



# “Testing the Waters” or Diving Right In?

How Candidates Bend and Break  
Campaign Finance Laws in  
Presidential Campaigns

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### **Acknowledgements:**

Common Cause is a nonpartisan grassroots organization dedicated to upholding the core values of American democracy. We work to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process.

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# INTRODUCTION<sup>1</sup>

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With the 2018 midterm elections behind us, public attention has shifted to the 2020 presidential election. News stories daily report prospective 2020 presidential candidates' repeated trips to Iowa and New Hampshire, extensive fundraising and campaign machine-building. Yet few of the early front-runners will even admit that they are testing the waters of a presidential campaign, let alone that they are running as candidates. Instead, we likely won't see candidacies by many serious contenders announced until spring or summer of 2019. Why is this?

Federal law requires an individual who is testing the waters of a federal candidacy to pay for exploratory activities with funds raised in compliance with the federal candidate contribution restrictions—no individual contributions above \$2,700;<sup>2</sup> and no contributions from corporations,<sup>3</sup> labor unions,<sup>4</sup> government contractors<sup>5</sup> or foreign nationals.<sup>6</sup> “Testing the waters” is a legal term that means activity undertaken “to determine whether an individual should become a candidate,”<sup>7</sup> including, for example, travel to see if there is sufficient support for one's candidacy.

Prospective presidential candidates deny that they are testing the waters for at least four reasons. First, prospective candidates may often receive contributions much larger than what is allowed under the \$2,700 candidate contribution limit. Second, such individuals “save” their contribution limit—their ability to ask a donor for a \$2,700 campaign contribution—until later in the presidential campaign cycle, once they've formally and publicly acknowledged their candidacy. Third, they often receive contributions from sources that are prohibited from contributing to candidates and to those testing the waters of candidacy—i.e., corporations and labor unions. Fourth, these prospective candidates avoid or postpone disclosure of who's bankrolling the launch of their campaigns.

Bottom line: The more money a person can raise and spend outside the contribution limits to get a campaign up and running, the easier it is to get the campaign off the ground and the more that candidate will be able to raise to run their campaign from the same donors down the road.

Why should defenders of democracy care? Candidate contribution limits serve an important purpose: to prevent corruption of public officials. Our federal candidate contribution limits were enacted in 1974 in the wake of the Watergate scandal, which was partly a money-in-politics scandal.<sup>8</sup> The U.S. Supreme Court upheld the constitutionality of candidate contribution limits in its landmark decision in *Buckley v. Valeo*.<sup>9</sup> The court reasoned that “[t]o the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined.”<sup>10</sup> The court continued: “Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”<sup>11</sup>

Compliance with contribution limits by those testing the waters of federal candidacy is vital to maintaining the integrity of and public confidence in our system of representative democracy. No one is above the law—especially those seeking the highest office in our land.

This report is part of Common Cause's 2020 Candidate Watch project, through which Common Cause will watchdog compliance with and enforcement of important campaign finance laws in the 2020 presidential election. Part I of this report provides a brief history of the practice of candidate's gaming and ignoring campaign finance laws in the early stages of presidential candidacies. Part II looks at Jeb Bush's 2016 campaign as a case study of just how bad—and absurd—things have gotten. Part III explains the statutes, regulations and other FEC guidance that determine when a person exploring candidacy must begin complying with contribution limits and when a person becomes a full-fledged candidate under the law. Part IV describes the FEC's track record on enforcement

of these laws. Part V describes the types of organizations prospective candidates frequently use to test the waters of candidacy. The report ends with a “Conclusion & Recommendations” section, which summarizes current law (i.e., regarding when a person is testing the waters and when that person becomes a candidate) and ends with recommendations for obtaining better compliance with these important laws, including, most importantly, a recommendation that the FEC repeal its testing the waters regulatory exemption for presidential candidates.

## PART I: BRIEF HISTORY

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It’s nothing new for prospective presidential candidates to use entities other than federal candidate campaign committees—e.g., federal multicandidate political action committees (PACs), federal leadership PACs, federal super PACs, state PACs, 501(c)(4) organizations, 527 organizations—to evade campaign finance restrictions while laying the foundation for a presidential campaign.<sup>12</sup>

Contribution limits were first imposed on presidential candidates for the 1976 election. It took only one election cycle under such limits for Ronald Reagan and his lawyers to find a way around them. In January 1977, Reagan converted his 1976 candidate campaign committee (with a \$1,000 contribution limit) into a multicandidate PAC (which has a \$5,000 contribution limit)—the type of committee that exists to support other peoples’ campaigns, not the founder’s own campaign.<sup>13</sup> Reagan named the multicandidate committee Citizens for the Republic<sup>14</sup> and used \$1.6 million left over from his 1976 presidential campaign to begin his 1980 campaign. In doing so, he skirted the \$1,000 limit that would have applied if he had converted his 1976 campaign committee into a 1980 campaign committee.

Using a strategy successfully employed by Richard Nixon in the years preceding his 1968 victory, Reagan planned to support conservative candidates and causes to lay a foundation for his 1980 presidential run.<sup>15</sup> In *Creative Campaigning: PACs and the Presidential Selection Process*, published in 1992, Professor Anthony Corrado described Reagan’s use of the Citizens for the Republic PAC to begin his 1980 presidential campaign:

Reagan and his advisors soon realized that this committee could also be used to conduct a wide range of campaign-related activities that would keep Reagan in the public spotlight and allow him to expand his political organization for a possible run in 1980. This insight became the operative principle that determined most of the PAC’s subsequent actions. The surplus funds from the 1976 campaign were used as “seed money” to finance an extensive fundraising operation, which raised close to \$5 million and developed a list of approximately 300,000 active donors, all of whom were likely prospects for future campaign contributions. The PAC used some of these funds to hire a staff, cover administrative costs, and make contributions to Republican candidates and party organizations. Most of the funds, however, were used to retain professional consultants, finance political outreach programs, organize volunteer recruitment efforts, publish a committee newsletter, subsidize Reagan’s travel and public appearances, and host receptions. These operations were aimed at increasing Reagan’s presence in crucial primary states, improving his support among party activists, and maintaining his public visibility. The committee thus served as a scaled-down campaign committee, providing Reagan with the essential resources and services needed to launch his 1980 campaign.<sup>16</sup>

Reagan could have simply re-designated his 1976 presidential campaign committee as his 1980 presidential campaign committee; doing so would have been the approach most consistent with the letter of campaign finance laws. Indeed, this is precisely what President Donald Trump did in January 2017, following his successful 2016 campaign and looking ahead to his 2020 reelection campaign. However, because President Trump won his

2016 campaign, he didn't realistically have the option of playing the charade Reagan had played 40 years earlier.

Reagan seemingly had every intention of spending the \$1.6 million left over from his 1976 campaign, as well as additional funds raised by the Citizens for the Republic PAC under a \$5,000 limit, "for the purpose of influencing"<sup>17</sup> his 1980 campaign—i.e., to make 1980 campaign "expenditures" as defined by law. But Reagan's lawyers suspected they could get away with telling a different story to the FEC, namely that Reagan was simply supporting other candidates and causes he liked. By doing so, Reagan raised funds under the \$5,000 per year multicandidate PAC contribution limit, instead of under the then-\$1,000 (now \$2,700) per election candidate contribution limit. Consequently, Reagan was able to ask his wealthiest supporters for \$5,000 in 1977, \$5,000 in 1978 and \$5,000 in 1979 before launching his official campaign in March 1979—and then go back to the same supporters again for \$2,000 in contributions to his 1980 candidate campaign committee's primary and general election efforts (\$1,000 per election).<sup>18</sup>

Reagan created the roadmap for skirting the candidate contribution limit, and others immediately followed suit. Leading up to the 1980 election, four of the 10 major presidential candidates sponsored multicandidate PACs (Reagan, George H.W. Bush, John Connally and Bob Dole).<sup>19</sup> Leading up to the 1984 election, five of the nine major presidential candidates sponsored multicandidate PACs, with Walter Mondale becoming the first Democrat to take advantage of the multicandidate PAC strategy.<sup>20</sup> And, according to Corrado, a "virtual explosion in the number of candidate-sponsored PACs occurred in advance of the 1988 prenomination contest."<sup>21</sup>

This "virtual explosion" prior to the 1988 presidential election is noteworthy because, while nine of the 14 major presidential candidates established federal multicandidate PACs, three others pushed the legal boundaries even farther—they set up groups that weren't subject to federal campaign finance laws at all. Republican Pete du Pont relied on a state PAC formed in Delaware, while Democrats Gary Hart and Reverend Jesse Jackson set up nonprofit organizations: the Center for a New Democracy and the National Rainbow Coalition, respectively.<sup>22</sup>

Using nonprofit organizations not registered as PACs enabled candidates to raise funds free of any contribution limits or restrictions. State PAC fundraising was subject only to the restrictions of a particular state's laws, creating the opportunity for prospective candidates to cherry-pick states with no restrictions on contributions and set up PACs there.

So by the 1988 presidential election cycle, nearly all of the vehicles popular today for skirting federal candidate contribution limits were in use—federal multicandidate PACs, state PACs and various nonprofit entities. Yet the FEC did nothing to stop these violations of federal campaign finance law. In 1986, FEC Commissioner Thomas E. Harris wrote the following scathing passage about the FEC and the eventual 1988 presidential election victor, President George H.W. Bush:

In its rulings on unannounced presidential aspirants the [FEC] has, step by step, gotten itself into the absurd position that it refuses to acknowledge what everyone knows: that Vice President Bush is running for President and is financing his campaign through the Fund for America's Future, Inc., which he organized and controls. . . . Only persons just alighting from a UFO can doubt that activities of these sorts, which are engaged in over a period of many months, will promote the candidacy of the founding father. That, of course, is why so many would-be Presidents, of both parties, have created and utilized PACs of this sort in recent years.<sup>23</sup>

## PART II: JEB BUSH & THE NEW WORLD OF SUPER PACS

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For decades, presidential hopefuls followed the blueprint for evading campaign finance laws that had been established in the 1970s and 1980s. Things changed—dramatically and for the worse—in the 2016 presidential election cycle.

