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September 11, 2015

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Office of the General Counsel
Attn: Daniel A. Petalas, Esq.
Acting General Counsel
Federal Election Commission
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Washington, D.C. 20463

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Re: Advisory Opinion Request

Dear Mr. Petalas:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion on behalf of Senate Majority PAC and House Majority PAC (individually "SMP" and "HMP," respectively, and collectively the "PACs"). SMP and HMP are independent-expenditure only political committees, or Super PACs, registered with the Federal Election Commission ("FEC" or the "Commission").[1] SMP makes independent expenditures in support of Democratic candidates in Senate races around the country. Similarly, HMP makes independent expenditures in support of Democratic candidates running for seats in the House of Representatives. Both organizations work to win a Democratic majority in each of the respective houses of Congress.

The PACs seek an advisory opinion due to the changing role of Super PACs and other soft money organizations in the 2016 federal election. Not only has Super PAC fundraising increased enormously since the 2012 election cycle – the last time that SMP and HMP came before the FEC with an advisory opinion request – but the relationship between Super PACs and campaigns has changed dramatically as well.[2] Based on these changes, outlined in more detail below, SMP and HMP have several sets of questions for the Commission. The first set involves so-called "pre-candidacy" activities between individuals contemplating federal candidacy and

[1] SMP, under its previous name, Commonsense Ten, filed its Statement of Organization with the FEC on June 11, 2010 and filed a letter with the Commission on July 27, 2010 notifying the Commission that it intended to make independent expenditures and solicit unlimited funds. On March 9, 2011, Commonsense Ten changed its name to Majority PAC and on March 8, 2013, Majority PAC changed its name to Senate Majority PAC. HMP filed its Statement of Organization with the FEC on April 11, 2011 with a cover letter notifying the FEC that it intended to make independent expenditures and solicit unlimited funds.

[2] Danielle Kurtzleben, *SuperPAC Fundraising Already Dwarfs 2012 Levels*, Nat'l Pub. Radio (Aug. 1, 2015), http://www.npr.org/sections/itsallpolitics/2015/08/01/428400117/super-pac-fundraising-already-dwarfs-2012-levels; Trip Gabriel, *'Super PACs' Take On New Role, Organizing Voters*, N.Y. Times (July 7, 2015), http://www.nytimes.com/2015/07/08/us/politics/super-pacs-take-on-new-role-organizing-voters.html; Reid J. Epstein & Rebecca Ballhaus, *Roles of Presidential Super PACs Expanding*, Wall St. J. (Apr. 30, 2015), http://www.wsj.com/articles/roles-of-presidential-super-pacs-expanding-1430437766.

federal Super PACs. The second set delves into the type of conduct that triggers federal candidacy. Finally, the third set focuses on Super PAC activity once an individual has become a candidate for federal office.

We ask the Commission to expedite this request and issue a response as soon as possible. The Commission has long adhered to an "informal practice of expediting certain highly significant time-sensitive requests (whether or not relating to an upcoming election). The Commission endeavors to issue advisory opinions within 30 days under this general expedited process."[3] The PACs' questions are highly significant and time-sensitive as the outcome of these issues may dramatically and quickly impact the way the PACs operate and interact with individuals who have not yet become candidates for the 2016 congressional elections. Until the Commission definitely resolves these questions, the regulated community will be left in a state of legal limbo.

I. Pre-Candidacy Questions

In the 2016 election cycle, there have been significant changes in the relationship between Super PACs and individuals who are not yet federal candidates, but later become candidates under the law. These changes have centered on various individuals delaying considering themselves as candidates and filing Form 2, the FEC's Statement of Candidacy form, while they establish, solicit funds for, and coordinate on strategy with Super PACs that have agreed to support the individual's potential candidacy.

Specifically, individuals – who did not consider themselves candidates at the time – established, directly or indirectly, Super PACs with an eye toward having those Super PACs make independent expenditures in the event that those individuals became candidates.[4] Additionally, such individuals have raised large sums of money for these Super PACs.[5] At least one individual armed his Super PAC with information about his eventual campaign's plans and reportedly

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[3] Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 Fed. Reg. 32160, 321621 (July 7, 2009).

[4] *See, e.g.*, Robert Costa, *Jeb Bush & His Allies Form Leadership PAC and Super PAC, Both Dubbed Right to Rise*, Wash. Post (Jan. 6, 2015), *available at* http://www.washingtonpost.com/blogs/post-politics/wp/2015/01/06/jeb-bush-forms-new-pac-right-to-rise/; Henry J. Gomez, *Pro-John Kasich Super PAC Staffs Up*, Cleveland.com (July 21, 2015), http://www.cleveland.com/open/index.ssf/2015/07/pro-john_kasich_super_pac_staf.html; Craig Gilbert, *Pro-Scott Walker Super PAC Spells Out Perks for $1 Million Donors*, Milwaukee Wis. J. Sentinel (May 19, 2015), *available at* http://www.jsonline.com/news/statepolitics/scott-walker-woos-members-of-congress-lobbyists-in-dc-visit-b99503384z1-304291621.html.

