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FEDERAL ELECTION COMMISSION
Washington, DC

AGENDA DOCUMENT NO. 24-38-A
AGENDA ITEM
For meeting of September 19, 2024

September 12, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson NFS for LJS
Acting General Counsel

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Associate General Counsel

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Assistant General Counsel

Scarlett Rufener SR
Attorney

SUBJECT: AO 2024-12 (McCutcheon) Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00pm (Eastern Time) on September 18, 2024.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to https://www.fec.gov/legal-resources/advisory-opinions-process/.

Attachment

ADVISORY OPINION 2024-12

Dan Backer, Esq.
Chalmers, Adams, Backer & Kaufman, LLC **DRAFT A**
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Alexandria, VA 22314

Dear Mr. Backer:

We are responding to the advisory opinion request you submitted on behalf of Mr. Shaun McCutcheon regarding the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the "Act"), and Commission regulations to whether a separate contribution limit applies to each individual round of vote tallying in Maine's 2024 ranked-choice voting system. The Commission concludes that it does not. Rather, a single contribution limit applies because the entire ranked-choice voting process, including all necessary rounds of vote tallying, constitutes a single general election under the Act.

Background

The facts presented in this advisory opinion are based on your letter received on July 23, 2024, and publicly available information.

Maine will use ranked-choice voting ("RCV") for its 2024 U.S. Senate election.[1] Voters will cast ballots on which they may "rank candidates in order of preference, [and then] tabulation proceeds in sequential rounds in which last-place candidates are defeated and the candidate with the most votes in the final round is elected."[2]

[1] Advisory Opinion Request ("AOR") at 003; Maine Bureau of Corporations, Elections & Commissions, *Upcoming Elections*, *Ranked-Choice Voting*, https://www.maine.gov/sos/cec/elec/upcoming/index.html (last visited Aug. 22, 2024).

[2] Me. Rev. Stat. Ann. tit. 21-A, § 1(35-A); s*ee also* AOR003.

After the polls close on Election Day, officials tally the votes and record the number of first-choice votes for each candidate.[3] If no candidate receives more than 50% of the first-choice votes, then the RCV count is conducted under the supervision of the Secretary of State in successive rounds.[4] In each round, "the number of votes for each continuing candidate must be counted."[5] A "continuing candidate" is any "candidate who has not been defeated."[6] Each ballot only counts as "one vote for its highest-ranked continuing candidate for that round."[7]

At the end of each round, if more than two candidates remain, the last-place candidate is defeated, and the vote for the next-highest-ranked continuing candidate on the defeated candidate's ballots is then counted in the next round."[8] If candidates tie for last place, then the candidate who must withdraw is determined randomly.[9] In the final round, when only two continuing candidates remain, "the candidate with the most votes . . . is elected."[10]

Four candidates have qualified to appear on the ballot in Maine's 2024 general election for U.S. Senate,[11] which means there will be a maximum of three rounds of vote tallying. The

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[3] AOR001-2; Code Me. R. tit. 29-250 Ch. 535, § 4(1)-(2)(A); *see also* Me. Rev. Stat. Ann. tit. 21-A, § 1(27-C(B)-(D)).

[4] AOR001-2; Code Me. R. tit. 29-250 Ch. 535, § 4(1).

[5] AOR001-2; Code Me. R. tit. 29-250 Ch. 535, § 4(2)(A).

[6] AOR001-2; Code Me. R. tit. 29-250 Ch. 535, § 2(2).

[7] AOR001-2; Code Me. R. tit. 29-250 Ch. 535, § 4(2)(A).

[8] AOR001-2; Code Me. R. tit. 29-250 Ch. 535, § 4(2)(A).

[9] AOR001-2; Code Me. R. tit. 29-250 Ch. 535, § 4(2)(B)(6).

[10] Me. Rev. Stat. Ann. tit. 21-A, § 1(35-A); Code Me. R. tit. 29-250 Ch. 535, § 4(2)(A).

