

**FEDERAL ELECTION COMMISSION**  
**FIRST GENERAL COUNSEL'S REPORT**

**MUR: 7794**

DATE COMPLAINT FILED: September 11, 2020

DATE OF NOTIFICATIONS: September 18, 2020

LAST RESPONSE RECEIVED: September 28, 2020

DATE ACTIVATED: November 3, 2020

EXPIRATION OF SOL: August 30, 2024

ELECTION CYCLE: 2020

**COMPLAINANT:**

Andrew B. Sadler

**RESPONDENTS:**

Amanda Adkins for Congress and

Robert Phillips III in his official capacity as treasurer

Amanda Adkins

**RELEVANT STATUTES**

52 U.S.C. § 30101(2)

**AND REGULATIONS:**

52 U.S.C. § 30102(e)(1)

11 C.F.R. § 100.72

11 C.F.R. § 100.131

11 C.F.R. § 101.1(a)

11 C.F.R. § 101.3

**INTERNAL REPORTS CHECKED:** Disclosure Reports**FEDERAL AGENCIES CHECKED:** None**I. INTRODUCTION**

The Complaint alleges that Amanda Adkins, a candidate for Congress in the Third Congressional District of Kansas, failed to timely file a Statement of Candidacy in violation of the Federal Election Campaign Act of 1971, as amended (the "Act").<sup>1</sup> The Complaint alleges that Adkins should have registered as a candidate earlier than she did based upon the amount of funds for campaign activity that Adkins allegedly amassed during the testing-the-waters period and statements made by a fundraising consultant who referred to Adkins as a candidate before

---

<sup>1</sup> Compl. at 1 (Sept. 11, 2020).

1 Adkins had registered as a candidate. Respondents deny any violation of the law, arguing that  
2 the amount raised was reasonable for testing the waters and that the fundraising consultant had  
3 publicly retracted her premature reference to Adkins as a candidate.<sup>2</sup>

4 As set forth below, this matter does not appear to warrant the additional use of  
5 Commission resources. We therefore recommend that the Commission dismiss as a matter of  
6 prosecutorial discretion the allegation that Adkins failed to timely file a Statement of Candidacy  
7 in violation of 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a).<sup>3</sup>

## 8 **II. FACTUAL BACKGROUND**

9 On August 30, 2019, Adkins filed her Statement of Candidacy, designating Amanda  
10 Adkins for Congress and Robert Phillips III in his official capacity as treasurer (the  
11 “Committee”) as her principal campaign committee.<sup>4</sup> The Committee filed its Statement of  
12 Organization on the same day.<sup>5</sup>

13 Before she filed her Statement of Candidacy, Adkins appears to have tested the waters for  
14 a potential candidacy beginning in at least May 2019.<sup>6</sup> By the time she filed her Statement of  
15 Candidacy at the end of August 2019, Adkins had raised \$139,403.82 and spent \$11,153.82,

---

<sup>2</sup> The Respondents mention a similar complaint in a matter that is currently pending before the Commission, MUR 7689 (Amanda Adkins for Congress, *et al.*). This Office recommended dismissal of the allegations in that complaint. *See* First Gen. Counsel's Rpt. at 9, MUR 7689. We note that unlike the Complaint in this matter, the Complaint in MUR 7689 did not directly allege that Adkins improperly amassed campaign funds during the testing-the-waters period.

<sup>3</sup> *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

<sup>4</sup> Amanda Adkins, Statement of Candidacy (Aug. 30, 2019).

<sup>5</sup> Amanda Adkins for Congress, Statement of Organization (Aug. 30, 2019).

<sup>6</sup> *See* Compl. at 1; Amanda Adkins for Congress, Second Amended 2019 October Quarterly Report at 20, 106 (Feb. 1, 2021) (“2019 October Quarterly Rpt.”) (reflecting the first in-kind contribution from the candidate on March 29 and the first contribution from a third-party on May 6); *see also* Bryan Lowry & Lindsay Wise, *Ex-Brownback, Sebelius Aides Among Women Weighing 2020 Congressional Runs In Kansas*, KANSAS CITY STAR (May 16, 2019), <https://www.kansascity.com/news/politics-government/article230422129.html> (quoting Adkins as saying, “What I can confirm is I’m definitely in the testing the waters phase right now. I am meeting with business and community leaders”).