[5] *See, e.g.*, Matea Gold, *Awash in Cash, Bush Asks Donors Not to Give More than $1 Million - for Now*, Wash. Post (Mar. 4, 2015), *available at* http://www.washingtonpost.com/politics/awash-in-cash-bush-asks-donors-to-limit-gifts-to-1-million--for-now/2015/03/04/0b8d3fc6-c1c8-11e4-9271-610273846239_story.html?postshare=2781425472080047; Ben White, *Jeb Bush's Eye-Popping Event: $100K per Ticket*, Politico (Feb. 10, 2015), http://www.politico.com/story/2015/02/jeb-bush-fundraiser-100k-per-ticket-115086.html.

tasked the Super PAC with making and airing television advertising and direct mail for the campaign, gathering data, engaging in online advertising, running phone banks, operating a get-out-the-vote effort, and maximizing absentee and early voting on the candidate's behalf.[6] Additionally, according to media reports, some individuals, who did not consider themselves candidates at the time, have filmed interviews and other footage for Super PACs to use in their future independent expenditures supporting the individuals' future candidacies.[7] It appears that one Super PAC has already aired paid advertisements using such footage and, notwithstanding the individual's appearance in the ads, the Super PAC characterized them as "independent expenditures" in 48-hour reports filed with the FEC.[8] Lastly, some individuals, who did not consider themselves candidates at the time, seem to have allowed a Super PAC or a 527 organization that accepts money outside the federal limitations and source restrictions to pay for their "testing-the-waters" pre-candidacy activity.[9]

The changes discussed above started with the presidential race, but are beginning to trickle down to Senate races as well.[10] At least one Senate candidate has undertaken some of the tactics described above prior to announcing his candidacy, reportedly basing his model on a Republican presidential candidate's pre-candidacy strategy.[11] During this cycle, SMP and HMP anticipate that more Super PACs and Senate candidates, and eventually House candidates, will embrace similar strategies.

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[6] Thomas Beaumont, *Jeb Bush Prepares to Give Traditional Campaign a Makeover*, Associated Press (Apr. 21, 2015), *available at* http://bigstory.ap.org/article/409837aa09ee405493ad64a94b8c2c3d/bush-preparing-delegate-many-campaign-tasks-super-pac.

[7] Andrew Kaczynski, *We Crashed Jeb Bush's Super PAC's Donor Call, And Here's What They Said*, BuzzFeed (Jun. 17, 2015), http://www.buzzfeed.com/andrewkaczynski/we-crashed-jeb-bushs-super-pacs-donor-call-and-heres-what-th#.lxox7YLM7; Dan Tuohy, *Kasich to Air First Major Ad Buy in NH*, N.H. Union Leader (July 8, 2015), *available at* http://www.unionleader.com/article/20150708/NEWS0605/150709332#; Mark Halperin, *Kasich Super-PAC Unleashes New Ad Focusing on National Security*, Bloomberg (July 31, 2015), http://www.bloomberg.com/politics/articles/2015-07-31/kasich-super-pac-unleashes-new-ad-focusing-on-national-security.

[8] *See* FEC Form 24/28, Sch. E, 24/48 Hour Report of Independent Expenditures, New Day for America (Aug. 18, 2015), *available at* http://docquery.fec.gov/pdf/435/201508189000848435/201508189000848435.pdf#navpanes=0; FEC Form 24/28, Sch. E, 24/48 Hour Report of Independent Expenditures, New Day for America (Aug. 6, 2015), *available at* http://docquery.fec.gov/pdf/588/201508069000805588/201508069000805588.pdf#navpanes=0; FEC Form 24/28, Sch. E, 24/48 Hour Report of Independent Expenditures, New Day for America (Aug. 4, 2015), *available at* http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf#navpanes=0; *see also* Halperin, *supra* note 7.

[9] *See, e.g.*, Associated Press, *Wisconsin Gov. Walker First to Open Iowa Office*, Chi. Trib. (Feb. 10, 2015), *available at* http://my.chicagotribune.com/#section/-1/article/p2p-82777004/.

[10] *See, e.g.*, Andrea Drusch, *Republican Candidate Adopts Jeb Bush Super-PAC Strategy for the Senate*, Nat'l J. (May 19, 2015), available at http://www.nationaljournal.com/politics/carlos-lopez-cantera-jeb-bush-super-pac-20150519; Emily Cahn, *Lieutenant Governor Moves Closer to Florida Senate Bid*, Roll Call (May 14, 2015), http://atr.rollcall.com/carlos-lopez-cantera-florida-senate-bid-super-pac/.

[11] *See e.g.*, Drusch *supra* note 10; Cahn, *supra* note 10.

The PACs have serious doubts about the permissibility of many of the activities. Yet the PACs cannot cede strategic advantage to their political competitors this election cycle or in future cycles. SMP and HMP, therefore, are asking the FEC to provide clear guidance about whether various activities in which both SMP and HMP wish to engage are legally permissible. Clear guidance from the FEC will provide legal assurance to the PACs and help guide the PACs' actions going forward.

Question 1: If an individual, who would not otherwise be a candidate, participates in the formation of a Super PAC (either directly or through agents), whose purpose is to support the individual's prospective candidacy, is the Super PAC barred from raising or spending soft money after the individual becomes a candidate? Would the answer be the same if the individual or his or her agents ask, request, or appoint the individual who would exercise control over the Super PAC?