The seed of this major change had been planted by the Supreme Court with its landmark 2010 decision in *Citizens United v. FEC*. The legal reasoning underlying the *Citizens United* decision—i.e., that independent expenditures don't pose a threat of corruption—led to the birth of super PACs.<sup>24</sup> Unlike candidate committees, party committees and traditional PACs, which are all subject to contribution limits, super PACs are political committees set up by persons other than candidates and parties and are permitted to raise unlimited funds to make “independent expenditures”—i.e., ads that expressly advocate for or against candidates but that are not coordinated with any candidates.

On December 16, 2014, former Florida governor Jeb Bush announced that he planned to “launch a political action committee tasked with ‘exploring a presidential bid.’”<sup>25</sup> Bush further stated via a Facebook note that he had “decided to actively explore the possibility of running for President of the United States,” and announced his plans to launch a leadership PAC in January to “facilitate conversations with citizens across America to discuss the most critical challenges facing our exceptional nation.” He concluded his Facebook note by stating, “In the coming months, I hope to visit with many of you and have a conversation about restoring the promise of America.”<sup>26</sup>

One former presidential campaign manager commented, “He dominated the holiday season’s headlines while everybody else was wrapping presents.”<sup>27</sup> Bush’s team “hit the phones and emails with what some have called a ‘shock and awe’ campaign that could raise between \$50 million and \$100 million by the end of the first quarter of the year” and lead many would-be presidential competitors not to run, “unwilling or unable to compete with the Bush juggernaut.”<sup>28</sup>

On January 6, 2015, it was reported that “Bush and his supporters launched” not one but two new political committees.<sup>29</sup> Bush’s advisers were reportedly “overseeing the operations of both Bush political committees.”<sup>30</sup> One of these committees, the Right to Rise PAC, was a multicandidate committee that raised funds under a \$5,000 per year federal law contribution limit; the other committee was the Right to Rise Super PAC, which could only be lawfully operated independently of a candidate or officeholder.

Shortly after formation of these PACs, “multiple Republican sources involved in finance meetings with Bush’s team” told reporters that Bush’s team had set a “fundraising goal of \$100 million in the first three months of [the] year—including a whopping \$25 million haul in Florida—in an effort to winnow the potential Republican presidential primary field with an audacious display of financial strength.”<sup>31</sup>

During a January visit to Washington, DC, Bush met with Republican lobbyists “to provide an update on his expected run for president and let supporters know how they could boost his budding campaign.” Bush operatives “announced that 60 events in cities across the country have been scheduled to raise money for his federal leadership political action committee, which can accept money only in limited amounts, and his super PAC, which can accept checks in unlimited amounts.” According to one attendee, “Bush talked about how the expected campaign of Democrat Hillary Clinton, the former secretary of state under President Obama, would ‘be a campaign of the past dating back to what happened in the 1990s’ and that his ‘will be [a] candidacy of [the] future’ focusing on positive immigration reform, among other issues.”<sup>32</sup>

Bush spent the first five months of 2015 traveling across the country on “a nonstop fundraising tour raking in millions” for the Right to Rise Super PAC “to back his expected presidential bid.”<sup>33</sup> Bush regularly head-

lined \$100,000-per-couple fundraising events<sup>34</sup> and focused his efforts on early primary states.<sup>35</sup> As Bush was headlining this series of high-dollar events, his team sent out an “unusual request . . . to wealthy donors writing large checks to support former Florida governor Jeb Bush: Please don’t give more than \$1 million right away.” Bush advisers were reportedly concerned that “accepting massive sums from a handful of uber-rich supporters could fuel a perception that the former governor is in their debt.”<sup>36</sup>

On May 13, 2015, Bush let his mask slip to show the actual candidate underneath when he stated: “I’m running for president in 2016 and the focus is going to be about how we . . .” Almost instantly, he seemed to recognize his mistake, adding, “If I run.”<sup>37</sup>

And as Bush was confirmed as speaker for the Iowa Republican party’s annual Lincoln Dinner on May 16, 2015, the announcement explained: “There’s always the chance for a candidate to have a defining moment at an event like this in Iowa. This dinner is an opportunity for our distinguished guests to set themselves apart and announce to Iowa and the country why they should be the next President of the United States. . . . The Lincoln Dinner is an important stepping stone for candidates on their way to the caucuses in February 2016.”<sup>38</sup>

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Jeb Bush finally announced his candidacy and registered a campaign committee, Jeb 2016, Inc., on June 15, 2015.<sup>39</sup> All told, through June 2015, Bush had raised more than \$103 million for his Right to Rise Super PAC<sup>40</sup>—including corporate contributions and more than 20 contributions of \$1 million or more. It would have been illegal to use those funds for testing the waters or actually running for federal office. Bush’s direct involvement in this fundraising was so central to his super PAC’s success that the PAC only raised another \$18 million after Bush stepped away to formally launch his campaign, and \$10 million of that was from a single corporate donor.<sup>41</sup>

Multiple complaints were filed with the FEC and DOJ alleging campaign finance law violations by Jeb Bush and Right to Rise Super PAC.<sup>42</sup> As of the publication of this report, neither the FEC nor the DOJ has made public any information regarding possible enforcement actions against Bush. In other words, Bush got away with massive campaign finance law violations, and candidates in the 2020 election may view the benefits of such a political strategy—evading the candidate contribution limit to amass a \$100 million campaign war chest—as far outweighing the risks.

## **PART III: LAWS REGARDING TESTING THE WATERS & CANDIDACY STATUS**

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This section provides an overview of federal statutes, regulations and FEC guidance that establish the rules for testing the waters of federal candidacy and actually becoming a candidate under the law. In a general sense, the rules are simple and straightforward—if a person is raising or spending money for the purpose of determining whether to run for federal office, that person is testing the waters of candidacy and must pay testing the waters expenses with candidate-permissible funds (i.e., no more than \$2,700 per donor; and no corporate, union or foreign funds). And if that person decides to run, or takes actions that the FEC has determined over the past 40 years indicate a decision to run, then that person must file paperwork with the FEC and begin disclosing political contributions and expenditures.

However, since so much of the laws involve the purpose of an individual’s activities—and whether or not the person is deliberating running or, by contrast, has actually decided to run—enforcing the laws can be challenging. This area of law requires a certain degree of honesty from politicians, and such honesty has been in short supply among politicians running for president in recent decades.

Federal campaign finance laws have evolved steadily over the past 100 years or so. In 1907, for example, passage of the Tillman Act prohibited contributions from corporations to candidates for federal office.<sup>43</sup> In 1910, campaign finance disclosure requirements were first incorporated into federal law.<sup>44</sup> In 1943, the War Labor Disputes Act extended the contribution prohibition to labor unions.<sup>45</sup> But these campaign finance laws went largely unenforced until the 1970s, when the Federal Election Campaign Act (FECA) of 1971, together with the 1974 amendments to FECA, led to the creation of the Federal Election Commission and established the basic rules of the game for federal candidate elections, which remain in effect today.

## Candidate Status

Federal statute defines “candidate” as “an individual who seeks nomination for election, or election, to Federal office” and provides that an individual shall be deemed to seek election “if such individual has received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000” or “if such individual has given his or her consent to another person to” do the same.<sup>46</sup>

The statutory definition of “candidate” hinges on the terms “contribution” and “expenditure.” “Contribution” means “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”<sup>47</sup> “Expenditure” means “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.”<sup>48</sup>

Taken together, these statutory definitions provide that an individual becomes a candidate under law when they receive or spend funds in excess of \$5,000 for the purpose of influencing an election. However, as explained in the next section, money raised and spent by an individual to test the waters of candidacy is temporarily exempted from the definitions of “contribution” and “expenditure”—resulting in an exemption from legal candidate status until the individual either decides to run for office or engages in activities that constitute campaigning and not testing the waters under federal law.<sup>49</sup>

Within 15 days of becoming a candidate, the candidate must register as a candidate with the FEC by filing a Statement of Candidacy (FEC Form 2), in which the candidate must designate a principal campaign committee.<sup>50</sup> And within 10 days of filing a Statement of Candidacy designating a principal campaign committee, a candidate must register that campaign committee with the FEC by filing a Statement of Organization (FEC Form 1).<sup>51</sup>

All federal political committees, including candidate campaign committees, must file periodic, detailed reports with the FEC disclosing all of the money they have raised and spent, including, for example, the contributor’s name and address, amount of the contribution and occupation and employer of any contributor who has given them more than \$200.<sup>52</sup>

## Testing the Waters Exception to Candidate Status

FECA included detailed candidate registration and disclosure requirements (summarized in the preceding section).<sup>53</sup> In 1977, the FEC adopted its first testing the waters regulations, which provided that payments for the purpose of determining whether an individual should become a candidate are excluded from the definition of “contribution” if the individual does not subsequently become a candidate.<sup>54</sup> The FEC explained that the “exception was made so that an individual is not discouraged from ‘testing the waters’ to determine whether his candidacy is feasible.”<sup>55</sup>

In 1985, the FEC amended the testing the waters rules to make a significant change. In several advisory opinions in the early 1980s, the FEC had concluded that the 1977 regulations permitted individuals to “accept funds in excess of the contribution limits . . . and funds from prohibited sources, such as corporations and labor organizations, for ‘testing the waters’ activities” so long as excessive contributions and contributions from prohibited sources were refunded by a candidate campaign committee in the event the individual decided to run for office.<sup>56</sup> The FEC explained, “The Commission has reconsidered this issue and determined that permitting prohibited funds to be used for ‘testing the waters’ activities extended the exemptions beyond the narrow range of activities they were originally intended to encompass.”<sup>57</sup> The 1985 rules, which are still in effect today, make clear that testing the waters activities must be paid for with candidate-permissible funds (i.e., no more than \$2,700 per donor; and no corporate, union or foreign funds).<sup>58</sup>

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The testing the waters regulations in effect today<sup>59</sup> operate as a temporary exemption from the candidate registration and reporting requirements for an individual still in the process of determining whether they will become a candidate—i.e., testing the waters of candidacy. Candidate contribution limits and prohibitions apply with full force to testing the waters activities. But only if and when a person becomes a candidate must that person register with the FEC and begin filing disclosure reports. And a candidate’s first disclosure report must include all funds raised and spent to test the waters of candidacy.<sup>60</sup>

The FEC has revisited the testing the waters regulations only once since 1985. In 2003, the commission promulgated rules making clear that certain expenses benefiting presidential candidates, paid for by federal multicandidate PACs before the candidate announces their candidacy, are in-kind contributions under the law and must be reimbursed by the presidential campaign committee if they exceed the applicable \$5,000 contribution limit.

