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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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November 20, 2013

AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 11-21-13

FROM: Lisa J. Stevenson
Deputy General Counsel

LJS

SUBMITTED LATE

Adav Noti *AN*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Cheryl Hemsley *CAFH by RMK*
Attorney

SUBJECT: Draft Interpretive Rule Regarding Date of Political Party Nominations of
Candidates for Special Primary Elections in New York

Attached is a draft Notice of Interpretive Rule Regarding Date of Political Party
Nominations of Candidates for Special Primary Elections in New York. We request that
this draft be placed on the agenda for November 21, 2013.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **[Notice 2013-XX]**

3 **Date of Political Party Nominations of Candidates for Special Primary Elections in**
4 **New York**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Notice of interpretive rule.

7 **SUMMARY:** The Federal Election Commission is clarifying its interpretation of its
8 rules for determining the date of a special primary election as those rules apply to
9 nominations conducted under New York statutes that provide for a candidate to be
10 nominated for a special election by a vote of a state or county party committee.

11 **DATES:** [Insert date of publication in FEDERAL REGISTER]

12 **FOR FURTHER**
13 **INFORMATION**

14 **CONTACT:** Robert M. Knop, Assistant General Counsel, or Cheryl A.F. Hemsley,
15 Attorney, 999 E Street NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

16 **SUPPLEMENTARY**
17 **INFORMATION:**

18
19 This Notice clarifies that, for purposes of the Federal Election Campaign Act of
20 1971, as amended (the “Act”), and Commission regulations, the date of a special primary
21 election under New York law is the date on which the political party committee votes to
22 nominate the party’s candidate for the special general election, not the date on which the
23 certification of that vote is filed. Because the Act and Commission regulations provide
24 for separate contribution limits for each “election,”¹ the Commission issues this
25 clarification to assist candidates and their authorized committees in distinguishing

¹ See 2 U.S.C. 441a(a)(1)(A); 11 CFR 110.1(b)(1), 110.2(b)(1).

1 contributions for special primary elections in New York from contributions for special
2 general elections.

3 The Act provides that an “election” includes “a general, special, primary, or
4 runoff election . . . [or] a convention or caucus of a political party which has authority to
5 nominate a candidate.” 2 U.S.C. 431(1)(A), (B). Commission regulations define a
6 “primary election” as an “election which is held prior to a general election, as a direct
7 result of which candidates are nominated, in accordance with applicable State law, for
8 election to Federal office in a subsequent election.” 11 CFR 100.2(c)(1).² A “special
9 election” is an election to fill a vacancy in a Federal office and may be a primary,
10 general, or runoff election. 11 CFR 100.2(f). Under the Act and Commission regulations,
11 therefore, a special primary election is an election, convention, or caucus with the
12 authority to nominate candidates in accordance with applicable state law for a subsequent
13 general election that is held to fill a vacancy in a Federal office.

14 New York election law generally provides that “[p]arty nominations for an office
15 to be filled at a special election shall be made in the manner prescribed by the rules of the
16 party.” N.Y. Elec. Law 6-114. New York Democratic and Republican State party
17 committee rules provide that the county committees within a vacant congressional district
18 nominate candidates for a special election to the U.S. House of Representatives, and that
19 the state committees nominate candidates for a special election to the U.S. Senate. *See*
20 Party Rules New York State Democratic Committee, Art. VI, Sec. 2 (2012); Rules of the
21 New York Republican State Committee, Art. VII, Rule 1 (June 9, 2011). Similarly, when

² Because the date of a special primary election for an independent or minor-party candidate is governed by different regulatory criteria, *see* 11 CFR 100.2(c)(4), this Notice encompasses only nominations by a major political party, which is a party whose candidate for President received at least 25 percent of the popular vote in the preceding presidential election. 26 USC 9002(6).

1 a vacancy in an elected office occurs too late for candidates to participate in a regularly
2 scheduled primary, New York election law requires a party to nominate its candidate by a
3 vote of the appropriate state or county party committee. See N.Y. Elec. Law 6-116.
4 After a party committee votes to nominate a candidate, a “certificate of nomination shall
5 be filed” with the appropriate election board certifying the committee’s vote. Id.; see also
6 id. 6-144, 6-156. Failure to file this certification is “a fatal defect” in the nomination. Id.
7 1-106.

8 Sections 6-114 and 6-116 vest special election nominating authority in the party
9 committees, either directly or by operation of state party rules. Under these provisions,
10 therefore, candidates are placed on the general election ballot “in accordance with
11 applicable state law” as “a direct result” of the relevant party committee vote. See 11
12 CFR 100.2(c)(1). Accordingly, the party committee vote is a “primary election” within
13 the meaning of the Act and Commission regulations. See Advisory Opinion 2004-20
14 (Farrell for Congress) (determining that party convention constituted primary election
15 where convention’s endorsement of only one candidate caused candidate to be placed
16 directly on general election ballot); Advisory Opinion 1992-25 (Owens for Senate
17 Committee) (concluding that party convention constituted primary election where
18 candidate would be placed directly on general election ballot if candidate received at least
19 70% of votes at convention). The subsequent filing of a certification formalizes the
20 nomination, but such a filing is not the primary election itself. See FEC v. Citizens for
21 Senator Wofford, No. 1:CV-94-2057, slip op. at 8-10 (M.D. Pa. Sept. 27, 1995) (holding
22 that state party convention constituted “primary election” under Act and Commission

1 regulations even though state law required party to file subsequent certificate of
2 nomination with state).

3 For the foregoing reasons, the Commission issues this interpretive rule to clarify
4 that the date of a special primary election held pursuant to N.Y. Elec. Law 6-114 or 6-116
5 is the date of the party committee's nomination vote. To the extent that other states'
6 nominating procedures for special elections are materially indistinguishable from those of
7 New York, the Commission anticipates that this interpretation would apply to such other
8 states as well.

9 This interpretive rule clarifies the Commission's interpretation of existing
10 statutory and regulatory provisions and therefore does not constitute an agency action
11 subject to notice and comment requirements or a delayed effective date under the
12 Administrative Procedure Act. See 5 U.S.C. 553. The provisions of the Regulatory
13 Flexibility Act, which apply when notice and comment are required by the
14 Administrative Procedure Act or another statute, do not apply. See 5 U.S.C. 603(a). The
15 Commission is not required to submit this interpretive rule for congressional review. See
16 2 U.S.C. 438(d)(1), (4).

17 On behalf of the Commission,

18
19 _____
20 Ellen L. Weintraub
21 Chair
22 Federal Election Commission
23

24 DATED: _____
25 BILLING CODE: 6715-01-P