As noted above, SMP and HMP have serious doubts about the permissibility of what the Republican candidates have done this cycle and, to date, have not favored single-candidate Super PACs. However, SMP and HMP are unwilling to cede strategic advantages to their competitors. Accordingly, if the FEC does not disapprove of the practice, SMP and HMP would consider working closely with individuals exploring candidacy and/or their agents, including establishing single-candidate Super PACs that would support the individuals' candidacies if they decide to run for office. These single-candidate Super PACs would work closely with SMP and HMP to solicit, transfer, and spend funds in particular states and, as set forth throughout this request, SMP and HMP would also work directly with these candidates within their own organizational structures.

For simplicity, we will refer to the potential candidates as "Senate Contender" and "House Contender," respectively, and to the contemplated Super PACs as "New Senate Super PAC" and "New House Super PAC" (and, collectively as the "New Super PACs").[12] SMP and HMP would work closely with Senate Contender and House Contender, who would not otherwise be candidates, and their agents, and would allow them to participate fully in the New Super PACs' formation. Senate Contender and House Contender, who would not otherwise be candidates, and their agents would also be allowed to select and appoint the individuals who would exercise control over the New Super PACs. Once established, New Senate Super PAC and New House Super PAC would raise funds in unlimited amounts, including from corporations and labor unions (hereinafter, "soft money") and would spend such soft money on independent

[12] If required, New Senate Super PAC and New House Super PAC would list SMP or HMP, respectively, on their Form 1, Statements of Organization, as affiliated committees. Additionally, if required, SMP or HMP, respectively, would each amend their Statements of Organization to reflect each affiliated Super PAC.

expenditures in support of Senate Contender and House Contender.[13]

Allowing prospective candidates to establish the New Super PACs and appoint their personnel would put the prospective candidates' direct imprimatur on the New Super PACs – which would make it substantially easier for the New Super PACs, SMP, and HMP to raise and spend soft money. To date, however, SMP and HMP have not adopted this model because of serious doubts about its legality under federal law and the risk of civil and criminal enforcement. Under federal law, entities established, financed, maintained, or controlled by a candidate or his or her agents are barred from raising or spending soft money in connection with an election.[14] SMP and HMP presume that contemplated activities would amount to impermissible "establishment" and "control" of a soft money entity if they took place *after* the individual became a candidate. Establishment occurs when an individual, directly or through his or her agent, has an active or significant role in the formation of the entity.[15] Senate Contender and House Contender, either directly or through their agents, would be involved in the formation of the New Super PACs. Among other ways, control occurs when an individual (1) has the authority or ability to direct or participate in the governance of the entity and/or (2) has the authority to hire, appoint, demote, or otherwise control the officers or decision-makers of the entity.[16] Senate Contender's and House Contender's ability to designate the persons who control the Super PACs would appear to make these designated persons their "agents," thereby giving Senate Contender and House Contender indirect control (through their agents) of the New Super PACs.

The only question, then, is whether these activities are somehow permissible because they occur *before* Senate Contender and House Contender are not otherwise candidates. The FEC's guidance to date has given SMP and HMP serious pause about this argument. In advisory opinions addressing nonfederal committees of newly-elected federal officeholders, the FEC has assumed that these entities were "established" by a federal candidate for purposes of the soft money ban – even though that establishment occurred well before the individual had become a federal candidate.[17] Moreover, federal law appears to contemplate – and prohibit – exactly this scenario, where an individual establishes an organization and then wishes to relinquish control of

[13] The New Super PACs would not solicit or accept funds from foreign nationals as defined by 52 U.S.C. §30121, government contractors as defined by 52 U.S.C. § 30119, or national banks or corporations organized by act of Congress, as described in 52 U.S.C. § 30118(a).
[14] 52 U.S.C. § 30125(e)(1); *see also* FEC Adv. Op. 2011-21 (Lee).
[15] 11 C.F.R. § 300.2(c)(2)(ix).
[16] *Id.* § 300.2(c)(2)(ii)-(iii).
[17] FEC Adv. Op. 2007-01 (McCaskill) ("Senator McCaskill is both a Federal candidate and officeholder, and the Committee is an entity that is directly *established*, financed, maintained, *and* controlled by her.") (emphasis added); FEC Adv. Op. 2009-06 (Risch) ("Senator Risch is a Federal officeholder, and the Committee is an entity that is directly *established*, financed, maintained, *and* controlled by him.") (emphasis added).

it to avoid the soft money ban. To prevent such circumvention, the law imposes a two-year cooling-off period before such an entity can raise or spend soft money.[18]

Question 2: *If Senate Contender and House Contender, who would not otherwise be candidates, share with the New Super PACs, SMP, and HMP (either directly or through agents) information about their plans, projects, activities, or needs, may the New Super PACs, SMP, and HMP use that information to create public communications that satisfy the "content prong" under 11 C.F.R. § 109.21 and air after Senate Contender and House Contender become candidates? If yes, does there need to be a cooling-off period before the New Super PACs, SMP, and HMP can use the information and if so, how long is the cooling-off period?*

