

1 **FEDERAL ELECTION COMMISSION**

2
3 **FIRST GENERAL COUNSEL'S REPORT**

4
5 **MUR: 7567**

6 DATE COMPLAINT FILED: February 14, 2019

7 DATE OF NOTIFICATIONS: February 15, 2019

8 RESPONSE RECEIVED: April 12, 2019

9 DATE ACTIVATED: September 4, 2019

10
11 EXPIRATION OF SOL: January 27, 2024 /

12 September 26, 2024

13 ELECTION CYCLE: 2020

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15 **COMPLAINANTS:**

American Bridge 21st Century

16 Bradley Beychok

17
18 **RESPONDENT:**

Howard Schultz

19
20 **RELEVANT STATUTES**

52 U.S.C. § 30101(2)

21 **AND REGULATIONS:**

52 U.S.C. § 30102(e)

22 52 U.S.C. § 30103

23 52 U.S.C. § 30104

24 11 C.F.R. § 100.72

25 11 C.F.R. § 100.131

26 11 C.F.R. § 101.3

27
28 **INTERNAL REPORTS**

None

29 **CHECKED:**

30
31 **AGENCIES CHECKED:**

None

32
33 **I. INTRODUCTION**

34 The Complaint alleges that Howard Schultz, former CEO of Starbucks, violated the
35 Federal Election Campaign Act of 1971, as amended (the "Act"), by failing to register and report
36 as a candidate for U.S. President, contending that Shultz went beyond testing the waters by
37 hiring political consultants, conducting polling, and laying the groundwork for paid advertising.
38 From late January 2019 through mid-April, Schultz maintained a high public profile through
39 interviews, town halls, and social media posts; however, from mid-April through September 6,

1 2019, the date when Schultz officially declared his intention not to run, Schultz receded from
2 public life amid health concerns and a crowded Democratic primary field.

3 We recommend that the Commission dismiss the allegation that Schultz violated
4 52 U.S.C. §§ 30102(e)(1), 30103, and 30104 by failing to register and report as a candidate
5 because the available record indicates that Schultz's expenses do not appear to have gone beyond
6 testing the waters.

7 **II. FACTUAL BACKGROUND**

8 On January 27, 2019, Schultz, the former CEO of Starbucks Corporation, announced on
9 CBS's 60 Minutes that he was "seriously thinking of running for president" as a "centrist
10 independent."¹ Schultz indicated that he would promote his memoir while deciding whether to
11 run for President and was willing to spend his personal fortune on his potential campaign.² The
12 Complaint alleges that Schultz became a federal candidate because a news article at the time
13 reported that he had hired political consultants, conducted polling, and laid the "groundwork for
14 paid advertising that could debut in the next two months."³

15 In late January, Schultz's website principally contained marketing for his book, *From the*
16 *Ground Up*, including an active book tour schedule traveling around the country.⁴ In the

¹ Compl. at 1 (Feb. 14, 2019); 60 Minutes Interview at 0:12-17, CBS (Jan. 27, 2019), <https://www.youtube.com/watch?v=gnBhtwKRFhA>.

² Lisa Lerer, *Is Howard Schultz a Candidate Without a Constituency?*, N.Y. TIMES, Jan. 28, 2019, <https://www.nytimes.com/2019/01/28/us/politics/on-politics-howard-schultz-starbucks-independent.html>; Compl. at 2.

³ Compl. at 2 (citing Michael Scherer, *Howard Schultz's presidential ambitions spurred a months-long effort to disrupt the 2020 race*, WASH. POST, Jan. 29, 2019, https://www.washingtonpost.com/politics/howard-schultzs-presidential-ambitions-spurred-a-months-long-effort-to-disrupt-the-2020-race/2019/01/29/30a22154-2408-11e9-ad53-824486280311_story.html).

⁴ Howard Shultz, (Jan. 31, 2019), <https://web.archive.org/web/20190131032136/https://www.howardschultz.com/>.

1 following months, in addition to promoting his book, Schultz also discussed a potential
2 campaign in televised town halls, speeches, news programs, and social media. For example, on
3 February 12, 2019, Schultz discussed his positions on political issues at a televised town hall on
4 CNN, stating that he was exploring a run, but had not yet made a decision whether to run.⁵
5 Beginning in March through late April, Schultz began tweeting about political issues and
6 criticizing candidates from both parties.⁶ For example, Schultz criticized President Trump by
7 tweeting that he “has polluted the presidency with his indecency for 788 days. His continuing
8 assault on the legacy of [John McCain] is a total disgrace and an embarrassment beneath the
9 dignity of the office.”⁷ Schultz also criticized Democratic primary candidate Bernie Sanders by
10 stating: “The Medicare for All proposal by [Bernie Sanders] would cause 180 million people to
11 lose their current healthcare coverage. All that Sanders and the far-left care about is furthering
12 their agenda. This is unrealistic and shows a total disregard of our country’s overwhelming
13 debt.”⁸

14 On March 30, Schultz began running ads on Facebook criticizing the two-party system,
15 requesting that people sign a #fixthesystem “petition.”⁹ The petition requested that people “sign
16 the petition” online by providing an email address if they “believe the two-party system is

⁵ Town Hall with Howard Schultz, CNN (Feb. 13, 2019),
<https://www.youtube.com/watch?v=A45CoomULVc>.

⁶ <https://twitter.com/HowardSchultz>.

⁷ Howard Schultz Tweet, Mar. 20, 2019, <https://twitter.com/HowardSchultz/status/1108472548516192256>.

⁸ Howard Schultz Tweet, Apr. 10, 2019, <https://twitter.com/HowardSchultz/status/1116101439376351232>.

⁹ Facebook Ad Library, Howard Schultz,
https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&view_all_page_id=1782368278496620 (last visited Oct. 22, 2019); Howard Schultz Tweet, Mar. 30, 2019,
<https://twitter.com/HowardSchultz/status/1112008873236258817>.

1 broken and not working for you.”¹⁰ Around the same time, Schultz’s website was revised to
2 contain more biographical information and include a video entitled “restoring our nation,” which
3 is no longer available.¹¹ The revised website also included the same #fixthesystem language and
4 petition linked in Schultz’s Facebook ads.¹²

5 On April 4, 2019, Schultz attended a Fox News town hall in Kansas City, Missouri.¹³
6 The moderators stated that Schultz had not yet declared his candidacy, but when asked whether
7 he would vote for Biden, Schultz stated, “Well, I’m going to vote for myself.” In a follow-up
8 question, moderators asked, “Does that mean you’re running? Is that a declaration?” Schultz
9 stated, “We have 18 months to decide that.”¹⁴ Later, during the same event, Schultz explained
10 that if a moderate Democrat ran, then he would not run; however, if a “Democratic Socialist”
11 like Bernie Sanders was emerging as the likely nominee, then he would be much more likely to
12 run.¹⁵

13 News reports indicate that Schultz “cooled” on a possible run after Biden officially
14 declared his candidacy on April 19, 2019, because Schultz reportedly believed that Biden would
15 run as a moderate.¹⁶ After Biden’s entry into the presidential race, Schultz posted only a handful

¹⁰ <https://fixthesystem.howardschultz.com/> (last visited Dec. 3, 2019).

