



215 E Street, NE · Washington, DC 20002

tel (202) 736-2200 · fax (202) 736-2222

www.campaignlegalcenter.org

***“Testing the Waters” and the Big Lie:
How Prospective Presidential Candidates Evade Candidate Contribution
Limits While the FEC Looks the Other Way***

Paul S. Ryan

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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. 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.

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Acronym Glossary

BCRA: Bipartisan Campaign Reform Act of 2002

FEC: Federal Election Commission

FECA: Federal Election Campaign Act

MUR: Matter Under Review

PAC: Political Committee or Political Action Committee

Introduction

The 2014 midterm elections are behind us and political news reporters have turned to coverage of the 2016 presidential election. Despite the fact that there is not yet anyone admitting he or she is a candidate, reports are written daily about near-constant travel and fundraising and campaign machine building by prospective Republican 2016 presidential candidates, including former Governor Jeb Bush, Governor Scott Walker, Senators Cruz, Paul and Rubio and many others. The 2016 race is unfolding differently on the Democratic side. With former Secretary of State Hillary Clinton looking like the presumptive nominee, only former Senator Jim Webb has officially acknowledged “testing the waters” for a possible run for the nomination. With no one else seemingly willing to mount a challenge, Clinton appears to believe she has the luxury of laying low and holding off on the most visible forms of campaign building.

With all of this prospective candidate activity, a few reporters—though not enough—are asking the question, “When do the federal law candidate contribution restrictions kick in?” The answer might surprise even astute political observers, because reality does not seem to correspond with the laws on the books.

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—*i.e.*, candidate-permissible funds.¹ The candidate registration and disclosure requirements, however, do not kick in until an individual actually becomes a candidate, at which point the individual must register a principal campaign committee with the Federal Election Commission (FEC) and, on the committee’s first campaign finance report, disclose all funds raised and spent to “test the waters.”

Put differently, an individual who is “testing the waters” of federal candidacy is exempt from disclosure requirements unless and until the individual becomes a candidate, but is subject to the candidate contribution restrictions for all “testing the waters” activities.

“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.²

Among the long list of prospective 2016 presidential candidates, only Senator Lindsey Graham and former Senator Jim Webb appear to be complying with the federal campaign

¹ See 52 U.S.C. §§ 30116(a)(1)(A) (limiting contributions from individuals to candidates to \$2,000 per election), 30116(c)(1)(C) (increasing the contribution limit for changes in the cost of living), 30118(a) (prohibiting contributions by corporations and labor unions).

² FEC, FEDERAL ELECTION COMMISSION CAMPAIGN GUIDE: CONGRESSIONAL CANDIDATES AND COMMITTEES 1 (June 2014), <http://fec.gov/pdf/candgui.pdf> (emphasis added) (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,” though special rules apply to Presidential candidates seeking public funding. *Id.* at iii. See also 11 C.F.R. §§ 100.72, 100.131 and 101.3.

finance law requirement that “testing the waters” activities be paid for with candidate-permissible funds. Webb announced in November 2014 that he had formed an “exploratory committee”³ and Graham announced in January 2015 that he had formed a “testing the waters” committee.⁴ Both organizations are raising funds in compliance with the \$2,700 contribution limit and ban on corporate/union funds.

By contrast to Graham and Webb, reporters have for months been writing about prospective presidential candidates using a myriad of political organizations to raise and spend money outside some or all of the federal candidate contribution restrictions—including Jeb Bush, Bobby Jindal, Carly Fiorina, Jim Webb, Marco Rubio, Martin O’Malley, Mike Huckabee, Rick Perry, Rick Santorum, Scott Walker and Chris Christie.

The legal structures of the organizations being used by these prospective candidates vary a bit,⁵ but they all share a common characteristic: they can accept funds in excess of the \$2,700 limit applicable to candidates and “testing the waters” activities; some of them (*e.g.*, super PACs, 527 organizations, 501(c)(4) organizations) can also accept corporate/union contributions, which may not be accepted by federal candidates or used to pay for “testing the waters” activities.

Prospective candidate use of corporate/union funds, or any individual contributions exceeding \$2,700, to pay for “testing the waters” activities—*i.e.*, activities to determine whether to become a presidential candidate—violates federal campaign finance law.⁶

Why does this matter? For more than 100 years federal law has restricted contributions to federal candidates.⁷ The U.S. Supreme Court has upheld laws restricting contributions to candidates because they reduce the threat of real and apparent corruption.⁸ For example,

³ See WEBB 2016 EXPLORATORY COMMITTEE, <http://www.webb2016.com/> (last visited Feb. 18, 2015) (“In that spirit I have decided to launch an Exploratory Committee to examine whether I should run for President in 2016.”).

⁴ See SECURITY THROUGH STRENGTH, <http://www.securitythroughstrength.com/> (last visited Feb. 18, 2015) (“Security Through Strength is the political committee helping United States Senator Lindsey Graham (R-SC) ‘test the waters’ for a potential 2016 run for president. The committee will fund the infrastructure and operations allowing Graham to travel the country, listen to Americans, and gauge support for a potential presidential candidacy.”).

⁵ The most common organizational structures being used in the 2016 presidential election cycle are super PACs and multicandidate PACs (a.k.a. leadership PACs). A small number of prospective candidates in this election cycle, and many prospective candidates in past election cycles, have also utilized 527 organizations, 501(c)(4) organizations and state PACs. All of these types of organizations are described in greater detail in Section III, below.

⁶ Except under limited circumstances discussed in Section III below, whereby the eventual presidential candidate committee reimburses a federal multicandidate committee (a.k.a. leadership PAC) for “testing the waters” expenditures.

⁷ See, *e.g.*, Tillman Act, ch. 420, 34 Stat. 864 (1907) (prohibiting contributions from corporations to federal candidates).

⁸ See, *e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (upholding the individual contribution limit); FEC v. Beaumont, 539 U.S. 146 (2003) (upholding ban on corporate contributions).

in the Court’s 1976 decision in *Buckley v. Valeo* upholding the \$1,000 contribution limit,⁹ the Court explained:

It is unnecessary to look beyond the Act’s primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation. . . . To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .

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.¹⁰

The \$1,000 candidate contribution limit challenged and upheld in *Buckley* has since been increased and is \$2,700 for the 2016 presidential election.¹¹

Regulation of “testing the waters” activities is crucial to maintaining the effectiveness of our corruption-preventing candidate contribution restrictions. The 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. The Commission’s most generous-to-prospective-candidates Advisory Opinion came in 1986, when the Commission permitted then-Vice President Bush to use a multicandidate PAC to engage in some “party building” and state/local candidate support activities prior to the 1986 midterm election—and even that opinion drew dissents from two out of six commissioners.¹²

Regardless of whether one agrees with the FEC’s 1986 opinion that a prospective presidential candidate could raise funds under the \$5,000 multicandidate PAC during a

⁹ Federal Election Campaign Act Amendments of 1974, § 101(a), Pub. L. No. 93-443, 88 Stat. 1263. The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (BCRA), then increased the candidate contribution limit to \$2,000 and provided for its adjustment in every odd-numbered year to account for changes in the cost of living. BCRA § 307, 116 Stat. at 102 (codified at 52 U.S.C. § 30116(a)(1)(A), (c)). In 2016, the limit on contributions from individuals to candidates is \$2,700. Price Index Adjustments for Expenditure Limitations and Lobbying Bundling Disclosure Threshold, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015).

¹⁰ *Buckley*, 424 U.S. at 26-27 (footnote omitted). *See also* *Citizens United v. FEC*, 558 U.S. 310, 345 (2010) (“*Buckley* first upheld . . . FECA’s limits on direct contributions to candidates. The *Buckley* Court recognized a ‘sufficiently important’ governmental interest in ‘the prevention of corruption and the appearance of corruption.’”); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014) (“This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combatting corruption.”).

¹¹ *See supra* note 9 and accompanying text.

¹² *See* FEC Advisory Opinion 1986-06 (Fund for America’s Future).

midterm election year for the purported purposes of “party building” and supporting other candidates, the Commission has never approved the use of unlimited funds to pay for activities of the sort prospective 2016 presidential candidates are engaged in today, less than a year before the presidential caucus and primaries begin. But for decades the FEC has failed to adequately enforce its “testing the waters” regulations and things have gotten progressively worse. 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 of degree from his father’s mid-80s activities, it is a difference of kind.

This paper aims to explain all of this. 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 FEC’s lack of enforcement of candidate contribution limits with respect to “testing the waters” activities is inexcusable. It is time for the FEC to end this long-existing and recently worsening abuse of federal campaign finance law.

I. Not a New Problem—A Historical Perspective: 1977-2012

Prospective presidential candidates’ use of entities other than federal candidate campaign committees (*e.g.*, federal multicandidate 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 is nothing new. Indeed, Colby College Professor of Government and Campaign Legal Center board member Anthony Corrado published a book on the topic in 1992, *Creative Campaigning: PACs and the Presidential Selection Process*, detailing the history of this practice from its inception in 1977 through the early 1990s.¹³

Contribution limits were first imposed on presidential candidates for the 1976 election. It took only one election cycle campaigning under a contribution limit for Ronald Reagan and his lawyers to find a way around the limit. In January 1977, Reagan converted his 1976 candidate campaign committee (\$1,000 contribution limit) into a multicandidate PAC (\$5,000 contribution limit)—the type of committee that exists to support other peoples’ campaigns, not the founder’s own campaign.¹⁴ Reagan named the multicandidate committee Citizens for the Republic,¹⁵ and used \$1.6 million left over from his 1976 presidential campaign to begin his 1980 campaign while skirting the \$1,000 limit that would apply if he had converted his 1976 campaign committee into a 1980 campaign committee.

¹³ ANTHONY CORRADO, *CREATIVE CAMPAIGNING: PACS AND THE PRESIDENTIAL SELECTION PROCESS* (1992).

¹⁴ Such multicandidate political committees are often referred to casually as “leadership PACs,” though as a technical legal matter, a “leadership PAC” is a specific type of multicandidate PAC that is established by federal candidate or officeholder other than that candidate/officeholder’s authorized campaign committee. *See* 52 U.S.C. § 30104(i)(8)(B).

¹⁵ CORRADO, *supra* note 13, at 2.

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.¹⁶ Corrado’s description of Reagan’s Citizens for the Republic PAC is worth quoting at length:

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.¹⁷

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. As explained in greater detail in Section III, federal campaign finance law defines “expenditure” as money spent “for the purpose of influencing” an election for federal office.¹⁸ A person who makes more than \$5,000 in “expenditures” seeking election to federal office—*i.e.*, spends more than \$5,000 for the purpose of influencing their own election to office—is a “candidate” under federal law¹⁹ and must register a candidate campaign committee with the FEC within 15 days.²⁰

Reagan seemingly had every intention of spending the \$1.6 million left over from his 1976 campaign, as well as additional funds raised by Citizens for the Republic PAC under a \$5,000 limit, “for the purpose of influencing” his 1980 campaign. But Reagan’s lawyers knew they could tell a different story to the FEC, namely, that Reagan was

¹⁶ *Id.* at 2 n.3 (citing *Reaganites to Back G.O.P. Conservatives*, N.Y. TIMES, Feb. 1, 1977, at A12; HERBERT E. ALEXANDER, FINANCING THE 1980 ELECTION (1983)).

¹⁷ *Id.* at 2 (emphasis added) (endnote omitted).

¹⁸ 52 U.S.C. § 30101(9)(A)(i) (defining “expenditure”).

¹⁹ *See id.* § 30101(2) (defining “candidate”).

²⁰ *Id.* § 30102(e)(1).

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 hit up 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 going back to the same supporters again for a \$1,000 contribution to his 1980 candidate campaign committee.²¹

As Corrado explained: “By maintaining this façade, Reagan was able to spend two years running for president in direct violation of the spirit of the presidential campaign finance regulations and the major provisions of [Federal Election Campaign Act (FECA)]. A new loophole in the campaign finance system was thus created.”²²

Reagan and his Citizens for the Republic PAC created the roadmap for skirting the candidate contribution limit and others immediately followed suit. Leading up to the 1980 election, four of the ten major presidential candidates sponsored multicandidate PACs (Reagan, Bush, Connally and Dole).²³ 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.²⁴ And, according to Corrado, a “virtual explosion in the number of candidate-sponsored PACs occurred in advance of the 1988 prenomination contest.”²⁵

This “virtual explosion” prior to the 1988 presidential election is noteworthy because, while nine of the fourteen major presidential candidates established federal multicandidate PACs, three others pushed the legal boundaries even farther. 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

²¹ 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 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 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 of time 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 between 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.

²² CORRADO, *supra* note 13, at 4.

²³ *Id.* at 73.

²⁴ *Id.* at 76.

²⁵ *Id.* at 77.

and the National Rainbow Coalition, respectively, which were not registered as PACs anywhere.²⁶

The significance of this development in the 1988 election cycle cannot be overstated. Although the use of federal multicandidate PACs to skirt the candidate contribution limit was an unfortunate development in campaign practice that undermined the federal law \$1,000 candidate contribution limit, at least those working through a federal multicandidate PAC were still bound by a \$5,000 contribution limit and the federal law ban on corporate and labor union contributions. The use of nonprofit organizations not registered as PACs meant fundraising free of any contribution limits or restrictions, while the use of state PACs meant fundraising subject only to the restrictions of the particular state's laws, creating the opportunity for prospective candidates to cherry-pick states with no restrictions on contributions.

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.

The 2012 presidential election cycle—the first following the Supreme Court's landmark 2010 decision in *Citizens United v. FEC*—added a new element to presidential elections: the super PAC. Nearly every major candidate in the 2012 cycle was supported by a dedicated super PAC once their campaign was in full swing. However, super PACs were not utilized during the 2012 cycle by prospective candidates for “testing the waters” activities.

Eventual 2012 Republican Party nominee Mitt Romney, for example, used a variety of entities to lay the foundation of his campaign before establishing a formal campaign committee. He maintained a federal multicandidate PAC, as well as state PACs in Iowa, New Hampshire, South Carolina, Michigan and Alabama.²⁷ According to *USA Today*, Romney's federal multicandidate PAC raised \$7.4 million in 2010, but contributed only \$827,708—less than 12%—to other candidates and committees.²⁸ The rest was absorbed by fundraising, staff and other administrative costs. Similarly, according to the *New York Times*, his Alabama PAC, which was permitted by state law to accept unlimited individual and corporate contributions, raised more than \$440,000 in 2010 and donated only “\$21,500—less than 5 percent of what it has raised—to state and local candidates in Alabama.”²⁹ The *New York Times* reported that a “vast majority of the just over \$300,000 Mr. Romney's Alabama PAC has reported spending [in 2010 had] been directed back to the Boston headquarters of Free and Strong America, paying for, among other expenses, a significant part of the salaries of Mr. Romney's political staff, who will almost certainly form the core of his presidential campaign if he decides to run.”³⁰

²⁶ *Id.*

²⁷ Michael Luo, *Romney, Weighing Run, Leans on State PACs*, N.Y. TIMES, Nov. 20, 2010, http://www.nytimes.com/2010/11/21/us/politics/21romney.html?_r=2.

²⁸ Fredreka Schouten, *GOP fundraising avoids campaign limits through PACs ahead of 2012*, USA TODAY, Dec. 30, 2010, http://www.usatoday.com/news/washington/2010-12-30-1Agopprez30_ST_N.htm.

²⁹ Luo, *supra* note 27.

