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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Free and Strong America PAC and	)	MURs 6470, 6482, 6484
Darrell Crate in his official capacity	)	
as treasurer, *et al.*	)	

STATEMENT OF REASONS OF CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONERS CAROLINE C. HUNTER AND LEE E. GOODMAN

Free and Strong America PAC ("FSA") was a registered political committee that disclosed, in public reports to the Commission, the contributions it received and the disbursements it made. Mitt Romney served as FSA's honorary chair. Complaints were filed with the Commission alleging, among other things, that FSA's payments for certain events in February and March 2011 constituted excessive in-kind contributions to Romney for President ("RFP")—Romney's 2012 presidential campaign committee—shortly before Romney became a presidential candidate.[1] RFP and FSA (collectively, "Respondents") disputed the allegations, contending that because the events at issue were *bona fide* FSA events, no in-kind contributions resulted from them.

In its First General Counsel's Report ("FGCR"), the Office of the General Counsel ("OGC") identified three FSA-sponsored events in February and March 2011 that potentially resulted in in-kind contributions. During these FSA functions, Romney allegedly discussed or was asked questions about a potential presidential campaign. OGC concluded that the events were, at least in part, "testing the waters" activities and that, therefore, a portion of the event costs constituted contributions from FSA to RFP.

The information available in the record does not convincingly demonstrate that there is reason to believe the events at issue resulted in violations of the Federal Election Campaign Act of 1971, as amended ("the Act"). At most, the record indicates that any discussion of Romney's future presidential plans—a common subject of speculation and interest in early 2011—was incidental to the events themselves. But even assuming the accuracy of the Complaints' factual allegations and legal conclusions, the events at issue cost approximately $30,000. Parsing the precise value of the alleged in-kind contributions would require (1) allocating between FSA, for its *bona fide* activity, and the Romney campaign, for its

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[1] With respect to allegations that certain state PACs made excessive contributions to RFP, the Office of General Counsel recommended that the Commission find no reason to believe a violation occurred or to take no further action. We supported those recommendations.

testing-the-waters activity; and then (2) reducing that amount by $10,000 because FSA was lawfully permitted to make separate $5,000 contributions to Romney's primary and general election campaign committees. The small amount of any potential subsidy, along with the fact that the boundaries governing pre-candidate activity have historically been rather nebulous and that the Commission has dismissed similar matters in the past, further counseled against opening a full-fledged Commission investigation and enforcement action.

Accordingly, we concluded that this matter should be dismissed pursuant to the Commission's prosecutorial discretion. We, therefore, voted to close the file.[2]

I. FACTUAL BACKGROUND

Mitt Romney first sought the Republican nomination for president in 2008.[3] His principal campaign committee, RFP, registered with the Commission on February 13, 2007.[4] After Romney withdrew from the race in February of 2008, RFP continued to file periodic reports with the Commission and eventually became Romney's authorized committee for president in 2012.

FSA registered with the Commission as a non-connected political committee on April 25, 2008.[5] Romney served as FSA's honorary chair.[6] FSA raised money to contribute to federal and state candidates, conduct "research to help those candidates communicate their positions on issues, travel around the country to assist candidates and build federal and state political parties, [and] communicat[e] on important policy topics."[7] FSA was funded by contributions raised subject to the Act's limits and prohibitions (*i.e.*, "hard money") and regularly filed disclosure reports with the Commission. These contributions paid for all of FSA's fundraising, events, websites, e-mail, direct mail expenses, and contributions to federal candidates.[8] After March 31, 2011, FSA ceased operations and became "effectively dormant."[9]

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2 *See* Amended Certification (December 1, 2015).

3 Mitt Romney, Amended Statement of Candidacy (Feb. 13, 2007).

4 Romney for President, Inc., Amended Statement of Organization (Feb. 13, 2007).

5 Free and Strong America PAC, Inc., Statement of Organization (Apr. 25, 2008). Free and Strong America became a multicandidate political committee on October 31, 2008. Free and Strong America PAC, Inc., Notification of Multicandidate Status (Oct. 31, 2008).

