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**FEDERAL ELECTION COMMISSION**  
**FIRST GENERAL COUNSEL'S REPORT**

**MUR: 6926**  
COMPLAINT FILED: March 31, 2015  
DATES OF NOTIFICATION: April 3, 2015 and  
November 3, 2015  
LAST RESPONSE: November 20, 2015  
ACTIVATED: June 24, 2015<sup>1</sup>

ELECTION CYCLE: 2016  
Earliest SOL: January 30, 2020  
Latest SOL: May 28, 2020

**COMPLAINANTS:** Campaign Legal Center  
Democracy 21

**RESPONDENTS:** Martin O'Malley  
Win Back Your State f/k/a O'Say Can You See  
PAC and Martin Cadogan in his official capacity  
as treasurer<sup>2</sup>  
O'Malley for President and Terry Lee Lierman in  
his official capacity as treasurer

**RELEVANT STATUTES  
AND REGULATIONS:** 52 U.S.C. § 30101(2)  
52 U.S.C. § 30101(8)(A)  
52 U.S.C. § 30102(e)(1)  
52 U.S.C. § 30103(a), (c)  
52 U.S.C. § 30116(a), (f)  
11 C.F.R. § 100.52(d)  
11 C.F.R. § 100.72  
11 C.F.R. § 100.131  
11 C.F.R. § 103.3(b)(3)  
11 C.F.R. § 110.2(l)

**INTERNAL REPORTS CHECKED:** Disclosure Reports

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<sup>1</sup> The Office of General Counsel delayed consideration of this matter pending the conclusion of the Title 26 audit required after O'Malley received matching funds for his presidential primary campaign in order to ensure consistency between this matter and the findings from the audit. See Memorandum to the Commission, MUR 6926 (O'Malley for President, *et al.*) (Mar. 6, 2017); 26 U.S.C. § 9038; 11 C.F.R. § 9038.1. The Audit Division has now completed its audit and a draft preliminary audit report, which we recently reviewed, does not include any findings or recommendations that relate to the allegations outlined in the Complaint.

<sup>2</sup> On November 16, 2017, O'Say Can You See PAC filed an amended Statement of Organization changing its name to Win Back Your State. Martin Cadogan remains the committee's treasurer. To avoid confusion, the committee will be referred to as O'Say Can You See PAC throughout this report.

1 **FEDERAL AGENCIES CHECKED:** None

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3 **I. INTRODUCTION**

4 The Complaint alleges that Martin O'Malley violated the Federal Election Campaign Act  
5 of 1971, as amended (the "Act"), and Commission regulations when O'Malley, unnamed others,  
6 and O'Say Can You See PAC ("OPAC") paid for O'Malley's "testing the waters" activities for a  
7 potential 2016 presidential run with funds that do not comply with the Act's candidate  
8 contribution limits and restrictions.<sup>3</sup> Respondents deny the allegations and request that the  
9 matter be dismissed.<sup>4</sup>

10 As discussed below, the record indicates that OPAC, which was formed by O'Malley in  
11 2012, paid testing the waters expenses for O'Malley, but that once O'Malley declared his  
12 candidacy (subsequent to the filing of the Complaint and Joint Response), his principal campaign  
13 committee, O'Malley for President (the "Committee"), timely reimbursed OPAC for most of  
14 those goods and services. The record does not support the allegation that O'Malley or anyone  
15 else other than OPAC financed his testing the waters activities. Accordingly, we recommend  
16 that the Commission find no reason to believe that OPAC violated 52 U.S.C. § 30116(a), find  
17 no reason to believe that the Committee violated 52 U.S.C. § 30116(f), find no reason to believe  
18 that Martin O'Malley violated 52 U.S.C. § 30116(f), and close the file.

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<sup>3</sup> Compl. ¶¶ 1, 35. (Mar. 31, 2015).

<sup>4</sup> Martin O'Malley and OPAC Joint Resp. at 1 (May 22, 2015). O'Malley for President was notified of the Complaint in November, 2015, and because its response incorporated the Joint Response as Exhibit A, we will reference a single response.