³⁰ *Id.*

Romney was not alone. *Politico* reported early in 2011 that Newt Gingrich raised more than \$14 million dollars in 2010 through both his 527 group American Solutions for Winning the Future (\$13.7 million), and his federal multicandidate PAC American Solutions PAC (\$737,000).³¹ *Politico* described the 527 organization’s activities, based on reports filed with the IRS:

The group—which has helped Gingrich remain a player in policy and political discussions—pays for advertising, office space, polling, a slick web presence and Gingrich and his staffers’ travels around the country. It’s raised \$52 million since its launch, and it maintains a 19-person staff and one of the biggest supporter lists in Republican politics, which could be rented by a potential Gingrich presidential campaign.³²

To the extent that Romney and/or Gingrich paid “testing the waters” expenses—including any travel, polling or staff expenses incurred in the process of determining to run for president—with corporate funds or funds from candidate-permissible sources that exceeded \$2,500 per donor, they violated federal law. The FEC has made no public mention of investigations or enforcement actions regarding possible “testing the waters” violations by these candidates.

II. Prospective 2016 Candidate Activities

Nearly all of the prospective candidates in the 2016 presidential election are raising and spending funds outside the \$2,700 federal candidate contribution limit, with many also receiving corporate contributions. And though the list of prospective 2016 candidates contains far more Republicans than Democrats, over the past decades prospective candidates from both major parties have raised and spent non-candidate-permissible funds while laying the foundations of their eventual presidential campaigns.³³

³¹ Kenneth P. Vogel, *Newt Gingrich haul far outpaces other 2012 hopefuls*, *POLITICO*, Feb. 5, 2011, <http://www.politico.com/news/stories/0211/48864.html>.

³² *Id.*

³³ For example, then-Senator Barack Obama spent more than \$3.7 million through his federal leadership PAC, Hope Fund, during the 2005-06 election cycle before launching his presidential election campaign, with only \$728,000 being distributed as contributions to other candidates. *See Hope Fund Summary: 2006 Cycle*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/pacs/expenditures.php?cmte=C00409052&cycle=2006>.

Similarly, then-Senator Hillary Clinton spent more than \$2.9 million through her federal leadership PAC, HILLPAC, in 2005-06, before launching her presidential election campaign, with only \$600,000 being distributed as contributions to other candidates. *See HILLPAC Summary: 2006 Cycle*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/pacs/lookup2.php?strID=C00363994&cycle=2006> (last visited Feb. 18, 2015).

Democratic Senator Chris Dodd of Connecticut spent more than \$1.2 million through his federal leadership PAC, CHRIS PAC, in 2005-06 before launching his presidential election campaign, including more than \$400,000 in administrative expenses. By contrast, Dodd spent only \$116,000 through CHRIS PAC in 2009-10, with nearly all of it contributed to other candidates. *See CHRIS PAC Summary: 2006 Cycle*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/pacs/lookup2.php?strID=C00391961&cycle=2006> (last visited Feb. 18, 2015).

Here is what we know so far about potential “testing the waters” activities by prospective 2016 presidential candidates (in alphabetical order).

Joe Biden

When asked on *Good Morning America* in January 2015 whether there is a chance that he would challenge Hillary Clinton for the Democratic Party’s 2016 presidential nomination, Vice President Joe Biden laughingly replied “Yes. There’s a chance, but I haven’t made my mind up about that, we’ve got a lot of work to do between now and then. There’s plenty of time[.]”³⁴ “He added that he doesn’t think a decision on a bid needs to be made ‘until the summer,’ noting that the race is ‘wide open on both sides’ and repeated that his focus right now is his duties as vice president.”³⁵

But while Clinton is supported by the super PACs Ready for Hillary and Priorities USA Action, Biden, according to the *Wall Street Journal*, “is one of the few potential candidates with no political organization, nonprofit, foundation, or campaign staff-in-waiting.”³⁶ It remains to be seen the extent to which Biden will engage in “testing the waters” activities and how he will pay for such activities. Time will tell whether Biden engages in legally questionable pre-candidacy activities as so many of his prospective candidate counterparts seem to be doing.

John Bolton

In November 2014, former U.S. Ambassador to the United Nations John Bolton told *The Daily Caller* that “he is considering a run for president in 2016 as a Republican.”³⁷ Bolton reportedly commented that “we don’t know who is in and who is out yet, so I want to see a little bit of what happens” and that “he plans to continue ramping up his activities in the John Bolton PAC and SuperPAC.”³⁸ Bolton created both a multicandidate PAC (“John Bolton PAC”)³⁹ and a super PAC (“John Bolton Super PAC”)⁴⁰ in March 2013. According to FEC disclosure records, Bolton’s super PAC received more than 80 contributions in excess of \$5,000 in 2014, including several \$500,000 contributions. Oddly, as of February 2, 2015, Bolton’s super PAC website donation page was only soliciting contributions up to \$5,200—the 2013-14 election cycle amount a candidate could permissibly receive from a married couple contributing jointly (*i.e.*, 2x\$2,600). According to the “news” page on the John Bolton PAC website, Bolton traveled to Iowa in late January 2015 to speak at the Iowa Freedom Summit—a well-known proving ground for prospective presidential candidates.⁴¹ In late January 2015,

³⁴ Lucy McCalmont, *Joe Biden on 2016: ‘There’s a chance’*, POLITICO, Jan. 21, 2015, <http://www.politico.com/story/2015/01/joe-biden-hillary-clinton-election-2016-democrats-114436.html>.

³⁵ *Id.*

³⁶ Byron Tau, *With No Organization, Biden Would Enter 2016 Race at Disadvantage*, WALL ST. J., Jan. 22, 2015, <http://blogs.wsj.com/washwire/2015/01/22/with-no-organization-biden-would-enter-2016-race-at-disadvantage/>.

³⁷ Alex Pappas, *With Eyes On Rand And Hillary, John Bolton Says He Is Mulling Presidential Bid*, THE DAILY CALLER, Nov. 5, 2014, <http://dailycaller.com/2014/11/05/with-eyes-on-rand-and-hillary-john-bolton-says-he-is-mulling-presidential-bid/>.

³⁸ *Id.*

³⁹ See JOHN BOLTON PAC, <http://www.boltonpac.com/> (last visited Feb. 18, 2015).

⁴⁰ See JOHN BOLTON SUPER PAC, <http://boltonsuperpac.com/> (last visited Feb. 18, 2015).

⁴¹ See *News*, JOHN BOLTON PAC, <http://www.boltonpac.com/news/> (last visited Feb. 2, 2015).

Bolton reportedly told a *Boston Herald* columnist “I’m not saying no” and that he will make an official announcement soon.⁴² And after appearing at the Iowa Summit, Bolton made his way to New Hampshire for an early February appearance.⁴³ To the extent Bolton uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for “testing the waters” activities to determine whether he should run for president, he is violating federal campaign finance law.⁴⁴

Jeb Bush

Former Florida Governor Jeb Bush announced in mid-December 2014 that he was planning to “launch a political action committee tasked with ‘exploring a presidential bid.’”⁴⁵ Bush reportedly said: “I have decided to actively explore the possibility of running for President of the United States.” This sounds like an intention to test the waters—*i.e.*, engage in activities to determine whether to become a candidate. Yet Bush went on in early January to set up a super PAC and a multicandidate PAC, two entities eligible to accept funds exceeding the \$2,700 limit that applies to “testing the waters” fundraising.⁴⁶ If Bush, through either of these PACs, uses funds in excess of \$2,700 per donor and/or corporate or union funds to pay for “testing the waters” activities, he will have violated federal campaign finance law.

To date, Bush has been on a fundraising tear. According to *Bloomberg Politics*, “Bush tore through Washington [in late January], impressing the lobbyists and potential donors he met for the first time and leaning on old family friends to help raise huge sums of money as he considers a run for the White House.”⁴⁷ “Bush’s allies are citing a first-quarter fundraising goal of \$100 million as they approach donors around the country.”⁴⁸

⁴² Adriana Cohen, *Adriana Cohen: No man better than John Bolton for our top job*, BOSTON HERALD, Feb. 1, 2015, http://www.bostonherald.com/news_opinion/columnists/adriana_cohen/2015/01/adriana_cohen_no_man_better_than_john_bolton_for_our.

⁴³ See Matt Stout, *Next stop NH: John Bolton mulls run for president*, BOSTON HERALD, Feb. 2, 2015, http://www.bostonherald.com/news_opinion/local_coverage/herald_bulldog/2015/01/next_stop_nh_john_bolton_mulls_run_for_president.

⁴⁴ As explained in Part III(C)(2), FEC regulations permit a seldom-used, limited circumstance cure to such a violation. Under 11 CFR §§ 110.2(l) and 9034.10, if the “testing the waters” activities were paid for by a multicandidate PAC, and the eventual candidate uses her authorized committee to reimburse the multicandidate PAC within 30 days of becoming a candidate, the multicandidate PAC’s payment is not deemed to be an illegal in-kind contribution to the candidate. This cure is not available to entities other than multicandidate PACs (*i.e.*, cure not available to super PACs, 527 organizations, etc.). And I have not found examples of it being utilized in recent presidential election cycles. So this paper assumes that the cure will unlikely be used by 2016 presidential candidates.

⁴⁵ Jose A. DelReal, *Jeb Bush forms PAC to explore presidential run*, WASH. POST, Dec. 16, 2014, <http://www.washingtonpost.com/blogs/post-politics/wp/2014/12/16/jeb-bush-forms-pac-to-explore-presidential-run/>.

⁴⁶ Robert Costa, *Jeb Bush and his allies form leadership PAC and super PAC, both dubbed Right to Rise*, WASH. POST, Jan. 6, 2015, <http://www.washingtonpost.com/blogs/post-politics/wp/2015/01/06/jeb-bush-forms-new-pac-right-to-rise/>.

⁴⁷ Michael C. Bender, *Revvng Up, Jeb Bush Rolls Through Washington*, BLOOMBERG POLITICS, Jan. 22, 2015, <http://www.bloomberg.com/politics/articles/2015-01-22/revving-up-jeb-bush-rolls-through-washington>.

⁴⁸ *Id.*

According to those who attended one of the D.C. fundraisers, “Bush’s team said they planned to hold 60 fundraisers around the U.S. by March 31”—a “frenetic pace of nearly one per day [that] will be focused mostly in the biggest states where the most political money is available: Florida, New York, Texas, and California.”⁴⁹ Bush is reportedly scheduled to hold a \$25,000 per person fundraising dinner in Chicago on February 18 and is aiming at a two-event total of \$2 million for his day in Chicago.⁵⁰

CNN reported in late January that, since forming his super PAC and multicandidate PAC in early January, Jeb Bush has been “putting an acute focus on raising money and building what his growing team of aides describe as a ‘shock and awe’ campaign operation.”⁵¹ “Bush’s mission in these early days of the cycle is to keep his head down and raise as much money as possible in an effort to muscle out his closest Republican rivals, hire a talented staff and build a high-octane campaign apparatus that can go the distance against Hillary Clinton in 2016.”⁵² One Bush-aligned strategist told *CNN*: “He is still in the process of considering whether to run, but we are building and organizing. It’s a pretty muscular financial and political organization.”⁵³

If all of this “campaign operation” building, coast to coast travel and fundraising does not constitute “testing the waters”—*i.e.*, activities for the purpose of determining whether Jeb Bush will become a candidate—it is difficult to imagine what would constitute “testing the waters.” To the extent Bush uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for “testing the waters” activities to determine whether he should run for president, he is violating federal campaign finance law.⁵⁴

Ben Carson

Retired neurosurgeon Ben Carson is reportedly considering a presidential run and “says he’ll announce before May 1 whether he’ll seek the presidency.”⁵⁵ His supporters have formed a super PAC named the National Draft Ben Carson for President Committee and raised more than \$12 million since 2013, including several contributions of \$50,000 or more and more than 25 contributions in excess of \$5,000. According to the “FAQ” page on the super PAC’s website, the “goal of the committee is not only to persuade Dr. Carson to run for president, but also to lay the organizational and financial groundwork necessary to secure the nomination and ultimately elect him as president in 2016.”⁵⁶

⁴⁹ *Id.*

⁵⁰ Greg Hinz, *Jeb Bush, Mark Kirk ramp up Illinois fundraising*, *CRAIN’S CHICAGO BUSINESS*, Feb. 3, 2015, <http://www.chicagobusiness.com/article/20150203/BLOGS02/150209937/jeb-bush-mark-kirk-ramp-up-illinois-fundraising>.

⁵¹ Peter Hamby, *Jeb’s invisible man strategy*, *CNN*, Jan. 27, 2015, <http://www.cnn.com/2015/01/26/politics/jeb-bush-presidential-campaign-2016/>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ As explained in Part III(C)(2), it may be possible to cure such a violation in certain, very limited circumstances. See discussion *supra* note 44.

⁵⁵ David Lightman, *Ben Carson: ‘A lot of doors opening’ to White House bid*, *SACRAMENTO BEE*, Jan. 22, 2015, <http://www.sacbee.com/news/politics-government/article7959123.html>.

⁵⁶ See *FAQ*, NAT’L DRAFT BEN CARSON FOR PRESIDENT COMMITTEE, <http://www.runbenrun.org/faq> (last visited Feb. 18, 2015).

According to the super PAC’s website, in the event Carson becomes a candidate, the super PAC “will change its name but will continue its organizational and fundraising efforts in order to secure a strong, influential, nationwide grassroots network in support of presidential candidate Dr. Ben Carson.”⁵⁷ According to other reporting, however, the “man behind the Draft Ben Carson for President Committee has launched a new super PAC that will snap into action when Carson announces a presidential bid.”⁵⁸ Unlike many other prospective 2016 presidential candidates, however, Carson appears not to be involved in setting up and operating these super PACs. If Carson is indeed not involved in operating this “super draft committee,” then its activities do not constitute “testing the waters” by Carson.

Carson is, however, actively considering a presidential campaign and he is directly associated with at least one non-candidate PAC. In August 2014, *CNN* reported that Carson was “taking a significant step toward a 2016 presidential run by forming a political action committee” called “One Nation—also the title of Carson’s book released earlier this year.”⁵⁹ According to the *CNN* piece, Carson told a group of supporters in Florida at the time: “Now is the time to start all of the appropriate exploration and investigation, and put down the structure that is necessary.”⁶⁰ It appears Carson’s announcement of his new PAC’s name may have been premature, as another PAC with the name One Nation has been registered with the FEC since 2009. Carson did, however, create the USA First PAC⁶¹ in August 2014, which has been operating as a multicandidate PAC, raising \$430,000 in the second half of 2014, in contributions up to \$5,000. Carson is also listed as the Chairman of the “Save Our Healthcare Project” of American Legacy PAC, another multicandidate PAC that accepts contributions up to \$5,000 per donor per year.⁶²

According to the *Washington Times*, “possible 2016 presidential candidate Ben Carson has tapped Ryan Rhodes, a top political insider, to oversee his Iowa campaign—and he also plans to launch an exploratory committee in the coming two to three weeks[.]”⁶³ This announcement was immediately followed by Carson’s trip to the Iowa Freedom Summit—a trip that was seemingly part of “testing the waters” process.

To the extent Carson uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for “testing the

⁵⁷ *Id.*

⁵⁸ Rosie Gray, *Draft Ben Carson Activist Launches New Super PAC*, BUZZFEED NEWS, Jan. 5, 2015, <http://www.buzzfeed.com/rosiegray/draft-ben-carson-activist-launches-new-super-pac#.ihMzkb57x>.

⁵⁹ Dana Davidsen, *Ben Carson’s big 2016 move*, CNN, Aug. 1, 2014, <http://politicalticker.blogs.cnn.com/2014/08/01/ben-carsons-big-2016-move/>.

⁶⁰ *Id.*

⁶¹ See USA FIRST PAC, <http://usafirstpac.nationbuilder.com/> (last visited Feb. 18, 2015) (“USA First Political Action Committee is a grassroots organization founded by Dr. Benjamin S. Carson, Sr. to further engage American citizens in the democratic process and to support restorative political candidates.”).

