



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 20, 2000

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2000-29

Honorable W. J. "Billy" Tauzin
United States House of Representatives
2183 Rayburn House Office Building
Washington, DC 20515-1803

Dear Mr. Tauzin:

This responds to your letter dated September 25, 2000, wherein you and eight other Members of Congress from the State of Louisiana request an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the determination of the number of elections to Federal office that will be held this year in Louisiana. Those Members joining in this request are Senators John Breaux and Mary Landrieu, and U.S. Representatives Richard H. Baker, John Cooksey, Jim McCrery, David Vitter, William Jefferson and Chris John.

The request explains that all Federal candidates in Louisiana received a letter from the Commission on or about July 26, 2000, apprising them of the Commission's interpretation that the 2000 Federal election cycle in Louisiana will include the general election on November 7 and a contingent runoff election on December 9, but only in those Congressional districts where no candidate in the November 7 election receives over 50% of the vote. The letter further indicated the Commission's understanding that there will be no primary elections for these Federal offices in 2000.

The request states that under this interpretation, "all individual Louisiana federal candidates are being denied equal legal treatment enjoyed by all other 526 Members of Congress." It further explains that, based on your research and that of legal counsel, the Louisiana Members of Congress believe that November 7, 2000, is "in actuality, our primary election date" and that December 9, 2000 is the date of "a run-off or general election . . . Therefore, we have two established election cycles and are entitled to two

separate contribution limits.” You request that the Commission review the above interpretation.

General election date

There can be no doubt in fact or in law that November 7, 2000 is the date of the general election for Federal offices in Louisiana as it is in the other 49 States of the United States.¹ It is prescribed by Federal statute, 2 U.S.C. §7, as the national election date, and Commission regulations have adhered to that statutory definition since 1977 because there is no other credible and legally justified alternative.² 11 CFR 100.2(b)(1).³ The United States Supreme Court affirmed this interpretation in *Foster v. Love*, 522 U.S. 67 (1997) [holding that Louisiana’s election schedule for Federal offices, allowing the final election of Federal officeholders before the national election day in early November, conflicted with the Federal statute and was invalid]. Federal court decisions in 1998 provided a remedy consistent with the cited Supreme Court decision, scheduling a final Federal election in Louisiana for November 3, 1998, and a runoff in December (but not reinstating the pre-1978 closed primary system). *Love v. Foster*, No. 95-788-B-M (M.D. La. May 21, 1998); *aff’d*, 147 F.3d 383 (5th Cir. 1998).

Given that the general election in Louisiana will be November 7, 2000, it follows that each Congressional candidate in this general election may accept otherwise lawful contributions made with respect to that election in amounts not exceeding \$1,000 per donor, or \$5,000 if the donor is a qualified multicandidate committee. 2 U.S.C. §§441a(a)(1)(A), 441a(a)(2)(A); *see* 11 CFR 110.1(b) and 110.2(b).⁴

¹ The Commission has consistently advised Congressional candidates in Louisiana of this position, first in 1978 and again in 1984. *See* Advisory Opinions 1978-79 and 1984-54.

² In 1984, the Commission addressed the schedule for Federal elections in Louisiana and concluded, as it did in 1978, that, for purposes of the Act, the general election for Federal office in Louisiana would occur on the same November date as the general election date in all other States. Advisory Opinion 1984-54. The Commission did recognize that the 1984 Federal candidates in Louisiana were seeking office in an earlier election (an open primary election under LA statutes) which preceded the November general election, and that the earlier election was a separate election for purposes of the Act. As a result of the United States Supreme Court decision in *Foster v. Love*, cited above, this open primary election is no longer held for Federal offices. Accordingly, Advisory Opinion 1984-54 is superseded as to its discussion of the application of the Act to the Louisiana open primary election process for nomination (or conclusive election) to Federal office since it was based upon what is no longer a correct description of the Federal election schedule in Louisiana. In addition, the conclusion of Advisory Opinion 1992-35 that an independent candidate for the U.S. Senate in Louisiana had a separate contribution limit for the October 3, 1992, “open primary” is no longer valid since, as a result of the cited court decisions, Louisiana no longer includes Congressional offices on its open primary election ballots. *See* discussion below.

³ Commission regulations also provide that a “general election” may occur in the context of a special election that is held to fill a vacancy in a Federal office. 11 CFR 100.2(b)(2), 100.2(f). That is obviously not the situation presented here. The most recent special election in Louisiana was held in May 1999 to fill a vacancy in the First Congressional District.

⁴ A general election contribution limit is available to these candidates even if they have no opponent in the general election. 11 CFR 110.1(j)(2), 110.2(i)(2).

