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FEDERAL ELECTION COMMISSION
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AGENDA DOCUMENT NO. 16-18-A
AGENDA ITEM
For meeting of April 28, 2016

April 19, 2016

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DAP*
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Subject: AO 2016-03 (Holding) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on April 27, 2016.

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 <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2016-03

2

3 Craig Engle, Esq.

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7

8 Brett Kappel, Esq.

9 Akerman LLP

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12

13 Dear Messrs. Engle and Kappel:

14 We are responding to your advisory opinion request on behalf of George Holding for

15 Congress, Inc. (“Holding Committee”), concerning whether, under the Federal Election

16 Campaign Act, 52 U.S.C. §§ 30101-46 (the “Act”), and Commission regulations, the Holding

17 Committee may raise additional contributions subject to a new contribution limit for the North

18 Carolina congressional primary election that was postponed from March 15, 2016, to June 7,

19 2016. The Commission concludes that the Holding Committee may not do so.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on March

22 16, 2016.

23 George Holding currently represents the 13th congressional district of North Carolina in

24 the U.S. House of Representatives. Advisory Opinion Request at AOR001. The Holding

25 Committee is his principal campaign committee for the 2016 election.¹

26 The North Carolina General Assembly originally selected March 15, 2016, as the date for

27 the state’s 2016 primary election, which included the primaries for Republican and Democratic

28 candidates for the U.S. House of Representatives. AOR001 (citing S.L. 2015-258, Special

¹ George E. Holding, FEC Form 2 at 1 (Feb. 20, 2015),
<http://docquery.fec.gov/pdf/344/15950807344/15950807344.pdf>.

1 Session (N.C. 2015)). On February 5, 2016, a three-judge panel of the U.S. District Court for the
2 Middle District of North Carolina found that two congressional districts whose boundaries North
3 Carolina had redrawn in 2011 constituted impermissible racial gerrymanders in violation of the
4 Equal Protection Clause of the U.S. Constitution and ordered the North Carolina legislature to
5 enact a remedial plan by February 19, 2016. *Id.* (citing *Harris v. McCrory*, Case No. 1:13-cv-
6 949, 2016 WL 482052, at *2 (M.D.N.C. Feb. 5, 2016)). North Carolina filed emergency motions
7 to stay the decision with the three-judge panel and with the U.S. Supreme Court; both motions
8 were denied. AOR002 (citing *Harris v. McCrory*, Case No. 1:13-cv-949, Defs.’ Emergency
9 Mot. to Stay Final J. & to Modify Inj. Pending Sup. Ct. Rev. (M.D.N.C. Feb. 8, 2016), ECF No.
10 145; *McCrory v. Harris*, 136 S. Ct. 1001 (Mem), 84 USLW 3450 (U.S. Feb. 19, 2016)).

11 To comply with the district court’s order to enact a remedial plan, the North Carolina
12 General Assembly held a special two-day session to redraw the district lines. On February 19,
13 2016, in compliance with the court’s order, the North Carolina General Assembly adopted two
14 separate bills during the special session. The first bill approved a remedial redistricting plan that
15 redrew the two impermissibly gerrymandered districts by redrawing several congressional
16 districts across the state. This included shifting the “majority of the old 13th [c]ongressional
17 district” into the 2d congressional district. AOR002.

18 The second bill revised the procedures for conducting the 2016 congressional primaries.
19 AOR003 (citing S.L. 2016-2, Special Session (N.C. 2016)). It postponed the congressional
20 primary date from March 15, 2016, to June 7, 2016, and provided that the approximately 400
21 absentee ballots that had already been cast for the March 15 primary date could not be certified
22 by the North Carolina State Board of Elections. AOR002-003. The second bill also provided
23 that all congressional candidates would receive a refund of their March ballot access filing fee

1 and would be required to re-file to run on June 7, 2016, whether or not the candidate continued to
2 seek election in the same congressional district. *See* AOR005.

3 On March 15, 2016, Representative Holding filed with the Commission an amended
4 statement of candidacy, changing the office he is seeking from North Carolina's 13th
5 congressional district to its 2d congressional district.²

6 ***Question Presented***

7 *May the Holding Committee raise additional contributions subject to a new contribution*
8 *limit for the June 7, 2016, North Carolina congressional primary election?*

9 ***Legal Analysis and Conclusion***

10 No, the Holding Committee may not raise additional primary contributions subject to a
11 new contribution limit because the June 7, 2016, North Carolina congressional primary election
12 will be the only primary election held for the office Representative Holding is seeking.

