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By Commission Secretary's Office at 3:58 pm, Sep 06, 2016



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 6, 2016

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Deputy General Counsel

Adav Noti *AN*
Associate General Counsel

Neven F. Stipanovic *NFS by AN*
Acting Assistant General Counsel

Joseph P. Wenzinger *JPW*
Attorney

Subject: Draft AO 2016-09 (Martins for Congress)

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 September 8, 2016.

For more information about how to submit comments, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2016-09

2

3 Jason Torchinsky, Esq.

4 Steven Donaldson, Esq.

5 Holtzman Vogel Josefiak Torchinsky, PLLC

6 45 North Hill Drive

7 Suite 100

8 Warrenton, VA 20186

9

DRAFT A

10 Dear Messrs. Torchinsky and Donaldson:

11 We are responding to your advisory opinion request on behalf of Martins for Congress
12 (the “Committee”), concerning the application of the Federal Election Campaign Act, 52 U.S.C.
13 §§ 30101-46 (the “Act”), and Commission regulations to contributions raised for a primary
14 election ordered by a federal court. You ask whether the Committee may raise contributions
15 subject to a separate contribution limit for such a primary election. The Commission concludes
16 that the Committee may do so.

17 ***Background***

18 The facts presented here are based on your letter received on August 24, 2016.

19 Jack Martins is a candidate for the U.S. House of Representatives representing New
20 York’s 3d Congressional District. Advisory Opinion Request at AOR001 (Aug. 23, 2016). The
21 Committee is his principal campaign committee.¹

22 The date of the primary election in New York for all congressional candidates was
23 originally set at June 28, 2016.² Prior to that election, the New York State Board of Elections
24 (“NYSBOE”) determined that Mr. Martins’s only potential opponent in the Republican primary,
25 Philip Pidot, had failed to qualify for the ballot by not obtaining the requisite number of

¹ Jack Martins, FEC Form 2 (Jan. 7, 2016) at 1,
<http://docquery.fec.gov/pdf/087/201601079004443087/201601079004443087.pdf>.

² Supplemental Remedial Order, *United States v. New York*, No. 10-cv-01214 (N.D.N.Y. Oct. 29, 2015),
ECF No. 88 at 1-2 (setting “the fourth Tuesday of June” as the election date for New York’s non-presidential
primary in even-numbered years).

1 signatures. AOR001-002. Because the primary was uncontested, and because New York law
2 provides that uncontested primary candidates “shall be deemed nominated . . .without balloting,”
3 the NYSBOE certified no Republican candidate of the 3d Congressional District for the June 28
4 ballot.³

5 Mr. Pidot challenged in court the NYSBOE’s determination regarding the signatures he
6 had submitted. AOR002. Four days before the primary election, the New York Supreme Court,
7 Nassau County, found that Mr. Pidot had obtained the required number of signatures but that it
8 was too late to require the state to place his name on the ballot.⁴ Thus, the election of June 28
9 took place without any Republican candidates for the 3d Congressional District on the ballot, and
10 Mr. Martins became the party’s nominee for the November 8, 2016, general election. AOR001.
11 According to the request, Mr. Martins then “began focusing his efforts on the general election by
12 raising and spending funds accordingly,” and the Committee “ceased collecting contributions for
13 the primary.” AOR002.

14 Mr. Pidot filed suit in federal court, and on August 17 the U.S. District Court for the
15 Northern District of New York ordered the NYSBOE to hold a Republican primary for the 3d
16 Congressional District with both Mr. Martins’s and Mr. Pidot’s names on the ballot.⁵ The court
17 ordered this primary to take place on October 6.

18 ***Question Presented***

19 *May the Committee raise contributions, subject to a separate contribution limit, in*

³ N.Y. Election Law § 6-160(2); *see* NYSBOE, Certification for the June 28, 2016 Federal Primary Election, <http://www.elections.ny.gov/NYSBOE/download/law/Certification2016FedCongressionalPrimaryBallot.pdf>.

⁴ AOR002; *see also* Complaint, Ex. 2, *Pidot v. NYSBOE*, No. 16-cv-00859 (N.D.N.Y. July 13, 2016), ECF No. 1-2 (attaching June 24, 2016, order of New York Supreme Court, Nassau County).

⁵ Judgment, *Pidot v. NYSBOE*, No. 16-cv-00859 (N.D.N.Y. Aug. 17, 2016), ECF No. 66. This litigation is ongoing, as Mr. Martins has intervened and filed a Motion to Alter Judgment, *see* Motion to Alter Judgment, *Pidot v. NYSBOE*, No. 16-cv-00859 (N.D.N.Y. Aug. 19, 2016), ECF No. 68. AOR002 n.1.

1 *connection with the October 6, 2016, primary ordered by the federal district court?*

2 ***Legal Analysis and Conclusion***

3 Yes, the Committee may raise primary contributions subject to a new contribution limit
4 because, under the Act and Commission regulations, the October 6, 2016, election is a different
5 election from the June 28, 2016, election.

6 The Act grants authorized committees a separate limit on contributions from individuals
7 with respect to “any election for Federal office.” 52 U.S.C. § 30116(a)(1)(A). An “election”
8 includes “a general, special, primary, or runoff election,” *id.* § 30101(1)(A), where an individual,
9 “whether opposed or unopposed, seek[s] nomination for election, or election, to Federal office.”
10 11 C.F.R. § 100.2(a). A primary election is an election “held prior to the general election, as a
11 direct result of which candidates are nominated, in accordance with applicable State law, for
12 election to Federal office in a subsequent election.” 11 C.F.R. § 100.2(c)(1).

13 Because contribution limits “apply separately with respect to each election,” 11 C.F.R.
14 § 110.1(j)(1), “participating in multiple distinct elections can render a candidate eligible for
15 separate contribution limits.” Advisory Opinion 2016-03 (George Holding for Congress) at 4.
16 As the Commission recently explained, separate contribution limits are permitted when a judicial
17 decision “create[s] a new election under the Act and Commission regulations.” *Id.* (approving
18 separate contribution limit where state legislature, in response to court ruling, established new
19 primary date after voting in primary had already begun); *see also* Advisory Opinion 2006-26
20 (Texans for Henry Bonilla) (following judicial nullification of earlier primary election results,
21 Commission approved separate contribution limit for newly scheduled special election);
22 Advisory Opinion 1996-37 (Brady for Congress) (same); Advisory Opinion 1996-36 (Frost
23 *et al.*) (same).

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Matthew S. Petersen
Chairman