¹¹ Howard Schultz, (Apr. 21, 2019), <https://web.archive.org/web/20190421200403/https://www.howardschultz.com/>.

¹² *Id.*

¹³ Town Hall with Howard Schultz: Part 1, FOX NEWS, (Apr. 4, 2019), <https://video.foxnews.com/v/6022650200001/#sp=show-clips>.

¹⁴ *Id.* at 4:17-4:35.

¹⁵ *Id.* at 6:45-7:30.

¹⁶ David Choi, *Former Starbucks CEO Howard Schultz is cooling it on his potential 2020 presidential run because of Joe Biden*, BUSINESS INSIDER, May 15, 2019, <https://www.businessinsider.com/howard-schultz-2020-campaign-and-joe-biden-2019-5>.

1 of tweets, compared to tweeting nearly daily in the previous months.¹⁷ Schultz's most recent
2 tweet as of the time of this report was posted on June 6, 2019.¹⁸ On June 12, 2019, Schultz sent
3 a letter to his supporters stating that he was recovering from back surgery and that he would be
4 discontinuing his exploration of a presidential bid until "after Labor Day."¹⁹ Schultz officially
5 declared that he would not run for president on September 6, 2019.²⁰

6 In an unsworn response, Schultz asserts that he was testing the waters because he
7 publicly stated on several occasions that he was only evaluating a run and never actually decided
8 to run.²¹ Schultz further asserts that, despite the allegation that he had laid the groundwork for
9 political advertising, he never actually disseminated any ads "to publicize his intention to
10 campaign for Federal office" as set forth in Commission regulations.²² Moreover, Schultz
11 argues that expenses for polling and the hiring of consultants to evaluate a potential bid are
12 traditional testing-the-waters expenses.²³

¹⁷ <https://twitter.com/HowardSchultz>.

¹⁸ Howard Schultz Tweet, June 6, 2019, <https://twitter.com/HowardSchultz/status/1136651347107885057>.

¹⁹ Kate Sullivan, *Howard Schultz cuts staff and takes the summer off from exploring presidential bid after back surgeries*, CNN, June 12, 2019, <https://www.cnn.com/2019/06/12/politics/howard-schultz-summer-off-recover-surgeries/index.html>.

²⁰ Greg Jaffe and Michael Scherer, *Former Starbucks chief executive Howard Schultz announces he will not run for president*, WASH. POST, Sept. 6, 2019, https://www.washingtonpost.com/politics/former-starbucks-chief-executive-howard-schultz-announces-he-will-not-run-for-president/2019/09/05/230b0fa2-d046-11e9-87fa-8501a456c003_story.html.

²¹ Resp. at 2 (Apr. 12, 2019).

²² *Id.* at 3

²³ *Id.* at 4.

1 **III. LEGAL ANALYSIS**

2 An individual becomes a candidate under the Act when: (a) such individual receives
3 contributions or makes expenditures in excess of \$5,000; or (b) such individual gives his or her
4 consent to another person to receive contributions or make expenditures on behalf of such
5 individual and if such person has received such contributions or has made such expenditures in
6 excess of \$5,000.²⁴ Once the \$5,000 threshold has been met, the candidate has 15 days to
7 designate a principal campaign committee by filing a Statement of Candidacy with the
8 Commission.²⁵ The principal campaign committee must file a Statement of Organization within
9 ten days of its designation,²⁶ and it must file disclosure reports with the Commission.²⁷

10 The Commission has established “testing-the-waters” regulations excepting from the
11 definitions of “contribution” and “expenditure” funds received and payments made solely to
12 determine whether an individual should become a candidate, thereby permitting an individual to
13 test the feasibility of a campaign for federal office without becoming a candidate under the Act.²⁸
14 These testing-the-waters regulations seek to draw a distinction between activities directed to
15 evaluating the feasibility of one’s candidacy and conduct signifying that a decision to become a
16 candidate has been made.²⁹ Testing-the-waters activities include, but are not limited to,

²⁴ 52 U.S.C. § 30101(2).

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

²⁶ *See* 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

²⁷ 52 U.S.C. § 30104(a), (b). *See, e.g.*, Factual and Legal Analysis at 6, 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).

²⁸ *See* 11 C.F.R. §§ 100.72 and 100.131; Factual and Legal Analysis at 7, MUR 6775 (Hillary Clinton);
Factual and Legal Analysis at 8, MUR 6776 (Niger Innis); Factual and Legal Analysis at 6, MUR 6735 (Joseph A.
Sestak).

²⁹ *See* Advisory Op. 1981-32 (Askew) (“AO 1981-32”).

1 payments for polling, telephone calls, and travel, and only funds subject to the Act's source and
2 amount prohibitions may be used for such activities.³⁰

3 An individual who is testing the waters is not required to register or file disclosure reports
4 with the Commission unless and until the individual subsequently decides to run for federal
5 office.³¹ However, an individual who tests the waters must keep financial records, and if he or
6 she becomes a candidate, all funds received, or payments made in connection with testing the
7 waters must be reported as contributions and expenditures in the first report filed by the
8 candidate's principal campaign committee.³²

9 The testing-the-waters exceptions are not available to an individual who has decided to
10 become a candidate.³³ Commission regulations set forth a non-exhaustive list of activities that
11 indicate when an individual is no longer testing the waters and has decided to become a
12 candidate. Such indicia include: (1) using general public political advertising to publicize his or
13 her intention to campaign for federal office; (2) raising funds in excess of what could reasonably
14 be expected to be used for exploratory activities or undertaking activity designed to amass
15 campaign funds that would be spent after he or she becomes a candidate; (3) making or
16 authorizing written or oral statements that refer to him or her as a candidate for a particular

³⁰ *Id.*

³¹ *Id.*; see also Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) ("AO 2015-09").

³² 11 C.F.R. § 101.3.

³³ See AO 2015-09 at 5. 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").

1 office; (4) conducting activities in close proximity to the election or over a protracted period of
2 time;³⁴ and (5) taking action to qualify for the ballot under state law.³⁵

3 Once an individual has decided to be a candidate, he or she must designate a principal
4 campaign committee within 15 days, which must file a Statement of Organization within ten
5 days of being designated by the candidate.³⁶ The committee must establish a separate segregated
6 fund, maintain a record of all contributions received and expenditures made while testing the
7 waters, and disclose all receipts and disbursements in the committee's first financial report filed
8 with the Commission.³⁷ All funds raised and spent for testing-the-waters activities are subject to
9 the Act's limitations and prohibitions.³⁸

10 In determining whether an individual has moved from testing the waters to candidate
11 status, the Commission considers whether the individual has engaged in activities or made
12 statements that would indicate the individual has decided to run for federal office.³⁹ "[T]he
13 determination of whether an individual has crossed the line from 'testing the waters' to
14 campaigning must be made on a case-by-case basis."⁴⁰

³⁴ 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.

