

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MURs 6955 and 6983

COMPLAINT DATES: 8/10/15; 11/10/15; 3/30/16

NOTIFICATION DATES: 8/14/15; 11/18/15; 4/6/16

LAST RESPONSE DATE: 1/15/16

ACTIVATION DATE: 6/16/16

STATUTE OF LIMITATIONS: 6/28/2020 – 7/8/2020

ELECTION CYCLE: 2016

COMPLAINANT:

American Democracy Legal Fund

RESPONDENTS:

John R. Kasich

Kasich for America, Inc. and J. Matthew Yuskewich¹ in
his capacity as treasurer

New Day For America and J. Matthew Yuskewich in
his capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101(4), (8)

52 U.S.C. § 30102(e)

52 U.S.C. § 30103(a)

52 U.S.C. § 30104(b)

52 U.S.C. § 30116(a), (f)

52 U.S.C. § 30118(a)

52 U.S.C. § 30120(d)

52 U.S.C. § 30125(e)(1)

11 C.F.R. § 100.72

11 C.F.R. § 100.131

11 C.F.R. § 109.20

11 C.F.R. § 109.21

11 C.F.R. § 110.11

11 C.F.R. § 300.2(c)(2)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

¹ After Kasich for America filed its responses in these matters, it filed an amended Statement of Organization changing its name to Kasich for America, Inc. and naming J. Matthew Yuskewich as its new treasurer.

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1 **I. INTRODUCTION**

2 These matters involve allegations that John R. Kasich, Kasich for America and J.
3 Matthew Yuskewich in his capacity as treasurer (the “Committee”), and New Day For America
4 and J. Matthew Yuskewich in his official capacity as treasurer (“New Day”), an independent
5 expenditure only political committee, violated the Federal Election Campaign Act of 1971, as
6 amended (the “Act”) when: (1) New Day paid for Kasich’s testing-the-waters activities with
7 impermissible and excessive funds; (2) Kasich failed to timely file his Statement of Candidacy
8 with the Commission; (3) New Day failed to timely file its Statement of Organization with the
9 Commission; (4) New Day made in-kind contributions to Kasich and the Committee by
10 coordinating its communications; (5) New Day failed to include proper disclaimers on its
11 communications; and (6) Kasich established, controlled, and solicited soft money for New Day.

12 Based on the available information, we recommend that the Commission: (1) find reason
13 to believe that Kasich violated 52 U.S.C. §§ 30116(f) and 30118(a) and 11 C.F.R. §§ 100.72(a)
14 and 100.131(a), that the Committee violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a) and
15 11 C.F.R. §§ 100.72 and 100.131, and that New Day violated 52 U.S.C. §§ 30116(f) and
16 30118(a) in connection with making and accepting impermissible, excessive, and unreported
17 contributions for testing-the-waters activities; (2) find reason to believe that Kasich violated
18 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy; (3) take no action
19 at this time as to whether New Day violated 52 U.S.C. § 30103(a) by failing to timely file its
20 Statement of Organization; (4) find reason to believe that New Day made, and Kasich and the
21 Committee accepted, prohibited and excessive in-kind contributions in the form of coordinated
22 communications in violation of 52 U.S.C. §§ 30116 and 30118(a), and that New Day and the
23 Committee did not disclose those contributions in violation of 52 U.S.C. § 30104(b); (5) find

1 reason to believe that New Day violated 52 U.S.C. § 30120(d)(1)(B) by failing to include
2 complete disclaimers on three television advertisements; and (6) take no action at this time as to
3 the allegation that Kasich and New Day solicited, received, directed, transferred, or spent soft
4 money in violation of 52 U.S.C. § 30125.

5 **II. FACTUAL BACKGROUND**

6 On July 21, 2015, Ohio Governor John Kasich publicly announced his candidacy for
7 President of the United States and filed a Statement of Candidacy with the Commission on July
8 23, 2015.² The Committee registered as Kasich's authorized committee for the presidential
9 election on July 23, 2015.³ As discussed in more detail below, in the months leading up to his
10 announcement, Kasich traveled extensively to a number of states on trips unrelated to his role as
11 governor of Ohio to discuss national policy issues. Some of these activities were conducted
12 through New Day, an organization established in April 2015.

13 **A. Kasich's Activities before Candidacy Announcement**

14 Beginning in January 2015 through the date he publicly announced his candidacy for
15 president on July 21, 2015, Kasich made numerous trips out of Ohio, including to several key
16 early primary and caucus states. Kasich's travels included trips to Montana, North Dakota,
17 South Dakota, Utah (twice), Wyoming, South Carolina (four times), New Hampshire (five
18 times), Michigan (twice), Washington, DC (four times), California, New York, Georgia, Texas,

² MUR 6955 Committee Resp. at 3 (Oct. 8, 2015); John Kasich, Statement of Candidacy (July 23, 2015).

³ MUR 6955 Committee Resp. at 3; Kasich for America, Statement of Organization (July 23, 2015). On July 1, 2015, prior to its designation as Kasich's authorized committee, the Committee incorporated as an Ohio non-profit organization, and then registered with the IRS as a section 527 organization. MUR 6955 Committee Resp. at 2.

1 Nevada, Illinois, Iowa, and Tennessee.⁴ On these trips, Kasich advocated for a variety of
2 nationwide policies, including a balanced budget amendment to the U.S. Constitution, and also
3 reportedly engaged in fundraising.⁵

4 Kasich's own public statements indicate that he was considering a presidential run during
5 this time. On May 17, 2015, CNN reported that "a source close to Governor Kasich told the
6 media outlet that he is 'very likely' to run for President."⁶ The same story indicated that Kasich
7 said in late April that "If I can win, I'm likely to run."⁷ The report further stated that, as of May
8 2015, "sources close to Kasich have been sending out positive signals," and that in late April,
9 Kasich stated that "[o]ne good thing about thinking of running for President is that I get invited
10 to stuff like this, where I can talk about what I care about."⁸

11 On June 28, 2015, Politico published an article stating that Kasich's "advisers" said
12 Kasich would announce his candidacy on July 21, 2015.⁹ The article attributes several other
13 statements to Kasich's advisers, including that Kasich "combines establishment appeal with a
14 conservative record," that qualifying for the Cleveland debate "will be tough, even with his
15 announcement bump," and that Kasich "will be positioned 'in Jeb's back right pocket' — with

⁴ Robert Higgs, *John Kasich's travels: a timeline*, CLEVELAND PLAIN DEALER, Sept. 10, 2015, available at http://www.cleveland.com/open/index.ssf/2015/09/john_kasichs_travels_a_timelin.html ("Higgs Timeline") (documenting Kasich's travels from January 2015 through his formal announcement in July 2015).

⁵ *Id.*

⁶ *Id.* at 2.

⁷ Gloria Berger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN, May 17, 2015, <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>.

⁸ *Id.*

⁹ Mike Allen, *John Kasich to Announce Presidential Bid July 21*, POLITICO, June 28, 2015, <http://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517.html>.

