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RECEIVED

By Office of the Commission Secretary at 5:32 pm, Aug 06, 2024

July 23, 2024

Hon. Lisa Stevenson
Office of the General Counsel
Federal Election Commission
1050 First Street, NE
Washington, D.C. 20463

RECEIVED

By Office of General Counsel at 1:14 pm, Jul 23, 2024

RE: Advisory Opinion Request for Shaun McCutcheon Regarding
Applicability of Contribution Limits to U.S. Senate Elections
Conducted with Ranked-Choice or Instant-Runoff Voting

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, American Patriot Shaun McCutcheon requests an advisory opinion concerning the applicability of federal contribution limits to U.S. Senate elections conducted through ranked-choice or instant-runoff voting. The Commission should affirm, for purposes of the Federal Election Campaign Act’s (“FECA”) contribution limits, the first round of such an election constitutes the general election, and each subsequent round, if any, is a distinct runoff election and entitled to its own contribution limit.

Maine’s 2024 general election for U.S. Senate involves ranked choice voting among the four candidates who have qualified to participate in it. Mr. McCutcheon wishes to confirm he may contribute \$9,900 to the Republican nominee in that race. This figure is comprised of the initial \$3,300, the maximum permissible contribution for the general election, as well as two additional contributions of \$3,300 each designated for up to two subsequent runoff elections (with those additional funds to be held separately by the candidate unless and until such runoffs occur, and refunded to Mr. McCutcheon in the event the candidate does not qualify for either or both of them).

BACKGROUND

Ranked-Choice Elections in Maine

The State of Maine conducts U.S. Senate (and certain other) elections through a process called “ranked choice voting” (“RCV”) when three or more candidates—including write-in candidates—have qualified to run for a particular office. *See* Me. Rev. Stat. tit. 21-A, § 1(27-C(B)-

(D)).¹ In RCV elections, the ballot must “allow a voter to rank candidates for an office in order of preference.” *Id.*, tit. 21-A, § 601(2)(J). A voter may “rank as many candidates as they wish.” Code Me. Regs. § 29-250-535, sec. 3(2). Below is an image of an RCV ballot for a U.S. House race in Maine:

Rep. to Congress District 2	1st Choice	2nd Choice	3rd Choice	4th Choice	5th Choice
Bond, Tiffany L. Portland Independent	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Golden, Jared F. Lewiston Democratic	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Hoar, William R.S. Southwest Harbor Independent	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Poiquin, Bruce Oakland Republican	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Write-in	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

After the polls close on Election Day, election officials tally the votes in each race. Code Me. Regs. § 29-250-535, sec. 4(1). In elections conducted through ranked-choice voting, municipal election officials complete a form specifying the number of first-choice votes each candidate received. *Id.*; *see also* Me. Rev. Stat. tit. 21-A, § 1(27-C(B)-(D)). “If no candidate receives more than 50% of the first-choice votes based on the election returns . . . the RCV count must be conducted under the supervision of the Secretary of State in successive rounds.” Code Me. Regs. § 29-250-535, sec. 4(1).

In each round, “the number of votes for each continuing candidate must be counted.” *Id.* § 29-250-535, sec. 4(2)(A). A “continuing candidate” is any “candidate who has not been defeated” in the election. *Id.* § 29-250-535, sec. 2(2). Each ballot counts as “one vote for its highest-ranked continuing candidate for that round.” *Id.* § 29-250-535, sec. 4(2)(A).

“At the end of each round, if more than 2 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.” *Id.* § 29-250-535, sec. 4(2)(A). If candidates tie for last place, then the candidate who must withdraw is determined randomly. *Id.* § 29-250-535, sec. 4(2)(B)(6). “In the final round, when only 2 continuing candidates remain, the candidate with the most votes in that round is the winning candidate.” *Id.* § 29-250-535, sec. 4(2)(A). Thus, if X candidates run in a particular election, and none of the candidates win in the first round of voting and tallying, then state law requires (X-1) rounds of ballot tallying and vote reallocation occur.

