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# *They Claim They're Not Ducks: Federal Campaign Finance Law and Presidential Pre-Candidacy Activity*

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## Executive Summary

For months, reporters have been writing about prospective presidential candidates raising and spending millions of dollars through a myriad of political organizations other than presidential campaign committees (*e.g.*, 527 organizations, state PACs, federal leadership PACs), focusing their activities in early presidential caucus/primary states, and accepting contributions in amounts that far exceed the federal candidate $2,500 contribution limit and from sources, namely corporations, that are prohibited from making contributions to federal political committees. Remarkably, until March 3, 2011, not a single major player had admitted they were even "testing the waters" for a presidential run.

We have all heard the adage: "If it walks like a duck and quacks like a duck, you can be reasonably sure it is a duck." Well these folks are walking like prospective candidates, talking like prospective candidates, but claiming they are not "testing the waters" of candidacy. They are in denial because if they admitted what is obvious to all, that they are "testing the waters," they would be subject to a whole set of federal rules and restrictions that they want to avoid for as long as they can.

When do the federal law candidate contribution restrictions kick in? Federal law requires an individual who is "testing the waters" of a federal candidacy—*i.e.*, spending money "for the purpose of determining whether [the] individual should become a candidate"—to pay for those activities with funds raised in compliance with the federal candidate contribution restrictions ($2,500 per individual donor, no corporate/union contributions).

Yet, for example, a political advisor to Mississippi Governor Haley Barbour has acknowledged that Barbour "is giving active consideration to running" for president, but Barbour is raising and spending funds through a Georgia PAC—funds that would be illegal under federal law (*e.g.*, $25,000 corporate contributions)—to buy the Republican Party of Iowa's voter list. Barbour is not alone. Mitt Romney has set up PACs in Iowa, New Hampshire, South Carolina, Michigan and Alabama and is spending millions on staff and consultants focused on early caucus/primary states. Other prospective Republican candidates, as well as prospective Democratic candidates in past election cycles, have done the same thing.

The notion that these individuals are not spending money for the purpose of determining whether they should become candidates strains credulity, yet they continue to ignore the federal candidate contribution restrictions applicable to such activities, which amounts to a refusal to acknowledge that they are "testing the waters" of a presidential campaign.

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 unlimited contributions. Effective "testing the waters" regulations are crucial to protecting the integrity of elections by preventing prospective candidates from accepting potentially-corrupting unlimited contributions.

However, for decades prospective presidential candidates, both Democrats and Republicans alike, have skirted candidate contribution restrictions with an astoundingly high degree of success. Ronald Reagan opened the door to this abuse in 1977 with his "Citizens for the Republic" PAC, which he used to lay the foundation of his 1980 presidential campaign outside the candidate contribution restrictions. By the 1988 election cycle, virtually all serious contenders for the major parties' presidential nominations were raising money outside the candidate contribution restrictions to fund their pre-candidacy activities, prompting one member of the FEC to write in dissent to Advisory Opinion 1986-6:

> 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.

In terms of enforcement, little has changed since 1986, but it is time for change. After detailing the activities of some of the most talked-about likely 2012 presidential candidates in Section I, putting these prospective candidate activities in historical context in Section II, and explaining the relevant federal laws and FEC guidance in Section III, this paper offers some ideas to close this long-existing loophole in federal campaign finance law in Section IV. Specifically, the Campaign Legal Center recommends:

(1) More rigorous enforcement by the FEC of existing regulations requiring "testing the waters" activities to be paid for with funds raised under the $2,500 per election candidate contribution limit, subject to the ban on corporate and union contributions,
(2) Amendment of an existing FEC regulation that creates a presumption that certain activities (*e.g.*, setting up and staffing offices in states other than the candidate's home state) by candidates participating in the public financing system constitute "testing the waters" of a presidential candidacy, to apply to all presidential candidates and any "person" paying the expenses covered by the current regulation, not just to federal leadership PACs covered by the current rule, and
(3) Demand honesty from prospective candidates through pointed questions by journalists and voters. Likely 2012 presidential candidates should be asked, point blank, whether they are spending any money for the purpose of determining whether they should become candidates—*i.e.*, "testing the waters." If they deny that they are "testing the waters," they should be asked why they are traveling repeatedly and often primarily to early caucus/primary states, buying voter lists in those states, staffing offices in those states, etc. Likely 2012 candidates should be required to explain their activities in a manner that passes the smell test. Just because the FEC may let abuse of the law slide, does not mean that voters and journalists have to. A little honesty is not too much to ask of those desiring to become our next president.

## TABLE OF CONTENTS

## Introduction

And they're off again! It's an endurance race, with the finish line set at November 6, 2012. The race's entrants? The presidential candidates, of course. Only, to skirt federal campaign contribution limits, presidential candidates are calling themselves anything but that. We have all heard the adage: "If it walks like a duck and quacks like a duck, you can be reasonably sure it is a duck." Well these folks are walking like prospective candidates, talking like prospective candidates, but claiming they are not "testing the waters" of candidacy in order to avoid federal campaign finance restrictions.

When do the federal law candidate contribution restrictions kick in? 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. If and when that individual decides to run for federal office, the candidate must then 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 not exempt from the contribution restrictions.