1 **II. FACTS**

2 Between January 2007 and January 2015, Martin O'Malley served as governor of  
3 Maryland. In July 2012, Governor O'Malley reportedly launched OPAC, which was registered  
4 with the Commission at the time of the Complaint as a nonconnected multicandidate committee.<sup>5</sup>

5 On May 29, 2015, O'Malley filed a Statement of Candidacy with the Commission for the  
6 2016 presidential election and his principal campaign committee filed a Statement of  
7 Organization.<sup>6</sup> The next day, O'Malley publicly announced that he was seeking the Democratic  
8 nomination for President.<sup>7</sup> OPAC and the Committee subsequently disclosed transactions  
9 showing that OPAC paid for certain testing the waters expenses of O'Malley starting in January  
10 2015 and that the O'Malley Committee repaid OPAC shortly after O'Malley filed his Statement  
11 of Candidacy. Specifically, the Committee disclosed disbursing \$46,579.47 to OPAC on  
12 June 13, 2015 (15 days after O'Malley filed his Statement of Candidacy), for "Expense  
13 Reimbursement."<sup>8</sup> Memo entries indicate that the reimbursement covered 16 payments made by

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<sup>5</sup> Compl. ¶ 3 (citing John Wagner, *O'Malley Launches Federal PAC as Profile Rises*, WASHINGTON POST, July 26, 2012, [http://www.washingtonpost.com/blogs/maryland-politics/post/omalley-launches-federal-pac-as-national-profile-rises/2012/07/26/gJQADPR6AX\\_blog.html](http://www.washingtonpost.com/blogs/maryland-politics/post/omalley-launches-federal-pac-as-national-profile-rises/2012/07/26/gJQADPR6AX_blog.html)); O'Say Can You See PAC, Statement of Organization (July 23, 2012). On February 19, 2014, OPAC notified the Commission that it had qualified as a multicandidate committee. See O'Say Can You See PAC, Notification of Multicandidate Status (Feb. 19, 2014). OPAC filed an Amended Statement of Organization on June 9, 2015, in which the committee identified itself as a Leadership PAC with O'Malley serving as "Sponsor." See OPAC, Amended Statement of Organization (June 9, 2015).

<sup>6</sup> See Martin O'Malley, Statement of Candidacy (May 29, 2015); O'Malley for President, Statement of Organization (May 29, 2015).

<sup>7</sup> See O'MALLEY FOR PRESIDENT HOMEPAGE, *Announcement Speech*, May 30, 2015, <https://martinomalley.com/category/the-latest/>. In February, 2016, O'Malley dropped out of the race for the Democratic presidential nomination. Ashley Parker, *Martin O'Malley to Drop Out After Finish in Iowa Vote*, NEW YORK TIMES, <https://www.nytimes.com/2016/02/02/us/politics/martin-o-malley-ends-presidential-campaign.html>.

<sup>8</sup> O'Malley for President, Amended 2015 July Quarterly Report at 590 (Jan. 31, 2017). Although the Committee's disclosure report states that the total amount reimbursed to OPAC was \$46,579.47, the related memo entries actually total \$46,472.35. *Id.* at 590-95.

1 OPAC for travel expenses, catering, rent, office supplies, and fees.<sup>9</sup> OPAC disclosed its receipt  
2 of the payment from the Committee as "a reimbursement of O'Malley for President exploratory  
3 expenses paid by O' Say Can You See PAC."<sup>10</sup> The following chart details OPAC's  
4 expenditures and the Committee's reimbursements:

Reimbursed Expenditures		
Payee and Purpose	Date of OPAC Expenditure	Amount
Amtrak:	5/20/2015 <sup>11</sup>	\$95.10
Travel expenses	5/21/2015	\$255.00
	5/24/2015	\$176.00
	5/24/2015	\$68.00
	5/24/2015	\$284.00
Carey:	5/21/2015	\$733.25
Travel expense		
Costco:	6/02/2015	\$320.64
Office supplies		
Eychaner Properties (Des Moines, IA): Rent	5/15/2015	\$4,800.00
Google Aps:	6/13/2015	\$341.88
Subscription Fee/Technology		
H&W Printing:	5/15/2015	\$2,058.81
Printing expenses		
Maestro (Oakland, CA):	6/08/2015	\$247.00
Catering		
Tidewater Inn (Easton, MD):	1/30/2015	\$4,450.00
Rental deposit	4/23/2015	\$12,474.00
Lodging/catering/space rental		
U. of Baltimore:	5/15/2015	\$150.00
Space rental	5/20/2015	\$800.00
Welldoc, Inc. (Baltimore, MD):	5/15/2015	\$19,218.67
Office rent deposit		
		<b>Total: \$46,472.35</b>

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<sup>9</sup> *Id.* According to the disclosure report, the Committee also owed OPAC a total of \$1,196.03 for "travel." *Id.* at 636. The report does not state when this debt, which appears to be separate from the reimbursed goods and services discussed in this report, was accrued. The debt was apparently repaid on July 14, 2015. O'Malley for President, 2015 October Quarterly Report at 775 (Oct. 15, 2015).