⁶² See *Meet Our Team*, AMERICAN LEGACY PAC, <http://www.americanlegacypac.org/meet-our-team/> (last visited Feb. 18, 2015).

⁶³ Cheryl K. Chumley, *Ben Carson to launch exploratory committee ‘within the next two or three weeks’*, WASH. TIMES, Jan. 16, 2015, <http://www.washingtontimes.com/news/2015/jan/16/ben-carson-to-launch-exploratory-committee-within-/>.

waters” activities to determine whether he should run for president, he is violating federal campaign finance law.⁶⁴

Hillary Clinton

Former Senator and Secretary of State Hillary Clinton is clearly the frontrunner for the Democratic Party’s 2016 presidential nomination, but her campaign committees for past elections were dissolved years ago and she has not played a direct role in creating any new political committees in recent years. Like Ben Carson, Hillary Clinton is supported by a super PAC, named Ready for Hillary, which she reportedly is not directly involved with establishing or operating. According to the *Wall Street Journal*, Ready for Hillary “raised nearly \$9 million in 2014, more than twice as much as the previous year and more than the groups affiliated with most Republicans known to be considering a 2016 presidential bid.”⁶⁵ The *Wall Street Journal* explained: “The Ready for Hillary group is not directly affiliated with Mrs. Clinton, but is collecting names and email addresses of her supporters that it will make available to her campaign should she decide to run.”⁶⁶ What the article fails to mention is that, as a super PAC, Ready for Hillary would be prohibited from giving its supporter database to Hillary Clinton; instead, a Clinton campaign committee would be required to pay fair market value for such a list. At any rate, if Hillary Clinton is indeed not involved in operating this “super draft committee,” then its activities do not constitute “testing the waters” by Clinton.

Clinton will also be supported by the super PAC Priorities USA Action and, perhaps, the 501(c)(4) Organizing for Action—both groups are run by former Obama campaign manager and White House Deputy Chief of Staff Jim Messina, who has already announced that Priorities USA will support Clinton.⁶⁷ The super PAC reported \$363,000 in receipts during the 2014 election cycle. The 501(c)(4) group is not required to disclose its fundraising to the public. Because Clinton is not involved in operating these organizations, their activities do not constitute “testing the waters” by Clinton.

Clinton is a board member of the Bill, Hillary and Chelsea Clinton Foundation and her travel paid for by the foundation in 2013 has been characterized by the Republican research arm America Rising as possibly politically-related, according to a *Politico* article.⁶⁸ Foundation payment for any “testing the waters” travel would violate federal law. However, according to *Politico*, “Clinton spokesman Nick Merrill said in a statement responding to America Rising that ‘her foundation travel in 2013 did not

⁶⁴ As explained in Part III(C)(2), it may be possible to cure such a violation in certain, very limited circumstances. See discussion *supra* note 44.

⁶⁵ Rebecca Ballhaus, *Ready for Hillary PAC Raised Nearly \$9 Million in 2014*, WALL ST. J., Feb. 1, 2015, <http://blogs.wsj.com/washwire/2015/02/01/ready-for-hillary-pac-raised-nearly-9-million-in-2014/>.

⁶⁶ *Id.*

⁶⁷ *Obama Campaign Manager Jim Messina: “We Want Hillary Clinton To Be The Next President,” “It’s Her Turn And Her Time,”* REAL CLEAR POLITICS, Feb. 2, 2015, http://www.realclearpolitics.com/video/2015/02/02/obama_campaign_manger_jim_messina_we_want_hillary_clinton_to_be_the_next_president_of_the_united_states.html.

⁶⁸ Maggie Haberman, *Clinton Foundation reports spike in travel expenses*, POLITICO, Nov. 19, 2014, <http://www.politico.com/story/2014/11/clinton-foundation-travel-expenses-113053.html>.

intersect at all with any political travel. There was no overlap. Period. The accusation is patently, but not surprisingly given its source, false.”⁶⁹

Nevertheless, though Clinton is not publicly affiliated with any formal political organizations, she is reportedly “assembling a massive campaign team-in-waiting.”⁷⁰ According to the *Washington Post*, “[a]t this point, without so much as an announcement, she has settled on—at the least—a campaign chairman, a campaign manager, a chief strategist and lead pollster, another pollster, a lead media adviser, a communication director, a deputy communications director, a focus group director and a communications strategist. She is also closing in on a New York City campaign headquarters and a date to make all of this official.”⁷¹

To the extent Clinton uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for recruiting and/or hiring staff for “testing the waters” or actual campaign activities, or to engage in any other “testing the waters” activities to determine whether she should run for president, she is violating federal campaign finance law.

Chris Christie

With respect to running for the Republican Party’s 2016 presidential nomination, New Jersey Governor Chris Christie has for years reportedly been “giving it a lot of thought.”⁷² On January 23, 2015, Christie registered the Leadership Matters for America PAC with the FEC—which appears to be multicandidate PAC (*i.e.*, \$5,000 contribution limit), not a super PAC, though no contribution limit is listed on the “contribute” page of the PAC’s website.⁷³

According to a January 26, 2015 *Huffington Post* article, “New Jersey Gov. Chris Christie has taken his firmest step yet toward running for president, launching an organization that allows him to raise money for a potential 2016 campaign. Opening the political action committee allows Christie to begin to hire staffers, build the foundations of a campaign operation and travel across the country as he weighs a final decision on a run. He’s not expected to announce a final decision until spring.”⁷⁴ The article notes that “[i]n the past several months, Christie has courted donors, convened late-night briefing sessions on foreign policy and made repeated visits to early-voting states[,]” and that

⁶⁹ *Id.*

⁷⁰ Anne Gearan and Dan Balz, *Official or not, Hillary Clinton builds a massive 2016 team-in-waiting*, WASH. POST, Feb. 6, 2015, http://www.washingtonpost.com/politics/official-or-not-hillary-clintons-2016-campaign-is-already-well-underway/2015/02/06/a78fc358-ac8d-11e4-ad71-7b9eba0f87d6_story.html.

⁷¹ *Id.*

⁷² Corbett Daly, *Chris Christie confidante says N.J. gov. mulling WH run*, CBS NEWS, Sept. 27, 2011, <http://www.cbsnews.com/news/chris-christie-confidante-says-nj-gov-mulling-wh-run/>.

⁷³ *Contribute*, LEADERSHIP MATTERS FOR AMERICA PAC, <https://leadershipmattersforamerica.org/contribute/> (last visited Feb. 18, 2015).

⁷⁴ Jill Colvin, *Chris Christie Launching Political Action Committee For Potential 2016 Presidential Campaign*, HUFFINGTON POST, Jan. 26, 2015, http://www.huffingtonpost.com/2015/01/26/chris-christie-pac_n_6544408.html.

“[h]is PAC’s early hires include fundraisers and operators with presidential campaign experience.”⁷⁵

National Journal reported in late January 2015 that “Gov. Chris Christie is tapping Phil Valenziano, a former top campaign official for Mitt Romney and Iowa Gov. Terry Branstad, as his top Iowa operative as he builds out a team for a potential presidential run[.]”⁷⁶ And like other prospective 2016 presidential candidates, Christie spoke at the Iowa Freedom Summit in January.⁷⁷ In early February, Christie embarked on a “trade mission” to the United Kingdom, “a trip that will give Christie a chance to strengthen his foreign policy credentials as he prepares for a potential presidential run.”⁷⁸

To the extent Christie uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for “testing the waters” activities to determine whether he should run for president, he is violating federal campaign finance law.⁷⁹

Ted Cruz

Senator Ted Cruz has been identified as a “likely Republican presidential contender[.]” and in late January 2015 participated in a panel discussion with two other likely contenders—Senators Rand Paul and Marco Rubio—“that offered a preview of the themes expected to dominate the 2016 election.”⁸⁰ The panel “took place at a private meeting of wealthy donors hosted by Freedom Partners, a tax-exempt group that serves as the hub of a political network supported by Charles and David Koch and other conservative financiers.”⁸¹ Also at the Freedom Partners meeting, “[t]op officials in the Koch brothers’ political organization . . . released a staggering \$889 million budget to fund the activities of the billionaires’ sprawling network ahead of the 2016 presidential contest.”⁸² And like many other prospective 2016 presidential candidates, Cruz traveled to Iowa in late January 2015 to speak at the Iowa Freedom Summit.⁸³

⁷⁵ *Id.*

⁷⁶ Shane Goldmacher, *Chris Christie to Tap Ex-Romney Aide to Lead Iowa Effort*, NAT’L J., Jan. 23, 2015, <http://www.nationaljournal.com/twenty-sixteen/chris-christie-to-tap-ex-romney-aide-to-lead-iowa-effort-20150123>.

⁷⁷ *Id.*

⁷⁸ Ashley Killough, *Chris Christie trade mission to UK has political overtones*, CNN, Feb. 1, 2015, <http://www.cnn.com/2015/02/01/politics/christie-london-trip/>.

⁷⁹ As explained in Part III(C)(2), it may be possible to cure such a violation in certain, very limited circumstances. See discussion *supra* note 44.

⁸⁰ Matea Gold, *Ted Cruz, Rand Paul and Marco Rubio decry income inequality, clash over foreign policy*, WASH. POST, Jan. 26, 2015, <http://www.washingtonpost.com/blogs/post-politics/wp/2015/01/26/ted-cruz-rand-paul-and-marco-rubio-decry-income-inequality-clash-over-foreign-policy/>.

⁸¹ *Id.*

⁸² Fredreka Schouten, *Koch brothers set \$889 million budget for 2016*, USA TODAY, Jan. 27, 2015, <http://www.usatoday.com/story/news/politics/2015/01/26/koch-brothers-network-announces-889-million-budget-for-next-two-years/22363809/>.

⁸³ Jennifer Jacobs, *Prominent speakers at the Iowa Freedom Summit*, DES MOINES REG., Jan. 24, 2015, <http://www.desmoinesregister.com/story/news/politics/2015/01/18/iowa-freedom-summit-speakers/21934883/>.

Unlike non-federal-officeholder prospective 2016 presidential candidates, Senator Cruz is prohibited by the federal law “soft money” ban from raising unlimited contributions into a super PAC or other entity. Senator Cruz does operate a “leadership PAC,” Jobs, Growth & Freedom Fund, which raises money under a \$5,000 per year contribution limit. Cruz’s leadership PAC reported raising just over \$2 million during the 2-year election cycle that ended December 31, 2014.

To the extent Cruz uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit to pay for “testing the waters” activities to determine whether he should run for president, he is violating federal campaign finance law.⁸⁴

Carly Fiorina

Former Hewlett-Packard CEO Carly Fiorina has made clear that she is “seriously considering a run for the White House in 2016”⁸⁵ and in June 2014 set up a super PAC, Unlocking Potential PAC, which raised \$1.8 million through the end of 2014, including several contributions of \$100,000 or more. In December 2014, *National Journal* reported that Fiorina had “authorized members of her inner circle to seek out and interview candidates for two key positions on her presidential campaign: political director and communications director.”⁸⁶ Then in early January 2015, *CNN* reported that Fiorina had “hired a top Republican National Committee spokeswoman to join her political action committee, another signal she is taking steps toward a bid for the White House later this year[.]”⁸⁷ The new hire, Sarah Isgur Flores, joined Fiorina’s super PAC and “[s]hould Fiorina transition the PAC’s operations into a presidential campaign, Isgur Flores would serve as deputy campaign manager, according to the PAC.”⁸⁸

Fiorina attended and spoke at the Iowa Freedom Summit in January 2015. In early February 2015, Fiorina self-identified as a “candidate,” telling *Fox News*: “I think many candidates are at the point now where we’re starting to assess political support and financial support, build a team. I am doing all those things as well.”⁸⁹ Responding to a question regarding building name recognition, Fiorina responded: “The way you deal with that is to get out and meet people, go to Iowa, to go to New Hampshire, to go to the early states and make sure that people understand what you believe in and who you are and what you want to accomplish. And so as I continue to consider this, that’s what I’m

⁸⁴ As explained in Part III(C)(2), it may be possible to cure such a violation in certain, very limited circumstances. See discussion *supra* note 44.

⁸⁵ Katie Pavlich, *Carly Fiorina Reminds Hillary: Traveling is an Activity, Not an Accomplishment*, TOWNHALL.COM, Feb. 3, 2015, <http://townhall.com/tipsheet/katiepavlich/2015/02/03/carly-fiorina-n1952085>.

⁸⁶ Tim Alberta, *Carly Fiorina Hiring for Presidential Campaign*, NAT’L J., Dec. 18, 2014, <http://www.nationaljournal.com/politics/carly-fiorina-hiring-for-presidential-campaign-20141218>.

⁸⁷ Chris Moody, *With eye on a presidential bid, Carly Fiorina hires Republican Party spokeswoman*, CNN, Jan. 2, 2015, <http://www.cnn.com/2015/01/02/politics/carly-fiorina-hires-republican-party-spokeswoman/>.

⁸⁸ *Id.*

⁸⁹ *Is Carly Fiorina the Republicans' 2016 dark horse?*, FOXNEWS.COM, Feb. 3, 2015, <http://www.foxnews.com/transcript/2015/02/03/is-carly-fiorina-republicans-2016-dark-horse/> (transcript from “The Kelly File” broadcast Feb. 2, 2015).

going to continue to do.”⁹⁰ To this end, Fiorina “will return to New Hampshire” to “give a keynote talk at a Feb. 10 ‘Politics and Eggs’ breakfast, an event sponsored by the New England Council that has become a rite of passage for presidential candidates.”⁹¹

Based on Fiorina’s own remarks, as well as her recent activities, Fiorina may already be a 2016 presidential “candidate” for the purposes of the law and, at the very least, is seemingly “testing the waters” of such a candidacy. To the extent Fiorina uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for “testing the waters” activities to determine whether she should run for president, or to actually campaign for president, she is violating federal campaign finance law.

Lindsey Graham

As noted in the introduction, among the long list of prospective 2016 presidential candidates, only two prospective candidates appear to be complying with the federal campaign finance law requirement that individuals “testing the waters” of a presidential campaign use funds raised under the \$2,700 candidate contribution limit to pay for such activities.⁹² Senator Lindsey Graham is one of them. Graham announced in late January 2015 that he had formed a “testing the waters” committee called Security Through Strength.⁹³ Contributions made via the organization’s website are limited to \$2,700 per person, and the donation page makes clear that corporate contributions are not permitted.⁹⁴ In the event that Senator Graham decides to run for president, contributions that have been made to his “testing the waters” committee will be treated as contributions to his presidential campaign committee—*i.e.*, any donor who has given the maximum \$2,700 to his “testing the waters” effort will not be able to contribute any more to his primary election campaign. Senator Graham’s approach to exploring a 2016 presidential run appears to be in full compliance with federal campaign finance law and should be emulated by other prospective candidates.

Mike Huckabee

Former Arkansas governor and 2008 presidential candidate Mike Huckabee activities related to another presidential campaign reportedly began in July 2013 when he met with

⁹⁰ *Id.*

⁹¹ James Pindell, *Former HP CEO Carly Fiorina to test waters for potential run at N.H. event*, BOSTON GLOBE, Jan. 12, 2015, <http://www.bostonglobe.com/metro/2015/01/12/former-hewlett-packard-ceo-carly-fiorina-returns-new-hampshire-next-month/UmO7vjB77VNw1qllH5W25L/story.html>.

⁹² This allegation that all but two prospective candidates are not complying with federal campaign finance law assumes that prospective candidates currently using federal multicandidate PACs to pay for “testing the waters” activities will not reimburse such PACs using candidate-permissible funds once the controlling individual creates a presidential campaign committee. If history is a reliable guide, this is a safe assumption. See discussion of “reimbursement” option in Part III(B)(2), below.