Federal law imposes a $2,500 per election limit on contributions from individuals to federal candidates and bans federal candidates and committees from receiving contributions from corporations and labor unions.[1] Again, these restrictions apply to "testing the waters" activities.[2] Yet reporters have for months been writing about suspected presidential candidates using a myriad of political organizations to raise and spend money outside some or all of these federal candidate contribution restrictions.

For the sake of simplicity, I will lump these myriad organizations (*e.g.*, 527 organizations, state political committees, federal multicandidate political committees a.k.a. "leadership PACs") into three categories and use the following short-hand to refer to them: non-federal PACs,[3] federal leadership PACs[4] and presidential candidate committees.[5]

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1 *See* 2 U.S.C. §§ 441a(a)(1)(A) (limiting contributions from individuals to candidates to $2,000 per election), 441a(c)(1)(C) (increasing the contribution limit for changes in the cost of living), 441b(a) prohibiting contributions by corporations and labor unions).

2 11 C.F.R. §§ 100.72, 100.131 and 101.3.

3 In this category, I include any organization not subject to federal "political committee" campaign finance laws—*e.g.*, political committees registered with state campaign finance agencies, 527 organizations that report to the Internal Revenue Service but are not registered as "political committees" anywhere, 501(c)(4) organizations.

4 The term "leadership PAC" is frequently used informally to refer to a political committee registered with the FEC that is <u>not</u> a political party committee, a candidate's authorized principal campaign committee or a corporate/union-connected PAC but, instead, is set up by an individual as a "multicandidate political committee" under the auspices of supporting the candidacies of others. The formal legal definition of "leadership PAC" is limited to a political committee established by federal candidate or officeholder other than that candidate/officeholder's authorized campaign committee. *See* 2 U.S.C. § 434(i)(8)(B). However, I use the term in its informal meaning in this paper.

The first two types of organizations are being used to skirt the $2,500 contribution limit that applies to the third type of organization. The millions of dollars spent by prospective candidates through non-federal PACs and federal leadership PACs are legal only if these individuals are not "testing the waters" of a federal candidacy or if, under limited circumstances discussed in Section III below, the eventual presidential candidate committee reimburses the federal leadership PAC for the "testing the waters" expenditures.[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 consistently upheld laws restricting political contributions to candidates because they reduce the threat of real and apparent corruption.[8] For example, 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. . . .

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Federal "leadership PACs" (a.k.a. multicandidate committees) may receive up to a $5,000 per calendar year per donor and are prohibited from receiving contributions from corporations and labor unions. Leadership PACs may contribute up to $5,000 per election to a candidate. *See* 2 U.S.C. §§ 441a(a)(1)(C), 441a(a)(2)(A), 441b(a). 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 2012 may only accept $2,500 per donor for the 2012 nomination contest (and another $2,500 for the 2012 general election, which cannot be spent unless the candidate wins her party's nomination), a prospective 2012 candidate who set up a leadership PAC in 2009, was permitted to collect from a single donor $5,000 in 2009, $5,000 in 2010 and $5,000 in 2011—without impacting her 2012 candidate contribution limit.

[5] Federal law requires a candidate to designate a registered political committee as her principal campaign committee. Candidates are permitted to authorize additional committees to raise and spend funds on their behalf but, for practical purposes, all of these authorized committees are treated as a single campaign committee subject to the $2,500 contribution limit. *See* 2 U.S.C. § 432(e)-(f).

[6] Technically, conducting "testing the waters" activity through a non-federal PAC or federal leadership PAC is also not illegal if (1) the PAC is only using up to $2,500 per individual donor and is not using any corporate/labor union money to pay for the "testing the waters" activity or (2) the PACs expenditures for "testing the waters" do not exceed $5,000, which is the limit on in-kind contributions from multicandidate PACs to candidates. Complying with these restrictions, however, defeats the whole purpose of utilizing one of these PACs, which is to benefit from looser fundraising restrictions.

[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).

[9] Federal Election Campaign Act, § 101, 88 Stat. 1263 (1974). The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, then increased the candidate contribution limit to $2,000 and provided for its adjustment for changes in the cost of living in every odd-numbered year. In 2012, the limit on contributions from individuals to candidates is $2,500.

> 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 $2,500 for the 2012 presidential election.[11] As detailed in Section I, below, nearly all of the likely 2012 presidential contenders are raising funds in excess of the $2,500 per donor limit and many are raising corporate contributions banned by federal law. Effective "testing the waters" regulations are crucial to protecting the integrity of elections because such rules prevent prospective candidates from accepting large contributions and contributions from prohibited sources (*e.g.*, corporations and labor unions) and thereby ensure that donors cannot purchase undue influence over candidates in the early stages of their campaigns, when money arguably matters most.

This paper aims to explain all of this. Section I details the activities of some of the most talked-about likely 2012 presidential candidates. Section II puts these prospective candidate activities in historical context. Section III discusses relevant federal laws. Finally, Section IV offers some recommendations to close this long-existing loophole in federal campaign finance law.

## I. Prospective 2012 Candidate Activities

Nearly all of the likely candidates in the 2012 presidential election are raising and spending funds outside federal candidate contribution limits, with many also receiving corporate contributions banned by federal law. And though the candidates profiled in this section are all Republicans, this is only because we have a Democratic incumbent president who is unlikely to face a serious challenger from his own party. Over the past decades, Democrats and Republicans alike have used non-federal PACs and federal leadership PACs to skirt candidate contribution restrictions.[12]

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[10] *Buckley*, 424 U.S. 1, 26-27 (1976) (footnote omitted).

