



FEDERAL ELECTION COMMISSION
Washington, DC 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Nebraska Democratic Party
421 S 9th Street
Suite 233
Lincoln, NE 68508

APR 15 2013

RE: MUR 6449
Jon Bruning
Bruning for Senate, Inc. f/k/a
Bruning 2012 Exploratory
Committee and Douglas R. Ayer
in his official capacity as treasurer
Jon Bruning Exploratory Committee
Friends of Jon Bruning and Douglas
R. Ayer in his official capacity
as treasurer (terminated)

Dear Sir/Madam:

This is in reference to the complaint you filed with the Federal Election Commission on December 30, 2010, and the amendment you filed on June 13, 2011, concerning Jon Bruning and his campaign committees for United States Senate. The Commission found that there was reason to believe Jon Bruning violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a) and that Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer ("2012 Committee") violated 2 U.S.C. §§ 433(a), 434(a) and 434(b), provisions of the Federal Election Campaign Act of 1971, as amended, ("the Act") and the Commission's regulations. On April 10, 2013, a conciliation agreement signed by counsel for these respondents was accepted by the Commission. In addition, the Commission dismissed the allegation that Jon Bruning Exploratory Committee violated 2 U.S.C. §§ 433(a) and 434(a), found no reason to believe that the 2012 Committee violated 2 U.S.C. § 441a(f), and found no reason to believe that Friends of Jon Bruning and Douglas R. Ayer in his official capacity as treasurer (terminated) violated the Act. Accordingly, the Commission closed the file in this matter on April 10, 2013.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files,

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68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). A copy of the agreement with Jon Bruning and the 2012 Committee is enclosed for your information. Also enclosed is the Commission's Factual and Legal Analysis that sets forth the basis for the Commission's determinations as to the other respondents in this matter.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,



Mark Allen
Attorney

Enclosures
Conciliation Agreement
Factual and Legal Analysis

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BEFORE THE FEDERAL ELECTION COMMISSION

2013 APR -9 AM 12: 04

In the Matter of)
Jon Bruning)
Bruning for Senate, Inc. f/k/a Bruning 2012)
Exploratory Committee and Douglas R. Ayer)
in his official capacity as treasurer)

MUR 6449 OFFICE OF GENERAL
COUNCIL

CONCILIATION AGREEMENT

This matter was initiated by a signed, sworn, and notarized complaint. The Federal Election Commission ("Commission") found reason to believe that Jon Bruning violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a) and that Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer violated 2 U.S.C. §§ 433(a), 434(a) and 434(b) (collectively, "Respondents") provisions of the Federal Election Campaign Act of 1971, as amended.

NOW, THEREFORE, the Commission and the Respondents, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 2 U.S.C. § 437g(a)(4)(A)(i).

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent law and facts in this matter are as follows:

Background

1. Jon Bruning was a candidate for the United States Senate in Nebraska in the

1 2008 and 2012 elections. His principal campaign committee for the 2008 election was Friends of
2 Jon Bruning ("Bruning 2008"). His principal campaign committee for the 2012 election was
3 Bruning for Senate, Inc. ("Bruning 2012").

4 2. On November 19, 2007, Bruning withdrew from the 2008 election.
5 Respondents contend that Bruning asked the 2008 general election contributors in writing to
6 redesignate their contributions to Jon Bruning Exploratory Committee "for a future election" and
7 advised contributors that they could in the alternative receive a refund. Respondents further
8 contend that all but \$4,600 of the refunds made was reported to the Commission by Bruning
9 2008 on its 2007 Year End/Termination Report filed in January 2008.

10 3. On December 31, 2007, Bruning 2008 transferred its remaining funds,
11 \$677,251.49, to Jon Bruning Exploratory Committee that was established in December 2007 as a
12 testing the waters account and authorized by Bruning for the purpose of exploring a possible
13 future federal candidacy. Respondents contend that all funds transferred to the Jon Bruning
14 Exploratory Committee were permissible funds and the donors whose contributions comprised
15 the transfer were reported by Bruning 2008 at the time of their original contribution, and that the
16 portion of the funds from contributors to the 2008 general election was also reported by Bruning
17 2012 on its 2011 April Quarterly Report.

18 4. Between January 1, 2008 and March 22, 2008, Jon Bruning Exploratory
19 Committee refunded \$4,600 to contributors to Bruning 2008. Jon Bruning Exploratory
20 Committee received bank interest on its funds through the remainder of 2008, 2009, and 2010.

21 5. On November 5, 2010, Bruning opened a "2012 Exploratory Account" for
22 testing the waters for the 2012 United States Senate election. On the same date, Jon Bruning
23 Exploratory Committee transferred \$448,349.52 to the 2012 Exploratory Account. On

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1 December 17, 2010, Jon Bruning Exploratory Committee transferred \$162,313.51 to the 2012
2 Exploratory Account. Respondents contend that the funds transferred to the 2012 Exploratory
3 Account included bank interest on the John Bruning Exploratory Committee funds between 2008
4 and 2010.

5 6. Between November 5, 2010, and December 31, 2010, the 2012 Exploratory
6 Account received an additional \$246,604.73 in contributions and interest, of which \$223,800 was
7 itemized contributions.

