FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

FROM: **Office of the Commission Secretary** LC

DATE: **July 11, 2022**

SUBJECT: **AO 2022-06 (Hispanic Leadership Trust) Comment on Draft A**

Attached are AO 2022-06 (Hispanic Leadership Trust) Comment on Draft A.

This matter will be discussed on the Open Meeting of July 14, 2022.

Attachment

THEGOBERGROUP
GO further

July 11, 2022

Attn: Jennifer Waldman
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: Comments on Advisory Opinion 2022-06 (Hispanic Leadership Trust) Draft A

Dear Commissioners:

On behalf of the Hispanic Leadership Trust ("HLT"), we submit these comments on Draft A of the above-referenced advisory opinion.

We respectfully ask the Commission to reject Draft A's analysis and conclusions that the "established, financed, maintained, or controlled" ("EFMC") and affiliation issues are contingent on HLT refunding the $5,000 contributions it has received from Maintaining All Republicans in Office PAC ("MARIO PAC") and Honor Courage Commitment PAC ("HCC PAC").[1]

HLT has offered to refund these contributions to the extent that they may affect the Commission's analysis on the EFMC and affiliation issues. However, under the circumstances presented, the contributions should not matter based on the law and Commission precedents. Draft A's internally contradictory treatment of the contributions underscores this point. Specifically, Draft A concludes that:

1. "[U]nder the circumstances presented [the] ten percent of the total amount of contributions HLT has received [from MARIO PAC and HCC PAC] in this initial operating period is not a significant enough amount to be considered 'seed money'" for the purposes of determining whether Reps. Diaz-Balart and Gonzales have "established" HLT. Draft A at 11, li.10-13.

[1] MARIO PAC is the leadership PAC of HLT's proposed Chair, and HCC PAC is the leadership PAC of HLT's proposed Vice Chair.

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F | 877.437.5755 | GoberGroup.com

2. However, "on [the] basis [of the MARIO PAC and HCC PAC contributions] alone, Representative Gonzales and Representative Diaz-Balart would finance HLT." *Id.* at 14, li.5-6.

3. In order to avoid a finding that HLT is EFMCd by Reps. Diaz-Balart and Gonzales, HLT must "refund[] the MARIO PAC and the HCC PAC contributions," along with adopting certain other measures. *Id.* at 22, li.7-12.

4. "MARIO PAC and HCC PAC's $5,000 contributions to HLT weigh slightly, but not independently, in favor of affiliation on [the 'formation'] factor, should HLT not refund these contributions." *Id.* at 28, li.1-3.

5. HLT must "refund[] the contributions it received from the proposed chair and vice chair's leadership PACs" in order to avoid an affiliation finding. *Id*. at 29, li.4-6.

A. Draft A is internally inconsistent.

While Draft A concludes that the MARIO PAC and HCC PAC contributions do not cause Reps. Diaz-Balart and Gonzales to "establish" HLT (see Point 1, *supra*), the contributions do cause them to "finance" HLT (see Point 2, *supra*) under the EFMC rules. Moreover, while the contributions do not cause Diaz-Balart and Gonzales to "establish" HLT (see Point 1, *supra*), they do weigh in favor of them "form[ing]" HLT under the affiliation rules (see Point 4, *supra*).

Intuitively, this is incongruous. If the contributions were insufficient to "establish" HLT, then they also should be insufficient to "finance" HLT. While the "establish" and "finance" prongs of the Commission's EFMC rules are conceptually distinct, in practice, the Commission has conflated them by evaluating the funding that a federal candidate or officeholder provides under the "establish" prong.

There is also nothing under the Commission's EFMC rules that commands such a disparate treatment of an entity's funding sources for the purposes of the "establish" and "finance" prongs. The parts of the rules that address funding do not specify whether they relate to the "establish" or "finance" prongs.[2]

Furthermore, while Point 1 evaluates the MARIO PAC and HCC PAC contributions through the "seed money" lens and concludes the amounts are insufficient to trigger *the "establish" prong* of the EFMC rules, the Commission previously has evaluated contributions

[2] *See* 11 C.F.R. §§ 100.5(g)(4)(ii)(G), (H); 300.2(c)(2)(vii), (viii).

vis-à-vis the "seed money" lens with respect to *the "finance" prong* of the EFMC rules.[3] Therefore, if the contributions were not "seed money" under the "establish" prong, then they also should not be "seed money" under the "finance" prong here.

