



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

November 25, 2020

**VIA ELECTRONIC MAIL**

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RE: MURs 6955 and 6983  
John R. Kasich, *et al.*

Dear Messrs. Braden and Stanley:

Based on complaints filed with the Federal Election Commission on August 13, 2015, and November 10, 2015, and information supplied by your clients, John R. Kasich and Kasich for America and J. Matthew Yuskewich, in his official capacity as treasurer (the "Committee"), the Commission, on April 23, 2019, found that there was reason to believe that John R. Kasich violated 52 U.S.C. § 30102, and that Kasich and the Committee violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a), and 11 C.F.R. §§ 110.72 and 100.131, and instituted an investigation of this matter.

Based on the available record, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that John R. Kasich violated 52 U.S.C. § 30102, and that John R. Kasich and the Committee have violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a), and 11 C.F.R. §§ 110.72 and 100.131.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file a brief stating your position on the issues and replying to the brief of the General Counsel.<sup>1</sup> The General Counsel's brief and any brief which you may submit will be considered by the

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<sup>1</sup> You may submit enforcement materials, such as reply briefs, to the FEC electronically at [cela@fec.gov](mailto:cela@fec.gov), or to the staff attorney assigned to the matter as applicable. Enforcement-related materials submitted only by mail will be deemed received when actually received by OGC staff, subject to delays due to the intermittent processing of mail. See [https://www.fec.gov/resources/cms-content/documents/status\\_of\\_fec\\_operations\\_8-10-2020.pdf](https://www.fec.gov/resources/cms-content/documents/status_of_fec_operations_8-10-2020.pdf).

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Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days and may require that your clients toll the running of the statute of limitations before granting such an extension.

You may also request additional information gathered by the Commission in the course of its investigation in this matter. *See Agency Procedure for Disclosure of Documents and Information in the Enforcement Process*, 76 Fed. Reg. 34986 (June 15, 2011).

In addition, you may also request an oral hearing before the Commission. *See Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64919 (Nov. 19, 2007) and *Amendment of Agency Procedures for Probable Cause Hearings*, 74 Fed. Reg. 55443 (Oct. 28, 2009). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted. If you request a probable cause hearing, the Commission may request that you toll the statute of limitations in connection with that hearing. *Id.* at 64,920.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement. If we are unable to reach an agreement after 30 days, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty. See 52 U.S.C. § 30109(a)(6)(A).

Should you have any questions, please contact Assistant General Counsel Mark Shonkwiler at (202) 213-3067 or Staff Attorney Wanda Brown at (202) 694-1513.

Sincerely,

Lisa J. Stevenson /by CK

Lisa J. Stevenson  
Acting General Counsel

Enclosure  
Brief

1 **BEFORE THE FEDERAL ELECTION COMMISSION**  
2

In the Matter of )  
 )  
John R. Kasich ) MURs 6955 & 6983  
Kasich for America and )  
J. Matthew Yuskewich in his official )  
capacity as treasurer )

3 **GENERAL COUNSEL'S BRIEF**  
4

5 **I. STATEMENT OF THE CASE**

6 During the three and a half months before he declared his 2016 presidential candidacy on  
7 July 21, 2015, Ohio Governor John Kasich was involved in creating, raising funds for, and  
8 participating in the activities of a non-profit corporation called New Day for America ("New  
9 Day"), which spent \$823,809 between April and July 2015 on activities promoting Kasich's  
10 political views and record of public service. Once Kasich declared his candidacy, New Day  
11 registered with the Commission as an independent expenditure-only political committee that  
12 spent over \$11 million dollars on an ostensibly independent advertising that expressly advocated  
13 either on behalf of Kasich or against his 2016 Republican Party primary election opponents.

14 New Day's activities prior to Kasich's declaration of candidacy included spending  
15 \$218,500 on public opinion polling, spending \$295,000 on political campaign consultants who  
16 interacted with and took video footage of Kasich, and spending approximately \$200,000 on  
17 nineteen trips Kasich and his political entourage took to states that would later hold presidential  
18 primaries. After being designated as Kasich's principal campaign committee, Kasich for  
19 America and J. Matthew Yuskewich, in his official capacity as treasurer ("the Committee") did  
20 not report Kasich incurring any pre-candidacy testing the waters expenses or accepting any in-  
21 kind contributions in connection with New Day funded public opinion polling, political  
22 consultants, or travel expenses. The Committee also did not report receiving any in-kind

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1 contributions in connection with the advertising campaign New Day sponsored immediately after  
2 the declaration of candidacy that utilized video footage of its political consultants interviewing  
3 Kasich in late June 2015.

4           Based on the Complaints, Responses, and available information, the Commission found  
5 reason to believe that: (1) Kasich violated 52 U.S.C. §§ 30116(f) and 30118(a) and 11 C.F.R.  
6 §§ 100.72(a) and 100.131(a), and the Committee violated 52 U.S.C. §§ 30104(b), 30116(f), and  
7 30118(a) and 11 C.F.R. §§ 100.72 and 100.131, in connection with accepting impermissible,  
8 excessive, and unreported contributions from New Day for testing-the-waters activities;  
9 (2) Kasich violated 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy;  
10 and (3) Kasich and the Committee violated 52 U.S.C. §§ 30116 and 30118(a) by accepting  
11 prohibited and excessive in-kind contributions in the form of coordinated communications from  
12 New Day and that the Committee violated 52 U.S.C. § 30104(b) by failing to disclose those  
13 contributions.

14           The Commission's investigation was impeded by a lack of cooperation from involved  
15 parties, including Kasich, the Committee, New Day, and New Day's political consultant, and  
16 various Kasich's 2015 travel companions, all of whom refused to comply fully with the  
17 Commission's subpoenas, which substantially reduced the extent to which New Day's and  
18 Kasich's activities and relationship were fully revealed. Specifically, Kasich, the Committee,  
19 New Day and New Day's consultants refused to provide the Commission with details regarding  
20 the public opinion polling, the political consulting work, and the activities undertaken on  
21 Kasich's New Day-funded trips.<sup>1</sup>

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<sup>1</sup> Kasich and the Committee filed a Motion to Quash the Subpoena that the Commission authorized in August 2019, but refused the Office of the General Counsel's request to toll the applicable statute of limitations during the period in which the Commission lacked a quorum to rule on their motion. Following

1           Kasich and the Committee claim that New Day did not support Kasich's candidacy until  
2 after his July 21, 2015, declaration of candidacy. Even so, Respondents refuse to explain or  
3 disclose all of their communications with New Day regarding the public opinion polling,  
4 political consulting work, and travel to presidential primary states. Although Kasich made  
5 explicit statements linking his New Day funded travel to making a decision to declare his  
6 candidacy, Respondents deny that Kasich engaged in any pre-declaration testing the waters  
7 activity. Respondents maintain that all of New Day's activities were to promote Kasich's  
8 conservative ideals and share his personal successes as Governor of Ohio, and not to promote his  
9 presidential candidacy. Respondents also maintain that Kasich stopped working with New Day  
10 in late July 2015, and that they did not coordinate with New Day regarding its pro-Kasich  
11 advertising campaign that used video footage from Kasich's interview with New Day  
12 consultants.

13           Despite Respondents' assertions, the information reflects that: (1) New Day paid for  
14 Kasich's testing-the-waters activities with impermissible and excessive funds, which Kasich and  
15 the Committee failed to report; (2) Kasich failed to timely file his Statement of Candidacy with  
16 the Commission; and (3) Kasich and the Committee accepted in-kind contributions from New  
17 Day in the form of a coordinated advertising campaign. In addition, based on Respondents'  
18 failure to fully comply with the Commission's subpoenas, the Commission is entitled to draw an  
19 adverse inference regarding the information Respondents have refused to disclose.<sup>2</sup>

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discussions regarding their objections, Respondents made a limited production that failed to provide the items required by the Commission's subpoena.

<sup>2</sup> See *Int'l Union v. Nation Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). In the context of administrative law proceedings, the agency need not resort to enforcement of a subpoena in order to make the inference. *Id.* at 1339. "The adverse-inference rule, we said is a 'well recognized means available for vindicating [an agency's] power to require the production of relevant documents short of a

1           Accordingly, based on the available information, and the Respondents' failure to fully  
2   comply with the Commission's subpoena, we are prepared to recommend that the Commission:  
3   (1) find probable cause to believe that Kasich violated 52 U.S.C. §§ 30116(f) and 30118(a) and  
4   11 C.F.R. §§ 100.72(a) and 100.131(a) and the Committee violated 52 U.S.C. §§ 30104(b),  
5   30116(f), and 30118(a) and 11 C.F.R. §§ 100.72 and 100.131, in connection with accepting and  
6   failing to report impermissible and excessive contributions from New Day for testing-the-waters  
7   activities; (2) find probable cause to believe that Kasich violated 52 U.S.C. § 30102(e)(1) by  
8   failing to timely file his Statement of Candidacy; and (3) find probable cause to believe that  
9   Kasich and the Committee violated 52 U.S.C. §§ 30116 and 30118(a) by accepting prohibited  
10   and excessive in-kind contributions in the form of coordinated communications from New Day  
11   and that the Committee violated 52 U.S.C. § 30104(b) by failing to disclose those contributions.

## 12   **II.   FACTUAL BACKGROUND**

13           On July 21, 2015, Ohio Governor John Kasich publicly announced his candidacy for  
14   President of the United States; he filed a Statement of Candidacy with the Commission on July  
15   23, 2015.<sup>3</sup> The Committee registered as Kasich's authorized committee for the presidential  
16   election on the same day.<sup>4</sup> As discussed below, between April and July 2015, Kasich was  
17   involved in establishing, funding, and operating a New Day which served as a vehicle for his

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subpoena enforcement proceeding.” *Atlantic Richfield Company v. United States Department of Energy*,  
769 F.2d 771, 794 (D.C. Cir. 1985).

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

<sup>4</sup> MUR 6955 Committee Resp. at 3; Kasich for America, Statement of Organization (July 23, 2015).  
On July 1, 2015, prior to its designation as Kasich's authorized committee, the Committee incorporated as  
an Ohio non-profit organization, and then registered with the IRS as a section 527 organization.

1 presidential testing the waters activities and acted as a de facto campaign committee prior to his  
 2 formal declaration of candidacy.

3 **A. Formation of New Day for America**

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.<sup>5</sup> Matthew Carle, the Executive Director of  
 6 New Day, previously served on Kasich's gubernatorial staff as director of legislative affairs and  
 7 ran Kasich's 2014 gubernatorial campaign.<sup>6</sup>

8 Kasich is featured in New Day's launch video, and appears to be its primary  
 9 spokesperson.<sup>7</sup> When it was founded, New Day launched a website that featured Kasich's  
 10 picture and biography, and a video of Kasich announcing the creation of New Day and  
 11 discussing a variety of policy goals.<sup>8</sup> Kasich's complete statement 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  
 14 that divide us and rediscover the values that we all share which  
 15 have made America great. Values like personal responsibility,  
 16 community, respect, courage, and of course, faith. There's so

<sup>5</sup> See Factual and Legal Analysis at 5, MURs 6955 and 6983 (Kasich, *et al.*) ("Kasich F&LA").