These rules establish certain activities as *de facto* testing the waters activities that must be paid for with funds raised under the \$2,700 per election candidate contribution limit instead of under the multicandidate PAC’s \$5,000 per year contribution limit. However, the regulations allow a cure: if the candidate committee reimburses the multicandidate PAC, then the fact that testing the waters activities were paid for with excessive contributions will be ignored by the FEC.<sup>61</sup> The FEC explained:

These provisions were designed to address situations where unauthorized political committees [e.g., Leadership PACs] closely associated with a particular individual planning to run for President defray costs that are properly treated as in-kind contributions unless reimbursed by the Presidential campaign. . . . The focus of the final rules, therefore, is those expenses paid by multicandidate political committees prior to actual candidacy under the law, i.e., during the “testing the waters” phase and before.<sup>62</sup>

## **Contribution Limits & Prohibitions Applicable to Testing the Waters & Campaigning**

With respect to contributions to candidates and those testing the waters of candidacy, federal law imposes both amount limits and source prohibitions.

An individual testing the waters of federal candidacy, or actually running for federal office, may not accept funds from an individual whose contributions, in the aggregate, exceed \$2,700 per election.<sup>63</sup> The individual who is testing the waters may accept \$5,000 per election from a political party committee and/or other multicandidate PAC.<sup>64</sup>

Federal law prohibits federal candidates, and those testing the waters of candidacy, from accepting contributions from corporations or labor unions<sup>65</sup> and also from government contractors.<sup>66</sup>

Federal law also prohibits foreign nationals from making contributions or expenditures in connection with any election in the United States, and it prohibits a person from soliciting, accepting or receiving a political contribution from a foreign national.<sup>67</sup>

Finally, the so-called “soft money” ban of the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibits federal candidates and officeholders from soliciting or receiving funds in connection with any election unless the funds comply with the federal law contribution amount limits and source restrictions detailed above.<sup>68</sup> Consequently, whereas individuals who are not federal candidates or officeholders, or testing the waters for becoming a federal candidate, can raise and spend unlimited funds in connection with elections (e.g., through a super PAC, 527 or 501[c][4] organization), federal candidates and officeholders raising funds in connection with any election must do so within the confines of federal contribution limits and source restrictions.<sup>69</sup>

### **FEC Advisory Opinions on Testing the Waters and Candidate Status**

During the first decade of its existence, the FEC was asked numerous times to advise prospective presidential candidates regarding activities that could permissibly be conducted under the testing the waters exemptions from the definitions of “contribution” and “expenditure.” During the late 1970s and early 1980s, prospective candidates attempted to stretch the boundary of activities that could be funded without forming a presidential candidate committee—but the activities would still be paid for with funds raised subject to the candidate contribution limit. Then, in the run-up to the 1988 election, prospective candidates shifted their focus to the boundary between non-candidacy and testing the waters, to pay for pre-candidacy activities with funds raised outside the candidate contribution restrictions.

Advisory Opinion 1981-32, for example, features former Florida governor Reubin Askew, who sought guidance from the FEC in July 1981—more than three years before the presidential election—regarding 14 specific activities he hoped to conduct to test the waters of a presidential candidacy without forming a principal campaign committee.<sup>70</sup> Unlike many of today’s prospective presidential candidates, Askew planned to pay for the activities using funds raised in compliance with the candidate contribution restrictions, but he wanted to know whether undertaking any or all of the activities would make him a candidate under FECA, even though he had not made a decision to become a candidate. The activities included:

- Traveling throughout the country to speak to groups and meet with opinion leaders to determine whether political support exists for a national campaign and to attend policy briefings;
- Employing political consultants for advice on constructing a national campaign organization;
- Employing a public relations consultant to arrange speaking engagements, dissemination of speeches, and publication of articles by the governor in newspapers and periodicals;
- Renting office space and equipment;
- Paying staff employed by the governor’s law firm to assist with testing the waters activities;
- Paying experts to conduct polls to determine the feasibility of a national campaign; and
- Soliciting contributions for engaging in such testing the waters activities.<sup>71</sup>

The FEC concluded:

[T]he testing the waters exemptions of the regulations permit all of the 14 activities described in your request provided and only so long as Governor Askew in undertaking any single activity, or

all the various activities, continues to deliberate his decision to become a presidential candidate for 1984, as distinguished from pursuing the activity as a means of seeking some affirmation or reinforcement of a private decision he has already made to be a candidate.<sup>72</sup>

The FEC made clear in Advisory Opinion 1981-32 that a private decision to run for president renders an individual a candidate under the law, but it also made clear that prospective presidential candidates could do a whole lot of campaign building without legally becoming candidates.

In January 1982, another prospective 1984 presidential candidate, Senator Alan Cranston, sought confirmation from the FEC that certain activities qualified for the testing the waters exemption. Senator Cranston's request repeated many of the same activities listed in Governor Askew's request in the prior year, and the FEC largely repeated the response it had given Governor Askew.<sup>73</sup> Perhaps what is most noteworthy about the Cranston advisory opinion is the dissenting opinion written by Commissioner Thomas E. Harris, cautioning:

I fear that the Commission will drown while protecting an individual's right to "test the waters" in order to determine the feasibility of his candidacy. The Commission's regulations were intended to be a narrow exemption from the definition of contribution and expenditure. . . . The Commission was cognizant that the line between "testing the waters" and campaign activity was a thin one, but now it is non-existent.<sup>74</sup>

Whereas prior to the 1984 presidential election, testing the waters advisory opinion requests focused on the legal line between testing the waters and candidacy, in the run-up to the 1988 election, prospective candidates' advisory opinion requests shifted focus to the legal line between non-candidacy and testing the waters—in efforts to expand the scope of activities that could be conducted outside of the candidate contribution restrictions.

Advisory Opinion 1985-40 responded to a joint request by the Republican Majority Fund (RMF) multicandidate PAC and a testing the waters fund of former U.S. senator and 1980 presidential candidate Howard H. Baker, Jr. Baker had been "closely identified" with RMF since its creation in 1980, having raised funds for the PAC and having been featured in the PAC's newsletter.<sup>75</sup>

At the time the request was submitted, in November 1985, Baker was admittedly "determining whether to become a candidate for the 1988 Republican presidential nomination."<sup>76</sup> Baker and RMF sought the FEC's opinion regarding whether RMF could pay certain expenses related to Baker's activities before the November 1986 midterm election or whether, by contrast, the activities constituted testing the waters activities. If they were categorized as the latter, they would have to be treated as in-kind contributions from RMF to Baker and be subject to the \$5,000 limit on contributions from multicandidate PACs to candidates or paid for with candidate-permissible funds.

For example, Baker had been invited to attend and address state and regional Republican Party meetings and conferences in conjunction with appearances by other reported potential contenders for the 1988 Republican presidential nomination. Baker had planned to travel to early primary states for private meetings with Republican Party leaders and set up steering committees in certain states, including Iowa and New Hampshire. The requestors wanted to know if RMF could nevertheless pay for Baker's travel expenses and rental of hospitality suites at such events. The FEC concluded that these activities constituted testing the waters activities, which must be paid for with candidate-permissible funds.<sup>77</sup>

Less than two months after Baker and RMF had filed their advisory opinion request, and before the commission had issued an opinion in response to that request, another multicandidate PAC closely associated with a prospective 1988 presidential candidate submitted an advisory opinion request.

In January 1986, the multicandidate PAC Fund for America's Future (FAF), founded by then-Vice President George H.W. Bush, requested an advisory opinion regarding activities that FAF and Bush intended to undertake prior to

the 1986 midterm election. FAF stated that it was “created to support the Republican Party and Republican candidates for state and local office as well as for both houses of Congress” and that it sought “to build a stronger Republican Party at all levels, including local party organizations.”<sup>78</sup> According to FAF, its “party-building and direct candidate support activities necessitate publications, fundraising solicitations, and travel and speechmaking by the Vice President” and that the “Vice President’s and the Fund’s activities in this regard [would] increase as the 1986 election season continue[d].”<sup>79</sup>

The FEC concluded that, prior to the 1986 midterm election, FAF could pay for Bush to make appearances on behalf of Republican candidates, mention Vice President Bush in its solicitations, and organize volunteers for the Republican Party without such activities being considered testing the waters by Bush for a 1988 presidential campaign—as long as the only references to any potential 1988 candidacy by the vice president at his appearances in 1986 were made “in an incidental manner or in response to questions by the public or press” and did not include “public statements referring to the Vice President’s possible intent to campaign for Federal office in the 1988 election cycle or to the campaign intentions of potential opponents for Federal office in 1988.”<sup>80</sup> The FEC further explained that FAF could not establish local offices and recruit volunteers “in order to benefit any potential candidacy by the Vice President in 1988[.]”<sup>81</sup>

With respect to all of these activities, the FEC took FAF at its word that the purpose of the activities was to aid the Republican Party and Republican candidates running in the 1986 midterm election—not to aid or benefit any potential candidacy by Bush in 1988.<sup>82</sup>

Although the commission’s majority circumscribed the activities it approved as detailed above, Commissioner Harris dissented and wrote the passage quoted in Part I of this report, stating that the FEC had, “step by step, gotten itself into the absurd position that it refuses to acknowledge what everyone knows: that Vice President Bush is running for President and is financing his campaign through the Fund for America’s Future, Inc., which he organized and controls.”<sup>83</sup> The commission’s vice chairman, John Warren McGarry, also dissented on the grounds that “it makes no sense for a multicandidate committee with which a prospective presidential candidate is closely and actively associated to make expenditures to . . . precinct delegate candidates, or to recruit or otherwise encourage such candidates, and to not have such expenditures count against that candidate’s expenditure limitations . . . once he or she becomes a candidate.”<sup>84</sup>

With two of the commission’s six commissioners dissenting, FAF and Bush followed their proposed course of action in 1986 and Vice President Bush did, of course, go on to successfully run for president in 1988. The FEC largely remains in the same “absurd position” today. And the FAF-Bush advisory opinion marks the last time the FEC considered the boundaries of testing the waters in any detail in an advisory opinion.

