



FEDERAL ELECTION COMMISSION
Washington, DC 20463

BY EMAIL AND CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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MAY - 1 2019

RE: MUR 6955 and 6983

Dear Mr. Stanley:

On August 14, 2015, and November 18, 2015, the Federal Election Commission (the "Commission") notified your clients, Governor John R. Kasich and Kasich for America, Inc., and J. Matthew Yuskewich in his official capacity as treasurer (the "Committee") of complaints alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). Copies of the complaints were forwarded to your clients at that time.

Upon review of the allegations contained in the complaints, and information provided by you on behalf of your clients, the Commission, on April 23, 2019, found that there is reason to believe John R. Kasich violated 52 U.S.C. §§ 30116 and 30118(a) and 11 C.F.R. §§ 100.72 and 100.131 by accepting impermissible and excessive in-kind contributions, and 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy. Further, the Commission found that there is reason to believe that the Committee violated 52 U.S.C. §§ 30104(b), 30116, 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. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is enclosed for your information.

Your client may submit any factual or legal materials that it believes is relevant to the Commission's consideration of this matter. Statements should be submitted under oath. All responses to the enclosed questions and requests for documents should be submitted to the Office of the General Counsel within 30 days of your receipt of this notification. Any additional materials or statements you wish to submit should accompany the response to the order. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation. *See* 52 U.S.C. § 30109(a)(4).

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Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

If you are interested in pursuing pre-probable cause conciliation, you should make such a request by letter to the Office of the General Counsel. *See* 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into in order to complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been delivered to the respondent(s).

Requests for extensions of time are not routinely granted. Requests must be made in writing at least five days prior to the due date of the response and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days. Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at http://www.fec.gov/em/respondent_guide.pdf.

Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.

This matter will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B) and 30109(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public. For your information we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Mark Shonkwiler, Saurav Ghosh, or Wanda Brown at (202) 694-1650.

On behalf of the Commission,



Ellen L. Weintraub
Chair

Enclosures

Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: John R. Kasich **MURs:** 6955 and 6983
 Kasich for America, Inc. and J. Matthew
 Yuskewich¹ in his capacity as treasurer

I. INTRODUCTION

These matters involve allegations that John R. Kasich, Kasich for America and J. Matthew Yuskewich in his official capacity as treasurer (the "Committee") violated the Federal Election Campaign Act of 1971, as amended (the "Act"), when: (1) New Day For America and J. Matthew Yuskewich in his official capacity as treasurer ("New Day"), an independent expenditure-only political committee, paid for Kasich's testing-the-waters activities with impermissible and excessive funds; (2) Kasich failed to timely file his Statement of Candidacy with the Commission; (3) Kasich and the Committee accepted in-kind contributions from New Day by coordinating its communications; and (4) Kasich established, controlled, and solicited soft money for New Day.

Based on the available information, the Commission finds reason to believe that: (1) Kasich violated 52 U.S.C. §§ 30116(f) and 30118(a) and 11 C.F.R. §§ 100.72(a) and 100.131(a); (2) the Committee violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a) and 11 C.F.R. §§ 100.72 and 100.131, in connection with accepting impermissible, excessive, and unreported contributions for testing-the-waters activities; (3) Kasich violated 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy; (4) Kasich and the Committee accepted prohibited and excessive in-kind contributions in the form of coordinated

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.

communications, in violation of 52 U.S.C. §§ 30116 and 30118(a); and (5) Kasich and the Committee did not disclose those contributions in violation of 52 U.S.C. § 30104(b).

II. FACTUAL BACKGROUND

On July 21, 2015, Ohio Governor John Kasich publicly announced his candidacy for President of the United States and filed a Statement of Candidacy with the Commission on July 23.² The Committee registered as Kasich's authorized committee for the presidential election on July 23.³ As discussed in more detail below, in the months leading up to his announcement, Kasich travelled to a number of states on trips that appear to be unrelated to his role as governor of Ohio to discuss national policy issues. Some of these activities were conducted through and paid for by New Day, an organization established in April 2015.

A. Kasich's Activities before Candidacy Announcement

The Complaint in MUR 6983 alleges that, in the months before Kasich publicly announced his candidacy for president on July 21, 2015, Kasich "engage[d] in prototypical 'testing-the-waters' activities, such as traveling around the country and meeting with voters to learn about their ideas."⁴ The Complaint points to a video that Kasich made for New Day for America, in which Kasich said that "[w]e're going to start getting around the country more, meeting and talking with more people."⁵ Kasich's travels included trips to South Carolina, New

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 Org. (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.

