

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR 7303

DATE COMPLAINT FILED: 12/15/17
DATE OF NOTIFICATION: 12/18/17
LAST RESPONSE RECEIVED: 2/23/18
DATE ACTIVATED: 7/11/18

EXPIRATION OF SOL: 11/7/22
ELECTION CYCLE: 2018

COMPLAINANT:

Pima County Democratic Party

RESPONDENTS:

Martha McSally
McSally for Congress and
Paul Kilgore in his official capacity as
treasurer

MUR 7380

DATE COMPLAINT FILED: 5/7/18
DATE OF NOTIFICATION: 5/14/18
LAST RESPONSE RECEIVED: 8/30/18
DATE ACTIVATED: 7/11/18

EXPIRATION OF SOL: 1/22/23-2/13/23
ELECTION CYCLE: 2018

COMPLAINANT:

End Citizens United

RESPONDENTS:

Martha McSally
McSally for Congress and
Paul Kilgore in his official capacity as
treasurer
McSally for Senate, Inc. and
Paul Kilgore in his official capacity as
treasurer

MUR 7566

DATE COMPLAINT FILED: 2/12/19
DATE OF NOTIFICATION: 2/15/19
LAST RESPONSE RECEIVED: 6/26/19
DATE ACTIVATED: 9/19/19

EXPIRATION OF SOL: 8/31/23-11/12/23

MURs 7303, 7380, 7566 and RR 19L-28 (McSally for Congress, *et al.*)

First General Counsel's Report

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1 ELECTION CYCLE: 2018
2
3 **COMPLAINANT:** American Democracy Legal Fund
4
5 **RESPONDENTS:** Martha McSally
6 McSally for Senate, Inc. and
7 Paul Kilgore in his official capacity as
8 treasurer and in his individual capacity
9
10 **RR 19L-28**
11 DATE OF REFERRAL: 8/28/19
12 DATE OF NOTIFICATION: 8/29/19
13 LAST RESPONSE RECEIVED: None
14 DATE ACTIVATED: 9/19/19
15
16 EXPIRATION OF SOL: 8/31/23-11/12/23
17 ELECTION CYCLE: 2018
18
19 **COMPLAINANT:** Internally Generated
20
21 **RESPONDENT:** McSally for Senate, Inc. and
22 Paul Kilgore in his official capacity as
23 treasurer
24
25 **INTERNAL REPORTS CHECKED:** Disclosure Reports
26
27 **FEDERAL AGENCIES CHECKED:** None
28
29 **RELEVANT STATUTES AND**
30 **REGULATIONS:** 52 U.S.C. § 30101(2)
31 52 U.S.C. § 30102(e)
32 52 U.S.C. § 30103(a)
33 52 U.S.C. § 30104(a), (b)
34 52 U.S.C. § 30116(a)(5)(C)
35 52 U.S.C. § 30116(f)
36 11 C.F.R. § 100.3
37 11 C.F.R. § 100.72
38 11 C.F.R. § 100.131
39 11 C.F.R. § 101.1
40 11 C.F.R. § 102.1(a)
41 11 C.F.R. § 102.12
42 11 C.F.R. § 101.3
43 11 C.F.R. § 110.1
44 11 C.F.R. § 110.3(c)(5)
45 11 C.F.R. § 110.8(d)
46

I. INTRODUCTION

During the 2018 election cycle, Martha McSally was serving as U.S. Representative from Arizona's 2nd Congressional District and was a candidate for the U.S. Senate.¹ The MUR 7303 Complaint alleges that McSally failed to file a timely Statement of Candidacy for the Senate and that McSally for Congress and Paul Kilgore in his official capacity as treasurer ("House Committee") continued to raise and spend funds to support McSally's Senate campaign, in violation of the Federal Election Campaign Act of 1971, as amended (the "Act").² The Complaint in MUR 7380 alleges that McSally, her House Committee, and McSally for Senate, Inc. and Paul Kilgore in his official capacity as treasurer ("Senate Committee") violated the Act by raising and spending funds through both her House and Senate Committees to support her Senate candidacy, and illegally transferring nearly \$1 million from her House Committee to her Senate Committee in January and February 2018.³ Finally, the Complaint in MUR 7566 and the Referral in RR 19L-28 allege that the Senate Committee received excessive contributions during the 2018 election cycle.⁴

As set forth below, we recommend that the Commission find reason to believe that the House Committee and Senate Committee violated 52 U.S.C. § 30116(a)(5)(C) in

¹ McSally won the August 28, 2018, Republican primary for the U.S. Senate and lost the general election in November 2018. On January 3, 2019, McSally was appointed by the Arizona governor to fill a vacant U.S. Senate seat.

² MUR 7303 Compl. at 1-2 (Dec. 15, 2017).

³ MUR 7380 Compl. at 1, 4 (May 7, 2018). The Office of the General Counsel previously circulated a First General Counsel's Report ("FGCR") in MURs 7303 and 7380, which we withdrew on August 22, 2019. Memorandum to the Commission, MUR 7303 and 7380 (Withdrawal of FGCR) (Aug. 22, 2019).

⁴ MUR 7566 Compl. at 2 (Feb. 12, 2019); RR 19L-28 at 1 (Aug. 28, 2019).

1 connection with the impermissible transfer of funds, and that the Senate Committee violated
2 30116(f) in connection with the receipt of excessive contributions. We additionally
3 recommend that the Commission exercise its prosecutorial discretion and dismiss the
4 allegation that McSally failed to timely file her Statement of Candidacy for the Senate, in
5 violation of 52 U.S.C. § 30102(e) and dismiss the allegations that the House Committee
6 and the Senate Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72(a) and
7 100.131(a) by failing to properly report receipts and disbursements in connection with
8 McSally's testing-the-waters activities and dismiss the allegation that McSally violated
9 11 C.F.R. § 110.8(d) by failing to establish separate campaign organizations for her House
10 candidacy and potential Senate candidacy. We further recommend that the Commission
11 open a MUR in RR 19L-28, merge the new MUR with MURs 7380 and 7566, and enter
12 into pre-probable cause conciliation with the Senate Committee and the House
13 Committee. We further recommend that the Commission close the file in MUR 7303, and
14 that the Commission close the file as to Martha McSally in MUR 7380 and 7566.