1 which was only eight percent of the total amount raised.<sup>7</sup> Based on those numbers, the  
2 Complaint alleges that the amount Adkins raised during testing-the-waters phase was in excess  
3 of what could reasonably be expected to be used for exploratory activities.<sup>8</sup>  
4 Further, the Complaint cites to a news article published on September 12, 2019, by the  
5 *Kansas City Star* to assert that Adkins was a candidate by no later than July 30.<sup>9</sup> According to  
6 that article, on July 30, 2019, Kathryn Jones, a senior fundraising associate at High Cotton, a  
7 Washington, D.C.-based political fundraising firm, sent a series of emails to donors that appear  
8 to refer to Adkins as a candidate.<sup>10</sup> In one email, Jones wrote that Adkins “hasn’t announced but  
9 will be running in KS-03.”<sup>11</sup> In a second email, Jones wrote, “We are very excited to announce  
10 that High Cotton will be working with Amanda Adkins, candidate in KS-03 . . . .”<sup>12</sup> In the  
11 article, Adkins’s campaign spokeswoman denied that Adkins had been a candidate at the time  
12 the emails were sent, and Jones indicated that she should not have referred to Adkins as a  
13 candidate in July and had not been authorized by Adkins to call her a candidate at that time.<sup>13</sup>  
14 According to its FEC filings, the Committee appears to have ultimately retained Jones’s firm

---

<sup>7</sup> Compl. at 3; 2019 October Quarterly Rpt. at 5-12, 14-16, 19-20, 24, 26-27, 29-33, 37-38, 40-44, 46-50, 52-57, 59-61, 63-68, 106-07 (reflecting contributions totaling \$139,403.82 from March 29 through August 29, 2019); 2019 October Quarterly Rpt. at 109-10, 113-114 (reflecting disbursements totaling \$11,153.82 from March 29 through August 28, 2019).

<sup>8</sup> Compl. at 4.

<sup>9</sup> Bryan Lowry, *Emails Suggest Kansas GOP Candidate Skirted Campaign Finance Rules, Watchdogs Say*, KANSAS CITY STAR (Sept. 12, 2019), <https://www.kansascity.com/article234971692.html> (cited in Compl. at 1).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

1 with the first reported payment to High Cotton or its parent company, Axiom Strategies, on  
2 September 13, 2019.<sup>14</sup>

3 The Complaint alleges that after Jones referred to Adkins as a candidate at the end of  
4 July 2019, the Committee proceeded to raise an additional \$33,800 from August 14 through  
5 August 29, 2019.<sup>15</sup> As described above, given that Adkins only spent eight percent of what she  
6 raised at the time she declared her candidacy, the Complaint alleges that Adkins raised far more  
7 than was necessary for testing the waters and therefore failed to timely file her Statement of  
8 Candidacy.<sup>16</sup>

9 The Respondents argue that the amount raised by the Committee does not demonstrate  
10 that Adkins had decided to become a candidate because there is no limit on the amount an  
11 exploratory committee can raise.<sup>17</sup> Respondents further state that the fundraiser's email was sent  
12 in error and, as reflected in public reporting at the time, was acknowledged as a mistake.<sup>18</sup>

### 13 **III. LEGAL ANALYSIS**

#### 14 **A. Relevant Law**

15 A "candidate" is "an individual who seeks nomination for election, or election, to Federal  
16 office."<sup>19</sup> An individual "shall be deemed to seek nomination for election, or election . . . if such  
17 individual has received contributions aggregating in excess of \$5,000 or has made expenditures

---

<sup>14</sup> 2019 October Quarterly Rpt. at 91; *see also* Compl. at 2.

<sup>15</sup> Compl. at 2.

<sup>16</sup> *Id.*

<sup>17</sup> Amanda Adkins for Congress Resp. at 1 (Sept. 28, 2020) ("Committee Resp."). Adkins responded separately, joining the Committee's Response. Adkins Resp. at 1 (Sept. 28, 2020).