<sup>6</sup> See MURs 6955 & 6983, Response of John R Kasich, Kasich for America, Inc., and J. Matthew Yuskewich to Subpoena to Produce Documents and Order to Submit Written Answers ("Kasich Subpoena Response") at 3 (Nov. 19, 2019); Henry J. Gomez, *Ohio governor's race: Matt Carle will leave John Kasich's administration to run re-election campaign*, NORTHEAST OHIO MEDIA GROUP, Aug. 9, 2013, at [http://www.cleveland.com/open/index.ssf/2013/08/ohio\\_governors\\_race\\_matt\\_carle.html](http://www.cleveland.com/open/index.ssf/2013/08/ohio_governors_race_matt_carle.html). Other New Day employees include Jeff Polesovsky, Carle's deputy in the 2014 Kasich campaign, Dave Luketic, a "Kasich insider" who worked on the 2014 campaign and was the "architect" of Kasich's national tour to promote a balanced budget amendment, and Kasich aide Chris Schrimpf. See Henry J. Gomez, *John Kasich builds his 2016 team*, NORTHEAST OHIO MEDIA GROUP, May 5, 2015, at [http://www.cleveland.com/open/index.ssf/2015/05/john\\_kasich\\_builds\\_his\\_2016\\_te.html](http://www.cleveland.com/open/index.ssf/2015/05/john_kasich_builds_his_2016_te.html).

<sup>7</sup> Kasich F&LA at 6, MURs 6955 and 6983 (describing Kasich's appearance in New Day's launch video).

<sup>8</sup> MUR 6955 Compl. at 2 (Aug. 13, 2015). The video no longer appears on New Day's website, but is available at [http://www.cleveland.com/open/index.ssf/2015/04/ohio\\_gov\\_john\\_kasich\\_begins\\_ra.html](http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html) (last visited July X, 2020). Available information does not show that Kasich has formed any similar group to advocate for issues when he was not contemplating a presidential run.

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

21 Once it registered with the IRS, New Day did not report that it supported or opposed any  
22 candidate for federal office, reporting instead that it discussed issues of general public  
23 importance and made only non-candidate related expenditures.<sup>9</sup> In its 2015 Mid-Year Report to  
24 the IRS, New Day reported that it raised \$11,130,730, and spent \$823,809 from April 20, 2015,  
25 to June 30, 2015.<sup>10</sup>

26 On July 23, 2015, two days after Kasich announced his candidacy and the same day on  
27 which Kasich for America registered as Kasich's authorized committee, New Day registered  
28 with the Commission as an independent expenditure-only political committee ("IEOPC").<sup>11</sup> In

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<sup>9</sup> 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).

<sup>10</sup> 2015 Mid-Year Report, Form 8872, Political Organization Report of Contributions and Expenditures, New Day for America (July 30, 2015).

<sup>11</sup> See New Day for America, FEC Form 1, Statement of Org. (July 23, 2015).



1 its reports filed with the Commission, New Day ultimately reported raising an additional  
2 \$3,336,360.27 between July and December 2015 and \$11,765,822.89 in 2016.<sup>12</sup> New Day  
3 reported making \$11,001,240.93 in independent expenditures supporting Kasich, following his  
4 declaration of candidacy, during the 2016 election cycle.<sup>13</sup> New Day also reported spending  
5 funds opposing candidates who were competing with Kasich for the 2016 Republican  
6 nomination for President. Specifically, it reported spending \$86,645.54 opposing Donald  
7 Trump, \$31,470.82 opposing former New Jersey Governor Chris Christie, \$24,661.98 opposing  
8 Senator Ted Cruz, and \$21,237.30 opposing former Florida Governor Jeb Bush.<sup>14</sup>

9 **B. Kasich's Activities Prior to Public Candidacy Announcement**

10 Beginning in January 2015 through the date on which he publicly announced his  
11 candidacy for President on July 21, 2015, Kasich made numerous trips outside of Ohio,  
12 including several to key early presidential primary and caucus states. His first trips to the  
13 following places were paid for by the Ohio Republican Party:

- 14
- 15 • Michigan – April 13, 2015 (one-day trip);
  - 16 • South Carolina – April 17, 2015 (two-day trip);
  - 17 • New Hampshire – April 18, 2015 (one-day trip);
  - 18 • Washington, DC – April 23, 2015 (four-day trip);
  - Washington, DC – May 1, 2015 (one-day trip).<sup>15</sup>

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<sup>12</sup> See 2015 Amended Year-End Report, New Day for America (July 11, 2016); 2016 Year-End Report, New Day for America (Jan. 31, 2017).

<sup>13</sup> See Independent Expenditures, New Day for America, 2015-16  
<https://www.fec.gov/data/committee/C00581868/?tab=spending&cycle=2016>.

<sup>14</sup> See *id.*

<sup>15</sup> Joint RTB Resp. at 23.

1           According to information provided by the Respondents, New Day then paid for Kasich to  
2 take the following nineteen trips in the two months prior to declaring his candidacy on July 21,  
3 2015:

- 4           • California – May 13, 2015 (four-day trip);
- 5           • New York – May 18, 2015 (three-day trip);
- 6           • Georgia – May 26, 2015 (one-day trip);
- 7           • South Carolina – May 26, 2015 (two-day trip);
- 8           • Texas – May 27, 2015 (two-day trip);
- 9           • New Hampshire – June 4, 2015 (two-day trip);
- 10          • Nevada – June 11, 2015 (one-day trip);
- 11          • Utah- June 11, 2015 (two-day trip);
- 12          • North Carolina – June 15, 2015 (one-day trip);
- 13          • Michigan – June 15, 2015 (two-day trip);
- 14          • New Hampshire – June 16, 2015 (two-day trip);
- 15          • Washington, DC – June 19, 2015 (one-day trip);
- 16          • Illinois – June 22, 2015 (two-day trip);
- 17          • Illinois – June 23, 2015 (one-day trip);
- 18          • Iowa – June 23, 2015 (two-day trip);
- 19          • Washington, DC – July 7, 2015 (one-day trip);
- 20          • South Carolina – July 7, 2015 (two-day trip);
- 21          • Tennessee – July 8, 2015 (two-day trip);
- 22          • New Hampshire – July 12, 2015 (two-day trip).<sup>16</sup>

23           According to media reports, during these trips Kasich presented himself as the  
24 “pragmatic conservative seeking solutions,” advocated for a variety of nationwide policies,

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<sup>16</sup> *Id.* at 23-27.

1 including a balanced budget amendment to the U.S. Constitution, and, in Tennessee, urged the  
 2 Governor to expand Medicare; he also reportedly engaged in fundraising.<sup>17</sup>

3 Kasich's own public statements likewise show that he was considering a presidential run  
 4 during this time. On May 17, 2015, Kasich appeared at a New America Foundation conference  
 5 in Washington, DC, where he also interviewed on CNN. In that interview, Kasich, when asked  
 6 whether he was running for President, responded that he "[didn't] know yet," but described how  
 7 he was evaluating a potential candidacy.<sup>18</sup> He explained:

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

16 Because New Day was the only organization started by Kasich at the relevant time, the  
 17 new "political organization" referenced in this statement appears to be New Day. Respondents  
 18 have not denied this conclusion. Moreover, Kasich's statement to CNN about travel matches the  
 19 above-described travel, which was funded by New Day, and expressly links such travel to his  
 20 decision-making process with regard to his candidacy for President.

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<sup>17</sup> See, e.g., Robert Higgs, *John Kasich's travels: a timeline*, CLEVELAND PLAIN DEALER (Sept. 10, 2015), [http://www.cleveland.com/open/index.ssf/2015/09/john\\_kasichs\\_travels\\_a\\_timelin.html](http://www.cleveland.com/open/index.ssf/2015/09/john_kasichs_travels_a_timelin.html) (documenting Kasich's travels from January 2015 through his formal announcement in July 2015). The article specifically notes fundraising trips in California from May 13-15, 2015, and Dallas on May 29, 2015, but does not speak as to whether the fundraising was for New Day or was expressly for testing the waters.

<sup>18</sup> 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) (cited in Kasich F&LA at 14, MURs 6955 and 6983).

<sup>19</sup> *Id.*

1 Further, CNN reported that “a source close to Governor Kasich told the media outlet that  
2 he is ‘very likely’ to run for President.”<sup>20</sup> The same story reported that Kasich told CNN that “If  
3 I can win, I’m likely to run.”<sup>21</sup> In addition, when speaking at the New America Foundation  
4 conference, Kasich reportedly said that “[o]ne good thing about thinking of running for President  
5 is that I get invited to stuff like this, where I can talk about what I care about.”<sup>22</sup>

6 On June 28, 2015, Politico published an article regarding Kasich’s activities and planned  
7 candidacy announcement on July 21, 2015, and it described exploratory steps that Kasich was  
8 taking to get to the announcement.<sup>23</sup> The article quotes Kasich advisers, stating that Kasich  
9 “combines establishment appeal with a conservative record,” and that qualifying for the August  
10 6, 2015, Cleveland debate “will be tough, even with his announcement bump.”<sup>24</sup> Further,  
11 advisers are reported as saying that Kasich “will be positioned ‘in Jeb’s back right pocket’ —  
12 with establishment appeal, but slightly more conservative.”<sup>25</sup> Finally, the article quotes Kasich  
13 from a May 2015 appearance on ABC’s “This Week” where Kasich again linked his travels to  
14 exploring the viability of a presidential run when he said “I’ve been very pleased with what I’ve  
15 found out on the ground in New Hampshire, South Carolina, Michigan. . . . I hope people will  
16 help me, if they like my sort of unique voice in this whole thing, and we look at organization . . .

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<sup>20</sup> *Id.*

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

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

<sup>23</sup> 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> (cited in Kasich F&LA  
at 4, MURs 6955 and 6983).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

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1 I [am] increasingly optimistic about all of this.”<sup>26</sup> The Politico article notes that, in that ABC  
2 appearance, Kasich called himself “the most experienced in the field,” and while he  
3 acknowledged that he was the underdog, he expressed hope about doing well in New Hampshire  
4 stating: “You know the way this system works. You know, you go to New Hampshire and you  
5 do well and you’re on a rocket ship.”<sup>27</sup>

6 The Politico article also announced the date, location, and start time of Kasich’s expected  
7 July 21, 2015, candidacy announcement and named his Committee staff and described their past  
8 political experience. Finally, the article describes the schedule for what it described as his  
9 “announcement tour that included Iowa, New Hampshire, South Carolina and Michigan.”<sup>28</sup>  
10 There is no information to suggest that Kasich or his representatives ever disputed this  
11 information or sought to have the record corrected.