15 **II. FACTS**

15 **A. MUR 7303**

16 McSally filed her Statement of Candidacy for re-election to the House in 2018 on
17 November 23, 2016.⁵ McSally for Congress is her principal campaign committee for her
18 House campaign.⁶ On January 11, 2018, she filed a Statement of Candidacy for the

⁵ Martha McSally, Statement of Candidacy (House) (Nov. 23, 2016).

⁶ McSally for Congress, Statement of Organization (amended May 30, 2017).

Senate.⁷ McSally for Senate, Inc. is her principal committee for the Senate campaign.⁸

Paul Kilgore is both committees' treasurer.

The Complaint in MUR 7303, filed about a month before McSally declared her candidacy for the Senate, alleges that she triggered candidacy as early as November 7, 2017, when a news article reported that Representative David Schweikert said McSally told him that she was running for the Senate seat to be vacated by then-Senator Jeff Flake.⁹ The article reported that "[t]he news didn't come from McSally" but from Schweikert, who "confirmed to reporters for several news outlets that the retired Air Force colonel said she was planning to enter the Senate race," and that McSally could not be reached for comment.¹⁰ The Complaint further alleges that McSally hired a polling company, WPA Intelligence, in November 2017 "to run a poll geared towards setting the strategy of her new campaign for U.S. Senate."¹¹ The Complaint alleges that after the date of the news article, the House Committee continued to accept contributions and make expenditures, and that McSally's House campaign website was still live and soliciting contributions.¹² The Complaint further alleges that Respondents used the House Committee to fundraise for McSally's Senate candidacy, implying that she was using her House Committee as the authorized committee for her Senate campaign without filing an

⁷ Martha McSally, Statement of Candidacy (Senate) (Jan. 11, 2018).

⁸ McSally for Senate, Inc., Statement of Organization (Jan. 11, 2018).

⁹ MUR 7303 Compl. at 3, n.6, citing Mike Christy, *U.S. Rep. Martha McSally Tells House Colleagues She's Running for Senate*, ARIZONA DAILY STAR, Nov. 7, 2017.

¹⁰ *Id.*

¹¹ *Id.* at 3-4.

¹² *Id.*

Amended Statement of Organization.¹³ The Complaint argues that given these facts, McSally must have raised or spent \$5,000 in support of her Senate campaign by November 15, 2017, thus triggering the requirement to file her Statement of Candidacy within 15 days.¹⁴

In a joint Response to MUR 7303, McSally and the House Committee assert that Schweikert was not McSally's agent or authorized representative, nor did he have actual or implied authority to act or speak on her behalf.¹⁵ The Response further asserts that McSally was merely testing the waters for a possible Senate candidacy in November 2017, but she did not become a Senate candidate until her announcement in January 2018.¹⁶ During this time, she "met with various constituents and groups throughout Arizona, and performed traditional testing-the-waters activities, such as polling, to determine the viability of her potential candidacy for Senate."¹⁷

B. MUR 7380

The Complaint in MUR 7380 alleges that after McSally became a declared Senate candidate, Respondents impermissibly raised and spent funds through both her House and Senate Committees to support her dual candidacy, and that the House Committee impermissibly transferred approximately \$1 million to the Senate Committee while

¹³ *Id.* at 4.

¹⁴ *Id.* at 3.

¹⁵ MUR 7303 Resp. at 4 (Feb. 7, 2018).

¹⁶ *Id.* at 2, 4.

¹⁷ *Id.* at 2.

McSally was actively seeking election to more than one Federal office.¹⁸ According to the Complaint, on January 22, 2018, the House Committee transferred \$140,000 to the Senate Committee, and on February 13, 2018, it made an additional transfer of \$832,498.97.¹⁹ The Complaint alleges that McSally made no formal announcement that she had abandoned her House candidacy nor did she file a termination report with the Commission.²⁰ According to the Complaint, these transfers indicate that McSally maintained the House Committee merely to raise additional funds under a separate limit to support her Senate candidacy.²¹

In a joint Response to MUR 7380, Respondents assert that the House Committee did not solicit or disburse funds to further her Senate campaign.²² Specifically, Respondents assert that any contributions the House Committee received after McSally announced her Senate candidacy were in response to “direct mail and email solicitations that were sent out before she became a candidate for Senate, most of which were in small dollar amounts.”²³ Respondents further assert that disbursements from her House Committee after McSally announced her Senate candidacy were made in connection with House Committee expenses incurred before McSally became a Senate candidate, not to further her Senate campaign.²⁴ Additionally, Respondents state that the House Committee

¹⁸ MUR 7380 Compl. at 1-2.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 2.

²¹ *Id.* at 3.

²² MUR 7380 Resp. at 4 (May 3, 2018).

²³ *Id.*

²⁴ *Id.*

remains open because of ongoing enforcement matters, including an audit.²⁵ Last, Respondents assert that the transfers from the House Committee to the Senate Committee were permissible because they occurred after McSally publicly announced that she was not running for re-election to the House, and the House Committee's counsel informed the Commission's Reports Analysis Division ("RAD") that McSally was not running for re-election.²⁶

C. MUR 7566 and RR 19L-28

The Complaint in MUR 7566 alleges that during the 2018 election cycle, the Senate Committee received more than \$270,000 in excessive contributions from over 60 individuals.²⁷ The allegations are based on two RFAIs that RAD sent to the Committee regarding its Amended 2018 12-Day Pre-General and Amended 2018 30-Day Post-General Reports, as well as to a news article referencing those RFAIs.²⁸

The Referral in RR 19L-28 states that the Senate Committee received a total of \$52,300 in excessive contributions from 20 individuals from October 1 through November 26, 2018, which were not timely refunded, reattributed or redesignated within the permissible time frames. On January 28, 2019, RAD sent an RFAI to the Senate

²⁵ *Id.* at 5; see A15-04, Final Audit Report of the Commission on McSally for Congress 2014 (May 15, 2018); ADR 872 (McSally for Congress) (closed on July 3, 2019, with a negotiated settlement).