Contingent runoff election date

The further question arises as to what other Federal elections may occur, or have already occurred, this year in Louisiana. Pursuant to the cited judicial decisions, the Louisiana Secretary of State (“Secretary”) has published a 2000 regular elections schedule indicating that a “CONGRESSIONAL RUNOFF/TIE” election may be held on December 9, 2000. See website <http://www.sec.state.la.us/elections/elec2000.htm>. The Commission understands that this runoff election would be held, if at all, only in each Congressional district where no candidate receives more than 50% of the vote in the November 7 general election, and it would be restricted to the two candidates who receive the highest number of votes in the November election.

Commission regulations provide that the term “election” includes a runoff election that is held after a general election and prescribed by applicable State law as the means for deciding which candidate should be certified as an officeholder elect. 11 CFR 100.2(d)(2).⁵ Therefore, any Congressional candidate in Louisiana who qualifies to participate in a December 9, 2000, runoff election will be a candidate with respect to that election. Such a candidate may accept and retain contributions designated, in writing, by the donors as made with respect to the runoff election if the contributions are otherwise lawful under the Act. 2 U.S.C. §§441a(a)(1)(A), 441a(a)(2)(A). However, if the December 9 runoff election will not be held, any contributions designated for the runoff must be refunded to the donors within 60 days after November 7 (in other words, not later than January 6, 2001). *See*, by analogy, 11 CFR 102.9(e). They may not be redesignated for any other election because the contribution redesignation option is only available under Commission regulations with respect to contributions made for an election that has already been held or that is certain to occur. *See* 11 CFR 110.1(b)(3)(i), 110.2(b)(3)(i); *see also* 11 CFR 110.1(b)(5)(i)--(5)(iii) and 110.2(b)(5)(i)--(iii). In the circumstances presented here, the December 9 runoff is, at most, a contingent possibility and by no means certain or even likely to become necessary.⁶

⁵ The cited regulations also provide that a runoff election may be held after a primary election in order to decide which candidate should be certified as a political party’s nominee. 11 CFR 100.2(d)(1). This regulation is not applicable here since, as explained above, the runoff in this instance would be held, if at all, after the November general election.

⁶ The most recent Congressional election outcomes in Louisiana suggest that a December runoff is not likely. In the 1998 election cycle, all of the Federal elections in Louisiana were decided at the November 3, general election. Furthermore, the current ballot listings of Congressional candidates provided by the Secretary indicate that only one candidate of either the Democratic or Republican party will appear on the ballot in the 2nd, 3rd, and 7th Congressional Districts. <http://www.sec.state.la.us/cgibin/> In the other four Districts the incumbent Members will appear on the ballot, and the ballot in each of them includes at least one other candidate who is identified as either a Democrat or Republican. However, the non-incumbent candidates in those four districts have not filed reports of financial activity with the Commission; this is also the case for the independent candidates who have filed in all seven districts. This may indicate that those individuals have not qualified as candidates under the Act; that is, they have not received or expended over \$5,000 in their campaigns. *See* 2 U.S.C. §431(2).

Primary election date

Having concluded that there is a general election contribution limit for all candidates in the November 7 general election, and the possibility of a separate contribution limit for candidates who qualify to enter a December 9 runoff election (if needed), the remaining question is whether any primary election for Federal office has occurred this year in Louisiana.

The Louisiana elections schedule for 2000, as published by the Secretary, indicates that an “OPEN PRIMARY” would be held on October 7, but no Congressional offices are listed for that ballot; only 34 non-federal offices. <http://www.sec.state.la.us/cgibin/?rqstyp=CNDMS&rqsdt=100700>.⁷ Commission regulations include multiple definitions of the term “primary election,” including the most typical form; namely, an election “held prior to a general election, as a direct result of which candidates are nominated, in accordance with applicable State law, for election to Federal office in a subsequent” election. 11 CFR 100.2(c)(1).⁸ Since the Louisiana primary election of October 7 did not include any candidates for Federal office, it clearly would not qualify as a “primary election” for purposes of the Act and Commission regulations.

Another definition, though, addresses candidates who seek Federal office as “independent candidates” or “without nomination by” either of the two major political parties (Democratic or Republican). 11 CFR 100.2(c)(4). The regulation provides that an independent candidate or one that seeks election without nomination by a major political party may choose one of three possible dates as his/her “primary election” date. One of the options for a primary election date is the last day, prescribed by State law, to qualify for a position on the general election ballot. 11 CFR 100.2(c)(4)(i).⁹

⁷ The Secretary’s published ballot list for the Congressional elections on November 7 includes all seven Congressional Districts and the candidates who have filed with the Secretary for those offices. <http://www.sec.state.la.us/cgibin/?rqstyp=CNDMS&rqsdt=110700>.

⁸ The cited regulations also include two types of primary elections that only occur in the presidential primary process. 11 CFR 100.2(c)(2), (c)(3). They also include a “primary election” definition for cases where a major party candidate is unopposed for nomination within his or her political party and who is thus certified to appear as that party’s nominee on the general election ballot. As indicated by the discussion above, this is not the case in Louisiana this year. Two candidates of the same party have qualified for the November 7 general election ballot in two Congressional districts, and there is no indication that any Congressional candidate was previously nominated by the political party with which they claim affiliation or affinity, for ballot listing purposes.

