

July 26, 2022

By ELECTRONIC MAIL DELIVERY

Office of General Counsel
Attn: Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion Request

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion on behalf of Bridget Fleming for Congress, Jackie Gordon for Congress, Conole for Congress, and Max Rose for Congress (“House Committees”). House Committees request confirmation that, in light of the Commission’s recent issuance of Advisory Opinion 2022-08 (NRCC) establishing a separate contribution limit for the August 23 primary election, they may, with the written authorization of contributors, redesignate contributions that were designated for the November 2022 general election to the August primary without regard to the 60-day timeframe for redesignating contributions under 11 C.F.R. § 110.1(b)(5)(ii)(A)(1)-(2). Because the August 23 primary election is less than 60 days away, House Committees respectfully request that the Commission issue an advisory opinion in response to this request within 20 days pursuant to 11 C.F.R. § 112.4.

I. FACTUAL DISCUSSION

Bridget Fleming, Jackie Gordon, Francis Conole, and Max Rose (“House Candidates”) are candidates currently running for nomination in the Democratic primary for U.S. House of Representatives in New York. House Committees are their authorized principal campaign committees. New York was originally scheduled to hold its federal primary election on June 28, 2022, but, due to redistricting litigation, a state court moved the federal primary to August 23, 2022. House Candidates were all candidates in the originally scheduled-June 28 primary election.

As detailed in Advisory Opinion 2022-08 (NRCC), on March 31, while New York congressional candidates were collecting signatures to appear on the June 28 primary election ballot, a state trial court found the congressional maps to be used in that election unconstitutional

and prevented the maps from being used.¹ The decision was appealed and eventually reached New York’s Court of Appeals, the state’s highest court. On April 27, 2022, the Court of Appeals affirmed the trial court’s ruling that the maps were unconstitutional and instructed the trial court to use a special master to draw new constitutional maps.² On April 29, 2022, the trial court instructed the special master to finalize new congressional maps by May 20 and set a new primary date of August 23.³ On May 11, 2022, the state trial court set the ballot access rules for the August 23, 2022, primary.⁴ On May 20, the state trial court adopted the final maps, setting the lines for the August 23 primary.⁵

On May 26, 2022, NRCC submitted an advisory opinion request to the Federal Election Commission arguing that federal candidates seeking nomination for election in New York may accept contributions for the court-ordered August 23 primary election separate, and, in addition to, contributions already accepted for the June 28 primary election.⁶ NRCC argued that congressional candidates face a “new electoral situation” since the court ordered the new August 23 primary and that the candidates have been forced to “essentially restart their campaigns for a new primary that is less than three months away.”⁷

On June 23, 2022, the Commission responded to NRCC’s request by issuing a unanimous advisory opinion, concluding that certain federal House candidates for nomination in New York are entitled to a separate contribution limit for the court-ordered August 23, 2022, primary election.⁸ The Commission explained that “preparations for the June primary were already well under way by the time the state courts established the new election date, ballot access requirements, and district lines for candidates wishing to run in the New York primary.”⁹ The cumulative effect of the courts’ orders, the Commission explained, created “a new electoral situation” that required candidates to file in congressional districts with new boundaries and prepare, plan, and campaign for a new election approximately three months away and under new rules and potentially against new opposing candidates.¹⁰ Under these circumstances, the Commission concluded that federal candidates who sought nomination for election to the U.S. House of Representatives from New York for the June 28, 2022, primary election are entitled to

¹ *Harkenrider v. Hochul*, No. E2022-0116CV, 2022 WL 1819491, at *13 (Mar. 31, 2022).

² *Id.*

³ *Harkenrider v. Hochul*, No. E2022-0116CV, at 2 (N.Y. Sup. Ct. Apr. 29, 2022); Advisory Opinion 2022-08 (NRCC) at 2.

⁴ *Harkenrider v. Hochul*, No. E2022-011CV (N.Y. Sup. Ct. May 11, 2022); Advisory Opinion 2022-08 (NRCC) at 3.

⁵ *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. May 21, 2022).

⁶ See Advisory Opinion Request 2022-08 (NRCC).

⁷ *Id.* at 3.

⁸ Advisory Opinion 2022-08 (NRCC) at 4.

⁹ *Id.*

¹⁰ *Id.* at 5.

a new contribution limit for the August 23, 2022, primary election, and that the new limit applies to contributions made after May 20, 2022.¹¹

In light of this advisory opinion, House Candidates have all since been accepting contributions for the court-ordered August 23 primary election. Because the House Candidates are now running in essentially a second election before the November general election, they need as many resources as possible to use towards their primary campaigns. They would like to redesignate some contributions designated for the November 2022 general election to the August primary election, including contributions that were received more than sixty days prior to June 23, 2022, which is the date the Commission issued its advisory opinion. The Commission was not asked, nor did it issue any guidance, on the process of redesignating any contributions received for the general election to the new August primary election if the contributions were received more than sixty days prior to June 23, 2022.

