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April 12, 2019

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Federal Election Commission
Office of Complaints Examination & Legal Administration
Attention: Kathryn Ross
1050 First Street, NE
Washington, DC 20463

Re: MUR 7567 (Howard Schultz)

Dear Ms. Ross:

This letter is submitted on behalf of Howard Schultz, in response to a complaint filed by American Bridge 21st Century (“Complainant”) with the Federal Election Commission (“Commission”) alleging that Mr. Schultz has engaged in activities that go beyond testing the waters and failed to register and report as a candidate.

The complaint, filed by an opposition research hub for the Democratic Party, is a transparent effort to harass a political opponent—part and parcel of Complainant’s publicly-announced strategy to “oppose [Mr. Schultz] at every turn.”¹ The lack of substantive factual allegations gives up the game. Stripped of its window dressing, the only factual support for the complaint is an unattributed statement from a single press report that Mr. Schultz has been “laying the groundwork for paid advertising.” The complaint ignores the fact that no campaign ads have been publicly disseminated. Moreover, even if this vague allegation could be substantiated, the Commission has long held that activities to prepare for a potential campaign are consistent with testing the waters.

Mr. Schultz has repeatedly said that he is evaluating the possibility of running for president in 2020, but has not yet made a decision to run. The complaint offers no evidence to the contrary. It should be seen for what it is—an attempt to intimidate Mr. Schultz and snuff out a campaign that has not even begun. As one media outlet described Complainant’s tactics, it is nothing more than an “oppo hit.”²

¹ Al Weaver, *Top Democratic Groups Threaten to Unleash Arsenal to Torpedo Schultz Third-Party Bid*, WASH. EXAMINER (Jan. 29, 2019), <https://www.washingtonexaminer.com/news/congress/top-democratic-groups-threaten-to-unleash-arsenal-to-torpedo-schultz-third-party-bid>.

² Lachlan Markay & Sam Stein, *Democratic Opposition Research Group Begins Digging in on Howard Schultz*, THE DAILY BEAST (FEB 1, 2019), <https://www.thedailybeast.com/democratic-oppo-research-group-begins-digging-in-to-howard-schultz>.

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I. An Individual Becomes a Federal Candidate Only After Making a Private Determination to Run

An individual becomes a “candidate” if he or she receives contributions or makes expenditures in excess of \$5,000 or consents to another person doing so on the individual’s behalf.³ However, funds raised or spent to evaluate the feasibility of a potential candidacy—referred to as “testing the waters”—are not considered contributions or expenditures.⁴ As a result, an individual who is testing the waters is not required to register with the Commission unless and until he or she surpasses the contribution or spending threshold *and* makes a private determination to run.⁵

Through examples, the Commission’s regulations draw a distinction between activities aimed at testing the waters and those signifying that a decision has been made. The nonexhaustive list of testing the waters activities consists of conducting a poll, making telephone calls, and traveling. Conversely, the regulations list activities that indicate that an individual has decided to become a candidate, such as making or authorizing written statements that refer to him or her as a candidate, and taking action to qualify for the ballot under state law. The Commission has clarified and expanded on these factors through advisory opinions and enforcement matters.

In determining whether an individual has gone beyond testing the waters in a particular case, “no one factor is necessarily determinative.”⁶ The Commission also must “look *objectively* to candidate activities, not to the stage of an individual’s subjective decision-making process.”⁷ In applying these principles, the Commission has found that an individual has triggered candidate status only when he or she has made an unequivocal statement indicating an intention to run (for example, informing the media that he or she “will announce candidacy” on a date certain) or through other “objective” evidence, “unambiguously indicates that the individual has decided to become a candidate.”⁸

³ 52 U.S.C. § 30101(2)(A); *see also* 11 C.F.R. § 100.3(a).

⁴ 11 C.F.R. §§ 100.72(b); 100.131(b).

⁵ Advisory Op. 2015-09 at 7 (Senate Majority PAC) (citing Advisory Op. 1981-32 (Askew)).

⁶ Factual & Legal Analysis at 6, MUR 6224 (Fiorina); *see also*, Advisory Op. 2015-09 at 6 (Senate Majority); Statement of Reasons of Chair Caroline C. Hunter and Commissioner Matthew S. Petersen at 7, MUR 7273 (Ritchie) (“The Commission’s testing-the-waters regulations have never been a simple check-the-box exercise.”)

⁷ Factual and Legal Analysis at 7-8, MUR 5363 (Sharpton). *See also* Statement of Reasons of Vice Chair Ellen L. Weintraub. MUR 7273 (Ritchie), (“In determining candidacy and applying the testing the waters exception, the Commission must rely on objective indications.”)

