



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. Tucker:

On August 14, 2015, and November 18, 2015, the Federal Election Commission (the "Commission") notified your client, New Day for America 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 the Committee at that time.

Upon review of the allegations contained in the complaints, and information provided by you on behalf of the Committee, the Commission, on April 23, 2019, found that there is reason to believe the Committee violated 52 U.S.C. §§ 30104(b), 30116, and 30118(a) by making and failing to report impermissible and excessive in-kind contributions, and 52 U.S.C. § 30120(d)(1)(B) by failing to include complete disclaimers on three television advertisements. 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 must 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).

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.

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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: New Day For America and J. Matthew Yuskewich in his capacity as treasurer **MURs:** 6955 and 6983

I. INTRODUCTION

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

Based on the available information, the Commission finds reason to believe that:

(1) New Day violated 52 U.S.C. §§ 30116(f) and 30118(a) in connection with making impermissible, excessive contributions for Kasich’s testing-the-waters activities; (2) New Day made prohibited and excessive in-kind contributions in the form of coordinated communications in violation of 52 U.S.C. §§ 30116 and 30118(a), and did not disclose those contributions in violation of 52 U.S.C. § 30104(b); and (3) New Day violated 52 U.S.C. § 30120(d)(1)(B) by failing to include complete disclaimers on three television advertisements.

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

1 23.¹ The Committee registered as Kasich’s authorized committee for the presidential election on
 2 July 23.² As discussed in more detail below, in the months leading up to his announcement,
 3 Kasich travelled to a number of states on trips that appear to be unrelated to his role as governor
 4 of Ohio to discuss national policy issues. Some of these activities were conducted through and
 5 paid for by New Day, an organization established in April 2015.

6 **A. Kasich’s Activities before Candidacy Announcement**

7 The Complaint in MUR 6983 alleges that, in the months before Kasich publicly
 8 announced his candidacy for president on July 21, 2015, Kasich “engage[d] in prototypical
 9 ‘testing-the-waters’ activities, such as traveling around the country and meeting with voters to
 10 learn about their ideas.”³ The Complaint points to a video that Kasich made for New Day for
 11 America, in which Kasich said that “[w]e’re going to start getting around the country more,
 12 meeting and talking with more people.”⁴ Kasich’s travels included trips to South Carolina, New
 13 Hampshire, Michigan, and Washington, DC.⁵ On these trips, Kasich advocated for a variety of

1 John Kasich, Statement of Candidacy (July 23, 2015).

2 Kasich for America, Statement of Org. (July 23, 2015).

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

4 *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)).

5 *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>)).

1 nationwide policies, including a balanced budget amendment to the U.S. Constitution, and also
2 reportedly engaged in fundraising.⁶

3 Kasich's own public statements indicate that he was considering a presidential run during
4 this time. In a CNN interview, Kasich, when asked whether he was running for President,
5 responded that he "[didn't] know yet," but described how he was evaluating a potential
6 candidacy.⁷ He explained:

7 I've taken a big step, for me, and created a political organization to
8 accumulate more resources so I can travel more robustly and begin
9 to think about infrastructure. And then once that's done, if I should
10 be successful in raising . . . that seed money, then . . . the next step
11 is to see if people like what I have to say. And then . . . find out
12 around the country whether I can raise enough money to compete at
13 least in the early states. If that works, then I'm likely to go forward.⁸

14 CNN further reported that "[a] source close to John Kasich said . . . that [he] is 'very likely' to
15 run for President, but cautioned there would be nothing definitive for at least a few weeks."⁹ The
16 same story indicated that Kasich said in late April that "If I can win, I'm likely to run."¹⁰ The
17 report further stated that, as of May 2015, "sources close to Kasich have been sending out
18 positive signals," and that in late April, Kasich stated that "One good thing about thinking of

⁶ *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>).