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

³⁶ See 52 U.S.C. §§ 30102(e)(1), 30103(a), 30104(a).

³⁷ 52 U.S.C. §§ 30102(b), 30104(a); 11 C.F.R. § 101.3.

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

³⁹ Factual & Legal Analysis at 6-7, MUR 6449 (Jon Bruning); First Gen. Counsel Rpt. at 10, MUR 6533 (Perry Haney for Congress).

⁴⁰ 50 Fed. Reg. at 9,993.

1 Here, the available information does not indicate that Schultz decided to become a federal
2 candidate before formally declaring his intention not to run. The Complaint bases its allegation
3 that Schultz became a candidate primarily on the first factor — that Schultz was “laying the
4 groundwork for paid advertising,” arguing that even in the absence of any public statement that
5 Schultz had become a candidate, expenditures for political advertising would be sufficient to
6 trigger candidacy.⁴¹ In his Response, Schultz argues that he did not run any ads specifically for
7 the purpose of publicizing “his intention to campaign for Federal office” as set forth in
8 Commission regulations.⁴² Although the Complaint did not identify any specific ads, a review of
9 the Facebook Ad Library reveals that Schultz spent \$143,212 on ads between May 29, 2018 and
10 October 15, 2019, the majority of which ran between March and April of 2019.⁴³ For example,
11 one 30-second ad that started running on April 23, 2019 contained no audio and the following
12 text on screen:

13 This is America, right now [half the screen red and half blue].
14 Stuck. In a broken two-party system. But America isn't broken.
15 Our politics are. United, we can change that. We are the new
16 majority. And together, we have the power to renew the promise
17 of America. Let's fix the broken two-party system. Sign our
18 petition #fixthesystem.⁴⁴
19

20 Other ads Schultz ran contained a similar message. For example, one ad that ran between
21 April 9, 2019 and May 10, 2019, stated “if you're not red or blue — who in Washington

⁴¹ Compl. at 4.

⁴² Resp. at 3.

⁴³ Facebook Ad Library, Howard Scultz, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&view_all_page_id=1782368278496620 (last visited Dec. 3, 2019). Although the ad library counts 950 ads, there are many duplicates.

⁴⁴ Howard Schultz, Fix the System, FACEBOOK AD LIBRARY (started running Apr. 23, 2019) <https://www.facebook.com/ads/library/?id=444591043012980>. The same ad ran at various other times.

1 represents you? Sign our petition. #fixthesystem.”⁴⁵ While the ads criticize the two-party
2 system, which apparently could have been a central campaign theme of a potential Schultz
3 campaign, we have been unable to identify an ad that publicizes Schultz’s “intention to campaign
4 for federal office” and the Complaint does not specifically identify any such ad.⁴⁶

5 Second, we do not have any information regarding Schultz’s fundraising or spending.
6 There is no allegation in the Complaint that Schultz raised or spent a significant amount of
7 money. News reports indicate that Schultz committed to spending \$300 to \$500 million of his
8 personal funds if he ran, suggesting that Schultz was not actively fundraising.⁴⁷ In any event, the
9 Commission has found that raising significant amounts of money, without other indicia of
10 candidacy, is not sufficient to trigger candidacy.⁴⁸

11 Third, although Schultz stated that he would “vote for myself” at a town hall, in follow-
12 up questions, Schultz clarified during in the same event that he had not yet made a decision to
13 run, explaining that the presence of a moderate Democratic candidate such as Biden would make

⁴⁵ Howard Schultz, FACEBOOK AD LIBRARY (Apr. 9, 2019 – May 10, 2019)
<https://www.facebook.com/ads/library/?id=326934198018728>.

⁴⁶ Cf. MUR 5934 (Thompson) (dismissing where candidate spent funds on general advertising, such as “I’m with Fred, Fred Thompson is testing the waters,” but did not specifically publicize an intention to campaign for federal office). Schultz’s ads constitute “general public political advertising” because the ads were placed for a fee on another person’s website. See 11 C.F.R. § 100.26.

⁴⁷ Compl. at 2 (citing Michael Scherer, *Howard Schultz’s presidential ambitions spurred a months-long effort to disrupt the 2020 race*, WASH. POST, Jan. 29, 2019, https://www.washingtonpost.com/politics/howard-schultzs-presidential-ambitions-spurred-a-months-long-effort-to-disrupt-the-2020-race/2019/01/29/30a22154-2408-11e9-ad53-824486280311_story.html).

⁴⁸ See, e.g., Factual and Legal Analysis at 6 n.11, MUR 6533 (Haney) (dismissing 30102(e)(1) allegation where candidate’s committee had received almost \$112,000, primarily in the form of loans from the candidate); Factual and Legal Analysis at 6, MUR 6224 (Carly Fiorina) (finding no reason to believe where exploratory committee raised \$225,000, and candidate spent \$400,000 in personal funds); MUR 5934 (Thompson) (dismissing where candidate had raised more than \$12 million and spent more than \$5 million); MUR 5703 (Rainville) (finding no reason to believe where \$100,000 raised was not dispositive); MUR 5661 (Butler) (same).

1 him less likely to enter the race.⁴⁹ Schultz also stated earlier in the town hall that he had not
2 decided to run. In this context, Schultz's statement that he intended to vote for himself, though
3 suggestive of a decision to run, is not sufficient in light of his other, contemporaneous statements
4 regarding his potential candidacy to indicate that he had decided to run.⁵⁰

5 Fourth, Schultz's activity predated the first primaries by more than a year and lasted only
6 several months and thus was not in close proximity to the election or over a protracted period of
7 time.⁵¹

8 Fifth, Schultz stated at a town hall that, if he ran, he intended to be on the ballot in all 50
9 states.⁵² The New York Times reported that "Mr. Shultz said he had already begun the
10 groundwork required to be on the ballot in all 50 states."⁵³ However, the article provides no
11 details regarding what specific steps, if any, that Schultz undertook to qualify for any state's
12 ballot. Nor is there other information in the available record that Schultz took any concrete
13 action to appear on any state ballots such as, for example, collecting signatures or filing
14 paperwork.

⁴⁹ Town Hall with Howard Schultz: Part 1 at 4:13-17, 6:45-7:30, FOX NEWS, (Apr. 4, 2019), <https://video.foxnews.com/v/6022650200001/#sp=show-clips>.

⁵⁰ See AO 2015-09 at 6 n.3 ("A demonstrably inadvertent misstatement, however, does not necessarily indicate that the individual has decided to become a candidate.").

⁵¹ Factual and Legal Analysis at 6, MUR 6948 (Nancy Rotering for Congress) (finding no reason to believe where, *inter alia*, the activity occurred more than one year before the primary).

⁵² Town Hall at 1:43-44, CNN, (Feb. 13, 2019), <https://www.youtube.com/watch?v=A45CoomULVc>.

