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BY HAND DELIVERY

Jeff S. Jordan, Esq.
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Federal Election Commission
999 E Street NW
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Re: MURs 6915/6927 – Governor John Ellis "Jeb" Bush

Dear Mr. Jordan:

This firm represents Governor Jeb Bush in Matter Under Review ("MUR") 6915 and MUR 6927.

We have reviewed the Complaint filed on February 5, 2015, the First Supplemental Complaint filed on May 4, 2015, and the Second Supplemental Complaint filed on May 27, 2015, by the American Democracy Legal Fund in MUR 6915. We have also reviewed the Complaint filed on March 31, 2015, and the First Supplemental Complaint filed on May 27, 2015, by the Campaign Legal Center and Democracy 21 in MUR 6927.

The Complaints and Supplemental Complaints in MURs 6915 and 6927 (collectively, the "Complaints") allege that Governor Bush violated the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), and Federal Election Commission ("FEC" or "Commission") regulations by: (1) financing his testing-the-waters activities through a leadership PAC with funds that do not comply with FECA's candidate contribution limits; (2) failing to timely register and report as a candidate; and (3) financing his testing-the-waters activities by "establish[ing]" and "controlling" an independent expenditure-only committee and soliciting funds on its behalf.

These allegations have no basis in law or fact. As detailed below, the Complaints contain erroneous and speculative allegations that fail to state a claim that a violation has occurred. Governor Bush scrupulously complied with the Commission's testing-the-waters regulations and timely registered and reported as a candidate. And because Governor Bush was not a "candidate" until early June 2015, FECA's prohibitions on "establishing," "controlling," or soliciting funds for an independent expenditure-only committee did not apply to him as a matter of law.

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In any event, the complainants proffer no credible evidence to support any of their claims.

Accordingly, the Commission should find no reason to believe that Governor Bush violated the Act or Commission regulations and should promptly dismiss these matters and close the file.

FACTS

I. GOVERNOR BUSH

Governor Bush began testing the waters for a possible presidential candidacy in June 2014 by making personal payments for:

- Research and polling to determine the feasibility of a presidential campaign;
- Political consulting services for the purpose of providing advice on the feasibility and mechanics of constructing a potential presidential campaign;
- Communications consulting services for the purpose of responding to press inquiries and providing advice on potential communications strategies of a presidential campaign; and
- Legal fees related to FECA compliance, personal financial disclosure requirements, and other legal matters related to a potential presidential campaign.

See Jeb 2016, Inc., 2015 July Quarterly Report, at 1658-73, 1700-01, 1933.

After privately testing the waters for a number of months, Governor Bush publicly announced on December 16, 2014, that he had "decided to actively explore the possibility of running for President of the United States." Jeb Bush, *A Note from Jeb Bush* (Dec. 16, 2014), https://www.facebook.com/notes/jeb-bush/a-note-from-jeb-bush/619074134888300. Over the next six months, Governor Bush continued

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to test the waters and personally paid for these expenses.[1] *See* Jeb 2016, Inc., 2015 July Quarterly Report, at 1658-73.

Throughout this time, Governor Bush repeatedly stated both in public and in private that he had not yet decided whether to run for federal office. These statements were reported in numerous press stories. For example:

- "During a telephone call with Iowa's Republican party chairman, Bush repeatedly said he's not a candidate, he's just exploring a bid for the presidency." Jennifer Jacobs, *Jeb Bush Reaches Out to Iowa GOP Chairman*, Des Moines Register (Jan. 21, 2015), http://www.desmoinesregister.com/story/news/2015/01/21/jeb-bush-calls-iowa-gop-chair/22116115.

- "If I was to go beyond the consideration of running, I would have to deal with this and turn this fact into an opportunity to share who I am, to connect on a human level with people and offer ideas that are important to people." James Hohmann, *Jeb on Running as a Bush: 'Interesting Challenge'*, Politco (Feb. 4, 2015), http://www.politico.com/story/2015/02/jeb-bush-candidate-2016-family-dynasty-114906.html.

- "But former Florida Gov. Jeb Bush insisted he had yet to make a decision on whether to run. 'I'm moving forward methodically on this,' he told reporters, adding that he doesn't have 'a particular time frame.'" Kathleen McGrory, *Jeb Bush Hosts Education Summit, Raises Funds in Florida*, Tampa Bay Times (Feb. 10, 2015), http://www.tampabay.com/news/politics/stateroundup/jeb-bush-hosts-education-summit-raises-funds-in-florida/2217098.

- "My wife is my inspiration, she's my soul mate. . . . She is going to be involved in the campaign and keep me sane, if I go beyond the consideration of thinking about this, for sure." Michael C. Bender, *Barbara Bush on Jeb: 'I've Changed My Mind'*, Bloomberg News (Feb. 13, 2015),

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[1] Jeb 2016, Inc. directly paid for any testing-the-waters expenses for which Governor Bush received invoices after he had already decided to become a candidate in early June 2015. *See* Jeb 2016, Inc., 2015 July Quarterly Report, at 1700-01, 1933.

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http://www.bloomberg.com/politics/articles/2015-02-14/barbara-bush-on-jeb-i-ve-changed-my-mind-.

- "If I go beyond the consideration of running, I'm not backing down from something that is a core belief." Byron York, *Jeb Bush: 'I'm Not Backing Down' From Immigration Stance*, Washington Examiner (Feb. 26, 2015), http://www.washingtonexaminer.com/jeb-bush-im-not-backing-down-from-immigration-stance/article/2560810.

- "If I go beyond consideration, I will offer ideas." Yesenia Amaro, *Potential 2016 Candidate Jeb Bush Talks Conservative Values at Vegas Event*, Las Vegas Review-Journal (Mar. 2, 2015), http://www.reviewjournal.com/politics/government/potential-2016-candidate-jeb-bush-talks-conservative-values-vegas-event.

- "Look, if I actually go beyond the consideration of running to actually running, then I'll do it with lots of energy. I'll do it with lots of passion, and I'll do it honestly, telling my story about how conservative principles applied the right way through principles-centered leadership made a difference here in Florida." Jennifer Jacobs, *Jeb Bush: Barely a Republican, or 'Conservative Hero'?*, Des Moines Register (Mar. 6, 2015), http://www.desmoinesregister.com/story/news/elections/presidential/caucus/2015/03/05/jeb-bush-first-iowa-trip-presidential-hopeful/24472469.

- "That life experience that came from business and public leadership—if I go forward and run for president—I think will be a useful part of the story that I'll tell Iowans." *Id.*

- "But I know if I'm going to go beyond the consideration of running I have to share my heart and tell my life story in a way that gives people a sense I care about them and have ideas that will help people rise up." Morgan Palmer, *Jeb Bush Kicks Political Tires in Dover*, Foster's Daily Democrat (Mar. 13, 2015), http://www.seacoastonline.com/article/20150313/News/150319527.

- "But here's the deal, Megyn, if I go beyond the consideration of running to be an actual candidate, do you want people to just bend with the wind, to mirror people's sentiment whoever is in front of you?" Interview by Megyn Kelly with Jeb Bush, *The Kelly File*, Fox News Network (May 10, 2015),

http://www.foxnews.com/politics/2015/05/10/exclusive-jeb-bush-says-hillary-clinton-would-have-backed-iraq-invasion.

In early June 2015, Governor Bush decided to become a candidate for President of the United States. On June 5, 2015, Governor Bush signed a Statement of Candidacy designating Jeb 2016, Inc. as his principal campaign committee. Jeb Bush, Statement of Candidacy (dated June 5, 2015), http://docquery.fec.gov/cgi-bin/fecimg?_15031431747+0. Also on June 5, 2015, Jeb 2016, Inc.'s treasurer signed a Statement of Organization. Jeb 2016, Inc., Statement of Organization (dated June 5, 2015), http://docquery.fec.gov/cgi-bin/fecimg?_15031431751+0. Both the Statement of Candidacy and Statement of Organization were timely filed with the Commission on June 15, 2015.

On July 15, 2015, Jeb 2016, Inc. filed its initial disclosure report with the Commission. Pursuant to the Act and Commission regulations, Jeb 2016, Inc.'s July Quarterly Report disclosed all disbursements made and expenses incurred for the purpose of testing the waters. *See* Jeb 2016, Inc., 2015 July Quarterly Report, at 1658-73, 1700-01, 1933. This report disclosed all of Governor Bush's personal payments for testing-the-waters expenses. Jeb 2016, Inc. properly reported these expenses as in-kind contributions from Governor Bush, identifying the original payees in the additional text field. *See id.* at 1658-73. Jeb 2016, Inc. opted to pay for three testing-the-waters expenses for which Governor Bush received invoices after he had decided to become a candidate in early June 2015. For such expenses, Jeb 2016, Inc., in the interest of full transparency and disclosure, voluntarily included a notation in the additional text field identifying these as testing-the-waters expenses. *See id.* at 1700-01, 1933.

II. RIGHT TO RISE PAC, INC.

Right to Rise PAC, Inc. (the "Leadership PAC") is a nonconnected political action committee registered with the Commission. In his December 16, 2014 Facebook Post, Governor Bush explained that, separate and apart from his exploratory activities, he "plan[ned] to establish a Leadership PAC." Jeb Bush, *A Note from Jeb Bush* (Dec. 16, 2014), https://www.facebook.com/notes/jeb-bush/a-note-from-jeb-bush/619074134888300. "The PAC's purpose [would] be to support leaders, ideas and policies that will expand opportunity and prosperity for all Americans." *Id.* Governor Bush served as the Leadership PAC's honorary chairman since its inception in January 2015. *See* Right to Rise PAC, Inc., *About*,

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https://righttorisepac.org/about. *See also* Response of Right to Rise PAC, Inc., et al. in MUR 6915, at 2 (dated Feb. 20, 2015); Response of Right to Rise PAC, Inc., et al. in MUR 6927, at 4-5 (dated Apr. 24, 2015).

In furtherance of the Leadership PAC's mission "to support candidates who share our optimistic, conservative, positive vision for helping every American get ahead," *see* Right to Rise PAC, Inc., *About*, https://righttorisepac.org/about, the Leadership PAC made 57 contributions totaling $283,800 to other political committees and candidates, *see* Right to Rise PAC, Inc., 2015 Mid-Year Report (amended July 31, 2015), at 4, 1331-60.

The Leadership PAC also supported conservative candidates, policies, and ideas by facilitating appearances by its honorary chairman, Governor Bush, at events sponsored by candidates, political parties, and non-profit organizations. *See, e.g.*, *Jeb Bush to Attend Iowa Fundraiser*, Quad City Times (Feb. 23, 2015), http://qctimes.com/news/local/government-and-politics/elections/jeb-bush-to-attend-iowa-fundraiser/article_c783fe06-f267-5b85-aa2c-6136d795aadc.html (noting that Governor Bush will be appearing at a fundraising event for U.S. Representative David Young); Press Release, *Media Advisory: RNC Spring Meeting*, Republican National Committee (May 8, 2015), https://www.gop.com/media-advisory-2015-rnc-spring-meeting (noting that Governor Bush will be speaking at an "RNC Reception and Dinner"). In his capacity as honorary chairman, Governor Bush also appeared at events sponsored by the Leadership PAC. Response of Right to Rise PAC, Inc., et al. in MUR 6915, at 2; Response of Right to Rise PAC, Inc., et al. in MUR 6927, at 4-5.