⁴ MUR 6983 Supp. Compl. at 5, 7 (March 30, 2016).

⁵ *Id.* (citing 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) (hosting New Day for America video)).

Hampshire, Michigan, and Washington, DC.⁶ On these trips, Kasich advocated for a variety of nationwide policies, including a balanced budget amendment to the U.S. Constitution, and also reportedly engaged in fundraising.⁷

Kasich's own public statements indicate that he was considering a presidential run during this time. In a CNN interview, Kasich, when asked whether he was running for President, responded that he "[didn't] know yet," but described how he was evaluating a potential candidacy.⁸ He explained:

I've taken a big step, for me, and created a political organization to accumulate more resources so I can travel more robustly and begin to think about infrastructure. And then once that's done, if I should be successful in raising . . . that seed money, then . . . the next step is to see if people like what I have to say. And then . . . find out around the country whether I can raise enough money to compete at least in the early states. If that works, then I'm likely to go forward.⁹

CNN further reported that "[a] source close to John Kasich said . . . that [he] is 'very likely' to run for President, but cautioned there would be nothing definitive for at least a few weeks."¹⁰

⁶ *Id.* at 2, 7-8 (citing Mike Allen, *John Kasich to Announce Presidential Bid July 21*, POLITICO, June 28, 2015, <https://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517>); *id.* at 2 (citing 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); *id.* at 7-8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>; New Hampshire Republican Leadership Summit, Day 2, C-SPAN, <https://www.c-span.org/video/?325374-1/hampshire-republican-leadership-summit-day-2>).

⁷ *Id.* at 8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>; New Hampshire Republican Leadership Summit, Day 2, C-SPAN, <https://www.c-span.org/video/?325374-1/hampshire-republican-leadership-summit-day-2>).

⁸ *Id.* (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>) (video embedded at link).

⁹ *Id.*

¹⁰ *Id.*

1 The same story indicated that Kasich said in late April that “If I can win, I’m likely to run.”¹¹

2 The report further stated that, as of May 2015, “sources close to Kasich have been sending out
 3 positive signals,” and that in late April, Kasich stated that “One good thing about thinking of
 4 running for President is that I get invited to stuff like this, where I can talk about what I care
 5 about.”¹²

6 On June 28, Politico published an article stating that Kasich’s “advisers” said Kasich
 7 would announce his candidacy on July 21.¹³ The article attributes several other statements to
 8 Kasich’s advisers, including that Kasich “combines establishment appeal with a conservative
 9 record,” that qualifying for the Cleveland debate “will be tough, even with his announcement
 10 bump,” and that Kasich “will be positioned ‘in Jeb’s back right pocket’ — with establishment
 11 appeal, but slightly more conservative.”¹⁴ The article also revealed the location and start time of
 12 Kasich’s July 21 announcement, the names of three of his strategists, and the schedule for his
 13 “announcement tour that includes Iowa, New Hampshire, South Carolina, and Michigan.”¹⁵

14 The Complaint states that Kasich, on one of his trips in April, appeared at the New
 15 Hampshire Republican Party’s “First in the Nation” Leadership summit and stated that
 16 “‘America regains its strength’ if it can tackle its immigration problem, balance the budget,
 17 lower the corporate tax rate, and invest in infrastructure.”¹⁶ The Complaint further states that

¹¹ *Id.*

¹² *Id.*

¹³ Mike Allen, *John Kasich to Announce Presidential Bid July 21*, POLITICO (JUNE 28, 2015), available at <http://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517.html>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ MUR 6983 Supp. Compl. at 7-8.

Kasich “asked attendees at the end of his appearance to ‘think about me, would you . . . don’t commit too soon . . . let us all have a chance to breath and get out, and you know what I really look forward to, being out in your homes again, letting you get to know me and see me, that’s what it’s really all about, it’s why I love New Hampshire . . .”¹⁷

Kasich and the Committee assert that Kasich did not become a candidate before July 21, 2015, “at th[e] moment” that he “unambiguously stated, for the first time” that he was running for President.¹⁸ Pointing to the example activities in the Commission’s testing-the-waters regulations that indicate an individual has decided to become a candidate, Kasich and the Committee assert that Kasich “did not conduct or authorize any activities *that triggered candidacy*” before that date.¹⁹ Notably, no response from Kasich or the Committee addresses *other* testing-the-waters activities (*i.e.*, those that Kasich argues did *not* trigger candidacy) or addresses how Kasich’s pre-candidacy testing-the-waters activities were funded, including whether New Day had paid for Kasich’s pre-candidacy travel or other testing-the-waters activities. Kasich and the Committee did not respond to the Supplemental Complaint.