8 7. On January 3, 2011, Bruning filed a Statement of Candidacy with the
9 Secretary of the Senate for the 2012 election, designating Bruning 2012 f/k/a Bruning 2012
10 Exploratory Committee as his principal campaign committee. Also on January 3, 2011, Bruning
11 2012 filed a Statement of Organization with the Secretary of the Senate, identifying Douglas R.
12 Ayer as the treasurer of Bruning 2012. The first disclosure report filed by Bruning 2012 was the
13 2011 April Quarterly Report filed on April 15, 2011.

14 Applicable Law

15 8. The Act provides that an individual seeking nomination for election to
16 federal office is deemed to be a "candidate" when he or she receives contributions or makes
17 expenditures aggregating in excess of \$5,000. 2 U.S.C. § 431(2).

18 9. The Act and the Commission's regulations provide that, within fifteen days
19 of becoming a candidate, an individual must file a Statement of Candidacy that designates the
20 candidate's principal campaign committee. 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a).

21 10. The Act requires a principal campaign committee to file a Statement of
22 Organization within ten days after it has been designated by the candidate. 2 U.S.C. § 433(a).

23 11. Each treasurer of a political committee shall file periodic reports of the

1 committee's receipts and disbursements with the Commission. *See* 2 U.S.C. §§ 434(a) and (b).
2 In the case of a principal campaign committee for a candidate running for the United States
3 Senate, it must timely file disclosure reports as required by 2 U.S.C. § 434(a)(2).

4 12. The Commission's "testing the waters" regulations, 11 C.F.R.
5 §§ 100.72(a) and 100.131(a), exempt from the definitions of "contribution" and "expenditure"
6 funds received solely for the purpose of determining whether an individual should become a
7 candidate. The exemptions do not apply to funds received or payments made for activities
8 indicating that an individual has decided to become a candidate for a particular office or for
9 activities relevant to conducting a campaign. *Id.* These regulations seek to draw a distinction
10 between activities directed to an evaluation of the feasibility of one's candidacy, as distinguished
11 from conduct signifying that a private decision to become a candidate has been made. *See*
12 Advisory Opinion 1981-32 (Askew).

13 13. The Commission's regulations provide that examples of activities
14 indicating that an individual has decided to become a candidate include, but are not limited to:
15 raising funds in excess of what could reasonably be expected to be used for exploratory activities
16 or activities designed to amass funds to be spent after becoming a candidate; or making or
17 authorizing written or oral statements that refer to the individual as a candidate for a particular
18 office. 11 C.F.R. §§ 100.72(b) and 100.131(b).

19 14. If the individual who had been "testing the waters" subsequently becomes a
20 candidate, funds received or payments made for "testing the waters" are contributions and
21 expenditures subject to the reporting requirements of the Act. 11 C.F.R. §§ 100.72(a)
22 and 100.131(a). Such contributions and expenditures must be reported with the first report filed
23 by the principal campaign committee of the candidate, regardless of the date the funds were

1 received and the payments made. *Id.*; 11 C.F.R. §§ 101.3, 104.3(a)-(b). Authorized committees
2 are required to disclose, *inter alia*, transfers, dividends and interest received, and contribution
3 refunds disbursed. 2 U.S.C. § 434(b)(2)(E), (b)(2)(J), (b)(4)(B), (b)(4)(F).

4 *Jon Bruning and Bruning 2012*

5 15. In a November 30, 2010, solicitation e-mail, Bruning stated, "Please help me
6 defeat Ben Nelson in 2012 by making a contribution today. Together we can take back this
7 country and bring true Nebraska values to Washington." Bruning's statement demonstrates that
8 he had decided to be a candidate for federal office.

9 16. Accordingly, Bruning became a candidate by November 30, 2010, and was
10 required to file a Statement of Candidacy designating a principal campaign committee within
11 fifteen days of that date. Bruning's principal campaign committee, Bruning 2012, was required
12 to file a Statement of Organization within ten days of Bruning's timely designation and file
13 quarterly disclosure reports thereafter.

14 17. Bruning 2012 was required to file the 2010 Year End Report by January 31,
15 2011. Bruning 2012 did not file a disclosure report until the 2011 April Quarterly Report on
16 April 15, 2011.

17 V. Respondents committed the following violations:

18 1. Jon Bruning violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101(a) by
19 failing to timely file his Statement of Candidacy after becoming a candidate by November 30,
20 2010.

21 2. Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee
22 and Douglas R. Ayer in his official capacity as treasurer violated 2 U.S.C. §§ 433(a) and 434(a)
23 by failing to timely file a Statement of Organization and the 2010 Year End disclosure report.

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1 3. Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee
2 and Douglas R. Ayer in his official capacity as treasurer violated 2 U.S.C. § 434(b) by failing to
3 disclose the financial activity of Jon Bruning Exploratory Committee.

4 VI. 1. Respondents will pay a civil penalty to the Federal Election Commission
5 in the amount of Nineteen Thousand Dollars (\$19,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

6 2. Jon Bruning will cease and desist from violating 2 U.S.C. § 432(e)(1)
7 and 11 C.F.R. § 101(a).

8 3. Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee
9 and Douglas R. Ayer in his official capacity as treasurer will cease and desist from violating
10 2 U.S.C. §§ 433(a), 434(a) and 434(b).

11 4. Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee
12 and Douglas R. Ayer in his official capacity as treasurer will amend its disclosure reports to
13 disclose all of the financial activity of Jon Bruning Exploratory Committee pursuant to the Act
14 and Commission regulations and as the Commission's Reports Analysis Division may direct.