12 Kasich, on one of his trips in April, appeared at the New Hampshire Republican Party’s  
13 “First in the Nation” Leadership Summit and stated that “‘America regains its strength’ if it can  
14 tackle its immigration problem, balance the budget, lower the corporate tax rate, and invest in  
15 infrastructure.”<sup>29</sup> The Complaint states that Kasich “asked attendees at the end of his appearance  
16 to ‘think about me, would you . . . don’t commit too soon . . . let us all have a chance to breath[e]  
17 and get out, and you know what I really look forward to, being out in your homes again, letting

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> MUR 6983 Supp. Compl. at 7-8 (March 30, 2016) (citing New Hampshire Republican Leadership Summit, Day 2, C-SPAN, <https://www.c-span.org/video/?325374-1/new-hampshire-republican-leadership-summit-day-2>).

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1 you get to know me and see me, that's what it's really all about, it's why I love New  
 2 Hampshire . . . .”<sup>30</sup>

3 Kasich and the Committee assert that Kasich did not become a candidate before July 21,  
 4 2015, and that Kasich “did not conduct or authorize any activities that triggered candidacy”  
 5 before that date.<sup>31</sup>

6 **C. New Day's Activities**

7 New Day's initial Mid-Year disclosure report to the IRS reported that New Day received  
 8 \$11,130,730 and spent \$823,809 between its founding on April 20, 2015 and June 30, 2015.<sup>32</sup>  
 9 New Day's Year End Report to the IRS disclosed that it received an additional \$3,981.570 and  
 10 spent \$7,842,778 between July 1 and December 31, 2015.<sup>33</sup> In its 2015 IRS disclosure reports,  
 11 New Day disclosed that it routinely accepted donations that exceeded \$5,000, including some as  
 12 large as \$1 million.<sup>34</sup>

13  
 14

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<sup>30</sup> *Id.* at 8; *see also* New Hampshire Republican Leadership Summit, Governor John Kasich, C-SPAN at 24:45, <https://www.c-span.org/video/?325374-12/republican-leadership-summit-governor-john-kasich>.

<sup>31</sup> MUR 6955 Committee Resp. at 4-5.

<sup>32</sup> 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).

<sup>33</sup> 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.

<sup>34</sup> 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                   1. Apparent Testing the Waters Activity

2                   New Day also reported numerous disbursements both prior to and immediately after  
 3 Kasich's July 21, 2015, announcement of his candidacy for which the purpose was described as  
 4 polling, media consulting, phone banks, airfare, travel, and travel expense reimbursements.<sup>35</sup>

5                   During the months prior to Kasich's July 21, 2015 declaration of candidacy, New Day  
 6 paid a total of \$218,500 to American Viewpoint Inc. for polling expenses.

7	• 6/1/2015	American Viewpoint, Inc. – Polling	\$62,000
8	• 6/25/2015	American Viewpoint, Inc. – Polling	\$79,000
9	• 6/25/2015	American Viewpoint, Inc. – Polling	\$77,500

10                  Respondents refused to provide the Office of the General Counsel with complete  
 11 information regarding their communications with New Day and its agents — such as American  
 12 Viewpoint, Inc., and as a result, the Commission has been deprived of additional information  
 13 regarding whether this New Day funded polling was related to Kasich's prospective presidential  
 14 campaign and whether the results of the polling were shared with Kasich and the Committee.

15                  Similarly, during the months prior to Kasich's July 21, 2015 declaration of candidacy,  
 16 New Day paid a total of \$295,500 to Strategic Perceptions Inc. for “Media Consulting” and  
 17 “Media Production.”

18	• 6/5/2015	Strategic Perceptions, Inc. – Consulting	\$ 60,000
19	• 6/26/2015	Strategic Perceptions, Inc. – Production	\$148,835
20	• 7/7/2015	Strategic Perceptions, Inc. – Consulting	\$ 60,000
21	• 7/8/2015	Strategic Perceptions, Inc. – Consulting	\$ 26,665

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<sup>35</sup> 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            Respondents refused to provide complete information regarding their communications  
2 with New Day and its agents — such as Strategic Perceptions Inc. New Day and Strategic  
3 Perceptions, Inc. also refused to provide complete information regarding their communications  
4 with Respondents as to this consulting work. As a result, the Commission has been deprived of  
5 additional information regarding whether this New Day funded political consulting work was  
6 related to Kasich's presidential campaign and whether the work product was shared with Kasich  
7 and the Committee; and whether this consulting work was the means by which New Day  
8 coordinated its later advertising campaign with the Respondents.

9            During the months prior to Kasich's July 21, 2015 declaration of candidacy, New Day  
10 paid over \$200,000 to various vendors and individuals for travel.<sup>36</sup> Respondents refused to  
11 provide complete information regarding their communications with New Day and its agents.  
12 New Day and various individuals who traveled with Kasich also refused to provide complete  
13 information regarding their communications with Respondents as to the activities on these trips.  
14 As a result, the Commission has been deprived of additional information regarding the extent to  
15 which these New Day funded trips were related to testing the waters for Kasich's presidential  
16 campaign.

## 17            2. New Day Advertising Campaign

18            As noted above, New Day paid Strategic Perceptions, Inc. \$295,500 for media consulting  
19 and media production prior to Kasich's declaration of candidacy. Although Respondents  
20 acknowledge that Kasich filmed an interview with Strategic Perceptions in late June 2015 and

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<sup>36</sup> See Exhibit A, Expenditures disclosed in New Day's 2015 Mid-year Report of receipts and expenditures.



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1 that this footage was used in New Day advertisements, they have refused to provide details about  
2 these interactions.

3 On July 8, New Day purchased \$58,400 of television air time in a New Hampshire media  
4 market.<sup>37</sup> New Day completed forms documenting two separate ad buys on July 8, with each  
5 listing “John Kasich for the Republican Presidential Primary” as the “name of the legally  
6 qualified candidate(s) the programming refers to”; the form for this television ad buy also states  
7 that the advertisement includes a “candidate (Republican) discussing his values/beliefs.”<sup>38</sup>

8 The first advertisement, “Us,” which reportedly aired on July 8, includes video of  
9 Kasich speaking directly to the camera.<sup>39</sup> Kasich states:

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

16  
17 The advertisement ends with a voiceover stating “John Kasich's for us.” The Commission has  
18 information indicating that the advertisement used footage from an interview with Kasich that  
19 was filmed in late June, 2015.<sup>40</sup>

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<sup>37</sup> MUR 6983 Supp. Compl. at 3.

<sup>38</sup> MUR 6955 Compl. at 2-3; MUR 6983 Supp. Compl. at 3 (citing FCC filings for advertisements run on two television stations).

<sup>39</sup> MUR 6955 Compl. at 3. “Us” is available at <https://www.youtube.com/watch?v=NeaJIH70PxY> (last visited Aug. 8, 2020).

<sup>40</sup> *See, e.g.*, Joint RTB Response at 17 (acknowledging Kasich's participation in interview with New Day). Although we do not know the exact date on which the footage was filmed, in a July 21, 2015 interview, Fred Davis, a strategist for New Day, stated that he filmed multiple advertisements featuring footage of Kasich that were paid for by New Day, and that he had worked with Kasich for about two months. *See* MUR 6983 Supp. Compl. at 4. New Day reported making disbursements to Davis's firm, Strategic Perception, Inc., on June 5, 2015 (\$60,000) and June 26, 2015 (\$148,835). *See* New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report.

1 Days after Kasich announced his candidacy and New Day registered with the  
 2 Commission as an IEOPC, on July 26 and August 5, New Day ran two additional advertisements  
 3 featuring Kasich. The July 26 advertisement, entitled “Balancing the Budget,”<sup>41</sup> begins with a  
 4 succession of images and sound clips of several Democratic and Republican presidential  
 5 candidates and continues with the following script:

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

8  
 9 Kasich: I spent ten years of my life fighting to balance the budget,  
 10 not because it was about numbers, but it was about values. We  
 11 don't have a right to live beyond our means, and make sure that  
 12 our children pay the debt.

13  
 14 Female Announcer: John Kasich helped balance the federal  
 15 budget, turned around the Ohio economy, and has 18 years'  
 16 experience on the Armed Services Committee. No one else comes  
 17 close.

18  
 19 Kasich: And I was willing to take beatings when I offered my own  
 20 budget proposals for America because I believed in it. The most  
 21 important thing in leadership is not what you say, it's what you do.

22  
 23 Female Announcer: John Kasich's for us.

24  
 25 The script for the August 5 advertisement, “John Kasich is for Us – National Security,”<sup>42</sup>

26 is as follows:

27 Female Announcer: [over images of President Obama and Hillary  
 28 Clinton] Weakness, handwringing, inexperience. They're looking  
 29 out for us?  
 30

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<sup>41</sup> See “John Kasich – Balancing the Budget,” <https://www.youtube.com/watch?v=S5MHotEOO-4> (last visited Aug. 7, 2020).

<sup>42</sup> MUR 6983 Compl. at 2 (Nov. 10, 2015). See “John Kasich is for Us – National Security,” [https://www.youtube.com/watch?v=JYDpIaO\\_kF4](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>.

1           Kasich: You know, I spent 18 years on the Armed Services  
2           Committee with some of the finest defense minds in the world. I  
3           learned how we get the services to work together. And I'll never  
4           forget my experience meeting with soldiers out in the desert.  
5           There's no substitute for experience. [Caption reads: "John  
6           Kasich. President 2016."]  
7

8           New Day's "Balanced Budget" and "Us – National Security" ads appear to use footage  
9           from the same interview as used in its "Us" ad, showing Kasich in a white shirt, without a tie,  
10          under a dark blazer, speaking to camera while standing in front of French doors.

11          **D.     Kasich for America's Earliest Reported Activities**

12          As described above, Kasich formally announced his presidential candidacy on July 21,  
13          2015, and filed a Statement of Candidacy on July 23, 2015.<sup>43</sup> Kasich for America registered as  
14          Kasich's authorized committee for the presidential election on the same day.<sup>44</sup> The Committee's  
15          first disclosure report was the October 2015 Quarterly Report.<sup>45</sup> That report disclosed that the  
16          Committee began receiving contributions for the 2016 presidential primary election on July 3,  
17          2015, and that it exceeded \$5,000 in contributions on July 13.<sup>46</sup> It also reflects that the  
18          Committee's first reported disbursement occurred on July 10, 2015, eleven days before Kasich  
19          publicly announced his candidacy.<sup>47</sup> The report disclosed a small number of disbursements  
20          between July 10 and July 21, mostly for expenses related to travel to New Hampshire, though it  
21

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<sup>43</sup> MUR 6955 Committee Resp. at 3; John Kasich, Statement of Candidacy (July 23, 2015).

<sup>44</sup> MUR 6955 Committee Resp. at 3; Kasich for America, Statement of Organization (July 23, 2015).

<sup>45</sup> 2015 Oct. Quarterly Rpt., Kasich for America at 9 (Oct. 15, 2015).