1 establishment appeal, but slightly more conservative.”¹⁰ The article also revealed the location
2 and start time of Kasich’s July 21 announcement, the names of three of his strategists, and the
3 schedule for his “announcement tour that includes Iowa, New Hampshire, South Carolina and
4 Michigan.”¹¹

5 The Complaint states that Kasich, on one of his trips in April 2015, appeared at the New
6 Hampshire Republican Party’s “First in the Nation” Leadership summit and stated that
7 “‘America regains its strength’ if it can tackle its immigration problem, balance the budget,
8 lower the corporate tax rate, and invest in infrastructure.”¹² The Complaint further states that
9 Kasich “asked attendees at the end of his appearance to ‘think about me, would you . . . don’t
10 commit too soon . . . let us all have a chance to breath[e] and get out, and you know what I really
11 look forward to, being out in your homes again, letting you get to know me and see me, that’s
12 what it’s really all about, it’s why I love New Hampshire”¹³

13 Kasich and the Committee assert that Kasich did not become a candidate before July 21,
14 2015, and that Kasich “did not conduct or authorize any activities *that triggered candidacy*”
15 before that date.¹⁴ Notably, no response from Kasich or the Committee addresses *other* testing-
16 the-waters activities (*i.e.*, those that Kasich argues did *not* trigger candidacy) or addresses how

¹⁰ *Id.*

¹¹ *Id.*

¹² MUR 6983 Supp. Compl. at 7-8 (March 30, 2016).

¹³ *Id.* at 8.

¹⁴ MUR 6955 Committee Resp. at 4-5 (emphasis added).

1 Kasich's pre-candidacy testing-the-waters activities were funded, including whether New Day
2 had paid for Kasich's pre-candidacy travel or other testing-the-waters activities.

3 **B. New Day's Activities before and around Registering as a Political Committee**

4 In the midst of Kasich's travels during the first half of 2015, New Day was established as
5 an Ohio non-profit corporation on April 14, 2015, and then registered with the IRS as a section
6 527 organization.¹⁵ Matthew Carle, Executive Director of New Day,¹⁶ avers that once it
7 registered with the IRS, it discussed issues of general public importance, made non-candidate
8 related expenditures, did not support or oppose any candidate for federal office, and disclosed all
9 expenditures and contributions to the IRS.¹⁷

10 When it was founded, New Day launched a website that featured Kasich's picture and
11 biography, and a video of Kasich announcing the creation of New Day and discussing a variety
12 of policy goals.¹⁸ Kasich's complete statement in the video is as follows:

13 Hi, I'm John Kasich, and I believe it's time for a new day for
14 America. You know, it's time to put aside the petty differences that
15 divide us and rediscover the values that we all share which have
16 made America great. Values like personal responsibility,

¹⁵ MUR 6955 New Day Resp. at 2, citing Decl. of Matthew J. Carle ¶¶ 2, 4 (Oct. 2, 2015).

¹⁶ Carle also served as Kasich's director of legislative affairs and ran Kasich's 2014 gubernatorial re-election campaign. See Henry J. Gomez, *Ohio governor's race: Matt Carle will leave John Kasich's administration to run re-election campaign*, NORTHEAST OHIO MEDIA GROUP, Aug. 9, 2013, at http://www.cleveland.com/open/index.ssf/2013/08/ohio_governors_race_matt_carle.html. Other New Day employees include Jeff Polesovsky, Carle's deputy in the 2014 Kasich campaign, Dave Luketic, a "Kasich insider" who worked on the 2014 campaign and was the "architect" of Kasich's national tour to promote a balanced budget amendment, and Kasich aide Chris Schrimpf. See Henry J. Gomez, *John Kasich builds his 2016 team*, NORTHEAST OHIO MEDIA GROUP, May 5, 2015, at http://www.cleveland.com/open/index.ssf/2015/05/john_kasich_builds_his_2016_te.html.

¹⁷ MUR 6955 New Day Resp., Carle Decl. ¶¶ 5-6. The IRS Political Organization database contains reports for both New Day for America (EIN No. 47-3715808) and a separate New Day Independent Media Committee Incorporated (EIN No. 47-4140945) operating from the same address. Compare New Day for America, IRS Form 8871 (Apr. 20, 2015) with New Day Independent Media Committee Incorporated, IRS Form 8871 (June 29, 2015).

¹⁸ MUR 6955 Compl. at 2 (Aug. 13, 2015). The video no longer appears on New Day's website, but is available at http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html.

1 community, respect, courage, and of course, faith. There's so much
2 more that brings us together than that that divides us. When we
3 remember that, we can come together and do what we all know
4 needs to be done. We can balance our nation's budget. We can
5 create jobs by cutting taxes and streamlining regulations and, of
6 course, reforming our tax code. We can help our fellow Americans
7 who live in the shadows move up and lead self-sufficient lives and
8 get smart about making healthcare affordable. And help make the
9 world a safer place by spreading freedom and prosperity. Those are
10 some of my thoughts, but I would like to hear what yours are, too.
11 And I'd like to talk to you about them. And that's why I'm
12 announcing that we've created the New Day for America
13 committee. We're going to start getting around the country more,
14 meeting and talking with more people, and see if by coming together
15 we can put in motion the solutions that will get this great idea called
16 America working the right way again. I hope you'll visit our website
17 at NewDayforAmerica.com. While there, I hope you'll sign up to
18 join our team. You can find out more. Take a moment to share your
19 thoughts. You know, we're all in this together, and together we can
20 bring a new day for America.
21

22 New Day's initial Mid-Year disclosure report to the IRS reported that New Day received
23 \$11,130,730 and spent \$823,809 between its founding on April 20, 2015 and June 30, 2015.¹⁹
24 New Day's Year-End Report disclosed that it received an additional \$3,981,570 and spent
25 \$7,842,778 between July 1 and December 31, 2015.²⁰ In its 2015 disclosure reports, New Day
26 disclosed that it routinely accepted donations that exceeded \$5,000, including some as large as
27 \$1 million.²¹ New Day also reported numerous disbursements both prior to and immediately

¹⁹ New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report at 1 (July 30, 2015). New Day Independent Media Committee Incorporated reported receiving \$600,000, but making no disbursements during June 2015. New Day Independent Media Committee Incorporated, IRS 2015 Form 8872 Mid-Year Disclosure Report (July 30, 2015).

²⁰ New Day for America, IRS 2015 Form 8872 Year End Disclosure Report at 1. New Day Independent Media Committee Incorporated reported receiving \$1,948,100, but only making \$57,051 in disbursements between July and December 2015. New Day Independent Media Committee Incorporated, IRS 2015 Form 8872 Year End Disclosure Report.

²¹ New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report; New Day for America, IRS 2015 Form 8872 Year End Disclosure Report.

1 after Kasich's July 21, 2015, announcement of his candidacy, for which the purpose was
2 described as media consulting, phone banks, polling, airfare, travel, and travel expense
3 reimbursements.²² New Day's responses to the Complaints, like Kasich's and the Committee's,
4 denied that Kasich was a candidate before July 21, 2015, but did not address whether New Day
5 had paid for Kasich's travel or other testing-the-waters activities.

6 On July 8, 2015, New Day purchased \$58,400 of television air time in a New Hampshire
7 media market.²³ New Day completed a form documenting two separate ad buys on July 8, with
8 each listing "John Kasich for the Republican Presidential Primary" as the "name of the legally
9 qualified candidate(s) the programming refers to"; the form for the WMUR ad buy also says the
10 advertisement includes a "candidate (Republican) discussing his values/beliefs."²⁴

11 The first advertisement, "Us," which reportedly aired on July 8, 2015, features Kasich
12 speaking directly to the camera.²⁵ Kasich states:

13 We turned Ohio around. And we've created jobs and cut taxes and
14 balanced our budgets. I spent 18 years on the Armed Services
15 Committee with some of the finest defense minds in the world. I
16 was one of the chief architects of balancing the budget, it's the first
17 time we did it since man walked on the moon, we haven't done it
18 since. It can happen again.

19
20 The advertisement ends with a voiceover stating "John Kasich's for us." It does not include a
21 "stand-by-your-ad disclaimer." New Day asserts that the advertisement used footage from

²² New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report; New Day for America, IRS 2015 Form 8872 Year End Disclosure Report.

