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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

October 3, 2016

**MEMORANDUM**

TO: The Commission

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

Adav Noti *AN*  
Associate General Counsel

Neven F. Stipanovic *NFS*  
Assistant General Counsel

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Attorney

Subject: AO 2016-13 (Martins II) 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 5:00 pm (Eastern Time) on October 6, 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 2016-13

2

3 Jason Torchinsky, Esq.

4 Steve Roberts, Esq.

5 Holtzman Vogel Josefiak Torchinsky, PLLC

6 45 North Hill Drive, Suite 100

7 Warrenton, VA 20186

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9 Dear Messrs. Torchinsky and Roberts:

**DRAFT A**

10 We are responding to your advisory opinion request on behalf of Martins for Congress  
11 (the “Committee”), concerning the application of the Federal Election Campaign Act, 52 U.S.C.  
12 §§ 30101-46 (the “Act”), and Commission regulations to contributions raised for a primary  
13 election canceled by a federal court. You ask whether, in light of a federal court’s cancelation of  
14 a primary that the Commission concluded in Advisory Opinion 2016-09 (Martins for Congress)  
15 (“Martins I”) entitled the Committee to a separate contribution limit, the Committee may  
16 continue to raise contributions subject to that separate limit to retire debts incurred with respect  
17 to the canceled election. The Commission concludes that the Committee may do so.

18 ***Background***

19 The facts presented here are based on your letter received on September 19, 2016, and on  
20 the factual background detailed in Advisory Opinion 2016-09 (Martins I).

21 Jack Martins is a candidate for the U.S. House of Representatives representing New  
22 York’s 3d Congressional District, and the Committee is his principal campaign committee.<sup>1</sup>

23 The date of the primary election in New York for all congressional candidates was  
24 originally set at June 28, 2016.<sup>2</sup> Because the primary was uncontested, and because New York

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

<sup>2</sup> 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 law provides that uncontested primary candidates “shall be deemed nominated . . . without  
2 balloting,” the New York State Board of Elections (“NYSBOE”) certified no Republican  
3 candidate of the 3d Congressional District for the June 28 ballot.<sup>3</sup> Thus, that election took place  
4 without any Republican candidates for the 3d Congressional District on the ballot, and  
5 Mr. Martins became the party’s nominee for the November 8 general election. Advisory  
6 Opinion 2016-09 (Martins I) at 2.

7 On August 17, 2016, the U.S. District Court for the Northern District of New York held  
8 that the NYSBOE had improperly excluded one of Mr. Martins’s opponents from the June 28  
9 primary ballot.<sup>4</sup> The court therefore ordered the NYSBOE to hold a new Republican primary on  
10 October 6 for the 3d Congressional District.<sup>5</sup> Because that order effectively nullified the results  
11 of the June 28 election and required Mr. Martins to re-seek the Republican nomination, the  
12 Commission concluded in Advisory Opinion 2016-09 (Martins I) that the October 6 primary  
13 election was a different election than the June 28 primary and that the Committee could therefore  
14 raise contributions for the October 6 primary subject to a separate contribution limit.

15 On September 14, 2016, the day after the Commission issued Advisory Opinion 2016-09  
16 (Martins I), the U.S. Court of Appeals for the Second Circuit orally vacated the district court’s  
17 decision.<sup>6</sup> Advisory Opinion Request at AOR002. Accordingly, Mr. Martins “will be the  
18 Republican nominee to face the Democratic nominee and other candidates in the November 8  
19 General Election.” *Id.*

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<sup>3</sup> 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>.

<sup>4</sup> Judgment, *Pidot v. NYSBOE*, No. 16-cv-00859 (N.D.N.Y. Aug. 17, 2016), ECF No. 66.

<sup>5</sup> *Id.*

<sup>6</sup> The court issued a written summary opinion two days later. Summary Order, *Martins v. Pidot*, No. 16-3028 (2d Cir. Sept. 16, 2016), ECF No. 136-1, at 6.

1           According to the Committee’s current advisory opinion request, between the date that the  
2 district court ordered a new election (August 17) and the date that this decision was overturned  
3 on appeal (September 14), Mr. Martins raised more than \$150,000 and made expenditures in  
4 excess of \$250,000 with respect to the October 6 primary. AOR002. After the appellate court’s  
5 order on September 14, the request states that Mr. Martins began campaigning for the general  
6 election. *Id.*

7 ***Questions Presented***

- 8 1. *May the Committee raise contributions subject to the separate contribution limit*  
9 *approved in Advisory Opinion 2016-09 (Martins I) to retire debts that the Committee*  
10 *incurred with respect to the court-ordered October 6 election before that election was*  
11 *canceled?*
- 12 2. *If the answer to Question 1 is “no,” may Martins for Congress allocate the portion of its*  
13 *expenditures capable of no other reasonable purpose than to defeat the October special*  
14 *primary opponent, and raise funds to retire debts incurred specifically for that spending?*
- 15 3. *If the answers to the first or second questions are negative, what is the appropriate*  
16 *treatment of funds raised and spent between August 17, 2016, and September 14, 2016?*

17 ***Legal Analysis and Conclusion***

- 18 1. *May the Committee raise contributions subject to the separate contribution limit*  
19 *approved in Advisory Opinion 2016-09 (Martins I) to retire debts that the Committee*  
20 *incurred with respect to the court-ordered October 6 election before that election was*  
21 *canceled?*

1           Yes, the Committee may raise contributions subject to the separate contribution limit  
2 approved in Advisory Opinion 2016-09 (Martins I) to retire debts that the Committee incurred in  
3 connection with the court-ordered October 6 primary before that election was canceled.