6 Romney Resp. at 1 (June 10, 2011); Second Romney Resp. at 1 (Mar. 28, 2012).

7 Romney Resp. at 2.

8 *Id.* at 2.

9 *Id.* at 1.

On April 11, 2011, Romney informed the Commission that he had reached the Act's threshold for candidacy with respect to the 2012 elections.[10] RFP's 2011 July Quarterly report indicated that the committee received its first contributions for the 2012 election cycle on April 11, 2011, in amounts exceeding the Act's $5,000 candidacy threshold.[11]

The allegations in this matter turn on just three FSA events that Romney attended in February and March 2011, shortly before announcing his 2012 candidacy. Those events are analyzed in detail below to determine the extent to which FSA's payments for the events might have constituted excessive contributions from FSA to RFP.[12]

II. LEGAL ANALYSIS

A "contribution" under the Act includes "any gift, subscription, loan, advance, or deposit of . . . anything of value made by any person for the purpose of influencing any election for federal office."[13] "[A]nything of value" includes in-kind contributions, such as the provision of goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.[14] Multicandidate political committees may contribute up to $5,000 per election to federal candidates.[15]

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10 Letter from Mitt Romney to FEC (Apr. 11, 2011).

11 Romney for President, 2011 July Quarterly Report (July 15, 2011).

12 The FGCR states that FSA disclosed paying $3,876.54 for a fourth event in Boston, which OGC includes in the total amount it claims FSA unlawfully contributed to Romney's testing the waters activities. *See* FGCR at 23. But the Boston event is omitted from the section of the FGCR in which various events are described to establish that they were in fact testing the waters events rather than FSA events. *See id.* at 18-22. The FGCR instead describes just "four events"—in Utah, Florida, Washington, and New York—that the FGCR, without citation, asserts were "designed to discuss and consider plans, build support, and raise money for Romney's 2012 campaign." *Id.* at 18. Accordingly, we do not analyze the Boston event in this Statement.

Additionally, among the alleged testing the waters activity costs that FSA allegedly paid, the FGCR lists—without analysis—FSA payments to two individuals, Beeson and Newhouse, who would later work on the Romney campaign. FGCR at 23; *see also id.* at 13-15. Obviously, the bare fact that FSA paid these individuals and that the recipients later worked on the Romney campaign does not provide reason to believe that the payments constituted impermissible contributions. The Respondents described the *bona fide* services provided by these individuals to FSA. *See* Second Romney Resp. at 3. The Commission has previously dispatched similar allegations. *See* MUR 5248 (Ralph Reed) (no reason to believe corporation would have employed consulting firm but for future candidate's testing the waters activities); FGCR at 29, MUR 5260 (Talent) (a finding of reason to believe based upon this information, without something tending to show a nexus between Missouri Renewal and federal campaign activity, would constitute mere speculation and conjecture); MUR 4960 (Hillary Clinton for U.S. Senate Exploratory Committee) (purely speculative charges do not form an adequate basis to find reason to believe that a violation of the Act has occurred).

13 52 U.S.C. § 30101(8)(A)(i).

14 11 C.F.R. § 100.52(d)(1).

15 52 U.S.C. § 30116(a)(2)(A).

The concept of "testing the waters" is not found in the Act. Rather, the Commission has addressed pre-candidacy exploratory activities in its regulations,[16] which provide that an individual who has not yet decided to become a federal candidate may raise and spend funds for the purpose of determining whether to become a candidate (*i.e.*, "testing the waters") without such funds being deemed "contributions" or "expenditures."[17] Commission regulations further provide that if an individual later decides to become a candidate, the "funds received [for testing-the-waters activities] are contributions subject to the reporting requirements of the Act," as well as the Act's amount limitations and source prohibitions.[18]