²³ MUR 6983 Supp. Compl. at 3.

²⁴ MUR 6955 Compl. at 2-3; MUR 6983 Supp. Compl. at 3.

²⁵ MUR 6955 Compl. at 3. "Us" is available at <https://www.youtube.com/watch?v=NeaJIH70PxY>.

1 interviews with Kasich filmed prior to July 8, 2015, and that the stations categorized the ad buys
 2 as “Non-Candidate Issue Ads.”²⁶

3 On July 23, 2015, two days after Kasich announced his candidacy and the same day on
 4 which Kasich for America registered as Kasich’s authorized committee, New Day registered
 5 with the Commission as an independent-expenditure-only political committee (“IEOPC”).²⁷
 6 On July 26 and August 5, 2015, New Day ran two additional advertisements featuring Kasich.
 7 The July 26 advertisement, titled “Balancing the Budget,”²⁸ begins with a succession of images
 8 and sound clips of several Democratic and Republican presidential candidates and continues with
 9 the following script:

10 Female Announcer: No one running for president has balanced the
 11 federal budget for us but John Kasich.

12
 13 Kasich: I spent ten years of my life fighting to balance the budget,
 14 not because it was about numbers, but it was about values. We don’t
 15 have a right to live beyond our means, and make sure that our
 16 children pay the debt.

17
 18 Female Announcer: John Kasich helped balance the federal budget,
 19 turned around the Ohio economy, and has 18 years’ experience on
 20 the Armed Services Committee. No one else comes close.

21
 22 Kasich: And I was willing to take beatings when I offered my own
 23 budget proposals for America because I believed in it. The most
 24 important thing in leadership is not what you say, it’s what you do.
 25

²⁶ MUR 6955 New Day Resp. at 3. Although we do not know the exact date on which the footage was filmed, in a July 21, 2015, interview, Fred Davis, a strategist for New Day, stated that he filmed multiple advertisements featuring footage of Kasich that were paid for by New Day, and that he had worked with Kasich for about two months. *See* MUR 6983 Supp. Compl. at 4. New Day reported making disbursements to Davis’s firm, Strategic Perception, Inc., on June 5, 2015 (\$60,000), and June 26, 2015 (\$148,835). *See* New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report.

²⁷ *See* New Day For America, Statement of Organization (July 23, 2015).

²⁸ *See* “Balancing the Budget,” *available at* <https://newrepublic.com/political-ad-database/john-kasich-balancing-the-budget/Ny8yMS8xNTpCYWxhbmNpbmcmdGhlIEJlZGldA>.

1 Female Announcer: John Kasich's for us.

2
3 The script for the August 5 advertisement, "John Kasich is for Us – National Security,"²⁹

4 is as follows:

5 Female Announcer: [over images of President Obama and Hillary
6 Clinton] Weakness, handwringing, inexperience. They're looking
7 out for us?

8
9 Kasich: You know, I spent 18 years on the Armed Services
10 Committee with some of the finest defense minds in the world. I
11 learned how we get the services to work together. And I'll never
12 forget my experience meeting with soldiers out in the desert.
13 There's no substitute for experience. [Caption reads: "John
14 Kasich. President 2016."]

15
16 **C. Kasich for America's Earliest Reported Activities**

17
18 As noted above, Kasich formally announced his presidential candidacy on July 21, 2015,
19 and filed a Statement of Candidacy on July 23, 2015.³⁰ Kasich for America also registered as
20 Kasich's authorized committee for the presidential election on July 23, 2015.³¹ The
21 Committee's first disclosure report was the October 2015 Quarterly Report.³² That report
22 disclosed that the Committee began receiving contributions for the 2016 presidential primary
23 election on July 3, 2015, and that it exceeded \$5,000 in contributions on July 13, 2015.³³ It also

²⁹ MUR 6983 Compl. at 2 (Nov. 10, 2015). See "John Kasich is for Us – National Security," available at https://www.youtube.com/watch?v=JYDpIaO_kF4. New Day filed an independent expenditure report for \$375,000 of "television advertising" in the New Hampshire market for August 4; this appears to have been for "John Kasich is for Us – National Security." See Schedule E, 24/48 Hour Report of Independent Expenditures, at <http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf>.

³⁰ MUR 6955 Committee Resp. at 3; John Kasich, Statement of Candidacy (July 23, 2015).

³¹ MUR 6955 Committee Resp. at 3; Kasich for America, Statement of Organization (July 23, 2015).

³² 2015 Oct. Quarterly Rpt., Kasich for America at 9 (Oct. 15, 2015).

³³ *Id.* at Schedule A-P (Itemized Receipts).

1 showed that the Committee's first disbursement occurred on July 10, 2015, only eleven days
2 before Kasich publicly announced his candidacy. The report disclosed a small number of
3 disbursements between July 10 and July 21, 2015, mostly for expenses related to travel to New
4 Hampshire, though it is not clear from the face of the reports when that travel occurred. The
5 Committee did not report receiving any in-kind contributions from New Day in this report, nor
6 did it designate any disbursements as having been made for testing-the-waters expenses.

7 **III. LEGAL ANALYSIS**

8 **A. There is Reason to Believe that New Day Made, and Kasich and the** 9 **Committee Accepted, Impermissible and Excessive In-Kind Contributions** 10 **and the Committee Failed to Report Them**

11 An individual becomes a candidate under the Act if: (a) such individual receives
12 contributions or makes expenditures in excess of \$5,000, or (b) such individual gives his or her
13 consent to another person to receive contributions or make expenditures on behalf of such
14 individual and if such person has received such contributions or has made such expenditures in
15 excess of \$5,000.³⁴

16 The Commission has established limited testing-the-waters exemptions that permit an
17 individual to test the feasibility of a campaign for federal office without becoming a candidate
18 under the Act.³⁵ These exemptions exclude from the definitions of "contribution" and
19 "expenditure" those funds received and payments made solely to determine whether an
20

³⁴ 52 U.S.C. § 30101(2).

³⁵ See 11 C.F.R. §§ 100.72 and 100.131; Factual and Legal Analysis at 7, MUR 6775 (Hillary Clinton); Factual and Legal Analysis at 8, MUR 6776 (Niger Innis); Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak).

1 individual should become a candidate.³⁶ These regulations seek to draw a distinction between
2 activities directed to an evaluation of the feasibility of one's candidacy and conduct signifying
3 that a decision to become a candidate has been made.³⁷ However, only funds permissible under
4 the Act may be used for testing-the-waters activities.³⁸

5 Testing-the-waters activities for which only funds permissible under the Act may be used
6 include, but are not limited to, payments for polling, telephone calls, and travel.³⁹ In advisory
7 opinions, the Commission has stated that "travel throughout the country for speaking to political
8 and non-political groups on a variety of public issues and meeting with opinion makers and
9 others interested in public affairs for the purpose of determining whether potential political
10 support exists for a national campaign" fits within testing-the-waters activities,⁴⁰ and that
11 expenses for such activities should be allocated to the individual's potential candidacy.⁴¹
12 Additionally, in MUR 5908 (Duncan Hunter), the Commission found reason to believe that a
13 candidate's spending on travel to early primary states "to publicize his Presidential campaign,
14 and/or gauge support for his campaign" before declaring his candidacy, should have been
15 reported as testing-the-waters or campaign expenses.⁴²

³⁶ 11 C.F.R. §§ 100.72(a); 100.131(a).

³⁷ *See* Advisory Op. ("AO") 1981-32 (Askew).