²⁶ MUR 7380 Resp. at 6-7, nn.19-22.

²⁷ MUR 7566 Compl. at 2.

²⁸ *Id.* at 2-3, nn.7, 8 citing RFAI (Jan. 28, 2019); RFAI (Feb. 5, 2019); Brian Slodysko, *FEC Flags Arizona Senator for Excessive Campaign Donations*, AP NEWS (Jan. 31, 2019). The Complaint further alleges recidivism with regard to the Senator's federal political committees, and as support refers to the Commission's 2014 audit of the House Committee. MUR 7566 Compl. at 3-4 citing Dylan Smith, *Errors in McSally Campaign Reports Add Up to Millions*, TUCSON SENTINEL (July 17, 2015), Dylan Smith, *FEC Audit: McSally Campaign Misstated Finances, Didn't Disclose Donors' Jobs*, TUCSON SENTINEL (Apr. 26, 2018).

1 Committee identifying \$116,667.50 in excessive contributions from 59 individuals
2 appearing on its first amended 2018 30-Day Post-General Report.²⁹ On February 5, 2019,
3 RAD sent another RFAI to the Senate Committee referencing the Amended 2018 12-Day
4 Pre-General Report filed on October 25, 2018, which contained excessive and prohibited
5 contributions totaling \$25,800 from ten individuals and two limited liability companies.³⁰

6 In Response to the MUR 7566 Complaint, the Senate Committee asserts that it
7 timely refunded or reattributed each of the excessive contributions identified in the
8 January 2019 RFAI, and addressed them in either its 2018 Year End Report, 2019 April
9 Quarterly Report, or its Form 99 Miscellaneous Report filed March 4, 2019.³¹

10 As set forth in detail in the Referral, the Committee timely remedied all but
11 \$30,700 in excessive contributions from twelve individuals disclosed on its first amended
12 2018 30-Day Post-General Report filed January 23, 2019,³² and timely remedied all but
13 \$21,600 in excessive contributions appearing on its original 2018 12-Day Pre-General
14 Report filed October 25, 2018.³³

15 From June 7 through July 26, 2019, a RAD analyst spoke with the Senate
16 Committee's treasurer or representative a few times regarding the excessive contributions,
17 and notified the Committee that it could be referred for potential enforcement action.³⁴

²⁹ RFAI (Jan. 28, 2019).

³⁰ RR 19L-29 at 1-2.

³¹ MUR 7566 Resp. at 2.

³² RR 19L-28 at 3-6.

³³ *Id.* at 1-3.

³⁴ *Id.* at 5-6.

1 The Senate Committee explained that some of the refunds were made outside of the
 2 permissible time frames because it received the RFAs in late January and early February
 3 2019.³⁵ On August 28, 2019, RAD referred the Senate Committee to the OGC, and on the
 4 same day we forwarded a copy of the Referral to the Senate Committee.³⁶ The Senate
 5 Committee did not respond to the RAD Referral.³⁷

6 **III. LEGAL ANALYSIS**

7 **A. There Is Reason to Believe McSally Impermissibly Transferred Funds** 8 **from the House Committee to the Senate Committee During the Time She** 9 **Was “Actively Seeking” Both Nominations.**

10 The Act and Commission regulations restrict transfers of funds between the
 11 principal campaign committees of a candidate who is seeking nomination or election to
 12 more than one Federal office.³⁸ A candidate is deemed to be seeking more than one
 13 Federal office if the individual is concurrently a candidate for more than one Federal
 14 office during the same or overlapping election cycles, and is thus subject to the “dual
 15 candidacy” transfer rules.³⁹

16 No funds may be transferred between the separate campaigns, except the transfer
 17 of funds between the principal campaign committees of a House or Senate candidate is
 18

³⁵ *Id.* at 6.

³⁶ See Memorandum from Patricia C Orrock, Chief Compliance Officer, to Lisa Stevenson, Acting General Counsel, Referral of McSally for Senate, Inc. (Aug. 28, 2019).

³⁷ The Senate Committee requested a 60-day extension of time in which to respond and did not respond to our request for commensurate tolling of the statute of limitations. Letter from James E. Tyrell III, counsel, to Jeff S. Jordan, FEC (Sept. 23, 2019).

³⁸ 52 U.S.C. § 30116(a)(5)(C); 11 C.F.R. § 110.3(c)(5)(i).

³⁹ Explanation and Justification, *Affiliated Committees, Transfers, Prohibited Contributions, Annual Contributions Limitations and Earmarked Contributions* (“E&J, Transfers”), 54 Fed. Reg. 34,098, 34,102-03 (Aug. 17, 1989). This rule, 11 C.F.R. § 110.3(c), along with others, implements the contribution limitations and prohibitions of the Act. *Id.*

permissible provided that two conditions are met: (i) the limitations in the Act on contributions by persons are not exceeded by such transfer, and (ii) the transfer is not made when the candidate is “actively seeking” nomination or election to both such offices.⁴⁰

1. Actively Seeking

Addressing the “actively seeking” condition precedent to a legal transfer first, an individual will not be considered to be “actively seeking” nomination or election to a Federal office if one of the following four criteria is met: (1) the individual has publicly announced that she will no longer seek nomination or election to that Federal office and “ceases to conduct campaign activities with respect to that election except in connection with the retirement of debts outstanding at the time of the announcement;” (2) “the individual becomes ineligible for nomination or election to that office by operation of law;” (3) the individual has filed a termination report with the Commission; or (4) the individual has notified the Commission in writing that she will no longer conduct further campaign activities with respect to that election.⁴¹

None of the four criteria in the regulation appears to be met here. Taking the criteria in turn, the available information does not support McSally’s argument that she had personally disavowed her House re-election campaign in January 2018 when she declared her Senate candidacy, nor is it clear that she ceased campaign activities with respect to her House race. Respondents assert that McSally “has made numerous public

⁴⁰ 52 U.S.C. § 30116(a)(5)(C); *see also* 11 C.F.R. §§ 110.3(c)(5), 110.8(d).