<sup>10</sup> O'Say Can You See PAC, 2015 Mid-Year Report at 65-66.

<sup>11</sup> Based on the Commission's Reports Analysis Division's review of OPAC's disclosure report, the Committee made sufficient payments to Amtrak on this date to cover the amount reimbursed by the campaign.

1 **III. LEGAL ANALYSIS**

2 The Complaint in this matter, which was filed on March 31, 2015, alleges that O'Malley  
3 started testing the waters for the 2016 Democratic nomination for president as early as 2012-  
4 2013 and failed to comply with the requirement that such activities be paid for with funds that  
5 comply with the Act's contribution limits and restrictions.<sup>12</sup> OPAC and O'Malley deny the  
6 allegations in a joint response and contend that the Complaint is speculative and conclusory.<sup>13</sup>

7 Under the Act, an individual who seeks nomination for election, or election, to Federal  
8 office is a candidate and shall be deemed to seek nomination for election, or election, if such  
9 individual receives contributions or makes expenditures in excess of \$5,000.<sup>14</sup> A candidate is  
10 required to designate in writing a principal campaign committee within fifteen days of reaching  
11 this \$5,000 threshold.<sup>15</sup> The designated principal campaign committee, in turn, is required to file  
12 a Statement of Organization within ten days of designation and report any subsequent changes on  
13 that Statement within ten days of the change.<sup>16</sup>

14 The Act defines "contribution" to include "any gift . . . of money or anything of value  
15 made by any person for the purpose of influencing any election for Federal office."<sup>17</sup> No  
16 multicandidate committee shall make contributions to any candidate, or his or authorized

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<sup>12</sup> Compl. ¶¶ 3, 9. The Complaint states that O'Malley's testing the waters activities included making telephone calls, traveling to key primary and battleground states, meeting privately with state party leadership to gauge support for a possible presidential candidacy, and retaining staff and vendors for services rendered in connection with establishing campaign offices. *Id.* ¶ 34.

<sup>13</sup> Resp. at 1 (citing Statement of Reasons, Comm'rs Mason, Sandstrom, Smith and Thomas at 2, MUR 4960 (Hillary Clinton)).

<sup>14</sup> 52 U.S.C. § 30101(2).

<sup>15</sup> *Id.* § 30102(e)(1).

<sup>16</sup> *Id.* § 30103(a), (c).

<sup>17</sup> *Id.* § 30101(8)(A)(i). "Anything of value" covers all in-kind contributions, including the provision of goods and services without charge or at less than the usual and normal charge. 11 C.F.R. § 100.52(d)(1).

1 committee which, in the aggregate, exceeds \$5,000.<sup>18</sup> Commission regulations permit a  
2 candidate to use his or her personal funds to make unlimited contributions to his campaign.<sup>19</sup>

3 The Commission created a limited exemption to the definitions of contribution and  
4 expenditure to allow individuals to conduct certain activities designed to evaluate a potential  
5 candidacy (*i.e.*, to “test the waters”).<sup>20</sup> Funds received and payments made “solely for the  
6 purpose of determining whether an individual should become a candidate” are not considered  
7 contributions or expenditures under the Act.<sup>21</sup> Testing the waters activities are those “conducted  
8 to determine whether an individual should become a candidate.”<sup>22</sup> The Commission has  
9 described testing the waters activities as those undertaken while an individual “continues to  
10 deliberate his decision to become a presidential candidate” and include, but are not limited to,  
11 “conducting a poll, telephone calls, and travel.”<sup>23</sup> Funds received and spent for “testing the  
12 waters” activities are subject to the limitations and prohibitions of the Act and, if the individual  
13 subsequently becomes a candidate, are also subject to reporting requirements.<sup>24</sup>

14 **A. Alleged Testing the Waters Activities From 2012-2014**

15 Based primarily on a number of news articles published between July 26, 2012 and  
16 March 25, 2015,<sup>25</sup> the Complaint asserts that O'Malley (and his agents) engaged in the following

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<sup>18</sup> 52 U.S.C. § 30116(a)(2)(A); 11 C.F.R. § 110.2(b).