None of the Leadership PAC's funds were used for Governor Bush's testing-the-waters activities. *Id.* In fact, the Leadership PAC carefully conducted its activities in a manner to avoid the possibility of inadvertently subsidizing Governor Bush's testing-the-waters activities. For example:

- The Leadership PAC's public communications made no references to any possible candidacy by Governor Bush. Instead, the Leadership PAC's public communications focused on supporting conservative candidates, policies, and ideas. *See, e.g.*, Right to Rise PAC, https://righttorisepac.org (not referring to Governor Bush as a possible candidate).

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- The Leadership PAC's solicitations referenced supporting Republican candidates and the Republican Party, but made no references to any possible candidacy by Governor Bush and made no representations to contributors that they were supporting or benefitting such a candidacy through their contributions to the Leadership PAC. Examples of the Leadership PAC's fundraising emails are attached hereto as Exhibit A.

- During Governor Bush's remarks at events in which he appeared in his capacity as honorary chairman of the Leadership PAC, he did not refer to the possibility that he may run for President, except in an incidental manner or in response to questions by the public or press. *See, e.g.*, James Hohmann, *Jeb Bush Says Florida Years Show He's No Moderate*, Politico (Feb. 26, 2015), http://www.politico.com/story/2015/02/jeb-bush-cpac-2015-115577.html?hp=lc3_4 (discussing Governor Bush's appearance at the Club for Growth's annual meeting).

- To the extent that any testing-the-waters activities occurred during Governor Bush's travel on behalf of the Leadership PAC, they were isolated and incidental in nature (*e.g.*, responding to a question from a member of the public or press regarding Governor Bush's potential candidacy, informally and privately discussing Governor Bush's potential candidacy with individuals outside of scheduled events). *See, e.g.*, Nicholas Confessore, et al., *Presidential Race Just Started? Not According to the Spending*, N.Y. Times (July 25, 2015) ("Kristy Campbell, a spokeswoman for Mr. Bush, said the travel expenses were covered by Right to Rise PAC, a political committee of which Mr. Bush was 'honorary chairman,' and were not related to his presidential bid. 'Governor Bush has attended events as a featured guest for organizations that have a mission and philosophy he shares,' Ms. Campbell said.").

Although the Leadership PAC remains registered with the Commission, the Leadership PAC's 2015 Mid-Year Report makes clear that its political activities have declined significantly in June 2015 after Governor Bush became a candidate. *See* Right to Rise PAC, Inc., 2015 Mid-Year Report (amended July 31, 2015).

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III. RIGHT TO RISE SUPER PAC, INC.

Right to Rise Super PAC, Inc.[2] ("RTR Super PAC") is registered with the Commission as an independent expenditure-only committee and was founded by supporters of Governor Bush. As RTR Super PAC's treasurer has already indicated to the Commission, "[t]he Super PAC was not established by Governor Bush, and Governor Bush does not direct or control the Super PAC's fundraising or other activities." Response of Right to Rise PAC, Inc., et al. in MUR 6915, at 4 (Feb. 20, 2015); Response of Right to Rise PAC, Inc., et al. in MUR 6927, at 5-6 (Apr. 24, 2015).

More specifically, Governor Bush did not incorporate RTR Super PAC. *See* D.C. Dep't of Consumer and Regulatory Affairs, *Governors for Right to Rise Super PAC, Inc.* (attached hereto as Exhibit B). Moreover, Governor Bush has not served as an officer or director of RTR Super PAC.[3] Nor did Governor Bush make any "seed money" contributions or any other contributions to RTR Super PAC. *See* Right to Rise USA, 2015 Mid-Year Report (amended July 31, 2015). In addition, out of an abundance of caution, Governor Bush has not solicited any contributions on behalf of RTR Super PAC. *See* Zeke Miller & Phillip Elliott, *How Jeb Bush's Super PAC Will Spend $103 Million*, Time (July 9, 2015), http://time.com/3951931/jeb-bush-super-pac-fundraising ("Aides say Bush never directly made a fundraising ask, even before he declared his candidacy."). Put simply, "[t]he extent of Governor Bush's involvement with the Super PAC is his appearance as a special guest at Super PAC fundraising events." Response of Right to Rise PAC, Inc., et al. in MUR 6915, at 4 (Feb. 20, 2015); Response of Right to Rise PAC, Inc., et al. in MUR 6927, at 5-6 (Apr. 24, 2015).

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[2] Right to Rise Super PAC, Inc. filed an Amended Statement of Organization on June 12, 2015, notifying the Commission that it had changed its name to Right to Rise USA. *See* Right to Rise USA, *Statement of Organization* (amended June 12, 2015), http://docquery.fec.gov/pdf/367/15951468367/15951468367.pdf. Through this response, we refer to this entity as Right to Rise Super PAC, Inc. ("RTR Super PAC") because that was the name used during the time period at issue in the Complaints.

[3] RTR Super PAC will be required to file a "Two-Year Report" with the D.C. Department of Consumer and Regulatory Affairs, which will publicly disclose its officers and directors, no later than April 1, 2016.

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THE LAW

I. THE DEFINITION OF "CANDIDATE" AND THE COMMISSION'S TESTING-THE-WATERS EXEMPTION

A. The Definition of "Candidate"

FECA provides that a "candidate" is "an individual who seeks nomination for election, or election, to Federal office." 52 U.S.C. § 30101(2). An individual automatically becomes a candidate when he or she "has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000." *Id.* *See also* 11 C.F.R. § 100.3 (similarly defining "candidate").

However, the Commission's regulations provide an exception to this automatic threshold that "permit[s] an individual to test the feasibility of a campaign for Federal office *without becoming a candidate under the Act*." *Payments Received for Testing the Waters Activities*, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (emphasis added). "Commonly referred to as the 'testing the waters' exception[]," *id.*, the Commission's definitions of "contribution" and "expenditure" exclude "[f]unds received solely for the purpose of determining whether an individual should become a candidate" and "[p]ayments made solely for the purpose of determining whether an individual should become a candidate," 11 C.F.R. §§ 100.72(a), 100.131(a). The FEC's testing-the-waters regulations, which have been in effect for decades, create important "exemptions from the reporting requirements of the Act to permit individuals to conduct certain activities while deciding whether to become a candidate for Federal office, without making their activities immediately public." *Payments Received for Testing the Waters Activities*, 50 Fed. Reg. at 9993.

B. Scope of the Commission's Testing-the-Waters Exemption

"Examples of activities permissible under [the testing-the-waters] 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." 11 C.F.R. §§ 100.72(a), 100.131(a). The testing-the-waters exemption does not apply, however, to funds received or payments made "for activities indicating that an individual has decided to become a candidate for a particular office or for activities relevant to conducting a campaign." *Id.* §§ 100.72(b), 100.131(b). "Examples of

activities that indicate that an individual has decided to become a candidate include":

- The individual uses general public political advertising to publicize his or her intention to run for Federal office.
- The individual raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate.
- The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office.
- The individual conducts activities in close proximity to the election or over a protracted period of time.
- The individual has taken action to qualify for the ballot under State law.

Id.

Through advisory opinions and enforcement matters, the Commission has sought to delineate between activities that are for exploratory purposes and fall within the testing-the-waters exemption and activities that indicate an individual has decided to become a candidate and is no longer engaged in testing-the-waters activities. Through these various advisory opinions and enforcement action decisions spanning more than 30 years, the FEC has made clear that a broad range of political activities may be conducted while testing the waters—often for extended periods of time—without becoming a candidate as a matter of law.

1. Activities that are for exploratory purposes and fall within the testing-the-waters exemption.

In 1981, former Florida Governor Reubin Askew asked the Commission to clarify whether specific types of activities would fall under the testing-the-waters exemption or whether they would make him a "candidate." FEC AO 1981-32, at 1-3 (Oct. 2, 1981). The Commission opined that the following activities would fall under the testing-the-waters exemption "so long as Governor Askew in undertaking any single activity, or all the various activities, continues to deliberate his decision

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to become a presidential candidate . . . as distinguished from pursuing the activity as a means of seeking some affirmation or reinforcement of a private decision he has already made to be a candidate":

- Travel throughout the country for the purpose of speaking to political and non-political groups on a variety of public issues and meeting with opinion makers and others interested in public affairs for the purpose of determining whether potential political support exists for a national campaign.

- Employment of political consultants for the purpose of assisting with advice on the potential and mechanics of constructing a national campaign organization.

- Employment of a public relations consultant for the purpose of arranging and coordinating speaking engagements, disseminating copies of the Governor's speeches, and arranging for the publication of articles by the Governor in newspapers and periodicals.

- Rental of office space.

- Rental or purchase of office equipment for the purpose of compiling the names and addresses of individuals who indicate an interest in organizing a national campaign.

- Preparation and use of letterhead stationery and correspondence with persons who have indicated an interest in a possible campaign by the Governor.

- Supplementing the salary of a personal secretary who is employed by the Governor's law firm but will have the additional responsibility during the testing period of making travel arrangements, taking and placing telephone calls related to the testing activities, assisting in receiving and depositing the funds used to finance the testing, and assisting with general correspondence.

- Reimbursement of the Governor's law firm for the activities of an associate attorney who is employed by the firm but will have the responsibility during the testing period of researching and preparing speeches, and coordinating the arrangement of interviews of the Governor by the news media,

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answering inquiries of the news media, arranging background briefings on various public issues, and traveling as an aide on some of the testing trips.

- Reimbursement of the Governor's law firm for telephone costs, copying costs, and other incidental expenses which may be incurred.

- Travel to other parts of the country in order to attend briefings on various public issues, and reimbursement of those who travel to Miami for the purpose of providing briefings on public issues.

- Employment of a specialist in opinion research to conduct polls for the purpose of determining the feasibility of a national campaign.

- Employment of an assistant to help coordinate travel arrangements and also travel as an aide on some of the testing trips.

- Preparation and printing of a biographical brochure and possibly photographs to be used in connection with speaking appearances by Governor Askew.

- Solicitation of contributions for the limited purpose of engaging in such "Testing the Water" activities as the foregoing.

Id. at 2-4.

Similarly, in Advisory Opinion 1985-40 (Republican Majority Fund), the Commission concluded that former Senator Howard Baker could engage in a broad array of political activities within the testing-the-waters exemption without triggering candidate status, including:

- Direct mail solicitations, which "clearly state that Mr. Baker has not yet determined whether he will seek the 1988 Republican presidential nomination," for the purpose of raising funds to "be used for the purpose of Mr. Baker's testing-the-waters activities."

- Travel in connection with "attend[ing] and address[ing] state and regional Republican Party meetings and conferences in conjunction with appearances by other reported potential contenders for the 1988 Republican presidential nomination," and during which "Mr. Baker's remarks . . . will indicate his

potential interest in, and his ongoing consideration whether to seek, the 1988 Republican presidential nomination."