[11] The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, then increased the candidate contribution limit to $2,000 and provided for its adjustment for changes in the cost of living in every odd-numbered year. In 2012, the limit on contributions from individuals to candidates is $2,500. *See* 2 U.S.C. §§ 441a(a)(1)(A) and 441a(c).

[12] For example, then-Senator Barak 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* Center for Responsive Politics Summary of 2006 Expenditures by Hope Fund at http://www.opensecrets.org/pacs/expenditures.php?cmte=C00409052&cycle=2006.

Similarly, then-Senator Hillary Clinton spent more than $2.9 million though 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* Center for Responsive Politics Summary of 2006 Expenditures by HILLPAC at http://www.opensecrets.org/pacs/lookup2.php?strID=C00363994&cycle=2006.

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* Center for Responsive Politics

While the ostensible purpose of these non-federal PACs and federal leadership PACs is to enable the controlling individuals to make contributions to candidates they support, in reality very little of the money raised is actually contributed to others. Instead, the money is used to fund political operations focused on Iowa, New Hampshire and other early primary/caucus states.

Mitt Romney, for example, maintains a federal leadership PAC, as well as non-federal PACs in Iowa, New Hampshire, South Carolina, Michigan and Alabama.[13] According to *USA Today*, Romney's federal leadership PAC raised $7.4 million in 2010, but contributed only $827,708—less than 12%—to other candidates and committees.[14] The rest was absorbed by fundraising, staff and other administrative costs. Similarly, according to the *New York Times*, his Alabama PAC, which is 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."[15] The *New York Times* reported that a "vast majority of the just over $300,000 Mr. Romney's Alabama PAC has reported spending this year has 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."[16]

Romney's not alone. *Politico* reported last month that Newt Gingrich raised more than $14 million dollars in 2010 through both his non-federal PAC, the 527 group American Solutions for Winning the Future ($13.7 million), and his federal leadership PAC American Solutions PAC ($737,000).[17] *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.[18]

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Summary of Expenditures by CHRIS PAC at http://www.opensecrets.org/pacs/lookup2.php?strID=C00391961&cycle=2006.

[13] 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.

[14] 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.

[15] 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.

[16] *Id.*

[17] Kenneth P. Vogel, *Newt Gingrich haul far outpaces other 2012 hopefuls*, POLITICO (Feb. 4, 2011), http://www.politico.com/news/stories/0211/48864.html.

[18] *Id.*

According to *Financial Times* and the Center for Responsive Politics, $6.5 million of the funds raised by American Solutions for Winning the Future since the 2006 election cycle came from people associated with Las Vegas Sands, a big U.S. gambling corporation with international operations that is currently under federal investigation over compliance with anti-bribery laws.[19] Federal contribution restrictions were enacted to prevent the threat of real and apparent corruption posed by such huge special interest contributions.

Mississippi Governor Haley Barbour likewise maintains a federal leadership PAC and a non-federal PAC in Georgia. Yes, you read that correctly. The Governor of Mississippi maintains a PAC in Georgia, probably because of the state's lax campaign finance laws. Barbour's top political adviser, his nephew Henry Barbour, has explained his uncle's motives: "Now that he is giving active consideration to running, having the PACs does complement that interest in running in 2012."[20] Sounds like an admission that Barbour is "testing the waters," if I've ever heard one. Barbour's federal leadership PAC raised $1.1 million in 2010 and gave just $233,590, about 21%, to other candidates and committees.[21] Barbour's expenditures out of his Georgia PAC included payment of more than $207,000 to consultants and $3,100 to purchase of an Iowa voter list—indeed a peculiar purchase by an individual who does not acknowledge that he is "testing the waters" of a 2012 presidential run.[22] As for Georgia's lax campaign finance laws, Barbour's Georgia PAC has received multiple $25,000 corporate contributions, which would be illegal under federal campaign finance law due both to their size and their corporate source if used to pay for "testing the waters" activities.[23]

Sarah Palin's federal leadership PAC raised $5.4 million in 2010 and gave just $516,500—less than 10%—to other candidates and committees.[24] The list of likely 2012

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[19] Stephanie Kirchgaessner, Inquiry into gambling group threatens to hurt Gingrich, FINANCIAL TIMES (March 2, 2011), http://www.ft.com/cms/s/0/8e2dcf22-4512-11e0-80e7-00144feab49a.html#axzz1FV04UhVX.

[20] 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.

[21] *Id*.

[22] *See*, *e.g.*, Haley's Leadership PAC's September 30, 2010 disclosure report at http://www.ethics.georgia.gov/Reports/Campaign/Campaign_ByExpenditures_RFR.aspx?NameID=6359&FilerID=NC2009000067&CDRID=28748&Name=Haley%27s%20Leadership%20PAC&Year=2010&Report=September%2030th%20-%20Election%20Year; *see also* 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.

[23] *See*, *e.g.*, Haley's Leadership PAC's October 25, 2010 disclosure report at http://ethics.georgia.gov/Reports/Campaign/Campaign_ByContributions_RFR.aspx?NameID=6359&FilerID=NC2009000067&CDRID=30158&Name=Haley%27s%20Leadership%20PAC&Year=2010&Report=October%2025th%20-%20Election%20Year; *see also* Haley's Leadership PAC's September 30, 2010 disclosure report at http://ethics.georgia.gov/Reports/Campaign/Campaign_ByContributions_RFR.aspx?NameID=6359&FilerID=NC2009000067&CDRID=28748&Name=Haley%27s%20Leadership%20PAC&Year=2010&Report=September%2030th%20-%20Election%20Year.