¹ The Maine legislature has amended the law governing ranked-choice voting. Those changes take effect August 9, 2024, in time for the 2024 general election. This discussion focuses on the amended versions of the pertinent statutes, though the amendments do not appear to affect any of the relevant analysis.

RCV played a dispositive role in determining Maine’s U.S. Representative from House District #2 in 2018. Four people ran for office that year. At the end of the first round, Republican candidate Bruce Poliquin was leading with 134,184 votes, while his Democratic opponent Jared Golden had only 132,013 votes. After the two losing candidates were eliminated—Maine law at the time allowed for multiple simultaneous eliminations—Golden prevailed in the second round with 142,440 votes, beating Poliquin who had only 138,391 votes. *See* Maine Sec’y of State, *Tabulations for Elections Held in 2018*, <https://www.maine.gov/sos/cec/elec/results/results18.html>. Last election cycle, three candidates ran for Maine’s U.S. House District #2. Yet again, two rounds of voting, tallying, and vote reallocation were necessary to resolve the race.

Four candidates have qualified to appear on the ballot in Maine’s November 2024 general election for U.S. Senate: (1) incumbent independent Senator Angus King, (2) Republican nominee Demi Kouzounas, (3) Democratic nominee David Costello, and (4) independent Jason Cherry. *See* United States Senate Election in Maine, 2024, [BALLOTPEDIA, https://ballotpedia.org/United_States_Senate_election_in_Maine,_2024](https://ballotpedia.org/United_States_Senate_election_in_Maine,_2024); *see also* Evan Popp, *Angus King Challenged to Series of Debates Ahead of November Election*, Me. Morning Star (June 20, 2024, 3:50 P.M.), <https://mainemorningstar.com/briefs/angus-king-challenged-to-series-of-debates-ahead-of-november-election/>.

Federal Contribution Limits

The FECA imposes contribution limits for federal elections. It provides, “[N]o person shall make contributions to any candidate . . . **with respect to any election** for Federal office which, in the aggregate, exceed [\$3,300].” 52 U.S.C. § 30116(a)(1)(A) (emphasis added); *accord* 11 C.F.R. § 110.01(b)(1); FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 88 Fed. Reg. 7,088, 7,090, Notice 2023-03 (Feb. 2, 2023) (adjusting contribution limit for inflation). The FECA defines the term “election” to include “a general, special, primary, **or runoff election**.” 52 U.S.C. § 30101(1)(A) (emphasis added). FEC regulations go on to define “runoff election,” in relevant part, as “[t]he election held after a general election and prescribed by applicable State law as the means for deciding which candidate should be certified as the officeholder elect.” 11 C.F.R. § 100.2(d)(2).

Each election is subject to an independent contribution limit. For purposes of these contribution limits, a “runoff election” is considered to be “a separate election” from the general election. *Sala Burton*, A.O. 1983-16, at 3 (June 10, 1983). Accordingly, during a single election cycle, a contributor may give a candidate \$3,300 for a general election and an additional \$3,300 for each runoff election in which that candidate participates.

Moreover, a person may make contributions in connection with a possible runoff before the general election has occurred. The FEC has recognized “contributions may be made and received with respect to a possible runoff election before the actual need for that election is determined under State law.” *Zell Miller for U.S. Senate Committee*, A.O. 1980-68, at 2 (July 11, 1980); *see also Friends of Bob Krueger Committee*, A.O. 1983-39, at 2 (Dec. 5, 1983). This situation is “analogous” to “accepting general election contributions before the primary election,” which FEC regulations expressly allow. *Zell Miller for U.S. Senate Committee*, A.O. 1980-68, at 2 (July 11, 1980) (citing 11 C.F.R. § 102.9(e)). Thus, contributions for both a general election and runoff elections may be provided in a single check or other transaction, so long as an appropriate written designation specifies the particular elections to which various portions of that contribution should be attributed. *See* 11 C.F.R. § 110.1(2)(i).