## **PART IV: FEC APPROACH TO ENFORCING TESTING THE WATERS LAWS**

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To put it bluntly, the FEC has a pretty bad track record of enforcing our laws regulating testing the waters and candidate status. One of the few instances in which the FEC has found a violation of these laws began with a complaint filed in October 1986 alleging that Reverend Pat Robertson’s activities made him a candidate under the law and that he was in violation of the law by his failure to register and report as a candidate and by his failure to comply with candidate contribution restrictions.<sup>85</sup>

According to the complaint, by October 1986, Robertson had “for several months” been “actively engaged in general public advertising directed to the solicitation of funds on a mass scale.”<sup>86</sup> Robertson had reportedly

stated that the success of his fundraising efforts would “tell him whether he should announce his candidacy for President of the United States.”<sup>87</sup> On September 17, 1986, Robertson sponsored a teleconference broadcast which was transmitted by satellite to 215 additional locations throughout the United States. Approximately 150,000 persons were present at the 216 locations.<sup>88</sup> More than \$4 million in expenditures were made in connection with the broadcast. In response to 1.6 million fundraising letters that were sent out in conjunction with the event, Americans for Robertson reported receipt of \$2.3 million.<sup>89</sup> In a speech during the broadcast, Robertson stated that “if by September 17, 1987 three million registered voters had signed petitions on his behalf and otherwise demonstrated their support, he would become a candidate.”<sup>90</sup>

The FEC concluded that the “context and content of the September 17, 1986 broadcast and of the related direct mail program went beyond the testing of the feasibility of a campaign and therefore exceed the scope” of the testing the waters exemption.<sup>91</sup> Not until October 1987 did Robertson and Americans for Robertson file the registration and disclosure paperwork the FEC requires of a candidate and authorized committee.<sup>92</sup> Robertson and Americans for Robertson, the FEC concluded, had violated federal law by failing to register with and report to the FEC in 1986.<sup>93</sup>

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*The more typical result of FEC complaints alleging violations of these laws—even when career FEC staff lawyers have found violations—has been dismissal as an exercise of “prosecutorial discretion” or the closing of enforcement actions due to a deadlocked vote among commissioners.*

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However, the penalty paid by Robertson was too little, too late to have any meaningful deterrent effect on similar future unlawful conduct. In December 2008, more than a month after the presidential election and several months after Robertson had dropped out of the Republican primary race, he entered a settlement agreement with the FEC agreeing to pay a \$25,000 fine for his violations.<sup>94</sup>

The more typical result of FEC complaints alleging violations of these laws—even when career FEC staff lawyers have found violations—has been dismissal as an exercise of “prosecutorial discretion” or the closing of enforcement actions due to a deadlocked vote among commissioners.<sup>95</sup>

In the 2012 presidential campaign cycle, a complaint was filed against Donald Trump, the Trump Organization, Michael Cohen and others alleging, among other things, violation of the contribution limits and prohibitions applicable to testing the waters activities.<sup>96</sup> Career FEC staff lawyers found reason to believe Trump made illegal disbursements for testing the waters activities by directing Cohen to fly to Iowa for meetings about a possible Trump candidacy and to operate the Should Trump Run website. Cohen was paid for these activities by the Trump Organization, and Cohen’s \$125,000 charter flight was paid for by Trump supporter Stewart Rahr.<sup>97</sup> FEC lawyers recommended the FEC “find reason to believe” that Trump, Cohen and Rahr violated testing the waters funding restrictions and open a full investigation.<sup>98</sup> The commissioners, however, deadlocked in a 2-3 vote—short of the necessary four votes to determine whether Trump, Cohen and Rahr had violated federal law.<sup>99</sup> Consequently, the commission voted unanimously to simply “close the file” without having made a determination of the legality of Trump’s testing the waters activities.<sup>100</sup>

In a more recent example, a July 2017 complaint alleged that Levi Tilleman, who was admittedly exploring a campaign for Congress, used language on his website and via social media platforms indicating that he had moved beyond testing the waters to actual candidacy—and that he violated federal law by failing to register and report as a candidate. Tilleman stated, “If I am elected . . . I will fight for progressive causes,” referred to prospective primary and general election opponents in tweets and used the Twitter hashtags #2018 and #victory.<sup>101</sup>

The FEC’s career staff lawyers concluded that Tilleman “had decided to become a candidate as early as May 11,

2017,” when he unveiled a logo on his Facebook page featuring his name near the phrase “U.S. Congress.”<sup>102</sup> He also posted videos featuring the logo and a link to a Crowdpac fundraising page in June 2017.<sup>103</sup> FEC lawyers also found that Tilleman had made public statements via social media platforms in June 2017 indicating he had decided to run for Congress.<sup>104</sup> Nevertheless, although the FEC’s lawyers concluded that Tilleman violated federal law requiring candidate filing and reporting, and failed to timely report \$38,000 in campaign finance activity, they recommended that the commission dismiss the matter “pursuant to its prosecutorial discretion” because Tilleman had missed the filing deadlines only “by about a month.”<sup>105</sup> The commission took its lawyers’ advice and closed the matter, issuing a “letter of caution” to Tilleman.<sup>106</sup>

In another recent enforcement matter, Common Cause filed a complaint in August 2017 against Robert James

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*In another recent enforcement matter, Common Cause filed a complaint in August 2017 against Robert James Ritchie, a musician better known by his stage name, Kid Rock, alleging that he had become a candidate for the U.S. Senate but had failed to comply with federal law regarding candidate registration and reporting requirements and contribution restrictions*

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Ritchie, a musician better known by his stage name, Kid Rock, alleging that he had become a candidate for the U.S. Senate but had failed to comply with federal law regarding candidate registration and reporting requirements and contribution restrictions.<sup>107</sup> In July 2017, Kid Rock launched a website, <http://kidrockforsenate.com>, and began selling “Kid Rock for US Senate” hats, yard signs and other merchandise.

Kid Rock acknowledged in a statement on the website that he was “exploring” candidacy and promoted his Kid Rock for US Senate website via Twitter.<sup>108</sup>

FEC staff lawyers concluded that Kid Rock’s activities “went beyond ‘testing the waters’” and that he legally became a candidate when he began producing and selling Kid Rock for US Senate merchandise.<sup>109</sup> The FEC lawyers recommended the commission find reason to believe Kid Rock violated multiple federal campaign finance laws and open a full investigation into the matter.<sup>110</sup>

However, the commissioners disagreed on whether to follow their own staff lawyers’ recommendation. The deadlocked commission didn’t have the requisite four votes either to proceed with an investigation or to dismiss Common Cause’s complaint. So, instead, the commission simply closed the case file without taking a position on whether Kid Rock broke federal law.<sup>111</sup>

Two commissioners who refused to proceed with an investigation gave several unpersuasive reasons for wanting to dismiss the matter, including, for example, that Ritchie could not have qualified for the ballot under his stage name Kid Rock and hadn’t made campaign statements under his legal name. They also claimed that he may have engaged in his campaign activities as celebrity parody (the same could have been said about President Trump in the early stages of his campaign) and that he hadn’t established a campaign committee (an ironic justification for no enforcement given that his failure to register a committee is one of the violations Common Cause alleged in its complaint). “Even assuming that Ritchie’s conduct technically violated FECA,” these commissioners wrote, “further pursuing this matter would have been an unwise use of Commission resources.” On this basis, they argued for dismissal of the matter as an exercise of prosecutorial discretion. The better course, they argued, was to investigate and enforce the law against violators who actually run for office<sup>112</sup>—another ironic justification given that the commission has not yet acted on similar complaints against actual 2016 presidential candidates Jeb Bush (detailed in Part II of this report), Scott Walker, Martin O’Malley and Rick Santorum. All of these complaints were drafted and filed by the same attorney who filed the Kid Rock complaint.<sup>113</sup>

## PART V: ORGANIZATIONS COMMONLY USED TO TEST THE WATERS

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An individual who is testing the waters of candidacy isn't required to use any specific organizational form to do so. The law requires only that the person keep track of money raised and spent to test the waters, to ensure compliance with the contribution restrictions and enable disclosure if they decide to run. Though the law does not require it, the FEC recommends that an individual who is testing the waters of candidacy at a minimum set up a separate bank account to keep testing the waters funds separate from personal funds.<sup>114</sup> Because the law doesn't require the use of any specific organization type to do so, people use a variety of different types of organizations to test the waters. The use of a particular type of organization isn't inherently legal or illegal. What legally matters most when testing the waters is compliance with candidate contribution limits. The following organization types are the ones most commonly used to test the waters.

### Exploratory Committees

Exploratory committees are not a type of political committee that exists under federal campaign finance law. Individuals who are testing the waters of candidacy often announce that they've formed an exploratory committee, which can mean anything the individual wants it to mean. Sometimes such an individual actually forms a federal candidate campaign committee, which operates in compliance with candidate contribution restrictions and reporting requirements. The formation of such a committee is sometimes done out of an abundance of caution and sometimes done because the individual has in fact become a candidate under federal law but is not yet ready to publicly declare their candidacy.



#### **SENATOR ELIZABETH WARREN**

made news on December 31, 2018, by announcing she had formed the Elizabeth Warren Presidential Exploratory Committee. In fact, Warren registered a presidential candidate campaign committee with the FEC.<sup>136</sup> In the eyes of the law, Warren is now a 2020 presidential election candidate and is required to comply with all

candidate contribution limits and disclosure requirements. When she decides to publicly acknowledge her candidacy, she will simply amend the name of the committee she registered on December 31 to remove the word “exploratory.”