⁴¹ 11 C.F.R. § 110.3(c)(5)(i). This regulation implements 52 U.S.C. § 30116(a)(5)(C). E&J, *Transfers*, 54 Fed. Reg. at 34,103.

statements to this effect, in both smaller settings and larger campaign events and fundraisers,” yet they provide no details or declarations in support of this assertion. Instead, they cite only to three news articles reacting to McSally’s announcement that she was running for the Senate, two of which observe that there would be no incumbent on the House ballot in her district, and one of which quotes the Democratic Congressional Campaign Committee as stating that McSally’s Senate race announcement creates a “vacancy” in the House.⁴² While a public statement by a third party that a person is running for the Senate may imply that the person is no longer running for the House, the Commission’s regulation specifies that the individual candidate must announce that he or she will no longer seek election or nomination to the Federal office.⁴³ Our review of publicly available information from the relevant time period did not reveal that McSally herself publicly stated that she would not be running for re-election to the House.

Further, the available information, while not free of ambiguity, does not sufficiently demonstrate that the Committee ceased campaign activity after McSally’s Senate candidacy announcement. The House Committee’s reports disclose that it accepted over \$380,000 in contributions, which included \$17,500 in PAC contributions, after the date of McSally’s candidacy announcement, a time when the House Committee

⁴² MUR 7380 Resp. at 6-7 nn.20-22 citing Matthew Yglesias, *Arizona’s Already Very Complicated Senate Race, explained*, VOXMEDIA (Jan. 12, 2018), <https://www.vox.com/policy-and-politics/2018/1/12/16877796/mcsally-announcement-arizona-senate>; Steven Shepard and Kevin Robillard, *McSally Will Run for Senate in Arizona*, POLITICO (Jan. 12, 2018), <https://www.politico.com/story/2018/01/12/martha-mcsally-arizona-senate-race-283408>; Democratic Congressional Campaign Committee, *DCCC Statement of Martha McSally’s Run for U.S. Senate* (Jan. 12, 2018), <https://dccc.org/dccc-statement-martha-mcsallys-run-u-s-senate/>.

⁴³ See 11 C.F.R. § 110.3(c)(5)(i)(A).

1 had no debt to retire.⁴⁴ While Respondents assert that these funds were received by the
 2 House Committee in response to solicitations sent before McSally's Senate run
 3 announcement,⁴⁵ their assertion in the response is general and unsworn. On the other
 4 hand, publicly available information shows that the House Committee's campaign
 5 website, which contained a "donate" link to accept contributions, remained active until
 6 January 2, 2018, a fact which would suggest that the House Committee ceased activities
 7 just before her Senate candidacy announcement.⁴⁶

8 As to the second "actively seeking" criterion, whether and when McSally became
 9 ineligible to run for one of the offices by operation of law, Arizona law provides:

10 A person is not eligible to be a candidate for nomination or election
 11 to more than one public office if the elections for those offices are held
 12 on the same day and if the person would be prohibited from serving the
 13 offices simultaneously. A person is not eligible to be a candidate for
 14 nomination or election to more than one federal office simultaneously
 15 (except for offices of president and vice president).⁴⁷

16 To have appeared on the ballot in the August 28, 2018, Arizona Senatorial
 17 primary, a candidate had to have filed a Statement of Candidacy with the Commission and
 18 submitted that statement along with a "Federal Candidate Nomination Paper Declaration

⁴⁴ McSally for Congress 2017 Year-End Report at 2 (Jan. 31, 2018); McSally for Congress 2018 April Quarterly Report at 2 (Apr. 13, 2018). Although the regulations do not define "campaign activities" for the purpose of determining whether a candidate ceases to conduct campaign activities with respect to a particular election, the Commission has defined "campaign activities" in another context to include accepting contributions. *See* 11 C.F.R. § 9004.7(b)(2) (defining "campaign activity" for purposes of determining qualified campaign expenses for presidential general election public financing).

⁴⁵ *See* MUR 7380 Resp. at 4.

⁴⁶ *See* MCSALLYFORCONGRESS.COM (Jan. 2, 2018) *archived at* <https://web.archive.org/web/20180102180444/https://mcsallyforcongress.com/>.

⁴⁷ A.R.S. § 38-296.01; *see also* A.R.S. § 38-296; Ariz. Const. Art. 22.

1 of Qualification” with the Arizona Secretary of State sometime between April 30 and May
2 30, 2018.⁴⁸

3 McSally filed her Statements of Candidacy with the Commission for the House on
4 November 23, 2016, and for the Senate on January 11, 2018. On May 16, 2018, she filed
5 the required documents with the Arizona Secretary of State to run for the Senate.⁴⁹ Thus,
6 by qualifying on May 16 for the Republican Senatorial primary, she became legally
7 ineligible to run for re-election to the House. Thus, under operation of state law, she was
8 “actively seeking” both positions until May 16.

9 With regard to the third and fourth criteria of the “actively seeking” regulation, the
10 record indicates that McSally has not filed a termination report with the Commission nor
11 did she notify the Commission in writing until August 30, 2018—the date of her Response
12 to the Complaint in MUR 7380—that she and the House Committee would conduct no
13 further campaign activities other than retiring debts. Although the Commission would not
14 approve a House Committee termination report because of pending Commission matters,
15 the regulation does not include an exception to this criterion under such circumstances.
16 Respondents also state that counsel to the House Committee informed RAD by phone that
17 McSally was not running for re-election to the House.⁵⁰ RAD’s records show that on
18 February 22, 2018, counsel to the House Committee spoke with RAD in connection with
19 an audit of the House Committee’s 2014 cycle activity, and they discussed termination

⁴⁸ See A.R.S. § 16-311.

⁴⁹ See State of Arizona, Martha McSally Federal Candidate Nomination Paper Declaration of Qualification (May 16, 2018), <https://apps.arizona.vote/electioninfo/assets/4/0/NominationPapers/mcsally-martha-8780-6029.pdf>.

⁵⁰ MUR 7380 Resp. at n.19.