<sup>18</sup> Committee Resp. at 1; *see also* Lowry, *supra* note 9 (reporting that Jones later claimed that she was not authorized to call Adkins a candidate and that her firm had not yet been hired nor had a contract been signed).

<sup>19</sup> 52 U.S.C. § 30101(2).

1 aggregating in excess of \$5,000” or “has given his or her consent to another person to receive  
2 contributions or make expenditures on behalf of such individual and if such person has received  
3 such contributions aggregating in excess of \$5,000 or has made such expenditures aggregating in  
4 excess of \$5,000.”<sup>20</sup> Within fifteen days of becoming a candidate, the candidate must designate  
5 a principal campaign committee by filing a Statement of Candidacy.<sup>21</sup> The principal campaign  
6 committee must then file a Statement of Organization within ten days of its designation,<sup>22</sup> and  
7 must file disclosure reports with the Commission in accordance with 52 U.S.C. § 30104(a)  
8 and (b).

9         The Commission has established limited exceptions from these thresholds, which permit  
10 an individual to test the feasibility of a campaign for federal office without becoming a candidate  
11 under the Act. Commonly referred to as the “testing the waters” exceptions, Commission  
12 regulations exclude from the definitions of “contribution” and “expenditure” those funds  
13 received and payments made “solely for the purpose of determining whether an individual  
14 should become a candidate.”<sup>23</sup> Testing-the-waters activities include, but are not limited to,  
15 payments for polling, telephone calls, and travel.<sup>24</sup> An individual who is “testing the waters”  
16 need not register or file disclosure reports with the Commission unless and until the individual

---

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

<sup>21</sup> *Id.* § 30102(e)(1); 11 C.F.R. § 101.1(a); *see* Factual & Legal Analysis at 2-3, MUR 7116 (Russell); Factual & Legal Analysis at 5, MUR 6449 (Bruning).

<sup>22</sup> 52 U.S.C. § 30103(a).

<sup>23</sup> 11 C.F.R. §§ 100.72(a), 100.131(a). The Commission has emphasized the narrow scope of these exemptions to the Act’s disclosure requirements. *See* Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (“The Commission has, therefore, amended the rules to ensure that the ‘testing the waters’ exemptions will not be extended beyond their original purpose. Specifically, these provisions are intended to be limited exemptions from the reporting requirements of the Act . . .”). *See* 52 U.S.C. § 30101(8), (9).

<sup>24</sup> 11 C.F.R. §§ 100.72(a), 100.131(a).

1 subsequently decides to run for federal office *or* conducts activities that indicate he or she has  
2 decided to become a candidate.<sup>25</sup> All funds raised and spent for testing-the-waters activities are,  
3 however, subject to the Act's limitations and prohibitions.<sup>26</sup> Once an individual becomes a  
4 candidate, all reportable amounts from the beginning of the testing-the-waters period must be  
5 disclosed on the first financial disclosure report filed by the candidate's committee, even if the  
6 funds were received or expended prior to the current reporting period.<sup>27</sup>

7       The testing-the-waters exemption is not available to individuals who have made a  
8 decision to become a candidate.<sup>28</sup> Commission regulations set forth a non-exhaustive list of  
9 activities that indicate that an individual is no longer testing the waters and has decided to  
10 become a candidate. Such indicia include: (1) using general public political advertising to  
11 publicize his or her intention to campaign for federal office; (2) raising funds in excess of what  
12 could reasonably be expected to be used for exploratory activities or undertaking activity  
13 designed to amass campaign funds that would be spent after he or she becomes a candidate;  
14 (3) making or authorizing written or oral statements that refer to him or her as a candidate for a  
15 particular office; (4) conducting activities in close proximity to the election or over a protracted  
16 period of time;<sup>29</sup> and (5) taking action to qualify for the ballot under state law.<sup>30</sup> “[T]he

---

<sup>25</sup> See 11 C.F.R. §§ 100.72(a), 100.131(a); *see also* Advisory Op. 1979-26 (Grassley).

<sup>26</sup> 11 C.F.R. §§ 100.72(a), 100.131(a).