SMP and HMP plan to ask Senate Contender and House Contender, who would not otherwise be candidates at this time, to share with SMP, HMP, and New Super PACs (either directly or through agents) information about their strategic plans, projects, activities, or needs. For example, SMP and HMP would ask for Senate Contender's and House Contender's input on whether they and/or the New Super PACs should sponsor positive advertising or negative advertising. Likewise, SMP and HMP would ask Senate Contender and House Contender to share their campaign messaging and scheduling plans, so that they and the New Super PACs can most efficiently complement the campaigns' strategies with their own. If Senate Contender and House Contender become candidates, SMP, HMP, and the New Super PACs would use this information to create public communications that satisfy the "content prong" under 11 C.F.R. § 109.21. If permissible, SMP, HMP, and the New Super PACs would use the information in these public communications immediately and would not undertake a cooling-off period.

Under the FEC's coordinated communication rule, a communication paid for by a Super PAC is treated as an impermissible contribution to a candidate if the communication includes certain content and is preceded by certain conduct between the candidate and the Super PAC.[19] As noted above, SMP, HMP, and the New Super PACs stipulate that the communications they propose to make would satisfy the content prong. However, SMP and HMP are unclear whether their communications will meet the conduct prong. A communication satisfies the conduct prong when the "communication is created, produced, or distributed after one or more substantial discussions about the communication between the [Super PAC], and the candidate who is clearly identified in the communication."[20] A discussion is considered substantial if information about the candidate's "campaign plans, projects, activities, or needs is conveyed to the [Super PAC], and that information is material to the creation, production, or distribution of the

[18] 11 C.F.R. § 300.2(c)(4)(ii).
[19] *See id.* § 109.20(b), 109.21.
[20] *Id.* § 109.21(d)(3).

communication."[21] The regulation, and its implementing guidance, suggest that information only remains "material" for 120 days.[22]

Here, SMP, HMP, and the New Super PACs' communications identifying Senate Contender and House Contender would take place within 120 days of a substantial discussion in which Senate Contender and House Contender conveyed their strategic plans, projects, activities, or needs, thereby satisfying the plain language of the conduct prong. The regulatory language does not exempt coordinating conduct that takes place prior to individuals becoming candidates. Nor does the policy underlying the rule support such an exemption. The coordinated communication regulation is the FEC's mechanism to ensure compliance with federal source restrictions and contribution limits in the specific context of third-party communications. Creating a broad exemption from the regulation for pre-candidacy activities would be inconsistent with the regulatory scheme – allowing individuals contemplating candidacy to finance their activities with funds that do not comply with federal source restrictions or contribution limits. Finally, the FEC regulation requiring reimbursement by presidential candidates of certain pre-candidacy expenses borne by PACs specifically incorporates the language from the coordinated communication regulation to determine when pre-candidacy expenses are deemed contributions.[23] This cross-reference indicates that the FEC intended to examine the conduct of individuals prior to their becoming candidates in determining whether a contribution was made during the individual's pre-candidacy period.

***Question 3**: May SMP, HMP, and the New Super PACs film footage in a studio of Senate Contender and House Contender, who would not then otherwise be candidates, discussing their achievements, experiences, and qualifications for office, and use that footage in public communications that satisfy the "content prong" under 11 C.F.R. § 109.21?*

If permissible, SMP, HMP, and the New Super PACs would film footage of Senate Contender and House Contender, who would not otherwise be candidates at this time, in a studio setting, discussing their achievements, experiences, and qualifications for office. SMP, HMP, and the New Super PACs would then use that footage in public communications that satisfy the "content prong" under 11 C.F.R. § 109.21.

Again, SMP and HMP have serious concerns about the permissibility of this activity. A third party communication satisfies the "conduct prong" if the candidate was "materially involved" in

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[21] *Id.* § 109.21(d)(3).
[22] *See id.* § 109.21(d)(4)-(5); *see also* Coordinated Communications, 71 Fed. Reg. 33190, 33205 (June 8, 2006) (explaining that "a limit of 120 days is more than sufficient to reduce the risk of circumvention of the [Federal Election Campaign] Act").
[23] 11 C.F.R. § 110.2(l); Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47,386, 47,407-08 (Aug. 8, 2003).

the creation of the communication.[24] On several occasions, the FEC has determined that a candidate's appearance in an advertisement means that he or she was, by definition, "materially involved" in its creation and that the communication therefore satisfies the "conduct prong."[25] For the same reasons as discussed in the preceding question, SMP and HMP have doubts that an exception to this per se rule applies merely because Senate Contender and House Contender were not otherwise candidates at the time the footage was filmed.

***Question 4**: May SMP, HMP, and the New Super PACs work with Senate Contender and House Contender to establish separate 527 organizations to pay for "testing-the-waters" activities with soft money?*

If permissible, SMP, HMP, and the New Super PACs would work with Senate Contender and House Contender to establish new section 527 organizations. These organizations would raise soft money and use those funds to pay for certain "testing-the-waters" expenses for Senate Contender and House Contender, including, but not limited to, travel to meet with prospective voters, office space, research, consulting, and polling.