⁵³ Andrew Ross Sorkin, *Howard Schultz Draws Fire From Trump and Bloomberg Over 2020 Plans*, NY TIMES, Jan. 27, 2019, https://www.nytimes.com/2019/01/27/us/politics/howard-schultz-president-2020.html?utm_source=CNM+Media%3A+Reliable+Sources&utm_campaign=8313daacb2-EMAIL_CAMPAIGN_2018_09_11_04_47_COPY_01&utm_medium=email&utm_term=0_e95cdc16a9-8313daacb2-97188109.

1 While not directly relevant to any one factor, the Complaint also alleges that Schultz
2 conducted polling and hired political consultants.⁵⁴ The Complaint, however, does not explain
3 how these activities establish candidacy, in contrast to reflecting permissible testing-the-waters
4 activity. Polling, for example, is an explicitly enumerated testing-the-waters activity,⁵⁵ and the
5 Commission has previously found that expenses for polling and consultants can be valid testing-
6 the-waters expenses if done to explore a run.⁵⁶ Given the available information, it is possible
7 that Shultz retained the consultants to test the waters for a potential run.

8 In sum, the available information does not establish that Schultz had made the private
9 decision to run and therefore had become a candidate. Instead, Schultz's contemporaneous
10 public statements that he was exploring a potential run, and his ultimate decision not to run,
11 indicate that Schultz never made the private decision to run. Therefore, because Schultz's
12 expenses appear to have been for testing the waters and due to the lack of countervailing
13 information in the available record, we recommend that the Commission dismiss the allegation
14 that Schultz violated 52 U.S.C. §§ 30102(e)(1), 30103, and 30104 by failing to register and
15 report as a candidate.

16 **IV. RECOMMENDATIONS**

- 17 1. Dismiss the allegation that Howard Schultz violated 52 U.S.C. §§ 30102(e)(1),
18 30103, and 30104 by failing to register and report as a candidate;
- 19 2. Approve the attached Factual and Legal Analysis;
- 20 3. Approve the appropriate letters; and

⁵⁴ Compl. at 2.

⁵⁵ 11 C.F.R. § 100.131(a).

⁵⁶ See, e.g., Advisory Op. 1982-03 (Cranston) at 4-5 (hiring of political consultants can be for testing the waters if the candidate had not yet decided to run).

1 4. Close the file.

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12/5/19
Date

Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Charles Kitcher
Acting Associate General Counsel
For Enforcement

Lynn Y. Tran
Lynn Y. Tran
Assistant General Counsel
For Enforcement

Nicholas I. Bamman
Nicholas I. Bamman
Attorney

Attachment:
Factual and Legal Analysis

Cooksey Office Edits

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Howard Schultz MUR: 7567

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission (the “Commission”). The Complaint alleges that Howard Schultz, former CEO of Starbucks, violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by failing to register and report as a candidate for U.S. President, contending that Shultz went beyond testing the waters by hiring political consultants, conducting polling, and laying the groundwork for paid advertising. From late January 2019 through mid-April, Schultz maintained a high public profile through interviews, town halls, and social media posts; however, from mid-April through September 6, 2019, the date when Schultz officially declared his intention not to run, Schultz receded from public life amid health concerns and a crowded Democratic primary field.

The Commission dismisses the allegation that Schultz violated 52 U.S.C. §§ 30102(e)(1), 30103, and 30104 by failing to register and report as a candidate because the available record indicates that Schultz’s expenses do not appear to have gone beyond testing the waters.

II. FACTUAL BACKGROUND

On January 27, 2019, Schultz, the former CEO of Starbucks Corporation, announced on CBS’s 60 Minutes that he was “seriously thinking of running for president” as a “centrist independent.”¹ Schultz indicated that he would promote his memoir while deciding whether to

¹ Compl. at 1 (Feb. 14, 2019); 60 Minutes Interview at 0:12-17, CBS (Jan. 27, 2019), <https://www.youtube.com/watch?v=gnBhtwKRFhA>.

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1 run for President and was willing to spend his personal fortune on his potential campaign.² The
2 Complaint alleges that Schultz became a federal candidate because a news article at the time
3 reported that he had hired political consultants, conducted polling, and laid the “groundwork for
4 paid advertising that could debut in the next two months.”³

5 In late January, Schultz’s website principally contained marketing for his book, *From the*
6 *Ground Up*, including an active book tour schedule traveling around the country.⁴ In the
7 following months, in addition to promoting his book, Schultz also discussed a potential
8 campaign in televised town halls, speeches, news programs, and social media. For example, on
9 February 12, 2019, Schultz discussed his positions on political issues at a televised town hall on
10 CNN, stating that he was exploring a run, but had not yet made a decision whether to run.⁵

11 Schultz officially declared that he would not run for president on September 6, 2019.⁶

12 In response, Schultz asserts that he was testing the waters because he publicly stated on
13 several occasions that he was only evaluating a run and never actually decided to run.⁷ Schultz

² Lisa Lerer, *Is Howard Schultz a Candidate Without a Constituency?*, N.Y. TIMES, Jan. 28, 2019, <https://www.nytimes.com/2019/01/28/us/politics/on-politics-howard-schultz-starbucks-independent.html>; Compl. at 2.

³ Compl. at 2 (citing Michael Scherer, *Howard Schultz’s presidential ambitions spurred a months-long effort to disrupt the 2020 race*, WASH. POST, Jan. 29, 2019, https://www.washingtonpost.com/politics/howard-schultz-presidential-ambitions-spurred-a-months-long-effort-to-disrupt-the-2020-race/2019/01/29/30a22154-2408-11e9-ad53-824486280311_story.html).

⁴ Howard Shultz, (Jan. 31, 2019), <https://web.archive.org/web/20190131032136/https://www.howardschultz.com/>.

⁵ Town Hall with Howard Schultz, CNN (Feb. 13, 2019), <https://www.youtube.com/watch?v=A45CoomULVc>.

⁶ Greg Jaffe and Michael Scherer, *Former Starbucks chief executive Howard Schultz announces he will not run for president*, WASH. POST, Sept. 6, 2019, https://www.washingtonpost.com/politics/former-starbucks-chief-executive-howard-schultz-announces-he-will-not-run-for-president/2019/09/05/230b0fa2-d046-11e9-87fa-8501a456c003_story.html.

⁷ Resp. at 2 (Apr. 12, 2019).

1 further asserts that, despite the allegation that he had laid the groundwork for political
2 advertising, he never actually disseminated any ads “to publicize his intention to campaign for
3 Federal office” as set forth in Commission regulations.⁸ Moreover, Schultz argues that expenses
4 for polling and the hiring of consultants to evaluate a potential bid are traditional testing-the-
5 waters expenses.⁹

6 **III. LEGAL ANALYSIS**

7 An individual becomes a candidate under the Act when: (a) such individual receives
8 contributions or makes expenditures in excess of \$5,000; or (b) such individual gives his or her
9 consent to another person to receive contributions or make expenditures on behalf of such
10 individual and if such person has received such contributions or has made such expenditures in
11 excess of \$5,000.¹⁰ Once the \$5,000 threshold has been met, the candidate has 15 days to
12 designate a principal campaign committee by filing a Statement of Candidacy with the
13 Commission.¹¹ The principal campaign committee must file a Statement of Organization within
14 ten days of its designation,¹² and it must file disclosure reports with the Commission.¹³

15 The Commission has established “testing-the-waters” regulations excepting from the
16 definitions of “contribution” and “expenditure” funds received and payments made solely to
17 determine whether an individual should become a candidate, thereby permitting an individual to

⁸ *Id.* at 3

⁹ *Id.* at 4.