<sup>27</sup> *Id.* §§ 101.3, 104.3(a)-(b).

<sup>28</sup> See Advisory Op. 2015-09 (Senate Majority PAC, *et al.*) at 5 (“AO 2015-09”); *see also* Payments Received for Testing the Waters Activities, 50 Fed Reg. 9992, 9993 (Mar. 13, 1985) (stating the exemption is “explicitly limited ‘solely’ to activities designed to evaluate a potential candidacy”).

<sup>29</sup> 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.

<sup>30</sup> 11 C.F.R. §§ 100.72(b), 100.131(b).

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.’<sup>31</sup>

3 **B. The Commission Should Dismiss the Allegation that Adkins Failed to Timely**  
4 **File Her Statement of Candidacy**

5 The publicly available information does not support finding reason to believe that Adkins  
6 untimely filed her Statement of Candidacy. Although the Commission has not specified a limit  
7 on the amount that can be raised in the testing-the-waters period, Commission regulations state  
8 that amassing campaign funds to be spent after the declaration of candidacy is indicia of a  
9 decision to become a candidate.<sup>32</sup> Here, the amount Adkins raised during the testing-the-waters  
10 period, approximately \$140,000, is similar to amounts that the Commission has previously found  
11 to be reasonable for a candidate to accumulate prior to declaring their candidacy.<sup>33</sup> We note,  
12 however, that the Complaint provides some support for the allegation that Adkins undertook  
13 “activities designed to amass campaign funds that would be spent after . . . she became a  
14 candidate,”<sup>34</sup> given that the vast majority of the funds she raised while she was allegedly testing  
15 the waters appears to have been spent after she registered as a candidate.<sup>35</sup> Nevertheless,

---

<sup>31</sup> Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities, 50 Fed. Reg. at 9993.

<sup>32</sup> 11 C.F.R. §§ 100.72(b)(2), 100.131(b) (2); *see* Committee Resp. at 1.

<sup>33</sup> *See, e.g.*, Factual & Legal Analysis at 5, MUR 6948 (Nancy Rotering for Congress) (finding no reason to believe in matter where 2016 congressional candidate raised \$247,180 before filing her Statement of Candidacy); Certification, MUR 5703 (Rainville) (June 22, 2006) (finding no reason to believe in matter where 2006 congressional candidate raised \$100,000 over six months); Statement of Reasons, Comm’rs Petersen, Hunter, McGahn, & Weintraub at 1-3, MUR 5934 (Fred D. Thompson, *et al.*) (dismissing case based on weakness of candidate’s public statements when First General Counsel’s Report had recommending finding RTB where 2008 presidential candidate raised \$9,528,494 yet spent only \$2,923,607); Certification, MUR 5661 (Butler) (Oct. 27, 2006) (finding no reason to believe in matter where a 2006 senatorial candidate raised \$100,000).

<sup>34</sup> Compl. at 2 (citing 11 C.F.R. §§ 100.72(b), 100.131(b)).

<sup>35</sup> In previous matters, the Commission has not squarely addressed the issue of whether an individual fails to timely register as a candidate solely based on the proportion of funds spent during the testing-the-waters period. But we note that the Commission voted to dismiss where the record before it indicated that respondents did not spend most of the funds raised while testing the waters. *See, e.g.*, Statement of Reasons, Comm’rs Petersen, Hunter, McGahn, & Weintraub at 1-3, MUR 5934 (Fred D. Thompson, *et al.*) (dismissing case based on weakness of

1 Adkins's testing-the-water period was for a limited period of time—approximately five months  
 2 —and all of the activity from that time appears to have been disclosed, with the Complaint  
 3 making no allegation that she used non-federal funds. Based on these facts, this allegation does  
 4 not appear to warrant the additional use of Commission resources.<sup>36</sup>

5 Likewise, the allegations based upon the fundraising consultant's statements referring to  
 6 Adkins as a candidate do not merit the use of Commission resources to conduct an investigation.  
 7 The only statement attributable to Adkins herself references her status as "definitely in the  
 8 testing the waters phase."<sup>37</sup> As for statements made by Jones referencing Adkins's status as a  
 9 candidate, Jones later reportedly claimed that she was not authorized to call Adkins a candidate  
 10 and that her firm had not yet been hired nor had a contract been signed.<sup>38</sup> Moreover, even if the