SMP and HMP believe that such conduct is not permissible under federal law. The law permits an individual to engage in certain activities for the purpose of deciding whether to run without triggering the candidacy registration and reporting requirements.[26] The purpose of this "testing-the-waters" exception is to "permit individuals to conduct certain activities while deciding whether to become a candidate for Federal office, without making their activities immediately public."[27] However, as noted above, federal contribution limits and source restrictions still apply to these "testing-the-waters" activities.[28] This means an individual's exploratory effort may not accept contributions (including in-kind contributions) from corporations, labor unions, or other prohibited sources, and may not accept contributions from any permissible source in amounts that exceed the contribution limits.[29]

This language would appear to prohibit a 527 organization from using soft money to pay for "testing-the-waters" expenses. However, if that activity is now permitted, SMP and HMP would consider following suit.

II. Candidacy Trigger Questions

[24] 11 C.F.R. § 109.21(d)(2).
[25] FEC Adv. Op. 2004-01 (Bush/Kerr); FEC Adv. Op. 2003-25 (Weinzapfel).
[26] 11 C.F.R. § 100.72, 100.131.
[27] Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9,992, 9,993 (Mar. 13, 1985).
[28] *See* 11 C.F.R. § 100.72(a).
[29] *See, e.g.*, FEC Matter Under Review 4935 (Dear), Factual and Legal Analysis (Aug. 23, 2000) (finding an outside entity's payment of $20,000 on behalf of a potential candidate to measure a potential candidate's support in his congressional district was an excessive in-kind contribution to the candidate's principal campaign committee once he decided to run for office).

As the discussion above makes clear, SMP and HMP may have more leeway to work with individuals before they become "candidates" under federal law. Therefore, SMP and HMP seek guidance from the FEC as to what conduct triggers candidacy under federal law – so that they know the point at which they must, as a matter of law, stop working closely with these individuals to avoid violating the law.

A "candidate" is "an individual who seeks nomination for election, or election, to federal office."[30] An individual becomes a candidate whenever he or she has received contributions aggregating in excess of $5,000 or made expenditures aggregating in excess of $5,000.[31] An individual also becomes a candidate whenever he or she has given his or her consent to another person and that other person receives contributions or makes expenditures on behalf of the individual in excess of $5,000.[32] Within 15 days of an individual making his or her decision to become a candidate or engaging in activity that indicates that the individual's decision to become a candidate has been made, the individual must file a Statement of Candidacy with the FEC.[33]

Although federal law permits an individual to engage in certain "testing-the-waters" activities without becoming a candidate, the allowance is narrow. The regulations are clear that the "testing-the-waters" exemption does not apply to individuals who have made a determination (publicly or privately) to become candidates.[34] FEC regulations provide a nonexhaustive list of activities that indicate when an individual has decided to become a candidate and can no longer take advantage of the "testing-the-waters" exemption: when the individual (1) uses general public political advertising to publicize his or her intention to campaign for federal office; (2) 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) makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office; (4) conducts activities in close proximity to the election or over a protracted period of time; and (5) has taken action to qualify for the ballot under state law.[35] Because this list is not exhaustive, other activities may indicate that an individual has decided to become a candidate for federal office.[36]

This election cycle, many individuals have pushed the "testing-the-waters" exemption well beyond what was previously understood to be permissible.

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[30] 52 U.S.C. § 30101(2).
[31] *Id.*; 11 C.F.R. § 100.3(a).
[32] 52 U.S.C. § 30101(2).
[33] 11 C.F.R. §§ 100.3(a), 101.1(a).
[34] *Id.* § 100.72(b).
[35] *Id.* § 100.72(b), 100.131(b).
[36] *Id.*

- At least one presidential candidate began "testing-the-waters" in May 2014 though he did not consider himself a candidate and waited to file his Statement of Candidacy until June 15, 2015, more than one year later.[37]

- Several presidential candidates appear to have authorized Super PACs to raise millions of dollars to spend on their behalf and helped raise that money.[38]

- At least two individuals considering a presidential bid made public statements that they were running for president, but subsequently withdrew those statements, and did not consider themselves candidates and did not file a Form 2 after making these statements.[39] For example, one individual who, at the time, was considering a presidential bid, called himself a candidate in a public interview and in a tweet.[40] That individual then attempted to withdraw those statements.[41] Another individual who was also actively exploring a presidential bid said "I'm running for president in 2016,"[42] but subsequently tried to walk back this comment.[43] Neither of these individuals filed a Form 2 with the FEC within 15 days of making these statements.

- Several prospective candidates have directly or indirectly (through an adviser) informed the press that they would make public declarations of candidacy on a specific date more than 15 days in the future. For example, on March 17, 2015, a senior adviser to one prospective candidate said that the prospective candidate would announce his candidacy

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[37] *See* FEC Form 2, Statement of Candidacy (Bush) (June 15, 2015), *available at* http://docquery.fec.gov/pdf/747/15031431747/15031431747.pdf; FEC Form 3P, Report of Receipts and Disbursements, Jeb 2016, Inc., at 1661 (July 15, 2015), *available at* http://docquery.fec.gov/pdf/887/201507159000159887/201507159000159887.pdf (documenting that Jeb Bush began testing the waters as early as May 2014).

