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July 12, 2013

MEMORANDUM

SENSITIVE

TO: The Commission

FROM: Lisa J. Stevenson
Deputy General Counsel - Law

LJS by mjt

Lorenzo Holloway
Assistant General Counsel
Compliance Advice

LH by mjt

Margaret J. Forman
Attorney

mjt

SUBJECT: Request for Consideration of a Legal Question – Kathy Hochul for Congress
(LRA 849)

I. INTRODUCTION

On June 13, 2013, the Commission received a Request for Consideration of a Legal Question (“Request”) from counsel on behalf of Kathy Hochul for Congress (“the Committee”) (C00494013), the principal campaign committee of Kathy Hochul.¹ Attachment 1.

The Request addresses a determination by the Reports Analysis Division (RAD), based on informal guidance provided by the Office of General Counsel (OGC), that the primary election date for the 2011 Special Primary Election in New York’s 26th Congressional District (“2011 Special Election”) was March 19, 2011. The effective primary date is relevant because if it falls prior to March 21, 2011, the date the Committee asserts is correct, the Committee may have accepted impermissible contributions. Based on OGC’s review of the record, the New York State Democratic Party (“Party”) nominated Kathy Hochul as its candidate for the special general election on March 19, 2011, as confirmed by the Party’s Certificate of Nomination filed with the New York State Board of Election, the candidate’s notarized Certificate of Nomination, and the Party’s Certificate of Authorization. OGC, therefore, concluded that March 19, 2011, was the effective primary election date for the 2011 Special Election.

¹ At least two Commissioners agreed to consider this Request pursuant to the Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45798-45799 (Aug. 1 2011).

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The issue presented in the Committee's Request is whether March 19, 2011 or March 21, 2011, is "the date of 2011 Democratic special primary election in New York's 26th [Congressional] District." Attachment 1 at 1.

II. THE NEW YORK STATE DEMOCRATIC PARTY NOMINATED KATHY HOCHUL ON MARCH 19, 2011

The Federal Election Campaign Act, as amended (the "Act"), provides that an "election" includes "a general, special, primary, or runoff election ... [or] a convention or caucus of a political party which has authority to nominate a candidate." 2 U.S.C. § 431(1)(A)&(B). The Commission's regulations define a primary election as 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 C.F.R. § 100.2(c)(1) (emphasis added). Since the election at issue here is a special election, New York state law provides that "party nominations ... shall be made in the manner prescribed by the rules of the party." N.Y. Elect. Law Section 6-114.² The New York Democratic Party rules require a meeting of the appropriate party members to vote to nominate the Party's candidate for an office to be filled at a special election. Party Rules, New York State Democratic Committee, Article IV, § 2; Article VI, §§ 1-2.³ It is at this meeting that the Party votes to nominate its candidate. *Id.* And under section 100.2(c), it is the actual date of the party's *nomination* that is relevant. 11 C.F.R. § 100.2(c)(1).

Here, the Certificate of Nomination filed by the Party confirms that Kathy Hochul was nominated by the Party on March 19, 2011. Attachment 2. The Certificate of Nomination provides that the Presiding Officer and Secretary, at "a meeting held of the members of the 26th Congressional District of New York State Nomination Committee ... held at 17 Main Street, Geneseo, NY 14454 on March 19, 2011, do hereby certify [Kathy Hochul] was nominated to be the candidate of the Democratic Party for the public office of Member of US House of Representatives in the New York State, 26th Congressional District at the Special Election...." *Id.* at 1 (emphasis in original). Also on March 19, 2011, Kathy Hochul signed her notarized Certificate of Acceptance, "having been designated/nominated by the Democratic Party as a

² New York state law presumes that the nomination occurs at a party nominating meeting. New York state law provides that "a party *nomination* of a candidate for election to fill a vacancy in an elective office required to be filled at the next general election, occurring ... after the holding of the meeting or convention to *nominate* or designate candidates for such, shall be made, ... by a majority vote of a quorum of the members of a county committee or committees last elected in the political subdivision in which such a vacancy is to be filled, or by a majority of such other committee as the rules of the party may provide." N.Y. Elect. Law Section 6-116, Article 6 (emphasis added). State law also provides that "[a] certificate of nomination shall be filed as provided for herein." *Id.* This provision, however, applies to candidates nominated by a party for the general election.

³ The New York Democratic Party rules also provide that special meetings require ten days prior written notice. Party Rules, Article IV, § 2. The March 19, 2011, meeting where party officials met and nominated Kathy Hochul as their candidate for the special general election to fill the 26th congressional seat, is ten days after the Governor's March 9, 2011 proclamation for the special election. See *Dems Tap Hochul for NY Special Election*, *supra* at 1; Memorandum from Robert A. Brehm to Commissioners of Elections, Special Election – 26th Congressional District (Mar. 9, 2011).

