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Election Year Restrictions on Mass Mailings by Members of Congress: How H.R. 1614 / S. 936 / S. 1285 Would Change Current Law

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July 11, 2007

Abstract. Current law prohibits the franking of mass mailings by Senators fewer than 60 days, and by House Members fewer than 90 days, prior to any primary or general election in which the Member is a candidate. H.R. 1614, S. 936, and S. 1285 would amend Title 39, United States Code, by altering the prohibition for both Senators and House Members to the period starting 90 days prior to any primary and ending on the day of the general election for any federal election to which the Member is a candidate. The legislation would also prohibit the mailing of mass mailings for the same period by any congressional committee or subcommittee of which the chair or ranking member was a candidate for office.

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July 11, 2007

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Summary

Current law prohibits the franking of mass mailings by Senators fewer than 60 days, and by House Members fewer than 90 days, prior to any primary or general election in which the Member is a candidate. H.R. 1614, S. 936, and S. 1285 would amend Title 39, United States Code, by altering the prohibition for both Senators and House Members to the period starting 90 days prior to any primary and ending on the day of the general election for any federal election to which the Member is a candidate for reelection.

The legislation would also prohibit the mailing of mass mailings for the same period by any congressional committee or subcommittee of which the chair or ranking member was a candidate for reelection to any federal office.

These changes would increase the mass-mailing-prohibited period for all Senators and some House Members. Had the legislation been enacted prior to the 2006 election, affected Members would have seen increases ranging from one day to 215 days, depending on the primary date in the Members home state. **Table 1** of this report details these increases by state.

This report provides an overview of the proposed changes and an analysis of the effect of the legislation on the mass-mailing-prohibited period for each state's Members, and other issues related to the proposed changes.

H.R. 1614 and S. 936 have been referred to committee. S. 1285 was referred to committee, and on June 20 hearings were held on the bill by the Committee on Rules and Administration.

This report will be updated as events warrant.

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Legislative History

On March 20, 2007, Representative John Tierney introduced the Clean Money, Clean Elections Act of 2007 (H.R. 1614, 110th Congress).¹ Section 203 of the bill would amend the election year mass mailing restriction on Members in Title 39, United States Code, by extending the period during which mass mailings are prohibited. In addition, H.R. 1614 provides for election year mass mailing restrictions on congressional committees and subcommittees. The bill was referred to the Committees on House Administration, Energy and Commerce, Ways and Means, and Oversight and Government Reform. No further action has been taken.

Similar legislation, with identical language in regards to election year mass mailing restrictions, was introduced in the Senate (S. 936, the Fair Elections Now Act, 110th Congress) by Senator Richard Durbin on March 20, 2007. The bill was referred to the Committee on Finance. No further action has been taken. On May 3, 2007, Senator Durbin introduced similar legislation (S. 1285, 110th Congress, the Fair Elections Now Act), also with identical language in regards to election year mass mailing restrictions, which was referred to the Committee on Rules and Administration. The committee held hearings on S. 1285 on June 20, 2007. No further action has been taken.

During the 109th Congress, Representative Tierney introduced similar legislation, the Clean Money, Clean Elections Act (H.R. 3099). Had the legislation been enacted, Section 303 would have amended the election year mass mailing restrictions on Members by extending the period during which mass mailings were prohibited. H.R. 3099 did not contain provisions restricting committee mass mailings. The bill was referred to the House Committees on House Administration, Energy and Commerce, and Government Reform. No further action was taken.

Overview of Legislative Provisions

Amendment of Election Year Mass Mailing Restrictions

Current law and chamber rules provide that mass mailings² may not be franked by a Senator fewer than 60 days, or by a House Member fewer than 90 days, immediately before the date of any primary or general election (whether regular, special, or runoff) in which such Member is a candidate for any public office.³ Senate rules further state that no Senator may frank mass mailings in the 60 days prior to the general election, regardless of whether or not they are a candidate for election.⁴

¹ For an overview of the Clean Money, Clean Elections Act, see CRS Report RL33814, *Public Financing of Congressional Elections: Background and Analysis*, by R. Sam Garrett.