15 VII. The Commission, on request of anyone filing a complaint under 2 U.S.C.
16 § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance
17 with this agreement. If the Commission believes that this agreement or any requirement thereof
18 has been violated, it may institute a civil action for relief in the United States District Court for
19 the District of Columbia.

20 VIII. This agreement shall become effective as of the date that all parties hereto have
21 executed same and the Commission has approved the entire agreement.

22 IX. Respondents shall have no more than 30 days from the date this agreement

1 becomes effective to comply with and implement the requirements contained in this agreement
2 and to so notify the Commission.

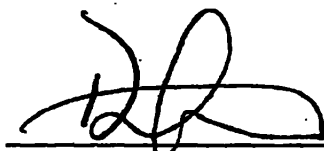
3 X. This Conciliation Agreement constitutes the entire agreement between the parties
4 on the matters raised herein, and no other statement, promise, or agreement, either written or
5 oral, made by either party or by agents of either party, that is not contained in this written
6 agreement shall be enforceable.

7
8 FOR THE COMMISSION:

9 Anthony Herman
10 General Counsel

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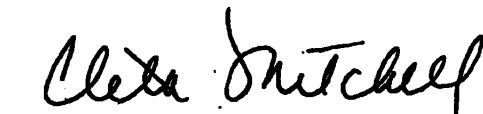


Daniel A. Petalas
Associate General Counsel for Enforcement

4/12/13
Date

FOR THE RESPONDENTS:

BY:



Clea Mitchell, Esq.
Counsel for Respondents

3.28.2013
Date

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BEFORE THE FEDERAL ELECTION COMMISSION

RESPONDENTS: Jon Bruning MUR 6449
Bruning for Senate, Inc. f/k/a Bruning 2012
Exploratory Committee and Douglas R. Ayer
in his official capacity as treasurer
John Bruning Exploratory Committee
Friends of Jon Bruning and Douglas R. Ayer
in his official capacity as treasurer (terminated)

FACTUAL AND LEGAL ANALYSIS

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Laura Wigley, Nebraska Democratic Party, alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by Respondents.

II. FACTUAL AND LEGAL ANALYSIS

A. Background

The Complaint alleges that Jon Bruning, a candidate for the United States Senate from Nebraska in 2012, violated the Act when he triggered candidate reporting requirements in November 2010 but failed to timely file a Statement of Candidacy with the Commission to designate his principal campaign committee.¹ The Complaint further alleges that Bruning's committee failed to timely file a Statement of Organization and to timely disclose receipts and disbursements.

After Bruning registered as a candidate in January 2011 and his committee, Bruning for Senate, Inc., ("Bruning 2012")² filed its first disclosure report in April 2011, complainant filed

¹ Bruning lost the May 15, 2012, primary election for United States Senate.

² The Bruning 2012 Exploratory Committee, the committee the Commission originally notified, became Jon Bruning for Senate, Inc., on January 3, 2011, when it filed its Statement of Organization as Bruning's principal campaign committee. Consequently, the Commission makes determinations as to Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer.

1 an Amendment to the Complaint. The Amendment alleged additional violations related to funds
2 received from the Jon Bruning Exploratory Committee ("JBEC"). JBEC is an unregistered entity
3 that held funds raised by Bruning's unsuccessful 2008 campaign for Nebraska's other Senate
4 seat. The Amendment alleges that, as a result of the transfer from JBEC, Bruning 2012 may
5 have received excessive contributions from contributors to Bruning's 2008 campaign and that
6 not all of the 2008 campaign funds are accounted for. It further alleges that JBEC was required
7 to register and report as a political committee, but has failed to do so.³

8 Respondents deny both sets of allegations. They contend Bruning did not become a
9 candidate in November 2010, but instead was "testing the waters" for the 2012 election at that
10 time. They contend he became a candidate only upon timely filing his Statement of Candidacy
11 on January 6, 2011, and that Bruning 2012 timely filed its Statement of Organization on the same
12 day.⁴ Finally, Respondents deny that JBEC had to register as a political committee and deny that
13 Bruning 2012 knowingly accepted contributions in excess of the Act's limitations. Therefore,
14 Respondents ask that the Commission dismiss the allegations.⁵

15 Based on the available information, the Commission finds reason to believe that Jon
16 Bruning failed to timely file his Statement of Candidacy and designate his principal campaign
17 committee and that Bruning 2012 failed to timely file a Statement of Organization and to

³ The Complaint also alleges that Respondents failed to disclose their activity to the IRS. *See* Compl. at 1-2, 9-10. This Report will address only the potential violations of the Act, as the Commission has no jurisdiction over IRS matters.

⁴ Respondents' filings were postmarked January 3, 2011, which serves as the filing date. *See* 2 U.S.C. § 434(a)(5). The Commission will refer to the January 3 date in this Report.

⁵ The "Response and Motion to Dismiss Complaint" was filed on behalf of Bruning's 2008 committee, Friends of Jon Bruning, but the other Respondents subsequently adopted it in its entirety. *See* Letter from Cleta Mitchell, Counsel, Bruning 2012 *et al.*, to Jeff S. Jordan, Supervisory Attorney, FEC (Mar. 11, 2011). The response to the Amendment to the Complaint, filed with the Commission on July 18, 2011, was also filed on behalf of all Respondents. The fact that the initial response is styled as a motion to dismiss does not require any additional procedural steps for the Commission.

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1 disclose in full the receipts and disbursements associated with the campaign's testing the waters
2 activity. The Commission dismisses the allegation as to JBEC, finds no reason to believe that
3 Bruning 2012 knowingly accepted excessive contributions, and finds no reason to believe that
4 Bruning 2008 violated the Act.