⁹³ See SECURITY THROUGH STRENGTH, <http://www.securitythroughstrength.com/> (last visited Feb. 18, 2015) (“Security Through Strength is the political committee helping United States Senator Lindsey Graham (R-SC) ‘test the waters’ for a potential 2016 run for president. The committee will fund the infrastructure and operations allowing Graham to travel the country, listen to Americans, and gauge support for a potential presidential candidacy.”).

⁹⁴ See *Donate Today*, SECURITY THROUGH STRENGTH, <https://secure.campaignsolutions.com/securitythroughstrength/donation1/?initiativekey=05V6JP5P4RK8> (last visited Feb. 18, 2015).

Chip Saltsman, who had managed his 2008 campaign.⁹⁵ According to the *Washington Post*, Saltsman encouraged Huckabee to call him when he was ready to “start mapping out a run” and Huckabee did so a “couple days later” and said, “Let’s go.”⁹⁶ Huckabee then formed a 501(c)(4) organization, America Takes Action, “to serve as an employment perch for his political team”—the group employs Saltsman and strategist Bob Wickers, Sarah Huckabee and a communications director, Alice Stewart, who is also a veteran of the 2008 Huckabee campaign.”⁹⁷

By November 2014, Huckabee was “reconnecting with activists and enlisting staff to position himself in a growing field of potential Republican presidential candidates.”⁹⁸ Huckabee led “more than 100 pastors and GOP insiders from early primary states on a 10-day overseas trip with stops in Poland and England” in mid-November [.]”⁹⁹ And advisers were reportedly already scouting real estate for a possible presidential campaign headquarters and Huckabee was scheduled in November to hold “private meetings with powerful GOP financiers in Las Vegas, New York and California, gauging their interest in being bundlers for his possible campaign and asking for pledges of five-to-six-figure donations to his aligned organizations.”¹⁰⁰ According to comments made by Huckabee’s daughter in November 2014, his “heart is into it” and “[h]e is personally engaged and more aggressive in taking on meetings. He can’t wait to get back to South Carolina and Iowa.”¹⁰¹

In early January 2015, the *Washington Post* reported that Huckabee left his *Fox News* show to “decide whether he wants to run for president.”¹⁰² Huckabee announced his departure on air, explaining: “I cannot bring myself to rule out another Presidential run. I say goodbye, but as we say in television, stay tuned. There’s more to come.”¹⁰³ According to the *Washington Post*, ending his show was a “requirement for laying the groundwork for a presidential run. As a policy, Fox ends relationships with commentators who form exploratory committees or seriously intend to run for office.”¹⁰⁴ An unnamed Huckabee aide said that Huckabee “would not form a presidential exploratory committee before April. Instead, the aide said, Huckabee will work with his non-profit group and his PAC on various projects, and will only formally create a new political entity if he decides to launch a campaign.”¹⁰⁵

⁹⁵ Tom Hamburger and Robert Costa, *Mike Huckabee rebuilds political team with eye on another presidential run*, WASH. POST, Nov. 12, 2014, http://www.washingtonpost.com/politics/mike-huckabee-rebuilds-political-team-with-eye-on-another-presidential-run/2014/11/12/8cb28ccc-69b3-11e4-b053-65cea7903f2e_story.html.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Robert Costa and Katie Zezima, *Huckabee to depart Fox News to consider 2016 presidential run*, WASH. POST, Jan. 3, 2015, <http://www.washingtonpost.com/blogs/post-politics/wp/2015/01/03/huckabee-to-depart-fox-news-to-consider-2016-presidential-run/>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

Huckabee joined many other prospective 2016 presidential candidates as a speaker at the January 2015 Iowa Freedom Summit¹⁰⁶ and has been touring the nation promoting his new book, *God, Guns, Grits, and Gravy*. On a book tour stop in Sarasota, Florida, Huckabee “sounded very much like a man getting closer to making a second run for the White House as he explained why 2016 might be his year.” Huckabee explained that “[e]ight years ago, most people didn’t know who I was,” and explained further: “I think that is a very different equation for me going into this particular cycle. I think the money will be very different for me. And hopefully the political support. And I’d like to believe the results will be, too.”¹⁰⁷

In addition to raising and spending an undisclosed amount through his 501(c)(4) America Takes Action, which can accept unlimited donations, Huckabee has also operated a multicandidate PAC, Huck PAC, since April 2008, which reported receiving more than \$2 million in contributions during the 2013-14 election cycle.

To the extent Huckabee uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for “testing the waters” activities to determine whether he should run for president, he is violating federal campaign finance law.¹⁰⁸

Bobby Jindal

Louisiana Governor Bobby Jindal is reportedly considering a 2016 presidential election campaign, with his political aspirations presently being supported by at least three organizations—a 501(c)(4) organization called America Next,¹⁰⁹ a federal multicandidate PAC called Stand Up to Washington PAC,¹¹⁰ and a federal super PAC called Believe Again.¹¹¹ According to *Politico*, “Jindal plans to rebrand and ramp up his fundraising efforts in the coming months as he eyes a presidential bid” and will soon “change the name of his federal political action committee, currently called Stand Up to Washington, to match that of a super PAC that’s already in place to back his potential 2016 run. Both entities will soon be called Believe Again, according to an adviser.”¹¹²

Jindal’s formal relationship with the super PAC is unclear, though the name-change plans suggest a close relationship. The *Washington Examiner* reported: “[T]he decision by the

¹⁰⁶ *Id.*

¹⁰⁷ Jeremy Wallace, *On Sarasota stopover, a more confident Huckabee*, HT POLITICS, Jan. 31, 2015, <http://politics.heraldtribune.com/2015/01/31/sarasota-stopover-confident-huckabee/>.

¹⁰⁸ As explained in Part III(C)(2), it may be possible to cure such a violation in certain, very limited circumstances. See discussion *supra* note 44.

¹⁰⁹ See AMERICANEXT.ORG, <http://americanxt.org> (last visited Feb. 18, 2015).

¹¹⁰ See David Sherfinski, *Bobby Jindal’s PAC boosted candidates in early presidential states in 2014*, WASH. TIMES, Dec. 3, 2014, <http://www.washingtontimes.com/news/2014/dec/3/bobby-jindal-pac-candidates-early-presidential>.

¹¹¹ Melinda Deslatte, *Super PAC created to boost Bobby Jindal presidential bid*, NOLA.COM, Jan. 22, 2015, http://www.nola.com/politics/index.ssf/2015/01/super_pac_created_to_boost_bob.html.

¹¹² Katie Glueck, *Gov. Bobby Jindal to rename PAC, ramp up cash quest*, POLITICO, Jan. 30, 2015, <http://www.politico.com/story/2015/01/bobby-jindal-pac-2016-114777.html>; see also BELIEVE AGAIN, <http://believeagain.gop/> (last visited Feb. 18, 2015).

governor's closest supporters to move ahead with Believe Again didn't happen in a vacuum: They wouldn't have moved if they didn't think he was running. Jindal has been signaling for some time that he intends to seek the White House, and the opening of a super PAC on his behalf was necessary if he hoped to be sufficiently resourced to prevail in what is expected to be crowded, competitive GOP primary."¹¹³

Jindal's 501(c)(4) group, America Next, reportedly raised \$3.1 million in unlimited contributions from undisclosed donors in 2014,¹¹⁴ while his multicandidate PAC, Stand Up To Washington, raised \$274,000 in 2014 according to a disclosure report filed with the FEC. The just-launched super PAC has not yet reported any fundraising data to the FEC. According to Curt Anderson, a GOP operative who has worked on all of Jindal's campaigns since his first governor's race in 2003, the 501(c)(4) America Next has provided Jindal with a "platform to travel the country, build relationships with donors and generate headlines."¹¹⁵

To the extent Jindal uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for "testing the waters" activities to determine whether he should run for president, he is violating federal campaign finance law.¹¹⁶

Martin O'Malley

Former Maryland Governor Martin O'Malley is reportedly considering a challenge to presumed candidate Hillary Clinton for the Democratic Party's 2016 presidential election nomination. Though O'Malley "hasn't officially declared his candidacy, . . . the formation of an O'Malley PAC and frequent trips to key presidential primary states such as Iowa and New Hampshire indicate a high likelihood he'll seek the office."¹¹⁷ According to reports filed with the FEC, O'Malley's O'Say Can You See PAC,¹¹⁸ a federal multicandidate PAC raising funds under a \$5,000 limit, raised more than \$1.3 million in the 2014 election cycle. The PAC had 32 staffers "on the ground in eight key battleground states" in the 2014 cycle, including Iowa, New Hampshire, South Carolina, Nevada and Wisconsin.¹¹⁹

¹¹³ David M. Drucker, *Bobby's Believers: Conservatives launch draft-Jindal PAC*, WASH. EXAMINER, Jan. 22, 2015, http://www.washingtonexaminer.com/bobbys-believers-conservatives-launch-draft-jindal-pac/article/2559070?custom_click=rss.

¹¹⁴ Glueck, *supra* note 112.

¹¹⁵ *Id.*

¹¹⁶ As explained in Part III(C)(2), it may be possible to cure such a violation in certain, very limited circumstances. See discussion *supra* note 44

¹¹⁷ Ben Wolfgang, *O'Malley faces steep climb to 2016 White House bid*, WASH. TIMES, Oct. 19, 2014, <http://www.washingtontimes.com/news/2014/oct/19/martin-omalley-faces-steep-climb-to-2016-president/?page=all>.

¹¹⁸ See MARTIN O'MALLEY.COM, <http://martinomalley.com/> (last visited Feb. 18, 2015).

¹¹⁹ Wolfgang, *supra* note 117; see also John Wagner, *O'Malley, in wait-and-see mode, looks to spring to launch race against Clinton*, WASH. POST, Dec. 26, 2014, http://www.washingtonpost.com/local/md-politics/omalley-in-wait-and-see-mode-looks-to-spring-to-assess-chances-against-clinton/2014/12/26/5b28e066-86c3-11e4-b9b7-b8632ae73d25_story.html.

According to the *Washington Post*, O'Malley's PAC "has helped fund his extensive travel over the past year and is paying the salaries of a modest but growing political staff. Recent hires include senior adviser Bill Hyers, who managed New York Mayor Bill de Blasio's campaign, and policy director Sarah Miller, who was on the policy team of Clinton's 2008 presidential campaign."¹²⁰ Although O'Malley's aides say he has not made a final decision about whether he is running, "it's hard to see how the exposure that comes with a White House run could hurt his prospects for future opportunities, whether as a vice-presidential nominee, Cabinet member, television commentator—or presidential candidate in 2020 or 2024."¹²¹

The *Washington Post* reported in late January 2015 that O'Malley's PAC added more staff, "retaining two operatives who worked in Iowa last year as he continues to weigh a 2016 White House bid."¹²² O'Malley's PAC "has hired Jake Oeth, a Des Moines-based consultant who most recently served as political director for Bruce Braley, the state's unsuccessful Democratic nominee for U.S. Senate last year And O'Malley has kept Brad Elkins on the payroll as a Washington-based staffer for his PAC. Elkins worked last year as political director for Jack Hatch, the unsuccessful Democratic nominee for governor in Iowa."¹²³

"O'Malley has been a frequent visitor to New Hampshire exploring a run for president" and will be visiting the state again in March for two days, appearing at the "Wild Irish Breakfast in Nashua on St. Patrick's Day and address[ing] a major Democratic fundraiser in Concord the night before."¹²⁴ O'Malley is also heading back to Iowa "to see if he can build on support for a White House bid during two trips here, one in March and one in April, aides told The Des Moines Register" in early February.¹²⁵

To the extent O'Malley uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for "testing the waters" activities to determine whether he should run for president, he is violating federal campaign finance law.¹²⁶

¹²⁰ See Wagner, *O'Malley, in wait-and-see mode*, *supra* note 119.

¹²¹ *Id.*

¹²² John Wagner, *O'Malley, with eye on 2016, retains two political operatives with Iowa experience*, WASH. POST, Jan. 27, 2015, http://www.washingtonpost.com/local/md-politics/omalley-with-eye-on-2016-retains-two-political-operatives-with-iowa-experience/2015/01/27/43df6060-a63f-11e4-a7c2-03d37af98440_story.html.

¹²³ *Id.*

¹²⁴ James Pindell, *Potential Democratic presidential candidate Martin O'Malley to visit N.H.*, BOSTON GLOBE, Jan. 29, 2015, <https://www.bostonglobe.com/metro/2015/01/29/potential-democratic-presidential-candidate-martin-malley-visit/w39eOdA1Mpg8ajVasJ6yhL/story.html>.

¹²⁵ Jennifer Jacobs, *O'Malley looks to capitalize on Clinton's Iowa absence*, DES MOINES REG., Feb. 3, 2015, <http://www.desmoinesregister.com/story/news/elections/presidential/caucus/2015/02/02/martin-omalley-hillary-clinton-iowa-democrat-caucus-president-iowa-poll/22753007/>.

¹²⁶ As explained in Part III(C)(2), it may be possible to cure such a violation in certain, very limited circumstances. See discussion *supra* note 44.

George Pataki

Former New York Governor George Pataki told *Fox News* in early February 2015 that he is “‘seriously’ exploring a 2016 Republican bid for president.”¹²⁷ According to *Fox News*, Pataki “has been teasing his own run for the White House for some time. The three-term former New York governor announced early on that he was weighing one, and in October launched a super PAC called Americans for Real Change, which produced an ad this past fall timed with earlier visits to New Hampshire, the first-in-the-nation primary state.”¹²⁸

Although a Pataki-centric website exists at americansforrealchange.com, the FEC’s database of political committees includes a seemingly different, unrelated super PAC by the name Americans for Real Change that was created in July 2012 and dissolved in July 2013, without ever having raised or spent any funds. Consequently, the legal status of the super PAC reportedly created by Pataki in October 2014 is unclear. Pataki also reportedly formed the super PAC Tipping Point in 2012, which reported no financial activity to the FEC during the 2014 election cycle but which has not yet been terminated.¹²⁹

And Pataki announced in January 2015 that he had formed yet another super PAC named We the People, Not Washington, which seems to be the super PAC he is actually utilizing in 2015.¹³⁰ The super PAC’s website states: “‘We The People, Not Washington’ is a Super PAC formed to support Governor Pataki’s future agenda Our country’s irrational campaign finance laws make it nearly impossible for Governor Pataki to begin a campaign for President. That’s why we are forming this Super PAC instead to ensure that Americans can discuss the Governor’s vision for our nation’s future.”¹³¹

Pataki reportedly told the *New Hampshire Union Leader* “that the new PAC was an important, major step in considering a possible presidential run.”¹³² The *Boston Globe* reported in late January 2015 that Pataki was planning to “return to New Hampshire next week to address a local Republican fund-raiser and speak to college students” and that the “two-day visit on Tuesday and Wednesday marks his second visit to the Granite State this month.”¹³³ According to the *New York Times*, “Mr. Pataki and his aides were frank about its purpose: to provide Mr. Pataki with enough money and a platform to travel the

¹²⁷ Pataki exploring 2016 White House run, FOXNEWS.COM, Feb. 2, 2015, <http://www.foxnews.com/politics/2015/02/02/pataki-exploring-2016-white-house-run/>.

¹²⁸ *Id.*

¹²⁹ Andrew Grossman, *Pataki Forms N.Y. Elections Super PAC*, WALL ST. J., Apr. 12, 2012, <http://www.wsj.com/articles/SB10001424052702304444604577340270527504862>.

¹³⁰ Dan, Tuohy, *Pataki forms super PAC, plans another NH visit*, N.H. UNION LEADER, Jan. 22, 2015, <http://www.unionleader.com/apps/pbcs.dll/article?AID=/20150122/NEWS06/150129619>.

¹³¹ *Our Mission*, WE THE PEOPLE, NOT WASHINGTON, <http://www.wethepeoplenotwashington.com/mission/> (last visited Feb. 18, 2015).

