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May 22, 2015

Jeff S. Jordan
Office of the General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20462

Re: MUR 6926

Dear Mr. Jordan,

This response is filed on behalf of our clients, Governor Martin O'Malley, O' Say Can You Say PAC ("OPAC") and Martin Cadogan, in his official capacity as treasurer of OPAC, to the above-referenced complaint. This complaint should be dismissed and no action should be taken in regards to the Respondents. None of the allegations in the complaint, even if taken as true, implicate any impermissible conduct by the Respondents and the complaint fails to identify a single fact upon which the Federal Election Commission ("Commission") could conclude that Respondents are about to commit a violation of the Federal Election Campaign Act of 1971 (the "Act") or Commission regulations.

The complaint fails to meet the requirements for a proper complaint. Commission regulations require a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction. 11 C.F.R. § 111.4(d)(3). "Unwarranted legal conclusions from asserted facts... or mere speculation... will not be accepted as true." MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 2. This complaint fails to allege any specific facts that describe a violation of the Act or Commission regulations by the Respondents. Instead, the complaint draws conclusions and speculates that Respondents may violate the Act in the future.

The complaint alleges that "Martin O'Malley has been 'testing the waters' of a 2016 presidential campaign and has not complied and will not comply with the requirement that 'testing the waters' activities be paid for with funds that comply" with the Act. Complaint ¶ 1. The complaint fails to provide a single fact to support its conclusion. The facts listed in the complaint merely show a number of activities that Governor O'Malley has engaged in over the last two years. They provide no basis to find a reason to believe that Governor O'Malley is about to commit a violation of the Act or that he will not comply with the Act if and when he becomes a federal candidate.

FACTUAL BACKGROUND

Governor Martin O'Malley is the former Governor of Maryland. In July 2012, OPAC was formed as a federal political committee to support candidates across the country that share Governor O'Malley's ideals of expanding opportunity, spurring job creation and moving America forward. Since its formation, OPAC has contributed hundreds of thousands of dollars to federal, state and local candidates and parties.¹ In addition to making contributions to Democratic candidates, during the 2014 election cycle OPAC provided staff to Democratic candidates in a number of states including Iowa and South Carolina. As Mr. O'Malley's spokeswoman said at the time, "He's committed to electing Democrats in 2014, and this commitment of staff in Iowa is part of that strategy."² Governor O'Malley has also supported federal, state and local candidates and parties through speaking and fundraising events. Expenses for these activities have been paid for by OPAC. Governor O'Malley has been considering running for President and if and when he does become a candidate, he will comply with all rules, regulations and reporting requirements in the Act and Commission regulations.

LEGAL ANALYSIS

Under the Act, an individual becomes a candidate when he or she receives or makes in excess of \$5,000 in contributions or expenditures. 52 U.S.C. § 30101(2) (formerly 2 U.S.C. § 431(2)). However, the Commission regulations provide that the terms "contribution" and "expenditure" do not include funds or payments made solely to determine whether an individual should become a candidate. 11 C.F.R. §§ 100.72; 100.131(a). Permissible "testing the waters" activities include, but are not limited to, conducting polls, making telephone calls, and traveling. *Id.* If the individual subsequently becomes a candidate, the funds received are contributions and payments made are expenditures, subject to the source limitations and reporting requirements of the Act and must be reported with the first report filed by the principal campaign committee, regardless of when the funds were received or payments were made. 11 C.F.R. §§ 100.72; 100.131(a).

Examples of activities that indicate that an individual has decided to become a candidate include, but are not limited to: (1) using general public political advertising to publicize his or her intention to campaign for federal office; (2) raising 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; (3) making or authorizing written or oral statements that refer to him or her as a candidate for a particular office; (4) conducting activities in close proximity to the election or over a protracted period of time; and (5) taking action to qualify for the ballot under state law. 11 C.F.R. §§ 100.72(a),

¹ See O' Say Can You See PAC (FEC ID# C00525220), contributions to committees.

² Ben Jacobs, *2016 Overachiever Martin O'Malley Now Has 11 Staffers Working in Iowa*, DAILY BEAST, September 9, 2014, <http://www.thedailybeast.com/articles/2014/09/12/2016-overachiever-martin-o-malley-now-has-11-staffers-working-in-iowa.html>.

100.131(b). All funds raised or spent for “testing the waters” activities are subject to the Act’s limitations, prohibitions, should the individual become a candidate. However, the individual is not required to form an exploratory committee while testing the waters.³

The Complaint should be dismissed because it fails to allege a violation of the Act. The Complaint is based on the mere belief that a future violation *may* occur and it fails to provide any facts to support this conclusion. The Complaint does not allege that Governor O’Malley has crossed the line to become a federal candidate.⁴ Instead, it alleges that he is using impermissible funds to test the waters. However, testing the waters does not create a concurrent reporting requirement or require that permissible funds be used **at the time they are spent** to test the waters if such funds are spent by a multicandidate committee such as OPAC. To be sure, Governor O’Malley has not established a testing the waters committee, nor has he engaged in any substantial testing the waters activities.