### Multicandidate PACs & Leadership PACs

From the time Ronald Reagan formed Citizens for the Republic in 1977, the multicandidate political committee (multicandidate PAC) has been the vehicle of choice for prospective presidential candidates to skirt candidate contribution limits. By statutory definition, a multicandidate PAC is a political committee that has been registered with the FEC for at least six months, has received contributions from more than 50 persons and has made contributions to five or more candidates for federal office.<sup>115</sup>

A leadership PAC is a type<sup>116</sup> of multicandidate PAC established or controlled by a federal candidate or officeholder but not an “authorized committee” of the candidate or officeholder.<sup>117</sup> In other words, a leadership PAC is a committee set up by a federal candidate or officeholder to, in theory, support the election campaigns of others—not to support the election of the candidate or officeholder who set up the leadership PAC. In actuality, leadership PACs are often used as officeholder slush funds, with very little of the money raised used to support other candidates.<sup>118</sup> Historically, leadership PACs have been very popular vehicles for federal officeholders testing the waters of a presidential campaign.



**SENATOR KAMALA HARRIS**, a likely 2020 presidential candidate, raised more money for her Fearless for the People leadership PAC between January 2017 and September 2018 than any other senator: \$2.3 million. Harris' leadership PAC made \$637,000 in contributions to other committees and more than \$1.1 million in "operating expenditures" (e.g., travel expenses).<sup>137</sup>

Only time will tell whether Harris, should she become a 2020 presidential candidate, discloses any of her leadership PAC spending as testing the waters expenditures.

Multicandidate PACs and leadership PACs raise funds under a \$5,000 per calendar year contribution limit<sup>119</sup> rather than the \$2,700 per election limit on contributions to candidate campaign committees,<sup>120</sup> and they are prohibited from accepting corporate and union contributions.<sup>121</sup> The fact that the limit on contributions to multicandidate and leadership PACs applies on a per calendar year basis, rather than on the per election basis applicable to candidate contributions is noteworthy. Whereas a candidate running in 2020 may accept only \$2,700 per donor for the 2020 pri-

mary contest, a prospective 2020 candidate who set up a leadership PAC in 2017 would be permitted to collect from a single donor \$5,000 in 2017, \$5,000 in 2018 and \$5,000 in 2019—without impacting their 2020 candidate contribution limit of \$2,700.<sup>122</sup> And because funds raised by leadership PACs are subject to contribution limits and the ban on corporate and union contributions, federal candidates and officeholders can maintain them without running afoul of the BCRA soft money ban.

## Super PACs



**JEB BUSH'S RIGHT TO RISE SUPER PAC**, detailed in Part II of this report, is an example of a super PAC used by a candidate to lay the foundation of a presidential campaign.

"Super PAC" is a nickname for the type of committee referred to by the FEC as an independent expenditure-only political committee. Super PACs were established in 2010, in the wake of the Supreme Court's decision in *Citizens United*.<sup>123</sup> Any non-candidate or non-party federal political committee that refrains from making contributions to candidates or parties (as well as expenditures coordinated with candidates

or parties—i.e., the PAC makes only independent expenditures) qualifies for super PAC status and is permitted to accept unlimited contributions from individuals, corporations and labor unions.<sup>124</sup> However, federal candidates and officeholders are prohibited by the BCRA soft money ban from establishing or controlling any entity that receives or spends funds outside of federal contribution limits in connection with any election—so federal candidates and officeholders are prohibited from operating super PACs.

## 527 Organizations

The name for 527 organizations comes from the section of the Internal Revenue Code that grants such "political organizations" exemption from federal income tax.<sup>125</sup> Specifically, section 527 tax-exempt status is available to a group that is "organized and operated primarily for the purpose of directly or indirectly accepting contributions

or making expenditures, or both, for . . . influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office . . .”<sup>126</sup> Organizations claiming section 527 tax-exempt status are permitted under the tax code to accept unlimited contributions, but they must comply with political committee-like disclosure requirements by filing disclosure reports with the Internal Revenue Service. Section 527 is the correct tax-exempt status for groups primarily formed and operated to elect individuals to public office. Every candidate committee and party committee—from city council candidate committees and county party central committees, up to federal office candidate committees and the national party committees—is eligible for exemption from federal income tax under section 527 of the tax code. Occasionally, a non-federal officeholder testing the waters of federal candidacy will do so using an organization that claims federal tax exemption under section 527 of the tax code but does not register with any federal or state campaign finance agency as a political committee.



In January 2015, then-Wisconsin Governor **SCOTT WALKER** announced that he had formed a 527 political organization called **OUR AMERICAN REVIVAL**, “a committee that will help spread his message and underwrite his activities as he seeks to build his political and fundraising networks in the months ahead to help boost a potential 2016 presidential run.”<sup>138</sup>

Walker raised funds in excess of federal testing the waters limits through Our American Revival, drawing an FEC complaint in March 2015,<sup>139</sup> before eventually acknowledging his candidacy in July 2015. The March 2015 complaint remains pending before the FEC as of the publication date of this report.

### 501(c)(4) Organizations

The name for 501(c)(4) organizations comes from the section of the Internal Revenue Code that grants exemption to social welfare organizations.<sup>127</sup> Sometimes referred to as “issue advocacy” groups, 501(c)(4) organizations can accept unlimited contributions from any source and are not required to publicly disclose their donors. And though 501(c)(4) organizations may engage in some candidate election-related activities, such activities may not be the primary activities of the organization under federal tax law.



In 2013, former Arkansas governor and 2008 presidential candidate **MIKE HUCKABEE** met with his 2008 campaign manager to “map out a run” for the presidency in 2016. Huckabee then set up the 501(c)(4) organization America Takes Action “to serve as an employment perch for his political team” and lay the foundation

of his 2016 campaign. Huckabee eventually acknowledged his candidacy in May 2015.<sup>140</sup>

## CONCLUSION & RECOMMENDATIONS

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Federal law clearly provides that funds raised and spent “for the purpose of determining whether an individual should become a candidate” constitutes “testing the waters” and requires that testing the waters activities be paid for with candidate-permissible funds (\$2,700 limit; and no corporate or union funds).<sup>128</sup> And when an individual decides to run for office, and/or engages in activities that indicate the individual has decided to become a candidate and is no longer testing the waters, the individual must register as a candidate with the FEC and begin disclosing fundraising and spending.

Specifically, federal statutes, together with FEC regulations and other guidance, make clear that testing the waters activities include:

- Travel for the purpose of determining whether an individual should become a candidate, including:
  - » Travel expenses to attend political party conferences where the individual “indicates his potential interest in, and his ongoing consideration of whether to seek” a party’s nomination; and/or
  - » Travel expenses for private meetings with state party leadership to gauge support of a possible candidacy;
- Polling expenses for determining the favorability, name recognition, or relative support level of the individual and/or whether an individual should become a candidate;
- Compensation paid to employees, consultants or vendors for services rendered in connection with the establishment and staffing of offices in states other than the candidate’s home state and in or near the District of Columbia;
- Administrative expenses—including rent, utilities, office supplies and equipment—in connection with the establishment and staffing of offices in states other than the candidate’s home state and in or near the District of Columbia; and
- Expenses to set up steering committees in early caucus and primary states, with the understanding that the committee will become the official campaign organization in the event the individual runs for office.<sup>129</sup>

Federal law makes clear that an individual who has decided to become a candidate, and/or engaged in activities that indicate the individual has decided to become a candidate, is a candidate under the law once they’ve received contributions or made expenditures in excess of the \$5,000 statutory threshold.

And federal statutes, FEC regulations and other guidance outline that the following activities indicate that an individual has decided to become a candidate and is no longer testing the waters of candidacy:

- Using general public political advertising to publicize their intention to campaign for federal office;
- Raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activities designed to amass campaign funds that would be spent after they become a candidate;
- Making or authorizing written or oral statements that refer to them as a candidate for a particular office;
- Conducting activities in close proximity to the election or over a protracted period of time; and
- Taking action to qualify for the ballot under state law.<sup>130</sup>

The FEC is responsible for enforcing the laws regulating testing the waters and actual candidate status—but it hasn’t effectively executed this responsibility. Common Cause has numerous recommendations for obtaining

better compliance with the contribution limits and disclosure requirements on which the integrity of our representative democracy depends.



## **RECOMMENDATION 1: REPEAL TESTING THE WATERS EXEMPTION FOR PRESIDENTIAL CANDIDATES**

Common Cause recommends that the FEC repeal its regulations exempting testing the waters activities by presidential candidates from the registration and reporting requirements of FECA. The original 1977 testing the waters regulations were adopted by the FEC “so that an individual is not discouraged from ‘testing the waters’ to determine whether his candidacy is feasible.”<sup>131</sup> In 1985, the FEC revised its 1977 testing the waters regulations, having concluded that the 1977 rules “could be interpreted to include activities beyond those they were originally intended to encompass.”<sup>132</sup> The FEC “view[ed] the amended regulations as reducing the potential for circumvention of the prohibitions and limitations” of FECA, necessary “to ensure consistent application of the Act’s contribution limitations and prohibitions.”<sup>133</sup> Amendment of the regulations to reduce the potential for circumvention of the contribution limits and prohibitions is once again necessary—and the amendment that makes most sense is repeal of the testing the waters rules as applied to presidential candidates.

The testing the waters rules arguably still make sense for prospective congressional candidates, who might be spared by the rules of the need to “lawyer up” at the exploratory stage. But these days, prospective presidential candidates recruit lawyers at the beginning of the exploratory stage. And, as detailed in this report, their lawyers advise them how to evade campaign finance laws during the early stage of their campaigns. The testing the waters rules don’t serve a sufficiently important public interest in the presidential election context to justify the potential for circumvention of the contribution limits and prohibitions created by the rules.

