

**FEDERAL ELECTION COMMISSION**

Washington, DC 20463

July 20, 2022

VIA EMAIL ONLY

James E. Tyrrell III
Dickinson Wright PLLC
1825 Eye Street, Suite 900
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RE: MUR 7921
Earl L. "Buddy" Carter
Buddy Carter for Congress and Paul
Kilgore in his official capacity
as treasurer

Dear Mr. Tyrrell:

On August 11, 2021, the Federal Election Commission notified your clients, Earl L. "Buddy" Carter and Buddy Carter for Congress and Paul Kilgore in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On July 12, 2022, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe Earl L. "Buddy" Carter violated 52 U.S.C. § 30102(e)(1) by failing to file a Statement of Candidacy. The Commission also found that there is no reason to believe that Buddy Carter for Congress and Paul Kilgore in his official capacity as treasurer violated 52 U.S.C. § 30103(c) by failing to file an amended Statement of Organization. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

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If you have any questions, please contact Delbert K. Rigsby, the attorney assigned to this matter, at (202) 694-1616 or drigsby@fec.gov.

Sincerely,

Mark Allen

Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Earl L. “Buddy” Carter
Buddy Carter for Congress and Paul Kilgore
in his official capacity as treasurer

MUR 7921

I. INTRODUCTION

The Complaint alleges that Earl L. “Buddy” Carter, a member of the United States House of Representatives from Georgia, was a candidate for the United States Senate from Georgia during 2021 but failed to file a Statement of Candidacy with the Commission in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”). The Complaint also alleges that Buddy Carter for Congress and Paul A. Kilgore in his official capacity as treasurer (“Carter Committee”) failed to amend its Statement of Organization after Carter became a Senate candidate. Because the available information indicates that Carter did not become a candidate for the U.S. Senate, the Commission finds no reason to believe that Carter failed to file a Statement of Candidacy or that the Carter Committee failed to file an amended Statement of Organization.

II. FACTUAL BACKGROUND

Earl L. “Buddy” Carter is a member of Congress representing the First Congressional District of Georgia. Buddy Carter for Congress is the principal campaign committee of Carter.¹ The Complaint alleges that Carter was a candidate for United States Senate from Georgia in 2021, citing the *Atlanta-Journal Constitution* reporting that Carter spent a significant sum of money to advance his candidacy by hiring a campaign team, preparing a launch statement and running a

¹ See Carter Committee’s Amended Statement of Organization (Dec. 20, 2021). Two weeks after Carter won the 2020 general election for U.S. Congress, he filed a Statement of Candidacy to run for re-election. Statement of Candidacy (Nov. 17, 2020), <https://docquery.fec.gov/pdf/396/202011179336995396/202011179336995396.pdf>.

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statewide television advertisement, and Carter’s own reported statement that he “spent a lot of money” on these activities.² The Complaint alleges that on July 13, 2021, the Carter Committee released the television advertisement, “Step Up to the Plate,” to run statewide during the weeks of July 13 and July 20, 2021, that cost \$75,000, with \$50,000 of that amount used to run the advertisement in the Atlanta media market, which is outside of Carter’s congressional district.³

The television advertisement portrays Carter hitting a baseball and stating:

Baseball used to be as America as it gets but the radical Left had other plans. I’m Buddy Carter, and I am not afraid to go toe-to-toe against the leftist Democrats to save America. In Congress, I fought alongside President Trump to defeat the big government Leftists. We need leaders who will take on big tech, big business and the big lies being forced down our throats. I’m Buddy Carter, and I approve this message because together, we can un-cancel America.⁴

The Complaint alleges that Carter became a candidate because he spent more than \$5,000 on a Senate campaign that does not fit within the testing-the-waters exemption because the activities are relevant to conducting a campaign rather than determining the feasibility of his candidacy.⁵ Specifically, the Complaint alleges that the purpose of the advertisement was to

² Compl. at 2 (Aug. 4, 2021) (citing Tia Mitchell, *The Jolt: Buddy Carter’s Waiting Game Has a Name, ‘Herschel Walker’*, ATLANTA JOURNAL & CONSTITUTION (July 8, 2021) (“Mitchell, *The Jolt*, ATLANTA J. & CONST.”)), <https://www.ajc.com/politics/politics-blog/the-jolt-the-jolt-buddy-carters-waiting-game-has-a-name-Herschel-Walker/OKHGUVNTHJF2TK4ZQALUJG57TA/>. The pages of the Complaint are not numbered, but we have numbered the pages for the purposes of this document.