¹⁰ 52 U.S.C. § 30101(2).

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

¹² *See* 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

¹³ 52 U.S.C. § 30104(a), (b).

1 test the feasibility of a campaign for federal office without becoming a candidate under the Act.¹⁴
2 These testing-the-waters regulations seek to draw a distinction between activities directed to
3 evaluating the feasibility of one's candidacy and conduct signifying that a decision to become a
4 candidate has been made.¹⁵ Testing-the-waters activities include, but are not limited to,
5 payments for polling, telephone calls, and travel, and only funds subject to the Act's source and
6 amount prohibitions may be used for such activities.¹⁶

7 An individual who is testing the waters is not required to register or file disclosure reports
8 with the Commission unless and until the individual subsequently decides to run for federal
9 office.¹⁷ However, an individual who tests the waters must keep financial records, and if he or
10 she becomes a candidate, all funds received, or payments made in connection with testing the
11 waters must be reported as contributions and expenditures in the first report filed by the
12 candidate's principal campaign committee.¹⁸

13 The testing-the-waters exceptions are not available to an individual who has decided to
14 become a candidate.¹⁹ Commission regulations set forth a non-exhaustive list of activities that
15 indicate when an individual is no longer testing the waters and has decided to become a
16 candidate. Such indicia include: (1) using general public political advertising to publicize his or
17 her intention to campaign for federal office; (2) raising funds in excess of what could reasonably

¹⁴ See 11 C.F.R. §§ 100.72 and 100.131.

¹⁵ See Advisory Op. 1981-32 (Askew) ("AO 1981-32").

¹⁶ *Id.*

¹⁷ *Id.*; see also Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) ("AO 2015-09").

¹⁸ 11 C.F.R. § 101.3.

¹⁹ See AO 2015-09 at 5. 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").

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1 be expected to be used for exploratory activities or undertaking activity designed to amass
2 campaign funds that would be spent after he or she becomes a candidate; (3) making or
3 authorizing written or oral statements that refer to him or her as a candidate for a particular
4 office; (4) conducting activities in close proximity to the election or over a protracted period of
5 time;²⁰ and (5) taking action to qualify for the ballot under state law.²¹

6 Once an individual has decided to be a candidate, he or she must designate a principal
7 campaign committee within 15 days, which must file a Statement of Organization within ten
8 days of being designated by the candidate.²² The committee must establish a separate segregated
9 fund, maintain a record of all contributions received and expenditures made while testing the
10 waters, and disclose all receipts and disbursements in the committee's first financial report filed
11 with the Commission.²³ All funds raised and spent for testing-the-waters activities are subject to
12 the Act's limitations and prohibitions.²⁴

13 In determining whether an individual has moved from testing the waters to candidate
14 status, the Commission considers whether the individual has engaged in activities or made
15 statements that would indicate the individual has decided to run for federal office.²⁵ “[T]he

²⁰ 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.

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

²² See 52 U.S.C. §§ 30102(e)(1), 30103(a), 30104(a).

²³ 52 U.S.C. §§ 30102(b), 30104(a); 11 C.F.R. § 101.3.

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

²⁵ Factual & Legal Analysis at 6-7, MUR 6449 (Jon Bruning); First Gen. Counsel Rpt. at 10, MUR 6533 (Perry Haney for Congress).

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1 determination of whether an individual has crossed the line from ‘testing the waters’ to
2 campaigning must be made on a case-by-case basis.’²⁶

3 Here, the available information does not indicate that Schultz decided to become a federal
4 candidate before formally declaring his intention not to run. The Complaint bases its allegation
5 that Schultz became a candidate primarily on the first factor — that Schultz was “laying the
6 groundwork for paid advertising,” arguing that even in the absence of any public statement that
7 Schultz had become a candidate, expenditures for political advertising would be sufficient to
8 trigger candidacy.²⁷ In his Response, Schultz argues that he did not run any ads specifically for
9 the purpose of publicizing “his intention to campaign for Federal office” as set forth in
10 Commission regulations.²⁸ The Complaint did not identify any specific ads.

11 Second, the Commission does not have any information regarding Schultz’s fundraising
12 or spending. There is no allegation in the Complaint that Schultz raised or spent a significant
13 amount of money. News reports indicate that Schultz committed to spending \$300 to \$500
14 million of his personal funds if he ran, suggesting that Schultz was not actively fundraising.²⁹ In

²⁶ 50 Fed. Reg. at 9,993.

²⁷ Compl. at 4.

²⁸ Resp. at 3.

²⁹ Compl. at 2 (citing Michael Scherer, *Howard Schultz’s presidential ambitions spurred a months-long effort to disrupt the 2020 race*, WASH. POST, Jan. 29, 2019, https://www.washingtonpost.com/politics/howard-schultzs-presidential-ambitions-spurred-a-months-long-effort-to-disrupt-the-2020-race/2019/01/29/30a22154-2408-11e9-ad53-824486280311_story.html).

1 any event, the Commission has found that raising significant amounts of money, without other
2 indicia of candidacy, is not sufficient to trigger candidacy.³⁰

3 Third, Schultz's activity predated the first primaries by more than a year and lasted only
4 several months and thus was not in close proximity to the election or over a protracted period of
5 time.³¹

6 While not directly relevant to any one factor, the Complaint also alleges that Schultz
7 conducted polling and hired political consultants.³² The Complaint, however, does not explain
8 how these activities establish candidacy, in contrast to reflecting permissible testing-the-waters
9 activity. Polling, for example, is an explicitly enumerated testing-the-waters activity,³³ and the
10 Commission has previously found that expenses for polling and consultants can be valid testing-
11 the-waters expenses if done to explore a run.³⁴

12 In sum, the available information does not establish that Schultz had made the private
13 decision to run and therefore had become a candidate. Instead, Schultz's contemporaneous
14 public statements that he was exploring a potential run, and his ultimate decision not to run,
15 indicate that Schultz never made the private decision to run. Therefore, because Schultz's

³⁰ See, e.g., Factual and Legal Analysis at 6 n.11, MUR 6533 (Haney) (dismissing 30102(e)(1) allegation where candidate's committee had received almost \$112,000, primarily in the form of loans from the candidate); Factual and Legal Analysis at 6, MUR 6224 (Carly Fiorina) (finding no reason to believe where exploratory committee raised \$225,000, and candidate spent \$400,000 in personal funds); MUR 5934 (Thompson) (dismissing where candidate had raised more than \$12 million and spent more than \$5 million); MUR 5703 (Rainville) (finding no reason to believe where \$100,000 raised was not dispositive); MUR 5661 (Butler) (same).