⁹ This subsection also offers independent or non-major party candidates an option to choose a primary election date that corresponds to the last major party primary held in the State, or the date of the candidate’s actual nomination by his political party. 11 CFR 100.2(c)(4)(ii), (4)(iii). Neither of those options are pertinent here since the two major political parties in Louisiana did not hold any primary election for Congressional candidates in 2000 and do not have any other party process for nominating one candidate to seek each Congressional office as the party’s nominee in the November general election.

The history and underlying purpose of this subsection of the election definitions was “to be neutral as between party affiliated and independent candidates” and to treat non-major party candidates “the same as

The Commission concludes that, pursuant to 11 CFR 100.2(c)(4), the candidates who are entered in the Louisiana Congressional general election this year must be treated as candidates who also had a primary election on August 18, 2000, which was the last day to file for the general election ballot. The salient circumstances are that such candidates had no opportunity under Louisiana statutes to seek nomination in a Congressional primary election, and there was no alternative political party nomination process in effect by either of the two major political parties in Louisiana that those candidates could have entered this year. Therefore, all such candidates are “seeking federal office . . . without nomination by a major party” and are entitled to consider August 18, 2000, as their primary election date. See 11 CFR 100.2(c)(4).

Contribution designation and limitation issues

As indicated above, Commission regulations apply the contribution limits on a per contributor and per election basis and make distinctions between contributions that are designated in writing by a contributor for a specific election and those that are not so designated. 11 CFR 110.1(b)(1)--(6), 110.2(b)(1)--(6). The Commission had earlier (about July 26, 2000) apprised the Louisiana Congressional candidates in the 2000 cycle that there would not be a primary election this year, and those candidates have reported receiving contributions for the 2000 cycle both before and after July 26. Having herein concluded that there was a “primary election” on August 18 for those candidates, it is necessary for the Commission to address how the Louisiana Congressional candidates should treat contributions received before and after the issuance of this opinion for purposes of the contribution limits which are now deemed available.

Because of the unique circumstances here, contributions (otherwise lawful) that were received at any time up to the issuance of this advisory opinion and that are within the combined limits of either \$2000 per donor (or \$10,000 for a multicandidate committee donor), will be regarded as within the Act’s limits. Only contributions received after the date of this opinion must be governed by designation rules at 11 CFR 110.1(b)(1)-(6) and 110.2(b)(1)-(6) and the rules relating to receipt and possible return of contributions for the December 9 conditional runoff referred to on page 3, *supra*.

Reporting periods and filing dates

The political committee reporting periods and filing dates remain unchanged as a result of this opinion. In part, this means that a report covering the period from July 1 through September 30, 2000 must be filed no later than October 15, 2000. A 12 day pre-general election report must be filed no later than October 26, 2000, with coverage dates from October 1 through October 18, 2000. Post general election reports are also required on December 7, as is a year end report with a filing date of January 31, 2001. Other

independent candidates. This was done because non-major parties usually do not have actual primary elections and spend a great deal of effort to secure a ballot position.” *Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 40, 41(1977)*.

reports will be required from candidates' committees who participate in a December 9 runoff, if held. The Act also requires other reports and 48 hour contribution notices at the prescribed dates within the 2000 Federal election cycle. *See generally*, 2 U.S.C. §434(a)(2) and (a)(6). Because the August 18 "primary election" date has passed and was not determined to be a primary election until this opinion was issued, and because the contributions and expenditures within that time frame will be disclosed on the report due October 15, 2000, the Commission will not require the filing of a deferred 12 day pre-election report covering the period that would normally be specified for such a report.

This response to your request that the Commission review its interpretation of the application of the Act and its regulation to the Louisiana Federal electoral system may have raised questions about whether candidates in the 2002 and 2004 Federal election cycles in Louisiana may rely upon this opinion pursuant to section 437f(c)(1)(B). Assuming that the Louisiana Congressional electoral system remains the same, candidates in those election cycles may rely on this opinion and accept otherwise lawful contributions for the primary or the general election. Until the last day to qualify for the general election ballot (a date not yet determined for the 2002 and 2004 elections), contributions to a candidate that are not designated for a particular election will be deemed contributions for the primary election. After such date, any undesignated contributions will be deemed contributions for the general election. *See* 11 CFR 110.1(b)(2)(i)-(ii) and 11 CFR 100.2(c)(4).

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. §437f.

Sincerely,

(signed)

Darryl R. Wold
Chairman

Enclosures (AOs 1992-35, 1984-54 and 1978-79)

cc: Senators John Breaux and Mary Landrieu
Representatives Richard H. Baker, John Cooksey, Jim McCrery, David Vitter, William Jefferson,
and Chris John