[24] 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.

candidates using non-federal PACs and federal leadership PACs to skirt the federal candidate contribution restrictions goes on.[25]

If recent media reporting on the subject is accurate, then many of the activities being paid for with non-federal PAC and federal leadership PAC funds fall within the scope of what the FEC considers to be "testing the waters" activity (*i.e.*, funds spent "for the purpose of determining whether an individual should become a candidate") and therefore must be paid for with funds raised in compliance with the federal law $2,500 per election candidate contribution limit and the ban on corporate and union contributions.

To be certain, prospective candidates have reported using non-federal PACs and federal leadership PACs to make contributions to other candidates for local, state and federal office. But watchdog and media reports indicate that such contributions to candidates comprise a small percentage of total disbursements by these committees. One can compare the use of leadership PAC funds of 29-year old Illinois Congressman Aaron Schock, a relatively junior status politician who clearly is not seeking the presidency,[26] or those of Congresswoman Nancy Pelosi who is also clearly not seeking the presidency in 2012,[27] with those of prospective 2012 presidential contender Mike Huckabee.[28] While the Schock spent 87% of leadership PAC funds on contributions to other candidates and Pelosi spent about 80% on such contributions, Huckabee spent only 13.5% on contributions to other candidates. The media has captured even more suspect spending from the prospective candidates' state PACs (*e.g.*, when an Alabama state PAC doles out $21,500 in contributions to Alabama candidates, but uses fifteen times more than that amount, and from the same PAC, to pay the administrative costs and salaries of the Boston-based federal leadership PAC).[29] The bulk of the funds raised by prospective presidential candidates through state committees and federal leadership PACs has been spent on travel, staff and national consultants; and it's this spending on activities in or directly connected to early presidential primary states—amounting to roughly four out of every five dollars raised—that seems to fall within the scope of the FEC's "testing the waters" regulations.

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[25] Earlier this month, the Center for Responsive Politics launched a page on its Web site dedicated to "tracking how notable presidential hopefuls—both confirmed and unconfirmed—are preparing for campaign battles ahead . . . ." *See* http://www.opensecrets.org/pres12/index.php. And in late January, the National Institute on Money in State Politics published a report entitled *2012 Presidential Contenders: State PACs Rev Up the Race*, which analyzes use of state political committees by likely presidential contenders. *See* http://www.followthemoney.org/press/ReportView.phtml?r=441. Both are valuable resources for those studying how likely 2012 presidential candidates are circumventing federal campaign finance laws.

[26] *See* Center for Responsive Politics Summary of 2010 Expenditures by Schock's federal leadership PAC, GOP Generation Y Fund at http://www.opensecrets.org/pacs/expenditures.php?cmte=C00448191&cycle=2010.

[27] *See* Center for Responsive Politics Summary of 2010 Expenditures by Pelosi's federal leadership PAC, PAC to the Future at http://www.opensecrets.org/pacs/expenditures.php?cmte=C00344234&cycle=2010.

[28] *See* Center for Responsive Politics Summary of 2010 Expenditures by Mike Huckabee's federal leadership PAC, Huck PAC: http://www.opensecrets.org/pacs/expenditures.php?cmte=C00448373&cycle=2010.

[29] 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.

## II. Not a New Problem—A Historical Perspective

Prospective presidential candidates' use of federal leadership PACs and non-federal PACs 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.[30]

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 formed Citizens for the Republic,[31] a federal leadership PAC, which enabled Reagan to use $1.6 million left over from his 1976 presidential campaign to begin his 1980 campaign. 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.[32] 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 fund 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.[33]

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

31 *Id.* at 2.

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

33 CORRADO at 2 (endnote omitted) (emphasis added).

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.[34] 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 law[35] and must register a candidate campaign committee with the FEC within 15 days.[36]

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, "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 simply supporting other candidates and causes he liked. By doing so, Reagan raised funds under the $5,000 per year leadership PAC contribution limit, instead of under the then-$1,000 (now $2,500) 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 1979 and then hitting up the same supporters again for a $1,000 contribution to his candidate campaign committee.

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 [FECA]. A new loophole in the campaign finance system was thus created."[37]

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 leadership PACs (Reagan, Bush, Connally and Dole).[38] Leading up to the 1984 election, five of the nine major presidential candidates sponsored leadership PACs, with Walter Mondale becoming the first Democrat to take advantage of the leadership PAC strategy.[39] And, according to Corrado, a "virtual explosion in the number of candidate-sponsored PACs occurred in advance of the 1988 prenomination contest."[40]

This "virtual explosion" prior to the 1988 presidential election is noteworthy because, while nine of the fourteen major presidential candidates established federal leadership 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

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34 2 U.S.C. § 431(9)(i) (defining "expenditure").
35 *See* 2 U.S.C. § 431(2) (defining "candidate").
36 *See* 2 U.S.C. § 432(e)(1).
37 CORRADO at 4.
38 *Id.* at 73.
39 *Id.* at 76.
40 *Id*. at 77.