- "[H]osting a hospitality suite or a reception in Mr. Baker's honor to which . . . party dignitaries and press representatives . . . will be invited" and when the "context associated with such suites or receptions will acknowledge and reflect Mr. Baker's ongoing consideration of becoming a candidate for the 1988 Republican presidential nomination."

- Travel in connection with "political associates of Mr. Baker, such as U.S. Senators, Governors, and other recognized Republican Party figures [attending events] as Mr. Baker's authorized representatives" and during which "they will be expected to express their support of Mr. Baker's potential candidacy and, in private meetings, encourage individuals attending these events to support Mr. Baker, if he should become a candidate."

- "[T]ravel to early primary and convention states to meet privately with Republican Party leaders to seek their views on whether [Mr. Baker] should seek the 1988 Republican presidential nomination."

- The organization of "steering committees in certain states, such as Iowa and New Hampshire," whose members will be requested to "encourage Mr. Baker to seek the 1988 Republican presidential nomination" and "remain uncommitted to any other potential candidate for such nomination until Mr. Baker decides whether to become a candidate." "[I]n certain instances[,] such steering committee members will be requested to join the committee with the understanding that it will become the official campaign organization supporting Mr. Baker in that state if he should become a candidate."

Id. at 3-4, 6-10.

2. Activities that indicate an individual has decided to become a candidate and is no longer engaged in testing-the-waters activities.

As noted above, the Commission's testing-the-waters regulations set forth five "[e]xamples of activities that indicate that an individual has decided to become a

candidate," thus triggering candidacy. 11 C.F.R. §§ 100.72(b), 100.131(b). Of these five examples, three have been the subject of considerable Commission attention.

a. Raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activities designed to amass campaign funds that would be spent after he or she becomes a candidate.

The Office of the General Counsel has noted that "the Commission has previously declined to find reason to believe in matters where exploratory committees had raised a significant amount in contributions." First General Counsel's Report in MUR 5934 (Thompson), at 5 (Oct. 15, 2008). In examining former Senator Fred Thompson's exploratory committee fundraising, the Office opined that "it is not clear whether [raising $3,462,355 in one month] exceeds what could reasonably be expected to be used for exploratory activities related to a potential candidacy for the office of President of the United States . . . . However, the fact that Thompson only spent $2,923,607, yet raised $9,528,494, prior to announcing his candidacy seems to indicate that he may have been amassing campaign funds to be used after he became a candidate." *Id.* Nevertheless, the Commission dismissed the complaint in MUR 5934.

b. Making or authorizing written or oral statements that refer to an individual as a candidate for a particular office.

The Commission has extensively analyzed whether an individual's statements indicate that the individual has, in fact, decided to become a candidate.[4] More

[4] *See, e.g.*, MUR 6776 (Innis) (finding no reason to believe that an individual had decided to become a candidate by stating "[a]s I prepare to declare for the race, please know that your support at this early state is of the utmost importance" because such a statement was "not [] enough to indicate that Innis had become a candidate"); MUR 6735 (Sestak) (finding reason to believe that an individual had decided to become a candidate by sending fundraising emails with statements suggesting that "Sestak was seeking office in combination with other phrases further indicating that Sestak had decided to become a candidate for federal office, such as 'I will win because of you [] and your support'"); Statement of Reasons of Commissioner Ellen L. Weintraub in MUR 5945 (Lalor) at 3 (Mar. 16, 2009) (explaining that Commissioner Weintraub voted to find reason to believe that an

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recently, the Commission has explained that an individual's inadvertent "slip-ups" and press reports referring to an individual as a "candidate" have no bearing on whether the individual has, in fact, decided to become a candidate.

With respect to the former, "quickly corrected 'slip ups' do not establish [an individual] as a candidate." Statement of Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason and Commissioners Michael E. Toner, Hans A. von Spakovsky, and Ellen L. Weintraub in MURs 5672/5733 (Davis), at 2 (Mar. 13, 2007). "Any other conclusion could run the risk of creating the impression that the Commission is waiting for prospective candidates to 'slip up,' at which point, it will exclaim, 'Gotcha!' and proclaim their 'testing the waters' periods over." *Id.* To make or authorize written or oral statements that refer to an individual as a candidate for a particular office "requires some objective deliberateness, not a mere 'slip up.'" *Id.*

With respect to the latter, the Commission's regulations clearly state that only statements "made" by a potential candidate or "authorized" by a potential candidate inform whether the potential candidate has decided to become a candidate. *See* 11 C.F.R. §§ 100.72(b)(3), 100.131(b)(3); Factual & Legal Analysis in MUR 6224 (Fiorina), at 10 (July 14, 2010) ("To the extent that complainant implies that statements by media sources such as reporters or bloggers that refer to Fiorina as a

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(Continued . . .)

individual had decided to become a candidate by making unqualified "present tense references to 'my candidacy' and 'my campaign'" which "suggest that he was no longer testing the waters, but running for office"); MUR 5693 (Aronsohn) (finding reason to believe that an individual had decided to become a candidate by sending 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 Scott Garrett"; and "We have come a long way in just a few short weeks. And with your support, we can go the distance"); MUR 5363 (Sharpton) (finding reason to believe that an individual had decided to become a candidate by publishing a book including statements such as "It is on these qualities that I am seeking the Presidency of the United States in 2004"); MUR 5251 (Rogers) (finding reason to believe that an individual had decided to become a candidate after reportedly saying "I want to be your congressman and need your help to win the seat" at a fundraising event, and sending a fundraising letter that stated "I know that I will effectively serve your interests in Congress and that because of the close working relationship with the President and the leadership of Congress that I will immediately work for the benefit of Colorado").

candidate should be considered dispositive, the Commission has no information that Fiorina was involved in or authorized how any media source referred to her.").

c. Conducting activities in close proximity to the election or over a protracted period of time.

The Commission's regulations do not provide a set time limit on how long an individual may test the waters. The Office of the General Counsel, however, has opined that "although it is true that engaging in testing the waters 'activities over a protracted time period would appear to diminish their usefulness for testing the waters purposes and would conversely suggest' that such activities were building support for a campaign . . . thirteen months . . . is not necessarily a 'protracted period of time' for the purpose of determining candidacy." First General Counsel's Report in MUR 6735 (Sestak), at 13 n.11.

The Commission's regulations also do not establish a pre-election deadline by which an individual must finish testing the waters. Accordingly, the Commission did not take issue with former Senator Fred Thompson commencing his testing-the-waters activities in June 2007, a mere seven months before the first presidential nominating event of 2008. *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter, Donald F. McGahn II, and Ellen L. Weintraub in MUR 5934 (Thompson) (Mar. 10, 2009).

C. Paying for and Reporting Testing-the-Waters Activities

Although an individual who is testing the waters is not a "candidate," the Commission's regulations provide that "[o]nly funds permissible under the Act may be used for [testing-the-waters] activities." 11 C.F.R. §§ 100.72(a), 100.131(a). "If the individual subsequently becomes a candidate, the funds received are contributions" and "the payments made are expenditures" subject to the Act's candidate contribution limits, prohibitions, and reporting requirements. *Id.* Such "contributions" and "expenditures" "must be reported with the first report filed by the principal campaign committee of the candidate, regardless of the date the funds were received" or "the payments were made." *Id.* Thus, the testing-the-waters exemption "has a retroactive effect" in that "[i]f and when the individual becomes a candidate," "the financing of all activity coming within the exemption must be reported and otherwise treated as contributions and expenditure for purposes of the Act." FEC AO 1981-32 (Askew), at 3.

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"[C]andidates for Federal office may make unlimited expenditures from personal funds" on behalf of their candidacies. 11 C.F.R. § 110.10. Accordingly, an individual who is exploring whether to run for office may spend an unlimited amount of his or her personal funds on testing-the-waters activities. If the individual subsequently becomes a candidate, his or her payments from personal funds for testing-the-waters activities become "contributions" and "expenditures" subject to the Act's reporting requirements noted above.

II. THE RELATIONSHIP BETWEEN LEADERSHIP PACS AND POTENTIAL CANDIDATES

A. Definition of "Leadership PAC"

A "leadership PAC" is "a political committee that is directly or indirectly established, financed, maintained or controlled by a candidate for Federal office or an individual holding Federal office but which is not an authorized committee of the candidate or individual, except that [a] leadership PAC does not include a political committee of a political party."[5] 11 C.F.R. § 100.5(e)(6).

The Commission has explained that, "leadership PACs are formed by individuals who are Federal officeholders and/or Federal candidates. The monies these committees receive are given to other Federal candidates to gain support when the officeholder seeks a leadership position in Congress, or are used to subsidize the officeholder's travel when campaigning for other Federal candidates. The monies may also be used to make contributions to party committees, including State party committees in key states, or donated to candidates for State and local office." *Notice of Proposed Rulemaking on Leadership PACs*, 67 Fed. Reg. 78753, 78754 (Dec. 26, 2002).

Although a political committee formed by an individual who is not a federal candidate or officeholder is technically not a "leadership PAC," the term is used

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[5] Although the definition of "leadership PAC" was promulgated after the passage of, and primarily relates to, the Honest Leadership and Open Government Act of 2007, the Commission noted in its rulemaking that "[t]his definition is consistent with the Commission's rules that treat such committees as unaffiliated with a candidate's authorized committee." *Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants*, 74 Fed. Reg. 7285, 7286 n.5 (Feb. 17, 2009).

colloquially to describe political committees other than campaigns that are associated with public figures. *See, e.g.*, The Center for Responsive Politics, *Leadership PACs: Background*, http://www.opensecrets.org/industries/background.php?ind=Q03 ("A leadership PAC is a political action committee that can be established by current and former members of Congress as well as other prominent political figures.").

When an individual is associated with a leadership PAC and simultaneously testing the waters to determine whether to become a candidate, questions arise about whether certain expenses should be classified as testing-the-waters expenses or leadership PAC expenses. The Commission has emphasized that the key factor is whether the activity is "undertaken to determine whether [the individual] should become a candidate." FEC AO 1985-40 (Republican Majority Fund), at 7-12 (Jan. 24, 1986).

B. Travel Expenses

The Commission has concluded that travel costs in connection with appearing at "state and regional Republican Party meetings and conferences in conjunction with appearances by other reported potential contenders," which "will be attended by party officials, party activists, elected officeholders, political consultants, and the press," and at which the potential candidate's remarks "will indicate his potential in, and his ongoing consideration of whether to seek, the . . . Republican presidential nomination" are testing-the-waters expenses. AO 1985-40 at 6-7.

By contrast, the Commission has made clear that travel costs in connection with appearing at "party functions, candidate rallies, fundraisers, and similar events" at which the potential candidate "will urge support for Republican candidates, the Republican Party, and the President and his policies," but "will not refer to the possibility [that] the [potential candidate] may seek any Federal office . . . except in an incidental manner or in response to questions by the public or press" may be paid for by the potential candidate's leadership PAC. FEC AO 1986-6 (Fund for America's Future), at 3-4 (Mar. 14, 1986). Furthermore, because "these appearances . . . exclud[e] such activities on behalf of the [individual's] potential candidacy as soliciting funds, holding meetings (which constitute more than incidental contacts) with individuals or the press regarding such a potential candidacy or regarding the formation of a campaign organization, or distributing

paraphernalia related to such a candidacy," they "need not be allocated to a potential candidacy by the [individual]." *Id.* at 4-5.