³⁸ 11 C.F.R. §§ 100.72, 100.131.

³⁹ 11 C.F.R. §§ 100.72(a); 100.131(a).

⁴⁰ AO 1981-32 at 2, 4; *see also id.* at 5 (stating that events "oriented to ascertaining whether there is an initial base of support adequate to launch a campaign effort" are testing-the-waters activities).

⁴¹ *See* AO 1985-40 at 9.

⁴² Factual & Legal Analysis at 4-7, MUR 5908 (Hunter). The Commission took no further action in this matter where the investigation revealed that the leadership committee's excessive contributions to the candidate

1 An individual who is testing the waters need not register or file disclosure reports with
2 the Commission unless and until the individual subsequently decides to run for federal office.⁴³
3 However, an individual who tests the waters must keep financial records and, if he or she
4 becomes a candidate, all funds received or payments made in connection with testing the waters
5 become contributions and expenditures under the Act and must be reported as such in the first
6 report filed by the candidate's principal campaign committee.⁴⁴

7 The Complaint alleges that New Day, after its founding in April 2015, illegally paid for
8 Kasich's testing-the-waters activities such as travel and "political advertising that allowed him to
9 convey his policy prerogatives and solicit support for his nascent candidacy."⁴⁵ The Kasich and
10 New Day responses do not confirm or deny the allegation that New Day paid for Kasich's
11 testing-the-waters activity. The Committee's initial report to the Commission shows that it
12 received \$40,050 in contributions and made \$19,180 in disbursements prior to July 21, 2015, but
13 it does not specifically designate any of these entries as in-kind contributions made to Kasich for
14 testing-the-waters activities, and the first reported disbursement occurred only 11 days prior to

were likely *de minimis*. See Statement of Reasons, Comm'rs Petersen, Hunter, McGahn, Walther & Weintraub at 2-3, *id.*

⁴³ *Id.*, see also Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) ("AO 2015-09"). The testing-the-waters exemption is not available to individuals who have made a decision to become a candidate. 11 C.F.R. §§ 100.72(b), 100.131(b). See also AO 2015-09 at 5; Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (exemption "explicitly limited 'solely' to activities designed to evaluate a potential candidacy").

⁴⁴ 11 C.F.R. § 101.3.

⁴⁵ MUR 6983 Supp. Compl. at 9, 5; see also Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER, Apr. 20, 2015, available at http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html (the creation of New Day "takes the Ohio Republican Party, which paid for Kasich's recent trips to the earl primary states of New Hampshire and South Carolina, off the hook for his travel expenses."); Chrissie Thompson, *Kasich's 2016 fundraising starts, backed by 'super donor'*, THE CINCINNATI ENQUIRER, Apr. 20, 2015, available at <http://www.cincinnati.com/story/news/politics/elections/2015/04/20/john-kasich-fundraising-interpublic-philip-geier-john-sununu/26074359/>.

1 Kasich's announcement of his candidacy.⁴⁶ Nonetheless, New Day's IRS disclosure reports
2 indicate that New Day made substantial disbursements for the types of expenses traditionally
3 associated with testing-the-waters activities, including media consulting, phone banks, polling,
4 airfare, travel, and travel expense reimbursements.⁴⁷

5 The available information indicates that Kasich did spend funds to test the waters prior to
6 declaring his candidacy in July 2015, and that New Day likely paid for at least a portion of those
7 expenses. In January 2015, Kasich began traveling the country to speak about his policy
8 positions on nationwide issues such as balancing the budget, tax reform and healthcare. During
9 this time, Kasich reportedly engaged in fundraising and made statements indicating that he was
10 considering running for President.⁴⁸ For example, CNN reported that Kasich said in late April
11 that "If I can win, I'm likely to run,"⁴⁹ and stated that "[o]ne good thing about thinking of
12 running for President is that I get invited to stuff like this, where I can talk about what I care
13 about."⁵⁰ Further, Kasich's travel included stops in key early primary states including South
14 Carolina (four times), New Hampshire (five times), and Iowa, where, among other things, he
15 held news conferences, addressed Republican caucuses and chambers of commerce, held private
16 meetings, and spoke at the Republican Leadership Summit.⁵¹

⁴⁶ See *Kasich for America 2015 Oct. Quarterly Report* (Oct. 15, 2015).

⁴⁷ New Day's first FEC disclosure report, the 2015 Year-End Report, does not include any disbursements made prior to the date of Kasich's announcement. See *New Day Amend. 2015 Year-End Report* (July 11, 2016).

⁴⁸ Higgs Timeline.

⁴⁹ Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN, May 17, 2015, at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>.

⁵⁰ *Id.*

⁵¹ See *supra*, Section II.A.

1 Based on this information, it appears that Kasich was testing the waters by discussing a
2 potential candidacy and testing his policy positions, and traveling the country to attend events
3 and meet fundraisers at least as early as January 2015. Kasich, however, never established a
4 testing-the-waters account, and the Committee did not report any testing-the-waters activities
5 once Kasich declared his candidacy. As a result, we recommend that the Commission find
6 reason to believe that Kasich violated 11 C.F.R. §§ 100.72 and 100.131 and that the Committee
7 violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72 and 100.131.

8 Further, it appears that New Day, once it was formed in April 2015, may have paid for at
9 least a portion of Kasich's testing-the-waters expenses. Kasich was the face of New Day and it
10 appears that New Day was formed as a vehicle for Kasich to present his platform of ideas for the
11 country's future. In Kasich's April 20, 2015, video message announcing the formation of New
12 Day, Kasich stated, "Those are some of my thoughts, but I would like to hear what yours are too,
13 and I'd like to talk to you about them. And that's why I'm announcing that we've created the
14 New Day for America committee. We're going to start getting around the country more,
15 meeting and talking with more people, and see if by coming together we can put in motion the
16 solutions that will get this great idea called America working the right way again."⁵² Thus, it
17 appears likely New Day funded Kasich's travel, which was at least in part connected to his own
18 potential candidacy. Even if Kasich's travel on behalf of New Day was partially unrelated to his
19 potential candidacy, he would have to allocate any expenses between New Day and his potential
20 candidacy. Because New Day is an IEOPC that accepted contributions from corporations and

⁵² http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html.

1 contributions in excess of the Act's limits,⁵³ and because an "independent expenditure-only
2 political committee may not make contributions to candidates ... including in-kind
3 contributions,"⁵⁴ New Day may not make contributions to Kasich, including by making
4 payments that are later required to be reported by the Committee as contributions for testing-the-
5 waters activities.

6 Therefore, we also recommend that the Commission find reason to believe that Kasich
7 and the Committee violated 52 U.S.C. §§ 30116(f) and 30118(a) by accepting, and the
8 Committee violated 52 U.S.C. § 30104(b) by failing to report, excessive and prohibited in-kind
9 contributions from New Day for testing-the-waters activities. Finally, we recommend that the
10 Commission find reason to believe that New Day violated 52 U.S.C. §§ 30116(f) and 30118(a)
11 by making excessive and prohibited in-kind contributions to the Committee for testing-the-
12 waters activity.

13 **B. There Is Reason to Believe Kasich Filed His Statement of Candidacy Late**

14
15 Once an individual meets the \$5,000 threshold for contributions received or expenditures
16 made, the candidate has fifteen days to designate a principal campaign committee by filing a
17 Statement of Candidacy with the Commission.⁵⁵ The principal campaign committee must file a

⁵³ *See, e.g.*, Amend. 2015 Year-End Report of New Day for America at 15, 19.

⁵⁴ Advisory Op. 2017-10 (Citizens Against Plutocracy).