1 guidelines and how to disclose a transfer of residual funds to the Senate Committee. RAD
 2 told counsel that while it encourages committees to file a Miscellaneous Report (“Form
 3 99”) to indicate that a dual candidate is no longer conducting activities with respect to one
 4 of the campaigns, it does not require a Form 99 if it is clear from the candidate’s public
 5 statements and media sources that the candidate or his or her committee is no longer
 6 seeking one of the offices. Thus, while counsel did speak with RAD on this subject, the
 7 regulation requires that the notice be written, as discussed above, public statements were
 8 not sufficiently clear, and, in any event, the bulk of the transfers, \$972,498.97, occurred
 9 *before* this conversation.⁵¹

10 In sum, the available information does not demonstrate that McSally had satisfied
 11 any of the “actively seeking” criteria until May 16, 2018, so the second condition
 12 precedent for a legal transfer between the House and Senate Committees did not occur.

13 2. Contribution Limits

14 As for the other condition precedent to a legal transfer between the House and
 15 Senate Committee – compliance with the applicable contributions limits—the Committees
 16 did not meet it. The Act prohibits any person from making contributions to any candidate
 17 and the candidate’s authorized political committee in excess of the limits at 52 U.S.C.
 18 § 30116(a), and candidate committees are prohibited from knowingly accepting excessive
 19 contributions.⁵² For the 2017-2018 election cycle, individuals were permitted to
 20 contribute a maximum of \$2,700 to a candidate or candidate committee per election.⁵³ All

⁵¹ 11 C.F.R. § 110.3(c)(5)(i)(D).

⁵² 52 U.S.C. § 30116(f); 11 C.F.R. § 110.9.

⁵³ 52 U.S.C. § 30116(a)(1)(A).

1 refunds, reattributions, or redesignations of contributions which exceed the Act's
 2 limitations must be made within sixty (60) days of receipt.⁵⁴

3 The Committees' disclosure reports reveal that the transfers from the House
 4 Committee to the Senate Committee resulted in at least \$10,875 in excessive contributions
 5 that were either not remedied or had not been refunded as of the date of McSally's
 6 October 2019 Quarterly Report. Further, it is not clear whether the Senate Committee
 7 obtained proper redesignations of money contributed to the House Committee. Thus,
 8 Respondents have not satisfied the first of the two conditions precedent for a permissible
 9 transfer from the House to the Senate Committee.

10 Commission regulations provide that when an individual is a candidate for more
 11 than one Federal office, a separate contribution limitation applies for each election to each
 12 office.⁵⁵ If a candidate is no longer seeking two federal offices, and the transfer from one
 13 campaign committee to the other is otherwise permitted, the contributions which make up
 14 the transfer shall be reviewed on a "last in, first transferred" basis, beginning with the last
 15 contribution received and working back until the amount transferred is reached. The total
 16 amount transferred must be reduced if the described review of contributions indicates that
 17 any contributor has reached the applicable limitation of the Act.⁵⁶ In addition, the

⁵⁴ 11 C.F.R. § 103.3(b)(3).

⁵⁵ 11 C.F.R. §§ 110.1(f), 110.8(d).

⁵⁶ See 52 U.S.C. § 30116(a)(5)(C); 11 C.F.R. § 110.3(c)(5)(ii); *see also* Advisory Op. 1984-38 (Friends of Jim Oberstar); Advisory Op. 1979-51 (Edgar for Congress Committee); Advisory Op. 1982-01 (James J. Florio).

1 transferee committee must disclose the transferred funds received as contributions
2 received from the original contributors.⁵⁷

3 McSally's reports show four transfers from the House to the Senate Committees
4 totaling \$1,292,982.77: \$140,000.00 on January 22, 2018; \$832,498.97 on February 13,
5 2018; \$6,222.63 on May 10, 2018; and \$314,261.17 on June 6, 2018. The January,
6 February and May transfers were impermissible because McSally was still "actively
7 seeking" the nomination or election to both the House and Senate at those times. The June
8 transfer is permissible because it occurred after McSally filed her nomination papers for
9 the Senate primary. Moreover, the House campaign was required to obtain written
10 statements from the House contributors redesignating those contributions to the Senate
11 candidacy, and aggregate those contributions with any others from those contributors to
12 the Senate campaign.⁵⁸ The Senate Committee appears to have reported each transfer,
13 disclosing memo entries to support each transfer on Schedule A for Line 12 of its reports.
14 The memo entries appear to disclose the transferred funds received as contributions
15 received from the original contributors.

16 Nonetheless, an examination of the Committees' reports reveals that the Act's
17 individual contribution limits were exceeded as a result of the transfers in the total amount
18 of \$10,875: \$4,475 in excessive individual contributions that were not remedied as of
19 September 30, 2019, the date of closing for the 2019 October Quarterly Report, and
20 \$6,400 that was refunded outside the applicable sixty-day limit set forth in 11 C.F.R.

⁵⁷ See 11 C.F.R. § 104.12.

⁵⁸ See 11 C.F.R. §§ 110.3(c)(5)(ii); 110.1(b)(5).

§ 103.3(b)(3). Further, at this stage the available information does not indicate whether the redesignations were obtained from any individual contributors.

Accordingly, we recommend that the Commission find reason to believe that the House Committee and Senate Committee violated 52 U.S.C. § 30116(a)(5)(C) by impermissibly transferring funds from the House Committee to the Senate Committee.⁵⁹ Although the amount of excessive contributions is not particularly large, it illustrates why the dual candidacy transfer rules exist: to carry out the Act's contribution limitations and prohibitions.⁶⁰ In addition, the current record does not indicate whether the Senate Committee obtained the necessary contribution redesignations. We thus recommend that the Commission find reason to believe that the Senate Committee violated 52 U.S.C. § 30116(f) by knowingly accepting excessive individual contributions created by the transfer.