Repealing the testing the waters regulations as they apply to prospective presidential candidates would effectively reinstate the test for candidate status created by FECA in the 1970s. As the FEC explained in its 1985 rulemaking:

Under 2 U.S.C. 431(2), an individual is deemed to be a “candidate” for the purposes of the Act if he or she receives contributions or makes expenditures in excess of \$5,000 . . . . The Act thus establishes automatic dollar thresholds for attaining candidate status which trigger its registration and reporting requirements. Through its [testing the waters] regulations, the Commission has established limited exceptions to these automatic thresholds which permit an individual to test the feasibility of a campaign for Federal office without becoming a candidate under the Act.<sup>134</sup>

In the absence of the FEC’s testing the waters regulations, funds raised and spent to explore candidacy in a presidential election would be contributions and expenditures under federal law—i.e., funds raised and spent “for the purpose of influencing” a federal election—and, therefore, would trigger the requirement that the individual register a committee and begin filing disclosure reports with the FEC when they exceeded the \$5,000 threshold. Requiring individuals to register with, and report fundraising and spending to, the FEC earlier in the process would better enable the public, the press and the FEC to watchdog compliance with contribution limits and prohibitions.



## **RECOMMENDATION 2: STRONGER ENFORCEMENT OF EXISTING LAWS**

Even if the FEC is unwilling to repeal the testing the waters rules for prospective presidential candidates, the FEC must commit to stronger, more effective enforcement of existing laws. The FEC has the capacity and authority to conduct investigations of prospective candidates to determine, for example, precisely what exploratory activities have been paid for by prospective candidates and their organizations, whether internal communications indicate a decision on the part of the individual to test the waters of candidacy or become an actual candidate, and what dollars have been used to pay for any testing the waters activities—i.e., whether candidate-permissible

funds have been used to pay for testing the waters activities. The fact that Jeb Bush seemingly committed the most massive violations of federal campaign finance laws in the modern history of presidential campaigns, yet complaints filed in early 2015 urging investigation of the matter still remain pending before the FEC nearly four years later is unacceptable. The FEC needs to step up its enforcement of the federal laws regulating testing the waters and early campaign activities.

### **RECOMMENDATION 3: MORE EFFECTIVE DISCLOSURE REGULATIONS**

If the FEC refuses to repeal the testing the waters rules, the commission must adopt more effective disclosure regulations for testing the waters fundraising and spending. FEC regulations currently require that if an individual who had been testing the waters subsequently becomes a candidate, funds raised and spent to test the waters become contributions and expenditures subject to federal law reporting requirements.<sup>135</sup> However, in the rare instance that a candidate actually reports testing the waters receipts and disbursements in compliance with FEC regulations, the disclosure typically contains insufficient information for a member of the public to ascertain when the testing the waters funds were raised or spent or what, precisely, the funds paid for.

For instance, Jeb Bush’s principal campaign committee, Jeb 2016, Inc., reported a limited amount of receipts and disbursements for testing the waters activities—far less disclosure than was warranted by his extensive travel and fundraising for his super PAC. However, the reported date of all of his testing the waters receipts and disbursements was June 5, 2015, despite the fact that there are numerous reported testing the waters disbursements for communications consulting, legal consulting and political strategy consulting—a volume and variety of consulting unlikely to have all been received by Jeb Bush on a single day immediately before his public announcement of candidacy. Testing the waters reporting should be sufficiently detailed to enable a member of the public, for example, to link particular receipts and disbursements with specific dates and locations of exploratory travel. The FEC created the testing the waters exception to candidate status by regulation and, consequently, could and should strengthen testing the waters disclosure by regulation.

Undoubtedly, the hardest part of applying the FEC’s regulatory structure to the real world is proving that an individual is testing the waters of a federal candidacy. If a prospective candidate wants to deny that their repeated trips to Iowa and New Hampshire less than one year before the states’ presidential caucus and primary, and staffing of offices in those states, and recruitment of volunteers in those states, and hiring of staff for a national political operation are for the purpose of exploring a potential 2020 presidential run, it might be difficult to prove in a court of law that such an individual is lying.

### **RECOMMENDATION 4: JOURNALISTS AND VOTERS HOLD CANDIDATES ACCOUNTABLE**

Common Cause’s final recommendation is that journalists and voters hold prospective 2020 presidential candidates accountable. Prospective candidates should be asked by journalists and voters, point blank, whether they are raising and spending funds for the purpose of determining whether they are going to run for president. If they deny that they are testing the waters of a candidacy, they should be asked why they are traveling repeatedly to Iowa and New Hampshire, and hiring staff for a national political operation. Prospective 2020 candidates should be required to explain their activities in a manner that passes the smell test. Just because the FEC may indulge abuses of the law does not mean that voters or journalists should do the same. A little honesty is not too much to ask of individuals seeking to become our next president. It is time for this tired charade to end.

## NOTES

- 1 In 2015, the author of this report, Paul S. Ryan, published a legal white paper titled “*Testing the Waters*” and *the Big Lie: How Prospective Presidential Candidates Evade Candidate Contribution Limits While the FEC Looks the Other Way as a publication of the Campaign Legal Center*, available at [http://www.campaignlegalcenter.org/sites/default/files/Testing\\_the\\_Waters\\_and\\_the\\_Big\\_Lie\\_2.19.15.pdf](http://www.campaignlegalcenter.org/sites/default/files/Testing_the_Waters_and_the_Big_Lie_2.19.15.pdf). With the generous permission of the Campaign Legal Center, some content of the 2015 white paper has been revised and included in this report.
- 2 The Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002, establishes a statutory limit of \$2,000 on individual contributions to candidates. This limit, by statute, is adjusted in every odd-numbered year to account for changes in the cost of living, 52 U.S.C. § 30116(a)(1)(A), (c). At the time of this publication (2018), the limit on contributions from individuals to candidates is \$2,700 but will be adjusted early in 2019 for the 2020 presidential election cycle. [Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold](#), 82 Fed. Reg. 10904, 10906 (Feb. 16, 2017).
- 3 52 U.S.C. § 30118.
- 4 *Id.*
- 5 *Id.* § 30119.
- 6 *Id.* § 30121.
- 7 11 C.F.R. §§ 100.72(a) and 100.131(a).
- 8 See Dale Eisman, *Linked in History—Watergate and Common Cause*, Dec. 5, 2013, <https://www.commoncause.org/democracy-wire/linked-in-history-watergate-and-common-cause/>.
- 9 424 U.S. 1 (1976).
- 10 *Id.* at 26-27.
- 11 *Id.* at 27.
- 12 Anthony Corrado, *CREATIVE CAMPAIGNING: PACs AND THE PRESIDENTIAL SELECTION PROCESS* (BOULDER, CO: WESTVIEW PRESS, 1992).
- 13 Such multicandidate political committees are often referred to casually as leadership PACs, though legally, a leadership PAC is a specific type of multicandidate PAC that is established by a federal candidate or officeholder other than that candidate or officeholder’s authorized campaign committee. See 52 U.S.C. § 30104(i)(8)(B).
- 14 Corrado, *SUPRA* NOTE 12, AT 2.
- 15 *Id.* at 2 n.3 (citing *Reaganites to Back G.O.P. Conservatives*, NEW YORK TIMES, FEB. 1, 1977, AT A12; HERBERT E. ALEXANDER, *FINANCING THE 1980 ELECTION* [LEXINGTON, MA: LEXINGTON BOOKS, 1983]).
- 16 *Id.* at 2 (endnote omitted).
- 17 52 U.S.C. § 30101(9)(A)(i).
- 18 Reagan finally registered a presidential campaign committee with the FEC in March 1979—yet maintained his position as chairman of Citizens for the Republic PAC until November 1979. A group called the National Committee for an Effective Congress filed a complaint with the FEC alleging that Citizens for the Republic PAC and the Reagan for President committee should be deemed affiliated committees under federal law—meaning that they would be treated as a single political committee. The FEC seemingly did not examine Reagan’s activities prior to his March 1979 campaign launch for possible testing the waters violations, nor did it consider the complainant’s affiliation argument. But the FEC did conclude that Citizens for the Republic PAC had made illegal in-kind contributions to the Reagan for President committee during the period in 1979 when Reagan was both a self-identified presidential candidate and chairman of Citizens for the Republic PAC. The violations related to mass mail sent out by Citizens for the Republic PAC promoting Reagan’s candidacy, the Reagan for President committee’s free use of some Citizens for the Republic PAC equipment, Citizens for the Republic PAC’s payment of certain Reagan travel expenses, etc. Finally in 1984, conciliation agreements were signed by the FEC, the Reagan for President committee and the Citizens for the Republic PAC, with the campaign committee paying a \$4,000 fine and the PAC paying a \$1,000 fine. See *General Counsel’s Brief*, MUR 950 (Aug. 25, 1983); see also *Conciliation Agreement (In Re Reagan for President)* and *Conciliation Agreement (In Re Citizens for the Republic Committee)*, MUR 950 (Feb. 24, 1984), available at [http://fec.gov/disclosure\\_data/mur/950.pdf](http://fec.gov/disclosure_data/mur/950.pdf).
- 19 *Id.* at 73.
- 20 *Id.* at 76.
- 21 *Id.* at 77.
- 22 *Id.*
- 23 Dissenting Opinion of Commissioner Thomas E. Harris at 1, FEC Advisory Opinion 1986-06.
- 24 See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).
- 25 Jose A. DelReal, *Jeb Bush Forms PAC to Explore Presidential Run*, WASHINGTON POST, DEC. 16, 2014, <http://www.washingtonpost.com/blogs/post-politics/wp/2014/12/16/jeb-bush-forms-pac-to-explore-presidential-run/>.
- 26 *Id.* See also Facebook, “A Note from Jeb Bush,” (Dec. 16, 2014), <https://www.facebook.com/notes/jeb-bush/a-note-from-jebbush/619074134888300>.
- 27 Ben White and Mark Caputo, *Inside Jeb Bush’s “Shock and Awe” Launch*, POLITICO, Feb. 18, 2015, <http://www.politico.com/story/2015/02/inside-jeb-bushs-shock-and-awe-launch-115272.html>.

28 *Id.*

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43 Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907).

44 Act of June 25, 1910, 36 Stat. 822; see *United States v. UAW*, 352 U.S. 567, 575 (1957) (describing 1910 Publicity Act).

45 War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943) (also known as the Smith-Connally Act).

46 52 U.S.C. § 30101(2).

47 *Id.* § 30101(8)(A)(i).