B. New Day’s Activities before and around Registering as a Political Committee

New Day was established as an Ohio non-profit corporation on April 14, 2015, and then registered with the IRS as a section 527 organization.²⁰

¹⁷ *Id.* at 8.

¹⁸ MUR 6955 Committee Resp. at 4-5.

¹⁹ MUR 6955 Committee Resp. at 4-5 (emphasis added) (citing 11 C.F.R. § 100.72(b)).

²⁰ New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report at 1 (July 30, 2015).

1 When it was founded, New Day launched a website that featured Kasich's picture and
 2 biography, and a video of Kasich announcing the creation of New Day and discussing a variety
 3 of policy goals.²¹ Kasich's complete statement in the video is as follows:

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

28
 29 New Day's initial Mid-Year Disclosure Report to the IRS reported that New Day
 30 received \$11,130,730 and spent \$823,809 between its founding on April 20, 2015, and June 30,

²¹ MUR 6955 Compl. at 2 (Aug. 13, 2015). The video no longer appears on New Day's website, but was embedded in a news article provided in the Supplemental Complaint. See MUR 6983 Supp. Compl. at 7 (citing 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)), http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html. In a CNN story dated May 17, 2015, Kasich referenced his creation of a "political organization" and described it as a "big step" in evaluating a potential presidential candidacy. *Id.* at 8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>).

2015.²² New Day's Year-End Report disclosed that it received an additional \$3,981,570 and spent \$7,842,778 between July 1 and December 31, 2015.²³ In its 2015 disclosure reports, New Day disclosed that it routinely accepted donations that exceeded \$5,000, including some as large as \$1 million.²⁴ New Day also reported numerous disbursements both prior to and immediately after Kasich's July 21, 2015, announcement of his candidacy, for which the purpose was described as media consulting, phone banks, polling, airfare, travel, and travel expense reimbursements.²⁵

On July 8, New Day purchased \$58,400 of television air time in a New Hampshire media market.²⁶ New Day completed a form documenting two separate ad buys on July 8, with each listing "John Kasich for the Republican Presidential Primary" as the "name of the legally qualified candidate(s) the programming refers to"; the form for the WMUR ad buy also says the advertisement includes a "candidate (Republican) discussing his values/beliefs."²⁷

²² 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).

²³ 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.

²⁴ New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report; New Day for America, IRS 2015 Form 8872 Year-End Disclosure Report.

²⁵ New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report; New Day for America, IRS 2015 Form 8872 Year-End Disclosure Report.

²⁶ MUR 6983 Supp. Compl. at 3.

²⁷ MUR 6955 Compl. at 2-3; MUR 6983 Supp. Compl. at 3.

1 The first advertisement, “Us,” which reportedly aired on July 8, begins with a succession
 2 of images and sound clips of several Democratic and Republican presidential candidates. It
 3 thereafter consists of the following script, much of which includes Kasich speaking directly to
 4 the camera:²⁸

5 Female Announcer: Hey, what about us?

6
 7 Kasich: My dad carried mail on his back. They called him ‘John
 8 the Mailman,’ and they loved him, because he looked out for
 9 everyone in his neighborhood. I learned something from my father:
 10 Do the best to look for other people. We turned Ohio around. And
 11 we’ve created jobs and cut taxes and balanced our budgets. I spent
 12 18 years on the Armed Services Committee with some of the finest
 13 defense minds in the world. I was one of the chief architects of
 14 balancing the budget, it’s the first time we did it since man walked
 15 on the moon, we haven’t done it since. It can happen again.

16
 17 Female Announcer: John Kasich’s for us.

18 The advertisement does not include a “stand-by-your-ad disclaimer.” New Day asserts that the
 19 advertisement used footage from interviews with Kasich filmed prior to July 8, 2015, and that
 20 the stations categorized the ad buys as “Non-Candidate Issue Ads.”²⁹

²⁸ MUR 6955 Compl. at 3, n.14 (citing Dan Tuohy, *Kasich to air first major ad buy in NH*, NEW HAMPSHIRE UNION LEADER (July 8, 2015) & “Us,” New Day for America, https://www.youtube.com/watch?v=Dg9Liwfs_tI).