⁵⁵ 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

1 Statement of Organization within ten days of its designation⁵⁶ and must file disclosure reports
2 with the Commission in accordance with 52 U.S.C. §§ 30104(a) and (b).⁵⁷

3 Commission regulations set forth a non-exhaustive list of activities that indicate that an
4 individual is no longer testing the waters and has decided to become a candidate. Such indicia
5 include: (1) using general public political advertising to publicize his or her intention to
6 campaign for federal office; (2) raising funds in excess of what could reasonably be expected to
7 be used for exploratory activities or undertaking activity designed to amass campaign funds that
8 would be spent after he or she becomes a candidate; (3) making or authorizing written or oral
9 statements that refer to him or her as a candidate for a particular office; (4) conducting activities
10 in close proximity to the election or over a protracted period of time; and (5) taking action to
11 qualify for the ballot under state law.⁵⁸

12 1. Kasich Appears To Have Made a Decision To Become A Candidate at
13 Least as Early as June 28, 2015

14
15 As noted above, the Commission, in deciding whether an individual is no longer testing
16 the waters and has made a decision to run for federal office, assesses an individual's objectively
17 deliberate actions to discern whether and when an individual decided to become a candidate.⁵⁹
18 The Commission has stated that “[a] non-conditional statement” by an individual (either directly
19 or through an adviser) that he or she “*will*” announce his or her candidacy on a given date

⁵⁶ See 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a)

⁵⁷ See, e.g., Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak); Factual and Legal Analysis at 5, MUR 6449 (Jon Brunning); Factual and Legal Analysis at 2, MUR 5363 (Alfred C. Sharpton).

⁵⁸ 11 C.F.R. §§ 100.72(b), 100.131(b).

⁵⁹ AO 2015-09 at 6.

1 unambiguously indicates that the individual has decided to become a candidate.”⁶⁰ The fact that
2 the public announcement postdates the individual’s statement of intent “do[es] not eradicate the
3 registration and reporting requirements that have been triggered” by the decision.⁶¹

4 Applying these criteria here, the purported statements by Kasich “advisers” in the June
5 28, 2015, Politico article provide reason to believe that Kasich had decided to run for president at
6 least as early as June 28, 2015, when the advisers reportedly stated that Kasich would be
7 announcing his candidacy approximately three weeks later. The June 28, 2015, Politico article
8 reports that Kasich’s “advisers” stated that Kasich “will jump into the crowded Republican
9 presidential field on July 21 at the student union at his alma mater, The Ohio State University, in
10 Columbus.” The article also reports that Kasich’s advisers provided information about Kasich’s
11 plans for positioning himself as a candidate, as well as his travel plans following his public
12 announcement. Respondents contest that Kasich’s advisers provided specific information about
13 Kasich’s purported planned announcement or subsequent campaign plans, asserting that the
14 journalist simply “conceive[d]” of this information.⁶² These statements, however, use direct
15 quotes from the purported advisers and, compellingly, the information regarding Kasich’s
16 planned announcement was accurate — Kasich did in fact announce his presidential candidacy
17 on July 21, 2015, at Ohio State University. As a result, there is ample support for the

⁶⁰ *Id.* (emphasis in original).

⁶¹ *Id.* (citing Factual and Legal Analysis at 8, MUR 5363 (Sharpton)).

⁶² MUR 6955 Committee Resp. at 4.

1 Commission to find reason to believe that Kasich may have already decided to become a
2 candidate at least as early as June 28, 2015, when the Politico article was published.⁶³

3 Further, Kasich's participation in the filming of video intended to be used to promote his
4 federal candidacy could also evidence the making of "a decision . . . to seek nomination for
5 election, or election, to a Federal office."⁶⁴ New Day argues that the interviews of Kasich that
6 appear in the New Day ads "only discussed issues of national importance, and . . . did not
7 promote any potential candidacy for President of the United States."⁶⁵ The New Day ads
8 themselves, however, focus on Kasich's positions and promote his candidacy; two were aired
9 after the Committee had registered as Kasich's authorized committee and New Day had
10 registered with the Commission as an IEOPC.⁶⁶ If Kasich understood at the time of the filming
11 that the footage of him discussing his experience and achievements would be used in ads that
12 would promote his candidacy, then that would "signify[] that a private decision to become a
13 candidate [had] been made" even before the appearance of the Politico article.⁶⁷

⁶³ AO 2015-09 at 6.

⁶⁴ AO 1981-32 at 4. *But see* Factual and Legal Analysis at 6, MUR 6533 (Haney) (explaining that "the mere preparation, rather than dissemination, of campaign materials in advance of a declaration of candidacy" does not by itself indicate that an individual has "decided to become a candidate" when the materials were distributed only to a small group of advisers in order to obtain their reactions); Factual and Legal Analysis at 9, MUR 6430 (Daines) (concluding that individual's mere appearance in *issue ad* aired during previous election cycle did not, by itself, trigger candidacy in the following election cycle) (emphasis added).

⁶⁵ MUR 6955 New Day Resp. at 3, 7, 9; MUR 6983 New Day Resp. at 4. New Day also states that neither Kasich nor the Committee was involved in decisions about the content or placement of the August 5 ad, but that contention does not address whether the footage featuring Kasich was filmed to promote Kasich's eventual candidacy. MUR 6983 New Day Resp. at 4. Likewise, the contention by all Respondents that the footage was filmed before Kasich was a candidate does not refute the allegation that the footage was filmed for use in communications that would promote Kasich's candidacy. *See, e.g., id.* at 3.

⁶⁶ *See infra* at 19-21.

⁶⁷ *See* AO 1981-32 at 3; *see also* 11 C.F.R. §§ 100.72(b), 100.131(b).

1 2. Kasich Appears To Have Raised or Spent In Excess of \$5,000

2 Given the amount of travel apparently undertaken by Kasich — nearly two dozen trips
3 out of Ohio on non-state business between January and July 2015 to meet with potential donors,
4 participate in forums, and speak at various events — expenses likely exceeded \$5,000 well
5 before the formal announcement of Kasich's candidacy on July 21, 2015.⁶⁸ Further, Kasich may
6 have accepted an in-kind contribution from New Day on the date that New Day incurred
7 expenses to film the footage, and that in-kind contribution may have been more than \$5,000.
8 Depending on the date that Kasich decided to become a candidate (which appears to have been
9 June 28, 2015, at the latest), these expenses may have triggered candidacy under the Act.
10 Accordingly, we recommend that the Commission find reason to believe that Kasich violated
11 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy.

12 **C. Take No Action at This Time as to Whether New Day Timely Filed Its**
13 **Statement of Organization**

14
15 The Act requires political committees not authorized by a candidate to file a statement of
16 organization within 10 days after becoming a political committee under the Act.⁶⁹ The Act and
17 Commission regulations define a “political committee” as “any committee, club, association or
18 other group of persons which receives contributions aggregating in excess of \$1,000 during a
19 calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar
20 year.”⁷⁰ In *Buckley v. Valeo*,⁷¹ the Supreme Court held that the term “political committee” “need

⁶⁸ Higgs Timeline.

⁶⁹ 52 U.S.C. § 30103(a).

⁷⁰ *Id.* § 30101(4)(A); 11 C.F.R. § 100.5.

⁷¹ 424 U.S. 1 (1976).

1 only encompass organizations that are under the control of a candidate or the major purpose of
2 which is the nomination or election of a candidate.”⁷² Accordingly, an organization that is not
3 controlled by a candidate must register as a political committee only if (1) it crosses the \$1,000
4 threshold and (2) it has as its “major purpose” the nomination or election of federal candidates.