<sup>46</sup> *Id.* at 8.

<sup>47</sup> *Id.* at 908.

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1 is not clear from the face of the reports when that travel occurred.<sup>48</sup> The Committee did not  
2 report receiving any in-kind contributions from New Day in this report, nor did it designate any  
3 disbursements as having been made for pre-candidacy testing-the-waters expenses.

4 The Respondents assert that the Committee had a “stringent firewall policy” regarding  
5 coordination between it and New Day.<sup>49</sup> They have provided a copy of a legal memo from  
6 counsel to the Committee setting out that policy, which states that coordination was prohibited  
7 between the two committees as of July 23, 2015, and states that a copy of the policy should be  
8 provided to each employee and agent of the Committee.<sup>50</sup> There is no information concerning  
9 any coordination policy prior to July 23, 2015, and the Committee did not provide any records  
10 documenting that Kasich or any Committee employees or agents actually received the  
11 coordination policy addressed to the Committee from its counsel.

12 Kasich and the Committee responded to the Complaint in MUR 6955 on October 7, 2015,  
13 and the Complaint in MUR 6983 on January 15, 2016.<sup>51</sup> They responded to the reason to believe  
14 finding on June 16, 2019.<sup>52</sup> The Responses argue that Kasich did not engage in testing the  
15 waters activities and that, instead, these trips were the type of activities he has been engaging in

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<sup>48</sup> See, *e.g.*, *id.* at 973, 986, 988, 1032, 1035 (disclosing disbursements for airfare, lodging, rental cars, and meals).

<sup>49</sup> Joint RTB Resp. at 14 (referencing attached memo, dated July 23, 2015, to the Committee on legal letterhead, with subject “Policy Prohibiting Coordination”).

<sup>50</sup> *Id.* at 19.

<sup>51</sup> MUR 6955 Committee Resp.; MUR 6983 Committee Resp. (January 15, 2016).

<sup>52</sup> Response of Kasich and Committee, MURs 6955 and 6983 (June 16, 2019) (“Joint RTB Resp.”). After receiving the Factual and Legal Analysis that accompanied the notification of the Commission’s reason to believe findings, Kasich and the Committee asserted that they had no record of receiving a March 30, 2016, Supplement to the MUR 6983 Complaint. Commission records, however, show that service of the Supplement was made on April 7, 2016. Another copy of the Supplement, along with the 2016 proof of service, was sent to Respondents on June 4, 2019, and Respondents had an opportunity to address the Supplement in their June 16, 2019, response.

1 for more than 30 years and continues to engage in even today when he is not running for any  
2 federal office.<sup>53</sup>

3           However, Respondents were either unable or unwilling to provide information to  
4 document the frequency of such trips in the past, or to explain why there were such a large  
5 number of trips in rapid succession between May and July of 2015, when Kasich was reported to  
6 be testing the waters for his presidential run. The Commission sought information from Kasich  
7 and the Committee, via both informal discovery and subpoena, specifically concerning Kasich's  
8 relationship with New Day, the New Day-funded trips, including the purpose of the trips, a  
9 description of any meetings held during the trips, and discussions of the 2016 Republican  
10 Presidential nomination during the trips, and sought provision of all documents relating to the  
11 trips. The Commission also sought information relating to Kasich's communications with New  
12 Day regarding such topics as its political polling and the filming of the interviews used in New  
13 Day's later advertising campaign. Respondents provided some limited information regarding  
14 when trips were taken and where Kasich traveled, but they failed to include details regarding the  
15 trips' purposes, meetings, and matters discussed during such meetings. In addition, while  
16 Respondents provided some documents, including 243 pages of itineraries from the trips, those  
17 itineraries are heavily redacted and the redactions appear to remove the most relevant  
18 information regarding the purpose of the trips; despite our requests, Respondents would not  
19 provide unredacted copies of these responsive documents. Neither Kasich nor any other person  
20 who traveled with Kasich in Spring 2015 or who worked for the Committee or New Day agreed  
21 to the Office of General Counsel's requests for interviews. Further, neither Kasich nor any other  
22 person involved provided any documents relating to the filmed interview used to prepare the

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<sup>53</sup> *Id.* at 4.

1 New Day advertisements supporting Kasich's candidacy. Respondents refused to provide any  
 2 documents regarding Kasich's communications with New Day regarding its political polling or  
 3 the filmed interview which produced footage used in later New Day independent expenditures.

### 4 **III. LEGAL ANALYSIS**

5

#### 6 **A. There is Probable Cause to Believe that Kasich and the Committee** 7 **Accepted Impermissible and Excessive In-Kind Contributions and** 8 **that the Committee Failed to Report Them**

9

10 The Commission found reason to believe that Kasich tested the waters for a potential  
 11 candidacy and failed to report any expenditures in connection with his testing-the-waters  
 12 activities.<sup>54</sup> The evidence developed during the investigation confirms that finding and supports  
 13 finding probable cause to believe that Kasich accepted contributions from New Day in the form  
 14 of expenditures to fund testing-the-waters activities for Kasich prior to his formal announcement  
 15 of candidacy on July 21, 2015.

16 An individual becomes a candidate under the Act if he or she receives contributions or  
 17 makes expenditures in excess of \$5,000, or consents to another doing so on his or her behalf.<sup>55</sup>  
 18 The Commission's regulations create exemptions to the definitions of contribution and  
 19 expenditure — and therefore to the \$5,000 candidacy threshold — to allow individuals to  
 20 conduct certain activities to evaluate a potential candidacy, *i.e.*, to “test the waters.”<sup>56</sup> These  
 21 exemptions exclude from the definition of “contribution” and “expenditure” those funds received

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<sup>54</sup> Kasich F&LA at 1, MURs 6955 and 6983.

<sup>55</sup> 52 U.S.C. § 30101(2); *see also* 11 C.F.R. § 100.3(a).

<sup>56</sup> *See* 11 C.F.R. §§ 100.72(a), 100.131(a); *see also* Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9,992, 9,993 (Mar. 13, 1985) (“Testing the Waters E&J”); *see also* Explanation and Justification to the Disclosure Regulations, House Doc. No. 95-44, Communication from the Chairman, FEC, Transmitting the Commission's Proposed Regulations Governing Federal Elections, at 40 (Jan. 12, 1977) (defining testing-the-waters payments).

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1 and payments made solely to determine whether an individual should become a candidate.<sup>57</sup> The  
 2 regulations allow this limited exemption for activities directed to an evaluation of the feasibility  
 3 of one's candidacy, though not for conduct signifying that a decision to become a candidate has  
 4 been made.<sup>58</sup> Testing-the-waters activities include, but are not limited to, payments for polling,  
 5 telephone calls, and travel, and only funds permissible under the Act may be used for such  
 6 activities.<sup>59</sup> When an individual becomes a candidate, any such funds received or payments  
 7 made in connection with testing-the-waters activity must be reported as contributions or  
 8 expenditures on the first disclosure report filed by the candidate's authorized committee.<sup>60</sup>

9 The Commission has stated that testing-the-waters activities are those "conducted to  
 10 determine whether an individual should be a candidate."<sup>61</sup> The Commission has concluded that  
 11 traveling to speak with opinion makers and political and non-political groups for the purpose of  
 12 deciding whether potential political support exists for a national campaign is testing-the-waters  
 13 activity.<sup>62</sup> In MUR 5908 (Duncan Hunter), for example, the Commission found reason to

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<sup>57</sup> 11 C.F.R. §§ 100.72(a), 100.131(a); *see also* F&LA at 7, MUR 6775 (Hillary Clinton); F&LA at 8, MUR 6776 (Niger Innis); F&LA at 6, MUR 6735 (Joseph A. Sestak).

<sup>58</sup> *See* Advisory Op. ("AO") 1981-32 at 4 (Askew); *see also* Testing the Waters E&J at 9,993.

<sup>59</sup> *See* AO 1981-32 at 3-4; *see also* F&LA at 4, MUR 6224 (Carly Fiorina); F&LA at 2, MUR 6533 (Haney); Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter, McGahn and Weintraub at 1, MUR 5934 (Thompson) ("SOR") (stating that, "[d]uring the 'testing the waters' period, the individual may, among other things, conduct polls, make telephone calls, and travel to determine the viability of the potential candidacy."); First Gen. Counsel's Rpt. at 3, MUR 5703 (Rainville) ("First GCR") (stating that, "while an individual is 'testing the waters,' he or she may raise or expend funds otherwise permissible under the Act for activities such as conducting a poll, making telephone calls and traveling.") *see also* Certification, MUR 5703 (Rainville) (June 22, 2006).

<sup>60</sup> 11 C.F.R. § 101.3. A contribution includes any "gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing" any federal election. 52 U.S.C. § 30101(8)(A). "[A]nything of value" includes all in-kind contributions. 11 C.F.R. § 100.52(d)(1).

<sup>61</sup> 11 C.F.R. §§ 100.72(a); 100.131(a); *accord* AO 1981-32 at 4.

<sup>62</sup> AO 1981-32 at 3-4.

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1 believe that a candidate's spending on travel to early primary states "to publicize his Presidential  
2 campaign, and/or gauge support for his campaign" before declaring his candidacy, should have  
3 been reported as testing the waters or campaign expenses.<sup>63</sup> When evaluating whether a  
4 respondent had ceased testing the waters and begun a candidacy, the Commission has determined  
5 that expenditures relating to political strategy consulting and fundraising consulting could fall  
6 within permissible testing-the-waters activity.<sup>64</sup>

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.<sup>65</sup>  
9 However, an individual who tests the waters must keep financial records and, when he or she  
10 becomes a candidate, all funds received or payments made in connection with testing the waters  
11 will be considered contributions and expenditures under the Act and must be reported as such in  
12 the first report filed by the candidate's principal campaign committee.<sup>66</sup>

13 All funds raised and spent for testing-the-waters activities are subject to the Act's  
14 limitations and prohibitions.<sup>67</sup> The Act prohibits any person from making contributions to any

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<sup>63</sup> F&LA at 4-7, MUR 5908 (Hunter). The Commission took no further action in MUR 5908 after the investigation revealed that the leadership committee's excessive contributions to the candidate were likely *de minimis*. See SOR, Comm'rs Petersen, Hunter, McGahn, Walther, & Weintraub at 2-3.

<sup>64</sup> F&LA at 5-6, MUR 6224 (Carly Fiorina) (finding that a candidate's "pre-announcement spending and fundraising were consistent with 'testing the waters' activity").

<sup>65</sup> 11 C.F.R. §§ 100.72 and 100.131; *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").

<sup>66</sup> 11 C.F.R. § 101.3.

<sup>67</sup> *See* 11 C.F.R. §§ 100.72(a), 100.131(a); *see also* Testing the Waters E&J at 9,993; F&LA at 3, MUR 6533 (Haney) ("All funds raised and spent for "testing the waters" activities are, however, subject to the Act's limitations and prohibitions.").