⁷ *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).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

1 running for President is that I get invited to stuff like this, where I can talk about what I care
2 about.”¹¹

3 On June 28, 2015, Politico published an article stating that Kasich’s “advisers” said
4 Kasich would announce his candidacy on July 21.¹² The article attributes several other
5 statements to Kasich’s advisers, including that Kasich “combines establishment appeal with a
6 conservative record,” that qualifying for the Cleveland debate “will be tough, even with his
7 announcement bump,” and that Kasich “will be positioned ‘in Jeb’s back right pocket’ — with
8 establishment appeal, but slightly more conservative.”¹³ The article also revealed the location
9 and start time of Kasich’s July 21 announcement, the names of three of his strategists, and the
10 schedule for his “announcement tour that includes Iowa, New Hampshire, South Carolina, and
11 Michigan.”¹⁴

12 The Complaint states that Kasich, on one of his trips in April, appeared at the New
13 Hampshire Republican Party’s “First in the Nation” Leadership summit and stated that
14 “‘America regains its strength’ if it can tackle its immigration problem, balance the budget,
15 lower the corporate tax rate, and invest in infrastructure.”¹⁵ The Complaint further states that
16 Kasich “asked attendees at the end of his appearance to ‘think about me, would you . . . don’t
17 commit too soon . . . let us all have a chance to breath and get out, and you know what I really

¹¹ *Id.*

¹² 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>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ MUR 6983 Supp. Compl. at 7-8 (Mar. 30, 2016).

1 look forward to, being out in your homes again, letting you get to know me and see me, that's
 2 what it's really all about, it's why I love New Hampshire . . ."16

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

4 New Day was established as an Ohio non-profit corporation on April 14, 2015, and then
 5 registered with the IRS as a section 527 organization.¹⁷ Matthew Carle, Executive Director of
 6 New Day, avers that once it registered with the IRS, it discussed issues of general public
 7 importance, made non-candidate related expenditures, did not support or oppose any candidate
 8 for federal office, and disclosed all expenditures and contributions to the IRS.¹⁸

9 When it was founded, New Day launched a website that featured Kasich's picture and
 10 biography, and a video of Kasich announcing the creation of New Day and discussing a variety
 11 of policy goals.¹⁹ Kasich's complete statement in the video is as follows:

12 Hi, I'm John Kasich, and I believe it's time for a new day for
 13 America. You know, it's time to put aside the petty differences that
 14 divide us and rediscover the values that we all share which have
 15 made America great. Values like personal responsibility,
 16 community, respect, courage, and of course, faith. There's so much
 17 more that brings us together than that that divides us. When we
 18 remember that, we can come together and do what we all know
 19 needs to be done. We can balance our nation's budget. We can

¹⁶ *Id.* at 8.

¹⁷ MUR 6955 New Day Resp. at 2, citing Decl. of Matthew J. Carle ¶¶ 2, 4 (Oct. 2, 2015).

¹⁸ 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).

¹⁹ 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 at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>).

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

17
18 New Day's initial Mid-Year Disclosure Report to the IRS reported that New Day
19 received \$11,130,730 and spent \$823,809 between its founding on April 20, 2015, and June 30,
20 2015.²⁰ New Day's Year-End Report disclosed that it received an additional \$3,981,570 and
21 spent \$7,842,778 between July 1 and December 31, 2015.²¹ In its 2015 disclosure reports, New
22 Day disclosed that it routinely accepted donations that exceeded \$5,000, including some as large
23 as \$1 million.²² New Day also reported numerous disbursements both prior to and immediately
24 after Kasich's July 21, 2015, announcement of his candidacy, for which the purpose was
25 described as media consulting, phone banks, polling, airfare, travel, and travel expense

²⁰ 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).

²¹ 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.

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.

1 reimbursements.²³ New Day’s responses to the Complaints denied that Kasich was a candidate
 2 before July 21, 2015, but did not address whether New Day had paid for Kasich’s travel or other
 3 testing-the-waters activities.²⁴

4 On July 8, New Day purchased \$58,400 of television air time in a New Hampshire media
 5 market.²⁵ New Day completed a form documenting two separate ad buys on July 8, with each
 6 listing “John Kasich for the Republican Presidential Primary” as the “name of the legally
 7 qualified candidate(s) the programming refers to”; the form for the WMUR ad buy also says the
 8 advertisement includes a “candidate (Republican) discussing his values/beliefs.”²⁶

9 The first advertisement, “Us,” which reportedly aired on July 8, begins with a succession
 10 of images and sound clips of several Democratic and Republican presidential candidates. It
 11 thereafter consists of the following script, much of which includes Kasich speaking directly to
 12 the camera:²⁷