Two common activities implicated by the testing-the-waters regulations are speeches and travel by individuals who are considering whether to run for federal office. Such activities may be undertaken to explore a potential candidacy without the associated costs being deemed "contributions" or "expenditures," even if the individuals make "incidental remarks" or "response[s] to questions" from the press or others about possible candidacy.[19] Thus, this rule abides by clear limitations on the Commission's jurisdiction. As previously observed, "courts have repeatedly held that political activity in support of persons who are not candidates for federal office is outside of the FEC's jurisdiction, even if the aim of the activity is to convince a specific individual to become a candidate for office."[20]

Accordingly, a political committee or other organization may provide an individual who is testing the waters (and later becomes a candidate) with a platform to speak about issues, support other candidates, and maintain a public profile without the payments for such activities necessarily being considered contributions to the future candidate's campaign.[21]

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[16] *See Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities*, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985).

[17] 11 C.F.R. §§ 100.72, 100.131.

[18] *Id.* Questions regarding the validity of treating testing-the-waters funds as "contributions" retroactively if and when an individual decides to become a candidate need not be resolved here because of our decision to dismiss the matter on other grounds. It suffices to observe that because the Commission's testing-the-waters regulation is extra-statutory and addresses non-candidate activity, the Commission must apply the rule narrowly to unambiguous testing-the-waters activities.

[19] *See* Advisory Op. 1986-06 (Fund for America's Future) at 3-5.

[20] MUR 6509 (Cain), Statement of Reasons of Commissioners Matthew S. Petersen, Caroline C. Hunter and Lee E. Goodman at 6; MUR 6462 (Trump), Statement of Reasons of Commissioners Caroline C. Hunter and Donald F. McGahn at 8 (citing *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010); *FEC v. Fla. for Kennedy*, 681 F.2d 1281 (11th Cir. 1982); *FEC v. Citizens for Democratic Alternatives in 1980*, 655 F.2d 397 (D.C. Cir. 1981); *FEC v. Machinist Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981)).

[21] *See* MUR 5260 (Talent), First General Counsel's Report at 26-29 (recommending that the Commission find no reason to believe an individual used an organization to test the waters even though: (1) that organization functioned as a platform for the individual "to keep up his public profile" while supporting "candidates and causes until he determined his political future"; (2) that organization secured and then vacated office space for the individual's subsequent campaign committee immediately before he announced his candidacy; (3) individuals working for organization resigned to work on campaign committee; and (4) organization stopped

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And even where payments may constitute an in-kind contribution to an individual's future campaign, such payments must be appropriately allocated between the organization and the campaign.[22]

Classifying certain pre-candidacy activities or expenditures as testing-the-waters expenses has presented legal and practical difficulties over the decades. The fact that some activities are inherently ambiguous, along with questions regarding the Commission's authority under the Act to regulate non-candidate activity, have militated in favor of regulatory restraint. Accordingly, the Commission has exercised its prosecutorial discretion pursuant to *Heckler v. Chaney*[23] and dismissed matters at the reason-to-believe stage involving as much as $30,000 in alleged testing-the-waters activities.[24]

A. Alleged FSA Contributions

In this matter, OGC's analysis focused on three FSA events held in February and March 2011 that allegedly constituted in-kind contributions to RFP.[25] The Complaints and

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accepting contributions and making expenditures as the campaign committee was organized); MUR 5260 (Talent), Commn. Cert. (Jan. 6, 2003) (finding "no reason to believe" on all allegations).

[22] *See* MUR 5908 (Duncan Hunter), Statement of Reasons of Commissioners Petersen, Bauerly, Hunter, McGahn, and Weintraub; Advisory Op. 1985-40 (Republican Majority Fund).

[23] 470 U.S. 821, 832 (1985).

[24] *See* MUR 6216 (Coakley for Senate) ($29,716 in alleged testing-the-waters payments to consultants benefitting the future candidate); MUR 5908 (Duncan Hunter) ($10,200).