³¹ Factual and Legal Analysis at 6, MUR 6948 (Nancy Rotering for Congress) (finding no reason to believe where, *inter alia*, the activity occurred more than one year before the primary).

³² Compl. at 2.

³³ 11 C.F.R. § 100.131(a).

³⁴ See, e.g., Advisory Op. 1982-03 (Cranston) at 4-5 (hiring of political consultants can be for testing the waters if the candidate had not yet decided to run).

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1 expenses appear to have been for testing the waters and due to the lack of countervailing
2 information in the available record, the Commission dismisses the allegation that Schultz
3 violated 52 U.S.C. §§ 30102(e)(1), 30103, and 30104 by failing to register and report as a
4 candidate.

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FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Howard Schultz MUR: 7567

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission (the “Commission”). The Complaint alleges that Howard Schultz, former CEO of Starbucks, violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by failing to register and report as a candidate for U.S. President, contending that Shultz went beyond testing the waters by hiring political consultants, conducting polling, and laying the groundwork for paid advertising. From late January 2019 through mid-April, Schultz maintained a high public profile through interviews, town halls, and social media posts; however, from mid-April through September 6, 2019, the date when Schultz officially declared his intention not to run, Schultz receded from public life amid health concerns and a crowded Democratic primary field.

The Commission dismisses the allegation that Schultz violated 52 U.S.C. §§ 30102(e)(1), 30103, and 30104 by failing to register and report as a candidate because the available record indicates that Schultz’s expenses do not appear to have gone beyond testing the waters.

II. FACTUAL BACKGROUND

On January 27, 2019, Schultz, the former CEO of Starbucks Corporation, announced on CBS’s 60 Minutes that he was “seriously thinking of running for president” as a “centrist independent.”¹ Schultz indicated that he would promote his memoir while deciding whether to

¹ Compl. at 1 (Feb. 14, 2019); 60 Minutes Interview at 0:12-17, CBS (Jan. 27, 2019), <https://www.youtube.com/watch?v=gnBhtwKRFhA>.

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1 run for President and was willing to spend his personal fortune on his potential campaign.² The
2 Complaint alleges that Schultz became a federal candidate because a news article at the time
3 reported that he had hired political consultants, conducted polling, and laid the “groundwork for
4 paid advertising that could debut in the next two months.”³

5 In late January, Schultz’s website principally contained marketing for his book, *From the*
6 *Ground Up*, including an active book tour schedule traveling around the country.⁴ In the
7 following months, in addition to promoting his book, Schultz also discussed a potential
8 campaign in televised town halls, speeches, news programs, and social media. For example, on
9 February 12, 2019, Schultz discussed his positions on political issues at a televised town hall on
10 CNN, stating that he was exploring a run, but had not yet made a decision whether to run.⁵
11 Beginning in March through late April, Schultz began tweeting about political issues and
12 criticizing candidates from both parties.⁶ For example, Schultz criticized President Trump by
13 tweeting that he “has polluted the presidency with his indecency for 788 days. His continuing
14 assault on the legacy of [John McCain] is a total disgrace and an embarrassment beneath the
15 dignity of the office.”⁷ Schultz also criticized Democratic primary candidate Bernie Sanders by

² Lisa Lerer, *Is Howard Schultz a Candidate Without a Constituency?*, N.Y. TIMES, Jan. 28, 2019, <https://www.nytimes.com/2019/01/28/us/politics/on-politics-howard-schultz-starbucks-independent.html>; Compl. at 2.

³ Compl. at 2 (citing Michael Scherer, *Howard Schultz’s presidential ambitions spurred a months-long effort to disrupt the 2020 race*, WASH. POST, Jan. 29, 2019, https://www.washingtonpost.com/politics/howard-schultzs-presidential-ambitions-spurred-a-months-long-effort-to-disrupt-the-2020-race/2019/01/29/30a22154-2408-11e9-ad53-824486280311_story.html).

⁴ Howard Shultz, (Jan. 31, 2019), <https://web.archive.org/web/20190131032136/https://www.howardschultz.com/>.

⁵ Town Hall with Howard Schultz, CNN (Feb. 13, 2019), <https://www.youtube.com/watch?v=A45CoomULVc>.

⁶ <https://twitter.com/HowardSchultz>.

⁷ Howard Schultz Tweet, Mar. 20, 2019, <https://twitter.com/HowardSchultz/status/1108472548516192256>.

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1 stating: “The Medicare for All proposal by [Bernie Sanders] would cause 180 million people to
2 lose their current healthcare coverage. All that Sanders and the far-left care about is furthering
3 their agenda. This is unrealistic and shows a total disregard of our country’s overwhelming
4 debt.”⁸

5 On March 30, Schultz began running ads on Facebook criticizing the two-party system,
6 requesting that people sign a #fixthesystem “petition.”⁹ The petition requested that people “sign
7 the petition” online by providing an email address if they “believe the two-party system is
8 broken and not working for you.”¹⁰ Around the same time, Schultz’s website was revised to
9 contain more biographical information and include a video entitled “restoring our nation,” which
10 is no longer available.¹¹ The revised website also included the same #fixthesystem language and
11 petition linked in Schultz’s Facebook ads.¹²

12 On April 4, 2019, Schultz attended a Fox News town hall in Kansas City, Missouri.¹³
13 The moderators stated that Schultz had not yet declared his candidacy, but when asked whether
14 he would vote for Biden, Schultz stated, “Well, I’m going to vote for myself.” In a follow-up
15 question, moderators asked, “Does that mean you’re running? Is that a declaration?” Schultz

⁸ Howard Schultz Tweet, Apr. 10, 2019, <https://twitter.com/HowardSchultz/status/1116101439376351232>.

⁹ Facebook Ad Library, Howard Schultz, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&view_all_page_id=1782368278496620 (last visited Oct. 22, 2019); Howard Schultz Tweet, Mar. 30, 2019, <https://twitter.com/HowardSchultz/status/1112008873236258817>.

¹⁰ <https://fixthesystem.howardschultz.com/> (last visited Dec. 3, 2019).

¹¹ Howard Schultz, (Apr. 21, 2019), <https://web.archive.org/web/20190421200403/https://www.howardschultz.com/>.

¹² *Id.*

¹³ Town Hall with Howard Schultz: Part 1, FOX NEWS, (Apr. 4, 2019), <https://video.foxnews.com/v/6022650200001/#sp=show-clips>.

