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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 (McKinney 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://gomyd.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

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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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