5 The Complaint alleges that on July 8, 2015, New Day purchased ad buys supporting
6 Kasich, and that it therefore should have registered with the Commission as an IEOPC by July
7 18, 2015, as required by 52 U.S.C. § 30103(a).⁷³ Instead, New Day registered with the
8 Commission as an IEOPC on July 23, 2015. Despite the fact that New Day referred to Kasich as
9 a candidate in the July 8 ad buys, New Day states that it was unaware of the June 28 article in
10 Politico indicating that Kasich’s candidacy announcement was imminent, and it understood
11 Kasich to be a non-candidate as of July 8.⁷⁴ New Day explains that it referred to Kasich as a
12 candidate when it made the July 8 media buy because the form was incorrectly filled out by a
13 third-party media vendor.⁷⁵ New Day further argues that the July 8 media buy was for a non-
14 candidate issue advertisement, not an independent expenditure.⁷⁶

15 Beyond what it paid for the advertisements featuring Kasich, we have little information
16 about the extent or type of New Day’s spending prior to it registering with the Commission as an
17 IEOPC on July 23, 2015. As discussed above, it appears that New Day paid for Kasich’s travel

⁷² *Id.* at 79.

⁷³ MUR 6955 Compl. at 6.

⁷⁴ *See generally* MUR 6955 New Day Resp., Carle Decl. at ¶ 16 (stating that New Day first learned of Kasich’s candidacy when he announced on July 21, 2015).

⁷⁵ MUR 6955 New Day Resp. at 7.

⁷⁶ *Id.*

1 to numerous states in the months leading up to his candidacy announcement, though any
2 expenses paid for Kasich to test the waters were not reportable as contributions or expenditures
3 until Kasich became a candidate. And though we conclude above that Kasich became a
4 candidate at least as early as June 28, 2015, we do not yet have enough information to determine
5 precisely when Kasich became a candidate. We therefore recommend that the Commission take
6 no action at this time as to the allegation that New Day was a political committee prior to July
7 13, 2015, and thus failed to timely register as such with the Commission; further
8 recommendations on this allegation should await the results of an investigation into whether
9 New Day paid for expenses related to Kasich's candidacy and when Kasich became a candidate.

10 **D. There Is Reason to Believe the New Day Advertisements Were Coordinated**
11 **Communications**

12 The Act defines a "contribution" to include "any gift . . . or anything of value made by
13 any person for the purpose of influencing any election for Federal office."⁷⁷ IEOPCs are
14 prohibited from making contributions to candidates and their authorized committees,⁷⁸ and it is
15 unlawful for candidates, political committees, and their officers and employees to knowingly accept
16 an excessive or prohibited contribution.⁷⁹

17 A "coordinated expenditure" — which is an expenditure made by any person "in
18 cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate, a
19 candidate's authorized committee, or the agents of either — is also a contribution to the

⁷⁷ 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 100.52(a).

⁷⁸ *See* 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. at 2010-11 (Commonsense Ten) at 2-3.

⁷⁹ 52 U.S.C. §§ 30116(f), 30118(a)

1 candidate.⁸⁰ A “coordinated communication” is one form of coordinated expenditure.⁸¹ Thus,
2 “[a]n independent expenditure-only political committee may not make contributions to
3 candidates or political party committees, including in-kind contributions such as coordinated
4 communications.”⁸²

5 Commission regulations provide a three-prong test to determine if a communication is a
6 “coordinated communication.”⁸³ First, a person other than the federal candidate or the
7 candidate’s authorized committee must pay for all or part of the communication.⁸⁴ Second, the
8 communication must satisfy at least one content standard.⁸⁵ Third, the communication must
9 satisfy at least one conduct standard.⁸⁶

10 The Complaint alleges that the three New Day advertisements featuring Kasich (“Us,”
11 “Balancing the Budget,” and “John Kasich is for Us – National Security,” collectively, the “New
12 Day Ads”) are coordinated communications and thus, because New Day accepts soft money,
13 they are prohibited in-kind contributions to the Committee.⁸⁷ Respondents argue that there was
14 no coordinated communication because the footage used in the video appearing on New Day’s

⁸⁰ 52 U.S.C. § 30116(a)(7)(B); *see also* 11 C.F.R. § 109.20.

⁸¹ *See* 11 C.F.R. § 109.21(b).

⁸² AO 2017-10.

⁸³ 11 C.F.R. § 109.21(a).

⁸⁴ *Id.* § 109.21(a)(1).

⁸⁵ *Id.* § 109.21(a)(2), (c).

⁸⁶ *Id.* § 109.21(a)(3), (d).

⁸⁷ MUR 6955 Compl. at 9-12; MUR 6983 Compl. at 3-7.

1 website and in the New Day advertisements was filmed before Kasich became a candidate, and
 2 thus was not made “in cooperation, consultation or concert with” a candidate.⁸⁸

3 Here, each of the three New Day advertisements — “Us,” “Balancing the Budget,” and
 4 “John Kasich is for Us – National Security” — appear to be coordinated communications. First,
 5 the ads were paid for by a third party, thereby satisfying the first prong of the coordination
 6 analysis. Second, all three ads satisfy the content standard as “public communications”⁸⁹ that
 7 contain express advocacy or its functional equivalent.⁹⁰ Under the Commission’s regulations, a
 8 communication expressly advocates the election or defeat of a clearly identified federal
 9 candidate if it:

10 [u]ses phrases such as ‘vote for the President,’ ‘re-elect your
 11 Congressman,’ ‘support the Democratic nominee,’ ‘cast your ballot
 12 for the Republican challenger for U.S. Senate in Georgia,’ ‘Smith
 13 for Congress,’ ‘Bill McKay in ’94,’ ‘vote Pro-Life’ or ‘vote Pro-
 14 Choice’ accompanied by a listing of clearly identified candidates
 15 described as Pro-Life or Pro-Choice, ‘vote against Old Hickory,’
 16 ‘defeat’ accompanied by a picture of one or more candidate(s),
 17 ‘reject the incumbent,’ or communications of campaign slogan(s) or
 18 individual word(s), which in context can have no other reasonable
 19 meaning than to urge the election or defeat of one or more clearly
 20 identified candidate(s), such as posters, bumper stickers,
 21 advertisements, etc. which say ‘Nixon’s the One,’ ‘Carter ’76,’
 22 ‘Reagan/Bush’ or ‘Mondale!’⁹¹

23
 24 or if:

25 [w]hen taken as a whole and with limited reference to external
 26 events, such as the proximity to the election, could only be

⁸⁸ MUR 6955 New Day Resp. at 8-9; MUR 6955 Committee Resp. at 7.

⁸⁹ “Public communication” includes “a communication by means of any broadcast, cable, or satellite communication” 11 C.F.R. § 100.26.

⁹⁰ *Id.* § 109.21(c)(4)-(5).

⁹¹ *Id.* § 100.22(a).