B. The Commission Should Dismiss the Allegations that McSally Untimely Filed her Statement of Candidacy

According to the Act, an individual becomes a candidate if: (a) such individual receives contributions or makes expenditures in excess of \$5,000, or (b) such individual gives his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions or has made such expenditures in excess of \$5,000.⁶¹ Once the \$5,000 threshold has been met,

⁵⁹ See Factual and Legal Analysis at 4-5, MUR 3063 (Bonker for Senate Committee) (Commission found reason to believe Bonker Senate Committee violated Title 2 predecessor to 52 U.S.C. § 30116(a)(5)(C)(i) for transferring funds from authorized Bonker House Committee to Senate Committee while candidate was actively seeking election to both federal offices). The Commission conciliated with the Senate Committee after discovery. See Certifications, MUR 3603 (Dec. 24, 1990 and July 12, 1991).

⁶⁰ See *supra* n.39.

⁶¹ 52 U.S.C. § 30101(2).

the candidate has fifteen days to designate a principal campaign committee by filing a Statement of Candidacy with the Commission.⁶² The principal campaign committee must file a Statement of Organization within ten days of its designation,⁶³ and must file disclosure reports with the Commission in accordance with 52 U.S.C. § 30104(a) and (b).⁶⁴

Notwithstanding the reporting requirements triggered by an individual's candidacy, the Commission has established limited "testing-the-waters" exemptions that permit an individual to test the feasibility of a campaign for Federal office without becoming a candidate under the Act.⁶⁵ These exemptions exclude from the definition of "contribution" and "expenditure" those funds received and payments made solely to determine whether an individual should become a candidate.⁶⁶ These regulations seek to "draw a distinction between activities directed to an evaluation of the feasibility of one's candidacy, as distinguished from conduct signifying that a private decision to become a candidate has been made."⁶⁷ Testing-the-waters activities include, but are not limited to, payments for polling, telephone calls, and travel, and only funds permissible under the Act

⁶² *Id.* § 30102(e)(1); 11 C.F.R. § 101.1(a).

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

⁶⁴ *See, e.g.*, Factual and Legal Analysis at 6-9, MUR 6735 (Joseph A. Sestak); Factual and Legal Analysis at 5, MUR 6449 (Jon Bruning); Factual and Legal Analysis at 2, MUR 5363 (Alfred C. Sharpton).

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

⁶⁶ 11 C.F.R. §§ 100.72(a), 100.131(a).

⁶⁷ Advisory Op. 1981-32 at 4 (Reubin Askew).

1 may be used for such activities.⁶⁸ The testing-the-waters exemption is not available to
 2 individuals who have made a decision to become a candidate or conduct activities that
 3 indicate he or she has decided to become a candidate.⁶⁹ Commission regulations set forth
 4 a non-exhaustive list of activities that indicate that an individual is no longer testing the
 5 waters and has decided to become a candidate. Such indicia include: (1) using general
 6 public political advertising to publicize his or her intention to campaign for Federal office;
 7 (2) raising funds in excess of what could reasonably be expected to be used for
 8 exploratory activities or undertaking activity designed to amass campaign funds that
 9 would be spent after he or she becomes a candidate; (3) making or authorizing written or
 10 oral statements that refer to him or her as a candidate for a particular office; (4) conducting
 11 activities in close proximity to the election or over a protracted period of time;⁷⁰ and
 12 (5) taking action to qualify for the ballot under state law.⁷¹

13 McSally contends that she was merely considering a run for the Senate and alleges
 14 that Schweikert's reported statement to the press on November 7, 2017, that "[s]he said
 15 she's in for Senate,"⁷² is hearsay, and is not attributable to her given that Schweikert is not
 16 McSally's agent or authorized representative, nor does he have actual or implied authority

⁶⁸ *Id.*

⁶⁹ See Advisory Op. 2015-09 at 5 (Senate Majority PAC, *et al.*) ("AO 2015-09"); see also Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9,992, 9,993 (Mar. 13, 1985) (exemption "explicitly limited 'solely' to activities designed to evaluate a potential candidacy").

⁷⁰ The Commission has advised that there is no specific time limit for such activities, and the length of time spent testing the waters is but one factor in determining whether an individual becomes a candidate. AO 2015-09 at 6.

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

⁷² See n.9, *supra*.

1 to speak on her behalf.⁷³ Regardless, the time between Schweikert's statement and
 2 McSally's candidacy announcement was relatively short—about two months—and
 3 occurred long before the primary election.⁷⁴ Given these circumstances, we recommend
 4 that the Commission exercise its prosecutorial discretion and dismiss the allegations that
 5 McSally untimely filed her statement of candidacy in violation of 52 U.S.C. § 30102(e).⁷⁵

6 **C. The Commission Should Dismiss the Allegations that Respondents Did Not**
 7 **Properly Report Receipts and Disbursements for McSally's House and**
 8 **Senate Campaigns and Failed to Maintain Separate Campaign**
 9 **Organizations.**

10
 11 Under the Act, reports filed with the Commission must accurately disclose, *inter*
 12 *alia*, the total amount of all receipts and disbursements as well as total amounts in
 13 contributions and expenditures made to meet the candidate's or committee's operating
 14 expenses.⁷⁶ Commission regulations provide that treasurers are personally responsible for
 15 ensuring the timely and complete filing of committee reports and the accuracy of the
 16 information contained therein.⁷⁷

17 An individual who is testing the waters need not register or file disclosure reports
 18 with the Commission unless and until the individual subsequently decides to run for
 19 Federal office,⁷⁸ or conducts activities that indicate he or she has decided to become a

⁷³ See MUR 7303 Resp. at 4.

⁷⁴ See MUR 7261 (Levi for Colorado) Factual and Legal Analysis at 6-7 (Dismissing allegation that candidate filed Statements of Candidacy and Organization about one month late but well in advance of primary election).

⁷⁵ See *Heckler v. Chaney*, 470 U.S. 521 (1985).

⁷⁶ 52 U.S.C. § 30104(b)(2), (4).

⁷⁷ 11 C.F.R. § 104.14(d).

⁷⁸ 11 C.F.R. §§ 100.72(b), 100.131(b). See also AO 2015-09.