Moreover, the Commission has previously determined that a leadership PAC's "disbursements for travel expenses incurred during approximately the same time that [the leadership PAC's honorary chairman] was testing the waters for his presidential campaign" were properly paid for by the leadership PAC because the honorary chairman "was involved in events and . . . made public statements regarding issues of longstanding concern to [the leadership PAC]" during the trips. Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter, Donald F. McGahn II, Steven T. Walther, and Ellen L. Weintraub in MUR 5908 (Hunter), at 3. It is important to note that the Commissioners reached this decision notwithstanding the fact that the travel expenses at issue involved trips to early presidential primary states. *See* First General Counsel's Report in MUR 5908 (Hunter), at 11-12.

C. Public Communications and Solicitations

A leadership PAC's public communication that contains "brief references" to an individual's "potential interest in the . . . Republican presidential nomination or the existence of his testing-the-waters fund will constitute . . . an in-kind gift to [the individual's testing-the-waters fund]." FEC AO 1985-40 at 11. Similarly, a leadership PAC's fundraising solicitations that "represent to . . . potential contributors that their contributions to [the leadership PAC] will 'promote' [the individual's] potential candidacy," "provide recipients of such [solicitations] with copies of news clippings favorable to [the individual]," or "represent that such contributors will, as a result of their contribution to [the leadership PAC], be viewed as early supporters of [the individual's] possible candidacy" is a "testing-the-waters activity [and] will constitute in-kind gifts to the [individual's testing-the-waters fund]." *Id.* at 11-12.

By contrast, a leadership PAC may pay for public communications and solicitations that "merely note the [individual's] association with the [leadership PAC] and his desire that individuals contribute to the [leadership PAC] to support Republican candidates and the Republican Party without references to any potential . . . candidacy by him." FEC AO 1986-6, at 5-4. Because the leadership PAC "in issuing publications and in soliciting contributions [would] make no references to any possible candidacy by the [individual] and no representations to contributors

about their being viewed as supporters of such a candidacy or about their benefitting such a candidacy through their contributions to the [leadership PAC]," these activities are "distinguishable from [the testing-the-waters activities] addressed in Advisory Opinion 1985-40." *Id.* at 5.

III. FEDERAL CANDIDATE SOFT MONEY FUNDRAISING RESTRICTIONS

Under FECA, "[a] candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act." 52 U.S.C. § 30125(e)(1)(A).

The Commission's regulations clarify that this prohibition, colloquially known as the "soft money ban," applies to: "(a) Federal candidates; (b) Individuals holding Federal office; (c) Agents acting on behalf of a Federal candidate or individual holding Federal office; and (d) Entities that are established, financed, maintained, or controlled by, or are acting on behalf of, one or more Federal candidates or individuals holding Federal office." 11 C.F.R. § 300.60.

A. Federal candidates

A "candidate" is "an individual who seeks nomination for election, or election, to Federal office" and "has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000." *Id.* § 30101(2).

As detailed above, the Commission's regulations permit an individual to raise funds and make payments "solely for the purpose of determining whether [the] individual should become a candidate," 11 C.F.R. §§ 100.72(a), 100.131(a), "*without becoming a candidate under the Act*," *Payments Received for Testing the Waters Activities*, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (emphasis added). An individual who is testing the waters under this exemption does not become a "candidate" until he or she "has decided to become a candidate for a particular

office" or raises funds or makes payments "for activities relevant to conducting a campaign." 11 C.F.R. §§ 100.72(a), 100.131(a).

Accordingly, the soft money ban does not apply, as a matter of law, to an individual who is testing the waters unless and until the individual becomes a "candidate." *See* First General Counsel's Report in MUR 6788 (Tracy), at 9 n.14 (Oct. 15, 2014) (noting that the soft money ban applied to the respondent "[a]t the point that [he] became a federal candidate").

B. Agents acting on behalf of a federal candidate or officeholder

For purposes of the soft money ban, an "agent" is "any person who has actual authority, either express or implied, to . . . solicit, receive, direct, transfer, or spend funds in connection with any election" on behalf of "an individual *who is a Federal candidate* or an individual holding Federal office." 11 C.F.R. § 300.2(b)(3) (emphasis added).

"[T]he definition of 'agent' . . . does not apply to individuals who do not have any actual authority to act on their [principal's] behalf, but only 'apparent authority' to do so." *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49064, 49082 (July 20, 2002).

The Commission has "emphasize[d] that . . . a principal cannot be held liable for the actions of an agent unless (1) the agent has actual authority, (2) the agent is acting on behalf of his or her principal, and (3) the agent is engaged in one of the specific activities described [above]." *Id.* at 49083. "Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal." *Id.*

For example, "a person may be an agent as a result of actual authority based on his or her position or title within a campaign organization." *Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures*, 71 Fed. Reg. 4975, 4978 (Jan. 31, 2006). By contrast, a "father-son relationship alone is insufficient to create an agency relationship." FEC AO 2003-10 (Reid), at 4 (June 16, 2003). Thus, the son of a federal candidate is not prohibited from soliciting soft money "*solely* by virtue of the fact that his father is a Federal candidate and officeholder." *Id.* (emphasis in original). *See also* Factual & Legal Analysis in MUR 5761 (Madrid), at 4 (Mar. 23, 2007) (finding that a federal

candidate's "husband's continued relationship with [a soft money entity], alone, is insufficient to create an agency relationship by which control of [the soft money entity] could be imputed to [the federal candidate]").

C. Entities that are established, financed, maintained, or controlled by, or are acting on behalf of, a federal candidate or officeholder

To determine whether a federal candidate or officeholder "directly or indirectly established, finances, maintains, or controls an entity," the Commission examines ten non-exclusive factors "in the context of the overall relationship between the sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor directly or indirectly established, finances, maintains, or controls the entity." 11 C.F.R. § 300.2(c). Such factors include:

- Whether a sponsor, directly or through its agent, owns controlling interest in the voting stock or securities of the entity;
- Whether a sponsor, directly or through its agent, has the authority or ability to direct or participate in the governance of the entity through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;
- Whether a sponsor, directly or through its agent, has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity;
- Whether a sponsor has a common or overlapping membership with the entity that indicates a formal or ongoing relationship between the sponsor and the entity;
- Whether a sponsor has common or overlapping officers or employees with the entity that indicates a formal or ongoing relationship between the sponsor and the entity;
- Whether a sponsor has any members, officers, or employees who were members, officers, or employees of the entity that indicates a formal or ongoing relationship between the sponsor and the entity, or that indicates the creation of a successor entity;

- Whether a sponsor, directly or through its agent, provides funds or goods in a significant amount or on an ongoing basis to the entity, such as through direct or indirect payments for administrative, fundraising, or other costs, but not including the transfer to a committee of its allocated share of proceeds jointly raised;

- Whether a sponsor, directly or through its agent, causes or arranges for funds in a significant amount or on an ongoing basis to be provided to the entity, but not including the transfer to a committee of its allocated share of proceeds jointly raised;

- Whether a sponsor, directly or through its agent, had an active or significant role in the formation of the entity; and

- Whether the sponsor and the entity have similar patterns of receipts or disbursements that indicate a formal or ongoing relationship between the sponsor and the entity.

See id. § 300.2(c)(2)(i)-(x).

A review of the Commission's analysis of these factors demonstrates that no single factor is dispositive and the totality of the circumstances must be considered.

1. Establishment

Determining whether a federal candidate or officeholder directly or indirectly "established" an entity is a relatively straightforward analysis whereby the Commission looks to "whether the sponsor, directly or through its agent, had an active or significant role in the formation of the entity." In conducting this analysis, the Commission has focused on whether a federal candidate or officeholder was formally involved with the creation of the entity. For example, the Commission found that an individual "established" a ballot measure committee because he was a federal officeholder when "he signed the documents with the Arizona Secretary of State's office creating [the committee]," served as the committee's "Chairman from its establishment on January 17, 2003, to March 21, 2003, when he resigned," and "[a]n individual who also served as [the officeholder's] part-time campaign consultant aided [the committee] with its State filings and opened its bank account." FEC AO 2003-12 (Flake), at 7 (July 29, 2003).

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2. Financing and Maintaining

The Commission has concluded that a federal officeholder financed and maintained a state committee by providing the committee with "seed money" used to "finance the newly formed [committee's] activities." Factual & Legal Analysis in MUR 5367 (Issa), at 4-5 (Feb. 20, 2004). By providing the "seed money," the federal officer played "an essential role in [the committee's] formation—its financing." *Id.* Furthermore, the federal officeholder donated funds "in a significant amount" to the entity by donating, personally and through his company, a total of $1.845 million—more than 60% of the committee's receipts. *Id.* at 11. "[T]hese funds were donated regularly—indeed, almost weekly . . . —indicating that the donations were made on an 'ongoing basis.'" *Id.* "These facts strongly indicate that in addition to financing [the committee,] [the federal officeholder] 'maintained' [the committee]." *Id.* at 11-12.

Although a potential sponsor's donation of personal funds (or funds otherwise under the potential sponsor's control, such as those of a company) is relevant in analyzing whether the potential sponsor established, finances, or maintains an entity, the Commission has explicitly stated that the potential sponsor's other lawful fundraising activities are not. The Office of the General Counsel has explained that "because members of the Senate Democratic leadership can legally attend, speak, or be featured at [the entity]'s fundraisers, this Office cannot conclude that such activity, by itself, demonstrates that the Senate Democratic leadership established, finances, maintains, or controls [the entity]." First General Counsel's Report in MUR 5343 (Democratic Senate Majority Fund), at 13 (Jan. 16, 2004) (adopted by the Commission). *See also* FEC AO 2011-12 (Majority PAC) (holding that federal candidates may appear and solicit FECA-permissible funds at fundraising events for independent expenditure-only committees).

3. Controlling

The Commission has made clear that a federal candidate or officeholder does not control an entity even if a former employee or consultant does. "[S]omething more than the mere fact of such informal, ongoing relationships between personnel of a potentially sponsoring and potentially sponsored entity is necessary to support a conclusion of 'establishment, financing, maintenance or control.' Moreover, while former employers and colleagues may exercise influence, influence is not necessarily control." First General Counsel's Report in MUR 5338 (The

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Leadership Forum), at 18 (Mar. 27, 2002). "[I]n the absence of information that [the former employee or consultant] continue[s] to receive instructions or directions from [the potential sponsor], we cannot rely solely on [the former employee or consultant's] prior association with the [potential sponsor] to establish an ongoing relationship between the [potential sponsor] and [the potentially sponsored entity].[6] First General Counsel's Report in MUR 5343 (Democratic Senate Majority Fund), at 12 (Jan. 16, 2004).