<sup>19</sup> 11 C.F.R. § 110.10; *see also* Advisory Op. 1988-7 (Bakal).

<sup>20</sup> *Id.* §§ 100.72, 100.131.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* These funds must be reported with the first report filed by the principal campaign committee of the candidate, regardless of when the funds were received or the payments made. *Id.*

<sup>25</sup> Compl. ¶¶ 3, 7-12.

1 political activities gauged to test the waters for a presidential run: launched OPAC in 2012 for  
2 the express purpose of promoting O'Malley's potential federal candidacy; sponsored a website,  
3 <http://www.martinomally.com>, featuring O'Malley to the exclusion of other candidates;<sup>26</sup> stated  
4 publicly before November 2013 that O'Malley was weighing a presidential bid and intended to  
5 campaign on behalf of other candidates during the 2014 mid-term elections in an "effort to build  
6 good will";<sup>27</sup> promoted O'Malley's future political endeavors by directing OPAC's hiring of  
7 experienced political operatives to serve as senior advisors and field staff in primary states  
8 during the 2014 mid-term elections;<sup>28</sup> and frequently visited Iowa and New Hampshire in 2014  
9 to meet with voters, attend fundraisers, and make speeches before influential party officials.<sup>29</sup> In  
10 addition, the Complaint asserts that O'Malley tested the waters when he established campaign  
11 offices, incurred administrative expenses such as rent and utilities in connection with staffing  
12 those offices, and formed "steering committees" in early caucus/primary states with the  
13 understanding that those committees would later become the official campaign organizations.<sup>30</sup>

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<sup>26</sup> *Id.* ¶¶ 3-4, 6 (citing Wagner *supra* note 5); see also James Pindell, *Potential Democratic Presidential Candidate Martin O'Malley to Visit N.H.*, BOSTON GLOBE, (Jan. 29, 2015).

<sup>27</sup> *Id.* ¶¶ 9, 12 (citing John Wagner, *O'Malley Invited to N.H. for Democratic Dinner, as He Weighs 2016 Presidential Bid*, WASHINGTON POST (Sept. 18, 2013) and John Wagner, *Not Waiting for Clinton, MD Gov. O'Malley Prepares for Possible Presidential Bid*, WASHINGTON POST (Feb. 1, 2014)).

<sup>28</sup> *Id.* ¶¶ 7-8 (citing Ben Wolfgang, *Martin O'Malley Faces Steep Climb to 2016 Presidential Bid*, WASHINGTON TIMES (Oct. 20, 2014) and John Wagner, *O'Malley in Wait-and-See Mode, Looks to Spring to Launch Race Against Clinton*, WASHINGTON POST (Dec. 26, 2014)).

<sup>29</sup> *Id.* ¶¶ 9-11 (citing Reuters, *Maryland Gov. O'Malley Tests Presidential Waters in New Hampshire Visit*, BALTIMORE SUN (June 14, 2014); James Pindell, *Potential Democratic Presidential Candidate Martin O'Malley to Visit N.H.*, BOSTON GLOBE, (Jan. 29, 2015); Mark Preston, *Can This Democrat Really Beat Hillary Clinton?* CNNPolitics.com (Mar. 25, 2015); and Jennifer Jacobs, *O'Malley Looks to Gain Ground*, DES MOINES REGISTER (Feb. 3, 2015)).

<sup>30</sup> *Id.* ¶ 34.