48 *Id.* § 30101(9)(A)(i).

49 The FEC’s “Campaign Guide” for candidates explains the transition from testing the waters to candidate status as follows:

**Testing the Waters:** An individual may conduct a variety of activities to test the waters. Examples of permissible testing the waters activities include conducting polls, travelling and making telephone calls to determine whether the individual should become a candidate.

**Campaigning:** Certain activities, however, indicate that the individual has decided to become a candidate and is no longer testing the waters. In that case, once the individual has raised or spent more than \$5,000, he or she must register as a candidate. Note that, when an individual decides to run for office, funds that were raised and spent to test the waters apply to the \$5,000 threshold.

**Campaigning (as opposed to testing the waters) is apparent, for example, when individuals:**

- Make or authorize statements that refer to themselves as candidates (“Smith in 2014” or “Smith for Senate”);
- Use general public political advertising to publicize their intention to campaign;
- Raise more money than what is reasonably needed to test the waters or amass funds (seed money) to be used after candidacy is established;
- Conduct activities over a protracted period of time or shortly before the election; or
- Take action to qualify for the ballot.

The FEC's campaign guide offers the following example to illustrate a candidate who has crossed over from testing the waters to campaigning:

Mr. Jones is interested in running for a seat in the U.S. House of Representatives but is unsure whether he has enough support within his district to make a successful bid. He therefore accepts up to \$2,300 from each of several relatives and friends and uses the money to pay for an opinion poll. He sees that good records are kept on the money raised and spent in his testing-the-waters effort. The poll results indicate good name recognition in the community, and Jones decides to run.

By making this decision, Jones has crossed the line from testing the waters to campaigning. The funds he raised earlier now automatically become contributions and the funds he spent, including the polling costs, are now expenditures. These contributions and expenditures count toward the threshold that triggers candidate status. Once his contributions or expenditures exceed \$5,000, he becomes a candidate and must register under the Act. The money raised and spent for testing the waters must be disclosed on the first report his principal campaign committee files.

Had Jones decided not to run for federal office, there would have been no obligation to report the monies received and spent for testing-the-waters activity, and the donations made to help pay for the poll would not have counted as contributions.

FEC, FEDERAL ELECTION COMMISSION CAMPAIGN GUIDE: CONGRESSIONAL CANDIDATES AND COMMITTEES 1-2 (JUNE 2014), [HTTP://FEC.GOV/PDF/CANDGUI.PDF](http://fec.gov/pdf/candgui.pdf) (FOOTNOTE OMITTED; CITATIONS OMITTED) [HEREINAFTER FEC CAMPAIGN GUIDE]. NO COMPARABLE PUBLICATION EXISTS FOR PRESIDENTIAL CANDIDATES, THOUGH THE FEC MAKES CLEAR IN THE INTRODUCTION TO THIS GUIDE THAT "[I]T MAY BE USED BY COMMITTEES SUPPORTING PRESIDENTIAL CANDIDATES." SPECIAL RULES APPLY TO PRESIDENTIAL CANDIDATES SEEKING PUBLIC FUNDING. FEC CAMPAIGN GUIDE AT III; SEE ALSO 11 C.F.R. §§ 100.72, 100.131 AND 101.3.

50 11 C.F.R. § 101.1; 52 U.S.C. § 30102(e)(1).

51 11 C.F.R. § 102.1; 52 U.S.C. § 30103(a).

52 52 U.S.C. §§ 30104(b)(3)(A) and 30101(13) (defining "identification").

53 Pub. L. No. 92-225, title III, §302, Feb. 7, 1972, 86 Stat. 12.

54 See *FEC Chairman Explanation and Justification of Proposed Regulations*, House Doc. 95-44, 95th Cong., 1st Sess. (1977), at 40, available at [http://www.fec.gov/law/cfr/ej\\_compilation/1977/95-44.pdf](http://www.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf).

55 *Id.*

56 *Payments Received for Testing the Waters Activities*, 50 Fed. Reg. at 9994 (internal citations omitted) (citing Advisory Opinions 1982-19 and 1983-09).

57 *Id.*

58 *Id.*

59 11 C.F.R. § 100.72 exempts certain testing the waters activities from the definition of "contribution" and reads:

(a) General exemption. Funds received solely for the purpose of determining whether an individual should become a candidate are not contributions. Examples of activities permissible under this exemption if they are conducted to determine whether an individual should become a candidate include, but are not limited to, conducting a poll, telephone calls, and travel. Only funds permissible under the Act may be used for such activities. The individual shall keep records of all such funds received. See 11 CFR 101.3. If the individual subsequently becomes a candidate, the funds received are contributions subject to the reporting requirements of the Act. Such contributions must be reported with the first report filed by the principal campaign committee of the candidate, regardless of the date the funds were received.

(b) Exemption not applicable to individuals who have decided to become candidates. This exemption does not apply to funds received for activities indicating that an individual has decided to become a candidate for a particular office or for activities relevant to conducting a campaign. Examples of activities that indicate that an individual has decided to become a candidate include, but are not limited to:

- (1) The individual uses general public political advertising to publicize his or her intention to campaign for Federal office.
- (2) The individual raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate.
- (3) The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office.
- (4) The individual conducts activities in close proximity to the election or over a protracted period of time.
- (5) The individual has taken action to qualify for the ballot under State law.

11 C.F.R. § 100.131 contains a nearly identically worded exemption from the definition of "expenditure" for testing the waters expenses, replacing the phrase "funds received" from section 100.72(a) with the phrase "payments made."

60 11 C.F.R. § 101.3.

61 11 C.F.R. § 110.2(l) provides:

Pre-candidacy expenditures by multicandidate political committees deemed in-kind contributions; effect of reimbursement.

(1) A payment by a multicandidate political committee is deemed an in-kind contribution to and an expenditure by a Presidential candidate, even though made before the individual becomes a candidate under 11 CFR 100.3, if--

- (i) The expenditure is made on or after January 1 of the year immediately following the last Presidential election year;
- (ii) With respect to the goods or services involved, the candidate accepted or received them, requested or suggested their provision, was materially involved in the decision to provide them, or was involved in substantial discussions about their provision; and

(iii) The goods or services are--

- (A) Polling expenses for determining the favorability, name recognition, or relative support level of the candidate involved;
- (B) Compensation paid to employees, consultants, or vendors for services rendered in connection with establishing and staffing offices in States where Presidential primaries, caucuses, or preference polls are to be held, other than offices in the candidate's home state and in or near the District of Columbia;
- (C) Administrative expenses, including rent, utilities, office supplies and equipment, in connection with establishing and staffing offices in States where Presidential primaries, caucuses, or preference polls are to be held, other than offices in the candidate's home state and in or near the District of Columbia; or
- (D) Expenses of individuals seeking to become delegates in the Presidential nomination process.

(2) Notwithstanding paragraph (1)(1) of this section, if the candidate, through an authorized committee, reimburses the multicandidate political committee within 30 days of becoming a candidate, the payment shall not be deemed an in-kind contribution for either entity, and the reimbursement shall be an expenditure of the candidate.

11 C.F.R. § 110.2(l); see also *Public Financing of Presidential Candidates and Nominating Conventions*, 68 Fed. Reg. 47386, 47387 (Aug. 8, 2003) (hereinafter "Presidential Candidates E&J") (Final Rules and Explanation and Justification), available at <https://www.govinfo.gov/content/pkg/FR-2003-08-08/pdf/03-19893.pdf>; see also 11 C.F.R. § 9034.10, which applies nearly identical rules to presidential candidates participating in the now largely defunct public financing system.

62 Presidential Candidates E&J, 68 Fed. Reg. at 47407.

63 52 U.S.C. § 30116(a)(1)(A). As prescribed by statute under 52 U.S.C. § 30116(c), the \$2,000 limit has been adjusted for changes in the cost of living at the beginning of every odd-numbered year since 2002, most recently early in 2015. See *Price Index Adjustments for Expenditure Limitations and Lobbying Bundling Disclosure Threshold*, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015). The limits will be adjusted in early 2019 for the 2020 election cycle.

64 52 U.S.C. § 30116(a)(2).

65 *Id.* § 30118(a).

66 *Id.* § 30119.

67 *Id.* § 30121.

68 *Id.* § 30125(e)(1).

69 See *FEC Advisory Opinion 2011-12 (Majority PAC and House Majority PAC)*.

70 The 14 activities were as follows (taken from *FEC Advisory Opinion 1981-32 [Askew]* at 2-3):

1. Travel throughout the country for the purpose of speaking to political and non-political groups on a variety of public issues and meeting with opinion makers and others interested in public affairs for the purpose of determining whether potential political support exists for a national campaign.
2. Employment of political consultants for the purpose of assisting with advice on the potential and mechanics of constructing a national campaign organization.
3. Employment of a public relations consultant for the purpose of arranging and coordinating speaking engagements, disseminating copies of the Governor's speeches, and arranging for the publication of articles by the Governor in newspapers and periodicals.
4. Rental of office space.
5. Rental or purchase of office equipment for the purpose of compiling the names and addresses of individuals who indicate an interest in organizing a national campaign.
6. Preparation and use of letterhead stationery and correspondence with persons who have indicated an interest in a possible campaign by the Governor. It is understood that dissemination of information through mailings to the general public would not be appropriate "Testing the Waters" activity.
7. Supplementing the salary of a personal secretary who is employed by the Governor's law firm but will have the additional responsibility during the testing period of making travel arrangements, taking and placing telephone calls related to the testing activities, assisting in receiving and depositing the funds used to finance the testing, and assisting with general correspondence.
8. Reimbursement of the Governor's law firm for the activities of an associate attorney who is employed by the firm but will have the responsibility during the testing period of researching and preparing speeches, and coordinating the arrangement of interviews of the Governor by the news media, answering inquiries of the news media, arranging background briefings on various public issues, and traveling as an aide on some of the testing trips.
9. Reimbursement of the Governor's law firm for telephone costs, copying costs, and other incidental expenses which may be incurred.
10. Travel to other parts of the country in order to attend briefings on various public issues, and reimbursement of those who travel to Miami for the purpose of providing briefings on public issues.
11. Employment of a specialist in opinion research to conduct polls for the purpose of determining the feasibility of a national campaign.
12. Employment of an assistant to help coordinate travel arrangements and also travel as an aide on some of the testing trips.
13. Preparation and printing of a biographical brochure and possibly photographs to be used in connection with speaking appearances by Governor Askew. It is understood that such a brochure and such photographs would not be utilized in a general mailing.
14. Solicitation of contributions for the limited purpose of engaging in such "Testing the Water" activities as the foregoing. It is understood that this period would not be used for the purpose of raising funds for any possible later campaign.

