FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

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

DATE: **July 28, 2022**

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

The following is a comment on AO 2022-06 (Hispanic Leadership Trust) Draft B from the Congressional Black Caucus PAC and CHC BOLD PAC.

This matter will be discussed on the Open Meeting of July 28, 2022.

Attachment

By Electronic Mail

July 27, 2022

The Honorable Allen Dickerson
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: FEC Advisory Opinion 2022-06 (Hispanic Leadership Trust)

Dear Chair Dickerson:

We write on behalf of the Congressional Black Caucus Political Action Committee (CBCPAC) and CHC BOLD PAC (BOLD PAC) regarding the above-referenced advisory opinion request. Draft B contains restrictions on the operation of caucus organizations that are not found in the statute or regulations, and so the Commission should not adopt or in any way appear to require them.

Congress has a long history of political organizations associated with caucuses and Congressional Member organizations that seek broadly to advance the political interests of Members, their political parties, supporters, adherents, and national communities of interest. The Congressional Black Caucus PAC and CHC-BOLD PAC are but two of these organizations. Both seek to increase the diversity of leadership in Congress, by supporting candidates who will champion the needs and interests of their communities and promote participation in the political process. There are currently 56 Black Members of Congress comprising the largest Congressional Black Caucus in history, and 35 BOLD Members, reflecting similar growth in the political power of the Hispanic community. Members of Congress play an active role in both organizations' operations in pursuit of those goals.

Draft B threatens to curtail the important political gains made through the work of these types of organizations. It erroneously suggests that the Federal Election Campaign Act of 1971, as amended (FECA) and the Federal Election Commission's (FEC) implementing regulations, somehow mandate that a political committee in which Members of Congress or candidates participate would be a leadership PAC or "affiliated" with those same Members' campaign committees and leadership PACs unless: (a) a majority of the board consists of individuals who are not Members or candidates; and (b) each Member recuses himself or herself from "any matter involving" that Member's leadership PAC or authorized committee.[1] These requirements are not found in the statute or regulations, nor are they reasonably drawn from those sources.

Draft B errs in three specific ways:

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[1] We note that all three drafts pending before the Commission address a requestor with no organizational past practices to factor into the analysis. When the Commission considers the question of affiliation in the context of an existing organization, we assume the analysis would include an assessment of the actual process by which decisions are made, in addition to the structure of decision making articulated in the organization's governing documents.

First, Draft B concludes that a Member of Congress might indirectly control a political committee unless a majority of the other decision makers are "disinterested" because they are not a Member of Congress or a candidate.[2] Draft B does not explain why either the chair or vice chair would "control" a vote of the board of directors even when they hold only a minority of the vote needed to take any action. Nor can we identify a statutory or regulatory basis for this new standard of "disinterested" directors. Draft B seems to imply that Members have some "indirect" control over other Members that they do not have over non-Members, or that the test of a "leadership PAC" or "affiliation" is collective (*i.e.*, all Members) rather than individual ("a" Member" or "the same organization") as provided for in the regulations. The Commission should omit this requirement from its final decision.

Second, Draft B implies that because two of the HLT board members are also officers, those board members have greater control over decisions about fundraising and contributions than their 12.5% share would indicate.[3] The draft states that "the composition of the board is relevant to whether the Chair or Vice Chair may be said to control the organization through its board."[4] It is not clear why this is true, either in the draft or intuitively. So long as the board or the full membership retains authority to make decisions about fundraising and spending, a single member of that board does not "control" board decisions.[5]

Third, Draft B incorrectly concludes that a single Member "controls" a decision over whether to contribute to their own campaign or leadership PAC if the Member votes on "any matter involving a board member's own leadership PAC or authorized committee."[6] If a Member only has 12.5% of the vote of the board, why does his or her participation in a vote on, for example, deciding to give to all incumbent Members, give that Member "control" of the decision? While it may be a general principle of corporate governance that board members disclose conflicts and in some cases, recuse themselves on matters in which they have an interest, it is not one the FEC has applied before in assessing if a Member has established, financed, maintained or controlled another political committee—and it exists nowhere in Commission rules.

Draft B is written as if it were a rulemaking, fashioning and applying criteria drawn from beyond FECA or Commission rules.[7] While the Commission can and should faithfully apply its existing rules to determine whether the conduct of this newly-formed organization would comply with the Act, it cannot and should not use the request to prescribe new, unsupported conditions not contemplated by the request that could impact a wide range of organizations—not only the CBCPAC and BOLD PAC, but many others besides—that have very different governance structures and have long operated in compliance with the Act's contribution limits

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[2] Draft B at pp. 15 & 21.

[3] *See, e.g.*, Draft B at p. 15 ("Moreover, under all three alternatives, Representative Diaz-Balart, as Chair, and Representative Gonzales, as Vice Chair, would be empowered to 'determine' HLT's 'contributions to candidates and other committees,' ...by voting with the other directors.") and at p. 22.

[4] Draft B at p. 15.

[5] Draft B at p. 14.

[6] Draft B at p. 21.

[7] *See,* 52 U.S.C. § 30108 (b) (requiring rules be promulgated through the agency's rulemaking process).

and other requirements. We urge the Commission to reject Draft B's erroneous and unsupported approach.

Sincerely,

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