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By Office of the Commission Secretary at 12:56 pm, Oct 11, 2016



FEDERAL ELECTION COMMISSION

Washington, DC 20463

October 11, 2016

MEMORANDUM

TO: The Commission

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

Adav Noti *AN*
Associate General Counsel

Neven F. Stipanovic *NFS*
Assistant General Counsel

Joseph P. Wenzinger *NFS for JPW*
Attorney

Subject: AO 2016-13 (Martins II) Draft B

Attached is a proposed draft of the subject advisory opinion.

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

8

9 Dear Messrs. Torchinsky and Roberts:

DRAFT B

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 that was canceled by a federal court. You ask whether, in light of the cancelation of a
14 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’s proposal is not
18 permissible.

19 ***Background***

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

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

24 The date of the primary election in New York for all congressional candidates was
25 originally set at June 28, 2016.² Because the primary was uncontested, and because New York

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),

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.³ 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.⁴ The court therefore ordered the NYSBOE to hold a new Republican primary on
10 October 6 for the 3d Congressional District.⁵ 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.⁶ Advisory Opinion Request at AOR002. Accordingly, Mr. Martins “will be the

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).

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

⁵ *Id.*

⁶ 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 Republican nominee to face the Democratic nominee and other candidates in the November 8
2 General Election.” *Id.*

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

9 ***Questions Presented***

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

19 ***Legal Analysis and Conclusion***

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

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

4 No, the Committee may not raise contributions subject to a separate contribution limit to
5 retire debts incurred in connection with the October 6 primary because that election was not held.

6 Under the Act and Commission regulations, campaigns may accept contributions subject
7 to limits that “apply separately with respect to each election.” 11 C.F.R. § 110.1(j)(1);
8 *see* Advisory Opinion 2016-03 (George Holding for Congress). An “election” includes “a
9 general, special, primary, or runoff election,” 52 U.S.C. § 30101(1)(A), where an individual,
10 “whether opposed or unopposed, seek[s] nomination for election, or election, to Federal office.”
11 11 C.F.R. § 100.2(a). A primary election is an election “held prior to the general election, as a
12 direct result of which candidates are nominated, in accordance with applicable State law, for
13 election to Federal office in a subsequent election.” 11 C.F.R. § 100.2(c)(1).

14 As the Commission explained in Advisory Opinion 2016-09 (Martins I), “separate
15 contribution limits are permitted when a judicial decision ‘creates a new election.’” *Id.*;
16 Advisory Opinion 2016-03 (George Holding for Congress) (approving separate contribution
17 limit where state legislature, in response to court ruling, established new primary date after
18 voting in primary had already begun); Advisory Opinion 2006-26 (Texans for Henry Bonilla)
19 (following judicial nullification of earlier primary election results, Commission approved
20 separate contribution limit for newly scheduled special election); Advisory Opinion 1996-37
21 (Brady for Congress) (same); Advisory Opinion 1996-36 (Frost *et al.*) (same). Because the
22 district court here effectively nullified the results of the June 28 primary — stripping Mr. Martins
23 of his title as nominee and requiring him to seek the nomination again — the Commission

1 concluded that the October 6 primary was a new election warranting a separate contribution
2 limit. Advisory Opinion 2016-09 (Martins I) at 3.

3 The Second Circuit’s cancelation of the October 6 primary does not affect the
4 Commission’s conclusion in Advisory Opinion 2016-09 (Martins I) that Mr. Martins was entitled
5 to a new contribution limit in connection with his second campaign for the Republican
6 nomination. But that entitlement terminated on September 14, when the Second Circuit canceled
7 the October 6 primary. The Second Circuit’s ruling returned Mr. Martins to the status he had
8 held before the district court’s decision: He was the winner of the June 28 primary and therefore
9 a candidate in the general election as the Republican nominee. Thus, like all other general
10 election candidates, any funds Mr. Martins raises after the Second Circuit’s decision are general
11 election funds and must be counted towards his general election contribution limits. *See* 11
12 C.F.R. § 110.1(b)(2)(ii), (b)(3)(i) (providing that contributions to candidates are presumptively
13 attributed to next election and generally may not be accepted for election that has already
14 occurred).⁷

15 The Commission notes that to the extent Mr. Martins has debts outstanding from the
16 period preceding the Second Circuit’s decision, Commission regulations expressly permit him,
17 as a general election candidate, to pay his primary debts with his general election funds. 11
18 C.F.R. § 110.1(b)(3)(iv).

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

⁷ Commission regulations permit a candidate to accept contributions “made after” a primary election to retire debts incurred with respect to that primary, 11 C.F.R. §§ 110.1(b)(3), 110.2(b)(3), but these regulations have no application in the context of a canceled election: A contribution cannot be “made after” an election that was never held.

1 Pursuant to Advisory Opinion 2016-09 (Martins I), Mr. Martins was entitled to raise
2 funds subject to a separate contribution limit from August 17 to September 14, 2016. Thus, Mr.
3 Martins lawfully raised \$150,000 subject to the separate contribution limit during that period,
4 and he need not refund, redesignate, or reattribute those funds. *See* 52 U.S.C. § 30108(c). To
5 the extent that Mr. Martins's expenditures during that period exceeded his receipts, he may pay
6 the balance with general election funds, as noted in response to Question 1. 11 C.F.R. §
7 110.1(b)(3)(iv).

8 This response constitutes an advisory opinion concerning the application of the Act and
9 Commission regulations to the specific transaction or activity set forth in your request.
10 *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts
11 or assumptions presented, and such facts or assumptions are material to a conclusion presented in
12 this advisory opinion, then the requestor may not rely on that conclusion as support for its
13 proposed activity. Any person involved in any specific transaction or activity which is
14 indistinguishable in all its material aspects from the transaction or activity with respect to which
15 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
16 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
17 affected by subsequent developments in the law including, but not limited to, statutes,
18 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
19 on the Commission's website.

20 On behalf of the Commission,
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22
23

24 Matthew S. Petersen
25 Chairman