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“Testing the Waters” and the Big Lie:

How Prospective Presidential Candidates Evade Candidate
Contribution Limits While the FEC Looks the Other Way

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EXECUTIVE SUMMARY

With the 2014 midterm elections behind us, public attention has shifted to the 2016 presidential election. News stories appear daily about prospective 2016 presidential candidates' repeated trips to Iowa and New Hampshire, extensive fundraising and campaign machine building. Yet none of the early frontrunners—former Governor Jeb Bush, Governor Scott Walker and more than a dozen other politicians—will even admit that they are “testing the waters” of a presidential campaign. Why is this? And how can it be?

The “why” part is easy to explain. Federal law requires an individual who is “testing the waters” of a federal candidacy to pay for those activities with funds raised in compliance with the federal candidate contribution restrictions—no individual contributions above \$2,700, no corporate or labor union funds. “Testing the waters” means activity “undertaken to determine whether the individual should become a candidate,” 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” in order to evade the candidate contribution limits.

The “how” part is more difficult to explain. Among the long list of nearly 20 prospective 2016 presidential candidates, only Senator Lindsey Graham and former Senator Jim Webb appear to be complying with the federal campaign finance law requirement that “testing the waters” activities be paid for with candidate-permissible funds.

Many others are raising and spending funds outside the candidate contribution limits, through super PACs, 527 organizations, multicandidate PACs

and 501(c)(4) groups, to engage in activities that certainly appear to be for the purpose of determining whether the individual should become a candidate. These prospective 2016 candidates claim they are not “testing the waters,” but they look more than a little bit wet.

Why does this matter? For more than 100 years federal law has restricted contributions to candidates and the Supreme Court has consistently upheld such restrictions as vital to reducing the threat of corruption that results from large contributions. Enforcement of the candidate contribution restrictions for “testing the waters” activities is crucial to protecting the integrity of elections and democratic governance.

The Federal Election Commission (FEC) seemed to understand this during the 1970s-80s, when the Commission regularly pushed back against prospective candidate efforts to evade federal law. Through a series of Advisory Opinions during the Commission’s early years, it made clear that many of the activities being engaged in today by prospective 2016 candidates needed to be paid for with candidate-permissible funds.

“Testing the waters” means activity undertaken to determine whether the individual should become a candidate. Prospective presidential candidates deny that they are “testing the waters” in order to evade the candidate contribution limits.

Under FEC guidance, “testing the waters” activities include, but are not limited to:

- Conducting a poll for the purpose of determining whether an individual should become a candidate;
- Telephone calls for the purpose of determining whether an individual should become a candidate;
- Travel for the purpose of determining whether an individual should become a candidate;
- Polling expenses for determining the favorability, name recognition, or relative support level of the candidate involved;
- Compensation paid to employees, consultants, or vendors for services rendered in connection with establishing and staffing 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 establishing and staffing offices in states other than the candidate’s home state and in or near the District of Columbia;
- Travel expenses to attend, address and rent hospitality suites at state political party conferences where the individual “indicates his potential interest in, and his ongoing consideration of whether to seek” his party’s nomination;
- Travel expenses for private meetings with state party leadership to gauge support of a possible candidacy; and
- Expenses to set up “steering committees” in early caucus/primary states with the understanding that the committee will become the official campaign organization in the event the individual runs for office.

To be certain, during the 1970s-80s, some high-profile prospective presidential candidates (e.g., Ronald Reagan, George H.W. Bush) got away with using multicandidate PACs to build political operations during the midterm elections that obviously served as the foundations for eventual presidential campaigns. But those operations, raising funds under the \$5,000 multicandidate PAC limit and spending them prior to the midterm election on activities purportedly aimed at the midterm elections, seem quaint compared to the post-midterm election unlimited fundraising and spending by prospective 2016 presidential candidates.

And though the FEC pushed back against prospective candidate abuses in the 1970s-80s, the Commission has failed to effectively enforce its “testing the waters” regulations in the intervening decades. Jeb Bush’s reported plan to raise \$100 million in unlimited super PAC contributions during the first quarter of 2015 is not merely a difference in degree from his father’s mid-80s activities; it is a difference in kind.

This paper aims to explain how we have arrived at this point in 2015, with Jeb Bush saying he has “decided to actively explore the possibility of running for President,” former Hewlett-Packard CEO Carly Fiorina referring to herself as a “candidate” on Fox News, and Wisconsin Governor Scott Walker opening an office in Iowa, all the while denying that they are “testing the waters” of a presidential campaign.

Section I puts prospective candidate activities in historical context. Section II details the activities of some of the most talked-about prospective 2016 presidential candidates. And Section III details relevant federal laws and FEC guidance regarding “testing the waters.”

The story is a long one, but the solution to these rampant abuses of federal campaign finance law is simple. The FEC needs to do its job and enforce the longstanding requirement that individuals “testing the waters” of federal candidacy by spending funds for the purpose of determining whether to run pay for those activities with funds raised under the candidate contribution restrictions.

**The full publication of the white paper is available here

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