13 Female Announcer: Hey, what about us?
 14

15 Kasich: My dad carried mail on his back. They called him ‘John
 16 the Mailman,’ and they loved him, because he looked out for
 17 everyone in his neighborhood. I learned something from my father:
 18 Do the best to look for other people. We turned Ohio around. And
 19 we’ve created jobs and cut taxes and balanced our budgets. I spent
 20 18 years on the Armed Services Committee with some of the finest
 21 defense minds in the world. I was one of the chief architects of

²³ New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report; New Day for America, IRS 2015 Form 8872 Year End Disclosure Report.

²⁴ MUR 6955 New Day Resp. at 2.

²⁵ MUR 6983 Supp. Compl. at 3.

²⁶ MUR 6955 Compl. at 2-3; MUR 6983 Supp. Compl. at 3.

²⁷ MUR 6955 Compl. at 3 (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_tl).

1 balancing the budget, it's the first time we did it since man walked
2 on the moon, we haven't done it since. It can happen again.

3
4 Female Announcer: John Kasich's for us.

5
6 The advertisement does not include a "stand-by-your-ad disclaimer." New Day asserts that the
7 advertisement used footage from interviews with Kasich filmed prior to July 8, 2015, and that
8 the stations categorized the ad buys as "Non-Candidate Issue Ads."²⁸

9 On July 23, 2015, two days after Kasich announced his candidacy and the same day on
10 which Kasich for America registered as Kasich's authorized committee, New Day registered
11 with the Commission as an independent expenditure-only political committee ("IEOPC").²⁹

12 The Complaint also alleges that on July 26 and August 5, New Day ran two additional
13 advertisements featuring Kasich. The July 26 advertisement, titled "Balancing the Budget,"³⁰
14 begins with a succession of images and sound clips of several Democrat and Republican
15 presidential candidates and continues with the following script:

16 Female Announcer: No one running for president has balanced the
17 federal budget for us but John Kasich.
18

²⁸ 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.

²⁹ See New Day for America, FEC Form 1 Statement of Org. (July 23, 2015).

³⁰ 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/Ny8yMS8xNTpCYWxhbmNpbmcmdGhllEJ1ZGldA>.

1 Kasich: I spent ten years of my life fighting to balance the budget,
2 not because it was about numbers, but it was about values. We don't
3 have a right to live beyond our means, and make sure that our
4 children pay the debt.
5

6 Female Announcer: John Kasich helped balance the federal budget,
7 turned around the Ohio economy, and has 18 years' experience on
8 the Armed Services Committee. No one else comes close.
9

10 Kasich: And I was willing to take beatings when I offered my own
11 budget proposals for America because I believed in it. [Caption:
12 reads: "John Kasich. President 2016."] The most important thing
13 in leadership is not what you say, it's what you do.
14

15 Female Announcer: John Kasich's for us.
16

17 The script for the August 5 advertisement, "John Kasich is for Us – National Security,"³¹

18 is as follows:

19 Female Announcer: [over images of President Obama and Hillary
20 Clinton] Weakness, handwringing, inexperience. They're looking
21 out for us?
22

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

³¹ MUR 6983 Compl. at 2 (Nov. 10, 2015). See "John Kasich is for Us – National Security," available at https://www.youtube.com/watch?v=JYDplaO_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>.

1 **C. Kasich for America’s Earliest Reported Activities**

2 As noted above, Kasich formally announced his presidential candidacy on July 21, 2015,
3 and filed a Statement of Candidacy on July 23.³² Kasich for America also registered as Kasich’s
4 authorized committee for the presidential election on July 23.³³ The Committee’s first disclosure
5 report was the October 2015 Quarterly Report.³⁴ That report disclosed that the Committee began
6 receiving contributions for the 2016 presidential primary election on July 3, 2015, and that it
7 exceeded \$5,000 in contributions on July 13.³⁵ It also showed that the Committee’s first
8 disbursement occurred on July 10, 2015, eleven days before Kasich publicly announced his
9 candidacy.³⁶ The report disclosed a small number of disbursements between July 10 and July 21,
10 mostly for expenses related to travel to New Hampshire, though it is not clear from the face of
11 the reports when that travel occurred. The Committee did not report receiving any in-kind
12 contributions from New Day in this report, nor did it designate any disbursements as having been
13 made for testing-the-waters expenses.