The Commission's redesignation rules under 11 C.F.R. § 110.1(b)(5)(ii)(A)(1)-(2) state that written redesignations of contributions for another election must be received by the committee's treasurer within 60 days of receipt of the contribution. As a result, if the 60-day window applies here, the Committees will not be able to ask for written redesignations for a significant number of contributions designated for the general election, even if the donors prefer that their general election contributions be used for the August primary. However, by obtaining written redesignations of those contributions now, House Committees will be able to consolidate resources that they think are needed for their primary elections, and avoid having to conduct a mass refund or reattribution effort, if they do not receive their Democratic nominations in August.

II. QUESTION PRESENTED

May House Committees receive redesignations of November 2022 general election contributions to the August primary election even if the redesignations are received more than 60 days after the committee's receipt of contributions, as long as the redesignation is received in writing prior to August 23, 2022?

III. LEGAL ANALYSIS

Under the Federal Election Campaign Act of 1971, as amended, (the "Act"), candidate committees may accept \$2,900 per election from individual contributors in the 2021-2022 cycle.¹² These contributions may be designated for "a particular election."¹³ Commission regulations permit candidate committees to receive contributions designated for a general

¹¹ *Id.* at 6; FEC June 23, 2022 Open Meeting, at 20:10-28, <https://youtu.be/yOXfLOWBL7Q> (Commissioner Weintraub and Chair Dickerson acknowledging that the new contribution limit would apply to any similarly situated candidate running in New York congressional races).

¹² 52 U.S.C. § 30116(a)(1); 11 C.F.R. § 110.1(b); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 86 Fed. Reg. 7,867, 7869 (Feb. 2, 2021).

¹³ 11 C.F.R. § 110.1(b)(2), (3), and (4).

election prior to the primary election, provided that the committee employs an acceptable accounting method to distinguish between primary and general election contributions.¹⁴ If the candidate does not participate in the general election, any contributions received for that election must be refunded, redesignated, or reattributed.¹⁵ Otherwise, the candidate's campaign will be liable for accepting excessive campaign contributions.

There is no regulation on redesignation for contributions that are within the contribution limits and are given before the election for which they are designated. However, the Commission has promulgated regulations that allow a committee to request a written redesignation of excessive contributions and contributions given after the election for which they are designated but cannot be accepted.¹⁶ For instance, the regulations explain that a committee may request a written redesignation of a contribution to a different election if:

1. The contribution was designated in writing for a particular election, and the contribution, either on its face or when aggregated with other contributions from the same contributor for the same election, exceeds the contribution limits; or
2. The contribution was designated in writing for a particular election and the contribution was made after that election and the contribution cannot be accepted under the net debts outstanding provisions of the regulations.¹⁷

A contribution is considered redesignated for another election if the treasurer of the recipient authorized political committee requests that the contributor provide a written redesignation of the contribution, informs the contributor that the contributor may request the refund of the contribution as an alternative to providing a written redesignation, and **the written redesignation is provided within sixty days from the date of the treasurer's receipt of the original contribution.**¹⁸

The Commission has explained that these rules permit political committees to “seek and obtain from contributors redesignations and reattributions of certain contributions that would otherwise be illegal.”¹⁹ In adopting these redesignation rules, the Commission stated that it was “encourag[ing] candidates to pay their debts by eliminating the need to refund impermissible contributions and then solicit contributions for another election.”²⁰ Further, the Commission included the 60-day timeline for obtaining written redesignations to allow committees sufficient

¹⁴ 11 C.F.R. § 102.9(e)(1).

¹⁵ See 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(5).

¹⁶ See 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(5).

¹⁷ 11 C.F.R. § 110.1(b)(5)(i)(A)-(B). The same rules apply to undesignated contributions that exceed the contribution limits or were received after the date of an election for which the committee has no debts outstanding. *Id.* § 110.1(b)(5)(i)(C)-(D).

¹⁸ 11 C.F.R. § 110.1(b)(5)(ii)(A)(1)-(2).

¹⁹ *Id.* at 760.