1 candidate.⁷⁹ All funds raised and spent for testing-the-waters activities are, however,
 2 subject to the Act's limitations and prohibitions.⁸⁰ Commission regulations require that
 3 once the individual begins to campaign or decides to become a candidate, funds received
 4 and disbursed for testing-the-waters activities are subject to the reporting requirements of
 5 the Act, and must be reported with the first report filed by the candidate's principal
 6 campaign committee.⁸¹

7 Finally, Commission regulations provide that an individual seeking more than one
 8 Federal office, or a Federal office and a state office, must designate separate principal
 9 campaign committees and maintain completely separate campaign organizations.⁸² No
 10 funds, goods, or services may be transferred between or used by the separate campaigns,
 11 except as provided by the Commission regulations.⁸³ If an individual wishes to contribute

⁷⁹ *Id.*; see also Advisory Op. 1979-26 (Grassley) (funds raised or spent solely for exploratory purposes are not immediately subject to the Act's reporting requirements).

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

⁸¹ *Id.* Commission regulations further require that an individual testing the waters keep records of the name of each contributor, the date of receipt and amount of all funds received, and all payments made in connection with activities conducted under 11 C.F.R. §§ 100.72 and 100.131. *Id.* § 101.3.

⁸² 11 C.F.R. § 110.8(d); Advisory Op. 1995-3 (Gramm) ("Commission regulations provide that a candidate seeking more than one Federal office must designate separate principal campaign committees and establish completely separate campaign organizations.") (superseded in part on other grounds); *Campaign Guide for Congressional Candidates and Committees* at 59-60 (June 2014) (presenting example of "Candidate B," who "begins the 2014 election cycle as a House candidate, but later begins a campaign for a Senate seat in 2014"); see also 52 U.S.C. § 30102(e)(3) (prohibiting an authorized committee from supporting more than one candidate); 11 C.F.R. § 101.1(a) (requiring a candidate to include, *inter alia*, his or her name and address, party affiliation, and *office sought* when designating a principal campaign committee).

⁸³ 11 C.F.R. § 110.8(d)(2); see 52 U.S.C. § 30116(a)(5)(C); 11 C.F.R. § 110.3(c)(5), (7).

1 to both campaigns, the contributions for each election for each office must be made to
2 separate committees.⁸⁴

3 The Act does not address, however, whether individuals who have declared their
4 candidacies for one federal office and are testing the waters for a second federal office
5 need to establish separate campaign committees. *See* Statement of Reasons in
6 MURs 7263 (Lucas “Luke” Messer, *et al.*) and 7264 (Theodore “Todd” Rokita, *et al.*)
7 (“SOR”).⁸⁵ McSally is similarly situated to Messer and Rokita as a candidate testing the
8 waters for a Senate candidacy while simultaneously running for re-election to her House
9 seat. While McSally established a separate Senate Committee after she declared her
10 candidacy, she did not do so during her Senate exploratory phase, and her House and
11 Senate Committees’ disclosure reports do not clearly identify some of the receipts and
12 disbursements by disclosing them as in connection with her House re-election campaign
13 or for testing-the-waters activities.

14 The MUR 7303 Response states that McSally’s testing-the-waters activities
15 included conducting a poll and “meeting with groups and individuals throughout
16 Arizona.”⁸⁶ But the Committees’ disclosure reports do not clearly indicate whether they
17 reported these activities correctly. For example, from November 2017 through January
18 2018, the House Committee disclosed a total of \$148,926 in disbursements to WPA

⁸⁴ 11 C.F.R. § 110.1(f). Each contribution must be designated in writing by the contributor for a particular office, and a committee generally may not transfer funds to, loan funds to, make contributions to, or make expenditures on behalf of the candidate’s other committee. *Id.*

⁸⁵ SOR at 1, Comm’rs Weintraub, Petersen, Hunter and Walther.

⁸⁶ MUR 7303 Resp. at 4.

Intelligence, the company McSally hired to conduct polling for her potential Senate run,⁸⁷ and it described the purpose of the disbursement as “surveying” without disclosing the office sought.⁸⁸ Similarly, the Senate Committee disclosed a disbursement to WPA Intelligence on March 8, 2018, for \$24,750 for “surveying,” also without disclosing the office sought.⁸⁹ Thus, the disclosure reports are not clear as to which disbursement is for the November 2017 poll conducted while McSally was testing the waters for a Senate run. Similarly, the disclosure reports do not show expenses incurred for travelling “throughout Arizona” to meet with various groups and individuals while testing the waters for her potential Senate candidacy.⁹⁰ The payments for travel during the testing-the-waters period became expenditures under the Act once McSally became a Senate candidate, and her Senate Committee was required to report them on its 2018 April Quarterly Report, but it did not.⁹¹

Finally, it is not clear from the disclosure reports whether McSally raised funds for a potential Senate run during the testing-the-waters period, and whether those funds were reported correctly. From January 1 through March 3, 2018, the House Committee reported receipts of \$362,634.54 in contributions from individuals and \$17,500 in PAC

⁸⁷ MUR 7303 Compl. at n.7.

⁸⁸ The House Committee reported the disbursements to WPA as follows: \$21,150 on November 14, 2017; \$39,600 on November 27, 2017; \$6,486.18 on December 12, 2017; \$81,690 on January 12, 2018. *See* McSally for Congress 2017 Year-End Report at 921, 924, 933 (Jan. 31, 2018); McSally for Congress April 2018 Quarterly Report at 357 (Apr. 13, 2018).

⁸⁹ McSally for Senate 2018 April Quarterly Report at 1092 (Apr. 13, 2018).

⁹⁰ MUR 7303 Resp. at 4.

⁹¹ 11 C.F.R. § 100.131.

1 contributions.⁹² The MUR 7380 Response states that the House Committee received the
2 contributions from individuals in response to solicitations made before McSally became a
3 Senate candidate.⁹³ Further, publicly available information shows that the House
4 campaign website, which contained a “donate” link to accept contributions, remained
5 active until January 2, 2018.⁹⁴ The Senate Committee’s reports disclose contributions
6 from individuals in the aggregate amount of \$2,087,881 during the first quarter of 2018,
7 but it is unclear if any of these funds were raised during the testing-the-waters period.⁹⁵
8 Consequently, the House Committee reports inaccurately reflect that all of the activity
9 from November 2017 through January 2018 was in connection with McSally’s House
10 campaign, when available information indicates that McSally was spending, and possibly
11 raising, funds to test the waters for her Senate campaign. Thus, the House and Senate
12 Committee reports do not clearly distinguish receipts and disbursements designating
13 campaign and exploratory activity for the different federal offices sought.