14 **III. LEGAL ANALYSIS**

15 **A. There is Reason to Believe that New Day Made Impermissible and Excessive**
16 **In-Kind Contributions and the Committee Failed to Report Them**

17 An individual becomes a candidate under the Act if: (a) such individual receives
18 contributions or makes expenditures in excess of \$5,000, or (b) such individual gives his or her
19 contributions or makes expenditures in excess of \$5,000, or (b) such individual gives his or her

32 Statement of Candidacy (July 23, 2015).

33 Kasich for America, Statement of Org. (July 23, 2015).

34 2015 Oct. Quarterly Rpt., Kasich for America at 9 (Oct. 15, 2015).

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

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

1 consent to another person to receive contributions or make expenditures on behalf of such
2 individual and if such person has received such contributions or has made such expenditures in
3 excess of \$5,000.³⁷

4 The Commission has established testing-the-waters exemptions that permit an individual
5 to test the feasibility of a campaign for federal office without becoming a candidate under the
6 Act.³⁸ These exemptions exclude from the definitions of “contribution” and “expenditure” those
7 funds received and payments made solely to determine whether an individual should become a
8 candidate.³⁹ These regulations seek to draw a distinction between activities directed to
9 evaluating the feasibility of one’s candidacy and conduct signifying that a decision to become a
10 candidate has been made.⁴⁰ However, only funds permissible under the Act may be used for
11 testing-the-waters activities.⁴¹

12 Testing-the-waters activities for which only funds permissible under the Act may be used
13 include, but are not limited to, payments for polling, telephone calls, and travel.⁴² In advisory
14 opinions, the Commission has stated that “travel throughout the country for speaking to political
15 and non-political groups on a variety of public issues and meeting with opinion makers and
16 others interested in public affairs for the purpose of determining whether potential political

³⁷ 52 U.S.C. § 30101(2).

³⁸ 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).

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

⁴⁰ See Advisory Op. 1981-32 (Askew) (“AO 1981-32”).

⁴¹ 11 C.F.R. §§ 100.72, 100.131.

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

1 support exists for a national campaign” fits within testing-the-waters activities,⁴³ and that
2 expenses for such activities should be allocated to the individual’s potential candidacy.⁴⁴
3 Additionally, in MUR 5908 (Duncan Hunter), the Commission found reason to believe that a
4 candidate’s spending on travel to early primary states “to publicize his Presidential campaign,
5 and/or gauge support for his campaign” before declaring his candidacy should have been
6 reported as testing-the-waters or campaign expenses.⁴⁵

7 An individual who is testing the waters need not register or file disclosure reports with
8 the Commission unless and until the individual subsequently decides to run for federal office.⁴⁶
9 However, an individual who tests the waters must keep financial records and, if he or she
10 becomes a candidate, all funds received or payments made in connection with testing the waters
11 become contributions and expenditures under the Act and must be reported as such in the first
12 report filed by the candidate’s principal campaign committee.⁴⁷

13 The Complaint alleges that New Day, after its founding in April 2015, illegally paid for
14 Kasich’s testing-the-waters activities such as travel and “political advertising that allowed him to

⁴³ 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).

⁴⁴ *See* Advisory Op. 1985-40 (Republican Majority Fund) at 9.

⁴⁵ 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.*

⁴⁶ *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”).

⁴⁷ 11 C.F.R. § 101.3.