[11] AOR003; Maine Bureau of Corporations, Elections & Commissions, *Upcoming Elections*, *2024 General Candidate List*, at 1, https://www.maine.gov/sos/cec/elec/upcoming/2024/excel/2024%20General%20Candidate%20list%20081924.xlsx, (last visited Aug. 22, 2024).

Requestor wishes to make contributions totaling $9,900 to Ms. Demi Kouzounas, the Republican nominee.[12] The request contends that the Commission should consider each of the three potential rounds of vote tallying in the RCV process to be separate elections, and thus subject to separate contribution limits.[13] Requestor's $9,900 contribution would be divided into three parts: $3,300 for the first round of the RCV process, which the request asserts is a general election per 52 U.S.C. § 30101(1)(A) and 11 C.F.R. § 100.2(d)(2); a second $3,300 for a potential second round of the RCV process should Ms. Kouzounas qualify; and a final $3,300 for a potential third and final round of the RCV process should Ms. Kouzounas qualify.[14] The request asserts that the second and third rounds would be runoff elections under 52 U.S.C. § 30101(1)(A) and 11 C.F.R. § 100.2(d)(2).[15]

Under the requestor's proposal, should Ms. Kouzounas accept the contributions, she would not be permitted to spend more than the initial $3,300 in connection with the first round of the RCV process (what the request asserts is the general election); the remaining funds would be held apart as described in the request.[16] If there are no second or third rounds of vote tallying — that is a winning candidate is chosen through the first round — or Ms. Kouzounas is not a candidate in any such rounds, she would be required to refund the additional $6,600 to Mr. McCutcheon.[17] Likewise, should Ms. Kouzounas qualify for a potential second round but not a

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12 AOR004-5.

13 *Id.*

14 *Id.*

15 AOR003, 9.

16 AOR004-5.

17 *Id.*

potential third round of the RCV process, she would be required to refund the $3,300 designated for the third round to Mr. McCutcheon.[18]

Question Presented

> *May Mr. McCutcheon make a $9,900 contribution to Ms. Kouzounas subject to the above-described terms and conditions? In this context, does each round of voting, tallying, and vote reallocation in Maine's ranked-choice voting system for U.S. Senate qualify as a separate "election" under the FECA subject to its own independent contribution limit?*

Legal Analysis

No, the individual rounds of vote tallying in Maine's ranked-choice voting system do not qualify as separate elections under the Act. Rather, the entire ranked-choice voting process, including all necessary rounds of vote tallying, for Maine's 2024 U.S. Senate general election constitutes a single election, currently subject to a $3,300 contribution limit per individual.

According to the Act and Commission regulations, an election — whether general, primary, runoff, or special — is "the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office."[19] Additionally, "general election" is defined as an election "held in even numbered years on the Tuesday following the first Monday in November."[20] And a "runoff election," in relevant part, is defined as the election "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."[21]

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[18] *Id.*

[19] 11 C.F.R. § 100.2(a); *see also* 52 U.S.C. § 30101(2).

[20] 11 C.F.R. § 100.2(b)(1).

[21] 11 C.F.R. § 100.2(d)(2).

In adopting the definitions of elections, the Commission further explained that, "[g]enerally, each candidate will participate in two elections: The primary . . . and the general election."[22] Even when the primary process consists of multiple parts — for example a convention or caucuses and a primary — the Commission normally counts the entire process as a single election for the purposes of contribution limits."[23]

The Act defines a contribution to include any gift, subscription, loan, advance, money or anything of value made by any person "*for the purpose of influencing* any election for Federal office."[24] Under the Act, no person shall make contributions to any candidate, his or her authorized committee, or their agents, "with respect to any election for Federal office" that in the aggregate exceed $3,300.[25]

Contribution limits "apply separately with respect to each election as defined in 11 CFR 100.2."[26] A candidate participating in multiple distinct elections, therefore, is eligible for separate contribution limits.[27] Here, however, only a single election will be held. Although

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[22] Explanation and Justifications of the Disclosure Regulation, Parts 100-105 and 109-111, House Document No. 94-293, at 28 (December 4, 1975) (https://www.fec.gov/resources/cms-content/documents/94-293_1.pdf#page=3).