² A mass mailing is defined at 39 U.S.C. 3210(6)(e) as “any mailing of newsletters or other pieces of mail with substantially identical content (whether such mail is deposited singly or in bulk, or at the same time or different times), totaling more than 500 pieces” in one session of Congress. Direct responses, correspondence with government officials, and releases to media are exempt.

³ 39 U.S.C. 3210(6)(a).

⁴ *U.S. Senate Handbook*, Appendix I-D, p. I-116, available from Senate computers at <http://webster/rules/rules.cfm?page=handbook> and *Senate Ethics Manual*, p. 171, available at <http://ethics.senate.gov/downloads/pdffiles/manual.pdf>.

The House and Senate define “candidate” differently. As defined by the House Commission on Congressional Mailing Standards, a candidate is a “Member whose name appears anywhere on any official ballot to be used in such election,”⁵ without regard to whether or not the candidate is running unopposed.

Because state laws vary considerably in regard to ballot practices in primary elections, this definition of candidate may impact House Members differently, depending on which state they represent. In some states, candidates running unopposed are not placed on primary ballots, and therefore a House Member running in such a state would not be subject to the mass mailing prohibition. In other states, unopposed candidates do appear on primary ballots, in which case the mass mailing prohibition would apply to House Members running unopposed.

Senate rules define a candidate as “an individual who seeks nomination for election” if that individual has either received campaign contributions in excess of \$5,000 or made campaign expenditures in excess of \$5,000.⁶ All Senators are prohibited from franking mass mailings prior to the general election, regardless of whether or not they are candidates. In regard to primary elections, Senate rules exempt candidates running unopposed from the mass mailing restrictions.⁷ Uncontested candidacy is only established when the Committee on Rules and Administration receives written certification from the appropriate state official.

H.R. 1614, S. 936, and S. 1285 would amend election year mass mailing restrictions by altering the period of time during which Members are prohibited from franking any mass mailing and the statutory conditions under which the prohibition applies. If enacted, Members of both the House and Senate would be prohibited from mailing any mass mailing during the period starting 90 days prior to any primary election in which such Member is a candidate and ending on the day of the general election.

The new statutory prohibition would apply only to Members who were candidates for reelection to any federal office. However, Members would still be subject to further restrictions found in House and Senate rules.

Prohibition of Election Year Committee Mass Mailing

Current law does not prohibit congressional committees and subcommittees from sending mass mailings during the election year period in which individual Members are restricted from mailing any mass mailings. If enacted, H.R. 1614, S. 936, and S. 1285 would prohibit a congressional committee or subcommittee from mailing any mass mailing during the same period individual members are prohibited from mass mailings, if either the chair or ranking member of the committee or subcommittee were a candidate for reelection to any federal office.

⁵ U.S. Congress, Commission on Congressional Mailing Standards, *Regulation of the Use of the Congressional Frank By Members of the House of Representatives*, 105th Cong., 2nd sess. (Washington: GPO, 1998), p. 25.

⁶ U.S. Senate Handbook, Appendix M, *Franking Privileges for Members of Congress*, available at <http://webster.senate.gov/rules/handbook/1713.htm>, p. 11.

⁷ Senate Rule XL. See also *U.S. Senate Handbook*, Appendix I-K, and *Senate Ethics Manual*, p. 171.

Analysis

Increased Election Year Restricted Period

If enacted, the provisions of H.R. 1614, S. 936, and S. 1285 that amend the election year mass mailing restrictions would generally increase the period of time individual Members were restricted from mailing any mass mailings. However, because state laws vary in regards to the timing of primary elections, both current law and the proposed legislation affect individual Members differently, based on when primary elections are held in the state they represent.

Had the proposed legislation been enacted prior to the 2006 election, some House Members would have seen no difference in the length of their restricted period; others would have seen an increase of up to 155 days. All Senators would have seen an increase in the restricted period of at least 30 days; some would have seen an increase of up to 215 days. **Table 1** reports the 2006 primary date and the length of the mass-mailing-restricted period for the 2006 election by state. It also reports the length of the hypothetical mass-mailing-restricted period for the 2006 election (and the difference between the hypothetical and actual period) if the election year mass mailing restrictions proposed in H.R. 1614, S. 936, and S. 1285 had been in effect.