14 The Messer-Rokita SOR states that under the Act’s reporting requirements, each
15 committee should make clear on the public record the proper designations for its House
16 re-election campaign and Senate exploratory activity.⁹⁶ In those two cases, however, the
17 Commission dismissed the allegations that the Rokita and Messer Committees failed to
18 properly report receipts and disbursements relating to the candidates’ House Committees

⁹² McSally for Congress 2018 April Quarterly Report (Apr. 13, 2018).

⁹³ See MUR 7380 Resp. at 4.

⁹⁴ See <https://web.archive.org/web/20180102180444/https://mcsallyforcongress.com/>.

⁹⁵ McSally for Senate 2018 April Quarterly Report (Apr. 13, 2018).

⁹⁶ SOR at 2.

1 and to testing-the-waters activities for their Senate runs, given that the underlying activity
2 was reported.⁹⁷ Similarly, the underlying activity related to McSally's House re-election
3 campaign and Senate exploratory activities was reported.

4 Accordingly, we recommend that, consistent with the Rokita and Messer matters,
5 the Commission dismiss the allegations that McSally failed to establish and maintain
6 separate campaign committees for each of her candidacies during the period in which
7 McSally was testing the waters for her Senate candidacy in violation of 11 C.F.R. §
8 110.8(d) and dismiss the allegations that receipts and disbursements were not accurately
9 reported for McSally's House and Senate campaigns in violation of 52 U.S.C. § 30104(b)
10 and 11 C.F.R. §§ 100.72(a) and 100.131(a).

11 **D. There is Reason to Believe that the Senate Committee Received Excessive**
12 **Contributions**
13

14 As set forth in RAD Referral 19L-28, the Committee did not timely refund or
15 reattribute an aggregate of \$53,200 in excessive contributions from 20 individuals as
16 identified on its 2018 12-Day Pre-General and 30-Day Post-General Reports. While the
17 MUR 7566 Complaint alleges that the Committee received \$270,000 in excessive
18 contributions, the Complaint did not take into account the timely corrective action by the
19 Committee. Nonetheless, the \$53,200 in excessive contributions is distinct from the
20 excessive contributions created from the transfer of funds from the House to Senate
21 Committee from April to October 2018 as discussed in Sections II.B and III.A, *supra*.
22

⁹⁷ See *id.* at 2.

1 Accordingly, we recommend that the Commission find reason to believe that the
2 Senate Committee violated 52 U.S.C. § 30116(f) by receiving excessive contributions
3 from individuals disclosed in its 2018 12-Day Pre-General and 2018 30-Day Post General
4 Reports.⁹⁸

⁹⁸ Based on the allegations in the MUR 7566 Complaint, we notified Paul Kilgore in both his official capacity as treasurer and in his individual capacity that he may have violated the Act. Letter from Jeff S. Jordan, FEC, to Paul Kilgore, Treasurer, McSally for Senate, Inc. (Feb. 15, 2019). Given that the available information does not suggest that Kilgore knowingly and willfully violated the Act or regulations, recklessly failed to fulfill his duties as treasurer, or intentionally deprived himself of the operative facts giving rise to a violation, we make no recommendations as to Kilgore in his individual capacity. *See Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings*, 70 Fed. Reg. 1, 6 (Jan. 3, 2005).

MURs 7303, 7380, 7566 and RR 19L-28 (McSally for Congress, *et al.*)

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V. **RECOMMENDATIONS**

1. Open a MUR in RR 19L-28;
2. Merge the new MUR and MUR 7566 into MUR 7380;
3. Find reason to believe that McSally for Senate, Inc. and Paul Kilgore in his official capacity as treasurer violated 52 U.S.C. § 30116(f) by receiving excessive individual contributions;
4. Find reason to believe that McSally for Senate, Inc. and Paul Kilgore in his official capacity as treasurer violated 52 U.S.C. § 30116(a)(5)(C) by impermissibly transferring funds from McSally's House Committee to her Senate Committee while she was actively seeking both nominations;
5. Find reason to believe that McSally for Congress and Paul Kilgore in his official capacity as treasurer violated 52 U.S.C. § 30116(a)(5)(C) by impermissibly transferring funds from McSally's House Committee to her Senate Committee while she was actively seeking both nominations;
6. Dismiss the allegation that Martha McSally untimely filed her Statement of Candidacy in violation of 52 U.S.C. § 30102(e);
7. Dismiss the allegation that Martha McSally violated 11 C.F.R. § 110.8(d) by failing to establish separate campaign organizations for her House candidacy and potential Senate candidacy;
8. Dismiss the allegations that McSally for Senate, Inc. and Paul Kilgore in his official capacity as treasurer violated 52 U.S.C. § 30104(b) and

MURs 7303, 7380, 7566 and RR 19L-28 (McSally for Congress, *et al.*)

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11 C.F.R. §§ 100.72(a) and 100.131(a) by failing to properly report receipts and disbursements in connection with her testing-the-waters activities;

9. Dismiss the allegations that McSally for Congress and Paul Kilgore in his official capacity as treasurer violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72(a) and 100.131(a) by failing to properly report receipts and disbursements in connection with her testing-the-waters activities;

10. Enter into conciliation with McSally for Congress and Paul Kilgore in his official capacity as treasurer, and McSally for Senate, Inc. and Paul Kilgore in his official capacity as treasurer, prior to a finding of probable cause to believe;

11. Approve the attached Factual and Legal Analysis;

12. Approve the attached conciliation agreement;

13. Close the file in MUR 7303;

14. Close the file as to Martha McSally in MURs 7380 and 7566; and

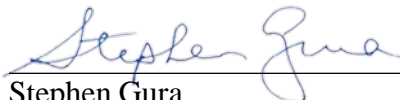
15. Approve the appropriate letters.


Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
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1.17.20

Date


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