Jesse Jackson set up nonprofit organizations, the Center for a New Democracy and the National Rainbow Coalition, respectively, which were not registered as PACs anywhere.[41]

The significance of this development in the 1988 election cycle cannot be overstated. Although the use of federal leadership PACs to skirt the candidate contribution limit was an unfortunate development in campaign practice that undermined federal campaign finance law, at least those working through a federal leadership 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, all of the vehicles popular today for skirting federal candidate contribution limits were in use—federal leadership PACs, state PACs and various nonprofit entities. Several developments in the law, discussed in Section III, have slightly changed the way these entities are used, but by and large, little has changed since the 1988 presidential cycle when it comes to money raised outside the candidate contribution limits by presidential candidates before officially declaring their candidacy.

## 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.

FEC Ad. Op. 1986-6, Commissioner Harris Dissenting Opinion.

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. The same could easily be written today about a large handful of individuals raising and spending millions of dollars through federal leadership PACs and non-federal PACs. Little has changed in law and practice. Likely candidates and the FEC continue playing the same charade.

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41 *Id.*

### 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.[42] In 1910, campaign finance disclosure requirements were first incorporated into federal law.[43] More than 65 years ago, the War Labor Disputes Act extended the contribution prohibition to labor unions.[44] But these campaign finance laws went largely unenforced until the 1974 amendments to the Federal Election Campaign Act (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.

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 regulations[45] 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.[46] The limit is $2,500 for the 2012 federal elections.[47] Second, BCRA banned federal candidates and officeholders from raising funds in connection with any election unless the funds comply with the federal law contribution limits and the ban on corporation and labor union contributions. Consequently, federal officeholders planning to campaign for the presidency are prohibited from setting up non-federal PACs to lay the foundation of their presidential campaign unlike, for example, former governors, who can and do establish non-federal PACs. BCRA did not, however, prohibit a federal officeholder from setting up a federal leadership PAC, so leadership PACs continue to be used by incumbent federal officeholders to fund such activities.

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42 Tillman Act, 34 Stat. 864 (1907).

43 Publicity Act of 1910, 36 Stat. 822 (1910).

44 War Labor Disputes Act, 57 Stat. 163 (1943).

45 *See* "Explanation and Justification for 1977 Amendments to Federal Election Campaign Act of 1971," House Document No. 95-44 (January 12, 1977), *available at* http://www.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf.

46 Federal Election Campaign Act, § 101, 88 Stat. 1263 (1974). The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, then increased the candidate contribution limit to $2,000 and provided for its adjustment for changes in the cost of living in every odd-numbered year. In 2012, the limit on contributions from individuals to candidates is $2,500.

47 *See* FEC**,** *FEC Announces 2011-2012 Campaign Cycle Contribution Limits* (Feb. 3, 2011), http://www.fec.gov/press/20110203newlimits.shtml.

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 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.[48,49]

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."[50]

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."[51]

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.

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[48] 2 U.S.C. § 432(2) (emphasis added).

[49] As an aside, subsection (B) 2 U.S.C. § 432 is somewhat relevant to recent news reports of Ambassador Jon Huntsman and speculation that Huntsman will run for president when he leaves his post in China later this year. Supporters of Huntsman recently set up a federal leadership PAC sporting a large "H" as its logo, Horizon PAC, which spurred media inquiries regarding the purpose of the PAC and whether Huntsman is involved in its operation. In addition to the legal issues explored in this paper, Huntsman's situation involves the additional layers of the Hatch Act and State Department rules, which severely limit the ability of ambassadors to engage in political activity. Examination of the Hatch Act and State Department rules is beyond the scope of this paper, but Huntsman's and Horizon PAC's activities illustrate a scenario in which a committee or group of persons might act "on behalf of" an individual—a possibility reflected in subsection (B) of the definition of "candidate."

[50] 2 U.S.C. § 431(8)(A)(i) (emphasis added).

[51] 2 U.S.C. § 431(9)(A)(i) (emphasis added).

### 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."[52] 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.[53]

Unlike non-federal PACs, which are subject to the reporting and disclosure laws of the jurisdictions in which they were created, Presidential candidate committees and federal leadership 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.[54] Non-federal PACs may or may not be subject to reporting and disclosure requirements, depending on the precise legal status of the organization (*e.g.* state PAC, 527 organization, 501(c)(4) organization, etc.) and the laws under which the organization was created.

### 3. 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 $2,500 per election.[55] Candidates may accept $5,000 per election from political party committees and other PACs.[56]

Federal political committees, including both candidate committees and leadership PACs, may not accept contributions from corporations or labor unions.[57] The applicability of this ban on corporation and labor union contributions to federal leadership PACs is a noteworthy distinction from non-federal PACs. A non-federal PAC is governed by the laws of the jurisdiction in which the PAC is formed. Approximately half of the states have no ban on contributions from corporations and labor unions; such states are attractive homes for non-federal PACs set up by prospective presidential candidates.

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52 2 U.S.C. § 432(e)(1).

53 2 U.S.C. §§ 432(e)(1)-(3) and 441a(a)(5).

54 2 U.S.C. §§ 434(b)(3)(a) and 431(13) (defining "identification").

55 2 U.S.C. § 441a(a)(1)(A). The statutory $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* FEC, *FEC Announces 2011-2012 Campaign Cycle Contribution Limits* (Feb. 3, 2011), http://www.fec.gov/press/20110203newlimits.shtml; *see also* 2 U.S.C. § 441a(c) (requiring adjustment of contribution limits for changes in the Consumer Price Index).