1 The Complaint asserts that OPAC, O'Malley, and "others" violated the Act and Commission  
2 regulations by paying for these testing the waters activities.<sup>31</sup>

3 Respondents acknowledge in their May 2015 response that O'Malley "has been  
4 considering running for President" and public statements attributed to O'Malley show that he  
5 was considering a 2016 presidential campaign as early as 2013.<sup>32</sup> According to Respondents,  
6 during the 2014 election cycle, OPAC contributed directly to federal, state and local candidates  
7 and party committees, and provided staff to assist Democratic campaigns in "a number of states  
8 including Iowa and South Carolina."<sup>33</sup>

9 The press reports cited by the Complaint focus on O'Malley's efforts to raise his national  
10 profile.<sup>34</sup> For instance, the Complaint contends that O'Malley's appearance at the November  
11 2013 Jefferson-Jackson Dinner in New Hampshire as the keynote speaker, where his political  
12 staff were observed leaving contact information on the seats of dinner attendees urging them to  
13 "stay in touch" and view social media sites, constituted testing the waters activities.<sup>35</sup> The

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<sup>31</sup> *Id.* ¶ 35. The Complaint alleges that these payments violated the candidate contribution limits established at 52 U.S.C. § 30116(a).

<sup>32</sup> Resp. at 2; John Wagner, *O'Malley Invited to N.H. for Democratic Dinner, as He Weighs 2016 Presidential Bid*, WASHINGTON POST (Sept. 18, 2013), [https://www.washingtonpost.com/local/md-politics/omalley-invited-to-nh-for-democratic-dinner-as-he-weighs-2016-presidential-bid/2013/09/18/2ea2438c-2096-11e3-a45b-9131e6a4cadf\\_story.html?utm\\_term=.4b3e0fdb3e69](https://www.washingtonpost.com/local/md-politics/omalley-invited-to-nh-for-democratic-dinner-as-he-weighs-2016-presidential-bid/2013/09/18/2ea2438c-2096-11e3-a45b-9131e6a4cadf_story.html?utm_term=.4b3e0fdb3e69) (O'Malley said to be weighing a 2016 bid, although aides said he was unlikely to run if Clinton becomes a candidate).

<sup>33</sup> Resp. at 2. During the 2014 election cycle, OPAC contributed \$199,941 to federal, state, and local candidates, joint fundraising committees, as well as national, state, and local party committees. OPAC's disclosure reports indicate that the PAC had receipts totaling \$1,403,200 and expenditures totaling \$852,232 during this time period. See O'Say Can You See PAC, Amended 2013 Year-End Report (Feb. 11, 2014); 2014 Year End-Report (Jan. 31, 2014). According to the Response, O'Malley personally supported a number of the same candidates who received contributions from OPAC. Resp. at 2.

<sup>34</sup> Compl. ¶¶ 3, 9, 12 (citing Wagner *supra* note 5 and Wagner *supra* note 32.)

<sup>35</sup> Compl. ¶ 9 (citing John Wagner, *O'Malley Recounts Leadership of Baltimore in Speech to New Hampshire Democrats*, WASHINGTON POST, Nov. 17, 2013, [https://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?utm\\_term=.c9b66744a806](https://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?utm_term=.c9b66744a806)).



1 Complaint, however, does not provide information that OPAC (or anyone else) was involved  
2 with, or paid for, this activity and does not demonstrate that O'Malley presented himself as a  
3 potential 2016 candidate at the dinner.<sup>36</sup>

4 The Complaint also alleges that O'Malley's travel to primary states, including New  
5 Hampshire, Iowa, South Carolina, and Nevada, where he campaigned for Democratic candidates  
6 in 2014, serves as evidence that he was actively considering a presidential run at that time.<sup>37</sup>  
7 Relying on disclosure reports filed with the Commission, the Complaint states that OPAC paid  
8 for field staff to assist in these same federal elections and work for state party organizations.<sup>38</sup>  
9 The Complaint, however, does not present specific information establishing that OPAC was  
10 working in these states to advance O'Malley's 2016 presidential ambitions, or that O'Malley's  
11 speaking engagements and fundraising for candidates and political parties constituted testing the  
12 waters of his *own* federal campaign during the 2014 election period. While O'Malley's close  
13 association with OPAC activities may have served to raise his national profile, the available

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<sup>36</sup> *Id.* The Complaint appears to equate O'Malley's appearance in New Hampshire with a political party "cattle show," which the Commission has determined is a testing the waters activity. *See* Advisory Op. 1985-40 at 6-7 (Republican Majority Fund) (The Republican Majority Fund paid a potential candidate's expenses at Republican party conference attended by other reported contenders for the nomination and a reception honoring party dignitaries and the press.) The Complaint, however, presents no information demonstrating that the 2013 Jefferson-Jackson dinner was attended by other potential 2016 Democratic nominees or that OPAC hosted any receptions for the purpose of enhancing O'Malley's profile.