THE COMPLAINTS

First, the Complaints allege that Governor Bush financed his testing-the-waters activities through the Leadership PAC, raising and spending funds for exploratory purposes that do not comply with FECA's candidate contribution limits. To support the allegation that the Leadership PAC was Governor Bush's "exploratory vehicle," the Complaints primarily rely on second-hand reporting in news articles. *See, e.g.*, Complaint in MUR 6915 at 5; Complaint in MUR 6927 at 2 (citing Jose A. DelReal, *Jeb Bush Forms PAC to Explore Presidential Run*, Wash. Post (Dec. 16, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/12/16/jeb-bush-forms-pac-to-explore-presidential-run ("Former Florida Gov. Jeb Bush formally announced Tuesday that he will launch a political action committee tasked with 'exploring a presidential bid,'" but "[i]t is unclear if the new PAC will function in the same capacity as a presidential exploratory committee.")). The Complaints do not provide evidence that the Leadership PAC paid for any of Governor Bush's

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[6] *See also* Factual & Legal Analysis in MUR 5952 (Clinton), at 12-13 (Oct. 31, 2008) (finding no reason to believe that a federal candidate established, financed, maintained, or controlled a ballot measure committee when "two individuals with prior connections to [the candidate's husband] are political consultants for" the ballot measure committee); Factual & Legal Analysis in MUR 5943 (Giuliani), at 9-10 (Nov. 14, 2008) (finding no reason to believe that a federal candidate established, financed, maintained, or controlled a ballot measure committee based on "tenuous connections" such as the fact that the ballot measure committee "was incorporated by an individual who donated $2,000 to the [candidate] and who is a former political associate of another donor and fundraiser for the [candidate]" and the ballot measure committee's "spokesman was the *former* spokesman for the [candidate's] campaign co-chair and policy advisor" (emphasis in original)); FEC AO 2013-03 (Bilbray-Kohn) (June 13, 2013) (expressing no concern that a 527 organization would be established, financed, maintained, or controlled by an individual who was testing the waters should the individual become a candidate, notwithstanding the fact that the individual was the organization's former executive director and member of the board of directors and continued to serve as a consultant to the organization).

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testing-the-waters expenses, but speculate that this is the case. For example, the Complaints speculate that the Leadership PAC paid for travel on behalf of Governor Bush that was for testing-the-waters purposes, but provide no direct factual evidence to support the allegation. First Supplemental Complaint in MUR 6915 at 6-7; First Supplemental Complaint in MUR 6927 at 3.

Second, the Complaints allege that Governor Bush "moved beyond 'testing the waters' to become a 'candidate' under FECA and violated the candidate registration and reporting requirements." Complaint in MUR 6927 at 1. To support this allegation, the Complaints contend that Governor Bush, through the Leadership PAC and RTR Super PAC, "is accumulating funds in excess of what could reasonably be expected to be used for his exploratory efforts" and "amassing campaign funds . . . in amounts that make it clear that he is no longer in the exploratory phase of his candidacy." Complaint in MUR 6915 at 5. *See also* Complaint in MUR 6927 at 16. The Complaints—which were filed well before the Leadership PAC or RTR Super PAC filed their initial disclosure reports with the FEC—acknowledge that they have no direct evidence of these entities' fundraising activities and instead base their allegation solely on "news reports which strongly suggest that Mr. Bush is amassing campaign funds" and "donor pledge forms for Mr. Bush's leadership PAC . . . encouraging bundlers to raise large sums of money." Complaint in MUR 6915 at 5; Complaint in MUR 6927 at 16. To further support their allegation that Governor Bush did not timely register and report as a candidate, the Complaints contend that an alleged "slip up" by Governor Bush on May 13, 2015 constituted "crystal clear" evidence that Governor Bush had already decided to become a candidate. Second Supplemental Complaint in MUR 6915 at 1. The Complaints further imply that press articles that erroneously referred to Governor Bush as a presidential "candidate" or erroneously referred to the Leadership PAC as Governor Bush's "campaign" should be dispositive.

Third, the Complaints allege that Governor Bush—because he was a "candidate" as early as January 2015—violated the soft money ban in several ways. Solely relying on news reports, the Complaints contend that Governor Bush violated the soft money ban by soliciting funds for RTR Super PAC. The Complaints further contend that Governor Bush "established" and "finances, maintains, and controls" RTR Super PAC in violation of the soft money ban. *See* Complaint in MUR 6915 at 5-6; First Supplemental Complaint in MUR 6915 at 7; Second Supplemental Complaint in MUR 6915 at 1-2; Complaint in MUR 6927 at 9, 15-16; First Supplemental Complaint in MUR 6927 at 16-17. To support this allegation, the

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Complaints state that Governor Bush *must* have established and *must* finance, maintain, and control RTR Super PAC because: press accounts characterize RTR Super PAC as "Bush's Super PAC;" RTR Super PAC shares the same name and was formed close in time to the Leadership PAC; Governor Bush has reportedly solicited funds for RTR Super PAC; and Mike Murphy, a former political advisor to Governor Bush, is reportedly leading RTR Super PAC.[7]

Finally, it is worth noting that the Complaints rely solely on speculation and innuendo contained in news articles and opinion pieces to support their allegations. The Commission has repeatedly emphasized that it is "reluctant to make a reason-to-believe finding based solely on" press accounts. Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II in MUR 6002 (Freedom's Watch), at 6 (Aug. 13, 2010). "For example, in MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), the Commission concluded that mere allegations in a newspaper [article] (specifically, an unsubstantiated quote) that could be read multiple ways are insufficient evidence to find a reason to believe." Statement of Reasons of Vice Chairman Donald F. McGahn II and Commissioners Caroline C. Hunter and Matthew S. Peterson in MUR 5878 (Arizona State Democratic Central Committee), at 9 (Sept. 19, 2013).

> In fact, the Commission has already determined that news articles standing alone are insufficiently reliable to support a reason to believe finding. This is not surprising, given the unreliability of modern media on issues of campaign finance. Thus, there are

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[7] The Complaints contain numerous corollary allegations and arguments to support these three key claims. We are not responding to each and every assertion in the Complaints because these corollary allegations and arguments are otherwise addressed in this overall response. For example, the Complaints allege that Governor Bush's resignation from several corporate and nonprofit board positions indicates that he "has begun his campaign for President." Complaint in MUR 6915 at 2. As previously explained in the section devoted to "The Law," the Commission does not factor such private activities into its analysis of whether an individual is a candidate. In addition, the Complaints allege that Barbara Bush's solicitation of contributions for RTR Super PAC indicates that Governor Bush established, financed, maintained, or controlled the entity. Complaint in MUR 6927 at 4. But as also previously explained, the Commission has repeatedly declined to make such inferences based on familial relationships. *See, e.g.*, FEC AO 2003-10 (Reid). The Complaints include many other stray allegations and claims, all of which are answered throughout.

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> fundamental issues with relying on newspaper articles as the source of information for finding RTB regardless of the avenue in which they are used. Articles are notoriously inaccurate and are often reliant on anonymous sources. Also, especially in the modern age of Internet journalism, the rush to break a story often takes precedence over the accuracy of the report.[8] This leads to a situation where skepticism of newspaper articles used as the basis for RTB is entirely necessary.[9] Further, if anonymous complaints are prohibited by the Act, it is illogical to permit the underlying basis for a complaint to be an anonymous source in a newspaper article.

Statement of Reasons of Vice Chairman Donald F. McGahn II and Commissioner Caroline C. Hunter in MUR 6540 (Rick Santorum for President), at 11 n.33 (July 25, 2013) (internal citations omitted and footnotes added).

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[8] Indeed, the *New York Times* recently issued a mea culpa after the newspaper inaccurately reported that the Department of Justice was seeking a "criminal inquiry" into Hillary Clinton's email practices while she was Secretary of State. *See Editors' Note: Clinton Email Coverage*, N.Y. Times (July 27, 2015), http://www.nytimes.com/2015/07/28/us/editors-note-clinton-email-coverage.html. *See also* Margaret Sullivan, *A Clinton Story Fraught With Inaccuracies: How It Happened and What Next?*, N.Y. Times (July 27, 2015) ("When you add together the lack of accountability that comes with anonymous sources, along with no ability to examine the referral itself, and then mix in the ever-faster pace of competitive reporting for the web, you've got a mistake waiting to happen. Or, in this case, several mistakes.").

[9] If "skepticism of news articles" is "entirely necessary," then opinion pieces written by a complainant should be disregarded entirely. As support for several allegations, one of the complainants cites to an opinion piece written by co-complainant Fred Wertheimer of Democracy 21. *See, e.g.*, First Supplemental Complaint in MUR 6915, at 5 n.14, 5 n.17, 6 n.23, 7 n.25, 7 n.28; Second Supplemental Complaint in MUR 6915, at 2 n.3, 7 n.23 (citing Fred Wertheimer, *Why Jeb Bush's Super PAC Plan is Potentially Illegal*, Reuters: The Great Debate (Apr. 23, 2015), http://blogs.reuters.com/great-debate/2015/04/22/why-jeb-bushs-super-pac-plan-is-potentially-illegal). *See also* Reuters, The Great Debate (accessed Aug. 6, 2015), http://blogs.reuters.com/great-debate (noting that "The Great Debate" is an "analysis & opinion" column).

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DISCUSSION

Governor Bush's progression from private citizen, to exploring a potential presidential candidacy, to candidate followed not only the steps taken by countless presidential candidates in the past, but also all the concomitant requirements of federal campaign finance law.

As a private citizen, Governor Bush exercised his First Amendment right to become politically engaged by associating with a leadership PAC devoted to supporting candidates and policies with which the Governor agreed and by making appearances on behalf of the leadership PAC to tout its message of opportunity and prosperity for all Americans. He also appeared as a special guest on behalf of a similarly aligned independent expenditure-only committee.

Separately, Governor Bush began to test the waters of his own possible candidacy for President. He raised no money to pay for these activities—all of which complied with FEC regulations and were conducted in a timeframe consistent with FEC precedent—but paid for them personally or, ultimately, with campaign funds. Governor Bush's testing-the-waters expenses were all scrupulously accounted for and disclosed consistent with Commission regulations.

In early June 2015, Governor Bush decided to become a candidate and took the necessary steps to qualify as a candidate. Only then did he become subject to the full force of federal campaign finance law. FECA and FEC regulations, by their own terms, apply only to activities that relate to a "candidate." This limiting principle performs the critical function of drawing the outer boundary of the FEC's authority to regulate private political activity. Until an individual becomes a "candidate," the FEC has virtually no jurisdiction to regulate activities related to his or her candidacy other than those to test the waters.

The Complaints in these matters effectively concede these legal constraints on the FEC's regulatory jurisdiction by: (1) alleging that Governor Bush's financing of his testing-the-waters activities was improper, and (2) going to great lengths attempting to establish that Governor Bush was a "candidate" prior to June 2015. Only by alleging that Governor Bush became a "candidate" far earlier than he actually did can the Complaints allege that Governor Bush violated the FEC's soft money restrictions.