1 convey his policy prerogatives and solicit support for his nascent candidacy.”⁴⁸ New Day’s
2 response does not confirm or deny the allegation that New Day paid for Kasich’s testing-the-
3 waters activity. The Committee’s initial report to the Commission shows that it received
4 \$40,050 in contributions and made \$19,180 in disbursements prior to July 21, but it does not
5 specifically designate any of these entries as in-kind contributions made to Kasich for testing-
6 the-waters activities, and the first reported disbursement occurred only 11 days prior to Kasich’s
7 announcement of his candidacy.⁴⁹ Nonetheless, New Day’s IRS disclosure reports indicate that
8 New Day made substantial disbursements for media consulting, phone banks, polling, airfare,
9 travel, and travel expense reimbursements.⁵⁰

10 The available information indicates that Kasich did spend funds to test the waters prior to
11 declaring his candidacy in July 2015, and that New Day may have paid for at least a portion of
12 those expenses. In the months before he announced his candidacy, Kasich began traveling the
13 country to speak about his policy positions on nationwide issues such as balancing the budget,
14 tax reform and healthcare. During this time, Kasich reportedly engaged in fundraising and made
15 statements indicating that he was considering running for President.⁵¹ For example, CNN

⁴⁸ 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), 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 early primary states of New Hampshire and South Carolina, off the hook for his travel expenses.”).

⁴⁹ *See* Kasich for America Oct. 2015 Quarterly Report (Oct. 15, 2015).

⁵⁰ 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).

⁵¹ Section II.A, *supra*.

1 reported that Kasich said in late April that “If I can win, I’m likely to run,”⁵² and stated that
2 “[o]ne good thing about thinking of running for President is that I get invited to stuff like this,
3 where I can talk about what I care about.”⁵³ He explained:

4 I’ve taken a big step, for me, and created a political organization to
5 accumulate more resources so I can travel more robustly and begin
6 to think about infrastructure. And then once that’s done, if I should
7 be successful in raising . . . that seed money, then . . . the next step
8 is to see if people like what I have to say. And then . . . find out
9 around the country whether I can raise enough money to compete at
10 least in the early states. If that works, then I’m likely to go
11 forward.⁵⁴

12 Further, Kasich’s travel included stops in key early primary states, including South
13 Carolina and New Hampshire, where, among other things, he held news conferences, addressed
14 Republican caucuses, and spoke at the Republican Leadership Summit.⁵⁵

15 Further, it appears that New Day, once it was formed in April 2015, may have paid for at
16 least a portion of Kasich’s testing-the-waters expenses. Kasich was the face of New Day and it
17 appears that New Day was formed as a vehicle for Kasich to present his platform of ideas for the
18 country’s future. In Kasich’s April 20, 2015, video message announcing the formation of New
19 Day, Kasich stated, “Those are some of my thoughts, but I would like to hear what yours are too,
20 and I’d like to talk to you about them. And that’s why I’m announcing that we’ve created the

⁵² 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/>.

⁵³ *Id.*

⁵⁴ 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/>).

⁵⁵ *See supra*, Section II.A.

1 New Day for America committee. We're going to start getting around the country more,
2 meeting and talking with more people, and see if by coming together we can put in motion the
3 solutions that will get this great idea called America working the right way again."⁵⁶
4 Furthermore, Kasich appears to acknowledge that a "political organization" that he had recently
5 formed — presumably New Day, as Kasich did not establish a testing-the-waters account — was
6 used to engage in testing-the-waters activities.

7 Thus, it appears likely New Day funded Kasich's travel, which was at least in part
8 connected to his testing-the-waters activities.⁵⁷ Even if Kasich's travel on behalf of New Day
9 was partially unrelated to his testing-the-waters activities, he would have to allocate any
10 expenses between New Day and his testing-the-waters activities. Because New Day is an
11 IEOPC that accepted contributions from corporations and contributions in excess of the Act's
12 limits,⁵⁸ and because an "independent expenditure-only political committee may not make
13 contributions to candidates ... including in-kind contributions,"⁵⁹ New Day may not make
14 contributions to Kasich, including by making payments that are later required to be reported by
15 the Committee as contributions for testing-the-waters activities.

⁵⁶ Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 Presidential Run*, CLEVELAND.COM (Apr. 20, 2015), http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html.

⁵⁷ *Cf.* MUR 6932 (Clinton).

⁵⁸ *See, e.g.*, 2015 Amend. Year-End Report of New Day for America at 15, 19.

⁵⁹ Advisory Op. 2017-10 (Citizens Against Plutocracy).

1 Therefore, the Commission finds reason to believe that New Day violated 52 U.S.C.
2 §§ 30116(f) and 30118(a) by making excessive and prohibited in-kind contributions to the
3 Committee for testing-the-waters activities.