If and when Governor O’Malley becomes a candidate, any funds spent by OPAC to test the waters on Governor O’Malley’s behalf will be timely reimbursed by Governor O’Malley’s campaign committee in accordance with 11 C.F.R. § 110.2(l)(2), which permits a candidate to reimburse a political committee for testing the waters activities within 30 days of becoming a candidate without such expenses resulting in an impermissible in-kind contribution. Therefore, there is no reason to believe that Respondents have “committed, or [are] about to commit, a violation of [the Act].” 52 U.S.C. § 30109(a)(2).

The complaint provides a number of articles that detail Governor O’Malley’s speaking engagements and fundraising activities for candidates and parties, going back as far as 2013, to suggest that these are testing the waters activities. For example, a 2013 speech Governor O’Malley made to New Hampshire Democrats.⁵ If the Commission determines that these activities are testing the waters activities, then every public official who considers running for office has violated the law. It is common for any individual considering running for President to visit early states to ingratiate themselves to local elected officials and no candidate has ever reported these activities as testing the waters. For example, in 2010, Mitt Romney, Rick Santorum and Newt Gingrich all visited early primary states prior to declaring the candidacy for the 2012 Presidential election and in 2006, President Obama visited Iowa a number of times

³ See FEC Campaign Guide for Congressional Candidates at 2-3 (June 2014) (Another consideration, though not a requirement, is the segregation of the testing the waters funds” by setting up a separate bank account for the deposit of receipts and the payment of expenses. “An individual may organize a ‘committee’ for testing the waters.”).

⁴ On the same day this Complaint was filed, Complainants filed similar complaints against three Republican candidates. Those complaints contained the same allegations at issue here and also alleged that those Respondents crossed the line to become candidates. This Complaint does not allege that Governor O’Malley has crossed the line to become a Presidential candidate. See Campaign Legal Center Press Release, *FEC Complaints Against Presidential Hopefuls Show Widespread Violations*, Mar. 31, 2015, <http://www.campaignlegalcenter.org/news/press-releases/fec-complaints-against-presidential-hopefuls-show-widespread-violations-total>.

⁵ John Wagner, *O’Malley Recounts Leadership of Baltimore in Speech to New Hampshire Democrats*, WASHINGTON POST, Nov. 17, 2011, http://www.washingtonpost.com/local/md-politics/omalley-recounts-leadership-of-baltimore-in-speech-to-new-hampshire-democrats/2013/11/17/ad97618e-4f8c-11e3-9fe0-fd2ca728e67c_story.html.

before declaring his candidacy for the 2008 Presidential election.⁶ These are just a handful of many of examples of prospective candidates visiting early primary states before they formally create a campaign for President or make any decision about running for President.⁷ None of these candidates reported these activities on their first reports and presumably did not consider such expenses to be testing the waters activities. The Commission has never held these activities to be testing the waters activities and the Commission should not use the enforcement process to create a novel requirement that such pre-candidacy activities are covered by the Act.

CONCLUSION

As explained above, if and when Governor O'Malley becomes a Presidential candidate, if we determine that any testing the waters activities were undertaken by Governor O'Malley and paid for by OPAC prior to the Governor's candidacy, the costs will be reimbursed to OPAC in accordance with 11 C.F.R. § 110.2(1)(2). In addition, these expenses will be reported on the campaign committee's first report filed with the FEC as required by 11 C.F.R. §§ 100.72 and 100.131(a).

The complaint does not allege sufficient facts to find reason to believe that the Respondents have not and will not comply with the Act and Commission regulations. Respondents respectfully request that the Commission find no reason to believe that any violation of the Act or Commission regulations has occurred or is about to occur, and dismiss this complaint forthwith.

Respectfully submitted,

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⁶ See O. Kay Henderson, *Romney Helps Iowa GOP kick-off get-out-the-vote effort*, RADIO IOWA, October 26, 2010, <http://www.radioiowa.com/2010/10/26/romney-helps-iowa-gop-kick-off-get-out-the-vote-effort/>; Kathie Obradovich, *Santorum returns to Iowa Aug. 16-18*, DES MOINES REGISTER, July 29, 2010, <http://blogs.desmoinesregister.com/dmr/index.php/2010/07/29/santorum-returns-to-iowa-aug-16-18>; Jason Spencer, *Newt Gingrich to speak at county GOP event*, GOUPSTATE.COM, November 28, 2010, <http://www.goupstate.com/article/20101128/articles/11281031>; Annie Kornblut, *For this Red Meat Crowd, Obama's '08 Choice is Clear*, NEW YORK TIMES, September 18, 2006, http://www.nytimes.com/2006/09/18/us/politics/18obama.html?_r=0.

⁷ See Nelson Polsby and Aaron Wildavsky, *Presidential Elections, Strategies and Structures of American Politics*, 97-100 (12th ed. 2012).