As a private citizen, Governor Bush freely associated with a leadership PAC and appeared as a special guest at events held by an independent expenditure-only committee while separately testing the waters of his own candidacy. He conducted these activities in full conformance with the law. Only in June 2015, did he become a candidate for President subject to the FEC's soft money restrictions. The Complaints' allegations to the contrary are, therefore, wrong as a matter of law and fact. In light of the foregoing, the Commission should find no reason to believe that Governor Bush violated the Act and should dismiss the Complaints.

I. GOVERNOR BUSH'S TESTING-THE-WATERS ACTIVITIES WERE APPROPRIATE AND PAID FOR WITH PERMISSIBLE PERSONAL AND CAMPAIGN FUNDS, NOT LEADERSHIP PAC OR INDEPENDENT EXPENDITURE-ONLY COMMITTEE FUNDS.

A. All of Governor Bush's testing-the-waters expenses were paid for with permissible funds.

As Jeb 2016, Inc.'s initial report filed with the Commission demonstrates, Governor Bush's testing-the-waters expenses, which totaled approximately $516,870, were paid for entirely with funds permitted by the FECA. Governor Bush personally paid for nearly all of his testing-the-waters expenses. Jeb 2016, Inc. properly reported these expenses as in-kind contributions from Governor Bush, identifying the original payees in the additional text field. *See* Jeb 2016, Inc., 2015 July Quarterly Report, at 1658-73. Jeb 2016, Inc. opted to pay for three testing-the-waters expenses for which Governor Bush received invoices after he had decided to become a candidate in early June 2015. In the interest of full disclosure, Jeb 2016, Inc. voluntarily included a notation in the additional text field identifying these three expenses as testing-the-waters expenses. *See id.* at 1700-01, 1933.

Governor Bush's testing-the-waters expenses included:

- Research and polling to determine the feasibility of a presidential campaign;

- Political consulting services for the purpose of providing advice on the feasibility and mechanics of constructing a potential presidential campaign;[10]

- Communications consulting services for the purpose of responding to press inquiries and providing advice on potential communications strategies of a presidential campaign;[11] and

- Legal fees related to FECA compliance, personal financial disclosure requirements, and other legal matters related to a potential presidential campaign.

See id. at 1658-73, 1700-01, 1933. These expenses fell squarely within what the FEC has concluded in its regulations and precedent are appropriate for testing-the-waters activities. *See* 11 C.F.R. §§ 100.72, 100.131; FEC AO 1981-32 (Oct. 2, 1981).

B. The Leadership PAC's funds were spent for its purposes, not to pay for testing-the-waters expenses.

As previously explained, Governor Bush exercised his First Amendment rights by founding the Leadership PAC and serving as its honorary chairman separate and apart from his testing-the-waters activities. The Leadership PAC spent its funds in a variety of permissible ways, such as (1) making contributions to candidates and other political committees, and (2) facilitating appearances by Governor Bush, in his capacity as the Leadership PAC's honorary chairman, at events sponsored by candidates, political parties, and non-profit organizations as well as at the Leadership PAC's own events.

Commission precedent is clear that these kinds of political activities are not testing-the-waters activities when a potential candidate is involved. Instead, the

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[10] Jeb 2016, Inc.'s $12,250 payment to Sally Bradshaw was for political consulting services rendered from January – June 2015 related to Governor Bush's testing-the-waters activities. *See* Jeb 2016, Inc., 2015 July Quarterly Report at 1700.

[11] Jeb 2016, Inc.'s $10,000 payment to Kristy Campbell was for communications consulting services rendered from January – June 2015 related to Governor Bush's testing-the-waters activities. *See id.* at 1701.

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Commission looks at whether an activity is "undertaken to determine whether [the individual] should become a candidate." FEC AO 1985-40, at 7-12. Specifically, the Commission has held that the following are not testing-the-waters activities: (1) a leadership PAC's public communications that note a potential candidate's association with the leadership PAC without referring to the individual's potential candidacy; (2) a leadership PAC's solicitations that note the potential candidate's association with the leadership PAC, the potential candidate's desire that persons contribute to the leadership PAC to support Republican candidates and the Republican party, and do not refer to the individual's potential candidacy; and (3) a leadership PAC's payment of travel expenses if the potential candidate's travel excluded activities on behalf of the individual's potential candidacy. *See* FEC AO 1986-6.

The Leadership PAC carefully structured its activities to avoid the possibility of inadvertently subsidizing Governor Bush's exploratory effort in all three of the areas identified by the Commission in Advisory Opinion 1986-6. As explained above:

- The Leadership PAC's public communications made no references to any possible candidacy by Governor Bush. Instead, the Leadership PAC's public communications focused on supporting conservative candidates, policies, and ideas. *See, e.g.*, Right to Rise PAC, https://righttorisepac.org (not referring to Governor Bush as a possible candidate).

- The Leadership PAC's solicitations made no references to any possible candidacy by Governor Bush and made no representations to contributors as supporters of such a candidacy through their contributions to the Leadership PAC. Examples of the Leadership PAC's fundraising emails are attached hereto as Exhibit A.

- When Governor Bush travelled to events in which he appeared in his capacity as honorary chairman of the Leadership PAC, his remarks did not refer to the possibility that he may run for President, except in an isolated and incidental manner or in response to questions by the public or press.[12]

[12] Not only was it permissible for the Leadership PAC to pay for Governor Bush's travel expenses when he travelled on its behalf, but the Leadership PAC was also legally required to do so. *See, e.g.*, 11 C.F.R. § 100.93(a)(3)(i) (defining "campaign traveler" to include "any individual

See, e.g., James Hohmann, *Jeb Bush Says Florida Years Show He's No Moderate*, Politico (Feb. 26, 2015), http://www.politico.com/story/2015/02/jeb-bush-cpac-2015-115577.html?hp=lc3_4 (discussing Governor Bush's appearance at the Club for Growth's annual meeting).

These incidental references occurred when, for example, Governor Bush was responding to a question from a member of the public or press regarding his potential candidacy and when he was informally and privately discussing his potential candidacy with individuals outside of scheduled events. Commissioners have concluded in the past that such isolated and incidental references, while engaged in bona fide leadership PAC activities, do not amount to impermissible financing of testing-the-waters expenses. *See* FEC AO 1986-6; Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter, Donald F. McGahn II, Steven T. Walther, and Ellen L. Weintraub in MUR 5908 (Hunter), at 3.

II. GOVERNOR BUSH LEGALLY BECAME A CANDIDATE IN EARLY JUNE 2015 AND NOT BEFORE.

As noted above, Governor Bush scrupulously complied with the Commission's testing-the-waters requirements. Once he decided to become a candidate for President in early June 2015, he timely filed his Statement of Candidacy with the Commission. At no time before did Governor Bush engage in the activities that Commission regulations and precedent indicate are those of a "candidate" as a matter of law.

(Continued . . .)

traveling . . . on behalf of a . . . political committee"). The Commission has previously determined that an individual is not required to allocate his or her travel expenses as testing-the-waters expenses unless more than an "incidental" amount of testing-the-waters activities occurred during the trip. *See* FEC AO 1985-40 (Republican Majority Fund), at 9 n.8; FEC AO 1986-6 (Fund for America's Future), at 3-4. This holds true even when the travel is to early presidential primary states. *See* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter, Donald F. McGahn II, Steven T. Walther, and Ellen L. Weintraub in MUR 5908 (Hunter).

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A. Governor Bush did not raise excessive funds for exploratory activities or amass campaign funds to be spent by him after he became a candidate.

If an individual raises money in excess of what can be reasonably expected for exploratory activities or for future use as a candidate, then Commission regulations suggest that the individual may already be a candidate. *See* 11 C.F.R. §§ 100.72(b)(2), 100.131(b)(2); First General Counsel's Report in MUR 5934 (Thompson) (Oct. 15, 2008) (noting the concern that excessive fundraising for exploratory activities indicates that the individual is raising funds for an actual candidacy).

This was not the case here because Governor Bush did not raise *any* funds for exploratory purposes. Governor Bush personally paid for nearly all of his testing-the-waters expenses and Jeb 2016, Inc. paid for three expenses for which Governor Bush received invoices after he had decided to become a candidate.

The Complaints suggest that the raising and spending of funds by the Leadership PAC and RTR Super PAC were to finance Governor Bush's testing-the-waters activities. But as previously explained, the Leadership PAC's funds were spent in furtherance of the Leadership PAC's mission to support conservative candidates, policies, and ideas. Governor Bush did not finance his testing-the-waters activities through the Leadership PAC, and it was not his "exploratory vehicle." The same is true for RTR Super PAC.[13]

B. Governor Bush did not make or authorize statements that referred to him as a candidate for President.

Commission regulations also state that an individual may be a candidate if he makes or authorizes written or oral statements that refer to him as a candidate for a

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[13] If the Complaints are suggesting that Governor Bush's involvement in Leadership PAC and RTR Super PAC fundraising events indicates that he satisfies this regulation because he was "undertak[ing] activities designed to amass campaign funds that would be spent after he . . . becomes a candidate," 11 C.F.R. §§ 100.72(b)(2), 100.131(b)(2), then the Complaints fail to account for the meaning of the phrase "campaign funds" which are limited to those funds to be spent by the campaign itself (*i.e.*, Jeb 2016, Inc., not the Leadership PAC or RTR Super PAC). *See* First General Counsel's Report in MUR 5934 (Thompson) (Oct. 15, 2008).

particular office.[14] *See* 11 C.F.R. §§ 100.72(b)(3), 100.131(b)(3). While Governor Bush was testing the waters, he repeatedly stated—both in public and in private—that he was not a candidate for President and had not decided whether to run for President. *See supra* pp. 3-5.

Nonetheless, the Complaints note that Governor Bush made the following oral statement on May 13, 2015: "I'm running for president in 2016, and the focus is going to be about how—if I run—you create high sustained economic growth." Michael Barbaro, *Jeb Bush Declares His Candidacy – Prematurely*, N.Y. Times (May 13, 2015), http://www.nytimes.com/politics/first-draft/2015/05/13/jeb-bush-declares-his-candidacy-prematurely/?_r=0; Paul Blumenthal, *Jeb Bush Messes Up Charade of Not Running for President*, The Huffington Post (May 13, 2015), http://www.huffingtonpost.com/2015/05/13/jeb-bush-president_n_7278624.html.

However, the foregoing statement did not transform Governor Bush into a presidential candidate. First, it is clear from the plain meaning of the entire statement that Governor Bush had not decided to become a candidate. *See id.* ("I'm running for president in 2016, and the focus is going to be about how—*if I run*—you create high sustained economic growth." (emphasis added)). Second, the Commission has previously determined that "quickly corrected 'slip ups' do not establish [an individual] as a candidate." Statement of Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason and Commissioners Michael E. Toner, Hans A. von Spakovsky, and Ellen L. Weintraub in MURs 5672/5733 (Davis, et al.) at 2 (Mar. 13, 2007). "Any other conclusion could run the risk of creating the impression that the Commission is waiting for prospective candidates to 'slip up,' at which point, it will exclaim, 'Gotcha!' and proclaim their 'testing the waters' periods over." *Id.* To make or authorize written or oral statements that refer to an individual as a candidate for a particular office "requires some objective deliberateness, not a mere 'slip up.'" *Id.* Thus, Governor Bush's statement above did not convert him into a candidate.