56 2 U.S.C. § 441a(a)(2).

57 2 U.S.C. § 441b(a).

Similarly, so-called "527 organizations" and other nonprofit entities, which I lump together with state PACs in this paper—referring to them all as non-federal PACs—are permitted to receive corporate and union contributions.

### B. Agency Law—FEC Guide, Regulations and Advisory Opinions

#### 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 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 first want to "test the waters"—that is, explore the feasibility of becoming a candidate. For example, the individual may want to travel around the state or district to see if there is sufficient support for his candidacy. An individual who merely conducts selected testing the waters activities that fall within the exemptions in FEC regulations that are discussed in section 1 below (but does not campaign for office) does not have to register or report as a candidate even if the individual raises or spends more than $5,000 on those activities (i.e., the dollar threshold that would normally trigger candidate registration (which is discussed in Chapter 2). Nevertheless, the individual must comply with the contribution limits and prohibitions.
>
> Once an individual begins to campaign or decides to become a candidate, 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 (candidates for the House of Representatives) or the Secretary of the Senate (candidates for the Senate), and begin to file reports (including in the first report all activity that occurred prior to reaching the $5,000 threshold), as discussed in Chapter 2.[58]

[58] FEC, *Federal Election Commission Campaign Guide: Congressional Candidates and Committees*, 1 (April 2008), http://fec.gov/pdf/candgui.pdf (emphasis added) (citations omitted) (footnote omitted). No comparable publication exists for presidential candidates, though, as indicated in the text above, the FEC makes clear in a footnote to the quoted text that these "testing the waters" provisions apply to presidential candidates.

In a footnote to this passage, the FEC explains: "The same guidance for 'testing the waters' applies to individuals testing the waters for a Presidential candidacy. Once the threshold is exceeded, such individuals must register their candidacy with the FEC."[59]

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 likely presidential candidates should be paying for with federally-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 polling, travel and telephone calls undertaken 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 2010" or "Smith for Senate");
> - Use general public political advertising to publicize their intention to campaign;
> - Raise more money than what is reasonably needed to test the waters or amass funds (seed money) to be used after candidacy is established;
> - Conduct activities over a protracted period of time or shortly before the election; or
> - Take action to qualify for the ballot.[60]

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

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[59] *Id.* at 1 n. 1.

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

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.[61]

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. §§ 100.72 and 100.131, which were promulgated by the FEC in 1985[62] to amend the original "testing the waters" regulation promulgated in 1977.[63]

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.[64] 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."[65]

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61 *Id.* at 2-3 (emphasis added).

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

63 *See* "Explanation and Justification for 1977 Amendments to Federal Election Campaign Act of 1971," House Document No. 95-44 (January 12, 1977), *available at* http://www.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf.

64 *See id.* at 40.

65 *See id.*

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.[66] 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."[67] 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.[68]

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 federally-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 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:

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66 50 Fed. Reg. at 9994 (internal citations omitted) (citing Ad. Ops. 1982-19 and 1983-9).

67 *Id.*

68 *See* 50 Fed. Reg. at 9992, 9994.

> (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.[69]

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."[70] And section 101.3 establishes the requirement that candidates disclosure the funds they used to "test the waters."[71]

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 leadership PACs (referred to in the regulation as "multicandidate political committees") 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.

These rules establish certain activities as *de facto* "testing the waters" activities that must be paid for with funds raised under the $2,500 per election candidate contribution limit instead of under the leadership PAC's $5,000 per calendar year contribution limit. However, the regulations allow a cure—if the candidate committee reimburses the leadership 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

[69] 11 C.F.R. § 100.72 (emphasis added).
[70] 11 C.F.R. § 100.131.
[71] 11 C.F.R. § 101.3.

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.[72]

Section 9034.10 applies to presidential candidates participating in the public financing program. Very similar language was added as Section 110.2(l)—a section of the regulations pertaining to leadership PACs—to encompass the same activities when engaged in by presidential candidates not participating in the public financing program.[73] 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.[74]

The FEC's explanation of these rules make 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

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[72] 11 C.F.R. § 9034.10 (emphasis added).

[73] 11 C.F.R. § 110.2(l); *see also* FEC, *Public Financing of Presidential Candidates and Nominating Conventions*, Final Rules and Explanation and Justification, 68 Fed. Reg. 47386, 47387 (August 8, 2003) (hereinafter "Presidential Candidates E&J").

[74] Presidential Candidates E&J, 68 Fed. Reg. at 47407.

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)."[75]

Based on the FEC's regulations, we know that, at the very least, the following activities constitute "testing the waters" activities when conducted by a person who eventually becomes a candidate. Consequently, these activities must be paid for with funds raised under the $2,500 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;[76]
- Telephone calls for the purpose of determining whether an individual should become a candidate;[77]
- Travel for the purpose of determining whether an individual should become a candidate;[78]
- Polling expenses for determining the favorability, name recognition, or relative support level of the candidate involved;[79]
- 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;[80] 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.[81]

### 3. FEC Advisory Opinions

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, likely 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 outside the candidate contribution restrictions.

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75 *Id*.
76 *See* 11 C.F.R. §§ 100.72 and 100.131.
77 *See id*.
78 *See id*.
79 *See* 11 C.F.R. §§ 110.2(l) and 9034.10.
80 *See id*.
81 *See id*.