[25] The FGCR also described an event in Utah on February 18, 2011, at which "Romney reportedly met 'privately with Utah supporters of his 2008 presidential bid' as part of a 40-state tour to thank supporters and *presumably* build support for his as yet-unannounced run for the GOP presidential nomination in 2012." FGCR at 18 (italics added). The FGCR relied on the journalist's presumption about the purpose of the event as evidence that this FSA event was secretly a Romney testing-the-waters event. Yet OGC also acknowledged that Romney was responding to press questions about his potential support in Utah, and that his response was that "it depends on what we decide to do." *Id.* The Commission has determined that a future candidate's response to reporters' questions at an event does not transform an entity's payments for that event into a contribution to the future candidate's campaign. *See* Advisory Op. 1986-06 (Fund for America's Future) at 3-5. The FGCR cites—as further evidence that this was a testing the waters event—that Romney's spouse stated to a reporter that Romney would "make a great president." FGCR at 18. Lacking evidence that this was a testing-the-waters event, the FGCR effectively shifted the burden of proof by contending that there was reason to believe a violation occurred because the Respondents did "not deny that Romney was in fact building support for his yet-unannounced presidential run." *Id.* at 19. In addition to mistaking the burden of proof, the FGCR's characterization of the Response as a failure to deny is also inaccurate. The Second Romney Response stated:

> The event . . . was not a "testing the waters" event. It was an FSA fundraising and donor appreciation event . . . there was nothing inappropriate about Governor Romney traveling the country to thank FSA supporters . . . it was natural that attendees would ask Governor Romney about whether he planned to run for president. These questions were merely incidental to the event.

Second Romney Resp. at 4. In sum, there is thus no basis to conclude that this event was in whole or in part a testing-the-waters event such that FSA's payments for it constituted a contribution to Romney's campaign. In

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OGC's analysis generally relied on news articles that selectively quoted statements made by Romney and others regarding these events but often omitted any context or other information about what transpired at these events. Respondents contended that the media accounts were speculative, and that the events, in fact, did not constitute testing-the-waters activities. Rather, according to the respondents, they were FSA fundraising and donor appreciation events.

We analyze each event below.

1. Fort Lauderdale Event on March 9, 2011

The FGCR asserted that an FSA event in Fort Lauderdale on March 9, 2011, was organized by a fundraising consultant whom FSA paid $93,000 "in addition to hundreds of thousands" more.[26] The details regarding this event are sparse. Nevertheless, the FGCR implied that the $93,000 and the "hundreds of thousands" more paid by FSA were potentially contributions to RFP.

But FSA finance officials met with donors at the event,[27] indicating the event was indeed an FSA fundraiser. The FGCR, moreover, omits additional facts stated in the *Politico* article indicating that the Fort Lauderdale event—and the costs attributed to the fundraiser—were for multiple "similar" meetings in Florida with Governor Rick Scott and a state Senate candidate. These facts cast doubt on the characterization of the Fort Lauderdale event as a Romney testing-the-waters event. And as to the actual event costs borne by FSA, the FGCR also omits the fact noted in the *Politico* article that the event was hosted by an individual in that individual's home.[28] This tends to support the Respondents' contention that FSA made no expenditure to host the Fort Lauderdale event. This conclusion is further corroborated by the absence of any disbursements for this event on FSA's disclosure reports filed with the Commission. (By comparison, FSA disclosed expenses for the other events.)

As for the $93,000 and "hundreds of thousands" of additional dollars, these amounts were paid to FSA's fundraising consultant, and no information suggests these payments were for anything other than fundraising activities benefitting FSA. Consequently, there is no basis for attributing any portion of these amounts to RFP.

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any event, the operative section of the FGCR that calculated the amount of the alleged FSA in-kind contributions did not include any amount for this event. *See* FGCR at 23-25.

[26] FGCR at 24.

[27] *Id.* at 19.

[28] Vogel, Kenneth P., *Romney Makes Fla. Play With Key Fundraiser Hire*, POLITICO (Mar. 10, 2011) ("reception" to be held at individual's "home" outside Fort Lauderdale).