²⁰ Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 763 (Jan. 9, 1987) (“E&J”).

time to “examine the contribution for compliance with the contribution limits, make a written request for redesignation if necessary and receive the written redesignation from the contributor.”²¹ To be sure, the Commission stated that the “sixty day time limit . . . represents a balance between the need to establish a realistic deadline, on the one hand, and the need to resolve the problems created by excessive contributions as quickly as possible, on the other hand.”²² If a redesignation “is not received within the sixty day time frame, the contribution must be refunded.”²³

Notwithstanding the fact that the regulations, on their face, refer only to redesignation of excessive contributions or contributions made after the election that violate the net debts outstanding regulations, the Commission has noted that “nothing in the regulations is intended to suggest that political committees may not seek redesignation of contributions that are within the contribution limitations and restrictions.”²⁴ In fact, in the past, the Commission has appeared to apply the 60-day timeframe to redesignations of lawful contributions.²⁵

Considering the “new electoral situation” in New York congressional races, the Commission was correct to establish a contribution limit for the August 23 primary that is separate from the cancelled June 28 primary. However, the Commission should not apply the 60-day redesignation rule to otherwise lawful general election contributions received by House Committees. First, as noted, there is no explicit provision of the Act or regulations that explicitly prohibits House Committees from seeking written redesignation between June 23 and August 23, 2022.²⁶ In addition, the 60-day rule should not apply here because the House Committees did not even know they could raise towards an August 23 primary until June 23, 2022.²⁷ Thus, the 60-day redesignation rule cuts off an important source of revenue for the August 23 primary through no fault of any House Committee. The House Committees could not, and thus, did not seek redesignations towards a then-non-existent August 23 primary within 60-days of the receipt of those general election contributions. Many of these candidates received contributions towards the general election in 2021 and early in 2022. However, it was only on June 23, 2022, that they

²¹ *Id.* at 763.

²² *Id.* at 763.

²³ *Id.*

²⁴ Advisory Opinion 2009-15 (White for Texas) at 6 n.7.

²⁵ Advisory Opinion 2009-15 (White for Texas) at 6 n.7. In Advisory Opinion 2009-15 (White for Texas), the Commission considered whether a campaign committee could redesignate contributions designated for the 2012 primary and/or 2012 general election to a 2009 or 2010 special election or runoff. The Commission reasoned that contributions properly designated for the 2012 primary and general elections could not presumptively be redesignated to another election. The Commission, without explanation, still required compliance with its redesignation rules that were adopted to address excessive or otherwise illegal contributions, including the 60-day redesignation requirement.

²⁶ As explained, the Commission’s Explanation and Justification for establishing redesignation rules makes clear that the Commission was concerned with providing a process to remedy illegal contributions short of requiring absolute refund. *See* E&J, 52 Fed. Reg. at 761, 763.

²⁷ *Cf.* Advisory Opinion 1992-15 (Russo for Congress) (concluding that the 60-day period begins to run on the date of the primary election for losing primary candidates because that is the date those candidates “have actual notice of the need to obtain redesignations . . . or refund the contribution”).

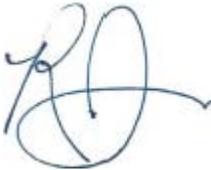
even knew they could raise towards this new election. If the Commission applies the 60-day redesignation rule towards these contributions, the House Committees are completely hand strung because they were never able to seek redesignations for those contributions.

Applying the 60-day rule will also have the unintended effect of preventing the House Committees from taking full advantage of the new contribution limit. For House Committees, soliciting and receiving additional contributions from donors who gave to the general election is not realistic; some donors are unable or unwilling to contribute additional funds for a third election. As such, House Committees prefer to seek redesignation of contributions designated for the general election to the August primary election to obtain the full benefit of the new contribution limit. Permitting House Committees to seek redesignation of general election contributions to the August 23 primary election outside of the 60-day requirement advances the Commission's interest. It reduces the need for House Committees to do mass refunds of general election contributions if their candidates do not advance to the general election. It also provides House Committees with funds available for use to cover campaign expenses now, reducing the need of having to resolicit contributions from these contributors to cover any primary campaign debts if the candidates are unsuccessful.

Moreover, permitting House Committees to seek written signed redesignations under these unique electoral circumstances still keeps the choice to redesignate with the contributors. Nothing about House Committee's advisory opinion request would alter or undermine the contributors' intent to have their contributions used in their preferred elections.

For these reasons, we ask the Commission to confirm that House Committees may seek and obtain redesignations of general election contributions to the primary election even if those contributions were received by House Committees more than 60 days ago.

Very truly yours,

A handwritten signature in blue ink, appearing to be 'RJ' with a flourish extending to the right.

Rachel L. Jacobs
Jonathan A. Peterson

Counsel to Committees