1 interpreted by a reasonable person as containing advocacy of the
2 election or defeat of one or more clearly identified candidate(s)
3 because — (1) [t]he electoral portion of the communication is
4 unmistakable, unambiguous, and suggestive of only one meaning;
5 and (2) [r]easonable minds could not differ as to whether it
6 encourages actions to elect or defeat one or more clearly identified
7 candidate(s) or encourages some other kind of action.⁹²
8

9 “Us,” which aired in New Hampshire on July 8 (before Kasich’s July 21 announcement
10 event but after the June 28 Politico article), features Kasich discussing his qualifications and
11 experience “creat[ing] jobs,” “cut[ting] taxes,” “balanc[ing] our budgets,” and serving on the
12 Armed Services Committee (“John Kasich looked out for America”), before concluding, “John
13 Kasich’s for us.” The advertisement discusses only Kasich’s accomplishments and does not
14 express any views on issues of public policy. The tagline “John Kasich’s for us” appears to be
15 the communication of a campaign slogan (akin to “Nixon’s the One”) which in context —
16 paired with a recitation of Kasich’s political experience and the absence of an identifiable issue
17 beyond the qualifications of Kasich himself — can have no other reasonable meaning than to
18 urge Kasich’s election.⁹³

19 “Balancing the Budget” aired on July 26, 2015, five days after Kasich’s announcement
20 event on July 21, and three days after New Day’s registration with the Commission as an IEOPC

⁹² *Id.* § 100.22(b); *see also* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 70 Fed. Reg. 35,292, 35,294-35,295 (July 6, 1995); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when “it provides, in effect, an explicit directive” to vote for the named candidates).

⁹³ *See id.* § 100.22(a); *see also* Factual and Legal Analysis at 8, MUR 5831 (Softer Voices) (Mar. 26, 2009) (identifying a slogan “centered on the candidate and referenc[ing] personal characteristics unrelated to any issue” as evidence of 100.22(a) express advocacy). As an express advocacy communication, the “Us” ad also satisfies the functional equivalent of express advocacy content standard, which “necessarily encompasses more than express advocacy.” *Coordinated Communications*, 75 Fed. Reg. 55947, 55954 (Sept. 15, 2010); *see also id.* at 55953 (providing example of communication that the Supreme Court determined was the functional equivalent of express advocacy).

1 on July 23. It explicitly refers to Kasich as a candidate for President (“No one running for
2 president has balanced the federal budget for us but John Kasich”), discusses his experience
3 balancing the budget and serving on the Armed Services Committee, and compares him
4 favorably to other candidates for President (“No one else comes close”), before concluding,
5 “John Kasich’s for us.” The phrase “John Kasich’s for us” appears to be the campaign slogan
6 (akin to “Nixon’s the One”). In context, the slogan can have no other reasonable meaning than
7 to urge Kasich’s election.⁹⁴

8 Likewise, the “John Kasich is for Us – National Security” advertisement discusses
9 Kasich’s qualifications for office in the context of the upcoming election, contrasting them with
10 the “weakness, handwringing, [and] inexperience” of fellow candidate Hillary Clinton as well as
11 President Obama, before closing with an image of Kasich over the caption “John Kasich.
12 President 2016.” The caption is akin to the “magic words” enumerated in section 100.22(a)
13 (such as “Bill McKay in ‘94”) and in context can have no other reasonable meaning than to urge
14 Kasich’s election.⁹⁵

15 Third, the conduct prong of the coordination test is satisfied if: (1) the communication
16 was created, produced, or distributed at the request or suggestion of a candidate, campaign, or
17 political party committee, or the payor suggests the communication and the candidate, campaign

⁹⁴ See 11 C.F.R. § 100.22(a); *see also* Factual and Legal Analysis at 8, MUR 5831 (Softer Voices) (Mar. 26, 2009) (identifying a slogan “centered on the candidate and referenc[ing] personal characteristics unrelated to any issue” as evidence of 100.22(a) express advocacy).

⁹⁵ See 11 C.F.R. § 100.22(a); *see also* Factual and Legal Analysis at 13, MUR 5024R (Tom Kean, Jr.) (Apr. 13, 2005) (an advertisement featuring a candidate wearing a campaign button identifying him as a candidate (“Tom Kean Jr. for Congress”) followed by the word “NEVER” can have no other reasonable meaning than to urge the candidate’s defeat). New Day appears to have filed an independent expenditure report for “John Kasich is for Us – National Security.” *See* Schedule E, 24/48 Hour Report of Independent Expenditures, at <http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf>.

1 or political party committee assents to the suggestion (the “request or suggestion” standard);
2 (2) the candidate, campaign, or political party committee was materially involved in decisions
3 regarding the communication (the “material involvement” standard); or (3) the communication
4 was created, produced, or distributed after one or more substantial discussions between the payor
5 and the candidate, campaign, or a political party committee involving information that is material
6 to the communication (the “substantial discussion” standard).⁹⁶

7 It appears that all three New Day Ads may satisfy the “material involvement” standard.
8 As the Commission has previously concluded, a federal candidate’s appearance in an
9 advertisement renders “highly implausible” any claim that he or she was not “materially
10 involved” in its creation.⁹⁷ Indeed, because the candidate would decide what statements to give
11 on camera, this arrangement would inherently grant the candidate a material amount of control
12 over the content of the eventual communications. Therefore, if Kasich was a candidate at the
13 time the footage was created, then he would have met the requirements of the “material
14 involvement” standard, satisfying the conduct prong of the coordinated communications
15 analysis. The information provided by the Respondents does not establish the date the footage
16 was filmed, except to say that it was prior to July 8, 2015. As discussed previously, it appears

⁹⁶ 11 C.F.R. § 109.21(d)(1)-(3). The conduct prong may also be satisfied in other ways, such as if the parties contracted with or employed a common vendor that used or conveyed material information about the campaign’s plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication. *See id.* at § 109.21(d)(4).

⁹⁷ Advisory Op. 2003-25 (Weinzapfel for Mayor Committee) (“AO 2003-25”); *see also* Advisory Op. 2004-01 (Bush-Cheney ’04, *et al.*) (“AO 2004-01”) (citing AO 2003-25). After issuing these advisory opinions, the Commission amended the coordinated communication regulations to create a “safe harbor” for certain public communications in which federal candidates merely endorse other candidates or solicit funds for other persons. *See* 11 C.F.R. § 109.21(g); *see also* Coordinated Communications, 71 Fed. Reg. 33,190, 33,202 (Jun. 8, 2006) (superseding AO 2004-01 and AO 2003-25 to extent they apply to such communications). That regulatory revision is not relevant to the communications at issue here, which do not endorse other candidates.

1 that Kasich triggered candidacy by June 28, 2015, at the latest, leaving open the possibility that
2 Kasich was a candidate at the time the footage was created.

3 Kasich's apparent relationship with New Day provides further reason to believe he was
4 either materially involved in decisions regarding the communications, or that his conduct
5 satisfies the request or suggestion, or substantial discussion standards of the Commission's
6 regulations. As the public face of New Day, Kasich appears to have been heavily involved with
7 the origination of New Day, as evidenced by his presence on the group's website and in the
8 video announcing its creation.

9 Based on the available information, we recommend that the Commission find reason to
10 believe that New Day made, and the Committee and Kasich accepted, excessive and prohibited
11 contributions in the form of coordinated communications in violation of 52 U.S.C. §§ 30116 and
12 30118(a), and that New Day and the Committee failed to disclose those contributions in violation
13 of 52 U.S.C. § 30104(b).

14 **E. There is Reason to Believe that the New Day Ads Failed To Include Complete**
15 **Disclaimers**

16 Under the Act and Commission regulations, any public communication that expressly
17 advocates the election or defeat of a clearly identified federal candidate must include a
18 disclaimer.⁹⁸ If the communication is paid for by other persons but authorized by a candidate, an
19 authorized political committee of a candidate, or its agents, the communication shall clearly state
20 that the communication has been paid for by such other persons and authorized by such
21 authorized political committee.⁹⁹

⁹⁸ See 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2).

⁹⁹ 52 U.S.C. § 30120(a)(2) and (d)(1)(B); 11 C.F.R. § 110.11(c)(3)(ii).