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candidate for the office of [Congressional] 26th District. *Id.* at 3. Again on March 19, 2011, the Party issued a Certificate of Authorization, which certifies that “at a meeting of the [political subdivisions within the 26th Congressional District] Committee of the Democratic Party held on the 19 day of March, 2011, a quorum being present, said committee, by majority vote of the members present, did consent and authorize the nomination/designation of Kathy Courtney Hochul ... for the office of NY 26th Congressional District as a candidate of the Democratic Party for public office indicated, at the Special Election to be held on May 24, 2011.” *Id.* at 4.

The Committee admits that the Party executed the certificate of nomination on Saturday, March 19, 2011, and that the candidate, Kathy Hochul, signed her certificate of acceptance on March 19. The Committee asserts, however, that March 21, 2011, the date on which the two certificates were filed with the NY State Board of Elections, should be the effective primary election date because the Party “remained able to select a different nominee until it filed the certificate.” Attachment 1 at 2. But the Committee’s argument disregards both New York state law and the New York New York Democratic Party rules, which indicate that the party’s nomination is effectuated by a meeting at which a majority of the party votes for the candidate. N.Y. Elect. Law Sections 6-114, 6-146, and 6-156, Article 6; Party Rules, New York State Democratic Committee, Article VI, §§ 1-2; *Cf.* N.Y. Elect. Law Section 6-116. Nothing in New York state law or the Party’s rules suggests that the filing of the certificate of nomination with the State election board constitutes the Party’s nomination, as the Committee argues. Rather, the certificate of nomination appears to be the manner in which the party communicates and confirms with the State election board that it has nominated its candidate.

Additionally, the Committee, by referencing the Party’s ability to “select a different nominee until it filed the certificate,” is referencing an event that never occurred. Ms. Hochul remained the candidate. Even if the Party had changed its mind after March 19, 2011, and nominated a different candidate on March 21, 2011, the March 21, 2011 effective primary election date would apply to that *different* candidate, not Ms. Hochul. *See* 11 C.F.R. § 100.2(a) (“Election means the process by which *individuals*, whether opposed or unopposed, seek nomination for election, or election, to Federal office.” (emphasis added)). The effective primary election date of March 19, 2011, is specific to Ms. Hochul’s nomination.

The Committee cites, in support of its case, MUR 4850 (Fossella) in which OGC stated that “the actual date that Mr. Fossella was nominated by the Republican Party is unclear.”⁴ Attachment 1 at 2, (quoting MUR 4850, First General Counsel’s Report at note 3). MUR 4850 (Fossella) involved an investigation as to whether a New York Congressional candidate and his committee accepted prohibited and excessive contributions in a 1997 “Special Primary Election.” *See* MUR 4850 (Fossella), First General Counsel’s Report at note 3. In that matter, OGC expressly noted that the actual nomination date was unclear and, as a result, recommended treating the last day of filing the certification of nomination with the New York State Elections

⁴ The Committee also references correspondence in the form of a Request for Additional Information (RAI) sent by RAD to a separate committee in a completely different election. Attachment 1 at 2. Whether RAD mistakenly told a separate committee in 2009 about whether the party nomination constituted a separate election has nothing to do with the date that the New York State Democratic Party nominated Kathy Hochul.

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Board as the effective primary election. *Id.* This recommendation was based on the understanding that the applicable party's rules govern the selection process and that the Republican party's rules, as they applied to the timing of the special election process in MUR 4850, provided that a meeting would take place after the state primary (which took place on September 9, 1997), but no later than September 16, 1997. *See* N.Y. Elect. Law Section 6-114. The party had the period of September 10, 1997 to September 16, 1997 to choose its nominee and file with the appropriate New York election board. MUR 4850 at note 3. OGC selected the last day that the party could have filed the certification with the New York State Election Board as the effective date solely due to the uncertainty in the actual date of the party's nomination, as there was no evidence in the record as to when the required meeting took place. *See* MUR 4850 (Fossella), First General Counsel's Report at note 3. The record indicates the Commission accepted OGC's recommendation. Commission Certification dated March 19, 2002, GCR #3; Commission Certification dated June 11, 2002.

Unlike in Fossella, the available information here shows a specific date that the nomination took place, in accordance with State law and the Party's rules. Specifically, the facts clearly show that Kathy Hochul was nominated by her party on March 19, 2011. *See* Attachment 2, Certificate of Nomination (certifies Party nominated candidate on March 19, 2011); Certificate of Acceptance (signed by candidate Kathy Hochul on March 19, 2011); Certificate of Authorization (certifies on March 19, 2011, the Party nominating committee met and authorized the nomination of candidate Kathy Hochul).