<sup>37</sup> Compl. ¶¶ 9-11.

<sup>38</sup> *Id.* ¶¶ 7-8 (citing Wolfgang *supra* note 28 and Wagner *supra* note 32). OPAC's disclosure reports indicate that approximately 32 OPAC-sponsored field staff worked in eight primary states, including Iowa, New Hampshire, South Carolina, Nevada, and Wisconsin during the 2014 mid-term elections. *See* O'Say Can You See PAC, 2014 Amended Pre-Primary Report (Nov. 28, 2014), 2014 October Quarterly Report (Oct. 15, 2014), 2014 Post-General Report (Dec. 04, 2014), Amended 2015 Mid-Year Report. Some of these individuals were subsequently retained by O'Malley's presidential campaign. *See* O'Malley for President, Amended 2015 July Quarterly Report.

1 information does not support the conclusion that OPAC was supporting O'Malley's testing the  
2 waters before 2015.<sup>39</sup>

3 **B. Testing the Waters and Candidate Status During 2015**

4 Disclosure reports indicate that in the first half of 2015, OPAC contributed directly to  
5 federal, state, and local candidates and party committees, and made disbursements for  
6 advertising, consulting, salaries, fundraising, travel, rent, and office supplies. In the joint  
7 response filed prior to O'Malley declaring his candidacy, Respondents state that if O'Malley  
8 were to become a presidential candidate, his campaign committee would, in accordance with  
9 Commission regulations, timely reimburse OPAC for any of these disbursements that OPAC  
10 spent to test the waters on O'Malley's behalf, and disclose the disbursements on its own reports.  
11 It appears they did so. The Committee and OPAC, through their disclosure reports, explicitly  
12 acknowledge that the multicandidate committee paid for testing the waters activities on behalf of  
13 O'Malley starting in January 2015.<sup>40</sup> The available information does not indicate that O'Malley,

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<sup>39</sup> OPAC supported a variety of other candidates, as noted. Indeed, its status as a multicandidate committee indicates that OPAC has supported multiple federal candidates. *See* 52 U.S.C. § 30116(a)(4).

<sup>40</sup> The Committee reported the reimbursement of these testing the waters activities on its first disclosure report. O'Malley for President, Amended 2015 July Quarterly Report at 590; O'Say Can You See PAC, 2015 Mid-Year Report at 65, 66 (Miscellaneous Text).

A second transfer of funds between these two committees occurred on August 19, 2015, when OPAC reimbursed the Committee \$39,834.40 for payment of payroll and advertising expenses. *See* O'Malley for President, 2015 October Quarterly Report at 3 (Oct. 15, 2015); O'Say Can You See PAC, 2015 Year-End Report at 18-21 (Jan. 31, 2016). In response to a November 5, 2015, Request for Additional Information from the Commission's Reports Analysis Division, the O'Malley Committee stated that "the committee incurred expenses that were activities of" OPAC, "not activities of the campaign." *Id.*, Miscellaneous Text (Dec. 10, 2015). This second transfer was addressed in the Audit Division's draft Preliminary Audit Report on O'Malley for President. According to the Audit Division, this transfer was not problematic because the Committee did not spend the funds on primary campaign expenses, and OPAC reimbursed the amount in full.

1 or the "others" referenced in the Complaint, financed any of O'Malley's testing the waters  
2 activities.<sup>41</sup>

3 Section 110.2(l) of the Commission's regulations permit an individual to reimburse a  
4 multicandidate committee within 30 days of becoming a presidential candidate for certain pre-  
5 candidacy expenditures that would otherwise be deemed in-kind contributions.<sup>42</sup> The specific  
6 goods and services covered under this regulation are:

- 7
- 8 • polling expenses for determining the favorability, name recognition, or relative  
9 support level of the candidate involved;
  - 10 • compensation paid to employees, consultants, and vendors for services rendered  
11 in connection with establishing and staffing offices in states where Presidential  
12 primaries, caucuses, or preference polls are to be held, other than offices in the  
13 candidate's home state and in or near the District of Columbia;
  - 14
  - 15 • administrative expenses, including rent, utilities, office supplies and equipment, in  
16 connection with establishing offices in States where Presidential primaries,  
17 caucuses, or preference polls are to be held, other than offices in the candidate's  
18 home state and in or near the District of Columbia; and
  - 19
  - 20 • expenses of individuals seeking to become delegates in the Presidential  
21 nomination process.<sup>43</sup>

22 An analysis of OPAC and the Committee's disclosure reports indicates that the only  
23 expense potentially qualified for reimbursement under section 110.2(l) is the office rent paid to  
24 the Iowa-based Eychaner Properties totaling \$4,800. This expense, initially paid for by OPAC,

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<sup>41</sup> Commission regulations permit candidates to finance their campaigns using personal funds. *See* 11 C.F.R. § 110.10 (candidates for Federal office may make unlimited expenditures to their authorized campaign committees from personal funds).