1 Here, the New Day Ads each included disclaimers but did not include a “stand by your
2 ad” portion indicating that Kasich approved the advertisements. The Complaint alleges that the
3 New Day Ads failed to include proper disclaimers under 52 U.S.C. § 30120 because they did not
4 state that Kasich approved the content.¹⁰⁰ As noted above, we have concluded that Kasich
5 became a candidate as least as early as June 28, 2015, prior to the airing of the advertisements,
6 and that Kasich’s involvement with New Day, including filming footage for the advertisements,
7 resulted in the advertisements being coordinated between Kasich and New Day. The same facts
8 that support these conclusions support the conclusion that Kasich approved the advertisements.
9 Accordingly, we recommend that the Commission find reason to believe that New Day violated
10 52 U.S.C. § 30120(d)(1)(B) by failing to include complete disclaimers.

11 **F. Take No Action as to Whether Kasich and New Day Solicited, Received,**
12 **Directed, Transferred, or Spent Soft Money**

13 Under the Act, candidates, officeholders, and entities directly or indirectly established,
14 financed, maintained or controlled by, or acting on behalf of, candidates or officeholders may not
15 solicit, receive, direct, transfer, spend, or disburse funds in connection with an election unless the
16 amounts consist of funds that are subject to the prohibitions, limitations, and reporting
17 requirements of the Act.¹⁰¹ The ten non-exclusive factors set out at 11 C.F.R. § 300.2(c)(2)
18 determine whether a person or entity (“sponsor”) “directly or indirectly established, financed,
19 maintained or controlled” another person or entity under 52 U.S.C. § 30125. These factors must
20 be examined in the context of the overall relationship between the sponsor and the entity to

¹⁰⁰ MUR 6955 Compl. at 3; MUR 6983 Compl. at 2-3.

¹⁰¹ 52 U.S.C. § 30125; *see* 11 C.F.R. §§ 300.60, 300.61.

1 determine whether the presence of any factor or factors is evidence that the sponsor “directly or
2 indirectly established, financed, maintained or controlled” the entity.¹⁰²

3 The Complaint alleges that Kasich’s statements in the New Day launch video plainly
4 show that he “established” New Day,¹⁰³ and further alleges that Kasich solicited money outside
5 the limits and prohibitions of the Act for an organization that he established, financed,
6 maintained, or controlled, in violation of 52 U.S.C. § 30125(e)(1).¹⁰⁴ Neither New Day nor
7 Kasich address the allegation that Kasich established New Day, but each denies that Kasich
8 solicited funds for New Day outside the limitations and prohibitions of the Act, arguing that
9 Kasich’s video did not include any statements that could be considered a solicitation of funds for
10 New Day.¹⁰⁵

11 Clearly Kasich had some prominent role in establishing New Day, as it appears to be a
12 platform for his ideas and he specifically states in the launch video that he is announcing that
13 “we’ve created the New Day for America committee.”¹⁰⁶ And the available information shows
14 that New Day employs several former members of Kasich’s administration and campaign

¹⁰² 11 C.F.R. § 300.2(c)(2).

¹⁰³ *See supra* Section II.B, note 22 (“...we’ve created the New Day for America committee”; “I hope you’ll visit *our* website...”; “I hope you’ll sign up to join *our* team.”) (emphasis added).

¹⁰⁴ MUR 6955 Compl. at 7-9.

¹⁰⁵ *Id.* at 8; MUR 6955 Committee Resp. at 6-7.

¹⁰⁶ <http://www.p2016.org/ads/kasichv042015.html> (emphasis added).

1 organization.¹⁰⁷ However, Kasich is not listed as an incorporator, agent, or officer of New Day
2 in its initial filings with either the Ohio Secretary of State or the Commission, and the Complaint
3 provides no information beyond those statements in New Day's online video to support its
4 allegation.¹⁰⁸

5 Because we are recommending that the Commission find reason to believe that New Day,
6 Kasich, and the Committee violated the Act relating to testing-the-waters activities, as well as
7 coordinated communications, information obtained as part of the investigation into the
8 relationship between New Day and Kasich in those contexts may inform our analysis of whether
9 Kasich established, financed, maintained, or controlled New Day. We therefore recommend that
10 the Commission take no action at this time as to whether Kasich and New Day violated
11 52 U.S.C. § 30125.

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¹⁰⁷ See *supra* Section II.B, note 16. The Commission has found, however, that “more than the mere fact of such informal, ongoing relationships between the personnel of the potentially sponsoring and potentially sponsored entity is necessary to support a conclusion of ‘establishment, financing, maintenance or control’” of an organization. See Factual and Legal Analysis at 8, MUR 6280 (Howard L. Berman); First Gen. Counsel's Report at 18, MUR 5338 (The Leadership Forum) (“[W]hile former employers and colleagues may exercise influence, influence is not necessarily control”).

¹⁰⁸ See Articles of Incorporation of New Day, available at <http://www2.sos.state.oh.us/reports/rwservlet?imgc12g&Din=201510400609>; New Day For America, Statement of Organization (July 23, 2015), available at <http://docquery.fec.gov/pdf/003/201507230300013003/201507230300013003.pdf>.

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V. RECOMMENDATIONS

1. Find reason to believe John R. Kasich violated 52 U.S.C. §§ 30116(f) and 30118(a) and 11 C.F.R. §§ 100.72 and 100.131 by accepting impermissible and excessive in-kind contributions for testing-the-waters activity.
2. Find reason to believe that Kasich for America, Inc. and J. Matthew Yuskewich in his official capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a) and 11 C.F.R. §§ 100.72 and 100.131 by accepting and failing to report impermissible and excessive in-kind contributions for testing-the-waters activity.
3. Find reason to believe that New Day for America and Matthew Yuskewich in his official capacity as treasurer violated 52 U.S.C. §§ 30116(f) and 30118(a) by making impermissible and excessive in-kind contributions for testing-the-waters activity.
4. Find reason to believe John R. Kasich violated 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy.
5. Take no action at this time as to whether New Day for America and Matthew Yuskewich in his official capacity as treasurer violated 52 U.S.C. § 30103(a) by failing to timely file its Statement of Organization.
6. Find reason to believe John R. Kasich violated 52 U.S.C. §§ 30116 and 30118(a) by accepting prohibited and excessive in-kind contributions in the form of coordinated communications.
7. Find reason to believe that Kasich for America, Inc. and J. Matthew Yuskewich in his official capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116, and 30118(a) by accepting and failing to report prohibited and excessive in-kind contributions in the form of coordinated communications.
8. Find reason to believe that New Day for America and Matthew Yuskewich in his official capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116, and 30118(a) by making and failing to report impermissible and excessive in-kind-contributions in the form of coordinated communications.

- 1 9. Find reason to believe that New Day for America and Matthew Yuskewich in his
- 2 official capacity as treasurer violated 52 U.S.C. § 30120(d)(1)(B) by failing to include
- 3 complete disclaimers on three television advertisements.

- 4 10. Take no action at this time on the allegation that John R. Kasich and New Day for
- 5 America and Matthew Yuskewich in his official capacity as treasurer violated
- 6 52 U.S.C. § 30125 by soliciting, receiving, directing, transferring, or spending soft
- 7 money.

- 8 11. Approve the attached Factual and Legal Analyses.

- 9 12. Authorize the use of compulsory process.

- 10 13. Approve the appropriate letters.

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Lisa J. Stevenson
Acting General Counsel

Kathleen M. Guith

7/12/18
Date

Kathleen M. Guith
Associate General Counsel

Mark Shonkwiler

Mark Shonkwiler
Assistant General Counsel

Christopher Edwards

Christopher Edwards
Attorney