4 **B. There Is Reason to Believe the New Day Advertisements Were Coordinated**
5 **Communications**

6 The Act defines a “contribution” to include “any gift . . . or anything of value made by
7 any person for the purpose of influencing any election for Federal office.”⁶⁰ IEOPCs are
8 prohibited from making contributions to candidates and their authorized committees,⁶¹ and it is
9 unlawful for candidates, political committees, and their officers and employees to knowingly accept
10 an excessive or prohibited contribution.⁶²

11 A “coordinated expenditure” — which is an expenditure made by any person “in
12 cooperation, consultation, or concert, with, or at the request or suggestion of,” a candidate, a
13 candidate’s authorized committee, or the agents of either — is also a contribution to the
14 candidate.⁶³ A “coordinated communication” is one form of coordinated expenditure.⁶⁴ Thus,
15 “[a]n independent expenditure-only political committee may not make contributions to
16 candidates or political party committees, including in-kind contributions such as coordinated
17 communications.”⁶⁵

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

⁶¹ *See* 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. at 2010-11 (Commonsense Ten) at 2-3.

⁶² 52 U.S.C. §§ 30116(f), 30118(a)

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

⁶⁴ *See* 11 C.F.R. § 109.21(b).

⁶⁵ Advisory Op. 2017-10.

1 Commission regulations provide a three-prong test to determine if a communication is a
2 “coordinated communication.”⁶⁶ First, a person other than the federal candidate or the
3 candidate’s authorized committee must pay for all or part of the communication.⁶⁷ Second, the
4 communication must satisfy at least one content standard.⁶⁸ Third, the communication must
5 satisfy at least one conduct standard.⁶⁹

6 The Complaint alleges that the three New Day advertisements featuring Kasich (“Us,”
7 “Balancing the Budget,” and “John Kasich is for Us – National Security,” collectively, the “New
8 Day Ads”) are coordinated communications and thus, because New Day accepts soft money,
9 they are prohibited in-kind contributions to the Committee.⁷⁰ Respondents argue that there was
10 no coordinated communication because the footage used in the video appearing on New Day’s
11 website and in the New Day advertisements was filmed before Kasich became a candidate, and
12 thus was not made “in cooperation, consultation or concert with” a candidate.⁷¹

13 Here, each of the three New Day advertisements — “Us,” “Balancing the Budget,” and
14 “John Kasich is for Us – National Security” — appear to be coordinated communications. First,
15 the ads were paid for by a third party, thereby satisfying the first prong of the coordination

⁶⁶ 11 C.F.R. § 109.21(a).

⁶⁷ *Id.* § 109.21(a)(1).

⁶⁸ *Id.* § 109.21(a)(2), (c).

⁶⁹ *Id.* § 109.21(a)(3), (d).

⁷⁰ MUR 6955 Compl. at 9-12; MUR 6983 Compl. at 3-7.

⁷¹ MUR 6955 New Day Resp. at 8-9.

1 analysis. Second, all three ads satisfy the content standard as “public communications”⁷² that
2 contain express advocacy or its functional equivalent.⁷³

3 For purposes of the content standard of the coordinated communications test, a
4 communication that is the functional equivalent of express advocacy means a communication
5 that “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a
6 clearly identified Federal candidate.”⁷⁴

7 “Us,” which aired in New Hampshire on July 8 (before Kasich’s July 21 announcement
8 event but after the June 28 Politico article), begins with a reference to the 2016 presidential
9 primary and general elections by presenting a succession of images and sound clips of several
10 Democratic and Republican presidential candidates. A narrator then asks “Hey, what about us?”
11 The ad thereafter features Kasich discussing his accomplishments, as well as his qualifications
12 and experience “creat[ing] jobs,” “cut[ting] taxes,” “balanc[ing] our budgets,” and serving on the
13 Armed Services Committee (“John Kasich looked out for America”), before concluding, “John
14 Kasich’s for us.” The tagline “John Kasich’s for us” in context — that is, paired with a recitation
15 of Kasich’s political experience, contrasting other primary candidates, and the absence of an
16 identifiable issue beyond the qualifications of Kasich himself — can have “no reasonable
17 interpretation other than as an appeal to vote” for Kasich.⁷⁵

⁷² “Public communication” includes “a communication by means of any broadcast, cable, or satellite communication . . .” 11 C.F.R. § 100.26.