5 **B. Factual Summary**

6 Jon Bruning was a candidate for the United States Senate from Nebraska in both 2008
7 and 2012. Bruning registered his 2008 principal campaign committee, Friends of Jon Bruning
8 ("Bruning 2008"), with the Commission. On November 19, 2007, Bruning withdrew from the
9 2008 election. Jon Bruning Aff. ¶ 3 (Feb. 21, 2011). On December 31, 2007, Bruning 2008
10 transferred its remaining funds, \$677,251.49, to JBEC, which Respondents describe as a
11 "testing the waters" account for a possible future federal election." See Bruning 2008 Year End
12 Report for 2007 at 75; Bruning Aff. ¶¶ 8-9, 14. On January 27, 2008, Bruning 2008 filed its
13 2007 Year End Report as a termination report with the Commission, stating that its residual
14 funds totaling \$677,251.49 were "transferred to an exploratory committee for a future election."
15 See Resp., Ex. 7, Letter from Douglas Ayer, Treasurer, Friends of Jon Bruning, to Travis Brown,
16 Reports Analysis Division ("RAD"), FEC (Jan. 28, 2008). JBEC, the recipient of these funds,
17 has never registered with the Commission and never filed any disclosure reports. It exists solely
18 as the name by which Bruning designated the financial account that would hold the funds from
19 his terminated 2008 campaign for exploratory activities related to any subsequent campaign.

20 On November 5, 2010, according to Respondents, Bruning initiated "testing the waters"
21 activities for the 2012 United States Senate election and Respondents opened a separate "2012
22 Exploratory Account" for testing the waters. Resp. at 5; Bruning Aff. ¶ 16; Mark Pedersen Aff.

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¶ 26 (Feb. 21, 2011) ("Feb. 2011 Pedersen Aff.").⁶ Also on that date, JBEC transferred \$448,349.52 to the 2012 Exploratory Account. JBEC transferred an additional \$162,313.51 to the 2012 Exploratory Account on December 17, 2010. See 2011 April Quarterly Report of Bruning 2012 at 251.

On January 3, 2011, Bruning filed a Statement of Candidacy with the Secretary of the Senate for the 2012 Senate election, designating Bruning 2012 as his principal campaign committee. Also on that date, Bruning 2012 filed a Statement of Organization with the Secretary of the Senate. See Resp., Exs. 11-12. On April 15, 2011, Bruning 2012 filed its first disclosure report, the 2011 April Quarterly Report, disclosing its activity for November 2010 through March 2011, including its receipt of the November and December 2010 transfers from JBEC.

The Complaint cites press coverage concerning Bruning that commenced on November 5, 2010, and alleges that Bruning was not "testing the waters" but rather was already acting as a candidate for the 2012 Senate election. Compl. at 7-9, Exs. B-H (Dec. 30, 2010). For example, Bruning was quoted in a published article that day, "I want to run. I'm ready to run." Compl., Ex. D. Also included in the Complaint is a November 30, 2010, e-mail solicitation from Bruning stating, "Please help me defeat Ben Nelson in 2012 by making a contribution today." Compl., Ex. I.

C. Legal Analysis

1. Legal Standards Applicable in "Testing the Waters" Matters

An individual is deemed to be a "candidate" for purposes of the Act if he or she receives contributions or makes expenditures in excess of \$5,000. 2 U.S.C. § 431(2). Once an individual meets the \$5,000 threshold, he or she has fifteen days to designate a principal campaign

⁶ Pedersen served as assistant treasurer of Bruning 2008 and serves as assistant treasurer of Bruning 2012.

1 committee by filing a Statement of Candidacy. 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a).

2 The principal campaign committee must then file a Statement of Organization within 10 days of
3 its designation, *see* 2 U.S.C. § 433(a), and must file disclosure reports with the Commission in
4 accordance with 2 U.S.C. §§ 434(a) and (b).

5 The Commission has established limited exemptions from these thresholds, which permit
6 an individual to test the feasibility of a campaign for federal office without becoming a candidate
7 under the Act. Commonly referred to as the "testing the waters" exemptions, 11 C.F.R.

8 §§ 100.72 and 100.131 respectively exclude from the definitions of "contribution" and

9 "expenditure" those funds received, and payments made, to determine whether an individual

10 should become a candidate.⁷ *See* 2 U.S.C. § 431(8), (9). "Testing the waters" activities include,

11 but are not limited to, payments for polling, telephone calls, and travel. 11 C.F.R.

12 §§ 100.72(a), 100.131(a). An individual who is "testing the waters" need not register or file

13 disclosure reports with the Commission unless and until the individual subsequently decides to

14 run for federal office *or* conducts activities that indicate he or she has decided to become a

15 candidate. *See id.*; *see also* Advisory Op. 1979-26 (Grassley). All funds raised and spent for

16 "testing the waters" activities are, however, subject to the Act's limitations and prohibitions.

17 11 C.F.R. §§ 100.72(a), 100.131(a).

18 Once an individual begins to campaign or decides to become a candidate, funds that were

19 raised or spent to "test the waters" apply to the \$5,000 threshold for qualifying as a candidate.