Moreover, if Draft A's position is that the "finance" prong should now be viewed as completely separate from the "establish" prong when evaluating an entity's funding sources (notwithstanding the conflation of these two concepts in this very draft), then it seems that *any* amount of "financing" provided by a federal candidate or officeholder would trigger the "finance" prong. That seems to contradict prior Commission precedents, which appear to imply that a certain insignificant amount of funding would not trigger the "finance" prong.[4]

And if Draft A's position is that *some* amount of "financing" will trigger the "finance" prong, then it is continuing the Commission's practice of arbitrary line-drawing in the advisory opinion process by introducing new and ever-decreasing EFMC thresholds and adjusting the timeframes by which those thresholds are calculated.[5] To wit, Draft A (at 11, li.10-13) looks to the entire four months that HLT has been in existence and concludes that the ten percent of total contributions HLT has received during that period from MARIO PAC and HCC PAC is fine under the "establish" prong. By stark contrast, the draft (at 14, li.1-6) looks at isolated snapshots in time (specifically, contributions made on March 28, 2022, and April 29, 2022) to conclude that the HCC PAC and MARIO PAC contributions constituted 100% and 33% of HLT's total receipts, respectively. To the extent that ten percent is the accurate percentage for these contributions, this would also be the first time that the Commission is effectively announcing a rule that contributing ten percent of an entity's initial receipts may trigger an EFMC finding under the "finance" prong.[6]

Lastly, Draft A inconsistently concludes that the MARIO PAC and HCC PAC contributions weigh *in favor of* "formation" under the affiliation rules (see Point 4, *supra*), even though they do *not* "establish" HLT under the EFMC rules (see Point 1, *supra*). "Establish" is

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[3] *See* AO 2006-04 (Tancredo) at 4-5.

[4] *See id*. ("the Commission concludes that the donation of 25% of DCN's total receipts by TFC is *a significant amount* of funds that would result in TFC 'financing' DCN") (emphasis added).

[5] *See* 52 U.S.C. § 30108(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.").

[6] *See id.*

synonymous with "form[]."[7] The Commission's EFMC and affiliation rules do not exist in isolation from each other, but rather are inextricably intertwined.[8] Therefore, Draft A's opposing conclusions with respect to Points 1 and 4 are illogical.

B. Draft A misapplies Commission precedents.

Draft A (at 10-11) relies upon MUR 5367 (Issa) for its analysis of the "establish" prong of the EFMC rules, but the draft (at 13-14) notably drops MUR 5367 in favor of AO 2004-06 (Tancredo) for its analysis of the "finance" prong. Both of these precedents actually counsel against Draft A's conclusion that HLT is "financed" by Reps. Diaz-Balart and Gonzales by virtue of the MARIO PAC and HCC PAC contributions.

Under the "finance" portion of the analysis in MUR 5367, the Commission concluded that Rep. Issa financed the ballot measure committee where he "donated or caused to be donated $1,845,000, a facially significant amount" to the committee.[9] Per the Commission, "these funds were donated regularly—indeed, almost weekly during the first two months of the crucial signature gathering period—indicating that the donations were made on an 'ongoing basis.' In total, more than 60% of [the ballot committee's] $3,053,772 in total reported receipts came from" Issa or his company.[10]

Needless to say, the $5,000/ten percent that MARIO PAC and HCC PAC each gave to HLT here is a far cry from the $1.845 million/more-than-60 percent at issue in MUR 5367. Moreover, unlike the "regularly" recurring funding that Issa provided to the ballot committee in MUR 5367, MARIO PAC and HCC PAC each have made only one contribution to HLT.

As for the Tancredo opinion that Draft A relies upon for its analysis of this issue, we have already explained at length in our Second Supplement to the request[11] (at 5-6) why reliance on that opinion is misplaced. Notably, as we stated before, the Commission's

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[7] *See* https://www.thesaurus.com/browse/establish.