13 Under the Act, candidates and their authorized committees are entitled to separate
14 individual contribution limits with respect to "any election for Federal office." 52 U.S.C.
15 § 30116(a)(1)(A). For the purposes of the Act and Commission regulations, an "election"
16 includes "a general, special, primary, or runoff election," *id.* at § 30101(1)(A), where an
17 individual, "whether opposed or unopposed, seek[s] nomination for election, or election, to
18 Federal office." 11 C.F.R. § 100.2(a). The present request involves a primary election, which is
19 an election "held prior to a general election, as a direct result of which candidates are nominated,
20 in accordance with applicable State law, for election to Federal office in a subsequent election."
21 11 C.F.R. § 100.2(c)(1).

² George E. Holding, FEC Form 2 at 1 (Mar. 15, 2016),
<http://docquery.fec.gov/pdf/475/201603159009751475/201603159009751475.pdf>.

1 Because contribution limits “apply separately with respect to each election,” 11 C.F.R.
2 § 110.1(j)(1), participating in multiple distinct elections can render a candidate eligible for
3 separate contribution limits. Although “[g]enerally, each [nominated] candidate will participate
4 in two elections: the primary . . . and the general election,” Explanation and Justification for
5 1977 Amendments to Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, at 40-41
6 (1st Sess. 1977); *see also* Advisory Opinion 1994-29 (Levy) at 2 (permitting committee one
7 contribution limit while competing in multiple primaries for same federal office), the
8 Commission has previously noted that “the plain language of the Act and Commission
9 regulations . . . on their face place no limit on the number of ‘elections’ eligible for separate
10 contribution limits.” Factual and Legal Analysis at 6-7, MUR 6438 (Art Robinson for Congress)
11 (Oct. 5, 2012) (finding no reason to believe that candidate violated Act and Commission
12 regulations by utilizing separate contribution limit for state-administered party primary and
13 internet-based independent party primary).

14 The Commission has previously concluded that a separate contribution limit is available
15 when a court nullifies an election that has already been held, necessitating that the election be
16 held for a second time. *See* Advisory Opinion 2006-26 (Texans for Henry Bonilla) (following
17 judicial nullification of earlier primary election, Commission approved separate contribution
18 limit for newly scheduled special election); Advisory Opinion 1996-37 (Brady) (same); Advisory
19 Opinion 1996-36 (Frost *et al.*) (same). The Commission has also determined, however, that a
20 candidate’s decision to run in a different congressional district in response to a pre-election,
21 court-ordered redistricting does not entitle the candidate to a new contribution limit. Advisory
22 Opinion 1982-22 (Bartlett). Viewed together, these opinions draw a distinction between an
23 election that is held twice, thereby constituting two elections, and an election that is restructured

1 in advance and therefore held only once. Therefore, the relevant question here is whether, by
2 moving the North Carolina congressional primary date from March 15, 2016, to June 7, 2016,
3 the State of North Carolina created two separate primary elections under the Act and
4 Commission regulations. *See* 52 U.S.C. § 30101(1)(A); 11 C.F.R. § 110.1(j).

5 The facts presented by this request demonstrate that North Carolina simply postponed the
6 date of its congressional primary. The dispositive fact is that the district court's order of
7 February 5 and the subsequent legislation of February 19 all predated and precluded the
8 originally scheduled primary date of March 15. Because these actions resulted in the primary
9 date being changed in advance, the March 15 election was never held, and the only congressional
10 primary that will take place in North Carolina is the June 7 election. Accordingly, pursuant to
11 11 C.F.R. § 110.1(j), only one contribution limit is available to candidates in that election.
12 Representative Holding's decision to seek nomination in a different congressional district in the
13 election is immaterial. *See* Advisory Opinion 1982-22 (Bartlett); *cf.* Advisory Opinion Sullivan
14 1982-47 (Sullivan) (concluding that candidate participating in multiple primary elections on one
15 day was not entitled to multiple contribution limits).

16 The request notes that "more than four hundred absentee ballots had already been
17 returned as of February 7, 2016," AOR002, and the North Carolina General Assembly's remedial
18 plan prohibits the State Board of Elections from certifying these ballots. AOR003; AOR013.
19 The request also indicates that all congressional candidates for the March 15 primary received a
20 refund of their March ballot access filing fee and were required to re-file to run on June 7, 2016.
21 AOR005. The fact that only a minute number of ballots were even submitted — and none were
22 certified — supports the Commission's conclusion that the March 15 election did not take place
23 and that the only relevant election will occur on June 7. And the remedial steps identified by the

1 request — such as requiring congressional candidates to re-file — reflect merely administrative
2 determinations by the state on how best to extend the primary election to June 7, 2016, and to
3 avoid voter confusion. *See* AOR002 (describing concerns about ensuring “the administrative
4 integrity of the election”). None of these facts indicates that an election was actually held on
5 March 15, such that a new contribution limit would apply to the June 7 election.