20 11 C.F.R. §§ 100.72(a), 100.131(a). Certain activities may indicate that the individual has

⁷ The Commission has emphasized the narrow scope of these exemptions to the Act's disclosure requirements. *See* Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) ("The Commission has, therefore, amended the rules to ensure that the 'testing the waters' exemptions will not be extended beyond their original purpose. Specifically, these provisions are intended to be limited exemptions from the reporting requirements of the Act . . .").

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1 decided to become a candidate and is no longer “testing the waters.” In that case, once the
2 individual has raised or spent more than \$5,000, he or she must register as a candidate.
3 Commission regulations set out five non-exhaustive factors to be considered in determining
4 whether an individual has decided to become a candidate. An individual indicates that he or she
5 has gone beyond “testing the waters” and has decided to become a candidate, for example, by
6 (1) using general public political advertising to publicize his or her intention to campaign for
7 federal office; (2) raising funds in excess of what could reasonably be expected to be used for
8 exploratory activities or undertaking activity designed to amass campaign funds that would be
9 spent after he or she becomes a candidate; (3) making or authorizing written or oral statements
10 that refer to him or her as a candidate for a particular office; (4) conducting activities in close
11 proximity to the election or over a protracted period of time; or (5) taking action to qualify for
12 the ballot under state law. 11 C.F.R. §§ 100.72(b), 100.131(b). These regulations seek to draw a
13 distinction between activities directed to an evaluation of the feasibility of one’s candidacy, as
14 distinguished from conduct signifying that a private decision to become a candidate has been
15 made. See Advisory Op. 1981-32 (Askew).

16 2. Jon Bruning and Bruning 2012 Did Not Timely Register and Report

17 The Complaint alleges that Bruning triggered candidate reporting requirements no later
18 than November 5, 2010, based on “his statements and actions” but failed to timely file a
19 Statement of Candidacy with the Commission to designate his principal campaign committee.
20 Compl. at 7-8. The Complaint further alleges that Bruning’s 2012 committee failed to timely file
21 a Statement of Organization and to timely disclose receipts and disbursements. *Id.* at 9.

22 In determining whether an individual has moved from “testing the waters” to candidacy,
23 the Commission has considered whether the individual has engaged in activities or made

1 statements that would indicate that he or she has decided to run for federal office.⁸ Once an
2 individual engages in these activities, he or she is a "candidate" under the Act, and the "testing
3 the waters" exemption is no longer available. In this matter, available information indicates that
4 Bruning made public statements and conducted activities during November 2010 that indicated
5 that he had decided to run as of that time and should have registered with the Commission as
6 required by the Act.

7 The Complaint attaches news articles dating back to approximately 60 days before
8 Bruning registered as a candidate. In an article published on November 5, 2010 — the first day
9 of Bruning's purported "testing the waters" activities and the day JBEC transferred \$448,349.52
10 to "Bruning 2012 Exploratory Committee" — Bruning was quoted, "I want to run. I'm ready to
11 run" and "I can't imagine any conditions under which I would not run." Compl., Ex. D, Don
12 Walton, *Bruning Says He's Actively Exploring a Senate Campaign*, LINCOLN J. STAR, Nov. 5,
13 2010.⁹ Bruning also reportedly declared that while he bowed out of the 2008 Senate race at the
14 request of then-President George W. Bush, "that's not going to happen again. I'm not asking
15 permission. I'm not asking for a blessing." *Id.* Bruning is further quoted that he welcomes "a
16 spirited primary" contest for the Republican nomination. *Id.* In another article, Bruning
17 reportedly stated that he still had more than \$600,000 in federal campaign funds from his

⁸ See, e.g., MUR 5693 (Arnssohn) (Commission found probable cause to believe that individual became a candidate when he sent a solicitation letter that included statements such as "But I have the energy, the experience, and the determination to win this race. And as evidenced by the attached news article, I am ready to begin fighting for our future . . . now"; "Every dollar we receive in the next few weeks can help us prepare for this fight against [incumbent] Scott Garrett"; and "We have come a long way in just a few short weeks. And with your support, we can go the distance."). But see MUR 5934 (Thompson) (Commission failed, by a vote of 2-4, to find reason to believe; and then voted to dismiss allegations, that Thompson became a candidate by making statements such as "I can't remember exactly the point that I said, 'I'm going to do this,' but when I did, the thing that occurred to me 'I'm going to tell people that I am thinking about it and see what kind of reaction I get to it,'" and was quoted as saying that he was "testing the waters" about a run, "but the waters feel pretty warm to me" and "You're either running or not running. I think the steps we've taken are pretty obvious").

⁹ http://journalstar.com/news/local/govt-and-politics/article_38d3c204-e819-11d9-805c-001cc4c002e0.html.

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1 previous run and that he had hired four campaign workers. Compl., Ex. C, Paul Hammel, *Senate*
2 *Interest for Bruning, Stenberg*, OMAHA WORLD-HERALD, Nov. 6, 2010.¹⁰ Bruning reportedly
3 also stated that his announcement only three days after his reelection as Nebraska Attorney
4 General was not meant to scare off other potential candidates. *Id.*¹¹

5 After Bruning's reported statements suggesting that he had made the decision to run for
6 Senate — "I want to run. I'm ready to run," and "I'm not asking permission." — he made a
7 more definitive statement on November 15, 2010, when he tweeted "Nebraska State Treasurer
8 Shane Osborne to chair our campaign." Compl., Ex. J. Finally, in a November 30, 2010,
9 solicitation e-mail, Bruning stated, "Please help me defeat Ben Nelson in 2012 by making a
10 contribution today. Together we can take back this country and bring true Nebraska values to
11 Washington." Compl., Ex. I.