[23] *Id.* (The Commission adopted this approach "cognizant of the fact that in some states, a candidate may have to run in the primary if he or she does not receive a certain percentage of the votes in a convention. The candidate must judge how much to spend on the convention and how much to hold back for a possible primary; the two events still constitute one election."). *See also* 11 C.F.R. § 110.1(j) (treating all elections for President held in a calendar year — except for the general — as a single election). *Cf.* Advisory Opinion 2004-20 (Farrell) (allowing separate contribution limits where a convention or a caucus has any potential to nominate a candidate, and a candidate has any potential to secure the nomination at such an event, so that the candidate can raise the necessary funds).

[24] *E.g.*, 52 U.S.C. § 30101(8)(A) (emphasis added).

[25] 11 C.F.R. § 110.1(b)(1); Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 89 Fed. Reg. 5534, 5536 (Jan. 29, 2024).

[26] 11 C.F.R. § 110.1(j)(1).

[27] *See* Advisory Opinion 2022-08 (NRCC).

Maine's RCV system will tabulate votes over the course of several rounds, the election will be held on a single date: Tuesday, November 5, 2024. This election, under the plain language of Commission regulations, is a general election.[28] The request does not indicate, and the Commission is not aware of, any date after November 5 prescribed by Maine law on which voters will be able to cast votes for U.S. Senate candidates in Maine's 2024 election.[29] Instead, the request argues that the separate rounds of counting votes, all of which will be cast in the general election of November 5, 2024, constitute separate distinct runoff elections. That argument is unavailing.

A 2011 opinion of the U.S. Court of Appeals for the Ninth Circuit is consistent with this conclusion.[30] In upholding the constitutionality of San Francisco's use of RCV in municipal elections, the Court noted that in an RCV election "voters must submit their preferences before polls close, and … they are not provided an opportunity to revise their choices."[31] Once polls close, "[t]he series of calculations required by the algorithm to produce the winning candidate are simply steps of a single tabulation, not separate rounds of voting."[32]

Maine law further supports the determination that the entire RCV process is a single election. It defines ranked-choice voting as "the method of casting and tabulating votes in which voters rank candidates in order of preference, tabulation proceeds in sequential rounds in which

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28 11 C.F.R. § 100.2(b)(1) ("An election held in even numbered years on the Tuesday following the first Monday in November is a general election.").

29 *Cf.* 11 C.F.R. § 100.2(d) (a "runoff election" is an election "held after a general election").

30 *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011).

31 *Id.* at 1105.

32 *Id.* at 1107.

last-place candidates are defeated and *the candidate with the most votes in the final round is elected*."[33] The italicized language is key — a candidate is elected by receiving the most votes in the final round. Rounds of vote tallying prior to the final round therefore cannot result in the selection of a candidate and cannot be considered separate elections.

Maine's campaign finance rules for its state-level primary elections also suggest the state intended for its RCV elections for federal office to be treated as single elections.[34] Maine currently only allows for a single contribution limit of $1,950 for gubernatorial, state legislative, and county-level candidates running in primary elections despite the fact that these elections may be conducted via RCV.[35] Maine does not provide for additional contribution limits for individual rounds of ranked-choice vote tallying in these state-level elections.

The request raises the example of traditional runoff elections held in certain states, comparing the general election where no candidate secures 50% or more of the votes to the first round of vote tallying in Maine's RCV election.[36] The request asserts that the first round of RCV tabulation should be treated as a general election under the Act, and any subsequent rounds of RCV vote tallying should be treated as runoff elections are treated in these states.[37] Each

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[33] Me. Rev. Stat. Ann. tit. 21-A, § 1(35-A) (emphasis added).

[34] Maine does not use ranked-choice voting for state-level general elections; only for the following elections: primary elections for the offices of United States Senator, United States Representative to Congress, Governor, State Senator and State Representative; general and special elections for the offices of United States Senator and United States Representative to Congress; general elections for presidential electors; and primary elections for the office of President of the United States. Me. Rev. Stat. Ann. tit. 21-A, § 1(27-C(A)-(E)).