<sup>42</sup> 11 C.F.R. § 110.2(l)(1), (2). The Commission designed this regulation to address situations where unauthorized committees closely associated with an individual intending to run for President cover expenses that are properly treated as in-kind contributions unless reimbursed by that individual's presidential campaign committee. *See Public Financing of Presidential Candidates and Nominating Conventions, Final Rule and Explanation and Justification*, 68 Fed. Reg. 47386, 47407 (Aug. 8, 2003) ("Section 110.2(l) E&J").

<sup>43</sup> 11 C.F.R. § 110.2(l)(1)(iii)(A)-(D).

1 was reimbursed on June 13, 2015, by the Committee within 30 days of O'Malley's Statement of  
2 Candidacy.<sup>44</sup>

3 Some of the remaining goods and services paid for by OPAC, such as travel, conference  
4 services, lodging, catering, and printing (totaling \$17,094.16), while occurring during the pre-  
5 candidacy period, are not the types of goods and services that qualify for reimbursement under  
6 section 110.2(l).<sup>45</sup> These include expenditures to Amtrak and Carey (Car Service) (travel), the  
7 University of Baltimore (space rental), H&W Printing (printing),<sup>46</sup> and the April 23, 2015  
8 expenditure to the Tidewater Inn (lodging, catering, space rental). In addition, OPAC's  
9 \$19,218.67 expenditure to Welldoc, Inc. for office rent<sup>47</sup> in Baltimore is not reimburseable under  
10 section 110.2(l) because the campaign office was established in O'Malley's home state.<sup>48</sup> The  
11 entire amount of these goods and services provided by OPAC (\$36,312.83) would, therefore,  
12 result in an excessive in-kind contribution.<sup>49</sup> However, the Committee appears to have

<sup>44</sup> *Id.* § 110.2(l)(2). According to news reports published in mid-May 2015, O'Malley planned to announce his intentions for the presidential race at the end of the month in Baltimore, Maryland. See Jennifer Jacobs, *Martin O'Malley Sets May 30 for Presidential Decision*, DES MOINES REGISTER, May 14, 2015, <http://www.desmoinesregister.com/story/news/elections/presidential/caucus/2015/05/14/martin-omalley-may-presidential-decision/27297559/>; *O'Malley Eyes New Baltimore Office Ahead of Possible Presidential Bid*, FOX NEWS, May 14, 2015, <http://www.foxnews.com/politics/2015/05/14/omalley-eyes-new-baltimore-office-ahead-possible-presidential-bid/>.

<sup>45</sup> 11 C.F.R. §§ 100.72, 100.131.

<sup>46</sup> According to the Audit division, the \$2,058.81 payment to H&W Printing was for save-the-date cards for two events, including the May 16, 2015, Preakness Stakes held in Baltimore, Maryland.

<sup>47</sup> Press reports indicate that this office space previously housed OPAC. See *O'Malley Eyes New Baltimore Office Ahead of Possible Presidential Bid*, FOX NEWS (May 14, 2015), <http://www.foxnews.com/politics/2015/05/14/omalley-eyes-new-baltimore-office-ahead-possible-presidential-bid/>. See also OPAC, 2015 Mid-Year report, which discloses a June 1, 2015 disbursement for rent to Welldoc, Inc. for its headquarters.

<sup>48</sup> See 11 C.F.R. § 110.2(l)(1)(D).

<sup>49</sup> See 11 C.F.R. § 100.52(d)(1). The Commission has stated that in situations not addressed in section 110.2(l), including when expenditures are paid for by multi-candidate committees after candidacy, the general provisions related to in-kind contributions would apply. See Section 110.2(l) E&J, 68 Fed. Reg. at 47407.