71 FEC Advisory Opinion 1981-32 (Askew) at 2-3.  
72 *Id.* at 4.  
73 FEC Advisory Opinion 1982-03 (Cranston) at 2.  
74 Dissenting Opinion of Commissioner Thomas E. Harris at 1, FEC Advisory Opinion 1982-03 (Cranston).  
75 FEC Advisory Opinion 1985-40 (Baker / Republican Majority Fund) at 1-2.  
76 *Id.* at 2.  
77 *Id.* at 6-9.  
78 FEC Advisory Opinion 1986-06 (George H.W. Bush / Fund for America's Future) at 1.  
79 *Id.* at 2.  
80 *Id.* at 4.  
81 *Id.* at 7.  
82 *Id.* at 4.  
83 Dissenting Opinion of Commissioner Thomas E. Harris at 1, FEC Advisory Opinion 1986-06 (Fund for America's Future).  
84 Dissenting Opinion of Vice Chairman McGarry at 1, FEC Advisory Opinion 1986-06 (Fund for America's Future).  
85 Complaint, MUR 2262, at 3, available at [http://fec.gov/disclosure\\_data/mur/2262.pdf](http://fec.gov/disclosure_data/mur/2262.pdf).  
86 *Id.* at 2.  
87 *Id.* at 2.  
88 Conciliation Agreement, MUR 2262, at 4, available at [http://fec.gov/disclosure\\_data/mur/2262.pdf](http://fec.gov/disclosure_data/mur/2262.pdf).  
89 *Id.* at 4-5.  
90 *Id.*  
91 *Id.* at 5-6.  
92 *Id.* at 2-3.  
93 *Id.* at 6.  
94 *Id.* at 7.  
95 See, e.g., MUR 7307 (Costello) (dismissed on prosecutorial discretion); MUR 7306 (Watson) (dismissed on prosecutorial discretion); MUR 7261 (Levi) (dismissed on prosecutorial discretion); MUR 7077 (Ellison) (dismissed on prosecutorial discretion); MUR 6999 (Larsen) (dismissed on prosecutorial discretion).  
96 Complaint, MUR 6462, available at <https://www.fec.gov/files/legal/murs/6462/13044334588.pdf>.  
97 First General Counsel's Report, MUR 6462, available at <https://www.fec.gov/files/legal/murs/6462/13044334657.pdf>.  
98 *Id.* at 19.  
99 Certification, MUR 6462, Mar. 19, 2013, available at <https://www.fec.gov/files/legal/murs/6462/13044334702.pdf>.  
100 Certification, MUR 6462, June 12, 2013, available at <https://www.fec.gov/files/legal/murs/6462/13044334705.pdf>.  
101 Complaint, MUR 7261 at 1, available at <https://www.fec.gov/files/legal/murs/7261/18044445092.pdf>.  
102 First General Counsel's Report, MUR 7261 at 6, available at <https://www.fec.gov/files/legal/murs/7261/18044445110.pdf>.  
103 First General Counsel's Report, MUR 7261 at 6-7, available at <https://www.fec.gov/files/legal/murs/7261/18044445110.pdf>.  
104 First General Counsel's Report, MUR 7261 at 7-8, available at <https://www.fec.gov/files/legal/murs/7261/18044445110.pdf>.  
105 First General Counsel's Report, MUR 7261 at 9-10, available at <https://www.fec.gov/files/legal/murs/7261/18044445110.pdf>.  
106 Certification, MUR 7261, available at <https://www.fec.gov/files/legal/murs/7261/18044445121.pdf>.  
107 Complaint, MUR 7273, available at <https://www.fec.gov/files/legal/murs/7273/18044453679.pdf>.  
108 Complaint, MUR 7273 at 4-6, available at <https://www.fec.gov/files/legal/murs/7273/18044453679.pdf>.  
109 First General Counsel's Report, MUR 7273 at 6-8, available at <https://www.fec.gov/files/legal/murs/7273/18044453781.pdf>.  
110 First General Counsel's Report, MUR 7273 at 14, available at <https://www.fec.gov/files/legal/murs/7273/18044453781.pdf>.  
111 Certification, MUR 7273 at 14, available at <https://www.fec.gov/files/legal/murs/7273/18044453814.pdf>.  
112 Statement of Reasons of Chair Caroline C. Hunter and Commissioner Matthew S. Petersen, MUR 7273, available at [https://www.fec.gov/files/legal/murs/7273/7273\\_1.pdf](https://www.fec.gov/files/legal/murs/7273/7273_1.pdf).  
113 Paul S. Ryan, currently Common Cause vice president for policy and litigation, and formerly deputy executive director of the Campaign Legal Center, principally drafted Common Cause's complaint against Kid Rock and principally authored the Campaign Legal Center's 2015 complaints against Bush, Walker, O'Malley and Santorum. See Campaign Legal Center, *FEC Complaints Against Presidential Hopefuls Show Widespread Violations, Total Disregard for Campaign Finance Law, Mar. 31, 2015*, <https://campaignlegal.org/press-releases/fec-complaints-against-presidential-hopefuls-show-widespread-violations-total>.

114 FEC CAMPAIGN GUIDE, SUPRA NOTE 49, AT III (FOOTNOTE OMITTED; CITATIONS OMITTED). NO COMPARABLE PUBLICATION EXISTS FOR PRESIDENTIAL CANDIDATES, THOUGH THE FEC MAKES CLEAR IN THE INTRODUCTION TO THIS GUIDE THAT “[I]T MAY BE USED BY COMMITTEES SUPPORTING PRESIDENTIAL CANDIDATES.” HOWEVER, SPECIAL RULES APPLY TO PRESIDENTIAL CANDIDATES SEEKING PUBLIC FUNDING. SEE ALSO 11 C.F.R. §§ 100.72, 100.131 AND 101.3.

115 52 U.S.C. § 30116(a)(4).

116 A leadership PAC does not automatically qualify for multicandidate PAC status, but it typically meets the durational, donor and contribution requirements of multicandidate PAC status.

117 *Id.* § 30104(i)(8)(B)

118 See, e.g., *Campaign Legal Center and Issue One, All Expenses Paid; How Leadership PACs Became Politicians' Ticket to Luxury Living, July 2018*, available at [https://campaignlegal.org/sites/default/files/2018-07/All%20Expenses%20Paid%20-%20How%20Leadership%20PACs%20Became%20Politicians%27%20Preferred%20Ticket%20to%20Luxury%20Living\\_0.pdf](https://campaignlegal.org/sites/default/files/2018-07/All%20Expenses%20Paid%20-%20How%20Leadership%20PACs%20Became%20Politicians%27%20Preferred%20Ticket%20to%20Luxury%20Living_0.pdf).

119 *Id.* § 30116(a)(1)(C).

120 *Id.* § 30116(a)(4).

121 *Id.* § 30118(a).

122 Leadership PACs came into existence in 1978, when the FEC issued an advisory opinion to Congressman Henry Waxman and a group of his supporters, who asked the FEC whether Congressman Waxman could participate in the operation of a political committee other than his own authorized campaign committee to support the candidacies of other individuals like Congressman Waxman, without having the funds raised by the committee count toward Congressman Waxman's candidate contribution limit. No provision existed in the FECA for such fundraising by a candidate or officeholder outside of the candidate contribution limit, but the FEC nevertheless permitted the proposal. See *FEC Advisory Opinion 1978-12 (Friends of Congressman Henry A. Waxman)*.

123 *Citizens United v. FEC*, 558 U.S. 310 (2010). In *Citizens United*, the Supreme Court held that corporations cannot be prohibited from making independent political expenditures because such independent expenditures do not give rise to corruption or the appearance of corruption. Several months later, in *SpeechNow.org v. FEC*, the D.C. Circuit Court of Appeals applied the Supreme Court's rationale in *Citizens United* to a case challenging the application of contribution limits to a PAC that intended to make only independent expenditures, not contributions directly to candidates or political parties. The Circuit Court reasoned that, if the independent expenditures by such a PAC posed no threat of corruption, then the contributions going into the PAC likewise posed no threat of corruption and could not be limited. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

124 See also *FEC Advisory Opinion 2010-09 (Club for Growth)*; *FEC Advisory Opinion 2010-11 (Commonsense Ten)*.

125 26 U.S.C. § 527.

126 *Id.* § 527(e)(1)-(2) (definitions of “political organization” and “exempt function”).

127 26 U.S.C. § 501(c)(4).

128 11 C.F.R. §§ 100.72 and 100.131.

129 11 C.F.R. §§ 100.72, 100.131, 110.2(l) and 9034.10. See also *FEC Advisory Opinion 1985-40 at 6-9*.

130 11 C.F.R. §§ 100.72 and 100.131.

131 See *FEC Chairman Explanation and Justification of Proposed Regulations*, House Doc. 95-44, 95th Cong., 1st Sess. (1977), at 40, available at [http://www.fec.gov/law/cfr/ej\\_compilation/1977/95-44.pdf](http://www.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf).

132 See *Payments Received for Testing the Waters Activities*, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (Final Rules and Explanations and Justification), available at [https://transition.fec.gov/law/cfr/ej\\_compilation/1985/50fr9992.pdf](https://transition.fec.gov/law/cfr/ej_compilation/1985/50fr9992.pdf).

133 *Id.* at 9994.

134 *Id.* at 9993.

135 11 C.F.R. §§ 100.72(a) and 100.131(a).

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137 Fearless for the People PAC, Financial Summary 2017-18, <https://www.fec.gov/data/committee/C00629071>.

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# Common Cause

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