We conclude that the Party nominated Kathy Hochul as its candidate for the special general election on March 19, 2011, and, therefore, March 19, 2011, is the effective primary election date.

III. RECOMMENDATION

The Office of General Counsel recommends that the Commission determine the New York Democratic Party nominated Kathy Hochul on March 19, 2011, and therefore, March 19, 2011, is the effective primary election date.

Attachments

1. Request for Legal Consideration from Kathy Hochul for Congress
2. Kathy Hochul Certificate of Nomination

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June 13, 2013

Ms. Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Ms. Werth:

I write on behalf of my client, Kathy Hochul for Congress ("the Committee"), pursuant to the Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45,798 (2011). There is a dispute over the date of the 2011 Democratic special primary election in New York's 26th District. The Commission should affirm that the date of that election was March 21, 2011, and not March 19 as the Reports Analysis Division has contended.

Representative Chris Lee resigned from Congress on February 9, 2011. On March 9, New York Governor Andrew Cuomo issued a proclamation calling for a special election to be held for the seat on May 24. *See* <http://www.elections.ny.gov/NYSBOE/Elections/2011/Special/2011SpecialElection26CDCalendar.pdf>. On March 23, the Commission published a notice of filing dates for the special election. Filing Dates for the New York Special Election in the 26th Congressional District, 76 Fed. Reg. 16,419 (2011). The notice referred only to the special general election; it did not refer to the parties' respective primary elections. *Id.*

New York law provided that, when the Governor calls a special election, party nominations "shall be made in the manner prescribed by the rules of the party." N.Y. Elec. Law § 6-114 (McKimney 2011). Under New York Democratic Party rules, nomination for a special election to Congress was made by a congressional district nomination committee, consisting of the chairs of each county Democratic political party within the congressional district. *See* Rules, New York State Democratic Committee, art. VI, § 2, available at <http://gomvd.com/uploads/New-York-State-Democratic-Party-Rules.pdf>; *see also id.*, art. II, § 3 (defining membership of the congressional district committee). The committee nominated its candidate by voting, executing

Attachment 1, page 1 of 3

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ANCHORAGE BEIJING BELLEVUE BOISE CHICAGO DALLAS DENVER LOS ANGELES MADISON NEW YORK
PALO ALTO PHOENIX PORTLAND SAN DIEGO SAN FRANCISCO SEATTLE SHANGHAI TAIPEI WASHINGTON D.C.

Perkins Coie LLP

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and filing a certificate of nomination with the State Board of Elections. *See* N.Y. Elec. Law § 6-158(6). The committee remained able to select a different nominee until it filed the certificate. The candidate was then required to file a certificate of acceptance. In this instance, the committee executed a certificate of nomination on Saturday, March 19, and filed it on Monday, March 21. The candidate, Kathy Hochul, executed a certificate of acceptance on March 19, *see id.* § 6-158(7), which was filed also on March 21.

Ms. Hochul's primary day was March 21, the date on which her party, under state law, irrevocably selected her to appear on the special election ballot by filing its certificate of nomination. Under Commission rules, an election is the process by which individuals seek nomination or election to federal office. *See* 11 C.F.R. § 100.2(a) (2011). A primary election is an election held prior to a general election, "as a direct result of which candidates are nominated in accordance with applicable State law..." *Id.* § 100.2 (c)(1).

In an enforcement action involving New York's 1997 special election of Vito Fossella to Congress, the First General Counsel's Report treated "the certification of Fossella's nomination by the appropriate Republican committee(s) for the 13th Congressional District" on September 16, 1997 "as the date of the 1997 Primary Election for purposes of contribution limits..." First General Counsel's Report, MUR 4850, at 3. The report cited *FEC v. Citizens for Sen. Wofford*, No. cv-94-2057 (E.D. Pa. Jan. 31, 1996), for the general proposition that it was the "selection date, not later certification," that constituted the primary election. *Id.* at 3 n.3. However, it said that "the actual date that Mr. Fossella was nominated by the Republican Party is unclear." *Id.* It noted that "media accounts indicate that Mr. Fossella was effectively selected as the Republican nominee as early as the first week of June." *Id.*

The Commission has since given no indication that any date, other than the filing of the certificate of nomination, should be treated as the primary date in a New York special election, when a party selects its special election nominee through its own rules. This is not the first time the Reports Analysis Division has offered a legal interpretation that differed from the one in the Fossella matter. In 2009, apparently unaware of that matter, RAD told one New York special election candidate in a Request for Additional Information that "only a Special General Election exists for New York's 20th Congressional District ..." *See* <http://www.fec.gov/fecviewer/CandCmteFilingsPDFDownload.do?imageNumber=29030062084&pdfURL=http://images.nictusa.com/pdf/084/29030062084/29030062084.pdf>.