⁸ Advisory Op. 2015-09 at 6 (Senate Majority PAC).

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II. Howard Schultz is Testing the Waters

On January 27, 2019, Howard Schultz announced in an interview that he is considering running for president as a centrist independent outside of the two-party system.⁹ Since then, he has consistently and clearly stated that he has not yet made a decision whether to run.¹⁰

The Complaint offers no facts to the contrary. Its claim that Mr. Schultz has gone beyond testing the waters and become a candidate is based solely on the vague and conclusory assertion that he has been “laying the groundwork for paid advertising,” a statement derived from a single press report and unattributed to any source.¹¹

While Commission regulations cite the use of “general public political advertising to publicize [an] intention to campaign for Federal Office” as one factor indicating that an individual has decided to become a candidate, the complaint against Mr. Schultz does not identify any ads that have been publicly disseminated to publicize his intention to campaign for Federal office. This is because no such ads have been publicly disseminated. Even if facts could be presented to substantiate the complaint’s vague allegation that Mr. Schultz has been “laying the groundwork for paid advertising,” whatever that phrase may mean, the Commission has long held that activities “to prepare for a campaign if one were to ensue...[are] consistent with testing the waters activities.”¹² Furthermore, such facts, if presented, would not establish that Mr. Schultz has made a decision that, in fact, he has yet to make.

The only other activities that Complainant attributes to Mr. Schultz appear in the “Factual Background” section of the Complaint—hiring political consultants experienced in presidential campaigns and polling related to a potential presidential run. It is unclear what Complainants

⁹ Scott Pelley, *Former Starbucks CEO Howard Schultz Says He’s Considering Independent Run for President*, CBS NEWS (Jan. 27, 2019), <https://www.cbsnews.com/news/howard-schultz-starbucks-ceo-considering-independent-run-for-president-60-minutes/>.

¹⁰ *Id.* at ¶ 5; see also, e.g., Shia Kapos, *Intent on Not Aiding Trump, Schultz Will Take 3-4 Months to Decide on Run*, POLITICO (FEB. 5, 2019), <https://www.politico.com/story/2019/02/05/howard-schultz-2020-decision-1146125>; Sahil Kapur, *Howard Schultz May Not Decide on 2020 Until at Least Midyear*, BLOOMBERG NEWS (Jan. 29, 2019), <https://www.bloomberg.com/news/articles/2019-01-29/starbucks-schultz-may-not-decide-on-2020-until-at-least-midyear>.

¹¹ Compl. at 4.

¹² Factual & Legal Analysis at 6, MUR 6533 (Haney) (concluding that the production of campaign videos that were uploaded to YouTube and made available to a private group did not trigger candidacy because “mere preparation, rather than dissemination, of campaign materials in advance of a declaration of candidacy does not by itself provide adequate evidence to support a reason to believe that [an individual] decided to become a candidate at that time”); see also Factual & Legal Analysis at 11, MUR 6776 (Niger Innis for Congress) (written campaign plan shared with NRCC was not intended for public distribution and thus constituted testing the waters activity); Advisory Op. 1981-32 (Askew) at 2-4 (testing the waters exemption permits preparation and use of letterhead and biographical brochure that would not be utilized in communications with the general public).

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think the Commission should make of these assertions, but there is no basis for viewing them as evidence that Mr. Schultz has made a decision to run. Commission regulations explicitly list polling as an activity that an individual may undertake to test the waters of a potential candidacy.¹³ Longstanding Commission precedent likewise recognizes that hiring political consultants to advise on the mechanics and feasibility of running for office does not trigger candidate status.¹⁴

III. The Commission Should Find No Reason to Believe that Mr. Schultz Violated the Act and Commission Regulations

The Complaint fails to offer any facts that, even if true, would give rise to a reasonable inference that a violation has occurred, and is based on a legal argument that directly conflicts with longstanding Commission precedent. Put simply, the Complainant is weaponizing the complaint process in an effort to thwart a political threat. Nothing more. After distributing the complaint to the media before filing it with the Commission, the Complainant's work was done.

The Commission should make short work of this matter, too. It should find that there is no reason to believe that a violation has occurred and promptly dismiss the complaint.

Thank you for your consideration. If you have any questions, please contact me at (202) 344-4541.

Respectfully submitted,



Lawrence H. Norton
Meredith K. McCoy

¹³ 11 C.F.R. § 100.131(a); *see also Askew* at 2, 4.

¹⁴ *Askew* at 2, 4; Advisory Op. 1982-03 at 2, 4 (Cranston); *see also* Factual and Legal Analysis, MUR 5196 (Kennedy) (concluding that discussions with political consultants to determine viability of potential candidacy and commissioning a poll to assess name recognition were within the testing the waters exemption).