¹³² *Id.*

¹³³ James Pindell, *Pataki, considering a run for president, plans N.H. trip*, BOSTON GLOBE, Jan. 22, 2015, <http://www.bostonglobe.com/metro/2015/01/22/pataki-considering-run-for-president-plans-trip/pJELVBfFdAKtokDZeTYLwM/story.html> (last visited Feb. 5, 2015).

country, with a presidential bid firmly in mind.”¹³⁴ The article quoted Pataki as saying: “If it weren’t for the election laws today, I could be running for president[.]”

Pataki’s comments to the *New York Times*, together with the mission statement on We the People, Not Washington’s website, seem to be a clear admission that Pataki is using the super PAC to test the waters of candidacy.

To the extent Pataki uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for “testing the waters” activities to determine whether he should run for president, he is violating federal campaign finance law.

Rand Paul

Senator Rand Paul has been identified as a “likely Republican presidential contender[.]” and, as noted above, in late January 2015 participated in a panel discussion with two other likely contenders—Senators Ted Cruz and Marco Rubio—“that offered a preview of the themes expected to dominate the 2016 election.”¹³⁵ The panel “took place at a private meeting of wealthy donors hosted by Freedom Partners, a tax-exempt group that serves as the hub of a political network supported by Charles and David Koch and other conservative financiers.”¹³⁶ Also at the Freedom Partners meeting, “[t]op officials in the Koch brothers’ political organization . . . Monday released a staggering \$889 million budget to fund the activities of the billionaires’ sprawling network ahead of the 2016 presidential contest.”¹³⁷

Unlike non-federal-officeholder prospective 2016 presidential candidates, Senator Paul is prohibited by the federal law “soft money” ban from raising unlimited contributions into a super PAC or other entity. Senator Paul does operate a “leadership PAC,” Reinventing A New Direction--RANDPAC,¹³⁸ which raises money under a \$5,000 per year contribution limit. Paul’s leadership PAC reported raising just over \$3.3 million during the 2-year election cycle that ended December 31, 2014.

In late January 2015, Senator Paul “picked up the backing of the Republican Party of Texas’ chairman, [Steve Munisteri,] who is stepping down from his role to take a position as a national senior adviser to the Kentucky Republican’s presidential campaign-in-waiting.”¹³⁹ “Munisteri will be tasked with helping Paul fine-tune his communications strategy, as well as help guide Paul’s ongoing effort to appeal to minority and younger[] voters, who typically vote for Democrats.”¹⁴⁰ Munisteri explained: “I don’t think we can

¹³⁴ Nicholas Confessore, *Today In Politics—Pataki Starts Another Flirtation With a Presidential Campaign*, N.Y. TIMES, Jan. 22, 2015, <http://www.nytimes.com/politics/first-draft/2015/01/22/today-in-politics-80/?entry=mb-5>.

¹³⁵ Gold, *supra* note 80.

¹³⁶ *Id.*

¹³⁷ Schouten, *Koch brothers set \$889 million budget*, *supra* note 82.

¹³⁸ See RAND PAC, <http://www.randpac.com/> (last visited Feb. 18, 2015).

¹³⁹ Philip Elliott, *Texas GOP chief leaves role, joins Rand Paul political team*, YAHOO! NEWS, Jan. 29, 2015, <http://news.yahoo.com/texas-gop-chief-leaves-role-joins-rand-paul-230036918--election.html>.

¹⁴⁰ *Id.*

win a national election unless we do a better job of getting new people into the party.” “Munisteri said his roster of contacts will be available to help connect Paul with the deep-pocke[te]d donors who define Texas and Republican politics, but he did not plan to have fundraising as his main task. Instead, he planned to help Paul plan a broader strategy.”¹⁴¹ Munisteri commented further: “I have some definite ideas [about] how to lay out a presidential campaign.” Senator Paul has also reportedly “been lining up senior advisers in Iowa, New Hampshire and South Carolina.”¹⁴²

According to a *U.S. News* report in mid-January, Senator Paul was “knotted with Sen. Ted Cruz, R-Texas, for conducting the most travel to early presidential nominating states over the past two years. Each freshman GOP senator has made a total of 16 trips to Iowa, New Hampshire and South Carolina, according to the U.S. News Presidential Tracker. It’s a leading signal that both Paul and Cruz will wage 2016 presidential bids.”¹⁴³ Senator Paul is planning extensive travel in February 2015 and beyond, planning to “travel every weekend, going forward.”¹⁴⁴

But Paul is also including some GOP stops that are a bit more predictable: “He’s back to red meat next weekend in Iowa,” said Allen. “He’s doing a liberty event and his big rally is audit the Fed. That’s about the reddest meat that you can get.”

To the extent Paul uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit to pay for “testing the waters” activities to determine whether he should run for president, he is violating federal campaign finance law.¹⁴⁵

Rick Perry

The *Washington Post* reported in early February 2015 that former Texas governor Rick Perry “has recruited more than 80 major donors, including some of the biggest bundlers in Republican politics, to aid his efforts as he prepares for a likely 2016 presidential campaign.”¹⁴⁶ These 80 major donors will serve on the advisory board of RickPAC, Perry’s multicandidate PAC that raised funds under a \$5,000 limit. “With his announcement, Perry hopes to signal that he would enjoy considerable financial support should he make a second presidential run in 2016, as many of his supporters anticipate. Most of the people listed have given the maximum \$5,000 donation to Rick PAC and they are likely to make up the finance team of any Perry campaign or pro-Perry super PAC, should he pull the trigger on a run.”¹⁴⁷

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ David Catanese, *Rand and Cruz Lead 2016 Travel*, U.S. NEWS & WORLD REP., Jan. 14, 2015, <http://www.usnews.com/news/blogs/run-2016/2015/01/14/rand-paul-and-ted-cruz-lead-2016-travel>.

¹⁴⁴ John King, *Jeb Bush & Rand Paul's post-Romney moves*, CNN, Feb. 1, 2015, <http://www.cnn.com/2015/02/01/politics/ip-jeb-bush--rand-pauls-post-romney-moves/>.

¹⁴⁵ As explained in Part III(C)(2), it may be possible to cure such a violation in certain, very limited circumstances. See discussion *supra* note 44.

¹⁴⁶ Philip Rucker, *Rick Perry to name 80-plus major donors to his PAC's advisory board*, WASH. POST, Feb. 5, 2015, <http://www.washingtonpost.com/blogs/post-politics/wp/2015/02/05/rick-perry-to-name-80-plus-major-donors-to-his-pacs-advisory-board/>.

¹⁴⁷ *Id.*

Although “Perry has said he won’t decide about launching another campaign until this spring,” late in 2014 he “invited hundreds of major Republican donors to the Governor’s Mansion in Austin for a series of intimate dinners and lunches, where he showcased his economic record as governor and made his pitch as a potential presidential candidate. He also held day-long tutorial sessions with leading conservative scholars and former government officials. And Perry has been making numerous campaign-style trips to Iowa and other early voting states.”¹⁴⁸ And like many other prospective 2016 presidential candidates, Perry traveled to Iowa in late January 2015 to speak at the Iowa Freedom Summit.¹⁴⁹

Though Perry was supported by the super PAC Make Us Great Again during his 2011-12 campaign for the Republican Party’s presidential nomination, the super PAC was terminated in September 2013. Perry is not known to be affiliated with any super PAC.

To the extent Perry uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for “testing the waters” activities to determine whether he should run for president, he is violating federal campaign finance law.¹⁵⁰

Marco Rubio

Senator Marco Rubio has been identified as a “likely Republican presidential contender[]” and, as noted above, in late January 2015 participated in a panel discussion with two other likely contenders—Senators Ted Cruz and Rand Paul—“that offered a preview of the themes expected to dominate the 2016 election.”¹⁵¹ The panel “took place at a private meeting of wealthy donors hosted by Freedom Partners, a tax-exempt group that serves as the hub of a political network supported by Charles and David Koch and other conservative financiers.”¹⁵² Also at the Freedom Partners meeting, “[t]op officials in the Koch brothers’ political organization . . . released a staggering \$889 million budget to fund the activities of the billionaires’ sprawling network ahead of the 2016 presidential contest.”¹⁵³

Unlike non-federal-officeholder prospective 2016 presidential candidates, Senator Rubio is prohibited by the federal law “soft money” ban from raising unlimited contributions into a super PAC or other entity. Senator Rubio does operate a “leadership PAC,”

¹⁴⁸ *Id.*

¹⁴⁹ Jennifer Jacobs, *Prominent speakers at the Iowa Freedom Summit*, DES MOINES REG., Jan. 24, 2015, <http://www.desmoinesregister.com/story/news/politics/2015/01/18/iowa-freedom-summit-speakers/21934883/>.

¹⁵⁰ As explained in Part III(C)(2), it may be possible to cure such a violation in certain, very limited circumstances. See discussion *supra* note 44.

¹⁵¹ Matea Gold, *Ted Cruz, Rand Paul and Marco Rubio decry income inequality, clash over foreign policy*, WASH. POST, Jan. 26, 2015, <http://www.washingtonpost.com/blogs/post-politics/wp/2015/01/26/ted-cruz-rand-paul-and-marco-rubio-decry-income-inequality-clash-over-foreign-policy/>.

¹⁵² *Id.*

¹⁵³ Schouten, *Koch brothers set \$889 million budget*, *supra* note 82.

Reclaim America PAC,¹⁵⁴ which raises money under a \$5,000 per year contribution limit. Rubio's leadership PAC reported receipts of just over \$3.9 million during the 2-year election cycle that ended December 31, 2014.

Rubio reportedly told the *National Journal* in early January 2015 that "his family is on board for a White House campaign in 2016," but that he has not yet decided whether he wants "to pursue his agenda from the safe confines of the U.S. Senate, or give up his seat to run for president[.]"¹⁵⁵

Rubio's recent focus on fundraising for his leadership PAC have many speculating that he will be running for president. "I think he's certainly seriously exploring the option. And I think he's very viable," said Sen. John McCain to the *Washington Post* in late January 2015.¹⁵⁶ According to the same article, Tim Baker, a Republican strategist in Florida, said, "All signs point to him running."¹⁵⁷ And "[t]op aides say he has not made a final decision. But his attention appears to be focused on a run for president."¹⁵⁸ In response to questions about Rubio missing key Senate votes related to the Keystone Pipeline for a fundraising trip to California, Rubio's spokesman Alex Conant told the *Washington Post*: "It's not uncommon for presidential candidates to occasionally miss Senate votes Senator Rubio hasn't made any final decisions on 2016, but he is taking the necessary steps to raise the resources he will need should he decide to seek the White House."¹⁵⁹

To the extent Rubio uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit to pay for "testing the waters" activities to determine whether he should run for president, he is violating federal campaign finance law.¹⁶⁰

Rick Santorum

Former Senator and 2012 presidential candidate Rick Santorum is "gathering supporters together to plot out another presidential bid."¹⁶¹ According to the *Washington Post*, in mid-January 2015, Foster Friess, who gave more than \$2 million to a super PAC supporting Santorum's 2012 presidential campaign, hosted a "private gathering in

¹⁵⁴ See RECLAIM AMERICA PAC, <http://www.reclaimamericapac.com/> (last visited Feb. 18, 2015).

¹⁵⁵ Tim Alberta, *Marco Rubio: My Family Is on Board With White House Run*, NAT'L J., Jan. 9, 2015, <http://www.nationaljournal.com/politics/marco-rubio-says-he-has-cleared-key-hurdles-to-white-house-run-20150109>.

¹⁵⁶ Sean Sullivan, *New signals of Rubio weighing a 2016 bid as senator makes California fundraising stop*, WASH. POST, Jan. 29, 2015, http://www.washingtonpost.com/politics/new-signals-of-rubio-weighing-a-2016-bid-as-senator-makes-california-fundraising-stop/2015/01/29/d7f19936-a715-11e4-a2b2-776095f393b2_story.html.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ As explained in Part III(C)(2), it may be possible to cure such a violation in certain, very limited circumstances. See discussion *supra* note 44.

¹⁶¹ Cameron Joseph, *Santorum, top backer gathering support*, ROLL CALL, Jan. 15, 2015, <http://thehill.com/blogs/ballot-box/presidential-races/229592-santorum-super-pac-backer-gathering-support-for-another>.

Scottsdale, Ariz. . . . to rally support behind Santorum’s potential 2016 bid.”¹⁶² Santorum and Friess were both expected to “address attendees and make clear they are working together as Santorum moves toward a run.”¹⁶³ Also according to the *Washington Post*, on a Tuesday night in mid-January 2015, Santorum “huddled in Washington with 33 friends and advisers, including his former Senate chiefs of staff, to discuss his 2016 plans.”¹⁶⁴ According to “Santorum confidant” Matthew Beynon, “The Senator talked about his 2012 run, lessons learned from 2012, how he has laid the groundwork for a potential 2016 run[.]”¹⁶⁵ And like many other prospective 2016 presidential candidates, Santorum traveled to Iowa in late January 2015 to speak at the Iowa Freedom Summit.¹⁶⁶

ABC News reported one week later that Santorum met with advisors in Leesburg, Virginia “to map out a possible new presidential bid aiming to avoid some of the mistakes that doomed his last candidacy.”¹⁶⁷ “The four-plus hour meeting was described to ABC News by an aide who attended as a discussion of ‘lessons learned’ from the 2012 campaign that they could use to improve their operation if he ‘makes the leap.’ The group also got into more detailed planning that never happened before his last run, the aide said.”¹⁶⁸

Santorum presently operates the 501(c)(4) organization Patriot Voices that raises unlimited, undisclosed donations, as well as a “hybrid” federal PAC called Patriot Voices PAC, which is effectively a multicandidate PAC raising funds under a \$5,000 limit and a super PAC raising unlimited contributions rolled into a single legal entity with two separate bank accounts. In January 2015 Santorum “announced his senior finance team for Patriot Voices and Patriot Voices PAC: Nadine Maenza, Roy Jones, and Rob Bickhart.”¹⁶⁹ Santorum said in the press release: “Nadine, Rob, and Roy will play a crucial role in ensuring we have the resources necessary to be a leader in the coming national debate, particularly as we tackle challenges confronting blue-collar families across this country.”¹⁷⁰

To the extent Santorum uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for “testing

¹⁶² Robert Costa, *GOP donor Foster Friess launches new effort to boost Rick Santorum*, WASH. POST, Jan. 14, 2015, <http://www.washingtonpost.com/blogs/post-politics/wp/2015/01/14/gop-donor-foster-friess-launches-new-effort-to-boost-rick-santorum/>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Jennifer Jacobs, *Prominent speakers at the Iowa Freedom Summit*, DES MOINES REG., Jan. 24, 2015, <http://www.desmoinesregister.com/story/news/politics/2015/01/18/iowa-freedom-summit-speakers/21934883/>.

¹⁶⁷ Shushannah Walshe, *Rick Santorum Preps for 2016, Meets with Aides to Plan Details*, ABC NEWS, Jan. 21, 2015, <http://abcnews.go.com/Politics/rick-santorum-preps-2016-meets-aides-plan-details/story?id=28384584&singlePage=true>.

¹⁶⁸ *Id.*

¹⁶⁹ *Rick Santorum and Patriot Voices PAC Announce Senior Finance Team*, PATRIOT VOICES, Jan. 20, 2015, http://www.patriotvoices.com/rick_santorum_and_patriot_voices_pac_announce_senior_finance_team.