6 The Holding Committee’s request is also factually distinguishable from the separate
7 contribution limits approved in prior advisory opinions. In Advisory Opinion 1996-36 (Frost),
8 for example, the Commission determined that five members of Congress from Texas were
9 entitled to a separate contribution limit for an ensuing special election after a federal district
10 court nullified the results of an earlier primary election. *Id.* at 4; *see also* Advisory Opinion
11 2006-26 (Texans for Henry Bonilla) (approving separate contribution limit for newly scheduled
12 special election after prior election was nullified); Advisory Opinion 1996-37 (Brady) (same).
13 The five Texas Representatives’ request followed a three-judge panel ruling and interim order
14 redrawing the boundaries of thirteen congressional districts that an earlier judicial decision had
15 found to be the ““product of overt racial gerrymandering.”” Advisory Opinion 1996-36 (Frost) at
16 1 (citing *Vera v. Bush*, 933 F. Supp. 1341, 1342 (S.D. Tex. 1996)). In permitting the separate
17 contribution limits, the Commission found that the district court’s decision “nullified the results
18 of the primary,” *id.* at 3, which had taken place nearly five months before the district court’s
19 ruling. Before the district court’s order, each of the five requestors had been “running in a
20 general election for Federal office as their party’s nominee.” *Id.* Following the district court’s
21 decision, “each candidate was placed in a new electoral situation, created by the district court,
22 whereby he or she was no longer the party’s nominee, but was instead a candidate in an election

1 that could involve other candidates of the same party.” *Id.* The Commission construed this “new
2 electoral situation” as creating “a new general election contest.” *Id.*

3 Here, Representative Holding was not placed in a “new electoral situation” because the
4 March 15, 2016, primary had not yet occurred. AOR002-003. Unlike the requestors in Advisory
5 Opinion 1996-36 (Frost), Representative Holding had not already won his primary and moved on
6 to his general election campaign at the time of the relevant court order. To the contrary, no
7 ballots were ever counted towards the nomination of any candidate in the originally scheduled
8 March 15 election. AOR013. Therefore, the court ruling and subsequent legislation did not
9 change Representative Holding’s status as a candidate for the Republican nomination for a North
10 Carolina congressional seat. And as the Commission has previously concluded, a candidate’s
11 decision to switch from competing in one congressional district to another cannot entitle the
12 candidate to a new contribution limit. Advisory Opinion 1982-22 (Bartlett).

13 In sum, nullified elections and postponed elections are different situations that require
14 different treatment under the Act.³ North Carolina did not have an election nullified and is not
15 holding two congressional primaries in 2016. Because the June 7, 2016, North Carolina
16 congressional primary is the only primary election that will be held, the postponement of that
17 election’s date does not entitle the requestor to a separate contribution limit under the Act and
18 Commission regulations. *See* 11 C.F.R. § 110.1(j).

19 This response constitutes an advisory opinion concerning the application of the Act and
20 Commission regulations to the specific transaction or activity set forth in your request. *See*

³ The Commission notes that elections may be postponed for many reasons and for varying time periods. An election may be postponed, for example, because of a natural disaster, inclement weather, administrative convenience, or any number of other intervening events. *Cf.* Jack Maskell, Cong. Research Serv., RL32623, Postponement and Rescheduling of Election to Federal Office 9 (2004), *available at* <https://www.fas.org/sgp/crs/misc/RL32623.pdf> (describing circumstances allowing for postponement, “including ‘natural disasters’ such as hurricanes, tied votes, or fraud”).

1 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
2 assumptions presented, and such facts or assumptions are material to a conclusion presented in
3 this advisory opinion, then the requestor may not rely on that conclusion as support for its
4 proposed activity. Any person involved in any specific transaction or activity which is
5 indistinguishable in all its material aspects from the transaction or activity with respect to which
6 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
7 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
8 affected by subsequent developments in the law including, but not limited to, statutes,
9 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
10 on the Commission's website.

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On behalf of the Commission,

Matthew S. Petersen
Chairman