⁷³ *Id.* § 109.21(c)(3), (5), § 100.22(a).

⁷⁴ *Id.* § 109.21(c)(5).

⁷⁵ *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007).

1 “Balancing the Budget” aired on July 26, 2015, five days after Kasich’s announcement
2 event on July 21, and three days after New Day’s registration with the Commission as an IEOPC
3 on July 23. It explicitly refers to Kasich as a candidate for President (“No one running for
4 president has balanced the federal budget for us but John Kasich”), discusses his experience
5 balancing the budget and serving on the Armed Services Committee, compares him favorably to
6 other candidates for President (“No one else comes close”), includes the caption “John. Kasich.
7 President 2016,” before concluding, “John Kasich’s for us.”⁷⁶ The caption is akin to the phrases
8 enumerated in section 100.22(a) (such as “Bill McKay in ‘94”) and in context can have no other
9 reasonable meaning than to urge Kasich’s election. The ad thus contains express advocacy.

10 Likewise, the “John Kasich is for Us – National Security” advertisement discusses
11 Kasich’s qualifications for office in the context of the upcoming election, contrasting them with
12 the “weakness, handwringing, [and] inexperience” of fellow candidate Hillary Clinton as well as
13 President Obama, before closing with an image of Kasich over the caption “John Kasich.
14 President 2016.” The caption is akin to the phrases enumerated in section 100.22(a) (such as
15 “Bill McKay in ‘94”) and in context can have no other reasonable meaning than to urge Kasich’s
16 election.⁷⁷ The ad thus contains express advocacy.

17 Third, the conduct prong of the coordination test is satisfied if: (1) the communication
18 was created, produced, or distributed at the request or suggestion of a candidate, campaign, or

⁷⁶ See 11 C.F.R. § 100.22(a).

⁷⁷ 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 political party committee, or the payor suggests the communication and the candidate, campaign
2 or political party committee assents to the suggestion (the “request or suggestion” standard);
3 (2) the candidate, campaign, or political party committee was materially involved in decisions
4 regarding the communication (the “material involvement” standard); or (3) the communication
5 was created, produced, or distributed after one or more substantial discussions between the payor
6 and the candidate, campaign, or a political party committee involving information that is material
7 to the communication (the “substantial discussion” standard).⁷⁸

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

16 Based on the available information, the Commission finds reason to believe New Day
17 made excessive and prohibited contributions in the form of coordinated communications in
18 violation of 52 U.S.C. §§ 30116 and 30118(a), and failed to disclose those contributions in
19 violation of 52 U.S.C. § 30104(b).

⁷⁸ 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).

1 **C. There is Reason to Believe that the New Day Ads Failed To Include Complete**
2 **Disclaimers**

3 Under the Act and Commission regulations, any public communication that expressly
4 advocates the election or defeat of a clearly identified federal candidate must include a
5 disclaimer.⁷⁹ If the communication is paid for by other persons but authorized by a candidate, an
6 authorized political committee of a candidate, or its agents, the communication shall clearly state
7 that the communication has been paid for by such other persons and authorized by such
8 authorized political committee.⁸⁰

9 Here, the New Day Ads each included disclaimers but did not include a stand by your ad
10 portion indicating that Kasich approved the advertisements. The Complaint alleges that the New
11 Day Ads failed to include proper disclaimers under 52 U.S.C. § 30120 because they did not state
12 that Kasich approved the content.⁸¹ As noted above, we have concluded that Kasich became a
13 candidate as least as early as June 28, 2015, prior to the airing of the advertisements, and that
14 Kasich's involvement with New Day, including filming footage for the advertisements, resulted
15 in the advertisements being coordinated communications between Kasich and New Day under
16 Commission regulations. The same facts that support these conclusions support the conclusion
17 that Kasich approved the advertisements. Accordingly, the Commission finds reason to believe
18 that New Day violated 52 U.S.C. § 30120(d)(1)(B) by failing to include complete disclaimers.

⁷⁹ See 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2).

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

⁸¹ MUR 6955 Compl. at 3; MUR 6983 Compl. at 2-3.