¹⁷⁰ *Id.*

the waters” activities to determine whether he should run for president, he is violating federal campaign finance law.¹⁷¹

Scott Walker

In December 2014 Wisconsin Governor Scott Walker “brought on Rick Wiley, a former Republican National Committee political director and veteran of multiple presidential campaigns, . . . to build a political operation in advance of the 2016 race[.]”¹⁷² Wiley was reportedly “tapped . . . to serve as his campaign manager should he decide to run for president[.]”¹⁷³ According to *CNN*, Wiley declined in early January to comment on the job but has reportedly “been aggressively reaching out to potential staffers in recent weeks.”¹⁷⁴ “One source close to Walker told *CNN* that the governor has no timeline for announcing a presidential bid but will be forming ‘some kind of entity in the coming weeks to lend itself as a vehicle’ . . . before moving forward with a full-blown campaign.”¹⁷⁵

Walker then announced in late January 2015 that he had formed a “527 political organization” called Our American Revival “to help boost a potential 2016 presidential run, the first concrete step toward a possible campaign that comes as others are also ramping up efforts to seek the GOP nomination.”¹⁷⁶ So-called 527 organizations are permitted under tax law to accept unlimited amounts from individuals, corporations and labor unions. Soon after its creation, Our American Revival “fir[ed] its opening salvo in the 2016 presidential campaign,” releasing a two-minute commercial featuring Walker and warning “against looking to past leaders or the federal government for answers, taking a not-so-subtle jab at former Secretary of State Hillary Clinton.”¹⁷⁷

Questioned about his new political organization and its ad, Walker mischaracterized the legal purpose of such 527 organizations, stating: “Others have political action committees, PACs, which are really about promoting themselves and political candidates. . . . Our organization is a 527, which means we’re focused on ideas.” In fact, 527 organizations are named after the section of the federal tax code that give tax exemption to groups “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”¹⁷⁸ In other words, 527 groups

¹⁷¹ As explained in Part III(C)(2), it may be possible to cure such a violation in certain, very limited circumstances. See discussion *supra* note 44.

¹⁷² Peter Hamby, *Walker builds 2016 team with likely campaign manager*, *CNN*, Jan. 8, 2015, <http://www.cnn.com/2015/01/07/politics/walker-builds-2016-team-with-likely-campaign-manager/>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Scott Bauer and Philip Elliot, *Scott Walker Forms First Committee For 2016 Run*, *HUFFINGTON POST*, Jan. 27, 2015, http://www.huffingtonpost.com/2015/01/27/scott-walker-2016_n_6556220.html.

¹⁷⁷ Jessie Opoien, *Scott Walker says fundraising committee is about 'ideas,' not promoting a candidate*, *THE CAPITAL TIMES*, Jan. 28, 2015, http://host.madison.com/news/local/writers/jessie-opoien/scott-walker-says-fundraising-committee-is-about-ideas-not-promoting/article_e9829dd-572f-5dab-b8fb-4ede66b8f52c.html.

¹⁷⁸ 26 U.S.C. § 527(e)(1)-(2) (definitions of “political organization” and “exempt function”).

must have the primary purpose of influencing candidate elections—not issue advocacy. Indeed, the PACs Walker refers to are also exempt from federal income tax under section 527 of the tax code. The appropriate tax exempt status for an issue advocacy organization is created by section 501(c)(4) of the tax code.

Walker spoke at the Iowa Freedom Summit and has said “he’ll likely visit other early primary states such as New Hampshire and South Carolina on weekends ‘in the not too distant future.’”¹⁷⁹

In early February, Walker became the first prospective 2016 presidential candidate to open an office in Iowa, leasing space in a strip mall outside Des Moines that has previously been used as a campaign office for Michele Bachmann before the 2012 Iowa caucuses, Mitt Romney during the 2012 general election campaign, and John McCain during his 2008 presidential campaign.¹⁸⁰

To the extent Walker uses funds raised from individual donors in amounts exceeding the \$2,700 candidate contribution limit, or any corporate/union funds, to pay for “testing the waters” activities to determine whether he should run for president, he is violating federal campaign finance law.

Jim Webb

As noted in the introduction, among the long list of prospective 2016 presidential candidates, only two prospective candidates appear to be complying with the federal campaign finance law requirement that individuals “testing the waters” of a presidential campaign use funds raised under the \$2,700 candidate contribution limit to pay for such activities.¹⁸¹ Former Senator Jim Webb is one of them. (Senator Lindsey Graham is the other.) In November 2014, Webb announced his formation of an “exploratory committee” “to examine whether [he] should run for President in 2016.”¹⁸² Contributions made via the Webb 2016 website are limited to \$2,700 per person. In the event that Webb decides to run for president, contributions that have been made to his exploratory committee will be treated as contributions to his presidential campaign committee—*i.e.*, any donor who has given the maximum \$2,700 to his exploratory effort will not be able to contribute any more to his primary election campaign. Webb’s approach to exploring a 2016 presidential run appears to be in full compliance with federal campaign finance law and should be emulated by other prospective candidates.

¹⁷⁹ Opoien, *supra* note 177.

¹⁸⁰ Jennifer Jacobs, *First 2016 presidential hopeful to open an Iowa office: Scott Walker*, DES MOINES REG., Feb. 10, 2015, <http://www.desmoinesregister.com/story/news/elections/presidential/caucus/2015/02/10/scott-walker-first-to-open-iowa-office-among-white-house-hopefuls/23173785/>.

¹⁸¹ This allegation that all but two prospective candidates are not complying with federal campaign finance law assumes that prospective candidates currently using federal multicandidate PACs to pay for “testing the waters” activities will not reimburse such PACs using candidate-permissible funds once the controlling individual creates a presidential campaign committee. If history is a reliable guide, this is a safe assumption. See discussion of “reimbursement” option in Part III(B)(2), below.

¹⁸² See WEBB 2016 EXPLORATORY COMMITTEE, <http://www.webb2016.com/> (last visited Feb. 18, 2015).

III. The Law

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.

Commissioner Harris Dissenting Opinion, FEC Advisory Opinion 1986-06.

Former FEC Commissioner Thomas E. Harris wrote this passage in 1986 about then-Vice President George H.W. Bush, who everyone believed would be running, and who did in fact run, for president in 1988.

It is worth emphasizing that then-Vice President Bush's activities occurred before—and were ostensibly directly related to—the 1986 midterm election. Given how upset Commissioner Harris was with the Commission's permission of such activities before the midterm election using funds raised under the \$5,000 multicandidate PAC limit, he would undoubtedly be livid about the absurdity unfolding today: prospective 2016 presidential candidates raising unlimited funds to pay for activities occurring within the presidential election cycle.

This section details federal statutes, regulations and FEC guidance regarding candidate contribution limits and “testing the waters” activities, which collectively seemingly prohibit much of the prospective 2016 presidential candidate fundraising and spending going on today.

A. Statutory Law

Federal campaign finance laws have evolved steadily over the past 100 plus years. In 1907, for example, Congress enacted and President Roosevelt signed into law the Tillman Act, which prohibited contributions from corporations to candidates for federal office.¹⁸³ In 1910, campaign finance disclosure requirements were first incorporated into federal law.¹⁸⁴ More than 65 years ago, the War Labor Disputes Act extended the contribution prohibition to labor unions.¹⁸⁵ But these campaign finance laws went largely unenforced until the 1974 amendments to the FECA led to the creation of the FEC and, for the first time, imposed a \$1,000 limit on contributions from individuals to candidates for federal office.

¹⁸³ Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907).

¹⁸⁴ Act of June 25, 1910, 36 Stat. 822; *see* United States v. UAW, 352 U.S. 567, 575 (1957) (describing 1910 Publicity Act).

¹⁸⁵ War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943) (also known as the Smith-Connally Act).

Since the 1970s, statutory law providing when a federal candidate must register as such with the FEC and establish a principal campaign committee through which all election-related activity is conducted has gone unchanged. The “testing the waters” provisions referenced throughout this paper do not appear in federal statutory law; instead, the “testing the waters” provisions were introduced by the FEC in 1977 as regulations¹⁸⁶ and are detailed below, in Section III(B)(2).

The Bipartisan Campaign Reform Act of 2002 (BCRA) made two noteworthy changes to the laws at issue in this paper. First, BCRA increased the limit on contributions from individuals to candidates from \$1,000 to \$2,000 and provided that the limit be adjusted every two years for changes in the cost of living.¹⁸⁷ The limit is \$2,700 for the 2016 federal elections.¹⁸⁸ Second, BCRA’s so-called “soft money” ban prohibits federal candidates and officeholders from raising funds in connection with any election unless the funds comply with the federal law contribution amount limits and source restrictions (no corporate/union funds).¹⁸⁹ 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. The BCRA soft money ban does not, however, prohibit a federal officeholder from setting up a federal multicandidate PAC and raising funds for such PAC under the applicable \$5,000 contribution limit.

The following is a summary of current federal statutes but, aside from the changes resulting from BCRA, also serves to accurately describe the statutes that have regulated federal candidacy since the 1970s.

1. Statutes Pertaining to “Candidate” Status

The term “candidate” means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election—

(A) if such individual has received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of

¹⁸⁶ 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.

¹⁸⁷ See *supra* note 9.

¹⁸⁸ See Price Index Adjustments for Expenditure Limitations and Lobbying Bundling Disclosure Threshold, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015); see also *Contribution Limits for 2015-2016*, FEC, <http://www.fec.gov/pages/fecrecord/2015/february/contriblimits20152016.shtml#search=contribution%20limits> (last visited Feb. 18, 2015).

¹⁸⁹ 52 U.S.C. § 30125(e)(1).

such individual and if such person has received such contributions aggregating in excess of \$5,000 or has made such expenditures aggregating in excess of \$5,000.¹⁹⁰

The statutory definition of “candidate” hinges on the terms “contribution” and “expenditure.”

The term “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.”¹⁹¹

The term “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.”¹⁹²

Taken together, these statutory provisions provide that an individual becomes a “candidate” under FECA when the individual seeks election to federal office—and an individual is deemed to seek election to federal office if such individual receives or spends funds in excess of \$5,000 for the purpose of influencing the election.

The FEC’s “testing the waters” regulations described below are structured as exceptions to the definitions of “contribution” and “expenditure” and, consequently, operate as an exception to “candidate” status. But for the “testing the waters” exception, funds raised and spent by an individual to determine whether to run for office would be treated as “contributions” and “expenditures” for the purposes of the \$5,000 threshold for “candidate” status.

2. Registration and Reporting Requirements for Presidential Candidate Committees

“Each candidate for Federal office (other than the nominee for the office of Vice President) shall designate in writing a political committee . . . to serve as the principal campaign committee of such candidate. Such designation shall be made no later than 15 days after becoming a candidate.”¹⁹³ Though a candidate must designate a single “principal campaign committee,” a candidate may designate additional “authorized” committees to raise and spend funds on behalf of the candidate (*e.g.*, joint fundraising committees). Contributions to all committees “authorized” by a single candidate are aggregated for the purposes of contribution limits, so multiple authorized committees cannot be used to circumvent contribution limits.¹⁹⁴

¹⁹⁰ *Id.* § 30101(2) (emphasis added).

¹⁹¹ *Id.* § 30101(8)(A)(i) (emphasis added).

¹⁹² *Id.* § 30101(9)(A)(i) (emphasis added).

¹⁹³ *Id.* § 30102(e)(1).

¹⁹⁴ *Id.* §§ 30102(e)(1)-(3) and 30116(a)(5).

All federal political committees, including authorized candidate committees, multicandidate PACs and super PACs must file periodic, detailed reports with the FEC disclosing all of the money they have raised and spent including, for example, the name, address, amount of the contribution and occupation and employer of any contributor who has given them more than \$200.¹⁹⁵

3. Contribution Restrictions on Presidential Candidate Committees

A presidential candidate's principal campaign committee, together with any other committees authorized by the candidate, may not accept contributions from an individual that, in the aggregate, exceed \$2,700 per election.¹⁹⁶ Candidates may accept \$5,000 per election from political party committees and other multicandidate PACs,¹⁹⁷ but federal candidate committees may not accept contributions from corporations or labor unions.¹⁹⁸

In addition, as noted above, the BCRA "soft money" ban prohibits federal candidates and officeholders from soliciting or receiving funds in connection with any election unless the funds comply with federal law contribution amount limits and source restrictions (no corporate/union funds).¹⁹⁹ Consequently, for example, though federal super PACs are permitted to receive contributions in unlimited amounts and may also accept corporate/union contributions, federal candidates and officeholders may only solicit up to \$5,000 for a super PAC (the multicandidate PAC contribution limit) and may not solicit any corporate/union funds for a super PAC.²⁰⁰

B. Organizations Commonly Used By Prospective Candidates

1. Multicandidate PACs

From the time Ronald Reagan formed Citizens for the Republic in 1977, the "multicandidate political committee" has been a vehicle of choice for prospective presidential candidates to skirt candidate contribution limits. By statutory definition, a "multicandidate political committee" is a political committee that has been registered with the FEC for at least 6 months, has received contributions from more than 50 persons, and has made contributions to 5 or more candidates for Federal office.²⁰¹

Multicandidate PACs raise funds under a \$5,000 per calendar year contribution limit²⁰² and can contribute up to \$5,000 per election to a candidate—slightly more than the

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

¹⁹⁶ 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 in this month. *See* Price Index Adjustments for Expenditure Limitations and Lobbying Bundling Disclosure Threshold, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015).

¹⁹⁷ 52 U.S.C. § 30116(a)(2).

¹⁹⁸ *Id.* § 30118(a).

¹⁹⁹ *Id.* § 30125(e)(1).

²⁰⁰ *See* FEC Advisory Opinion 2011-12 (Majority PAC and House Majority PAC).

²⁰¹ 52 U.S.C. § 30116(a)(4).

²⁰² *Id.* § 30116(a)(1)(C).

\$2,700 that non-multicandidate PACs and individuals can give to candidates.²⁰³ Multicandidate PACs are prohibited from accepting corporate/union contributions.²⁰⁴

In addition to being a popular vehicle for prospective candidates skirting the candidate contribution limits, a multicandidate PAC is the type of committee that would be set up by any person wanting to raise funds to make contributions directly to multiple federal candidates. Furthermore, it is permissible for a retiring federal officeholder or unsuccessful candidate with leftover campaign funds to convert their campaign committee into a multicandidate PAC for the actual purpose of supporting other candidates (as opposed to an actual purpose of laying the foundation of their next campaign).

2. Leadership PACs

A “leadership PAC” is a political committee that is established or controlled by a federal candidate or officeholder, but which is not an authorized committee of the candidate/officeholder.²⁰⁵ In other words, a leadership PAC is a committee set up by a federal candidate/officeholder, but that does not raise and spend funds to support the election/reelection of that candidate/officeholder. Most leadership PACs qualify as multicandidate PACs, though qualification for multicandidate PAC status is not a requirement of leadership PAC status.

Because leadership PACs are, by definition, controlled by federal candidates/officeholders, only those prospective presidential candidates (*i.e.*, individuals who are not yet presidential candidates) who are federal officeholders can operate leadership PACs. Many press accounts of activities by prospective 2016 presidential candidates who are not currently federal officeholders mistakenly refer to PACs operated by such individuals as “leadership PACs” when, instead, their PACs are simply multicandidate PACs. The mischaracterization is of little consequence, as both types of PACs operate under essentially the same campaign finance rules.

Leadership PACs raise funds under a \$5,000 per calendar year contribution limit²⁰⁶ and can contribute up to \$5,000 per election to a candidate if they qualify as multicandidate PACs, but are otherwise subject to the \$2,700 limit.²⁰⁷ Multicandidate PACs are prohibited from accepting corporate/union contributions.²⁰⁸ The fact that the limit on contributions to a leadership PAC 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 2016 may only accept \$2,700 per donor for the 2016 nomination contest (and another \$2,700 for the 2016 general election, which cannot be spent unless the candidate wins her party’s nomination), a prospective 2016 candidate who set up a

²⁰³ *Id.* § 30116(a)(4).