1 reimbursed OPAC for the full amount of these expenditures within the 60 days permitted by the  
2 regulations for resolving potential excessive contribution violations.<sup>50</sup>

3 Other goods and services purchased by OPAC on behalf of the Committee in June 2015,  
4 such as the Google subscription, Costco office supplies, and expenditure to Maestro restaurant  
5 for catering (totaling \$909.52) are ineligible for reimbursement under section 110.2(l) because  
6 they were procured after O'Malley became a candidate.<sup>51</sup> Nevertheless, as with the other  
7 expenditures listed above that do not qualify for reimbursement under section 110.2(l), the  
8 Committee, by reimbursing OPAC for the full amount of these expenditures within 60 days,  
9 resolved any potential excessive contribution within the regulatory timeframe provided for  
10 committees to cure excessive contributions.<sup>52</sup>

11 One of the Committee's reimbursements to OPAC for testing the waters expenses,  
12 however, was not made within the 60 day time frame. The Committee reimbursed OPAC's  
13 January 30, 2015, \$4,450 expenditure to the Tidewater Inn (rental deposit) on June 13, 2015 —  
14 134 days after the expenditure was made. Accordingly, OPAC made a contribution to the  
15 Committee in this amount. However, because OPAC had not disclosed any contributions to the

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<sup>50</sup> 11 C.F.R. § 103.3(b)(3). Reimbursed in-kind contributions are treated in the same manner as monetary contributions. *See* Advisory Op. 2004-37, at 2, 4 (Waters) (The Commission determined that the reimbursement of costs associated with the production and distribution of a brochure featuring several federal candidates would not constitute in-kind contributions provided that the federal campaign committees provide reimbursements "in a timely manner."); Advisory Op. 2003-17, at 7-8 (Treffinger) (The Commission determined that, consistent with Section 103.3(b), which requires the refund of illegal contributions, Treffinger's Senate committee was required to reimburse the county for salary paid to county employees working on the campaign.).

<sup>51</sup> *See* 11 C.F.R. § 110.2(l)(1).

<sup>52</sup> 11 C.F.R. § 103.3(b)(3).

1 Committee,<sup>53</sup> it appears that the entire \$5,000 contribution limit to the Committee was  
2 available.<sup>54</sup>

3 Accordingly, the record does not support a finding that OPAC made excessive in-kind  
4 contributions to the Committee in connection with payments for O'Malley's testing the waters  
5 activities. We therefore recommend that the Commission find no reason to believe that Win  
6 Back Your State f/k/a O'Say Can You See PAC made excessive in-kind contributions to the  
7 Committee in violation of 52 U.S.C. § 30116(a). For the same reason, we recommend that the  
8 Commission find no reason to believe that O'Malley for President accepted excessive in-kind  
9 contributions in violation of 52 U.S.C. § 30116(f). We also recommend that the Commission  
10 find no reason to believe that Martin O'Malley violated 52 U.S.C. § 30116(f). We further  
11 recommend that the Commission close the file in this matter.

12 **IV. RECOMMENDATIONS**

- 13 1. Find no reason to believe that Win Back Your State f/k/a O'Say Can You See  
14 PAC and Martin Cadogan in his official capacity as treasurer violated 52 U.S.C.  
15 § 30116(a).
- 16 2. Find no reason to believe that O'Malley for President and Terry Lee Lierman in  
17 his official capacity as treasurer violated 52 U.S.C. § 30116(f).
- 18 3. Find no reason to believe that Martin O'Malley violated 52 U.S.C. § 30116(f).
- 19 4. Approve the attached Factual and Legal Analysis.
- 20 5. Approve the appropriate letters.
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<sup>53</sup> Nor had the Committee disclosed the receipt of any contributions from the PAC. Although OPAC and the Committee failed to properly report this in-kind contribution, we are not making recommendations relating to such violations given that the amount at issue is *de minimis*.

<sup>54</sup> See 52 U.S.C. § 30116(a)(2)(A).

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6. Close the file.

Lisa J. Stephenson  
Acting General Counsel

12/14/17  
Date

Kathleen M. Guith  
Kathleen Guith  
Associate General Counsel for Enforcement

Mark Allen  
Mark Allen  
Assistant General Counsel

Marianne Abely  
Marianne Abely  
Attorney

UNION-BUREAU