12 That November 30, 2010, solicitation demonstrates that Bruning had by that time
13 concluded he would run. By soliciting funds to be used to campaign against a specifically
14 named opponent, Bruning made or authorized a statement that refers to himself as a candidate for
15 a particular office, and thus certainly by this point he was no longer merely evaluating the
16 viability of his candidacy but had decided to campaign for office. See 11 C.F.R.
17 §§ 100.72(b)(3), 100.131(b)(3). Bruning's message is comparable to the solicitation letter at
18 issue in MUR 5693 (Aronsohn), where the Commission found probable cause to believe that the
19 candidate was no longer "testing the waters" after sending a solicitation letter including a

¹⁰ <http://www.omaha.com/article/20101106/NEWS01/711069870/202>.

¹¹ Two other press articles from early November 2010 included in the Complaint report that Bruning had declared his candidacy. See Compl., Ex. F, *Treasurer-elect Don Stenberg Ponders Senate Race*, LINCOLN J. STAR, Nov. 8, 2010 ("Attorney General Jon Bruning announced last week he will seek the Republican nomination for the Senate seat."); Ex. G, Robynn Tysver, *GOP Poll Finds Nelson Vulnerable, Viable*, OMAHA WORLD-HERALD, Nov. 9, 2010 ("So far, only Bruning has declared his candidacy."). Neither of these articles contains quoted statements from Bruning.

13044331985

1 statement that “[e]very dollar we receive in the next few weeks can help us prepare for this fight
2 against [incumbent] Scott Garrett.” *Cf.* Advisory Op. 1981-32 (Askew) (the “testing the waters”
3 exemption “becomes inapplicable once the public activities of the individual take on a partisan
4 political quality which would indicate that a decision has been made to seek nomination for
5 election, or election, to a Federal office;” conduct of this type “is distinguished from continuing
6 to deliberate whether one should actually seek election Federal office.”). Although Bruning’s
7 solicitation was sent under the email letterhead of the 2012 Exploratory Committee, the text of
8 the email indicates that Bruning had decided to run. *See* MUR 5693 (Aronsohn) (the use of the
9 word “exploratory” in communications that otherwise evidence candidate status does not prevent
10 the application of the Act’s requirements that the candidate register and report with the
11 Commission).

12 Respondents assert that Bruning was “testing the waters” for the 2012 election as of
13 November 5, 2010, and only later, “[o]ver the 2010 holidays, [he] made the final decision to seek
14 the United States Senate seat from Nebraska” *Resp.* at 5 (Feb. 22, 2011); *Bruning Aff.*
15 ¶¶ 16-17. Thus, Respondents contend that when Bruning filed his Statement of Candidacy on
16 January 3, 2011, and his principal campaign committee filed its Statement of Organization on the
17 same day, both were timely. *Resp.* at 5-6. Respondents do not, however, describe their “testing
18 the waters” activities. Nor do they address the allegations in the Complaint regarding public
19 statements that indicate Bruning had decided he would be a candidate or the fact that the funds
20 amassed by the Committee were in excess of what would be required to test the waters.

21 Relying on Bruning’s November 30, 2010, solicitation to collect funds to defeat the
22 incumbent, Senator Ben Nelson, as the latest date that Bruning became a candidate for the 2012
23 election, he was required to designate a principal campaign committee by filing a Statement of

13044331986

1 Candidacy with the Commission within fifteen days, or by December 15, 2010, at the latest.¹²
2 See 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a). Bruning's principal campaign committee was
3 then required to file a Statement of Organization within ten days of its designation, or by
4 December 25, 2010, at the latest, see 2 U.S.C. § 433(a), and to file its 2010 Year-End disclosure
5 report with the Commission, in accordance with 2 U.S.C. § 434(a), by January 31, 2011.
6 Bruning did not file his Statement of Candidacy with the Commission until January 3, 2011, and
7 Bruning 2012 did not file its first disclosure report, the 2011 April Quarterly, until April 15,
8 2011.¹³ Accordingly, the Commission finds reason to believe that Jon Bruning violated 2 U.S.C.
9 § 432(e)(1) and 11 C.F.R. § 101.1(a) and that Bruning for Senate, Inc. f/k/a Bruning 2012
10 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer violated
11 2 U.S.C. §§ 433(a) and 434(a).¹⁴

¹² The complaint also alleged that funds raised by the Bruning 2012 Exploratory Committee, including the \$610,663.03 transferred from the Bruning 2008 campaign, are in excess of what would be required to conduct "testing the waters" activities, and were instead intended to be used by Bruning's 2012 campaign. Compl. at 7. The Commission concludes that Bruning moved from "testing the waters" into candidate status no later than November 30, 2010, based on his public statements and, therefore, the Commission need not reach these facts.

¹³ The Commission notes that this matter is distinguishable from other matters, which were dismissed by the Commission where a candidate failed to timely file a statement of candidacy for longer periods of time. See, e.g., MUR 6282 (Friends of John Lee Smith) (EPS dismissal where statement of candidacy filed more than 30 days late); MUR 6374 (Roly Arrojito for Congress) (EPS dismissal where statement of candidacy filed 60 days late). However, these prior matters either did not result in the candidate missing the filing of a scheduled report (Smith), or else involved a missing report that contained little financial activity (Arrojito). Bruning's failure to timely file his statement of candidacy resulted in the failure of Bruning 2012 to file its 2010 Year-End report at all and to omit over \$850,000 in activity. Accordingly, the Commission concludes that the violations in this matter are material and thus not suited to dismissal as a matter of prosecutorial discretion.