1 candidate and his authorized political committee with respect to any election for federal office  
 2 which, in the aggregate, exceed \$2,700 for the 2016 election cycle.<sup>68</sup> The Act also prohibits any  
 3 candidate or political committee from knowingly accepting any excessive contributions.<sup>69</sup> The  
 4 Act and Commission regulations prohibit corporations from making contributions to candidate  
 5 committees in connection with a federal election.<sup>70</sup> The Commission has concluded that a 527  
 6 organization's "use of funds raised outside of the Act's limitations and prohibitions to pay for  
 7 individuals' testing-the-waters activities would violate Commission regulations if those  
 8 individuals decide to become candidates."<sup>71</sup>

9 1. Kasich's Use of New Day Polling, Political Consulting, and Travel  
 10 Expenses Appear to Be Unreported Testing-the-Waters Activity

11  
 12 The information shows that New Day, after its founding in April 2015 as a 527  
 13 organization that was exclusively focused on promoting Kasich's record and policy agenda, paid  
 14 for testing-the-waters activities such as polling, political consulting and travel that allowed  
 15 Kasich to solicit support for his yet to be officially announced presidential candidacy and  
 16 develop and convey the policy positions that would be used in the campaign.<sup>72</sup> The Committee's

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<sup>68</sup> 52 U.S.C. § 30116(a)(1)(A).

<sup>69</sup> *Id.* § 30116(f).

<sup>70</sup> *Id.* § 30118(a); 11 C.F.R. § 114.2(b); *cf.* 11 C.F.R. § 114.2, note to paragraph (b) (clarifying that corporations can make contributions to non-connected political committees); AO 2010-11 (Commonsense Ten) at 2-3 (concluding that corporations may contribute to independent expenditure-only political committees).

<sup>71</sup> AO 2015-09 (Senate Majority PAC and House Majority PAC) at 5 (concluding that 527 organizations' payment for testing-the-waters activities with soft money would violate 11 C.F.R. §§ 100.72(a) and 100.13(a)).

<sup>72</sup> MUR 6983 Supp. Compl. at 9, 5; *see also* Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER, Apr. 20, 2015, available at [http://www.cleveland.com/open/index.ssf/2015/04/ohio\\_gov\\_john\\_kasich\\_begins\\_ra.html](http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html) (the creation of New Day "takes the Ohio Republican Party, which paid for Kasich's recent trips to the earl primary states of New Hampshire and South Carolina, off the hook for his travel expenses."); Chrissie Thompson, *Kasich's 2016 fundraising starts, backed by 'super donor'*, THE CINCINNATI ENQUIRER,

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1 initial report to the Commission reflects that it received \$40,050 in contributions and made  
2 \$19,180 in disbursements prior to July 21, but it does not specifically designate any of these  
3 entries as in-kind contributions made to Kasich for testing-the-waters activities, and the first  
4 reported disbursement occurred only 11 days prior to Kasich's announcement of his candidacy.<sup>73</sup>

5 As discussed above, New Day's IRS disclosure reports and information obtained in the  
6 investigation of this matter indicate that New Day made substantial disbursements for media  
7 consulting, phone banks, polling, airfare, travel, and travel expense reimbursements, all of which  
8 are payments for the types of expenses traditionally associated with testing-the-waters activities;  
9 the available information indicates that many, if not all, of these payments were made for  
10 activities directed to an evaluation of the feasibility of Kasich's candidacy, and with Kasich's  
11 consent and participation.<sup>74</sup>

12 Starting in January 2015, Kasich began traveling the country and speaking about his  
13 policy positions on nationwide issues such as balancing the budget, tax reform and healthcare, as  
14 well as his prospective candidacy. Notwithstanding the Respondents' assertion that Kasich's  
15 travels in 2015, prior to his declaration of candidacy, were similar to other travels he had done  
16 for 30 years "to share and discuss his ideas,"<sup>75</sup> the available information indicates that Kasich's  
17 travel in 2015 was directed to an evaluation of the feasibility of his candidacy. Specifically,

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Apr. 20, 2015, available at <http://www.cincinnati.com/story/news/politics/elections/2015/04/20/john-kasich-fundraising-interpublic-philip-geier-john-sununu/26074359/>.

<sup>73</sup> See Kasich for America October 2015 Quarterly Report (Oct. 15, 2015).

<sup>74</sup> See *supra*, nn. 32-35; Exhibit A; 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 Amended 2015 Year-End Report (July 11, 2016).

<sup>75</sup> Joint RTB Resp. at 4.

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1 during this time, Kasich engaged in fundraising and made statements that were widely reported  
2 in the press and not contested by Respondents indicating that he was considering and evaluating  
3 a run for President.<sup>76</sup>

4 For example, CNN reported that Kasich said in late April that “If I can win, I’m likely to  
5 run,”<sup>77</sup> and stated that “[o]ne good thing about thinking of running for President is that I get  
6 invited to stuff like this, where I can talk about what I care about.”<sup>78</sup> In that interview, Kasich  
7 specifically spoke about the steps he had taken — including the creation of a political  
8 organization “to accumulate more resources” in order to “travel more robustly” — and the steps  
9 he would need to take — including “infrastructure,” success in raising “seed money,” and  
10 assessment of whether “people like what I have to say” — when deciding whether he “would go  
11 forward” with a candidacy.<sup>79</sup> Respondents point to Kasich’s equivocal statements in this CNN  
12 interview (such as his “not really” response to a question of whether he was testing the waters  
13 and “I don’t know” response to whether he would run for President) as indications that Kasich  
14 was neither a candidate nor testing the waters for a candidacy.<sup>80</sup> The limited reporting exception  
15 for testing-the-waters payments for activities “conducted to determine *whether* an individual

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<sup>76</sup> Robert Higgs, *John Kasich’s travels: a timeline*, CLEVELAND PLAIN DEALER, Sept. 10, 2015, available at [http://www.cleveland.com/open/index.ssf/2015/09/john\\_kasichs\\_travels\\_a\\_timelin.html](http://www.cleveland.com/open/index.ssf/2015/09/john_kasichs_travels_a_timelin.html) (documenting Kasich’s fundraising and travels from January 2015 through his formal announcement in July 2015).

<sup>77</sup> Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN, May 17, 2015, at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Joint RTB Resp. at 9-10.

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1 should be a candidate,”<sup>81</sup> is by nature equivocal, and once an individual has stopped  
2 equivocating and made a decision to become a candidate, the testing-the-waters exemption is no  
3 longer available.<sup>82</sup> Respondents also assert that Kasich’s pivot, in the CNN interview, from a  
4 question about whether he would run for President to a discussion of issues in Ohio, indicates  
5 that Kasich was not testing the waters.<sup>83</sup> But it is New Day’s payment, with Kasich’s consent,  
6 for travel and other activities directed to an evaluation of the feasibility of Kasich’s candidacy  
7 that is the basis of Kasich and the Committee’s liability under the Act,<sup>84</sup> because those payments  
8 and the associated circumstances indicate that Kasich was testing the waters.

9 In addition to his statements to CNN about how he would evaluate his potential  
10 candidacy, Kasich, in New Hampshire, closed his speech at the Leadership Summit by both  
11 explaining that he was evaluating the feasibility of his own candidacy and asking attendees to do  
12 the same, stating:

13 . . . think about me, would you . . . don’t commit too soon . . . let  
14 us all have a chance to breathe and get out, and you know what I  
15 really look forward to, being out in your homes again, letting you  
16 get to know me and see me, that’s what it’s really all about, it’s  
17 why I love New Hampshire.<sup>85</sup>  
18

19 Finally, in his interview on ABC’s “This Week,” Kasich tied his travel, funded by New Day, to  
20 his assessment of the feasibility of his potential candidacy when he described what he had  
21 “found on the ground” while traveling and expressed “hope people will help me, if they like my

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<sup>81</sup> 11 C.F.R. §§ 100.72(a) (emphasis added); 100.131(a).

<sup>82</sup> 11 C.F.R. §§ 100.72(a); 100.131(a); *accord* AO 1981-32 at 4.

<sup>83</sup> Joint RTB Resp. at 10.

<sup>84</sup> Testing the Waters E&J at 9,993.

<sup>85</sup> New Hampshire Republican Leadership Summit, Governor John Kasich, C-SPAN at 24:45,  
<https://www.c-span.org/video/?325374-12/republican-leadership-summit-governor-john-kasich>.

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1 sort of unique voice in this whole thing.”<sup>86</sup> Kasich, in the ABC interview, did not dispute the  
2 characterization of him as an underdog in the presidential race; instead, Kasich used the  
3 reference to his “underdog” status to assess the viability of his potential campaign if he were to  
4 do well in New Hampshire.<sup>87</sup> Traveling to engage in these unsubtle assessments of Kasich’s  
5 potential candidacy indicate activities “conducted to determine whether an individual should be a  
6 candidate.”<sup>88</sup>

7 Further, Kasich’s travel included stops in key early primary states including South  
8 Carolina (four times), New Hampshire (five times), and Iowa, which the Commission has  
9 concluded can be a factor in assessing whether payments for travel are for testing-the-waters  
10 activity.<sup>89</sup> In these early primary states, Kasich engaged in activities that included, among other  
11 things, holding news conferences, addressing Republican caucuses and chambers of commerce,  
12 holding private meetings, and speaking at the Republican Leadership Summit.<sup>90</sup>

13 Kasich and the Committee, in responses to the Complaint, reason to believe notifications,  
14 and the Commission’s subpoenas, deny that these trips were for testing the waters, but refused to  
15 provide the sort of detailed information regarding the travel that would corroborate their  
16 assertions that these trips were not for the purpose of testing the waters for a presidential run.

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<sup>86</sup> <https://abcnews.go.com/Politics/week-transcript-ohio-gov-john-kasich/story?id=31257546>.

<sup>87</sup> *Id.*

<sup>88</sup> 11 C.F.R. §§ 100.72(a); 100.131(a); *accord* AO 1981-32 at 4.

<sup>89</sup> *See supra*, Section II.A; *and see* F&LA at 4-7, MUR 5908 (Hunter) (finding reason to believe candidate’s spending on travel to early primary states “to publicize his Presidential campaign, and/or gauge support for his campaign” before declaring his candidacy, should have been reported as testing the waters or campaign expenses).

<sup>90</sup> *See supra*, Section II.F&LA at 4-7.