Of course, if a candidate in the general election does not qualify for a runoff, he would be ineligible to receive contributions in connection with that runoff. *See National Republican Senatorial Committee*, A.O. 1978-25 (Part A), at 2 (May 12, 1978) (concluding a person may not make contributions to a candidate in connection with “a runoff election which, as to that candidate, is obviously immaterial”); *see, e.g., Ileana Ros-Lehtinen*, A.O. 1989-15, at 3 (Aug. 11, 1989) (concluding a candidate not participating in a runoff election cannot accept funds in connection with it). Accordingly, any funds a candidate received prior to the general election in connection with a runoff for which that candidate does not qualify would have to be returned to the contributors. *Zell Miller for U.S. Senate Committee*, A.O. 1980-68, at 2 (July 11, 1980); *see also Mark Green*, A.O. 1986-17, at 3 (June 27, 1986) (reiterating contributions made for a runoff “may be accepted but become refundable to the contributors if the candidate does not participate in that election”); *Friends of Bob Krueger Committee*, A.O. 1983-39, at 2 (Dec. 5, 1983).

QUESTION PRESENTED

Mr. McCutcheon wishes to immediately make a single contribution totaling \$9,900 to Republican nominee for U.S. Senate Demi Kouzounas,² including:

² Mr. McCutcheon has transferred \$10,000 to the online VIP Gatekeeper offered by PAC Management Services LLC. He has provided irrevocable instructions to the platform to transfer \$3,300 to Ms. Kouzounas in connection with Maine’s 2024 general election for U.S. Senate, as well as an additional \$3,300 to her, designated for each of two runoff elections, in the event the Commission issued an advisory opinion confirming the permissibility of such contributions. VIP Gatekeeper retains the remaining \$100 as its standard, commercially reasonable fee for facilitating these contributions. In the event the Commission declines to recognize each round of voting in Maine’s RCV system as a separate election under the FECA, the platform will provide \$3,300 to Ms. Kouzounas in connection with the general election, and hold the additional \$6,600 in Mr. McCutcheon’s account for distribution to other recipients at his direction. *See* PAC Management Services (“PACMS”), A.O. 2021-07, at 7-8 (July 29, 2021); *see also Skimmerhat*, A.O. 2012-22, at 4-6 (Aug. 2, 2012). Mr. McCutcheon’s use

- \$3,300 in connection with Maine’s 2024 general election for U.S. Senate, occurring as Round 1 of the RCV process,
- an additional \$3,300 in connection with a potential runoff election which may occur as Round 2 of the RCV process, and
- an additional \$3,300 in connection with another potential runoff election which may occur as Round 3 of the RCV process.³

Should Ms. Kouzounas accept this contribution, she would not be permitted to spend more than the initial \$3,300 in connection with the general election; the remaining funds would have to be held apart using a reasonable accounting mechanism.

In the event no runoff elections occur—that is, a winning candidate is chosen through the general election occurring as Round 1—or Ms. Kouzounas is not a candidate in any such runoff, she would be required to refund the additional \$6,600 to Mr. McCutcheon. Likewise, should Ms. Kouzounas not qualify for a second runoff, conducted as Round 3 of the RCV process, she would be required to refund the \$3,300 designated for that election to Mr. McCutcheon.

May Mr. McCutcheon make a \$9,900 contribution to Ms. Kouzounas subject to these 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?

ANALYSIS

Maine’s ranked-choice voting system is, in effect, an instant-runoff system. See MIT Election Data + Science Lab, *Instant Runoff Voting*, <https://electionlab.mit.edu/research/instant-runoff-voting>. It involves a general election potentially followed by, depending on the number of

of VIP Gatekeeper is irrelevant to the proper treatment of the various rounds of voting, tallying, and vote reallocation in Maine’s RCV system for purposes of the FECA.