¹⁴ Respondents assert that because the Commission did not object to Bruning 2008's transfer of its excess campaign funds to JBEC at the time of the December 31, 2007, transfer, the Commission is now estopped from penalizing Respondents for "inadvertent or technical errors." Resp. at 8-9. The response does not specify what potential "error" the Commission is assertedly estopped from penalizing. Respondents themselves acknowledge that "the general rule is that equitable estoppel is not applicable against the government regardless of the actions of its agents." *Id.* at 8. Respondents argue that this matter merits an exception to the rule, citing *Tokonogy v. United States*, 417 F. Supp. 78 (S.D.N.Y. 1976). In that case, the IRS sent a letter to a taxpayer requesting a payment "as soon as possible" and suggesting the possibility of alternative arrangements, but subsequently informed the taxpayer, who had been in the hospital, that he was in default. By contrast, the Commission never offered Respondents any assurance regarding their actions. Rather, as noted below, RAD advised Bruning to seek an Advisory Opinion on the subject of redesignations of Bruning 2008 general election contributions to JBEC.

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3. Bruning 2012 Should Have Disclosed All of Bruning's Testing the Waters Activity, Including JBEC's Activity

The Amendment to the Complaint alleges that JBEC was required to disclose its contributions and expenditures when it triggered political committee status by transferring \$448,349.52 to Bruning's 2012 Senate campaign on November 5, 2010. Amend. Compl. at 3, 5-6. Respondents state that JBEC was "established in December, 2007 as a testing the waters account, authorized by Mr. Bruning for the purpose of exploring a possible future federal candidacy," and that "testing the waters" accounts are not obligated to register and report until the candidate determines that he or she is a federal candidate. Resp. at 6; Amend. Resp. at 1-2 (July 18, 2011).

Respondents are correct, up to a point. After an individual reaches candidate status, however, all reportable amounts from the beginning of the "testing the waters" period must be filed with the first financial disclosure report filed by the candidate's committee, even if the funds were received or expended prior to the current reporting period. See 11 C.F.R. §§ 100.72(a), 100.131(a), 101.3, 104.3(a)-(b).

Accordingly, regardless of when Bruning became a candidate for the 2012 election, his principal campaign committee, Bruning 2012, should have disclosed all of the testing the waters activity — which here would include the activity of Bruning's other exploratory account, JBEC — on its first disclosure report, the 2011 April Quarterly, rather than solely the transfers that JBEC made to the 2012 Exploratory Account on November 5, 2010, and December 17, 2010. Authorized committees are required to disclose, *inter alia*, dividends and interest received and contribution refunds disbursed, as well as all transactions in which they engaged. See 2 U.S.C.

Nonetheless, to the extent Respondents assert that the Commission is estopped from penalizing Respondents for Bruning 2008's transfer to JBEC, the Commission does not analyze whether the \$677,251 transfer was itself a violation of the Act.

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1 § 434(b)(2)(J), (b)(4)(F). Respondents here characterize JBEC as an exploratory, testing the
2 waters account, Resp. at 3; Bruning Aff. ¶¶ 8-9; like the 2012 Exploratory Account, it is a named
3 financial account indistinguishable from Bruning 2012, the recipient of the funds, after Bruning
4 became a candidate. See 11 C.F.R. §§ 100.72(a), 100.131(a). Accordingly, all transactions from
5 both exploratory accounts should have been disclosed, not merely the transfer of funds from the
6 first account to the Bruning 2012 account opened later. As such, Bruning 2012 should have
7 disclosed these transactions for JBEC as well as Bruning 2012 when it disclosed testing the
8 waters activity after Bruning became a candidate. See 2 U.S.C. § 434(b); 11 C.F.R.
9 §§ 100.72(a), 100.131(a), 101.3, 104.3(a)-(b).

10 In view of Bruning 2012's responsibility to disclose JBEC's activity, there is reason to
11 believe that Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee and Douglas R.
12 Ayer in his official capacity as treasurer violated 2 U.S.C. § 434(b) by failing to disclose JBEC's
13 activity on its 2011 April Quarterly Report. In light of this finding, the Commission dismisses
14 the allegation that the Jon Bruning Exploratory Committee failed to register and report as a
15 political committee in violation of 2 U.S.C. §§ 433(a) and 434(a).

16 4. The Bruning 2008 Contributions Transferred
17 to Bruning 2012
18

19 The Amendment to the Complaint alleges that JBEC likely accepted excessive
20 contributions from contributors whose contributions to Bruning 2008 were transferred to
21 Bruning 2012 through JBEC. Amend. Compl. at 3-4, 6-7. Respondents deny the allegation.
22 The available information indicates that Bruning 2012 did not accept excessive contributions in
23 this manner.

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a. 2008 Primary Election Contributions

The Act limits the amount of contributions by individuals to authorized committees of a candidate to \$2,300 per election in the 2008 cycle and \$2,500 per election in the 2012 cycle, and no political committee may knowingly accept contributions in excess of these limits. 2 U.S.C. §§ 441a(a)(1)(A), 441a(f). The Amendment to the Complaint alleges that Bruning 2012, on its 2011 April Quarterly Report, failed to identify the Bruning 2008 contributors whose funds comprised the \$448,349.52 transfer from JBEC on November 5, 2010, and that Bruning 2012 thereby may have received excessive contributions from these contributors if they subsequently donated to Bruning 2012 for the primary and general elections. Amend. Compl. at 3. Respondents state that these funds are comprised of contributions for Bruning's 2008 primary election plus interest earned on the funds while in the JBEC account.¹⁵ July 2011 Pedersen Aff. ¶ 22.

