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Acting Associate General Counsel for Policy  
Office of the General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: Comments on Draft A of Advisory Opinion 2016-03 (Holding)

Dear Mr. Noti:

Draft A of Advisory Opinion 2016-03 (Holding) is premised on the belief that the March 15, 2016 Congressional primary was merely postponed to a later date and that, therefore, only one contribution limit can be accorded candidates who ran in that primary election and are now running in the June 7, 2016 for their party's nomination for the U.S. House of Representatives. Draft A is also based on the belief that a primary must be completed, i.e., votes cast, ballots counted and the results certified, before the Commission can accord new contribution limits for a replacement election.

Those arguments are incorrect both as a matter of law and fact. We will not re-argue our prior submission here, but will provide comments on Draft A with the benefit of having the March 15, 2016 primary behind us.

Draft A is based on the belief that an election takes place on a specific date and, therefore, is an event, not a process. Federal Election Commission ("FEC" or "the Commission") regulations, however, define the term "Election" as "The *process* by which individuals, whether opposed or unopposed, seek nomination for election, or election to federal office." 11 C.F.R. § 100.2(a)(emphasis added).

The election process involves candidates filing papers with the FEC and with state agencies sometime the year before election day, voter registration, designing and printing ballots, early and election day voting, the counting of ballots, the certification of results and, in contested elections, recounts.

Essentially, Draft A confuses "an election" for "election day." The election for candidates to Congress in North Carolina this year actually started with the close of the filing period for candidates on December 21, 2015 and the distribution of absentee primary ballots on January 25, 2016. The three-judge panel of the U.S. District Court for the Middle District of North Carolina did not issue its order regarding the election until February 5, 2016 – after the election was already underway and with less than a month to go before election day. Unfortunately, at that point the election could not be stopped: it was physically going to occur. Given that fact, the

North Carolina General Assembly had only one option; allow the election to occur, but nullify its effect by prohibiting the State Board of Election from certifying the results.<sup>1</sup>

To take a position that an election must be thoroughly completed before the Commission could accord a new contribution limit for a replacement election could lead to absurd results: imagine an election halted just days before voting after a year of campaigning when everyone has spent all their campaign funds. The candidates would have to start over, with no resources. And new candidates could enter the race with untapped contribution limits.

Draft A also repeatedly says the primary election was “merely postponed.” This is incorrect. Black’s Law Dictionary and others define “postpone” as to put off, defer or delay an event which had been planned for a particular date until a later date.<sup>2</sup> Postponing an event does not change the event to be postponed, just when the event will occur. Draft A actually makes our point in footnote 3 with examples of an election being postponed: because of a natural disaster, inclement weather, administrative convenience or other intervening events. It’s the same election, just on a different day.<sup>3</sup>

The May 15th and the June 7th Congressional primaries are by no means the same election. They are different in law and fact. Legally one election violated the U.S. Constitution, the present one does not. The factual change that makes the legal difference is that the boundaries for the election were redrawn. That created other new facts such as different voter and candidate eligibilities, new candidates, some candidates dropping out of the race and also importantly a change in North Carolina law abandoning the run-off system.<sup>4</sup> That is a significant difference. The June 7th primary winner no longer needs an absolute majority he or she would have had to have if the March 15th primary been completed.

The Requestor does not contest that prior Advisory Opinions have involved primary elections that were completed. And the Requestor does not contend his campaign is entitled to a new limit only because he is running in a new Congressional district. Instead, the Requestor states that elections are processes and when one is halted mid-way for purposes of the Voting Rights Act and, regardless of where he chooses to run, he is facing a new election with new rules and new constituents, he is entitled to a new contribution limit.

## **Conclusion**

Mr. Holding was running unopposed as his party’s nominee for Congress in the 12th Congressional District of North Carolina. Now he is being opposed for his party’s nomination in the 2nd Congressional District. The entire March 15th Congressional primary system was

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<sup>1</sup> S.L. 2016-2, § 4, Special Session (N.C. 2016)(“House Bill 2”).

<sup>2</sup> Black’s Law Dictionary 1051 (5<sup>th</sup> ed. 1979).

<sup>3</sup> The Congressional Research Service (“CRS”) report Draft A relies upon actually supports our argument that the March 15th primary election was not postponed. The CRS report notes that there is no federal power to postpone an election and that the states’ power to do so are based on them facing exigent circumstances. The CRS report correctly uses the words “postpone” and “reschedule” interchangeably, but does not equate them with elections being “cancelled” or “nullified” as was the case here. Jack Maskell, Cong. Research Serv., RL32623, Postponement and Rescheduling of Election to Federal Office (2004), available at <https://www.fas.org/sfp/crs/misc/RL32623.pdf>.

<sup>4</sup> House Bill 2, § 2.(a).

nullified following the Middle District of North Carolina's decision. Despite all the work, the campaigning, and even the voting, the election will be of no effect. Mr. Holding now finds himself in a new electoral situation running in a new election now with candidates of his own party.

This case involves a unique fact situation: a state legislature, while under a federal court order, nullifying the results of an election after the election was already underway, but before election day. While facts of prior FEC Advisory Opinions may be different, that does not mean the answer has to be. Draft A concedes that nullified elections and postponed elections are different factual situations that require different treatment under the Federal Election Campaign Act. Draft A at 4-5. We agree.

In our view, an election does not have to be completed and certified before it can be legally nullified. And there can be no mistake that the U.S. District Court for the Middle District of North Carolina legally nullified the March 15th primary because it was a racially discriminatory election and violated the United States Constitution. The North Carolina General Assembly complied with the court's order by providing that the State Board of Elections could not certify the results. An election was held, but its results were nullified. With all due respect, it cannot get much clearer than that.



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