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The FGCR notes that a hearsay press article characterized an invitation to the event as suggesting Romney would discuss his potential campaign.[29] The alleged invitation is not in the record before the Commission, so we have no way of judging its existence or contents. Moreover, there is no evidence—either in the news article, complaint, or FGCR—that FSA disseminated or approved this alleged invitation. Nor are there details about its maker or its recipient. The press article thus provides little basis for launching an investigation into one event in March 2011, hosted by a private citizen in his personal residence, in order to establish that Romney might have spoken about his future presidential plans.

Accordingly, the evidence in the record does not establish that there is reason to believe the Fort Lauderdale event was something other than an FSA fundraiser and donor appreciation event or that FSA's payments for fundraising services may have been for testing-the-waters activities. And even assuming *arguendo* that the event held in the volunteer's home featured questions and discussion about Romney's potential candidacy that went beyond being merely incidental, any event costs would likely have been minimal and, thus, not merit an investigation.

2. Washington Event on March 22, 2011

Information about the FSA event in Washington, D.C. on March 22, 2011, principally comes from an article published in the *Wall Street Journal* two days after the event. The article indicated that Romney spoke at length about the Massachusetts health care law.[30] The article also included information purportedly derived from statements Romney made at the event about his potential candidacy, though it does not provide any context for how that subject was raised. Respondents assert that those statements were responses to questions that were incidental to the event.[31] Standing alone, and even assuming Romney unilaterally interjected the remarks, such brief remarks, in the context of the entire event, would be insufficient to transform an event focused on health care policy into a Romney testing-the-waters event. The information in the record, therefore, does not provide a reason to believe that FSA's payments for this event constituted contributions to RFP.

However, even assuming *arguendo* that FSA's payments in connection with the Washington event constituted contributions to RFP, the amount associated with this event was

[29] FGCR at 19. As a general evidentiary matter, we decline to open investigations based solely upon hearsay reports or editorial characterizations contained in press articles, particularly where, as here, the speculation is rebutted by record evidence.

[30] Ltr. from FEC to Romney, Attach. H (Feb. 23, 2012).

[31] Romney Second Resp. at 5.

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$9,172.[32] As explained in greater detail below, this amount would not justify further Commission enforcement action.

3. The New York Harvard Club Event on March 24, 2011

According to the FGCR, on March 24, 2011, "Romney reportedly met with donors at the Harvard Club in New York City and asked them 'to raise between $25,000 and $50,000 for [him] within 90 days, in an effort to post large fund-raising goals quickly.'"[33] The costs associated with this event amounted to $14,312 for venue rental and catering.[34] The FGCR concluded that the event consisted of testing-the-waters activities since "Romney was soliciting funds for what was at least a potential candidacy."[35]

We could not support this conclusion for a number of reasons. First, the quoted statement derives from a *Wall Street Journal* article published on the day of the event, Thursday, March 24, 2011—but written *before* the event.[36] The second sentence of that article stated that Romney "*will* meet Thursday" at the Harvard Club. Accordingly, it was based on an expectation of what would occur at the meeting, not a statement about what in fact took place.

Second, this expectation is not attributed to Romney or FSA, but rather is a journalist's paraphrase of a statement by an anonymous source "familiar with" an event that had not yet occurred. Thus, the reliability of this expectation is in question.

Third, while the record includes another *Wall Street Journal* article published the same day as but *after* the event,[37] the post-event article provides no indication that Romney actually solicited attendees for contributions to a future presidential campaign. Consequently, the record does not contain sufficient information regarding the Harvard Club event to justify a reason-to-believe finding.

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32 FGCR at 24.

33 *Id.* at 20.

34 *See id.* at 24.