The Complaints also imply that press articles referring to Governor Bush as a presidential "candidate" or referring to the Leadership PAC as Governor Bush's "campaign" should be dispositive. However, the Commission's regulations clearly state that only statements made by a potential candidate or "authorized" by a

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[14] *See supra* n.4 for examples.

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potential candidate are relevant to determining whether a potential candidate has decided to become a candidate. *See* 11 C.F.R. §§ 100.72(b)(3), 100.131(b)(3); Factual & Legal Analysis in MUR 6224 (Fiorina), at 10 (July 14, 2010) ("To the extent that complainant implies that statements by media sources such as reporters or bloggers that refer to Fiorina as a candidate should be considered dispositive, the Commission has no information that Fiorina was involved in or authorized how any media source referred to her."). The Complaints present no evidence that Governor Bush authorized these statements. Moreover, Governor Bush is not obligated to publicly disavow such inaccuracies, speculation, rumor, or innuendo, nor could he practically do so. Rather, Governor Bush affirmatively stated—time and again—that he was exploring a possible run for President, not that he had decided to do so. *See supra* pp. 3-5 (collecting and quoting published news stories and public statements).

C. The timing of Governor Bush's testing-the-waters activities was consistent with FEC regulations and precedent.

In addition, Commission regulations state that an individual can become a candidate if the individual conducts testing-the-waters activities in close proximity to the election or over a protracted period of time. *See* 11 C.F.R. §§ 100.72(b)(4), 100.131(b)(4). As previously explained, Governor Bush's testing-the-waters activities spanned a total of 12 months—he privately began testing the waters in June 2014 and publicly began testing the waters in December 2014—and ended in June 2015, long before any presidential nominating events.

Neither the Commission's regulations, nor any Commission precedent, provide a set time limit on how long an individual may test the waters. However, the Office of the General Counsel has opined that "thirteen months . . . is not necessarily a 'protracted period of time' for the purpose of determining candidacy." First General Counsel's Report in MUR 6735 (Sestak), at 13 n.11. The Commission's regulations also do not establish a pre-election deadline by which an individual must conclude testing-the-waters activities. However, the Commission did not take issue with former Senator Fred Thompson commencing his testing-the-waters activities in June 2007 in anticipation of the 2008 presidential nominating events and general election. *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter, Donald F. McGahn II, and Ellen L. Weintraub in MUR 5934 (Thompson) (Mar. 10, 2009). Governor Bush *concluded* his testing-the-waters activities and decided to become a candidate at the

same point during the presidential election cycle that Senator Thompson *began* testing the waters.[15]

III. GOVERNOR BUSH'S ASSOCIATION WITH AN INDEPENDENT EXPENDITURE-ONLY COMMITTEE PRIOR TO HIS CANDIDACY DOES NOT IMPLICATE FECA'S SOFT-MONEY RESTRICTIONS.

Governor Bush's association with RTR Super PAC could not possibly have violated FECA's soft money restrictions because, as a matter of law, he was not a "candidate" until early June 2015 and was not subject to FECA's soft money restrictions until that time. In any event, Governor Bush went beyond the law's requirements of a private citizen and did not solicit any funds for RTR Super PAC and did not establish, finance, maintain, or control RTR Super PAC.

A. As a matter of law, Governor Bush was not subject to FECA's soft money ban until he became a federal candidate.

FECA's soft-money ban is implemented by the Commission's regulations which prohibit "Federal *candidates*," "[a]gents acting on behalf of a Federal *candidate*," and "[e]ntities that are directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, one or more Federal *candidates*" from soliciting, receiving, directing, transferring, spending, or disbursing funds in connection with a federal election that do not comply with FECA's contribution limitations, prohibitions, and reporting requirements. 11 C.F.R. §§ 300.60, 300.61 (emphasis added).

In fact, FECA and Commission regulations extend the reach of federal campaign finance law only to activities that relate to a "candidate." *See, e.g.*, 52 U.S.C. §§ 30114 (regulating the use of "contribution[s] accepted by a *candidate*" (emphasis added)), 30116(a) (imposing limits on contributions "to any *candidate* and his authorized political committees" (emphasis added)), 30101(17) (defining "independent expenditure" to mean, in relevant part, "an expenditure made by a person expressly advocating the election or defeat of a *clearly identified candidate*"

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[15] FEC regulations also indicate that an individual can become a candidate if he "has taken action to qualify for the ballot under State law." *See* 11 C.F.R. §§ 100.72(b)(5), 100.131(b)(5). That has not been alleged here, nor did it occur.

(emphasis added)), 30104(f)(e) (defining "electioneering communication" to mean, in relevant part, "any broadcast, cable, or satellite communication which refers to a *clearly identified candidate for Federal office*" (emphasis added)), 30101(16) (defining "political party" to mean, in relevant part, "an association, committee, or organization which nominates a *candidate for election to any Federal office*" (emphasis added)); *Buckley v. Valeo*, 494 U.S. 1, 79 (1976) (limiting the definition of "political committee" to "only encompass organizations that are under the control of a *candidate* or the major purpose of which is the nomination or election of a *candidate*" (emphasis added)). The Commission can regulate very little else.

This limitation is jurisdictional: "The limits on the Commission's authority—like that authority itself—are derived from statutory provisions" which extend to reach only activities that relate to a candidate. *In re Sealed Case*, 237 F.3d 657, 669 (D.C. Cir. 2001). Federal courts have repeatedly reminded the Commission of the legal limits of its regulatory jurisdiction. The D.C. Circuit, for example, held that the Commission "lacks subject matter jurisdiction over draft group activities." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 384-85 (1981). "Draft groups may vary widely in character," but "have one thing in common[:] they aim to produce some day a candidate acceptable to them, but they have not yet succeeded." *Id.* at 392. "Therefore none are promoting a 'candidate' for office, as Congress uses that term in FECA." *Id.* "[W]here a group's activities are not related in any way to a person who has decided to become a candidate, the 'actuality and potential for corruption' are far from having been 'identified.'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976)). In the D.C. Circuit's view, there are "grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not under the control of a 'candidate,' or directly related to promoting or defeating a clearly identified 'candidate' for federal office." *Id.* at 393.[16]

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[16] *See also Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010) (holding that the Commission did not have the authority to regulate a group that sought to facilitate a mixed party ticket for President and Vice President until and unless the group selected a "clearly identified candidate"); *FEC v. GOPAC, Inc.*, 917 F.Supp. 851, 859 (D.D.C. 1996) (holding that the Commission did not have the authority to regulate a group that supported a "farm team" of future federal candidates because such individuals were not "candidates" under FECA); *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281 (11th Cir. 1982) (holding that the Commission did not have the authority to regulate draft groups because there was no "candidate" involved in the group's activities, and a

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Commissioners have dutifully recognized this strict jurisdictional limit to the Commission's regulatory authority, noting that "[t]he 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. . . ." Statement of Reasons of Vice Chairman Donald F. McGahn II and Commissioner Caroline C. Hunter in MUR 6462 (Trump), at 8 (Sept. 18, 2013). For this reason, the Commission has "no authority" to "expand the scope of the Act to reach individuals who [have] not become candidates." *Id.* at 9. The Commission recently reaffirmed these principles. *See* Factual & Legal Analysis in MUR 6775 (Clinton), at 8 n.37 (Feb. 12, 2015).

Of critical importance here is that an individual is not a "candidate," as a matter of law, while the individual is testing the waters. 11 C.F.R. §§ 100.72, 100.131. *See also Payments Received for Testing the Waters Activities*, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) ("Through its regulations, the Commission has established limited exceptions to these automatic thresholds which permit an individual to test the feasibility of a campaign for Federal office *without becoming a candidate under the Act*." (emphasis added)). Thus, an individual who is testing the waters is not a "candidate" and, therefore, is not subject to the soft money ban. One of the complainants has confirmed this precise point, writing that "individuals who are not federal candidates or officeholders, or 'testing the waters' for becoming a federal candidate, can raise and spend unlimited funds in connection with elections (*e.g.*, through a super PAC, 527, or 501(c)(4) organization)." Paul S. Ryan, Campaign Legal Center, *"Testing the Waters" and the Big Lie*, at 31 (Feb. 2015), http://www.campaignlegalcenter.org/sites/default/files/Testing_the_Waters_and_the_Big_Lie_2.19.15.pdf.

Similarly, an individual cannot be an "agent" within the meaning of the soft money restrictions when the individual's principal is not a "candidate." The Commission's regulations make clear that an "agent" is "any person who has actual authority, either express or implied, to . . . solicit, receive, direct, transfer, or spend funds in connection with any election" on behalf of "an individual *who is a Federal candidate*." 11 C.F.R. § 300.2(b)(3) (emphasis added). Even if an individual had actual authority to act on behalf of a principal who was testing the waters, the

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(Continued . . .)

"political committee" must either be under the control of a "candidate" or have the major purpose to nominate or elect a "candidate").

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individual would not be an "agent" for purposes of the soft money ban because the principal is not a "candidate."

FECA's jurisdictional limit to the Commission's regulatory reach—to activities that relate only to a "candidate"—is a necessary component of Congress's delegated authority to the Commission. As a matter of administrative law, Congress does not delegate unlimited authority to administrative agencies, but circumscribes that authority in the agency's enabling statute. *See, e.g.*, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (The Food and Drug Administration's enabling statute permitted regulation of "drugs," tobacco products were not "drugs," therefore, regulation of tobacco products was beyond the agency's regulatory jurisdiction.). Here, Congress was clear in FECA that the Commission may not regulate activity by persons unless it relates to a "candidate."

That limiting principle serves two critical purposes. First, it ensures that the Commission regulates no more activity than what Congress has authorized. Second, it puts participants in the political process on clear notice of what is regulated when they engage in political speech and association that receives the utmost protection under the First Amendment. Anything less than such a clear demarcation would be subject to serious constitutional challenge.

The Complaints recognize this reality and, therefore, base *all* of their allegations that Governor Bush violated FECA's soft money ban on the faulty premise that Governor Bush was a "candidate" for many months prior to June 2015. *See* Complaint in MUR 6915 at 6; First Supplemental Complaint in MUR 6915 at 6-7; Second Supplemental Complaint in MUR 6915 at 6-7; Complaint in MUR 6927 at 15-16; First Supplemental Complaint in MUR 6927 at 16-17. As explained above, Governor Bush scrupulously complied with the Commission's testing-the-waters regulations and did not become a candidate until early June 2015. Thus, FECA's soft money ban did not apply to him until early June 2015—well after the Complaints were filed and the alleged violations purportedly occurred. On this basis alone, there is no reason to believe that Governor Bush violated the soft money ban.