³ *Id.* at 3, Ex. A and B (consisting of a press release about the advertisement and the cost and placement of the advertisement). The Carter Committee made a disbursement of \$75,000 to Strategic Media Placement for advertising on July 12, 2021, which is one day before the advertisement at issue was scheduled to run. *See* Carter Committee 2021 October Quarterly Report at 97 (Oct. 15, 2021). The boundaries of Representative Carter’s congressional district, the first congressional district of Georgia, in 2021 was in southeastern Georgia, from Savannah, Georgia to the Florida border. *See* Georgia Map of Congressional Districts, GOVTRACK, <https://www.govtrack.us/congress/members/GA#map>.

⁴ Compl. at 4; *see also* Lawton Sack, *Rep. Buddy Carter Releases Statewide TV Ad Targeting MLB All-Star Game*, GEORGIAPOL.COM (July 13, 2021), <https://geopol.com/2021/07/13/rep.-buddy-carter-releases-statewide-tv-ad-targeting-mlb-all-star-game/> (contains the YouTube video of the ad (July 13, 2021)).

⁵ Compl. at 5.

heighten Carter’s political appeal, which falls outside the testing-the-waters exemption.⁶ The Complaint alleges that Carter failed to file a Statement of Candidacy within fifteen days of becoming a Senate candidate and that the Carter Committee failed to file an amended Statement of Organization within ten days of Carter becoming a Senate candidate, as required by the Act.⁷ Finally, the Complaint notes that Carter has publicly claimed that he had not decided whether he would run for U.S. Senate, and that if Herschel Walker, a prospective U.S. Senate candidate in Georgia, decided to run for Senate, then Carter would instead plan to run for re-election in the First Congressional District.⁸

Respondents acknowledge that in 2021, Carter explored whether to run for U.S. Senate, referencing an April 2021 interview with WGAU in Athens, Georgia, in which Carter stated that he was ““considering it very seriously and doing [his] due diligence.””⁹ Respondents further state that during the spring and summer of 2021, Carter engaged in traditional testing the waters activities, such as traveling the state to talk to voters, speaking to consultants, mapping out a potential campaign team and performing polling and survey research.¹⁰ Respondents cite the *Atlanta Journal Constitution* report quoting Carter that “if Herschel [Walker] is running, I am going to support him.”¹¹ After the Complaint in this matter was filed, Walker announced his

⁶ *Id.* at 6.

⁷ *Id.* at 2.

⁸ *Id.* at 3-4.

⁹ Carter and Carter Committee Resp. (“Resp.”) at 3 (Oct. 25, 2021). See <https://www.wgauradio.com>.

¹⁰ Resp. at 3.

¹¹ *Id.* (citing Mitchell, *The Jolt*, ATLANTA J. & CONST).

candidacy on August 24, 2021.¹² On August 25, 2021, Carter reportedly announced his support for Walker for U.S. Senate and in an interview confirmed that he was running for reelection to the U.S. House of Representatives.¹³ Respondents assert that “there has never been a factual context indicating that Rep. Carter moved beyond the deliberative process of deciding to become a candidate, as his potential candidacy for U.S. Senate was always contingent on Herschel Walker not running for U.S. Senate.”¹⁴

Regarding the Complaint referencing Carter hiring a campaign team, Respondents state that these words are a news article author’s words and not a quote from Carter or his agents, and in any event, putting together such a team is permitted under the testing-the-waters exemptions.¹⁵

In reference to the Carter Committee spending \$50,000 on a television advertisement that aired beyond Carter’s congressional district, Respondents state that the television advertisement had no reference to a campaign for U.S. Senate or to any election at all.¹⁶ Respondents state that Carter “decided to cut an ad geared at educating Georgia voters about the left’s role in having the All Star Game moved elsewhere.”¹⁷

¹² *Id.* (citing Greg Bluestein, *Herschel Walker is Running for U.S. Senate in Georgia*, ATLANTA JOURNAL & CONSTITUTION (Aug. 24, 2021), <https://www.ajc.com/politics/politics-blog/breaking-herschel-walker-is-running-for-us-senate-in-georgia/6GZ3BDZBHJHRFFJA76PT2K2XLA/>).