²⁰⁴ *Id.* § 30118(a).

²⁰⁵ *Id.* § 30104(i)(8)(B).

²⁰⁶ *Id.* § 30116(a)(1)(C).

²⁰⁷ *Id.* § 30116(a)(4) and (a)(1)(A).

²⁰⁸ *Id.* § 30118(a).

leadership PAC in 2013, was permitted to collect from a single donor \$5,000 in 2013, \$5,000 in 2014 and \$5,000 in 2015—without impacting her 2016 candidate contribution limit.

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, in order 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.²⁰⁹ No provision existed in the FECA for such fundraising by a candidate/officeholder outside of the candidate contribution limit, but the FEC nevertheless permitted the proposal.

Notwithstanding the fact that the original leadership PAC intended to use the funds it raised to make contributions to other candidates, there is no legal requirement that leadership PACs do so. Consequently, over the intervening decades, many leadership PACs have become little more than slush funds for many federal officeholders, with little of the funds raised being passed on to other candidates in the form of contributions. The “slush fund” nature of leadership PACs makes them attractive vehicles for prospective presidential candidates.

Finally, because funds raised into leadership PACs are subject to contribution limits and the ban on corporate/union contributions, federal candidates/officeholders can maintain them without running afoul of the BCRA “soft money” ban. This makes leadership PACs the only viable option for prospective presidential candidates who are incumbent federal officeholders (*e.g.*, Senators Cruz, Paul, Rubio) and want to skirt the presidential contribution restrictions for pre-candidacy activities.

3. Super PACs

“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 born in 2010, in the wake of the Supreme Court’s decision in *Citizens United*. 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.²¹⁰

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 only intended to make independent expenditures, not contributions directly to candidates or political parties.²¹¹ The Circuit Court reasoned that, if the independent expenditures by such a PAC posed no threat of

²⁰⁹ See FEC Advisory Opinion 1978-12 (Friends of Congressman Henry A. Waxman).

²¹⁰ *Citizens United v. FEC*, 558 U.S. 310 (2010).

²¹¹ *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

corruption, then the contributions going into the PAC likewise posed no threat of corruption and could not be limited.

As the result of the *SpeechNow* decision, any non-candidate/non-party federal political committee that refrains from making contributions to candidates or parties, as well as expenditures coordinated with candidates or parties, is free to accept contributions free of federal law contribution amount limits and the ban on corporate/union contributions.²¹²

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.

4. 527 Organizations

“527 organizations” are named after the section of the Internal Revenue Code that grants such “political organizations” exemption from federal income tax.²¹³ 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”²¹⁴

Organizations claiming section 527 tax-exempt status are permitted under the tax code to accept unlimited contributions, but 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, are eligible for exemption from federal income tax under section 527 of the tax code.

Over the past 15 years or so, for reasons that are beyond the scope of this white paper, the term “527 organization” has become shorthand for groups claiming exemption under section 527 of the tax code but not registering with the FEC or with any corollary state or municipal campaign finance agency as a “political committee.”

Self-designation as a 527 organization amounts to an admission that the organization’s primary purpose is influencing candidate nominations/elections. 527 organizations are not issue advocacy groups. The appropriate tax-exempt status for an issue advocacy group is section 501(c)(4) of the tax code. This is apparently a point of confusion for at least one 2016 prospective candidate. In January 2015, Wisconsin Governor Scott Walker announced that he had formed a “527 political organization” called Our American

²¹² See also FEC Advisory Opinion 2010-09 (Club for Growth); FEC Advisory Opinion 2010-11 (Commonsense Ten).

²¹³ 26 U.S.C. § 527.

²¹⁴ *Id.* § 527(e)(1)-(2) (definitions of “political organization” and “exempt function”).

Revival. Questioned about his new political organization, Walker mischaracterized the legal purpose of such 527 organizations, stating: “Others have political action committees, PACs, which are really about promoting themselves and political candidates. . . . Our organization is a 527, which means we’re focused on ideas.”²¹⁵

5. 501(c)(4) Organizations

“501(c)(4) organizations” are named after the section of the Internal Revenue Code that grants exemption to “social welfare” organizations.²¹⁶ 501(c)(4) organizations, sometimes referred to as “issue advocacy” groups, 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.

6. State PACs

Every state has its own campaign finance laws defining “political committee,” with a high degree of variation among states in the degree of regulation of such entities. For example, some states impose contribution limits on such entities, while others do not. Though prospective presidential candidates have used state PACs to skirt federal candidate contribution restrictions in past elections, no major prospective 2016 candidates are employing that strategy.

C. Agency Law—FEC Guide, Regulations, Advisory Opinions and Enforcement Actions

1. FEC Campaign Guide

Since its creation by the 1974 amendments to FECA, the FEC has promulgated numerous regulations and issued numerous advisory opinions explaining and implementing the statutes that deem an individual who raises or spends funds in excess of \$5,000 for the purpose of influencing their election to be a “candidate.”

The FEC summarizes the relevant statutes, regulations and advisory opinions in a “campaign guide” as follows:

Before deciding to campaign for federal office, an individual may want to “test the waters,” that is, explore the feasibility of becoming a candidate. For example, an individual may want to conduct polls or travel around the state or district to see if there is sufficient support for his or her candidacy. An individual who merely tests the waters, but does not campaign for office, does not have to register or report to the FEC. This is the case even if the individual exceeds the usual \$5,000 candidate registration threshold.

²¹⁵ Scott Bauer and Philip Elliot, *Scott Walker Forms First Committee For 2016 Run*, HUFFINGTON POST, Jan. 27, 2015, http://www.huffingtonpost.com/2015/01/27/scott-walker-2016_n_6556220.html.

²¹⁶ 26 U.S.C. § 501(c)(4).

Nevertheless, all funds raised and spent during the testing the waters period must comply with the Federal Election Campaign Act’s contribution limits and prohibitions.

Once an individual begins to campaign or decides to become a candidate, the testing the waters period ends, and any funds that were raised or spent to test the waters apply to the \$5,000 threshold for qualifying as a candidate. Once that threshold is exceeded, the individual must register with the FEC and begin to file reports. The first report must include all activity that occurred during the testing the waters period.²¹⁷

Most of the FEC’s guidance with respect to “testing the waters” has been issued in the context of distinguishing “testing the waters” from campaigning—not in the context of distinguishing between not campaigning and “testing the waters.” Nevertheless, the FEC’s guidance regarding what constitutes “testing the waters” is useful to identifying those activities that prospective presidential candidates should be paying for with candidate-permissible funds. The FEC explains:

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;

²¹⁷ FEC CAMPAIGN GUIDE, *supra* note 2 (emphasis added) (footnote omitted) (citations omitted). No comparable publication exists for presidential candidates, though the FEC makes clear in the guide for Congressional candidates “may be used by committees supporting Presidential candidates,” subject to certain differences for presidential candidates in general and, in particular, presidential candidates seeking public funding. *Id.* at iii. No differences exist in the application of federal law “testing the waters” provisions to congressional candidates versus presidential candidates.

- 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.²¹⁸

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.²¹⁹

Notice that the operative act in the example that converts Jones from “testing the waters” to full-fledged candidacy is Jones deciding to run. What happens if an individual makes a decision, but does not share that decision with others—or at least not with anyone who will break the candidate’s confidence?

2. FEC Regulations

The FEC “campaign guide” quoted above paraphrases and cites the FEC’s two “testing the waters” regulations, 11 C.F.R. sections 100.72 and 100.131, which were promulgated

²¹⁸ *Id.* at 1 (citations omitted) (citing 11 C.F.R. §§ 100.72(a)-(b) and 100.131(a)-(b)).

²¹⁹ *Id.* at 2 (emphasis added).

by the FEC in 1985²²⁰ to amend the original “testing the waters” regulation promulgated in 1977.²²¹

The 1977 rule simply 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.²²² The FEC explained: “This exception was made so that an individual is not discouraged from ‘testing the waters’ to determine whether his candidacy is feasible.”²²³

The FEC’s 1985 amendments to the rules made a significant change to the prior rules. In several advisory opinions in the early 1980s, the FEC had concluded that the prior 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.²²⁴ 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.”²²⁵ The 1985 rules overrode the earlier advisory opinions and prohibited the use of funds in excess of contribution limits or from prohibited sources to pay for “testing the waters” activities.²²⁶

The 1985 “testing the waters” regulations, which remain in effect today, are structured as exceptions to the definitions of “contribution” and “expenditure.” In other words, but for these regulations, the activities described therein would be “contributions” and “expenditures” under federal law—funds raised/spent “for the purpose of influencing” a federal election—and, therefore, would trigger the requirement that the candidate set up a principal campaign committee when they exceeded \$5,000. Instead, because of these exceptions, so long as an individual uses candidate-permissible funds, the individual can “test the waters” without registering a principal campaign committee with the FEC.

Section 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

²²⁰ See Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992 (Mar. 13, 1985) (Final Rules and Explanations and Justification), available at http://www.fec.gov/law/cfr/ej_compilation/1985/50fr9992.pdf.

²²¹ 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.

²²² *Id.*

²²³ *Id.*

²²⁴ Payments Received for Testing the Waters Activities, 50 Fed. Reg. at 9994 (internal citations omitted) (citing Advisory Opinions 1982-19 and 1983-09).

²²⁵ *Id.*

²²⁶ *Id.*

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.²²⁷

Section 100.131 of the FEC's regulations contain 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."²²⁸ And section 101.3 establishes the requirement that candidates disclose the funds they used to "test the waters."²²⁹

After the 1985 "testing the waters" rulemaking that produced these regulations, the FEC did not revisit this issue in a rulemaking proceeding until 2001-03, when it promulgated rules making clear that certain expenses benefiting presidential candidates, paid for by federal multicandidate PACs before the candidate announces her 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.

²²⁷ 11 C.F.R. § 100.72 (emphasis added).

²²⁸ *Id.* § 100.131.

²²⁹ *Id.* § 101.3.

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 calendar year contribution limit. However, the regulations allow a cure—if the candidate committee reimburses the multicandidate PAC, all is well under the FEC’s regulations.

Section 9034.10 states:

(a) A payment by a multicandidate political committee is an in-kind contribution to, and qualified campaign expense by, a Presidential candidate, even though made before the individual becomes a candidate under 11 CFR 100.3 and 9032.2, if—

(1) The expenditure is made on or after January 1 of the year immediately following the last Presidential election year;

(2) 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

(3) The goods or services are—

(i) Polling expenses for determining the favorability, name recognition, or relative support level of the candidate involved;

(ii) 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;

(iii) 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

(iv) Expenses of individuals seeking to become delegates in the Presidential nomination process.

(b) Notwithstanding paragraph (a) 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 and a qualified campaign expense of the candidate.²³⁰

Section 9034.10 applies to presidential candidates participating in the public financing program. Very similar language was added as section 110.2(1)—a section of the regulations pertaining to all multicandidate political committees—to encompass the same

²³⁰ *Id.* § 9034.10 (emphasis added).

activities when engaged in by presidential candidates not participating in the public financing program.²³¹ The FEC explained:

These provisions were designed to address situations where unauthorized political committees 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.²³²

The FEC’s explanation of these rules makes clear that the FEC deems the activities covered by the rules to be “testing the waters” activities. “The covered expenses in the new rules at 11 CFR 110.2(l) and 9034.10 would not trigger candidacy themselves, but would count as contributions in-kind and/or qualified campaign expenses if and when the individual benefiting becomes a candidate, including by operation of 11 CFR 100.72(b) and 100.131(b).”²³³

Based on the FEC’s regulations, we know that, at the very least, the following activities constitute “testing the waters” activities. Consequently, these activities must be paid for with funds raised under the \$2,700 candidate contribution limit and subject to the federal law ban on corporation and labor union contributions:

- Conducting a poll for the purpose of determining whether an individual should become a candidate;²³⁴
- Telephone calls for the purpose of determining whether an individual should become a candidate;²³⁵
- Travel for the purpose of determining whether an individual should become a candidate;²³⁶
- Polling expenses for determining the favorability, name recognition, or relative support level of the candidate involved;²³⁷
- 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;²³⁸ and
- 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.²³⁹

²³¹ *Id.* § 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).

²³² Presidential Candidates E&J, 68 Fed. Reg. at 47407.

²³³ *Id.*

²³⁴ *See* 11 C.F.R. §§ 100.72 and 100.131.

²³⁵ 11 C.F.R. §§ 100.72, 100.131.

²³⁶ 11 C.F.R. §§ 100.72, 100.131.

²³⁷ *See* 11 C.F.R. §§ 110.2(l), 9034.10.

²³⁸ 11 C.F.R. §§ 110.2(l), 9034.10.

3. FEC Advisory Opinions and Enforcement Actions

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 were attempting to stretch the boundary of activities that could be funded without forming a presidential candidate committee—but they were still paying for the activities using 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,” in order to pay for pre-candidacy activities with funds raised outside the candidate contribution restrictions.

a. Advisory Opinion 1981-32 (Askew)

In Advisory Opinion 1981-32, for example, former Florida Governor Reubin Askew sought guidance from the FEC in July 1981—more than three years before the presidential election—regarding 14 specific activities he hoped to conduct in order to “test the waters” of a presidential candidacy without forming a principal campaign committee. Unlike many of today’s prospective presidential candidates, Askew had every intention of paying for the activities using funds raised in compliance with the candidate contribution restrictions, but 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. His request pertained to the following activities:

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.

²³⁹ 11 C.F.R. §§ 110.2(l), 9034.10.

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.²⁴⁰

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.²⁴¹

The FEC then went on and, perhaps unwittingly, provided some advice for how to stay out of "candidate" status. The Commission advised:

This means that any oral or written statements by Governor Askew, or by others who assist in any of the 14 activities, may not refer to him as a

²⁴⁰ FEC Advisory Opinion 1981-32 (Askew) at 2-3.

²⁴¹ *Id.* at 4 (emphasis added).

presidential candidate. For example, any name selected for the testing the waters effort must avoid expressions such as “Askew for President,” or “Askew in ‘84,” etc.²⁴²

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 also made clear that prospective presidential candidates could do a whole lot of campaign building without legally becoming “candidates.”

Nevertheless, the Commission emphasized that if the proposed activities took “place in a factual context indicating that Governor Askew ha[d] moved beyond the deliberative process of deciding to become a candidate, and into the process of planning and scheduling public activities designed to heighten his political appeal to the electorate,” then the activity would cease to be within the “testing the waters” exemption, and “candidacy would arise.”²⁴³ And Governor Askew’s request made clear that many of the activities being engaged in today by 2016 prospective presidential candidates were clearly considered in 1981 to be “testing the waters” activities that had to be paid for with candidate-permissible funds.

b. Advisory Opinion 1982-03 (Cranston)

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. As was the case with Governor Askew in Advisory Opinion 1981-32, Senator Cranston fully intended to pay for such activities with candidate-permissible funds. Unlike so many prospective 2016 presidential candidates, evasion of the candidate contribution limit was not Senator Cranston’s goal. Senator Cranston sought confirmation that the following activities constituted “testing the waters” activities:

1. Travel by the Senator, committee members and perhaps others for the purpose of “testing the waters,” including speaking to groups on a variety of public issues and meeting with opinion makers.
2. Reimbursement of certain expenses incurred by the Senator, committee members and perhaps others for the purpose of “testing the waters,” including some expenses which, if the Senator were to become a candidate, would be contributions to the committee if not reimbursed.
3. Hiring independent contractors in such fields as polling, political consulting, public opinion, communications or research for specific tasks relating to “testing the waters.”
4. Compiling and maintaining information concerning persons who indicate an interest in the possible candidacy of Senator Cranston. There will be no expenditures for mass mailings to such persons or to the general public.

²⁴² *Id.*

²⁴³ *Id.* at 5.

