FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Friends for Lauzen and	)	**MUR 5722**
Lee Holmes, in his official capacity as Treasurer	)	
Chris Lauzen	)	

Statement of Reasons of Commissioner Hans A. von Spakovsky
(Funding of "testing the waters" activity)

This matter is about how a potential candidate for Federal office may pay for "testing the waters" activity, *i.e.*, activity conducted to determine if that individual should become a candidate. The Office of General Counsel concluded, and my colleagues agreed, that a potential candidate for Federal office may not use federally permissible funds to pay for what is known as "testing the waters" activity if those funds come from a state campaign account. I dissented because the applicable regulations plainly say otherwise.

I. Background

In November 2005, Illinois State Senator Chris Lauzen paid for a telephone poll to be conducted of Republican voters in Illinois' 14th Congressional District. Senator Lauzen's state campaign committee stated that one of the poll's purposes was "to gauge voter preferences in a hypothetical congressional election that may or may not occur at some point in the future." *Factual and Legal Analysis* at 2. One of the questions asked was which candidate would the call recipient prefer if Speaker Hastert retired and an open seat emerged in the 14th District. *Id.* My colleagues concluded that this telephone poll constituted "testing the waters" activity under 11 CFR 100.72.[1]

The total cost of the poll was $12,750, and OGC calculated the "federal share" to be $4,250, because other poll questions were related to Senator Lauzen's state election. *Id.* at 8-9. The poll was paid with funds from Senator Lauzen's state campaign account. Senator Lauzen argued that the poll was not "testing the waters" activity, but even if it was, his state campaign account contained amounts raised within the limits and prohibitions of Federal law that were "more than sufficient" to cover the full cost of the telephone poll. There is no dispute that his state account contained ample Federally

[1] The Commission does not have a full transcript of the telephone poll It is believed that the names of potential candidates, including Senator Lauzen, were provided to assist call recipients in answering the question

permissible funds to pay for the poll. *Id.* at 8. However, my colleagues concluded that the poll had been improperly funded, because 11 CFR 110.3(d) "prohibits all transfers from the nonfederal to a federal campaign of the same individual regardless of whether the funds used are permissible under the Act." *Id.*

II. Argument

With this matter, the Commission has concluded that an individual considering a run for Federal office may not pay for testing the waters activity with money from a state campaign account, regardless of whether the funds in that account are Federally permissible. This is in spite of the language of our "testing the waters" regulations:

> Funds received solely for the purpose of determining whether an individual should become a candidate are not contributions. Examples of activities permissible under this exemption if they are conducted to determine whether an individual should become a candidate include, but are not limited to, conducting a poll, telephone calls, and travel. **Only funds permissible under the Act may be used for such activities.** The individual shall keep records of all such funds received. See 11 CFR 101.3. If the individual subsequently becomes a candidate, the funds received are contributions subject to the reporting requirements of the Act. Such contributions must be reported with the first report filed by the principal campaign committee of the candidate, regardless of the date the funds were received.

11 CFR 100.72(a) (emphasis added); *see also* 11 CFR 100.131(a).

While the "testing the waters" regulation clearly states that testing the waters activity must be paid for with "funds permissible under the Act," the Commission has determined that 11 CFR 110.3(d) trumps this very specific regulation. Under section 110.3(d), "[t]ransfers of funds or assets from a candidate's campaign committee or account for a nonfederal election to his or her **principal campaign committee or other authorized committee for a federal election** are prohibited" (emphasis added).

It goes without saying that an individual who is merely "testing the waters" does not have a federal political committee, nor is one required at that stage. Until one actually becomes a "candidate," no "principal campaign committee or other authorized committee for a federal election" exists. Senator Lauzen never became a federal candidate and never established a principal campaign committee. How could he possibly have violated 11 CFR 110.3(d) when he quite clearly made no transfers of funds from a state election account to a federal principal campaign committee or other authorized committee account?

My colleagues' rationale for their conclusion is that *if* an individual who is testing the waters becomes a candidate, then at that point, all the funds he has received and used for testing the waters activities become contributions and expenditures, and must be

reported. Once this happens, these contributions and expenditures must be reported as having come from a prohibited source – a state (nonfederal) committee. This is certainly true. But it is also irrelevant, because this is not the case with which we are confronted. Senator Lauzen **never** became a Federal candidate. He **never** had a federal principal campaign committee. He abided by the plain language of the testing the waters regulation. His conduct did not even implicate 11 CFR 110.3(d). My colleagues' conclusion penalizes Senator Lauzen, and anyone in his situation, for conduct that *may have* happened in the future.

III. Conclusion

The Commission should limit itself to deciding the matter at hand in an enforcement proceeding. Here, Senator Lauzen engaged in "testing the waters" activity. He paid for that activity with Federally permissible funds. That payment was entirely in accord with the "testing the waters" regulation. The plain language of 11 CFR 110.3(d) is inapplicable on its face to the facts before us. *If* Senator Lauzen had subsequently become a Federal candidate with a principal campaign committee, *then* we would face an 11 CFR 110.3(d) question. My colleagues, however, have changed the meaning of 11 CFR 110.3(d) to avoid possible future situations that would reveal an inconsistency in our regulations – such as the aforementioned "if" scenario. We have a rulemaking process to consider questions of "if" and to fix regulatory inconsistencies. If it was the Commission's view that 11 CFR 110.3(d) should mean something other than what it actually says, then its meaning should have been changed through the rulemaking process. This would have given the regulated community notice of what the new rule was. Instead, we have admonished someone for conduct that was entirely in compliance with the law and consistent with our regulations – at least as they appear on the books now – and which he could not possibly have known was prohibited.

March 26, 2007

Hans A. von Spakovsky
Commissioner