1 Although Respondents assert that the 2015 travel was not for testing the waters, but was instead  
2 for travel similar to that Kasich has engaged in for more than 30 years to tell the story of Ohio's  
3 success and promote the ideals that were important to him,<sup>91</sup> Respondents fail to address the  
4 qualitative similarities and differences between Kasich's 2015 pre-declaration of candidacy  
5 travel, and Kasich's post-declaration of candidacy travel as a candidate. Respondents failed to  
6 provide evidence demonstrating that Kasich made similar travels when he was not considering a  
7 presidential campaign. In response to the Commission's subpoenas, Respondents submitted  
8 redacted documents related to Kasich's travel, with no justification for the redactions;  
9 Respondents refused to submit unredacted documents. Absent supporting documentation and  
10 information, Respondents' assertion is unpersuasive and the Commission is entitled to infer that  
11 the information that would have been provided would be adverse to Respondents' position.<sup>92</sup> In  
12 any event, the existence of pre-2015 activity by Kasich that was not testing-the-waters activity  
13 does not negate the testing-the-waters activity that followed in 2015. Notably, Respondents'  
14 argument does not take into account that the establishment of New Day and its role in arranging  
15 for and funding Kasich's 2015 trips itself establishes that Kasich's 2015 engagements  
16 substantially differed from his pre-2015 activity.

17 As discussed above, the available information indicates that Kasich spent the 2015 New  
18 Day-funded trips discussing potential candidacy and testing specific policy positions later used in  
19 his presidential candidacy. Kasich's multiple statements regarding his viability as a candidate, as

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<sup>91</sup> Joint RTB Resp. at 4 (asserting that Kasich "has consistently traveled around the country to share and discuss his ideas — ideas involving balancing the budget, tax reform, and healthcare" and that Kasich's "involvement in discussions around issues of national importance was not an effort to determine whether he should run for President – his involvement was an effort to start a conversation about his vision to improve the country based on the successes he achieved in Ohio").

<sup>92</sup> *See supra*, n. 2.

1 well as the choice of the locations for these trips, indicate that Kasich was testing the waters for a  
2 presidential run. Kasich never established a testing-the-waters account, and the Committee did  
3 not report disbursements for any testing-the-waters activities once Kasich declared his  
4 candidacy. As a result, we are prepared to recommend that the Commission find probable cause  
5 to believe that Kasich violated 11 C.F.R. §§ 100.72 and 100.131 and that the Committee violated  
6 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72 and 100.131.

7           2.       Kasich and the Committee Appear To Have Accepted Contributions from  
8                    New Day for Its Payments for Kasich's Testing-the-Waters Activity  
9

10           Further, it appears that New Day, once it was formed in April 2015, paid for at least a  
11 portion of Kasich's testing-the-waters expenses, including polling, political consulting and  
12 travel-related expenses.<sup>93</sup> While Kasich did not report making any payments for political polling  
13 prior to the announcement of his candidacy, New Day paid \$223,000 to American Viewpoint  
14 Inc. for "polling" in June 2015.<sup>94</sup> Both New Day and Kasich failed to produce Kasich's  
15 communications with New Day, which would reveal whether or not this polling was related to  
16 testing the waters for a Kasich candidacy and whether or not the polling results were shared with  
17 Kasich.

18           Additionally, New Day provided Kasich with digital and television messaging media  
19 from the New Day announcement video to the July 8 television advertisement buys.<sup>95</sup> Kasich  
20 was the face of New Day and it appears that New Day was formed as a vehicle for Kasich to  
21 present his platform of ideas for the country's future to assist in his assessment of whether to

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<sup>93</sup> See Exhibit A.

<sup>94</sup> New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report.

<sup>95</sup> See *supra*, nn. 39-42 (and related text detailing New Day's July 8, 2015 ad buys); Exhibit A.

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1 launch a candidacy after “see[ing] if people like what I have to say.”<sup>96</sup> In Kasich’s April 20,  
2 2015, video message announcing the formation of New Day, Kasich stated, “Those are some of  
3 my thoughts, but I would like to hear what yours are too, and I’d like to talk to you about them.  
4 And that’s why I’m announcing that we’ve created the New Day for America committee.”<sup>97</sup> He  
5 continued: “We’re going to start getting around the country more, meeting and talking with  
6 more people, and see if by coming together we can put in motion the solutions that will get this  
7 great idea called America working the right way again.”<sup>98</sup> In light of these statements and the  
8 close relationship between New Day and Kasich, which Respondents do not contest, the  
9 information shows that New Day funded Kasich’s travel which was at least in part connected to  
10 his own potential candidacy. As Kasich came to the end of the testing-the-waters-period and  
11 towards his announcement of candidacy, New Day filmed an interview with Kasich and  
12 contracted, on July 8, to distribute a television advertisement incorporating that interview  
13 footage; New Day acknowledged in an FCC filing that the advertisement was for the purpose of  
14 supporting Kasich’s candidacy.<sup>99</sup>

15           Moreover, in the course of arranging, paying for, and otherwise supporting Kasich’s  
16 testing-the-waters activities, New Day paid for, in addition to direct travel cost expenses and

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<sup>96</sup> Gloria Berger 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/>

<sup>97</sup> [http://www.cleveland.com/open/index.ssf/2015/04/ohio\\_gov\\_john\\_kasich\\_begins\\_ra.html](http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html).

<sup>98</sup> *Id.*

<sup>99</sup> *See supra*, nn. 39-42 (and related text detailing New Day’s July 8, 2015 ad buys). Should the Commission find probable cause to believe that Kasich’s candidacy began as early as late June 2015, *see* Section X, *infra*, the Commission need not include the costs of the production and distribution of the July 8 advertisement with the unreported testing-the-waters activity as it would be more properly assessed as an unreported contribution to a candidate.



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1 reimbursements, and communication costs, the fees of consultants to assist Kasich.<sup>100</sup> The  
2 Commission has previously advised that employing “political consultants for the purpose of  
3 assisting with advice on the potential mechanics of constructing a national campaign  
4 organization” constitutes testing-the-waters activity.<sup>101</sup> To the extent any of Kasich’s New Day  
5 funded travel was unrelated to his potential candidacy, at minimum the portion of his expenses  
6 related to assessing and promoting his potential candidacy would be allocable as testing the  
7 waters expenses.<sup>102</sup>

8 New Day was, until it registered as an IEOPC after Kasich declared his candidacy, a  
9 corporation, specifically a 527 organization. New Day, an Ohio corporation, was a prohibited  
10 source and was not permitted to make contributions to Kasich, including in-kind contributions  
11 made by funding travel for Kasich that were required to be reported by the Committee as  
12 contributions for testing-the-waters activities.<sup>103</sup>

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<sup>100</sup> See, e.g., Joint RTB Resp. at 24- (listing Chris Schrimpf as person assisting Kasich and attending Kasich travel events paid for by New Day between May 26 and July 13, 2015); *Id.* at 50 (listing Schrimpf as press contact for Kasich travel event in July 2015); Exhibit A (listing monthly payments by New Day to Schrimpf for fundraising and consulting services).

<sup>101</sup> AO 1981-32 at 2-4 (concluding that hiring political consultants to assist with advice on the potential mechanics of constructing a national campaign organization and employing a specialist in opinion research to conduct polls for the purpose of determining the feasibility of a national campaign were within the scope of the testing the waters exemption as long as the prospective candidate conducted the activities while continuing to deliberate his decision to become a candidate); see also F&LA at 5-6, MUR 6196 (Kennedy) (concluding that having discussions with political consultants to determine the viability of a potential candidacy and commissioning a poll to assess name recognition were within the testing the waters exemption).

<sup>102</sup> Cf. 11 C.F.R. § 106.3; AO 1986-06 (Fund for America’s Future) at 4-5 (concluding that multicandidate committee could fund potential candidate’s appearances on behalf of other candidates, a political party, and policies, but cautioning that committee would make and have to allocate those expenses as in-kind contributions if that individual made public statements referring to his possible intent to campaign for federal office or included activities such as “soliciting funds, holding meetings (which constitute more than incidental contacts) with individuals or the press regarding such a potential candidacy”).

<sup>103</sup> See *supra*, n. 70.

1           Therefore, we are prepared to recommend that the Commission find probable cause to  
 2 believe that Kasich and the Committee violated 52 U.S.C. §§ 30116(f) and 30118(a) by  
 3 accepting, and the Committee violated 52 U.S.C. § 30104(b) by failing to report, excessive and  
 4 prohibited in-kind contributions for testing-the-waters activities from New Day.

5           **B.       There Is Probable Cause to Believe Kasich Filed His Statement of**  
 6           **Candidacy Late**

7  
 8           Once an individual meets the \$5,000 threshold for contributions received or expenditures  
 9 made, the candidate has fifteen days to designate a principal campaign committee by filing a  
 10 Statement of Candidacy with the Commission.<sup>104</sup> The principal campaign committee must file a  
 11 Statement of Organization within ten days of its designation<sup>105</sup> and must file disclosure reports  
 12 with the Commission in accordance with 52 U.S.C. §§ 30104(a) and (b).<sup>106</sup>

13           Commission regulations set forth a non-exhaustive list of activities that indicate that an  
 14 individual is no longer testing the waters and has decided to become a candidate. Such indicia  
 15 include: (1) using general public political advertising to publicize his or her intention to  
 16 campaign for federal office; (2) raising funds in excess of what could reasonably be expected to  
 17 be used for exploratory activities or undertaking activity designed to amass campaign funds that  
 18 would be spent after he or she becomes a candidate; (3) making or authorizing written or oral  
 19 statements that refer to him or her as a candidate for a particular office; (4) conducting activities

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<sup>104</sup> *Id.* § 30102(e)(1); 11 C.F.R. § 101.1(a).

<sup>105</sup> *See* 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a)

<sup>106</sup> *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).

1 in close proximity to the election or over a protracted period of time; and (5) taking action to  
 2 qualify for the ballot under state law. 11 C.F.R. §§ 100.72(b), 100.131(b).

3 1. Kasich Appears To Have Made a Decision To Become A Candidate at  
 4 Least as Early as June 28, 2015  
 5

6 In order to decide whether an individual is no longer testing the waters and has made a  
 7 decision to run for federal office, the Commission assesses an individual's objectively deliberate  
 8 actions to discern whether and when that individual decided to become a candidate.<sup>107</sup> The  
 9 Commission has stated that “[a] non-conditional statement” by an individual (either directly or  
 10 through an adviser) that he or she “*will*” announce his or her candidacy on a given date  
 11 unambiguously indicates that the individual has decided to become a candidate.”<sup>108</sup> That the  
 12 public announcement postdates the individual's statement of intent “do[es] not eradicate the  
 13 registration and reporting requirements that have been triggered” by the decision.<sup>109</sup>

14 Applying this criteria here, the statements attributed to Kasich's “advisers” in the June  
 15 28, 2015, Politico article establish that Kasich had decided to run for president at least as early as  
 16 June 28, 2015, when the advisors reportedly stated that Kasich would be announcing his  
 17 candidacy approximately three weeks later as the culmination of a pre-candidacy tour.<sup>110</sup> The  
 18 Politico article reports that Kasich's advisers stated that Kasich “will jump into the crowded  
 19 Republican presidential field on July 21 at the student union at his alma mater, The Ohio State

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<sup>107</sup> AO 2015-09 at 6.

<sup>108</sup> *Id.* (emphasis in original).

<sup>109</sup> *Id.* (citing Factual and Legal Analysis at 8, MUR 5363 (Sharpton)).