[8] *See* 54 Fed. Reg. 34098, Explanation and Justification for Final Rules on Affiliated Committees (Aug. 17, 1989) (the rules set forth "factors used to evaluate whether committees are commonly *established, financed, maintained or controlled and therefore affiliated*") (emphasis added); *see also* MUR 5367, Factual and Legal Analysis at 4 (evaluating whether "Rep. Issa had an active role in Rescue California's *formation*") (emphasis added) under the EFMC rule.

[9] MUR 5367, Factual and Legal Analysis at 5.

[10] *Id.* at 6.

[11] https://saos.fec.gov/saos/searchao?SUBMIT=ao&AO=5451&START=202206R_3.pdf

conclusion that Tancredo's proposal to contribute 25 percent of the ballot committee's total receipts would trigger the "financing" prong of the EFMC rule "was wholly conclusory and lacked any modicum of analysis or reasoning and therefore should not be considered precedential." Putting that aside, and to note the obvious, the ten percent at issue here is far less than the 25 percent at issue in AO 2004-06. If the Commission adopts Draft A and its reliance on the Tancredo opinion, it will continue its downward ratchet of the percentage threshold at which the "financing" prong is triggered. At what point will the Commission stop? Five percent? One percent? And based upon what articulated rationale or principle?

C. Draft A fails to give due consideration to HLT's status as a "hard money" PAC.

As Draft A (at 21, li.16-19) itself acknowledges, and as we have argued previously,[12] the EFMC rules should be applied more leniently to a "hard money" PAC such as HLT. This is especially so where, as here, Draft A is relying upon precedents (MUR 5367 and AO 2004-06) that applied the EFMC rules to a "*soft money*" entity. As Draft A (at n.52) itself explains, this is because federal candidates and officeholders are strictly prohibited from EFMCing a "soft money" entity that engages in election-related activities.[13] By contrast, there is no comparable ban on a "hard money" PAC like HLT.

While Draft A (at 21-22) appropriately recognizes this distinction in its analysis and application of the "control" prong of the EFMC rule, it fails to apply this same distinction in its analysis and application of the "finance" prong. Rather, Draft A applies a "soft money" precedent to HLT, a "hard money" PAC. There simply is no basis for this inconsistent treatment.[14]

D. Draft A would have significant practical consequences.

As a practical matter, Draft A would inhibit federal PACs—including leadership PACs, corporate and union separate segregated funds, and even non-connected PACs—from ever contributing to a new PAC for fear that the PAC or its "sponsor" would be deemed to have "financed" the new PAC. As discussed above, Draft A fails to articulate the time period during which contributions made to the new entity will be evaluated under the "finance" prong. Draft A simply concludes that HCC PAC and MARIO PAC trigger the "finance" prong by being among HLT's first contributors during HLT's first and second month of

[12] Second Supplement at 6.

[13] *See* 52 U.S.C. § 30125(e)(1).

[14] *See id*. The "soft money" ban applies to any entity "established, *financed*, maintained or *controlled*" (emphasis added) by a federal candidate or officeholder and does not distinguish between the "finance" and "control" prongs in the manner that Draft A implicitly does.

existence. What about a PAC that is the fifth donor to a new PAC during the new PAC's third month of existence? What about the tenth donor during a new PAC's fifth month of existence? There is simply no way to tell under Draft A whether such contributions would trigger the "finance" prong.

Again, we note that the statute prohibits Commission advisory opinions from setting forth any new "rule of law," which "may be initially proposed by the Commission only as a rule or regulation" pursuant to a rulemaking proceeding.[15] An issue as important and consequential as this should be decided in a rulemaking. For the purposes of the instant advisory opinion request, the Commission should simply conclude that, under the circumstances presented, the MARIO PAC and HCC PAC contributions do not cause HLT to be "financed" by Reps. Diaz-Balart and Gonzales for the reasons discussed above and in our Second Supplement (at 5-6).

Sincerely,

Chris K. Gober
Eric Wang
Counsel to Hispanic Leadership Trust

cc: Ms. Jessica Selinkoff

[15] *See* note 5, *supra*.