[38] *See e.g.*, Gold, *supra* note 5; White, *supra* note 5; Kurtzleben, *supra* note 2.

[39] *See* Evan McMurry, *Rand Paul Tweets About Himself as a 'Candidate,' but for What?*, Mediaite (Mar. 16, 2015), *available at* http://www.mediaite.com/online/rand-paul-tweets-about-himself-as-a-candidate-but-for-what/; Matt Berman, *Jeb Bush Inadvertently Says He's Running for President*, Nat'l J. (May 13, 2015), *available at* http://www.nationaljournal.com/2016-elections/jeb-bush-inadvertently-says-he-s-running-for-president-20150513; *see also Slip of the Tongue? Jeb Bush May Have Accidentally Dropped Big 2016 News*, NBC News (May 13, 2015), http://www.nbcnews.com/watch/nbc-news/slip-of-the-tongue-jeb-bush-may-have-accidentally-dropped-big-2016-news-444840515654 [hereinafter *Slip of the Tongue*].

[40] McMurry, *supra* note 39 (explaining that Rand Paul sent a tweet from his "@RandPaul" twitter account stating "I'm the only candidate who thinks the NSA program on phone records should be shut down. #sxsw").

[41] Catalina Camia, *Rand Paul Targets Young Voters with Austin Tech Office*, USA Today (Mar. 16, 2015), http://onpolitics.usatoday.com/2015/03/16/rand-paul-young-voters-tech-sxsw/.

[42] Berman, *supra* note 39; *see also Slip of the Tongue*, *supra* note 39.

[43] Rebecca Kaplan, *Bush: "No Coordination" With Super PAC if I Run*, Face the Nation, CBS News (May 31, 2015), http://www.cbsnews.com/news/jeb-bush-promises-no-coordination-with-super-pac-if-he-runs/.

at a rally on April 7, 2015.[44] That individual did not file his Form 2 within 15 days of March 17, 2015. On June 28, 2015, another prospective candidate's advisers told the media that the prospective candidate would announce his candidacy for president on July 21, 2015.[45] That individual did not file his Form 2 within 15 days of June 28, 2015.

- Lastly, as discussed in the preceding section, media reports indicate that some individuals filmed footage for their supportive Super PACs before they became candidates for use after they became candidates.[46]

These actions have blurred the line between when an individual is not a candidate and when he or she actually becomes a candidate under federal regulations. This ambiguity creates potential civil and criminal legal jeopardy for SMP and HMP. If they rely on when a candidate considers himself or herself to be a candidate, and the FEC or Department of Justice subsequently determines that an individual had become a candidate prior to when that person considered himself or herself to be a candidate, then SMP and HMP might be held liable for engaging in activities that are impermissible once the individual became a candidate. Accordingly, SMP and HMP seek clarity on the following questions so that they can properly determine whether individuals have triggered candidacy and the stricter rules that accompany this status.

Question 5: *Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters" activities, does an individual become a candidate when he or she makes a private determination that he or she will run for federal office?*

The law is clear that the "testing-the-waters" exemption does not apply if an individual "has moved beyond the deliberative process of deciding to become a candidate."[47] The FEC has said that when an individual has concluded that he or she would run for federal office, he or she is a candidate under the law.[48] These precedents indicate that once a person makes a private decision

[44] Philip Elliot, *Source: Rand Paul Eyes April 7 to Announce White House Run*, Las Vegas Sun (Mar. 17, 2015), http://lasvegassun.com/news/2015/mar/17/source-rand-paul-eyes-april-7-announce-white-house/; Joseph Gerth, *Rand Paul to Announce Presidential Bid April 7*, Louisville Courier-J. (Mar. 17, 2015), *available at* http://www.courier-journal.com/story/news/politics/rand-paul/2015/03/17/rand-paul-announce-presidential-bid-april/24926973/.

[45] Mike Allen, *John Kasich to Announce Presidential Bid July 21*, Politico (June 28, 2015), http://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517.html.

[46] Chrissie Thompson, *John Kasich Looks to Launch White House Bid July 21*, Cincinnati.com (June 28, 2015), http://www.cincinnati.com/story/news/politics/elections/2015/06/28/john-kasich-expected-to-launch-presidential-campaign-july-21/29388341/; Kaczynski, *supra* note 7.

[47] FEC Adv. Op. 1982-03 (Cranston); *see also* Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9,992, 9,993 (Mar. 13, 1985).

[48] FEC Matter Under Review 6449 (Bruning), Factual and Legal Analysis at 6 (stating that candidacy is triggered when "a private decision to become a candidate has been made") [hereinafter Factual Legal Analysis (Bruning)].

to seek office, he or she is a federal candidate and must register with and report to the FEC as such.

SMP and HMP seek the FEC's confirmation that an individual becomes a candidate once he or she makes a private a decision to seek office, assuming that an individual has raised or spent more than $5,000 on "testing-the-waters" activities.