---

candidate's public statements where 2008 presidential candidate raised \$9,528,494 yet spent only \$2,923,607 during testing the waters); Statement of Reasons, Comm'rs Petersen, Hunter, McGahn, & Weintraub at 1-3, MUR 5930 (Kirk Schuring, *et al.*) (dismissing case based on weakness of candidate's public statements when complaint had alleged that 2008 congressional candidate had raised \$136,375, and spent only \$6,447.98).

MURs

7370/7496 (New Republican PAC, *et al.*) (recommending a finding of reason to believe that a Senate candidate triggered candidate status based in part on the indicia of candidacy resulting from his participation in a Super PAC's efforts to raise more than \$2.3 million where it only spent \$615,735).

<sup>36</sup> Cf. Statement of Reasons, Comm'rs Weintraub, Petersen, Hunter & Walther at 2-3, MURs 7263/7264 (Allen Lucas "Luke" Messer, *et al.*) (exercising prosecutorial discretion to dismiss allegations that candidates failed to accurately report testing-the-waters activities based, in part, on respondents' disclosure of the underlying activity and noting that "all the funds raised and expended by [the candidates] were federal").

<sup>37</sup> Lowry & Wise, *supra* note 6.

<sup>38</sup> Lowry, *supra* note 9; cf. First Gen. Counsel's Rpt. at 10-11, MUR 6932 (Hillary Rodham Clinton, *et al.*) (recommending that paraphrased statements made by unidentified associates of a presidential candidate are not enough to show a decision regarding candidacy, especially when they are contemporaneously contradicted by quoted statements by an authorized spokesperson saying the candidate was still deciding); Cert. ¶ 2.a (Feb. 7, 2019),



1 July 30 emails triggered candidacy, they are close enough in time to Adkins's Statement of  
2 Candidacy on August 30 that no disclosure reports by the Adkins Committee would have been  
3 missed. In previous matters, the Commission has dismissed allegations where the late filing of a  
4 Statement of Candidacy did not result in the failure to file a quarterly report.<sup>39</sup>

5 Accordingly, we recommend that the Commission dismiss as a matter of prosecutorial  
6 discretion the allegation that Adkins untimely filed her Statement of Candidacy in violation of  
7 52 U.S.C. § 30102(e) and 11 C.F.R. § 101.1(a).<sup>40</sup>

## 8 **V. RECOMMENDATIONS**

- 9 1. Dismiss the allegation that Amanda Adkins untimely filed her Statement of  
10 Candidacy in violation of 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a);
- 11 2. Approve the attached Factual and Legal Analysis;
- 12 3. Approve the appropriate letters; and
- 13 4. Close the file.

---

MUR 6932 (deciding by a vote of 4-0 to find no reason to believe that the presidential candidate failed to timely file her Statement of Candidacy).

<sup>39</sup> See Factual & Legal Analysis at 4-5, MUR 6785 (Kwasman for Congress, *et al.*) (dismissing as a matter of prosecutorial discretion because the Statement of Candidacy was filed only a few days late and did not cause the committee to miss filing a scheduled disclosure report); *see also* Factual & Legal Analysis at 6, MUR 6533 (Perry Haney) (dismissing as a matter of prosecutorial discretion because regardless of the dates of statements that may have triggered candidacy, the committee still timely filed its initial disclosure report).

<sup>40</sup> See *Heckler*, 470 U.S. at 831.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

March 3, 2021  
Date

Lisa J. Stevenson  
Acting General Counsel

Charles Kitcher  
Acting Associate General Counsel  
For Enforcement

*Peter G. Blumberg*  
Peter G. Blumberg  
Acting Deputy Associate General  
Counsel for Enforcement

*Jin Lee*  
Jin Lee  
Acting Assistant General Counsel  
for Enforcement

*Cerissa Cafasso*  
Cerissa Cafasso  
Attorney