For House Members, the restricted period would have been increased for all Members whose states hold primaries more than 90 days prior to the general election. In 2006, sixteen states held primaries fewer than 90 days prior to the general election. Thirty-three states held primaries more than 90 days prior to the general election.⁸

For example, under current law, in 2006, all House Members seeking reelection were prohibited from sending mass mailings fewer than 90 days prior to the general election—August 9, 2006, to November 7, 2006. Texas held its primary on March 7, 2006. House Members from Texas were thus also prohibited from making mass mailings between December 7, 2005, and March 7, 2006. Therefore, Members from Texas were restricted from making mass mailings for two separate 90-day periods and a total of 180 days.⁹

If the proposed legislation in H.R. 1614, S. 936, and S. 1285 had been enacted prior to the 2006 primary and general election, House Members from Texas would have been prohibited from mailing any mass mailings from December 7, 2005 (90 days prior to the primary election), until November 7, 2006, a total of 335 days

There would have been no increase for House Members representing states that held primaries fewer than 90 days prior to the general election. For example, Hawaii held its primary on

⁸ One state—Louisiana—has no primary election. A runoff election, if necessary, is held following the general election. Current law restricts mass mailings by Members from Louisiana in the 90-day period prior to the general election and, if necessary, until the day of the runoff election.

⁹ The phrase “fewer than 90 days” has several plausible interpretations. In Interpretive Rule 149, the Senate Ethics Committee stated that the “limitation is computed by excluding the actual day of the election, whether it is a primary, general, regular, special, or runoff” and used the following example: if a primary election is scheduled for May 1, the moratoria restrictions would begin at 11:59:59 PM on March 2. All dates listed in this report follow this guideline, and cut-off dates are listed strictly; the cut-off date for the example would be listed as March 2. Because the proposed amendment to the restrictions describes a “period” of time rather than using the “fewer” formulation, it is not clear how the new restrictions would be interpreted. In this report, “90-day period” will be interpreted as “fewer than 90 days” as defined by the Senate rules.

September 23, 2006. House Members from Hawaii were thus prohibited from making mass mailings between June 25, 2006, and September 23, 2006. Because this period overlapped with the general election restrictions that began on August 9, 2006, House Members from Hawaii were restricted from making mass mailings for a single period of 135 consecutive days.

If the proposed changes in H.R. 1614, S. 936, and S. 1285 had been enacted prior to the 2006 primary and general election, House Members from Hawaii would have been prohibited from mailing any mass mailings from June 25, 2006, until November 7, 2006, the identical 135 days prohibited under current law.

Senators would be restricted for at least 30 additional days under the proposed legislation, because of the provision which extends the restricted period from 60 days to 90 days prior to the primary election.

All Senators who represent states that hold primaries fewer than 90 days prior to the general election would be restricted for 30 additional days. For example, under current law, in 2006, a Senator who represented Arizona was prohibited from mailing any mass mailing from July 14, 2006, until November 7, 2006, a total of 116 days. If the proposed changes in H.R. 1614, S. 936, and S. 1285 had been enacted prior to the 2006 primary and general election, a Senator from Arizona would have been prohibited from mailing any mass mailings from June 14, 2006, until November 7, 2006, a total of 146 days.

Under current law, Senators who represent states that hold primaries more than 90 days prior to the general election are restricted from making mass mailings for a total of 120 days, 60 prior to the primary election and 60 prior to the general election. For example, in 2006, a Senator who represented North Dakota was prohibited from mailing any mass mailing from April 14, 2006, until June 13, 2006, and from September 8, 2006, until November 7, 2006.

If the proposed changes in H.R. 1614, S. 936, and S. 1285 had been enacted prior to the 2006 primary and general election, a Senator from North Dakota would have been prohibited from mailing any mass mailings from March 15, 2006, until November 7, 2006, a total of 257 days.

If enacted, H.R. 1614, S. 936, and S. 1285 would also make the election year mass-mailing-restricted period identical for House Members and Senate Members. Members of both chambers would be prohibited from sending mass mail during the period 90 days prior to the primary election until the date of the general election. Under current law, as already noted, election year mass mailing restrictions are shorter for Senators than for House Members.