³ Mr. McCutcheon would have preferred to make contributions of \$1,776 for each of the elections conducted as part of Maine’s RCV system to symbolically emphasize the importance and values of our nation’s Founding Era. He must instead make a substantially larger contribution of \$3,300 per election due to the rampant inflation that has occurred as a direct result of President Joe Biden’s failed economy policies, reckless spending, and irresponsibly large deficits.

candidates who run in the general election, one or more runoff elections, conducted in close temporal proximity to each other.

The proper treatment and classification of the distinct rounds of voting, tallying, and vote reallocation within Maine's ranked-choice voting system for purposes of the FECA's contribution limits is a question of federal statutory interpretation, albeit one informed by state law. *See, e.g., Sala Burton*, A.O. 1983-16, at 2 (June 10, 1983) (concluding an election which state law called a "special primary" instead qualified as a "general election" under the FECA); *Democratic Senatorial Campaign Committee*, A.O. 1993-2, at 2 (Mar. 5, 1993). If Maine, like Georgia and/or Louisiana, conducted its runoff election(s) on subsequent date(s), there would be no question the runoff(s) qualify as separate elections, subject to independent contribution limits, for purposes of the FECA. *Zell Miller for U.S. Senate Committee*, A.O. 1980-68, at 2 (July 11, 1980); *see also Tauzin*, A.O. 2000-29, at 3 (Oct. 20, 2000) (concluding any congressional candidate who qualifies for a runoff "may accept and retain contributions designated, in writing, by the donors as made with respect to the runoff election"); *Friends of Bob Krueger Committee*, A.O. 1983-39, at 2 (Dec. 5, 1983).

Neither the FECA's definition of "election," nor any other provision of the statute requires a runoff election to be held on a different date than a general election. *See* 52 U.S.C. § 30101(1)(A) (defining "election"); 11 C.F.R. § 100.2(a), (d)(2). Rather than requiring voters to return to the polls repeatedly on multiple occasions to cast physically separate ballots, Maine's system allows voters to cast their ballots for all subsequent potential runoff elections on the same piece of paper or electronic ballot as their first-choice general election vote. And rather than having votes tallied for the general election and runoffs on separate days, the general election and any subsequent runoff results are determined sequentially on the same day through a series of tallies and vote reallocations. Such efficiencies should not preclude the Commission from recognizing Maine's RCV system as a general election followed by one or more runoffs, each subject to separate contribution limits.

The Commission's advisory opinion in *Busby*, A.O. 2006-06 (Mar. 10, 2006), while not directly addressing this issue, is highly suggestive. In that matter, the Commission considered how the so-called Millionaire's Amendment (which has since been invalidated on other grounds by the Supreme Court, *see Davis v. FEC*, 554 U.S. 724 (2008)) applied in the context of simultaneous overlapping elections for the same seat in the U.S. House of Representatives. The possibility existed California would hold both a Special General Election Runoff (for the completion of the 2004-06 term) as well as a Primary Election (for the 2006-08 term) for the state's 50th Congressional District on the same date: June 6, 2006. *Busby*, A.O. 2006-06, at 7 (Mar. 10, 2006). The Commission observed most "of the candidates currently running in the Special General

Election are also running in the Primary Election for their respective political party’s nomination.”
Id. at 2.

As the Commission explained, the Millionaire’s Amendment (among other things) allowed candidates to “solicit, receive, and spend” contributions from individuals in excess of typically applicable base limits “if they are running against self-financed candidates who make expenditures from their personal funds that exceed certain amounts.” *Id.* at 2. The Amendment “applie[d] separately to each *election cycle*.” *Id.* at 3 (emphasis added). The Commission noted if the potential runoff occurred, then from mid-April through that date, candidates would be “technically running in two simultaneous election cycles”: one for the runoff and the other for the primary. *Id.* at 7. It declared any expenditures made during that period must be attributed to “*both* elections in which the candidate is participating. . . . count[ing] toward both elections.” *Id.* (emphasis added). Thus, a single \$400,000 expenditure would be considered a \$400,000 expenditure with regard to the primary, as well as a \$400,000 expenditure in connection with the runoff. *Id.*⁴