²⁹ 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 (citing Interview by Mark Halperin and John Heileman with Fred Davis, *Why Fred Davis is Going to Miss John Kasich*, BLOOMBERG NEWS (July 21, 2015), <https://www.bloomberg.com/news/videos/2015-07-21/why-fred-davis-is-going-to-miss-john-kasich>). 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.

On July 23, 2015, two days after Kasich announced his candidacy and the same day on which Kasich for America registered as Kasich's authorized committee, New Day registered with the Commission as an independent expenditure-only political committee ("IEOPC").³⁰ The Complaint also alleges that, on July 26 and August 5, New Day ran two additional advertisements featuring Kasich. The July 26 advertisement, titled "Balancing the Budget,"³¹ begins with a succession of images and sound clips of several Democrat and Republican presidential candidates and continues with the following script:

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

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

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

Kasich: And I was willing to take beatings when I offered my own budget proposals for America because I believed in it. [Caption: reads: "John Kasich. President 2016."] The most important thing in leadership is not what you say, it's what you do.

Female Announcer: John Kasich's for us.

³⁰ See New Day for America, FEC Form 1 Statement of Org. (July 23, 2015).

³¹ The Complaint in MUR 6955 refers to a "second" ad that aired on July 26, 2015, from WCVB-BOS in which Kasich "speak[s] about his qualifications to be President, citing a webpage from TVEyes.com. See MUR 6955, Compl. at 3 (citing TVEyes, Inc., Media Monitoring Suite, WCVB July 26, 2015, <https://mms.tveyes.com/transcript.asp?StationID=919&DateTime=7/26/2015%209:43:07%20am&playclip=true>). It appears the same ad is available through a database hosted by The New Republic, though The New Republic's database dates the ad at July 21, 2015. See "Balancing the Budget," available at <https://newrepublic.com/political-ad-database/john-kasich-balancing-the-budget/Ny8yMS8xNTpCYWxhbmNpbmcgdGhlIEJlZGdldA>.

The script for the August 5 advertisement, “John Kasich is for Us – National Security,”³² is as follows:

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

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

C. Kasich for America’s Earliest Reported Activities

As noted above, Kasich formally announced his presidential candidacy on July 21, 2015, and filed a Statement of Candidacy on July 23.³³ Kasich for America also registered as Kasich’s authorized committee for the presidential election on July 23.³⁴ The Committee’s first disclosure report was the October 2015 Quarterly Report.³⁵ That report disclosed that the Committee began receiving contributions for the 2016 presidential primary election on July 3, 2015, and that it exceeded \$5,000 in contributions on July 13.³⁶ It also showed that the Committee’s first disbursement occurred on July 10, 2015, eleven days before Kasich publicly announced his

³² 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>.

³³ MUR 6955 Committee Resp. at 3; John Kasich, Statement of Candidacy (July 23, 2015).

³⁴ MUR 6955 Committee Resp. at 3; Kasich for America, Statement of Org. (July 23, 2015).

³⁵ 2015 Oct. Quarterly Rpt., Kasich for America at 9 (Oct. 15, 2015).

³⁶ *Id.* at Schedule A-P (Itemized Receipts).

candidacy.³⁷ The report disclosed a small number of disbursements between July 10 and July 21, mostly for expenses related to travel to New Hampshire, though it is not clear from the face of the reports when that travel occurred. The Committee did not report receiving any in-kind contributions from New Day in this report, nor did it designate any disbursements as having been made for testing-the-waters expenses.

III. LEGAL ANALYSIS

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

An individual becomes a candidate under the Act if: (a) such individual receives contributions or makes expenditures in excess of \$5,000, or (b) such individual gives his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions or has made such expenditures in excess of \$5,000.³⁸

The Commission has established testing-the-waters exemptions that permit an individual to test the feasibility of a campaign for federal office without becoming a candidate under the Act.³⁹ These exemptions exclude from the definitions of “contribution” and “expenditure” those funds received and payments made solely to determine whether an individual should become a candidate.⁴⁰ These regulations seek to draw a distinction between activities directed to

³⁷ *Id.* at Schedule B-P (Itemized Disbursements).