Applicability to Jurisdictions Without Primary Elections

One question raised by the proposed legislation is how the new restrictions on mass mailing by individual Members would apply to Members from states and territories that do not hold primary elections. Currently, one state (Louisiana) and one territory (American Samoa) do not hold primary elections. Instead, each uses a system in which the general election is an open contest. If no candidate receives more than 50% of the vote, a runoff election is held several weeks later, with the date set pursuant to state or territorial law.

Under current law, the restrictions on states and territories without primaries are clear; candidates are prohibited from franking mass mailings fewer than 60 days (90 for House Members) prior to any primary or general election, including runoff elections.¹⁰ Thus, for example, Members who represent Louisiana are prohibited from franking mass mailings fewer than 60 days prior to the general election, as well as during the 60 days prior to any runoff election that might take place after the general election.

However, under the proposed changes in H.R. 1614, S. 936, and S. 1285, the beginning of the restricted period is defined in relation only to primary elections; Members are prohibited from franking mass mailings beginning 90 days prior to the primary election. This creates an ambiguity for states and territories that do not have primary elections. Arguably, the intent of the proposed legislation is that the restricted period would begin 90 days prior to the general election in states without primaries.

However, the legislation could be alternatively read to place no restrictions on mass mailings in states and territories that do not have primaries. In this case, Members from such states would be subject only to mass mailing restrictions in House and Senate rules.

Similarly, the end of the restricted period in the proposed legislation is defined in relationship only to the general election, with no specific mention of runoff elections. As with the beginning of the restricted period, arguably the intent of the legislation is to restrict mass mailings in the period between the general election and runoff election in a state without a primary election. However, the legislation could be alternatively read to place no restrictions on mass mailings between the general and runoff elections. In this case, again, Members from such states would be subject only to mass mailing restrictions in House and Senate rules.

Applicability to Candidates for Non-Federal Offices

Another question raised by the proposed legislation is how the new restrictions would apply to Members seeking non-federal public office. Under the current statute, House members are subject to the election year mass mailing restrictions if they are a candidate for reelection or for any other public office.¹¹ Senators are subject to election year mass mailing restrictions for the general election regardless of their status as candidates, and for primary elections if they are a candidate for any national, state, or local office.¹²

Under the proposed changes in H.R. 1614, S. 936, and S. 1285, Members are only subject to the restrictions if they are candidates for reelection to any federal offices. Candidates for non-federal office would only be subject to the restrictions of House and Senate rules. Current House rules reflect the current statutory laws, restricting election year mass mailings 90 days prior to any primary or general election to which the Member is a candidate. Current Senate rules also reflect the current statutory laws, restricting election year mass mailings fewer than 60 days prior to any primary election to which the Senator is a contested candidate, and fewer than 60 days prior to any general election.

¹⁰ 39 U.S.C. 3210(6)(A)(i).

¹¹ 39 U.S.C. 3210(6)(A)(ii)(II).

¹² 39 U.S.C. 3210(6)(C).

Table I. Comparison of Actual 2006 Mass Mailing Restrictions and Hypothetical Restrictions Based On Proposed Legislation