<sup>110</sup> 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> (cited in Kasich F&LA  
 at 4, MURs 6955 and 6983).

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1 University, in Columbus.”<sup>111</sup> The article also reports that Kasich’s advisers provided  
2 information about Kasich’s plans for positioning himself as a candidate, staffing his Committee,  
3 and planning his travel following his public announcement.<sup>112</sup> Respondents contest that  
4 Kasich’s advisers provided specific information about Kasich’s purported planned  
5 announcement or subsequent campaign plans, asserting that the journalist simply “conceive[d]”  
6 of this information.<sup>113</sup> However, the Commission properly rejected this argument at the reason  
7 to believe stage, explaining that the article used direct quotes from the advisers and,  
8 compellingly, the article provided readers with information regarding Kasich’s planned  
9 announcement that turned out to be accurate — Kasich did in fact announce his presidential  
10 candidacy on July 21, 2015, at Ohio State University. Furthermore, there is no evidence that any  
11 retraction was contemporaneously requested or demanded. As a result, the available  
12 information, including the candidacy announcement reported through Politico, unambiguously  
13 indicates that Kasich may have already decided to become a candidate at least as early as June 28,  
14 when the article was published.<sup>114</sup>

15 Further, Kasich’s participation in the filming of a video interview in late June 2015 for  
16 New Day to use weeks later to promote Kasich’s federal candidacy could also evidence the  
17 making of “a decision . . . to seek nomination for election, or election, to a Federal office.”<sup>115</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Joint RTB Resp. at 11; MUR 6955 Committee Resp. at 4.

<sup>114</sup> AO 2015-09 at 6.

<sup>115</sup> See AO 1981-32 at 4; accord 11 C.F.R. §§ 100.72(b)(1), 100.131(b)(1). *But see* Factual and Legal Analysis at 6, MUR 6533 (Haney) (explaining that “the mere preparation, rather than dissemination, of campaign materials in advance of a declaration of candidacy” does not by itself indicate that an individual has “decided to become a candidate” when the materials were distributed only to a small group

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1 Although the Respondents assert that the interview was filmed before Kasich was a candidate,  
 2 they do not refute the allegation that the footage was filmed for use in communications that  
 3 would promote Kasich's candidacy.<sup>116</sup> Moreover, when New Day first booked time for its  
 4 advertisements in early July, several weeks before Kasich's actual declaration, its notification to  
 5 the television station indicated that the advertisements were to support a Republican presidential  
 6 candidate. And the New Day ads themselves focus on Kasich's positions and promote his  
 7 candidacy; two were aired after the Committee had registered as Kasich's authorized committee  
 8 and New Day had registered with the Commission as an IEOPC. The Commission's regulations  
 9 make a distinction between activity and time spent "evaluating" a candidacy, and conduct that  
 10 would signify that a private decision to become a candidate had been made.<sup>117</sup> In this matter,  
 11 Kasich appears to have decided to become a candidate even prior to the June 28th publication of  
 12 the Politico article.

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

14           Given the amount of travel apparently undertaken by Kasich — including at least two  
 15 dozen trips outside of Ohio on non-state business between January and July 2015 to meet with  
 16 potential donors, participate in forums, and speak at various events — his expenses almost  
 17 certainly surpassed the \$5,000 threshold after taking four New Day funded trips in April 2015,  
 18 well before the formal announcement of Kasich's candidacy on July 21.<sup>118</sup>

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of advisers in order to obtain their reactions); Factual and Legal Analysis at 9, MUR 6430 (Daines)  
 (concluding that individual's mere appearance in *issue ad* aired during previous election cycle did not, by  
 itself, trigger candidacy in the following election cycle) (emphasis added).

<sup>116</sup> Joint RTB Resp. at 14.

<sup>117</sup> See AO 1981-32 at 3; see also 11 C.F.R. §§ 100.72(b), 100.131(b).

<sup>118</sup> See Robert Higgs, *John Kasich's travels: a timeline*, CLEVELAND PLAIN DEALER, Sept. 10, 2015, available at [http://www.cleveland.com/open/index.ssf/2015/09/john\\_kasichs\\_travels\\_a\\_timelin.html](http://www.cleveland.com/open/index.ssf/2015/09/john_kasichs_travels_a_timelin.html)

1 Further, Kasich accepted an additional in-kind contribution from New Day in June 2015  
 2 when New Day incurred expenses to film the interview footage and incorporate that footage in  
 3 the “Us” television communication on July 8; that in-kind contribution likely exceeded \$5,000.  
 4 Accordingly, because Kasich appears to have ceased testing the waters by deciding to become a  
 5 candidate prior to the June 28th publication of the Politico article and also appears to have  
 6 reached the statutory threshold for contributions or expenditures by that date, we are prepared to  
 7 recommend that the Commission find probable cause to believe that Kasich violated 52 U.S.C.  
 8 § 30102(e)(1) by failing to timely file his Statement of Candidacy.

9 **C. There Is Probable Cause to Believe that the New Day Advertisements**  
 10 **Were Coordinated Communications**

11 The Act defines a “contribution” to include “any gift . . . or anything of value made by  
 12 any person for the purpose of influencing any election for Federal office.”<sup>119</sup> IEOPCs are  
 13 prohibited from making contributions to candidates and their authorized committees,<sup>120</sup> and it is  
 14 unlawful for candidates, political committees, and their officers and employees to knowingly  
 15 accept an excessive or prohibited contribution.<sup>121</sup>

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

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(documenting Kasich’s fundraising and travels from January 2015 through his formal announcement in July 2015); Exhibit A.

<sup>119</sup> 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 100.52(a).

<sup>120</sup> *See* 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. at 2010-11 (Commonsense Ten) at 2-3.

<sup>121</sup> 52 U.S.C. §§ 30116(f), 30118(a)

1 candidate.<sup>122</sup> A “coordinated communication” is one form of coordinated expenditure.<sup>123</sup> Thus,  
2 “[a]n independent expenditure-only political committee may not make contributions to  
3 candidates or political party committees, including in-kind contributions such as coordinated  
4 communications.”<sup>124</sup>

5 Commission regulations provide a three-prong test to determine if a communication is a  
6 “coordinated communication.”<sup>125</sup> First, a person other than the federal candidate or the  
7 candidate’s authorized committee must pay for all or part of the communication.<sup>126</sup> Second, the  
8 communication must satisfy at least one content standard.<sup>127</sup> Third, the communication must  
9 satisfy at least one conduct standard.<sup>128</sup>

10 The Complaint alleges and the Commission found reason to believe that the three New  
11 Day advertisements featuring Kasich (“Us,” “Balancing the Budget,” and “John Kasich is for Us  
12 – National Security,” collectively, the “New Day Ads”) are coordinated communications and,  
13 thus, prohibited and excessive in-kind contributions from New Day to the Committee.<sup>129</sup>  
14 Respondents argue that there was no coordinated communication because the only evidence to  
15 satisfy the conduct prong of the coordination test is Kasich’s material involvement in the

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<sup>122</sup> 52 U.S.C. § 30116(a)(7)(B); *see also* 11 C.F.R. § 109.20.

<sup>123</sup> *See* 11 C.F.R. § 109.21(b).

<sup>124</sup> AO 2017-10.

<sup>125</sup> 11 C.F.R. § 109.21(a).

<sup>126</sup> *Id.* § 109.21(a)(1).

<sup>127</sup> *Id.* § 109.21(a)(2), (c).

<sup>128</sup> *Id.* § 109.21(a)(3), (d).

<sup>129</sup> MUR 6955 Compl. at 9-12; MUR 6983 Compl. at 3-7.

1 interview footage used in the New Day advertisements, which was filmed before Kasich became  
 2 a candidate, and thus was not made “in cooperation, consultation or concert with” a candidate.<sup>130</sup>

3 Here, each of the three New Day advertisements — “Us,” “Balancing the Budget,” and  
 4 “John Kasich is for Us – National Security” — appears to be a coordinated communication.  
 5 First, the ads were paid for by New Day, a third party, thereby satisfying the first prong of the  
 6 coordination analysis. Second, all three ads satisfy the content standard as “public  
 7 communications”<sup>131</sup> that contain express advocacy or its functional equivalent.<sup>132</sup> Under the  
 8 Commission’s regulations, a communication expressly advocates the election or defeat of a  
 9 clearly identified federal candidate if it:

10 [u]ses phrases such as ‘vote for the President,’ ‘re-elect your  
 11 Congressman,’ ‘support the Democratic nominee,’ ‘cast your  
 12 ballot for the Republican challenger for U.S. Senate in Georgia,’  
 13 ‘Smith for Congress,’ ‘Bill McKay in ’94,’ ‘vote Pro-Life’ or ‘vote  
 14 Pro-Choice’ accompanied by a listing of clearly identified  
 15 candidates described as Pro-Life or Pro-Choice, ‘vote against Old  
 16 Hickory,’ ‘defeat’ accompanied by a picture of one or more  
 17 candidate(s), ‘reject the incumbent,’ or communications of  
 18 campaign slogan(s) or individual word(s), which in context can  
 19 have no other reasonable meaning than to urge the election or  
 20 defeat of one or more clearly identified candidate(s), such as  
 21 posters, bumper stickers, advertisements, etc. which say ‘Nixon’s  
 22 the One,’ ‘Carter ’76,’ ‘Reagan/Bush’ or ‘Mondale!’<sup>133</sup>

23  
 24 A communication is also express advocacy if:

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

<sup>130</sup> Joint RTB Resp. at 14; MUR 6955 Committee Resp. at 7.

<sup>131</sup> “Public communication” includes “a communication by means of any broadcast, cable, or satellite communication . . . .” 11 C.F.R. § 100.26.

<sup>132</sup> *Id.* § 109.21(c)(3), (5).

<sup>133</sup> *Id.* § 100.22(a).



1 interpreted by a reasonable person as containing advocacy of the  
 2 election or defeat of one or more clearly identified candidate(s)  
 3 because — (1) [t]he electoral portion of the communication is  
 4 unmistakable, unambiguous, and suggestive of only one meaning;  
 5 and (2) [r]easonable minds could not differ as to whether it  
 6 encourages actions to elect or defeat one or more clearly identified  
 7 candidate(s) or encourages some other kind of action.<sup>134</sup>

8  
 9 “Us,” which aired in New Hampshire on July 8 (before Kasich’s July 21 announcement  
 10 event but after the June 28 Politico article), includes video of Kasich discussing his qualifications  
 11 and experience “creat[ing] jobs,” “cut[ting] taxes,” “balanc[ing] our budgets,” and serving on the  
 12 Armed Services Committee (“John Kasich looked out for America”), before concluding, “John  
 13 Kasich’s for us.” The advertisement discusses only Kasich’s accomplishments and does not  
 14 express any views on issues of public policy. The tagline “John Kasich’s for us” appears to be  
 15 the communication of a campaign slogan (akin to “Nixon’s the One”) which in context — paired  
 16 with a recitation of Kasich’s political experience and the absence of an identifiable issue beyond  
 17 the qualifications of Kasich himself — can have no other reasonable meaning than to urge  
 18 Kasich’s election.<sup>135</sup>

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

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<sup>134</sup> *Id.* § 100.22(b); *see also* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 70 Fed. Reg. 35,292, 35,294-35,295 (July 6, 1995); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when “it provides, in effect, an explicit directive” to vote for the named candidates).