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1 stated, “We have 18 months to decide that.”¹⁴ Later, during the same event, Schultz explained
2 that if a moderate Democrat ran, then he would not run; however, if a “Democratic Socialist”
3 like Bernie Sanders was emerging as the likely nominee, then he would be much more likely to
4 run.¹⁵

5 News reports indicate that Schultz “cooled” on a possible run after Biden officially
6 declared his candidacy on April 19, 2019, because Schultz reportedly believed that Biden would
7 run as a moderate.¹⁶ After Biden’s entry into the presidential race, Schultz posted only a handful
8 of tweets, compared to tweeting nearly daily in the previous months.¹⁷ Schultz’s most recent
9 tweet as of the time of this report was posted on June 6, 2019.¹⁸ On June 12, 2019, Schultz sent
10 a letter to his supporters stating that he was recovering from back surgery and that he would be
11 discontinuing his exploration of a presidential bid until “after Labor Day.”¹⁹ Schultz officially
12 declared that he would not run for president on September 6, 2019.²⁰

13 In an unsworn response, Schultz asserts that he was testing the waters because he
14 publicly stated on several occasions that he was only evaluating a run and never actually decided

¹⁴ *Id.* at 4:17-4:35.

¹⁵ *Id.* at 6:45-7:30.

¹⁶ David Choi, *Former Starbucks CEO Howard Schultz is cooling it on his potential 2020 presidential run because of Joe Biden*, BUSINESS INSIDER, May 15, 2019, <https://www.businessinsider.com/howard-schultz-2020-campaign-and-joe-biden-2019-5>.

¹⁷ <https://twitter.com/HowardSchultz>.

¹⁸ Howard Schultz Tweet, June 6, 2019, <https://twitter.com/HowardSchultz/status/1136651347107885057>.

¹⁹ Kate Sullivan, *Howard Schultz cuts staff and takes the summer off from exploring presidential bid after back surgeries*, CNN, June 12, 2019, <https://www.cnn.com/2019/06/12/politics/howard-schultz-summer-off-recover-surgeries/index.html>.

²⁰ Greg Jaffe and Michael Scherer, *Former Starbucks chief executive Howard Schultz announces he will not run for president*, WASH. POST, Sept. 6, 2019, https://www.washingtonpost.com/politics/former-starbucks-chief-executive-howard-schultz-announces-he-will-not-run-for-president/2019/09/05/230b0fa2-d046-11e9-87fa-8501a456c003_story.html.

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1 to run.²¹ Schultz further asserts that, despite the allegation that he had laid the groundwork for
2 political advertising, he never actually disseminated any ads “to publicize his intention to
3 campaign for Federal office” as set forth in Commission regulations.²² Moreover, Schultz
4 argues that expenses for polling and the hiring of consultants to evaluate a potential bid are
5 traditional testing-the-waters expenses.²³

6 **III. LEGAL ANALYSIS**

7 An individual becomes a candidate under the Act when: (a) such individual receives
8 contributions or makes expenditures in excess of \$5,000; or (b) such individual gives his or her
9 consent to another person to receive contributions or make expenditures on behalf of such
10 individual and if such person has received such contributions or has made such expenditures in
11 excess of \$5,000.²⁴ Once the \$5,000 threshold has been met, the candidate has 15 days to
12 designate a principal campaign committee by filing a Statement of Candidacy with the
13 Commission.²⁵ The principal campaign committee must file a Statement of Organization within
14 ten days of its designation,²⁶ and it must file disclosure reports with the Commission.²⁷

15 The Commission has established “testing-the-waters” regulations excepting from the
16 definitions of “contribution” and “expenditure” funds received and payments made solely to

²¹ Resp. at 2 (Apr. 12, 2019).

²² *Id.* at 3

²³ *Id.* at 4.

²⁴ 52 U.S.C. § 30101(2).

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

²⁶ *See* 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

²⁷ 52 U.S.C. § 30104(a), (b). *See, e.g.*, Factual and Legal Analysis at 6, 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).

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1 determine whether an individual should become a candidate, thereby permitting an individual to
2 test the feasibility of a campaign for federal office without becoming a candidate under the Act.²⁸
3 These testing-the-waters regulations seek to draw a distinction between activities directed to
4 evaluating the feasibility of one's candidacy and conduct signifying that a decision to become a
5 candidate has been made.²⁹ Testing-the-waters activities include, but are not limited to,
6 payments for polling, telephone calls, and travel, and only funds subject to the Act's source and
7 amount prohibitions may be used for such activities.³⁰

8 An individual who is testing the waters is not required to register or file disclosure reports
9 with the Commission unless and until the individual subsequently decides to run for federal
10 office.³¹ However, an individual who tests the waters must keep financial records, and if he or
11 she becomes a candidate, all funds received, or payments made in connection with testing the
12 waters must be reported as contributions and expenditures in the first report filed by the
13 candidate's principal campaign committee.³²

14 The testing-the-waters exceptions are not available to an individual who has decided to
15 become a candidate.³³ Commission regulations set forth a non-exhaustive list of activities that
16 indicate when an individual is no longer testing the waters and has decided to become a

²⁸ See 11 C.F.R. §§ 100.72 and 100.131; Factual and Legal Analysis at 7, MUR 6775 (Hillary Clinton); Factual and Legal Analysis at 8, MUR 6776 (Niger Innis); Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak).

²⁹ See Advisory Op. 1981-32 (Askew) ("AO 1981-32").

³⁰ *Id.*

³¹ *Id.*; see also Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) ("AO 2015-09").

³² 11 C.F.R. § 101.3.

³³ See AO 2015-09 at 5. 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").

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1 candidate. Such indicia include: (1) using general public political advertising to publicize his or
2 her intention to campaign for federal office; (2) raising funds in excess of what could reasonably
3 be expected to be used for exploratory activities or undertaking activity designed to amass
4 campaign funds that would be spent after he or she becomes a candidate; (3) making or
5 authorizing written or oral statements that refer to him or her as a candidate for a particular
6 office; (4) conducting activities in close proximity to the election or over a protracted period of
7 time;³⁴ and (5) taking action to qualify for the ballot under state law.³⁵

8 Once an individual has decided to be a candidate, he or she must designate a principal
9 campaign committee within 15 days, which must file a Statement of Organization within ten
10 days of being designated by the candidate.³⁶ The committee must establish a separate segregated
11 fund, maintain a record of all contributions received and expenditures made while testing the
12 waters, and disclose all receipts and disbursements in the committee's first financial report filed
13 with the Commission.³⁷ All funds raised and spent for testing-the-waters activities are subject to
14 the Act's limitations and prohibitions.³⁸

15 In determining whether an individual has moved from testing the waters to candidate
16 status, the Commission considers whether the individual has engaged in activities or made

³⁴ 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.

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

³⁶ See 52 U.S.C. §§ 30102(e)(1), 30103(a), 30104(a).

³⁷ 52 U.S.C. §§ 30102(b), 30104(a); 11 C.F.R. § 101.3.