³⁸ 52 U.S.C. § 30101(2).

³⁹ *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).

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

1 evaluating the feasibility of one's candidacy and conduct signifying that a decision to become a
 2 candidate has been made.⁴¹ However, only funds permissible under the Act may be used for
 3 testing-the-waters activities.⁴²

4 Testing-the-waters activities for which only funds permissible under the Act may be used
 5 include, but are not limited to, payments for polling, telephone calls, and travel.⁴³ In advisory
 6 opinions, the Commission has stated that "travel throughout the country for speaking to political
 7 and non-political groups on a variety of public issues and meeting with opinion makers and
 8 others interested in public affairs for the purpose of determining whether potential political
 9 support exists for a national campaign" fits within testing-the-waters activities,⁴⁴ and that
 10 expenses for such activities should be allocated to the individual's potential candidacy.⁴⁵
 11 Additionally, in MUR 5908 (Duncan Hunter), the Commission found reason to believe that a
 12 candidate's spending on travel to early primary states "to publicize his Presidential campaign,
 13 and/or gauge support for his campaign" before declaring his candidacy should have been
 14 reported as testing-the-waters or campaign expenses.⁴⁶

⁴¹ See Advisory Op. 1981-32 (Askew) ("AO 1981-32").

⁴² 11 C.F.R. §§ 100.72, 100.131.

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

⁴⁴ 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).

⁴⁵ See Advisory Op. 1985-40 (Republican Majority Fund) at 9.

⁴⁶ Factual and Legal Analysis at 4-7, MUR 5908 (Duncan Hunter). The Commission took no further action in this matter where the investigation revealed that the leadership committee's excessive contributions to the candidate were likely *de minimis*. See Statement of Reasons, Comm'rs Petersen, Hunter, McGahn, Walther & Weintraub at 2-3, *id.*

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.⁴⁷
 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.⁴⁸

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."⁴⁹ The Kasich
 10 response does not confirm or deny the allegation that New Day paid for Kasich's testing-the-
 11 waters activity. The Committee's initial report to the Commission shows that it received
 12 \$40,050 in contributions and made \$19,180 in disbursements prior to July 21, but it does not
 13 specifically designate any of these entries as in-kind contributions made to Kasich for testing-
 14 the-waters activities, and the first reported disbursement occurred only 11 days prior to Kasich's
 15 announcement of his candidacy.⁵⁰ Nonetheless, New Day's IRS disclosure reports indicate that

⁴⁷ *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").

⁴⁸ 11 C.F.R. § 101.3.

⁴⁹ MUR 6983 Supp. Compl. at 5, 9; 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.").

⁵⁰ See Kasich for America October 2015 Quarterly Report (Oct. 15, 2015).

1 New Day made substantial disbursements for media consulting, phone banks, polling, airfare,
 2 travel, and travel expense reimbursements.⁵¹

3 The available information indicates that Kasich did spend funds to test the waters prior to
 4 declaring his candidacy in July 2015, and that New Day may have paid for at least a portion of
 5 those expenses. In the months before he announced his candidacy, Kasich began traveling the
 6 country to speak about his policy positions on nationwide issues such as balancing the budget,
 7 tax reform and healthcare. During this time, Kasich reportedly engaged in fundraising and made
 8 statements indicating that he was considering running for President.⁵² For example, CNN
 9 reported that Kasich said in late April that “If I can win, I’m likely to run,”⁵³ and stated that
 10 “[o]ne good thing about thinking of running for President is that I get invited to stuff like this,
 11 where I can talk about what I care about.”⁵⁴ He explained:

12 I’ve taken a big step, for me, and created a political organization to
 13 accumulate more resources so I can travel more robustly and begin
 14 to think about infrastructure. And then once that’s done, if I should
 15 be successful in raising . . . that seed money, then . . . the next step
 16 is to see if people like what I have to say. And then . . . find out
 17 around the country whether I can raise enough money to compete at
 18 least in the early states. If that works, then I’m likely to go
 19 forward.⁵⁵

⁵¹ 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).

⁵² Section II.A, *supra*.

⁵³ Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>.

⁵⁴ *Id.*

⁵⁵ MUR 6983 Supp. Compl. at 8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>).