5. Organizing advisory groups on critical and substantive issues requiring expertise and particularized knowledge.²⁴⁴

The FEC repeated its response to Advisory Opinion 1981-31, advising Cranston:

The Commission is of the opinion that the testing the waters exemptions of the regulations permit all of the activities described in your request provided and only so long as Senator Cranston 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.²⁴⁵

It is again worth noting that many of the activities being engaged in today by prospective 2016 presidential candidates were clearly considered in 1982 to be “testing the waters” activities. Prospective 1984 presidential candidates were paying for these activities with candidate-permissible funds, while prospective 2016 presidential candidates seemingly are not.

Notwithstanding the fact that these prospective 1984 presidential candidates were paying for these activities with candidate-permissible funds, Commissioner Thomas E. Harris wrote a dissenting opinion to Advisory Opinion 1982-03, 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.²⁴⁶

c. Advisory Opinion 1985-40 (Baker / Republican Majority Fund)

Prior to the 1984 presidential election, “testing the waters” advisory opinion requests focused on the legal line between “testing the waters” and candidacy, with requestors steadily expanding the scope of activities that could be conducted to “test the waters” without immediately registering a political committee and filing disclosure reports—but all the while using funds raised under the candidate contribution restrictions to pay for such activities.

In the run-up to the 1988 election, however, prospective candidates’ advisory opinion requests shifted focus to the legal line between non-candidacy and “testing the waters”—

²⁴⁴ FEC Advisory Opinion 1982-03 (Cranston) at 2.

²⁴⁵ *Id.* at 4.

²⁴⁶ Dissenting Opinion of Comm’r Thomas E. Harris at 1, FEC Advisory Opinion 1982-03.

in an effort 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 the “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 PACs newsletter.²⁴⁷

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.”²⁴⁸ Baker and RMF sought the FEC’s opinion as to 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” that must be treated as in-kind contributions from RMF to Baker, subject to the \$5,000 limit on contributions from multicandidate PACs to candidates, or paid for with candidate-permissible funds.

For example, RMF and Baker explained that “Mr. Baker has 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” and described these events as “cattle shows” that would “be attended by party officials, party activists, elected officeholders, political consultants, and the press.” RMF and Baker conceded that “Mr. Baker’s remarks at such events will indicate his potential interest in, and his ongoing consideration of whether to seek, the 1988 Republican presidential nomination.”²⁴⁹ 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 travel expenses and hospitality suite rentals for these events constituted “testing the waters” activity. Accordingly, the FEC advised that RMF expenditures to defray travel costs for such appearances would constitute in-kind contributions to Baker’s “testing the waters” fund subject to candidate contribution limits.²⁵⁰

Similarly, RMF and Baker explained that Baker planned to “travel to early primary and convention states to meet privately with Republican Party leaders to seek their views on whether he should seek the 1988 Republican presidential nomination.”²⁵¹ The FEC concluded: “Mr. Baker will be undertaking travel for these private meetings to determine whether he should become a candidate. Thus, the Commission concludes that travel for such private meetings will constitute testing-the-waters activity” that must be paid for with candidate-permissible funds.²⁵²

²⁴⁷ FEC Advisory Opinion 1985-40 (Baker / Republican Majority Fund) at 1-2.

²⁴⁸ *Id.* at 2.

²⁴⁹ *Id.* at 6.

²⁵⁰ *Id.* at 6-7.

²⁵¹ *Id.* at 8.

²⁵² *Id.* (emphasis added).

Baker and RMF also planned to organize “steering committees in certain states, such as Iowa and New Hampshire, which will hold early caucuses and primaries in connection with the 1988 Republican presidential nomination.”²⁵³ The members “will be requested to (1) advise and consult with RMF regarding its contributions to candidates for Federal, state, and local offices in such states; (2) encourage Mr. Baker to seek the 1988 Republican presidential nomination; and (3) remain uncommitted to any other potential candidate for such nomination until Mr. Baker decides whether to become a candidate.”²⁵⁴ Baker and RMF further explained that “in certain instances such steering committee members will be requested to join the committee with the understanding that it will become the official campaign organization supporting Mr. Baker in that state if he should become a candidate.”²⁵⁵ The Commission concluded that “the setting up of these RMF steering committees will constitute in-kind support for Mr. Baker’s testing-the waters activities, and will be subject to the \$5,000 limit.”²⁵⁶

The RMF/Baker advisory opinion makes sense and acknowledges the obvious—that attending and addressing state political party conferences in conjunction with appearances by other reported potential contenders, traveling to states for private meetings with party leadership to gauge support of a possible candidacy, and setting up “steering committees” in early caucus/primary states constitute classic “testing the waters” activities that must be paid for with candidate-permissible funds.

After testing the waters, Baker decided not to run for the Republican Party’s 1988 presidential nomination.

d. Advisory Opinion 1986-06 (George H.W. Bush / Fund for America’s Future)

Less than two months after Mr. 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 Vice President George H.W. Bush, requested an advisory opinion regarding activities that FAF and Vice President 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.”²⁵⁷ At the time of its request, FAF had “made contributions to Republican Party organizations in Arizona, California, Iowa, Michigan, New Jersey, Ohio, Oregon,

²⁵³ *Id.* at 9.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ FEC Advisory Opinion 1986-06 (George H.W. Bush / Fund for America’s Future) at 1.

South Dakota, Virginia, and Washington” and had “contributed to more than 100 Republican candidates for local, state, and Federal office.”²⁵⁸

According to FAF, its “party-building and direct candidate support activities necessitate publications, fundraising solicitations, and travel and speechmaking by the Vice President, other Fund officials, and other well-known Republicans” and that the “Vice President’s and the Fund’s activities in this regard [would] increase as the 1986 election season continue[d].”²⁵⁹

FAF represented that Vice President Bush was not a candidate at the time of its request and that he would not consider any potential candidacy until after the 1986 midterm elections.²⁶⁰ But FAF was “concerned that the Commission may view its expenditures for activities in support of the Republican Party and Republican candidates as allocable toward any potential future candidacy by the Vice President in 1988.”²⁶¹ In other words, FAF was concerned that the FEC might conclude that the proposed activities constituted “testing the waters” by Bush, requiring payment with candidate-permissible funds.

The FEC explained:

The Fund’s proposed activities described in [its] request include: (1) appearances by the Vice President on behalf of Republican candidates and the Republican Party; (2) references to the Vice President in the Fund’s publications and solicitations; (3) the establishment and operation of the Fund’s steering committees; (4) the Fund’s program to organize volunteers for the Republican Party; and (5) the Fund’s recruitment and financial assistance to persons seeking election to party offices, particularly with regard to the Michigan precinct delegate election in August 1986.²⁶²

The FEC concluded that the first four activities could be undertaken subject to some restrictions described below, and that the fifth activity does not necessarily involve candidate-related activities and was therefore permissible.²⁶³

As for the FEC’s requirement that the activities be restricted in some fashion, the Commission explained, for example:

According to your description of the Fund’s proposed activity, the only references to any potential candidacy by the Vice President in 1988 at his appearances in 1986 will be made “in an incidental manner or in response to questions by the public or press.” In the Commission’s view, this

²⁵⁸ *Id.* at 1-2.

²⁵⁹ *Id.* at 2.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 3.

²⁶³ *Id.*

statement should be narrowly interpreted to apply only to incidental contacts and incidental remarks, such as those in response to questions. Thus, the Commission assumes that it excludes 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 1988.²⁶⁴

The FEC further explained that the “Fund has established steering committees with members from every state” with the purpose “to involve local party officials, leaders, and officeholders in the Fund’s activities and to permit them to advise and consult with the Fund concerning contributions to Republican candidates for Federal, state, local, and party office in such states.”²⁶⁵ The Commission then “note[d] that the establishment of steering committees by itself is a permissible activity for a multicandidate political committee” and the Commission “assume[d] that the Fund’s steering committee’s activities will only be related to the Fund’s stated purposes of aiding the Republican Party and Republican candidates and will not be related to any potential candidacy by the Vice President in 1988, such as the formation of a campaign organization on the Vice President’s behalf or participation in the presidential nomination process, such as the delegate selection process, on his behalf.”²⁶⁶

Similarly, the Fund established a “volunteer program” in states throughout the nation for the same purposes, “include[ing] the establishment of local offices in many states in order to identify, encourage, and organize Republican volunteers and make it possible for them to play a role in local party efforts and campaigns.”²⁶⁷ The FEC explained that the Fund’s “description of this proposed activity makes no reference to the Vice President or any 1988 candidacy by him. Thus, by implication, [the Fund’s] description suggests that the Fund will not conduct this activity in order to benefit any potential candidacy by the Vice President in 1988, such as the formation of a campaign organization on the Vice President’s behalf or participation in the presidential nomination process, such as the delegate selection process, on his behalf.”²⁶⁸

With respect to all of these activities, the FEC took FAF at its word that the purpose of the activities was aid the Republican Party and Republican candidates running in the 1986 midterm election—not to aid or benefit any potential candidacy by Vice President Bush in 1988. And the Commission made clear that any references to potential candidacy by the Vice President in 1988 during the proposed 1986 activities must be truly incidental, with incidental interpreted “narrowly” to apply, for example, to remarks in response to questions and excluding “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.”²⁶⁹

²⁶⁴ *Id.* at 4 (emphasis added).

²⁶⁵ *Id.* at 6.

²⁶⁶ *Id.* (emphasis added).

²⁶⁷ *Id.* at 6-7.

²⁶⁸ *Id.* at 7 (emphasis added).

²⁶⁹ *Id.* at 4.

Although the Commission's majority circumscribed the activities it approved as detailed above, Commissioner Harris dissented and wrote the passage quoted at the outset of Section III of this paper:

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.²⁷⁰

The Commission's Vice Chairman John Warren McGarry also dissented, on the ground 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."²⁷¹

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. Nevertheless, it is worth pointing out important distinctions between the activities proposed by Vice President Bush/FAF and those being conducted today by so many prospective 2016 presidential candidates.

Whereas the Bush/FAF activities that the Commission accepted as not "testing the waters" in Advisory Opinion 1986-06 were to take place in 1986, a midterm election year, prospective 2016 presidential candidates are engaging in such activities today, in the year immediately preceding a presidential election, with no valid claim to be supporting the Republican Party in general or Republican candidates running in Congressional, state and local elections. Also, whereas "the only references to any potential candidacy by the Vice President in 1988 at his appearances in 1986" would be incidental ones, or in response to questions by the public or press, such is not the case for many 2016 prospective presidential candidates, who repeatedly and very publicly discuss their possible presidential campaigns without any prodding at all.

For these reasons, Advisory Opinion 1986-06 simply cannot reasonably be read as permitting the types of activities so common among prospective presidential candidates today. And it marks the last time the FEC considered the boundaries of "testing the waters" in any detail in an advisory opinion.

²⁷⁰ Comm'r Harris Dissenting Opinion at 1, FEC Advisory Opinion 1986-06.

²⁷¹ Vice Chairman McGarry Dissenting Opinion at 1, FEC Advisory Opinion 1986-06.

e. Matter Under Review 2262 (Robertson)

In October 1986, a complaint was filed against Reverend Pat Robertson alleging that Robertson was violating federal campaign finance laws because the complainant believed that Robertson's activities "clearly identif[ied] Mr. Robertson's ambitions and goals and on the basis of these facts and the law . . . the Commission should conclude that Mr. Robertson has, as a matter of law, established himself as a candidate for nomination by the Republican Party as president of the United States."²⁷²

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." 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."²⁷³ 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."²⁷⁴ More than \$4 million in expenditures were made in connection with the broadcast and, in response to 1.6 million fundraising letters were sent out in conjunction with the event, Americans for Robertson reported receipt of \$2.3 million in return.²⁷⁵ 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."²⁷⁶

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.²⁷⁷ Not until October 1987 did Robertson and Americans for Robertson file registration and disclosure paperwork with the FEC required by a candidate and authorized committee.²⁷⁸ Robertson and Americans for Robertson, the FEC concluded, had violated federal law by failing to register with and report to the FEC in 1986.²⁷⁹

Conclusion

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 "testing the waters" activities must be paid for with candidate-permissible funds (\$2,700

²⁷² Complaint, MUR 2262, at 3, available at http://fec.gov/disclosure_data/mur/2262.pdf.

²⁷³ *Id.* at 2.

²⁷⁴ Conciliation Agreement, MUR 2262, at 4, available at http://fec.gov/disclosure_data/mur/2262.pdf.

²⁷⁵ *Id.* at 4-5.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 5-6.

²⁷⁸ *Id.* at 2-3.

²⁷⁹ *Id.* at 6.

limit, no corporate/union funds). “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;²⁸⁰
- Telephone calls for the purpose of determining whether an individual should become a candidate;²⁸¹
- Travel for the purpose of determining whether an individual should become a candidate;²⁸²
- Polling expenses for determining the favorability, name recognition, or relative support level of the candidate involved;²⁸³
- 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;²⁸⁴
- 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;²⁸⁵
- 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;²⁸⁶
- Travel expenses for private meetings with state party leadership to gauge support of a possible candidacy;²⁸⁷ 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.²⁸⁸

The FEC is responsible for enforcing the contribution limits and has the capacity to conduct investigations of prospective candidates, to determine, for example, precisely what 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.

Statements such as Jeb Bush’s acknowledgement that he has “decided to actively explore the possibility of running for President of the United States,” combined with his establishment of a multicandidate PAC and super PAC and the widely-reported fact that

²⁸⁰ 11 C.F.R. §§ 100.72 and 100.131.
²⁸¹ 11 C.F.R. §§ 100.72 and 100.131.
²⁸² 11 C.F.R. §§ 100.72 and 100.131.
²⁸³ 11 C.F.R. §§ 110.2(l) and 9034.10.
²⁸⁴ 11 C.F.R. §§ 110.2(l) and 9034.10.
²⁸⁵ 11 C.F.R. §§ 110.2(l) and 9034.10.
²⁸⁶ See FEC Advisory Opinion 1985-40 at 6-7.
²⁸⁷ See *id.* at 8.
²⁸⁸ See *id.* at 9.

he is building a campaign team is enough to warrant a close examination by the FEC. Similarly, Governor Walker's establishment of Our American Revival and his opening of an office in Iowa warrants close examination by the FEC.

It is important to keep what is currently going on in perspective. While it may be true that many politicians at one time or another think about running for president, no one has ever suggested that inchoate aspirations and blue sky thoughts are the same as "testing the waters." And it is also true that it is sometimes difficult to find the line where aspirations become the intention and purpose to undertake specific activity. Likewise, there is no doubt that there are current and former officeholders and other public figures who are raising money to support their party and its candidates, with no serious thought of running for president. But in order for the corruption-preventing candidate contribution restrictions to be effective in this new age of unlimited super PAC fundraising and spending, some difficult lines will have to be drawn. The FEC struggled with such line-drawing in the 1970s-80s, too often turning a blind eye to what appeared to be "testing the waters" or actual candidate activity if the activity occurred before the midterm election. Yet even the too-often-feckless FEC had previously insisted in its Advisory Opinions and rare enforcement efforts that individuals make some effort to avoid the theater of the absurd by using only candidate-permissible funds to pay for activities that only make sense if the person is "testing the waters" or actually running for office.

Today, even the FEC's meager limits are being flouted by prospective 2016 presidential candidates and the Commission appears to be doing nothing in response. The FEC needs to step up its enforcement of the federal law requirement that "testing the waters" activities be paid for with candidate-permissible funds.

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 his repeated trips to Iowa and New Hampshire less than one year before the state's presidential caucus/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 2016 presidential run, it might be difficult to prove in a court of law that such an individual is lying.

Journalists and voters should ask prospective 2016 presidential candidates, 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—and typically doing it all through a political committee of one type or another that exists for the purpose of influencing candidate elections. Prospective 2016 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.