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

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1 statements that would indicate the individual has decided to run for federal office.³⁹ “[T]he
2 determination of whether an individual has crossed the line from ‘testing the waters’ to
3 campaigning must be made on a case-by-case basis.”⁴⁰

4 Here, the available information does not indicate that Schultz decided to become a federal
5 candidate before formally declaring his intention not to run. The Complaint bases its allegation
6 that Schultz became a candidate primarily on the first factor — that Schultz was “laying the
7 groundwork for paid advertising,” arguing that even in the absence of any public statement that
8 Schultz had become a candidate, expenditures for political advertising would be sufficient to
9 trigger candidacy.⁴¹ In his Response, Schultz argues that he did not run any ads specifically for
10 the purpose of publicizing “his intention to campaign for Federal office” as set forth in
11 Commission regulations.⁴² Although the Complaint did not identify any specific ads, a review of
12 the Facebook Ad Library reveals that Schultz spent \$143,212 on ads between May 29, 2018 and
13 October 15, 2019, the majority of which ran between March and April of 2019.⁴³ For example,
14 one 30-second ad that started running on April 23, 2019 contained no audio and the following
15 text on screen:

16 This is America, right now [half the screen red and half blue].
17 Stuck. In a broken two-party system. But America isn’t broken.
18 Our politics are. United, we can change that. We are the new
19 majority. And together, we have the power to renew the promise

³⁹ Factual & Legal Analysis at 6-7, MUR 6449 (Jon Bruning); First Gen. Counsel Rpt. at 10, MUR 6533 (Perry Haney for Congress).

⁴⁰ 50 Fed. Reg. at 9,993.

⁴¹ Compl. at 4.

⁴² Resp. at 3.

⁴³ Facebook Ad Library, Howard Schultz, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&view_all_page_id=1782368278496620 (last visited Dec. 3, 2019). Although the ad library counts 950 ads, there are many duplicates.

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1 of America. Let’s fix the broken two-party system. Sign our
2 petition #fixthesystem.⁴⁴

3
4 Other ads Schultz ran contained a similar message. For example, one ad that ran between
5 April 9, 2019 and May 10, 2019, stated “if you’re not red or blue — who in Washington
6 represents you? Sign our petition. #fixthesystem.”⁴⁵ While the ads criticize the two-party
7 system, which apparently could have been a central campaign theme of a potential Schultz
8 campaign, we have been unable to identify an ad that publicizes Schultz’s “intention to campaign
9 for federal office” and the Complaint does not specifically identify any such ad.

10 Second, we do not have any information regarding Schultz’s fundraising or spending.
11 There is no allegation in the Complaint that Schultz raised or spent a significant amount of
12 money. News reports indicate that Schultz committed to spending \$300 to \$500 million of his
13 personal funds if he ran, suggesting that Schultz was not actively fundraising.⁴⁶

14 Third, although Schultz stated that he would “vote for myself” at a town hall, in follow-
15 up questions, Schultz clarified during in the same event that he had not yet made a decision to
16 run, explaining that the presence of a moderate Democratic candidate such as Biden would make
17 him less likely to enter the race.⁴⁷ Schultz also stated earlier in the town hall that he had not
18 decided to run. In this context, Schultz’s statement that he intended to vote for himself, though

⁴⁴ Howard Schultz, Fix the System, FACEBOOK AD LIBRARY (started running Apr. 23, 2019)
<https://www.facebook.com/ads/library/?id=444591043012980>. The same ad ran at various other times.

⁴⁵ Howard Schultz, FACEBOOK AD LIBRARY (Apr. 9, 2019 – May 10, 2019)
<https://www.facebook.com/ads/library/?id=326934198018728>.

⁴⁶ Compl. at 2 (citing Michael Scherer, *Howard Schultz’s presidential ambitions spurred a months-long effort to disrupt the 2020 race*, WASH. POST, Jan. 29, 2019, https://www.washingtonpost.com/politics/howard-schultzs-presidential-ambitions-spurred-a-months-long-effort-to-disrupt-the-2020-race/2019/01/29/30a22154-2408-11e9-ad53-824486280311_story.html).

⁴⁷ Town Hall with Howard Schultz: Part 1 at 4:13-17, 6:45-7:30, FOX NEWS, (Apr. 4, 2019),
<https://video.foxnews.com/v/6022650200001/#sp=show-clips>.

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1 suggestive of a decision to run, is not sufficient in light of his other, contemporaneous statements
2 regarding his potential candidacy to indicate that he had decided to run.⁴⁸

3 Fourth, Schultz's activity predated the first primaries by more than a year and lasted only
4 several months and thus was not in close proximity to the election or over a protracted period of
5 time.⁴⁹

6 Fifth, Schultz stated at a town hall that, if he ran, he intended to be on the ballot in all 50
7 states.⁵⁰ The New York Times reported that "Mr. Shultz said he had already begun the
8 groundwork required to be on the ballot in all 50 states."⁵¹ However, the article provides no
9 details regarding what specific steps, if any, that Schultz undertook to qualify for any state's
10 ballot. Nor is there other information in the available record that Schultz took any concrete
11 action to appear on any state ballots such as, for example, collecting signatures or filing
12 paperwork.

13 While not directly relevant to any one factor, the Complaint also alleges that Schultz
14 conducted polling and hired political consultants.⁵² The Complaint, however, does not explain
15 how these activities establish candidacy, in contrast to reflecting permissible testing-the-waters

⁴⁸ See AO 2015-09 at 6 n.3 ("A demonstrably inadvertent misstatement, however, does not necessarily indicate that the individual has decided to become a candidate.").

⁴⁹ Factual and Legal Analysis at 6, MUR 6948 (Nancy Rotering for Congress) (finding no reason to believe where, *inter alia*, the activity occurred more than one year before the primary).

⁵⁰ Town Hall at 1:43-44, CNN, (Feb. 13, 2019), <https://www.youtube.com/watch?v=A45CoomULVc>.

⁵¹ Andrew Ross Sorkin, *Howard Schultz Draws Fire From Trump and Bloomberg Over 2020 Plans*, NY TIMES, Jan. 27, 2019, https://www.nytimes.com/2019/01/27/us/politics/howard-schultz-president-2020.html?utm_source=CN+Media%3A+Reliable+Sources&utm_campaign=8313daacb2-EMAIL_CAMPAIGN_2018_09_11_04_47_COPY_01&utm_medium=email&utm_term=0_e95cdc16a9-8313daacb2-97188109.

⁵² Compl. at 2.

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1 activity. Polling, for example, is an explicitly enumerated testing-the-waters activity,⁵³ and the
2 Commission has previously found that expenses for polling and consultants can be valid testing-
3 the-waters expenses if done to explore a run.⁵⁴ Given the available information, it is possible
4 that Shultz retained the consultants to test the waters for a potential run.

5 In sum, the available information does not establish that Schultz had made the private
6 decision to run and therefore had become a candidate. Instead, Schultz's contemporaneous
7 public statements that he was exploring a potential run, and his ultimate decision not to run, are
8 consistent with testing-the-waters activities. Therefore, because Schultz's expenses appear to
9 have been for testing the waters and due to the lack of countervailing information in the available
10 record, the Commission dismisses the allegation that Schultz violated 52 U.S.C. §§ 30102(e)(1),
11 30103, and 30104 by failing to register and report as a candidate.

⁵³ 11 C.F.R. § 100.131(a).

⁵⁴ See, e.g., Advisory Op. 1982-03 (Cranston) at 4-5 (hiring of political consultants can be for testing the waters if the candidate had not yet decided to run).