1 Further, Kasich's travel included stops in key early primary states, including South
2 Carolina and New Hampshire, where, among other things, he held news conferences, addressed
3 Republican caucuses, and spoke at the Republican Leadership Summit.⁵⁶

4 Based on this information, it appears that Kasich was testing-the-waters. Kasich,
5 however, never established a testing-the-waters account, and the Committee did not report any
6 testing-the-waters activities once Kasich declared his candidacy. As a result, the Commission
7 finds reason to believe that Kasich violated 11 C.F.R. §§ 100.72 and 100.131 and that the
8 Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72 and 100.131.

9 Further, it appears that New Day, once it was formed in April 2015, may have paid for at
10 least a portion of Kasich's testing-the-waters expenses. Kasich was the face of New Day and it
11 appears that New Day was formed as a vehicle for Kasich to present his platform of ideas for the
12 country's future. In Kasich's April 20, 2015, video message announcing the formation of New
13 Day, Kasich stated, "Those are some of my thoughts, but I would like to hear what yours are too,
14 and I'd like to talk to you about them. And that's why I'm announcing that we've created the
15 New Day for America committee. We're going to start getting around the country more,
16 meeting and talking with more people, and see if by coming together we can put in motion the
17 solutions that will get this great idea called America working the right way again."⁵⁷
18 Furthermore, Kasich appears to acknowledge that a "political organization" that he had recently

⁵⁶ See *supra*, Section II.A.

⁵⁷ Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 Presidential Run*, CLEVELAND.COM (Apr. 20, 2015), available at http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html.

1 formed — presumably New Day, as Kasich did not establish a testing-the-waters account — was
 2 used to engage in testing-the-waters activities.

3 Thus, it appears likely New Day funded Kasich's travel, which was at least in part
 4 connected to his testing-the-waters activities.⁵⁸ Even if Kasich's travel on behalf of New Day
 5 was partially unrelated to his testing-the-waters activities, he would have to allocate any
 6 expenses between New Day and his testing-the-waters activities. Because New Day is an
 7 IEOPC that accepted contributions from corporations and contributions in excess of the Act's
 8 limits,⁵⁹ and because an "independent expenditure-only political committee may not make
 9 contributions to candidates ... including in-kind contributions,"⁶⁰ New Day may not make
 10 contributions to Kasich, including by making payments that are later required to be reported by
 11 the Committee as contributions for testing-the-waters activities.

12 Therefore, the Commission finds reason to believe that Kasich and the Committee
 13 violated 52 U.S.C. §§ 30116(f) and 30118(a) by accepting, and the Committee violated
 14 52 U.S.C. § 30104(b) by failing to report, excessive and prohibited in-kind contributions for
 15 testing-the-waters activities from New Day.

16 **B. There Is Reason to Believe Kasich Filed His Statement of Candidacy Late**
 17

18 Once an individual meets the \$5,000 threshold for contributions received or expenditures
 19 made, the candidate has fifteen days to designate a principal campaign committee by filing a
 20 Statement of Candidacy with the Commission.⁶¹ The principal campaign committee must file a

⁵⁸ *Cf.* MUR 6932 (Clinton).

⁵⁹ *See, e.g.*, 2015 Amend. Year-End Report of New Day for America at 15, 19.

⁶⁰ Advisory Op. 2017-10 (Citizens Against Plutocracy).

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

Statement of Organization within ten days of its designation⁶² and must file disclosure reports with the Commission in accordance with 52 U.S.C. §§ 30104(a) and (b).⁶³

Commission regulations set forth a non-exhaustive list of activities that indicate that an individual is no longer testing the waters and has decided to become a candidate. Such indicia include: (1) using general public political advertising to publicize his or her intention to campaign for federal office; (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after he or she becomes a candidate; (3) making or authorizing written or oral statements that refer to him or her as a candidate for a particular office; (4) conducting activities in close proximity to the election or over a protracted period of time; and (5) taking action to qualify for the ballot under state law.⁶⁴

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

As noted above, the Commission, in deciding whether an individual is no longer testing the waters and has made a decision to run for federal office, assesses an individual's objectively deliberate actions to discern whether and when an individual decided to become a candidate.⁶⁵ The Commission has stated that "[a] non-conditional statement" by an individual (either directly or through an adviser) that he or she "'will' announce his or her candidacy on a given date

⁶² See 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

⁶³ 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).

⁶⁴ 11 C.F.R. §§ 100.72(b), 100.131(b)

⁶⁵ AO 2015-09 at 6.