35 *Id.*

36 Ltr. from FEC to Romney, Attach. H (Feb. 23, 2012).

37 Ltr. from FEC to Romney, Attach. I (Feb. 23, 2012).

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B. FSA's Total Potential Contributions Were Relatively Minimal

For the reasons set forth above, the record does not provide us reason to believe these events were testing-the-waters activities. However, even if we were to assume that all three events featured non-incidental discussions about potential candidacy by Romney sufficient to transform them into testing-the-waters activities, the record identifies less than $30,000 in payments for all three events *before* any allocation. Even if we were to use that unallocated number, the potential amount in violation in this matter would be analogous to that at issue in MUR 6216 (Coakley for Senate), which involved a state party committee making $29,716 in payments for potential testing-the-waters activities.[38] The Commission concluded that the payments were "minimal" and dismissed them pursuant to its prosecutorial discretion.[39] By comparison to the 2010 Senate election at issue in MUR 6216, in which Coakley raised approximately $9.7 million, RFP raised over $304 million in the 2012 cycle, while the opponent committee raised over $738 million—and that is in addition to hundreds of millions of dollars spent by other primary candidates. Thus, the rationale for dismissing MUR 6216 is even more compelling here, where the potential amount in violation is much smaller relative to the overall amounts raised and spent.

That still leaves the issue of allocation of event costs. The Washington and New York events, unlike the Fort Lauderdale event, were not hosted in a volunteer's home and, thus, FSA's payments for the Washington and New York events likely comprise the vast majority of any potential FSA contributions to RFP. The evidence regarding any testing-the-waters activities during those events is largely confined to a few reported (hearsay) remarks during the course of each event, most likely in response to questions. Thus, any allocation would be weighted heavily toward the PAC's benefit and not toward Romney's testing-the-waters activity. But even allocating 50 percent of the cost of each event to RFP, the resulting contribution by FSA would be no more than about $15,000.

Furthermore, FSA was lawfully permitted to contribute $5,000 to *each* of RFP's primary and general election campaign committees. Thus, even were the Commission to pursue the events as testing-the-waters activities, the amount of the alleged excessive

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[38] MUR 6216 (Martha Coakley), Statement of Reasons of Chair Petersen, Vice Chair Bauerly, and Commissioners Hunter, McGahn, and Weintraub at 3, n.8 (identifying $29,716 in Coakley state campaign committee payments shortly before Coakley's candidacy began for consultants whose work allegedly benefitted Coakley's federal campaign).

[39] *Id.* at 6-7 ("Although the State Committee's August payments to the consultants occurred in close proximity to Coakley's September 3, 2009 announcement of her Federal candidacy, and the Respondents did not address the allegation that the State Committee paid for consulting services that benefited the Federal Committee, the use of the Commission's limited resources to pursue this matter is not warranted here, as it would appear that any amount of State Committee consultant payments attributable to the Federal Committee would be minimal.").

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contribution would have to be reduced by $10,000 to account for the amount FSA could have lawfully contributed. Thus, at most, FSA's excessive contribution would have been $5,000—roughly 15 percent of the amount dismissed in MUR 6216 and half the potential violation dismissed in MUR 5908 (Duncan Hunter).[40]

For all of these reasons, we did not support opening an investigation into three events involving minimal costs that were held almost two years before the presidential election.

III. CONCLUSION

Accordingly, we voted to dismiss the allegations against Respondents and to close the file on this matter.

Mar. 29, 2016
Date

Matthew S. Petersen
Chairman

March 30, 2016
Date

Caroline C. Hunter
Commissioner

March 29, 2016
Date

Lee E. Goodman
Commissioner

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[40] We note that while any potential penalties obtained through an enforcement action would be minimal, the costs of proceeding, for both Respondents and the Commission, would be high. For instance, in MUR 2133 (RNC), the Commission pursued similar allegations through a time-intensive and costly investigation (including numerous depositions), and at the end of the matter, however, the Commission accepted a conciliation agreement without a clear admission of the violation. The alleged beneficiary committee merely reimbursed the RNC for the alleged unlawful in-kind contribution (a pre-candidacy poll).