[35] Maine Commission on Governmental Ethics and Election Practices, *Contributing Information and Rules*, https://www.maine.gov/ethics/political-activity/contributing-information (last visited Aug. 22, 2024).

[36] AOR006.

[37] AOR001.

round of vote tallying would, according to the request, receive its own contribution limit.[38] However, the request fails to acknowledge that fact that when such a runoff election occurs, candidates have a second, separate opportunity to campaign before voters cast another ballot, thus demanding additional resources for campaigning.[39] In contrast, Maine's RCV process by its explicit terms results in the election of a candidate, and does not allow for any additional periods of campaigning and voting.[40]

Finally, the request cites Advisory Opinion 2006-06 (Busby) for support for separate contribution limits, but fails to acknowledge that *Busby* concerned two separate elections for two different terms of office where voters happened to be casting ballots on the same day.[41] In Advisory Opinion 2022-08 (NRCC), the Commission also allowed separate contribution limits where court orders "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 more than three months away held under new rules and, potentially, against new opposing candidates."[42] Neither of these situations are analogous here. The same set of electoral boundaries, rules, and candidates persist throughout the RCV process for Maine's 2024 U.S.

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38 *Id.*

39 *See* Advisory Opinion 2004-20 (Farrell) at 5 ("Where a convention or a caucus has any potential to nominate a candidate, and a candidate has any potential to secure the nomination at such an event, separate contribution limits are needed to supply the necessary resources for the candidates involved.").

40 Me. Rev. Stat. Ann. tit. 21-A, § 1(35-A).

41 AOR006-7; *see also* Advisory Opinion 2006-06 (Busby) (for a candidate participating in a special general election, all expenditures from personal funds that she or her opponent(s) in the special general election made or make between the end of the last general election and the date of the special general election must be aggregated as expenditures for the special general election for Millionaires' Amendment purposes; the application of the Millionaires' Amendment provisions between the date of the special general election and a potential primary election vary depending on whether there are two elections or just one).

42 *See* Advisory Opinion 2022-08 (NRCC) at 5.

Senate election, where voters are casting ballots in a general election on November 5, 2024 for a single term of office.[43]

Conclusion

The Commission concludes that the individual rounds of vote tallying in Maine's ranked-choice voting system do not qualify as separate elections under the Act and Commission regulations. Rather, the Commission determines that the entire ranked-choice voting process, including all necessary rounds of vote tallying, for Maine's 2024 U.S. Senate general election constitutes a single election.

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.[44] The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity that is indistinguishable in all its material aspects

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[43] The request argues that each round of vote tabulation is a distinct election because "the candidates participating in [the] second and each subsequent round of tallying and vote reallocation are necessarily different than in the initial round." AOR009. However, candidates who are "eliminated" in rounds of vote tabulation prior to the final round in Maine's RCV process are still participants in the same overall election given that all candidates have the same opportunity to receive votes on election day and participate in the overall process. The request is also incorrect to suggest that "[t]he identities of the voters who participate in later rounds will . . . typically differ, since some ballots are likely to become "exhausted" and therefore not counted in second and subsequent rounds." *Id.* The Ninth Circuit addressed a similar argument in *Dudum v. Arntz,* 640 F.3d at 1109-11, where the appellant argued that "voters whose ballots are exhausted do not have their ballots counted in further stages of the tabulation . . . meaning that exhausted ballots are discarded, and so not counted, in determining the election's ultimate outcome. *Id.* at 1109 (internal quotations omitted). The court disagreed, saying that "[e]xhausted ballots are not disregarded in tabulating election results, and the result of not counting them is identical to counting them while explicitly recognizing that the system often produces a winner who attains a plurality, not a majority, of the total votes cast." *Id.* at 1111 (internal quotations omitted).

[44] *See* 52 U.S.C. § 30108.

from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion.[45] Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

Sean J. Cooksey,
Chairman

[45] *See id.* § 30108(c)(1)(B).