1 unambiguously indicates that the individual has decided to become a candidate.”⁶⁶ 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.⁶⁷

4 Applying these criteria here, the purported statements by Kasich “advisers” in the June 28
5 Politico article provide reason to believe that Kasich had decided to run for president at least as
6 early as June 28, 2015, when the advisors reportedly stated that Kasich would be announcing his
7 candidacy approximately three weeks later. The June 28 Politico article reports that Kasich’s
8 “advisers” stated that Kasich “will jump into the crowded Republican presidential field on July
9 21 at the student union at his alma mater, The Ohio State University, in Columbus.” The article
10 also reports that Kasich’s advisers provided information about Kasich’s plans for positioning
11 himself as a candidate, as well as his travel plans following his public announcement.
12 Respondents contest that Kasich’s advisers provided specific information about Kasich’s
13 purported planned announcement or subsequent campaign plans, asserting that the journalist
14 simply “conceive[d]” of this information.⁶⁸ These statements, however, use direct quotes from
15 the purported advisers and, compellingly, the information regarding Kasich’s planned
16 announcement was accurate — Kasich did in fact announce his presidential candidacy on July
17 21, 2015, at The Ohio State University. As a result, there is ample support for the Commission
18 to find reason to believe that Kasich may have already decided to become a candidate at least as
19 early as June 28, when the Politico article was published.⁶⁹

⁶⁶ *Id.* (emphasis in original).

⁶⁷ *Id.* (citing Factual and Legal Analysis at 8, MUR 5363 (Alfred C. Sharpton)).

⁶⁸ MUR 6955 Committee Resp. at 4.

⁶⁹ AO 2015-09 at 6.

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

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

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

The Act defines a “contribution” to include “any gift . . . or anything of value made by any person for the purpose of influencing any election for Federal office.”⁷⁰ IEOPCs are prohibited from making contributions to candidates and their authorized committees,⁷¹ and it is unlawful for candidates, political committees, and their officers and employees to knowingly accept an excessive or prohibited contribution.⁷²

A “coordinated expenditure” — which is an expenditure made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of,” a candidate, a

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

⁷¹ See 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. at 2010-11 (Commonsense Ten) at 2-3.

⁷² 52 U.S.C. §§ 30116(f), 30118(a)

1 candidate's authorized committee, or the agents of either — is also a contribution to the
 2 candidate.⁷³ A “coordinated communication” is one form of coordinated expenditure.⁷⁴ Thus,
 3 “[a]n independent expenditure-only political committee may not make contributions to
 4 candidates or political party committees, including in-kind contributions such as coordinated
 5 communications.”⁷⁵

6 Commission regulations provide a three-prong test to determine if a communication is a
 7 “coordinated communication.”⁷⁶ First, a person other than the federal candidate or the
 8 candidate's authorized committee must pay for all or part of the communication.⁷⁷ Second, the
 9 communication must satisfy at least one content standard.⁷⁸ Third, the communication must
 10 satisfy at least one conduct standard.⁷⁹

11 The Complaint alleges that the three New Day advertisements featuring Kasich (“Us,”
 12 “Balancing the Budget,” and “John Kasich is for Us – National Security,” collectively, the “New
 13 Day Ads”) are coordinated communications and thus, because New Day accepts soft money,
 14 they are prohibited in-kind contributions to the Committee.⁸⁰ The Committee argues that there
 15 was no coordinated communication because the footage used in the video appearing on New

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

⁷⁴ *See* 11 C.F.R. § 109.21(b).

⁷⁵ Advisory Op. 2017-10.

⁷⁶ 11 C.F.R. § 109.21(a).

⁷⁷ *Id.* § 109.21(a)(1).

⁷⁸ *Id.* § 109.21(a)(2), (c).

⁷⁹ *Id.* § 109.21(a)(3), (d).

⁸⁰ MUR 6955 Compl. at 9-12; MUR 6983 Compl. at 3-7.