Busby suggests each round of voting, tallying, and vote reallocation in Maine’s U.S. 2024 Senate election should be deemed a separate election. **First**, *Busby* confirms federal elections may be deemed separate and distinct from each other under FECA even when—like the various rounds of Maine’s RCV process—they are for the same office, occur on the same day, and involve most of the same candidates. **Second**, *Busby* concluded the Millionaire’s Amendment required a candidate’s expenditures to be attributed to two different elections because the amendment was based on election cycles or campaigns. The Commission has consistently treated election campaigns/cycles under the FECA, however, differently from “elections” for purposes of contribution limits. *See, e.g., Democratic Senatorial Campaign Comm.*, A.O. 1993-2, at 2-3 (Mar. 5, 1993) (recognizing a general election and runoff election within the same election cycle are distinct “elections” subject to separate contribution limits, but political parties are nevertheless subject to a single combined expenditure limit with regard to both since they are stages within the same “general election campaign” and “election process”); *Sala Burton*, A.O. 1983-16, at 3 (June 10, 1983) (“[O]nly a single set of [party expenditure] limits are available in connection with both the June 21 election and the follow up August 16 election . . .”).

Third, while *Busby* concludes a candidate’s expenditures must be attributed to both the primary and the runoff, nothing in the advisory opinion suggests the same reasoning applies to contributions. Although the opinion discusses the impact of the Millionaire’s Amendment on

⁴ The Commission dropped a footnote stating its conclusion was “limited to the specific circumstances here, where no candidate running in the Special General Runoff will be running against the same opposing candidate in *both* the Special General Runoff and the Primary Election.” *Busby*, A.O. 2006-06, at 7 n.8 (Mar. 10, 2006). Although the Commission did not further explain this qualification, it appears to arise from concerns unique to the structure of Millionaire’s Amendment.

contribution limits, it never suggests candidates would be subject to a single contribution limit simply because the primary and runoff elections were going to occur on the same day, for the same office, with mostly the same candidates. Accordingly, *Busby* supports the imposition of separate contribution limits for each stage of Maine’s RCV system.

The Commission’s precedents confirm the initial round of voting and tallying in Maine’s RCV system should be deemed a “general election,” while each subsequent round of voting, tallying, and vote reallocation, if any, should be deemed a “runoff election.” The Commission has explained an electoral process constitutes a “general election” when it “must be entered by all candidates who wish to fill the vacancy” and that election “may, in fact, fill the vacancy without any subsequent election.” *Sala Burton*, A.O. 1983-16, at 3 (June 10, 1983); *see also* 11 C.F.R. § 100.2(b)(2). The initial round of voting tallying in Maine’s RCV process for filling its federal offices satisfies both of these requirements.

First, it is impossible for a person to win an RCV election unless they qualify as a candidate for, and participate as a candidate in, the first round of voting and tallying. *Second*, under Maine law, the first round of voting in an RCV process can be dispositive “without any subsequent election,” *Sala Burton*, A.O. 1983-16, at 3 (June 10, 1983), when either: (i) only two candidates qualify to run for that office, Code Me. Regs. § 29-250-535, sec. 1, or (ii) three or more candidates have qualified to run for that office, but one of them receives more than 50% of the first-choice votes, *id.* § 29-250-535, sec. 4(2)(A).

The instant case differs from *Jim Shannon for Senate Committee*, A.O. 1984-16, at 3 (May 11, 1984). There, the Commission concluded a state convention to endorse candidates for federal office did not constitute a separate “election” under the FECA because the convention “only has the authority to endorse, not to nominate, a candidate.” *Id.* Accordingly, the Commission declared the convention was merely “*a step in the primary election campaign*,” rather than an independent election subject to distinct contribution limits. *Id.* (emphasis added). Here, the initial round of the RCV process *cannot* be dismissed as merely “a step” in a general election, since it is legally possible for a candidate to actually win office as a result of the voting and tallying in that first round. Likewise, the fact subsequent rounds of voting, tallying, and vote reallocation may be necessary after the first round of Maine’s RCV process to determine the ultimate winner does not preclude that initial round from being deemed a “general election.” *See Sala Barton*, A.O. 1983-16, at 3 (June 10, 1983) (“[T]he fact that . . . a runoff may, in fact, be necessary to fill the [office] does not change the status of the first election as a general election since [state law] recognizes that the first election may fill the [office].”).