¹³ *Id.* (citing Isabel Litterst, *Rep. Buddy Carter Endorses Herschel Walker for U.S. Senate*, WGXA News (Aug. 25, 2021), <https://WGXA.tv/new/local/Rep-buddy-Carter-endorses-herschel-walker-for-ga-senate>).

¹⁴ Resp. at 10.

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 4.

III. LEGAL ANALYSIS

An individual becomes a candidate under the Act if he or she receives contributions or makes expenditures in excess of \$5,000, or consents to another doing so on his or her behalf.¹⁸ Once the \$5,000 threshold has been met, the candidate has 15 days to designate a principal campaign committee by filing a Statement of Candidacy with the Commission.¹⁹ The principal campaign committee must file a Statement of Organization within ten days of its designation,²⁰ and it must file disclosure reports with the Commission.²¹ A change in information previously submitted in a Statement of Organization shall be reported in accordance with section 30102(g) no later than 10 days after the date of the change.²²

The Commission has established testing-the-waters regulations excepting from the definitions of “contributions” and “expenditures” funds received and payments made solely to determine whether an individual should become a candidate, thereby permitting an individual to test the feasibility of a campaign for federal office without becoming a candidate under the Act.²³ These testing-the-waters regulations seek to draw a distinction between activities directed to evaluating the feasibility of one’s candidacy and conduct signifying that a decision to become a candidate has been made.²⁴ Testing-the-waters activities include, but are not limited to, payments

¹⁸ 52 U.S.C. § 30101(2) (definition of candidate); 11 C.F.R. § 100.3(a) (same).

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

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

²¹ *See* 52 U.S.C. § 30104(a), (b); *see, e.g.*, Factual and Legal Analysis (“F&LA”) at 6, MUR 6735 (Joseph A. Sestak); F&LA at 5, MUR 6449 (Jon Bruning); F&LA at 2, MUR 5363 (Alfred C. Sharpton).

²² *See* 52 U.S.C. § 30103(c).

²³ *See* 11 C.F.R. §§ 100.72, 100.131; F&LA at 7, MUR 6775 (Hilary Clinton); F&LA at 8, MUR 6776 (Niger Innis); F&LA at 6, MUR 6735 (Joseph A. Sestak).

²⁴ *See* Advisory Opinion 1981-32 at 4 (Askew).

for polling, telephone calls, and travel, and only funds subject to the Act’s source and amount prohibitions may be used for such activities.²⁵

An individual who is testing the waters is not required to register or file disclosure reports with the Commission unless and until the individual subsequently decides to run for federal office.²⁶ However, an individual who tests the waters must keep financial records, and if he or she becomes a candidate, all funds received, or payments made in connection with testing the waters must be reported as contributions and expenditures in the first report filed by the candidate’s principal campaign committee.²⁷

The testing-the-waters exceptions are not available to an individual who has decided to become a candidate.²⁸ In determining whether an individual has moved from testing the waters to candidate status, the Commission considers whether the individual has engaged in activities or made statements that would indicate the individual has decided to run for federal office.²⁹ The determination of whether an individual has crossed the line from testing the waters to campaigning must be made on a case-by-case basis.³⁰

Commission regulations set forth a non-exhaustive list of activities that indicate when an individual is no longer testing the waters and has decided to become a candidate. Such indicia

²⁵ *Id* at 3; *see also* 11 C.F.R. §§ 100.72, 100.131.

²⁶ *Id*; *see also* Advisory Opinion 2015-09 at 6 (Senate Maj. PAC, *et al.*) (“AO 2015-09”).

²⁷ 11 C.F.R. § 101.3.

²⁸ *See* AO 2015-09 at 5; *see also* Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9,993 (Mar. 13, 1985) (exemption “explicitly limited ‘solely’ to activities designed to evaluate a potential candidacy”).