Day's website and in the New Day advertisements was filmed before Kasich became a candidate, and thus was not made "in cooperation, consultation or concert with" a candidate.⁸¹

Here, each of the three New Day advertisements — "Us," "Balancing the Budget," and "John Kasich is for Us – National Security" — appear to be coordinated communications. First, the ads were paid for by a third party, thereby satisfying the first prong of the coordination analysis. Second, all three ads satisfy the content standard as "public communications"⁸² that contain express advocacy or its functional equivalent.⁸³

For purposes of the content standard of the coordinated communications test, a communication that is the functional equivalent of express advocacy means a communication that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."⁸⁴

"Us," which aired in New Hampshire on July 8 (before Kasich's July 21 announcement event but after the June 28 Politico article), begins with a reference to the 2016 presidential primary and general elections by presenting a succession of images and sound clips of several Democratic and Republican presidential candidates. A narrator then asks "Hey, what about us?" The ad thereafter features Kasich discussing his accomplishments, as well as his qualifications and experience "creat[ing] jobs," "cut[ting] taxes," "balanc[ing] our budgets," and serving on the Armed Services Committee ("John Kasich looked out for America"), before concluding, "John

⁸¹ MUR 6955 Committee Resp. at 7.

⁸² "Public communication" includes "a communication by means of any broadcast, cable, or satellite communication . . ." 11 C.F.R. § 100.26.

⁸³ *Id.* § 109.21(c)(3), (5); § 100.22.

⁸⁴ *Id.* § 109.21(c)(5).

Kasich’s for us.” The tagline “John Kasich’s for us” in context — that is, paired with a recitation of Kasich’s political experience, contrasting other primary candidates, and the absence of an identifiable issue beyond the qualifications of Kasich himself — can have “no reasonable interpretation other than as an appeal to vote” for Kasich.⁸⁵

“Balancing the Budget” aired on July 26, 2015, five days after Kasich’s announcement event on July 21, and three days after New Day’s registration with the Commission as an IEOPC on July 23. It explicitly refers to Kasich as a candidate for President (“No one running for president has balanced the federal budget for us but John Kasich”), discusses his experience balancing the budget and serving on the Armed Services Committee, compares him favorably to other candidates for President (“No one else comes close”), includes the caption “John Kasich. President 2016,” before concluding, “John Kasich’s for us.”⁸⁶ The caption is akin to the phrases enumerated in section 100.22(a) (such as “Bill McKay in ‘94”) and in context can have no other reasonable meaning than to urge Kasich’s election. The ad thus contains express advocacy.

Likewise, the “John Kasich is for Us – National Security” advertisement discusses Kasich’s qualifications for office in the context of the upcoming election, contrasting them with the “weakness, handwringing, [and] inexperience” of fellow candidate Hillary Clinton as well as President Obama, before closing with an image of Kasich over the caption “John Kasich. President 2016.” The caption is akin to the phrases enumerated in section 100.22(a) (such as

⁸⁵ See *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007).

⁸⁶ See 11 C.F.R. § 100.22(a).

1 “Bill McKay in ‘94”) and in context can have no other reasonable meaning than to urge Kasich’s
 2 election.⁸⁷ The ad thus contains express advocacy.

3 Third, the conduct prong of the coordination test is satisfied if: (1) the communication
 4 was created, produced, or distributed at the request or suggestion of a candidate, campaign, or
 5 political party committee, or the payor suggests the communication and the candidate, campaign
 6 or political party committee assents to the suggestion (the “request or suggestion” standard); (2)
 7 the candidate, campaign, or political party committee was materially involved in decisions
 8 regarding the communication (the “material involvement” standard); or (3) the communication
 9 was created, produced, or distributed after one or more substantial discussions between the payor
 10 and the candidate, campaign, or a political party committee involving information that is material
 11 to the communication (the “substantial discussion” standard).⁸⁸

12 It appears that all three New Day Ads may satisfy the “material involvement” standard.
 13 Kasich’s apparent relationship with New Day provides reason to believe he was either materially
 14 involved in decisions regarding the communications, or that his conduct satisfies the request or
 15 suggestion, or substantial discussion standards of the Commission’s regulations. As the public
 16 face of New Day, Kasich appears to have been heavily involved with the origination of New
 17 Day, as evidenced by his presence on the group’s website and in the video announcing its

⁸⁷ 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>.

⁸⁸ 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).

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1 creation, as well as by Kasich and Fred Davis's descriptions of Kasich's interactions with New
2 Day in advance of Kasich's public announcement of his candidacy.

3 Based on the available information, the Commission finds reason to believe that Kasich
4 and the Committee accepted excessive and prohibited contributions in the form of coordinated
5 communications in violation of 52 U.S.C. §§ 30116 and 30118(a), and failed to disclose those
6 contributions in violation of 52 U.S.C. § 30104(b).