State / Territory	2006 Primary Date	Actual Mass Mailing Restricted Days		Hypothetical Mass Mailing Restrictions		Change (days)	
		House	Senate	Start Date ^a	Days	House	Senate
Alabama	6/6/06	180	120	3/8/06	244	+64	+124
Alaska	8/22/06	167	120	5/24/06	167	0	+47
American Samoa	N/A ^b	90	N/A	?	?	?	N/A
Arizona	9/12/06	146	116	6/14/06	146	0	+30
Arkansas	5/23/06	180	120	2/22/06	258	+78	+138
California	6/6/06	180	120	3/8/06	244	+64	+124
Colorado	8/8/06	180	120	5/10/06	181	+1	+61
Connecticut	8/8/06	180	120	5/10/06	181	+1	+61
Delaware	9/12/06	146	116	6/14/06	146	0	+30
District of Columbia	9/12/06	146	N/A	6/14/06	146	0	N/A
Florida	9/5/06	153	120	6/7/06	153	0	+33
Georgia	7/18/06	180	120	4/19/06	202	+22	+82
Guam	9/2/06	156	N/A	6/4/06	156	0	N/A
Hawaii	9/23/06	135	105	6/25/06	135	0	+30
Idaho	5/23/06	180	120	2/22/06	258	+78	+138
Illinois	3/21/06	180	120	12/21/05	321	+141	+201
Indiana	5/2/06	180	120	2/1/06	279	+99	+159
Iowa	6/6/06	180	120	3/8/06	244	+64	+124
Kansas	8/1/06	180	120	5/3/06	188	+8	+68
Kentucky	5/16/06	180	120	2/15/06	265	+85	+145
Louisiana	N/A ^c	90	60	?	?	?	?
Maine	6/13/06	180	120	3/15/06	237	+57	+117
Maryland	9/12/06	146	116	6/14/06	146	0	+30
Massachusetts	9/19/06	140	110	6/21/06	140	0	+30
Michigan	8/8/06	180	120	5/10/06	181	+1	+61
Minnesota	9/12/06	146	116	6/14/06	146	0	+30
Mississippi	6/6/06	180	120	3/8/06	244	+64	+124
Missouri	8/8/06	180	120	5/10/06	181	+1	+61
Montana	6/6/06	180	120	3/8/06	244	+64	+124
Nebraska	5/9/06	180	120	2/8/06	272	+92	+152
Nevada	8/15/06	174	120	5/17/06	174	0	+54
New Hampshire	9/12/06	146	116	6/14/06	146	0	+30

State / Territory	2006 Primary Date	Actual Mass Mailing Restricted Days		Hypothetical Mass Mailing Restrictions		Change (days)	
		House	Senate	Start Date ^a	Days	House	Senate
New Jersey	6/6/06	180	120	3/8/06	244	+64	+124
New Mexico	6/6/06	180	120	3/8/06	244	+64	+124
New York	9/12/06	146	116	6/14/06	146	0	+30
North Carolina	5/2/06	180	120	2/1/06	279	+99	+159
North Dakota	6/13/06	180	120	3/15/06	237	+57	+117
Ohio	5/2/06	180	120	2/1/06	279	+99	+159
Oklahoma	7/25/06	180	120	4/26/06	195	+35	+95
Oregon	5/16/06	180	120	2/15/06	265	+85	+145
Pennsylvania	5/16/06	180	120	2/15/06	265	+85	+145
Puerto Rico	N/A ^d	N/A	N/A	N/A	N/A	N/A	N/A
Rhode Island	9/12/06	146	116	6/14/06	146	0	+30
South Carolina	6/13/06	180	120	3/15/06	237	+57	+117
South Dakota	6/6/06	180	120	3/8/06	244	+64	+124
Tennessee	8/3/06	180	120	5/5/06	186	+6	+66
Texas	3/7/06	180	120	12/7/05	335	+155	+215
Utah	6/27/06	180	120	3/29/06	223	+53	+113
Vermont	9/12/06	146	116	6/14/06	146	0	+30
Virgin Islands	9/9/06	149	N/A	6/11/06	149	0	N/A
Virginia	6/13/06	180	120	3/15/06	237	+57	+117
Washington	9/19/06	139	109	6/21/06	139	0	+30
West Virginia	5/9/06	180	120	2/8/06	272	+92	+152
Wisconsin	9/12/06	146	116	6/14/06	146	0	+30
Wyoming	8/22/06	167	120	5/24/06	167	0	+47

Source: Data on primary dates are from the Federal Election Commission <http://www.fec.gov/pubrec/fe2006/2006pdates.pdf>, viewed 7/5/2007.

- a. The Senate Ethics Committee Interpretive Ruling 149 states that the “60-day limitation is computed by excluding the actual day of the election, whether it is a primary, general, regular, special, or runoff.” For example, if a primary election is scheduled for May 1, the moratoria restrictions would begin at 11:59:59PM on March 2. The date listed in the Table would be March 2.
- b. American Samoa holds an open election on the date of the general election, and a runoff election (if necessary) two weeks later.
- c. Louisiana holds an open election on the date of the general election, and a runoff election (if necessary) four weeks later.
- d. Puerto Rico holds an election for its Resident Commissioner every four years, concurrent with the U.S. Presidential election. For the 2004 election, the primary was held on November 9, 2003, making a total of 180 restricted days under current law and 359 days under the hypothetical restrictions.

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