²⁹ F&LA at 6, MUR 7590 (Strabone); F&LA at 6-7, MUR 6449 (Jon Bruning);

³⁰ 50 Fed. Reg. at 9,993.

include: (1) using general public political advertising to publicize his or her intention to campaign for federal office; (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after he or she becomes a candidate; (3) making or authorizing written or oral statements that refer to him or her as a candidate for a particular office; (4) conducting activities in close proximity to the election or over a protracted period of time;³¹ and (5) taking action to qualify for a ballot under state law.³² All funds raised or spent for testing-the-waters activities are subject to the Act’s limitations and prohibitions.³³

The Complaint alleges that Carter’s actions such as assembling a campaign team, preparing a launch statement and spending funds on a statewide television advertisement that aired in areas of Georgia that were not a part of Carter’s congressional district indicate that he was a candidate for the U.S. Senate.

The available information, however, does not indicate that Carter had decided to become a candidate for the U.S. Senate. To the extent the alleged activities are not among the permissible activities for testing-the-waters in the Commission’s regulation such as spending funds on a poll, telephone and travel, the regulation states that it does not contain an exhaustive list of permissible activities.³⁴ Carter’s public statements do not refer to himself as a candidate for the Senate or otherwise indicate he had become a candidate for the U.S. Senate.³⁵ The advertisement by Carter

³¹ 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 is a candidate. AO 2015-09 at 6.

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

³³ *Id.* §§ 100.72(a), 100.131(a).

³⁴ *Id.* § 100.131(a).

³⁵ *Id.* §§ 100.72(b)(3), 100.131(b)(3).

references Democrats and President Trump and ran in areas outside of Carter’s congressional district, but the advertisement does not reference Carter as a candidate for the Senate or otherwise indicate that he has made a decision to run for the Senate.³⁶

Moreover, Carter reportedly expressly conditioned his potential Senate candidacy on Walker not running, a fact cited in the Complaint (and, indeed, announced his support for Walker and his intention to run for re-election to the U.S. House the day after Walker announced his Senate candidacy). This is similar to cases where the Commission found that individuals had not triggered candidacy where their decision to become a candidate was conditioned on whether an incumbent would run again.³⁷ While not dispositive, this supports the overall conclusion that the available information does not indicate that Carter became a candidate for the U.S. Senate.³⁸ Accordingly, the Commission finds no reason to believe that Earl L. “Buddy” Carter failed to file a Statement of Candidacy for the U.S. Senate in violation of 52 U.S.C. § 30102(e)(1). Because Carter does not appear to have been a Senate candidate, there was no need for the Carter Committee to file an amended Statement of Organization that it was a committee for Carter

³⁶ See *id.* §§ 100.72(b)(1), 100.131(b)(1). The ad includes the web address for his congressional campaign website (BuddyCarterforCongress.com) and the disclaimer states that the ad was “Paid for by Buddy Carter for Congress.”

³⁷ See F&LA at 8, MURs 7373, 7386, and 7388 (Dunbar for Congress) (citing MUR 5930 (Kirk Schuring) Statement of Reasons of Commissioners Petersen, Hunter, McGahn and Weintraub at 2 (where the individual conditioned his candidacy upon the incumbent’s decision whether to run, “the individual cannot be said to have decided to run until the condition precedent occurs.”)).

³⁸ Nor does the available information indicate that Carter had decided to become a candidate because he tested the waters over a protracted period of time. See 11 C.F.R. §§ 100.72(b)(4), 100.131(b)(4). The available information indicates that Carter had begun testing the waters by April 2021 and by late August 2021 had declared his intention to run for reelection to the U.S. House. In prior matters the Commission has determined that testing the waters for periods longer than Carter’s did not alone suggest candidate status. See F&LA at 12, MUR 6776 (Niger Innis for Congress) (six months of testing the waters).

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running for Senate.³⁹ Accordingly, the Commission finds no reason to believe that the Carter Committee failed to file an amended Statement of Organization in violation of 52 U.S.C. § 30103(c).

³⁹ As noted, if an individual testing the waters becomes a candidate, all funds received, or payments made in connection with testing the waters must be reported as contributions and expenditures in the first report filed by the candidate’s principal campaign committee. *See* 11 C.F.R. § 101.3.