Besides Commission precedent, there were many sound reasons to treat the certificate of nomination's March 21 filing, and not its March 19 adoption and execution, as the date of the 2011 special primary election. First, Ms. Hochul's nomination was not effective under state law until March 21. Under state law and its own rules, until the party filed the certificate, it remained free to select a different nominee. Such flexibility was especially important to the party in a race like that in the 26th District, where the incumbent was forced to resign because of an abrupt

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media scandal. Second, New York operated under an extraordinarily tight timetable for certifying its nominees. Unlike the *Wofford* case, where three months elapsed between the candidate's selection and his asserted date of nomination, there was only one day between the filing of the certificate and the initial action to authorize it, and the primary contributions involved were comparably insubstantial.

To the best of the campaign's knowledge and belief, this question -- which seems to have persisted internally within the Commission for nearly two years now -- is the lone matter preventing a now-defunct campaign from terminating its registration with the Commission. Going forward, there is ample opportunity for the Commission to reevaluate and restate when primary elections are deemed to occur in New York special elections. But looking backwards, with the campaign and party having acted reasonably and consistently with the available authority, the Commission should not now change the rules to their disadvantage. The Commission should follow its own past reasoning and New York state law, and affirm that the 2011 Democratic primary in New York's 26th District occurred on March 21, 2011, when the Democratic Party took the action necessary under New York state law to certify Kathy Hochul as its nominee.

Very truly yours,



Brian G. Svoboda
Counsel to Kathy Hochul for Congress

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Name

Address

Judith A. Hunter
Signature of Presiding Officer

3-19-2011
Date

Harold J. Bush
Signature of Secretary

3-19-2011
Date

Known to me

JANE M. DOHUS
Notary Public in the State of New York
No. 4511920
EXPIRES 31 JULY
2011

Jane M. Dohus

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CERTIFICATE OF ACCEPTANCE

(Section 6-146, Election Law)

I, Kathy Courtney Hochul, residing at

4521 Copperfield Drive Hamburg

having been designated/nominated by the Democratic Party,

as a candidate for the office of Congress 26th District,

26 district, do hereby ACCEPT such designation/nomination

and consent to be such candidate of such party at a Special

election to be held on May 24, 2011.

3/19/11
(Date)

Kathy Courtney Hochul
(Signature of Candidate)

STATE OF NEW YORK

COUNTY OF Livingston : ss:

On this 19th day of March, 2011, before me personally appeared Kathy Courtney Hochul, to me known and known to me to be the individual described therein, and who executed the foregoing instrument, and acknowledged to me that he/she executed the same.

JANE M. DODDS
Notary Public in the State of New York
No. 4951960
LIVINGSTON COUNTY
Commission Expires June 5, 2011

Jane M. Dodds
Notary Public

(11/99) f:\files\forma\accept

SAMPLE PREPARED BY STATE BOARD OF ELECTIONS

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CERTIFICATE OF AUTHORIZATION

(Section 6-120, Election Law)

We, Judith Hunter and Harold Bush
(Presiding Officer) (Secretary)

Presiding Officer and Secretary of the meeting of the Democratic Party
of 26th C.D. Nominating Committee DO HEREBY CERTIFY THAT: at a meeting of the
(Political Subdivision)

ERIE, Genesee, Livingston, Monroe Counties
Niagara Orleans, Wyoming Committee of the Democratic Party
(Political Subdivision)

held on the 19 day of March, 2011, a quorum being present, said committee, by

majority vote of the members present, did consent and authorize the nomination/designation of

Kathy Courtney Huchel residing at 4521 Copperfield Dr
(Name of Candidate) (Place of Residence)

Hamburg, NY 14075 for the office of NY 26th Congressional District as

a candidate of the Democratic Party for public office indicated, at the

Special Election to be held on May 29th 2011
(Special/Primary/General) (Date of Election)

Said nomination/designation is authorized pursuant to the provisions of Section 6-120 of the New York State Election Law.

IN WITNESS WHERE OF, we have set our hands this _____ day of _____, 2011.

Judith A. Hunter
Presiding Officer

Harold J. Bush
Secretary

On this 19th day of March, 2011 before me personally came

Judith Hunter and Harold Bush

to me known and known to me to be the persons described in and who executed the foregoing instrument and he/she duly acknowledged to me that he/she executed the same.

JANE M. DODDS
Notary Public in the State of New York
No. 4951960
LIVINGSTON COUNTY
Commission Expires June 5, 2011

Jane M. Dodds
Notary Public

(1/99)f:file/forms/author

(Sample prepared by the State Board of Elections)

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