### a. Advisory Opinion 1981-32 (Askew)

In Advisory Opinion 1981-32 , for example, former Florida Governor Reubin Askew sought guidance from the FEC 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 likely 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 has 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.
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.[82]

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.[83]

The FEC then went on perhaps unwittingly, to provide the initial roadmap 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 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.[84]

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," so long as they did not refer to themselves as candidates.

**b. Advisory Opinion 1982-3 (Cranston)**

The line between "candidacy" and "testing the waters" was stretched a bit further in Advisory Opinion 1982-3, when Senator Alan Cranston asked the FEC's permission to conduct the following activities under the "testing the waters" exemption:

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82 Ad. Op. 1981-32 at 2-3.
83 *Id.* at 4 (emphasis added).
84 *Id.*

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.
5. Organizing advisory groups on critical and substantive issues requiring expertise and particularized knowledge.[85]

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.[86]

The FEC had essentially sanctioned the establishment of a campaign—hiring pollsters, consultants and communications experts, compiling supporter lists (undoubtedly for future fundraising), and organizing "advisory groups"—all under the auspices of "testing the waters" and permissible so long as the candidate had not actually privately decided to run for office.

This was too much for Commissioner Thomas E. Harris, who wrote a dissenting opinion to Advisory Opinion 1982-3, 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.[87]

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85 Ad. Op. 1982-3 at 2.

86 *Id.* at 4.

87 Ad. Op. 1982-3, Dissenting Opinion of Commissioner Thomas E. Harris at 1.

### 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.

However, in the run-up to the 1988 election, prospective candidates' advisory opinion requests shifted to the legal line between non-candidacy and "testing the waters"—in an effort to expand the scope of activities that could be conducted outside of the contribution restrictions.

In a moment of clarity and sensibility early in 1986, the FEC issued Advisory Opinion 1985-40 in response to a joint request by the Republican Majority Fund (RMF) federal leadership PAC and the "testing the waters" fund of former U.S. Senator 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.[88] At the time the request was submitted, Baker had "not made a decision to become a candidate for Federal office," but was "presently determining whether to become a candidate for the 1988 Republican presidential nomination."[89] Baker and RMF sought the FEC's opinion as to whether RMF could pay certain expenses related to Baker's activities 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 leadership 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."[90] 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.[91]

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88 Ad. Op. 1985-40 at 1-2.

89 *Id.* at 2.

90 *Id.* at 6.

91 *Id.* at 6-7.

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."[92] 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.[93]

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."[94] 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."[95] 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."[96] 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."[97]

The RMF/Baker advisory opinion request and the FEC's response are refreshing because they acknowledge the reality that has been denied year after year by so many prospective presidential candidates—namely, that attending and addressing address 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.

### d. Advisory Opinion 1986-6 (George H.W. Bush / Fund for America's Future)

Unfortunately, the honesty and clarity of Advisory Opinion 1985-40 would be short-lived. In Advisory Opinion 1986-6, the FEC for the first time permitted explicitly extensive campaign-building activities to be conducted through a leadership PAC—George H.W. Bush's Fund for America's Future. The practical effect of Advisory Opinion 1986-6 was that, in less than a decade, obvious campaign-building activities were moved from legal characterization as campaigning, to legal characterization as

92 *Id.* at 8.
93 *Id.*
94 *Id.* at 9.
95 *Id.*
96 *Id.*
97 *Id.*

"testing the waters," to legal characterization as unrelated to the future candidate's campaign and, therefore, permissibly paid for with funds raised outside the candidate contribution limits.

As explained in Advisory Opinion 1986-6, Vice President George Bush was the founder and honorary chairman of the Fund but, the Fund explained to the FEC, the committee was not authorized by any candidate and Bush had not yet decided whether he would run for president in 1988. Instead, "the Fund was created to support the Republican Party and Republican candidates for state and local office as well as for both houses of Congress."[98] Bush's lawyers further explained that the Fund "seeks to build a stronger Republican Party at all levels, including local party organizations."[99]

The Fund's advisory opinion request was a bit vague, but the FEC interpreted the Fund's request as asking whether the Fund's expenditures for several specific proposed activities must nevertheless be treated as made for the purpose of influencing the Vice President's nomination or election to federal office.[100] In other words, the FEC interpreted the Fund as asking it to declare that the proposed activities did not constitute "testing the waters" by Bush, so that the activities could be paid for with funds raised outside the candidate contribution limit.

> 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.[101]

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 were therefore permissible.[102]

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

98 Ad. Op. 1986-6 at 1.
99 *Id.*
100 *Id.* at 2.
101 *Id.* at 3.
102 *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.[103]

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."[104] 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."[105]

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."[106] 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."[107]

With respect to all of these activities, the FEC advised, in short, that so long as Bush and his leadership PAC did not refer to the possibility that he may decide to become a candidate for president in 1988 or actively consider such a candidacy, the proposed activities did not constitute "testing the waters" or campaign activity and, therefore, could be paid for with funds raised outside the candidate contribution limit.

This was all too much for Commissioner Harris, who wrote in dissent the passage quoted at the outset of Section III of this paper:

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103 *Id.* at 4.
104 *Id.* at 6.
105 *Id.*
106 *Id.* at 6-7.
107 *Id.* at 7.