<sup>135</sup> *See* Kasich F&LA at 21, MUR 6955 and 6983; *see also* 11 C.F.R. § 100.22(a); Factual and Legal Analysis at 8, MUR 5831 (Softer Voices) (Mar. 26, 2009) (identifying a slogan “centered on the candidate and referenc[ing] personal characteristics unrelated to any issue” as evidence of 100.22(a) express advocacy). As an express advocacy communication, the “Us” ad also satisfies the functional equivalent of express advocacy content standard, which “necessarily encompasses more than express advocacy.” Coordinated Communications, 75 Fed. Reg. 55947, 55954 (Sept. 15, 2010); *see also id.* at 55953 (providing example of communication that the Supreme Court determined was the functional equivalent of express advocacy).

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1 on July 23. It explicitly refers to Kasich as a candidate for President (“No one running for  
 2 president has balanced the federal budget for us but John Kasich”), discusses his experience  
 3 balancing the budget and serving on the Armed Services Committee, and compares him  
 4 favorably to other candidates for President (“No one else comes close”), before concluding,  
 5 “John Kasich’s for us.” The phrase “John Kasich’s for us” appears to be the campaign slogan  
 6 (akin to “Nixon’s the One”). In context, the slogan can have no other reasonable meaning than  
 7 to urge Kasich’s election.<sup>136</sup>

8 Likewise, the “John Kasich is for Us – National Security” advertisement discusses  
 9 Kasich’s qualifications for office in the context of the upcoming election, contrasting them with  
 10 the “weakness, handwringing, [and] inexperience” of fellow candidate Hillary Clinton as well as  
 11 President Obama, before closing with an image of Kasich over the caption “John Kasich.  
 12 President 2016.” The caption is akin to the “magic words” enumerated in section 100.22(a)  
 13 (such as “Bill McKay in ‘94”) and in context can have no other reasonable meaning than to urge  
 14 Kasich’s election.<sup>137</sup> All three communications thus constitute express advocacy.

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

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<sup>136</sup> See 11 C.F.R. § 100.22(a); *see also* Factual and Legal Analysis at 8, MUR 5831 (Softer Voices) (Mar. 26, 2009) (identifying a slogan “centered on the candidate and referenc[ing] personal characteristics unrelated to any issue” as evidence of 100.22(a) express advocacy).

<sup>137</sup> 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>.

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1 or political party committee assents to the suggestion (the “request or suggestion” standard);  
2 (2) the candidate, campaign, or political party committee was materially involved in decisions  
3 regarding the communication (the “material involvement” standard); or (3) the communication  
4 was created, produced, or distributed after one or more substantial discussions between the payor  
5 and the candidate, campaign, or a political party committee involving information that is material  
6 to the communication (the “substantial discussion” standard).<sup>138</sup>

7 The Commission, at the reason to believe stage, properly rejected Respondents’ argument  
8 that Kasich could not meet the conduct prong because he not yet declared candidacy before the  
9 first of the New Day ads was produced and distributed, concluding that all three New Day Ads  
10 may satisfy the “material involvement” standard.<sup>139</sup> As the Commission has previously  
11 concluded, a federal candidate’s appearance in footage created for an advertisement renders  
12 “highly implausible” any claim that he or she was not “materially involved” in its creation.<sup>140</sup>  
13 Indeed, because the candidate would decide what statements to give on camera, this arrangement  
14 would inherently grant the candidate material involvement in decisions over the content of the  
15 eventual communications and, the Commission has noted, may also result from one or more

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<sup>138</sup> 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).

<sup>139</sup> *See* Kasich F&LA at 23, MUR 6955 and 6983.

<sup>140</sup> Advisory Opinion 2003-25 (Weinzapfel for Mayor Committee) (“AO 2003-25”); *see also* Advisory Opinion 2004-01 (Bush-Cheney ’04 *et al.*) (“AO 2004-01”) (citing AO 2003-25). After issuing these advisory opinions, the Commission amended the coordinated communication regulations to create a “safe harbor” for certain public communications in which federal candidates merely endorse other candidates or solicit funds for other persons. *See* 11 C.F.R. § 109.21(g); *see also* Coordinated Communications, 71 Fed. Reg. 33,190, 33,202 (Jun. 8, 2006) (superseding AO 2004-01 and AO 2003-25 to extent they apply to such communications). That regulatory revision is not relevant to the communications at issue here, which do not endorse other candidates.

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1 substantial discussions with the person filming the communication.<sup>141</sup> Therefore, because of his  
2 appearance in recorded interview footage incorporated in the New Day Ads, Kasich met the  
3 requirements of the “material involvement” standard, satisfying the conduct prong of the  
4 coordinated communications analysis. Although Respondents have argued that the interview  
5 footage was recorded before Kasich’s formal declaration of candidacy, as discussed above, there  
6 is information indicating that Kasich was already a candidate when he participated in the filming  
7 of the New Day advertisements. The filming appears to have occurred in late June 2015, which  
8 puts it around the time of the Politico article published on June 28 that is the latest point at which  
9 Kasich was already a candidate, as discussed above.<sup>142</sup>

10 Kasich’s apparent relationship with New Day provides further evidence he was either  
11 materially involved in decisions regarding the communications, or that his conduct satisfies the  
12 request or suggestion, or substantial discussion standards of the Commission’s regulations.<sup>143</sup> As  
13 the public face of New Day, Kasich appears to have been heavily involved with the origination  
14 of New Day, as evidenced by his presence on the group’s website and in the video announcing  
15 its creation. While Respondents have provided information that it had a “firewall” policy  
16 prohibiting coordination between the Committee and New Day as of July 23, 2015, Kasich was  
17 materially involved and had substantial discussions with New Day prior to that date, both during

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<sup>141</sup> AO 2003-25 at 6, n.5 (citing 11 C.F.R. § 109.21(d)(3)); *cf.* Kasich F&LA at 23, MUR 6955 and 6983 (concluding that the New Day Ads may have met the substantial discussion and request or suggest conduct standards as well as the material involvement standard).

<sup>142</sup> *See supra*, n. 42.

<sup>143</sup> *See* Kasich F&LA at 23, MUR 6955 and 6983.

1 his testing-the-waters period and as a candidate. Thus, the existence of any firewall policy  
 2 addressing subsequent activity does not bear on the earlier coordination that occurred.

3 Based on the available information, we are prepared to recommend that the Commission  
 4 find probable cause to believe that the Committee and Kasich accepted excessive and prohibited  
 5 contributions in the form of coordinated communications in violation of 52 U.S.C. §§ 30116 and  
 6 30118(a), and that the Committee failed to disclose those contributions in violation of 52 U.S.C.  
 7 § 30104(b).<sup>144</sup>

8 **D. Where Activity Occurred Longer than Five Years Ago, the Commission**  
 9 **Should Seek Equitable Remedies**

10 Most of the activity related to Kasich's testing the waters expenditures occurred more  
 11 than five years ago. Even so, the Commission has previously pursued activity and violations of  
 12 the Act which were more than five years old, and the nature of the violations here in the context  
 13 of a presidential election and the strength of the information supporting them support doing so  
 14 here too.<sup>145</sup> While activity under the Act is subject to a five-year statute of limitations, pursuant  
 15 to 28 U.S.C. § 2462, that statute limits the Commission's time to bring "an action, suit or  
 16 proceeding for the *enforcement of any civil fine, penalty, or forfeiture.*"<sup>146</sup> The agency's ability

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<sup>144</sup> The evidence indicates that, to the extent Kasich may have established, financed, maintained, or controlled New Day while he was a federal candidate, there may be violations of the Act's soft money provisions. *See* 52 U.S.C. § 30125(e); 11 C.F.R. § 300.2(c)(2); F&LA at 7-8, MUR 5367 (Issa). However, in light of the circumstances of this matter, and the gaps in the record as to Kasich's relationship with New Day, notwithstanding New Day's significant role supporting Kasich's testing-the-waters activities, this Office recommended and the Commission previously took, no action at that time as to whether Kasich violated 52 U.S.C. § 30125. Given that the investigation did not provide sufficient clarity as to Kasich's precise relationship with New Day, and the timing of this matter, we make no probable cause recommendation regarding possible violations of 52 U.S.C. § 30125.

<sup>145</sup> *See generally* Conciliation Agreement, MUR 6538R (Americans for Job Security) (addressing equitable remedies).

<sup>146</sup> 28 U.S.C. § 2462 (emphasis added).

1 to seek equitable remedies is not subject to such limitations.<sup>147</sup> Thus, regardless of whether the  
 2 five-year statute of limitations invoked by the statute impedes the Commission's ability to seek a  
 3 civil penalty, it does not prevent the Commission from pursuing equitable remedies, including  
 4 requiring disclosure of excessive and prohibited contributions, as well as the disclosure of  
 5 Kasich's testing-the-waters activity.

#### 6 **IV. GENERAL COUNSEL'S RECOMMENDATIONS**

- 7
- 8 1. Find probable cause to believe that John R. Kasich and Kasich for America and J.  
 9 Matthew Yuskewich in his official capacity violated 52 U.S.C. §§ 30116(f),  
 10 30118(a) and 11 C.F.R. §§ 100.72(a) and 100.131(a) in connection with accepting  
 11 impermissible, excessive, and unreported contributions from New Day for  
 12 America for testing-the-waters activities;
- 13
- 14 2. Find probable cause to believe that John R. Kasich violated 52 U.S.C.  
 15 § 30102(e)(1) by failing to timely file his Statement of Candidacy;
- 16
- 17 3. Find probable cause to believe that John R. Kasich and Kasich for America and J.  
 18 Matthew Yuskewich in his official capacity accepted, prohibited and excessive in-kind  
 19 contributions in the form of coordinated communications from New Day in violation of  
 20 52 U.S.C. §§ 30116 and 30118(a); and

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<sup>147</sup> Compare *Citizens for Responsibility and Ethics in Washington v. FEC*, 209 F.Supp.3d 77, n.3 (D.D.C. 2016) (rejecting an argument that the FEC cannot pursue equitable remedies after five years on the basis that no "authoritative policy or rule" barring equitable enforcement was before the court); *FEC v. Christian Coal.*, 965 F. Supp. 66, 71 (D.D.C. 1997) (holding that injunctive relief is not a penalty); *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995) (*same*).

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- 4. Find probable cause to believe that Kasich for America and J. Matthew Yuskewich in his official capacity did not disclose contributions from New Day for America in violation of 52 U.S.C. § 30104(b).

November 24, 2020  
Date

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Attachments:  
Exhibit A: New Day for America Expenses