B. In any event, Governor Bush did not establish, finance, maintain, or control RTR Super PAC.

Put simply, Governor Bush did not establish nor has he financed, maintained, or controlled RTR Super PAC. As RTR Super PAC's Treasurer Charles R. Spies has already explained to the Commission:

> The Super PAC was not established by Governor Bush, and Governor Bush does not direct or control the Super PAC's fundraising or other activities. The extent of Governor Bush's involvement with the Super PAC is his appearance as a special guest at Super PAC fundraising events, which would be permissible even if Governor Bush was a candidate for federal office.

Response of Right to Rise PAC, Inc., et al. in MUR 6915, at 4 (Feb. 20, 2015); Response of Right to Rise PAC, Inc., et al. in MUR 6927, at 5-6 (Apr. 24, 2015).

This factual representation by RTR Super PAC's Treasurer—a co-respondent in these MURs—should be sufficient to rebut the Complaints' allegations that Governor Bush established, financed, maintained, or controlled RTR Super PAC. However, this representation is further supported by other publicly available information and FEC precedent.

1. Governor Bush did not establish RTR Super PAC.

A sponsor "established" an entity if he or she "had an active or significant role in the formation of the entity." 11 C.F.R. § 300.2(c)(2)(x). The Commission has found that a sponsor "established" an entity by serving as the incorporator, the initial chief executive officer, a member of the initial board of directors, or providing "seed money." *See* FEC AO 2003-12 (Flake), at 7 (July 29, 2003); Factual & Legal Analysis in MUR 5367 (Issa), at 11-12 (Feb. 20, 2004).

Governor Bush did none of these things. He did not incorporate RTR Super PAC. *See* D.C. Dep't of Regulatory & Consumer Affairs, *Governors for Right to Rise Super PAC, Inc.* (attached hereto as Exhibit B). Moreover, Governor Bush has not served as an officer or director of RTR Super PAC. *See supra* n.3. Nor did he

make any "seed money" contributions to RTR Super PAC. *See* Right to Rise USA, 2015 Mid-Year Report (amended July 31, 2015).

The Complaints make conclusory allegations that Governor Bush "established" RTR Super PAC, yet fail to provide evidence that Governor Bush had *any* formal role in the entity's formation—let alone an "active" or "significant" one.

2. Governor Bush did not finance or maintain RTR Super PAC.

A sponsor "finances" or "maintains" an entity by "provid[ing] funds or goods in a significant amount or on an ongoing basis to the entity" or by "caus[ing] or arrang[ing] for funds in a significant amount or on an ongoing basis to be provided to the entity." 11 C.F.R. § 300.2(c)(2)(vii), (viii). This occurs when a sponsor provides funds under the sponsor's control (*e.g.*, personal funds, business funds, campaign funds) to an entity in "significant amounts" (*e.g.*, 60% of the entity's receipts) or "on an ongoing basis" (*e.g.*, weekly). Factual & Legal Analysis in MUR 5367 (Issa), at 11-12 (Feb. 20, 2004).

The Commission has already considered—and expressly rejected—whether fundraising activities on behalf of an entity amount to "financing" or "maintaining" the entity. The Office of the General Counsel has explained that "because members of the Senate Democratic leadership can legally attend, speak, or be featured at [the entity]'s fundraisers, this Office cannot conclude that such activity, by itself, demonstrates that the Senate Democratic leadership established, finances, maintains, or controls [the entity]." First General Counsel's Report in MUR 5343 (Democratic Senate Majority Fund), at 13 (Jan. 16, 2004) (adopted by the Commission).

Like the "members of the Senate Democratic leadership," Governor Bush's appearances as a featured speaker at RTR Super PAC fundraising events clearly do not constitute "financing" or "maintaining." *See* FEC AO 2011-12 (Majority PAC) (permitting federal candidates and officeholders to appear and solicit FECA-permissible funds at Super PAC fundraising events); Zeke Miller & Phillip Elliott, *How Jeb Bush's Super PAC Will Spend $103 Million*, Time (July 9, 2015), http://time.com/3951931/jeb-bush-super-pac-fundraising ("Aides say Bush never directly made a fundraising ask, even before he declared his candidacy."). Thus, the Complaints' characterization of Governor Bush's appearances as a featured

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speaker at RTR Super PAC fundraising events as "financing" and "maintaining" the entity are foreclosed by longstanding Commission precedent.

3. Governor Bush did not control RTR Super PAC.

As RTR Super PAC's Treasurer has already explained to the Commission, Governor Bush does not "control" RTR Super PAC, which should be the end of the inquiry. *See* Response of Right to Rise PAC, Inc., et al. in MUR 6915, at 4 (Feb. 20, 2015); Response of Right to Rise PAC, Inc., et al. in MUR 6927, at 5-6 (Apr. 24, 2015). However, the Complaints point to press accounts characterizing RTR Super PAC as "Bush's Super PAC" and that Mike Murphy, a longtime political advisor to Governor Bush, is leading RTR Super PAC as "evidence" of Governor Bush's alleged control.

As a threshold matter, it is hardly surprising that an ally of Governor Bush's would lead the efforts of RTR Super PAC to support a now-declared candidate. *See* Right to Rise Super PAC, Inc., *About*, https://righttorisesuperpac.org/about/rtrusa?lang=en. But that is legally irrelevant. The Commission has ruled that "something more than the mere fact of such informal, ongoing relationships between personnel of a potentially sponsoring and potentially sponsored entity is necessary to support a conclusion of 'establishment, financing, maintenance or control.'" First General Counsel's Report in MUR 5338 (The Leadership Forum), at 18 (Mar. 27, 2002). The Commission has likewise made clear that "in the absence of information that [the former employee or consultant] continue[s] to receive instructions or directions from [the potential sponsor], we cannot rely solely on [the former employee or consultant's] prior association with the [potential sponsor] to establish an ongoing relationship between the [potential sponsor] and [the potentially sponsored entity]. First General Counsel's Report in MUR 5343 (Democratic Senate Majority Fund), at 12 (Jan. 16, 2004).

Thus, Mr. Murphy's leadership of RTR Super PAC does not mean that Governor Bush "controls" RTR Super PAC. If a father-son or spousal relationship "alone is insufficient to create an agency relationship," then the relationship between Governor Bush and Mr. Murphy—that of a politician and a former political advisor—is also insufficient to create an agency relationship. *See* FEC AO 2003-10 (Reid), at 4 (June 16, 2003); Factual & Legal Analysis in MUR 5761 (Madrid), at 4 (Mar. 23, 2007).

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In order for a potential sponsor to "control" an entity through another person, that person would have to be an "agent." And as the Commission has explained, "a principal cannot be held liable for the actions of an agent unless (1) the agent has actual authority, (2) the agent is acting on behalf of his or her principal, and (3) the agent is engaged in" "solicit[ing], receiv[ing], direct[ing], transfer[ing], or spend[ing] funds in connection with any election" on the principal's behalf. *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49064, 49083 (July 20, 2002). "[I]t is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal." *Id.* Besides pointing to speculative and inaccurate press reports, the Complaints proffer no evidence that Governor Bush has controlled RTR Super PAC via Mr. Murphy or anyone else.

* * *

But this is all beside the point. Governor Bush was not a candidate until June 2015. Therefore, these soft money restrictions that the Complaints accuse him of violating could not, as a matter of law, have applied to him.

CONCLUSION

The foregoing demonstrates that Governor Bush conducted his affairs as a private citizen, his testing-the-waters activities, and, ultimately, his declaration as a candidate for President in complete conformity with federal campaign finance law. Accordingly, the Commission should find no reason to believe that a violation occurred and should promptly dismiss the Complaints.

Respectfully submitted,

Michael E. Toner
Caleb P. Burns
Brandis L. Zehr

Attachments

Exhibit A

Survey copy:
Sender: Jeb Bush
Subject: I need your opinion on something

Copy:

I need your help.

Next week I'm going to sit down with my team to start building a path forward on some of the key issues facing our nation, but before that, I need your input.

Will you take my American Priorities survey and tell me what issues are most important to you, and how you think we should address them?

Your answers will help inform our discussion, and provide the crucial feedback we need to help counter the policies of President Obama which have led us astray.

I know your time is valuable, but your opinions and thoughts are important to me, so please fill out our survey today: **RighttoRisePAC.org/American-Priorities-Survey/**

I look forward to reading your responses,

Jeb

Jeb Photo Contest
Sender: Jeb Bush
Subject: My dad and me

[-FirstName-],

I keep a pretty close eye on my email account, and recently quite a few of you have reached out asking for a signed photo or bumper sticker. But, I thought I would do one better… so I gave dad a call to see if he would be willing to sign a few photos with me.

He insisted on an action shot, but was all in.

So today we're officially launching a contest where 3 lucky winners will win the photo below of my dad and I battling it out on the tennis court, signed by both of us. **All you have to do to enter is submit your email right now.**

This contest won't last long, so enter now while you still can.

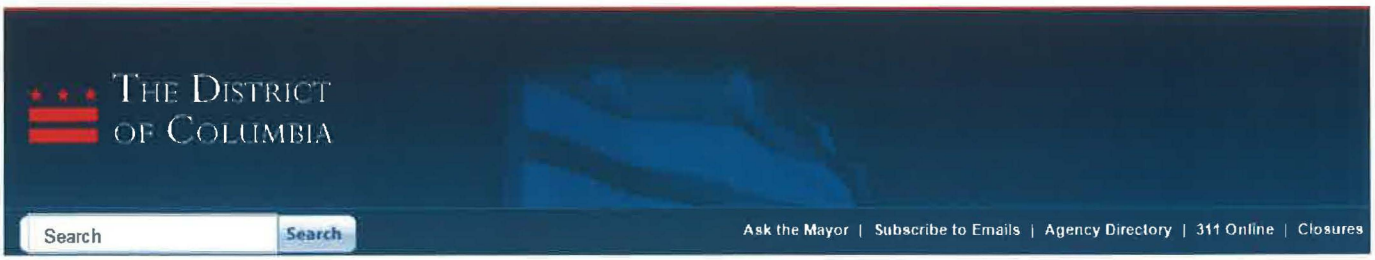
Remember, just add your name right now for your chance to win one of three framed, autographed photos of my dad and me.

An opportunity like this doesn't come around every day, don't miss out, [-FirstName-]:
RighttoRisePAC.org/Win-a-Signed-Photo/

Thank you and good luck!

Jeb

Exhibit B



Right to Rise Super PAC, Inc. - Initial File Number: N00005082027

Main | Reports | Trade Names | Governors

Governors

Business Contact Type	Name	Address	Executing Officer	File Number	Actions
Authorized Official	Spies, Charles	601 Pennsylvania Ave. NW Suite 1000N Washington, DC 20004	Is Executing Officer?: No	TN0005214470	View
Incorporator	Spies, Charles	601 Pennsylvania Avenue NW North Building, Suite 1000 Washington, DC 20004	Is Executing Officer?: No	N00005082027	View

1 to 2 of 2 rows 4

Business Contact Type Incorporator

Name

First Name Charles
Middle Name
Last Name Spies

Address

Line1 601 Pennsylvania Avenue NW
Line2 North Building, Suite 1000

City Washington **State** District of Columbia **Zip** 20004

Return to Home