> 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.[108]

The FEC largely remains in this same "absurd position" today.

## IV. Recommendations

### A. More Rigorous Enforcement

One immediate remedy to these abuses would be more rigorous enforcement by the FEC of existing statutes and regulations requiring "testing the waters" activities to be paid for with funds raised under the $2,500 per election candidate contribution limit, subject to the ban on corporate and union contributions. As explained in Section III, above, federal law already establishes that payments made "for the purpose of determining whether an individual should become a candidate" constitute "testing the waters,"[109] including, but not limited to:

- Conducting a poll for the purpose of determining whether an individual should become a candidate;[110]
- Telephone calls for the purpose of determining whether an individual should become a candidate;[111]
- Travel for the purpose of determining whether an individual should become a candidate;[112]
- Polling expenses for determining the favorability, name recognition, or relative support level of the candidate involved;[113]
- 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;[114]
- 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;[115]

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108 Ad. Op. 1986-6, Commissioner Harris Dissenting Opinion at 1.
109 *See* 11 C.F.R. § 100.131.
110 *See* 11 C.F.R. §§ 100.72 and 100.131.
111 *See id.*
112 *See id.*
113 *See* 11 C.F.R. §§ 110.2(l) and 9034.10.
114 *See id.*
115 *See id.*

- 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 see" his party's nomination;[116]
- Travel expenses for private meetings with state party leadership to gauge support of a possible candidacy;[117] 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.[118]

If the FEC enforced the law as to the foregoing activities, some measure of the current evasion of candidate contribution restrictions would be remedied. The FEC has the capacity to conduct investigations of prospective candidates, to determine, for example, whether internal communications belie a decision on the part of the individual to "test the waters" of candidacy. Statements such as the above-quoted admission from Haley Barbour's advisor that Barbour "is giving active consideration to running" for president, combined with the widely-known fact that Barbour is raising and spending funds through a non-federal PAC to buy Iowa voter lists, etc., should be enough to trigger a closer examination by the FEC.[119] Yet the FEC has shown no appetite over the decades to investigate possible violations of the law in this area. The FEC needs to step up its enforcement of the federal law requirement that "testing the waters" activities be paid for with federally permissible funds.

### B. Amend FEC Regulation Section 9034.10

Section 9034.10 creates a presumption that certain activities (*e.g.*, setting up and staffing offices in states other than the candidate's home state) by candidates participating in the public financing system constitute "testing the waters" of a presidential candidacy—a presumption that reflects experience and common sense.

But in order to be effective, the FEC should also amend and extend Section 9034.10 to apply to (1) all presidential candidates, not just those participating in the public financing program and (2) any "person" paying the expenses covered by the current regulation, not just to federal leadership PACs paying for such expenses.[120]

Such an extended regulation would make clear that a person spending money to "test the waters" for a presidential campaign—including all staffing and administrative expenses to set up offices in states other than the individual's home state—must pay for such activities using funds raised under the federal law $2,500 per election candidate

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[116] *See* Ad. Op. 1985-40 at 6-7.

[117] *See id.* at 8.

[118] *See id.* at 9.

[119] 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.

[120] Federal law currently defines the term "person" to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 2 U.S.C. § 431(11).

contribution limit and ban on corporate and union contributions, regardless of whether the individual is paying for such activity through a non-federal PAC (*e.g.*, state PAC, 527 organization, 501(c)(4) organization, etc.).

However, because Section 9034.10 operates retroactively, its extension as suggested here would not impact or inconvenience individuals who do not run for federal office. Only individuals who become candidates will be require to demonstrate that all *de facto* "testing the waters" activities covered by the rule were paid for with candidate-permissible funds.

### C. Demand Honesty

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.

Aside from the modest presumed "testing the waters" activities covered by Section 9034.10, how can one prove that a carefully-counseled individual (*i.e.*, one who has been told by his lawyer to refrain from making any explicit references to a possible presidential run), who has heeded their lawyer's advice, is in fact "testing the waters"? If a candidate wants to deny that their repeated trips to Iowa and New Hampshire two years before an election, and staffing of offices in those states, and recruitment of volunteers in those states, are not for the purpose of exploring a potential 2012 Presidential run, it might be difficult to prove in a court of law that such an individual is lying.

We've all heard the adage: "If it walks like a duck and quacks like a duck, you can be reasonably sure it is a duck." Well, many of the activities paid for in recent months by prospective presidential candidates' using non-federal PACs and federal leadership PACs certainly look and sound like "testing the waters" activity.

Likely 2012 presidential candidates should be asked, point blank, whether they are testing the waters of a presidential candidacy. If they deny that they are testing the waters of a candidacy, they should be asked why they are traveling repeatedly to early caucus and primary states and staffing offices in those states. The public should be educated that "testing the waters" activities must be paid for with funds raised under the $2,500 candidate contribution limit, subject to the ban on corporate and labor union contributions. And likely 2012 candidates should be required to explain their activities in a manner that passes the smell test. Just because the FEC may let abuse of the law slide does not mean that voters or journalists have to. After all, is a little honesty too much to ask of our next president?

## Conclusion

For decades, prospective presidential candidates have skirted candidate contribution restrictions by refusing to acknowledge what everyone knows—that they are "testing the waters" of candidacy—and relying on FEC inaction to get away with it. It is time for this charade to end.