagues and I have explained elsewhere, the Commission's affiliation regulations—first promulgated in 1989—have become increasingly cumbersome and ill-fitting in the modern political landscape.[7] Until those regulations are reformed, the Commission should exercise restraint and flexibility in applying them.

Sean J. Cooksey
Chairman

January 11, 2024
Date

---

[5] 11 C.F.R. § 102.2(b)(1).

[6] Advisory Op. 2023-09 (Cortez Masto) at 3–4; 11 C.F.R. § 110.3(a).

[7] *See* Statement of Reasons of Vice Chairman Cooksey and Commissioners Dickerson and Trainor at 6 (Mar. 1, 2023), MUR 7912 (Senate Leadership Fund, *et al.*).