Likewise, each subsequent round of voting, tallying, and vote reallocation in Maine’s RCV process qualifies as a “runoff” election under the FECA. Maine law allows—and requires—such a runoff to occur only if no candidate prevails in the general election. Code Me. Regs. § 29-250-535, sec. 4(2)(A). The runoff is necessarily a distinct election from the initial round of voting in virtually every respect. For example, the candidates participating in second and each subsequent round of tallying and vote reallocation are necessarily different than in the initial round, because one or more of them will have been eliminated. *See id.* The identities of the voters who participate in later rounds will likewise typically differ, since some ballots are likely to become “exhausted” and therefore not counted in second and subsequent rounds. *Id.*; *see also id.* § 29-250-535, 4(2)(B)(5) (defining “exhausted ballot” as one in which a voter has not ranked any “continuing candidate”). And, of course, the tally of votes each candidate receives will necessarily differ between the initial general election round and any subsequent runoff rounds. In short, Maine’s RCV system is simply a cost-reducing alternative to traditional runoff systems where the general election and runoff are scheduled for different days. Accordingly, the FEC should apply its contribution limits to Maine’s RCV system for congressional races in the same manner it would to any other runoffs. *See, e.g., Tauzin, A.O. 2000-29, at 3 (Oct. 20, 2000).*

Four candidates have qualified for Maine’s 2024 U.S. Senate race. Accordingly, a maximum of three rounds of voting, tallying, and vote reallocation may occur. If the Commission properly deems the first round to be the “general election,” and each subsequent round to be a runoff election, then Mr. McCutcheon may contribute \$3,300 per election, or a total of \$9,900, to Republican nominee Demi Kouzounas. *Sala Burton, A.O. 1983-16, at 3 (June 10, 1983); see also 52 U.S.C. § 30116(a)(1)(A); accord 11 C.F.R. § 110.01(b)(1).* He may make this contribution before the general election occurs, even though it is not yet certain the runoff elections will occur, so long as he designates \$3,300 for the general election and \$3,300 for each of the two potential runoffs. *Zell Miller for U.S. Senate Committee, A.O. 1980-68, at 2 (July 11, 1980); see also Friends of Bob Krueger Committee, A.O. 1983-39, at 2 (Dec. 5, 1983).* Ms. Kouzounas must hold any funds designated for the runoffs apart from other funds, and refrain from spending them until she qualifies for them. Should she not qualify for either or both of the runoffs, she must refund the funds designated for any such election. *National Republican Senatorial Committee, A.O. 1978-25 (Part A), at 2 (May 12, 1978); Ileana Ros-Lehtinen, A.O. 1989-15, at 3 (Aug. 11, 1989).*

CONCLUSION

For these reasons, the Commission should issue an Advisory Opinion concluding Mr. McCutcheon may immediately contribute a total of \$9,900 to Republican Senate nominee Demi Kouzounas, including \$3,300 in connection with the general election, as well as an additional \$3,300 in connection with each subsequent possible round of the RCV process as “runoff



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elections” (subject to segregation of those funds by Ms. Kouzounas and refund if, for any reason, Ms. Kouzounas does not participate in a particular runoff). The FECA’s definition of “election,” 52 U.S.C. § 30101(1)(A), *see Sala Burton*, A.O. 1983-16, at 3 (June 10, 1983), does not empower the Commission to treat Maine’s RCV system differently from a traditional runoff-based system based solely on timing concerns, *see Busby*, A.O. 2006-06 (Mar. 10, 2006).

Respectfully submitted,

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