4           Under the Act and Commission regulations, campaigns may accept contributions subject  
5 to limits that “apply separately with respect to each election.” 11 C.F.R. § 110.1(j)(1);  
6 *see* Advisory Opinion 2016-03 (George Holding for Congress) at 4 (“[P]articipating in multiple  
7 distinct elections can render a candidate eligible for separate contribution limits.”). An  
8 “election” includes “a general, special, primary, or runoff election,” 52 U.S.C. § 30101(1)(A),  
9 where an individual, “whether opposed or unopposed, seek[s] nomination for election, or  
10 election, to Federal office.” 11 C.F.R. § 100.2(a). A primary election is an election “held prior  
11 to the general election, as a direct result of which candidates are nominated, in accordance with  
12 applicable State law, for election to Federal office in a subsequent election.” 11 C.F.R.  
13 § 100.2(c)(1). To retire debts incurred for a particular election, a campaign may accept  
14 contributions designated for that election but made after it, within the requirements of certain  
15 Commission regulations. *See, e.g.*, 11 C.F.R. § 110.1(b); Advisory Opinion 2004-20 (Farrell for  
16 Congress) at 4.

17           As the Commission explained in Advisory Opinion 2016-09 (Martins I), “separate  
18 contribution limits are permitted when a judicial decision ‘creates a new election.’” *Id.*;  
19 Advisory Opinion 2016-03 (George Holding for Congress) (approving separate contribution  
20 limit where state legislature, in response to court ruling, established new primary date after  
21 voting in primary had already begun); Advisory Opinion 2006-26 (Texans for Henry Bonilla)  
22 (following judicial nullification of earlier primary election results, Commission approved  
23 separate contribution limit for newly scheduled special election); Advisory Opinion 1996-37

1 (Brady for Congress) (same); Advisory Opinion 1996-36 (Frost *et al.*) (same). Because the  
2 district court here effectively nullified the results of the June 28 primary—stripping Mr. Martins  
3 of his title as nominee and requiring him to seek the nomination again—the Commission  
4 concluded that the October 6 primary was a new election warranting a separate contribution  
5 limit. Advisory Opinion 2016-09 (Martins I) at 3.

6         The Second Circuit’s cancelation of the October 6 primary does not affect the  
7 Commission’s conclusion in Advisory Opinion 2016-09 (Martins I) that Mr. Martins was entitled  
8 to a new contribution limit in connection with his campaign for the Republican nomination.  
9 Indeed, Mr. Martins spent nearly a month campaigning for the October 6 primary, raising more  
10 than \$150,000 in contributions and making more than \$250,000 in expenditures in connection  
11 with that election. When the Second Circuit canceled the primary on September 14, however,  
12 Mr. Martins became the Republican nominee for the general election. Accordingly, as of that  
13 date, Mr. Martins was similarly situated to any other candidate who has prevailed in a primary:  
14 He was no longer seeking nomination and was instead a candidate in the general election.  
15 Commission regulations expressly permit such a candidate to raise funds after the primary  
16 election to retire debts incurred with respect to it. 11 C.F.R. §§ 110.1(b)(3) (providing that  
17 committee may accept “[a] contribution designated . . . for a particular election, but made after  
18 that election, . . . only to the extent that the contribution does not exceed net debts outstanding  
19 from such election”), 110.2(b)(3) (same); *cf.* 11 C.F.R. § 110.1(b)(3)(iv) (providing that  
20 candidate who prevails in primary may also “pay[] primary election debts” with general election  
21 funds).

22         The Committee states that it has approximately \$100,000 in outstanding debts that it  
23 incurred with respect to the court-ordered primary election before that election was canceled and

1 Mr. Martins became the Republican nominee. Thus, pursuant to the Commission's regulations,  
2 the Committee may accept contributions under the separate contribution limit approved in  
3 Advisory Opinion 2016-09 (Martins I) to the extent that such contributions do not exceed the net  
4 debts outstanding that the Committee incurred on or before September 14 with respect to the  
5 court-ordered primary. *See* 11 C.F.R. § 110.1(b)(3)(ii) (defining "net debts outstanding").

6 2. *If the answer to Question 1 is "no," may the Committee allocate the portion of its*  
7 *expenditures capable of no other reasonable purpose than to defeat the October special*  
8 *primary opponent, and raise funds to retire debts incurred specifically for that spending?*

9 3. *If the answers to the first or second questions are negative, what is the appropriate*  
10 *treatment of funds raised and spent between August 17, 2016, and September 14, 2016?*

11 Because the answer to Question 1 is yes, these questions are moot.

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

14 *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts  
15 or assumptions presented, and such facts or assumptions are material to a conclusion presented in  
16 this advisory opinion, then the requestor may not rely on that conclusion as support for its  
17 proposed activity. Any person involved in any specific transaction or activity which is  
18 indistinguishable in all its material aspects from the transaction or activity with respect to which  
19 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.

20 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be  
21 affected by subsequent developments in the law including, but not limited to, statutes,  
22 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available  
23 on the Commission's website.

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On behalf of the Commission,

Matthew S. Petersen  
Chairman