The available information does not indicate that the November 5 transfer resulted in Respondents accepting excessive contributions. Respondents state, based on a sworn affidavit, that they monitored the 2008 donors' contributions transferred to Bruning 2012 "to ensure that any donor who made contributions during the 2008 cycle do [sic] not make contributions in the aggregate which exceed \$2500 for the 2012 primary and \$2500 for the 2012 general election." Amend. Resp. at 2; *see also* July 2011 Pedersen Aff. ¶¶ 30-31. Other available information tends to confirm this assertion. For example, in March 2011, Bruning 2012 refunded \$2,300 to each of two contributors, Peggy Sokol and David Sokol, the amount of their contributions to Bruning 2008 for the general election, which were itemized in JBEC's transfer to Bruning 2012, after they each made the maximum \$2,500 contributions to Bruning 2012 on March 2, 2011.

¹⁵ Bruning 2012's disclosure report describes the receipt from JBEC as "Transfer of Surplus Funds-No Donor Item[ization]." Bruning 2012 April 2011 Quarterly Report at 251.

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1 Under the circumstances, there is no reason to believe that Respondents accepted excessive
2 contributions with respect to the November 5 transfer.¹⁶

3 b. 2008 General Election Contributions

4 The Amendment to the Complaint states that Bruning 2012, on its 2011 April Quarterly
5 Report, properly itemized the \$162,100 transfer from JBEC on December 17, 2010. Amend.
6 Compl. at 3 n.4. Respondents state that these funds are comprised of contributions for Bruning's
7 2008 general election which were redesignated by the donors to JBEC, plus accrued interest
8 from November and December 2010.¹⁷ July 2011 Pedersen Aff. ¶ 23. The available information
9 does not suggest that Bruning 2012 has received excessive contributions as a result of its receipt
10 of the Bruning 2008 general election contributions, but as noted below, the redesignations to
11 JBEC present a novel issue.

12 Bruning ended his 2008 campaign in November 2007 and thus did not participate in the
13 2008 general election. Under the Commission's regulations, if a candidate does not participate
14 in the general election, any contributions made for the general election shall be refunded to the
15 contributors, redesignated, or reattributed in accordance with the Commission's regulations.
16 11 C.F.R. § 102.9(e)(3). Treasurers of authorized committees may request a written
17 redesignation of a contribution by the contributor for a different election if certain conditions are
18 met. 11 C.F.R. § 110.1(b)(5). According to RAD's communication log, Bruning asked if he
19 could keep the money he received for the 2008 general election despite dropping out of the race.

¹⁶ As explained in Footnote 14 above, the Commission is not analyzing the legality of the November 5 transfer under the Act in this instance. Nor is the Commission opining here on whether the Act would have required aggregation of the 2008 and 2012 contributions.

¹⁷ Bruning 2012 itemized contributions from 71 individuals on its 2011 April Quarterly Report at 252-75. Also on December 17, 2010, Bruning 2012 received an unitemized \$213.51 transfer from JBEC, which may be the accrued interest.

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1 The RAD Analyst told Bruning that typically such money needed to be refunded, but that
2 Bruning's idea of redesignating the funds to a future election by holding it in an exploratory
3 committee would have to be explored via an Advisory Opinion. RAD Communication Log,
4 Dec. 11, 2007.¹⁸ According to Respondents, Bruning asked the 2008 general election
5 contributors in writing to redesignate their contributions to JBEC "for a future election" and
6 advised contributors that they could in the alternative receive a refund. Resp. at 3, Ex. 14
7 (sample redesignation request); Bruning Aff. ¶ 10; Feb. 2011 Pedersen Aff. ¶ 12. On December
8 31, 2007, Bruning 2008's transfer of \$677,251.49 to JBEC consisted partly of 2008 general
9 election contributions "from donors who had not yet requested refunds . . . and others who had
10 redesignated their contributions to the Bruning Exploratory Account." Feb. 2011 Pedersen Aff.
11 ¶ 17.

12 The available information does not indicate that Respondents have accepted excessive
13 contributions by virtue of the December 17 transfer. As explained above, Respondents state that
14 they voluntarily monitored the 2008 contributions transferred to Bruning 2012 to make sure they
15 were not excessive when aggregated with 2012 contributions, and submitted a sworn affidavit to
16 support this assertion, which is also supported by other evidence.¹⁹

17 Accordingly, there is no reason to believe that Bruning for Senate, Inc. f/k/a Bruning
18 2012 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer violated
19 2 U.S.C. § 441a(f). Finally, because Friends of Jon Bruning, his 2008 campaign committee

¹⁸ Bruning avers that he "spoke repeatedly to the FEC analyst assigned to [his] campaign in 2007 and also sought expert legal advice in 2007 and 2008 to make certain [he] was doing everything according to the FEC regulations." Bruning Aff. ¶ 21.

¹⁹ As explained in Footnote 14 above, the Commission is not analyzing the legality of the December 17 transfer under the Act in this instance.

- 1 which terminated in 2008, does not appear to have violated any provision of the Act, there is no
- 2 reason to believe that Friends of Jon Bruning violated the Act.

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