***Question 6**: Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters" activities, does an individual "testing-the-waters" for six months or longer trigger candidacy? Nine months? One year?*

FEC regulations dictate that engaging in "testing-the-waters" activities over a "protracted period of time" can be evidence that the potential candidate has moved beyond "testing-the-waters" and is instead engaged in the activities "as a means of building campaign support."[49] The FEC has never taken a clear position on the length of time a potential candidate may permissibly conduct exploratory activities without triggering candidacy. In an advisory opinion from 1981, the FEC suggested that if a potential candidate for the 1984 election tested the waters in 1982 for several months and continued this activity into 1983, that such activity would be "very significant" in determining the applicability of the "testing-the-waters" exemption.[50]

In a more recent enforcement matter, however, the FEC suggested that longer periods of "testing-the-waters" activities are acceptable, but has not given a definitive answer to what length of time is too long. For example, in 2007 the FEC found that an individual who had been conducting "testing-the-waters" activities for six and a half months became a candidate only when he sent a solicitation letter that referenced "our campaign" and said that "defeating an incumbent" would be a "tough fight."[51] In finding that candidacy had been triggered, the FEC Office of the General Counsel ("OGC") pointed only to the candidate's solicitation letter and the fact that his solicitations were designed to amass campaign funds. The FEC was silent as to whether six and a half months of exploratory activity constituted a "protracted" period of time that would trigger candidacy.

This interpretation suggests that there is a temporal limit during which an individual may permissibly "test-the-waters." However, the FEC's statements on this topic fail to provide clear guidelines regarding the permissible duration of "testing-the-waters" activities. SMP and HMP seek guidance as to whether that period is reached when an individual has tested-the-waters for: (a) six months, (b) nine months, (c) one year, or (d) some other length of time.

[49] 11 C.F.R. § 100.72(b)(4); FEC Adv. Op. 1982-03 (Cranston).
[50] FEC Adv. Op. 1981-32 (Askew).
[51] FEC Matter Under Review 5693 (Aronsohn), General Counsel's Report #2, at 2, 3 (Nov. 7, 2007).

***Question 7**: Would the activities described in Question 1 trigger candidacy once the New Super PACs had raised more than $5,000? If not, would the Super PAC's receipt of $1 million, $5 million, $10 million, $25 million, $50 million, or $100 million trigger an individual's candidacy?*

Under federal law, a candidate is an individual who has received contributions aggregating in excess of $5,000 or an individual who has given his or her "consent to another person to receive contributions ...on behalf of that individual and such person has received contributions aggregating in excess of $5,000."[52] This language suggests that when an individual who is contemplating candidacy solicits contributions in excess of $5,000 for a Super PAC that plans to support the individual if he or she becomes a federal candidate, the individual has given consent to the Super PAC to receive contributions on behalf of the individual to support that individual's possible election.

Additionally, candidacy can be triggered when an individual who is "testing-the-waters" undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate.[53] In 2008, in an enforcement action against Senator Fred Thompson's presidential campaign, the FEC OGC took the position that $3,462,355 raised in the first month of Senator Thompson's exploratory activity did not necessarily exceed "what could reasonably be expected to be used for exploratory activities related to a potential candidacy for . . . President of the United States, particularly given the anticipated cost of the 2008 Presidential Election."[54] However, the Commission has cautioned that some limits do exist on an exploratory effort's ability to raise funds to be used in a later campaign. For example, in the same enforcement action against Senator Thompson, the FEC OGC noted that the fact Senator Thompson had raised over $9 million prior to announcing his candidacy but had spent less than $3 million of that amount "seem[ed] to indicate he may have been amassing campaign funds to be used after he became a candidate" in violation of the "testing-the-waters" exemption.[55]

The FEC has not specified a particular level of funding that triggers candidacy, nor has the FEC addressed whether candidacy can be triggered when a prospective candidate solicits these funds for a Super PAC rather than for his or her own exploratory or campaign committee. Nonetheless, it would appear that the law imposes *some* limit on how much a prospective candidate may help raise for a Super PAC planning to make communications in support of his or her candidacy before the "amassing" threshold has been crossed and candidacy is triggered.

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[52] 11 C.F.R § 100.3(a).
[53] *Id.* § 100.72(b)(2).
[54] FEC Matter Under Review 5934 (Thompson), First General Counsel's Report, at 5 (Oct. 14, 2008) [hereinafter First General Counsel's Report (Thompson)]. The FEC later voted to dismiss the allegations that Senator Thompson violated the "testing-the-waters" exemption. FEC Matter Under Review 5934 (Thompson), Statement of Reasons of Vice Chairman Petersen and Comm'rs Hunter, McGahn and Weintraub (Mar. 10, 2009) [hereinafter Statement of Reasons (Thompson)].
[55] First General Counsel's Report (Thompson), *supra* note 54, at 5.

Accordingly, SMP and HMP would like the FEC to answer whether Senate Contender and House Contender would trigger candidacy by agreeing to solicit funds for the New Super PACs, given that the New Super PACs exist to pay for communications supporting Senate Contender and House Contender in the event they become candidates. If the answer depends on the amount of money being received by the New Super PACs, SMP and HMP ask whether the New Super PACs' receipt of more than $5,000 would trigger candidacy for Senate Contender and House Contender, or whether a greater amount would trigger candidacy? And would that amount be $1 million? $5 million? $10 million? $25 million? $50 million? $100 million? Some other amount?

***Question 8**: Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters" activities, does an individual's public statement that he or she is running for office trigger candidacy, even if the individual subsequently attempts to withdraw that statement?*

As noted above, in the list of activities indicating that an individual has decided to become a candidate for federal office, federal regulations include when an individual "makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office."[56] This language, on its face, clearly would require Senate Contender and House Contender to register as candidates if they make written or oral statements that refer to themselves as candidates.

In past enforcement actions, the FEC has closely parsed public statements to determine if the candidacy line has been crossed. In one enforcement action, the FEC found reason to believe that an individual became a candidate when he was quoted in a news article announcing his exploratory committee as saying, "I want to run, I'm ready to run"; "I can't imagine any conditions under which I would not run"; and that he was looking forward to "a spirited primary."[57] That candidate also tweeted out an announcement that a high-level supporter had agreed to serve as campaign chair.[58] Based on those facts, the FEC found the candidate had made or authorized statements referring to himself as a candidate for a particular office, and "certainly . . . was no longer merely evaluating the viability of his candidacy."[59]

On the other hand, in the enforcement action against Senator Thompson discussed above, the FEC dismissed allegations against Senator Thompson that he became a candidate when he said he was "testing the waters" about a run, "but the waters feel pretty warm to me" and also said "[y]ou're either running or not running. I think the steps we've taken are pretty obvious."[60] Senator Thompson also was quoted telling an audience that he "doesn't have any big

[56] 11 C.F.R. §§ 100.72(b)(3), 100.131(b)(3).
[57] Factual and Legal Analysis (Bruning), *supra* note 48, at 7.
[58] *Id.* at 8.
[59] *Id.*
[60] *See* First General Counsel's Report (Thompson), *supra* note 54, at 9.

announcement tonight" but "I plan on seeing a whole lot more of you, how 'bout that?"[61] Four Commissioners found that Senator Thompson's statement that "the steps he had taken were 'pretty obvious'" did not establish that Senator Thompson had decided to run, and that his statement that he would make a formal announcement in the future could simply mean that he anticipated making a final decision soon.[62] The Senator Thompson statements represent the outer bounds of what the FEC has allowed a potential candidate to say within the limits of the "testing-the-waters" exception.[63]

The regulations do not specifically allow individuals to withdraw statements referring to themselves as candidates for federal office. If the FEC determines that a public statement by an individual referring to himself or herself as a candidate triggers candidacy, and that there is no allowance to withdraw the statement, then SMP and HMP would carefully monitor all public statements made by Senate Contender and House Contender and would halt any "pre-candidacy" interactions once those initial public statements of intent were made.

***Question 9**: Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters" activities, if the individual or his or her advisers inform the media that the individual will announce candidacy on a date certain in the future, has the individual triggered candidacy?*

For planning purposes, it is helpful to have at least one month – and sometimes longer – to organize announcement events. Accordingly, it is common for individuals to inform the media more than a month in advance of a candidacy announcement event. This cycle, however, some individuals have treated the announcement date – not the date on which the media is informed that the individual will be declaring candidacy on a date certain in the future – as the candidacy trigger. If the FEC concludes that candidacy is triggered when an individual or his or her advisers inform the media that the announcement of candidacy will take place on a date certain in the future, then SMP and HMP would halt any pre-candidacy interactions with Senate Contender and House Contender once the announcement date was set.

The FEC has explained that when a candidate moves "beyond the deliberative process of deciding to become a candidate, and into the process of planning and scheduling public activities," candidacy has been triggered.[64] Further, "[o]nce an individual becomes a candidate, equivocal statements of intent or a future 'official announcement' do not eradicate the registration and reporting requirements that have been triggered."[65] Public statements that the press links to an individual's "advisers" may be indicative of whether the individual has made a

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[61] *Id.* at 7.
[62] Statement of Reasons (Thompson), *supra* note 54, at 2.
[63] *See id.* (acknowledging that these statements "tested the boundaries of the testing the waters exemption").
[64] FEC Adv. Op. 1981-32 (Askew).
[65] FEC Matter Under Review 5363 (Sharpton), Factual and Legal Analysis at 8 (Nov. 13, 2003) [hereinafter Factual and Legal Analysis (Sharpton)].

decision to become a candidate.[66] Once an individual informs the media that an announcement of candidacy will occur on a date certain in the future, it would appear that the individual has made a final decision to run and has begun the process of planning and scheduling public activities. SMP and HMP seek the FEC's confirmation on this point.

***Question 10**: Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters" activities, would the activity described in Question 3 trigger candidacy?*

The FEC's regulations explain that when an "individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office," such activity is indicative that the individual has become a candidate.[67] Additionally, when exploratory efforts include activities that indicate a decision to run has been made, an individual cannot maintain that he or she does not intend to be a candidate.[68] Moreover, engaging in the planning or production of communications to be aired after one becomes a candidate is also considered evidence that a final decision to become a candidate has been reached.[69]

This guidance suggests that if SMP, HMP, or the New Super PACs were to film Senate Contender and House Contender speaking directly to the camera touting their achievements, experiences, and qualifications for use in subsequent public communications, that may trigger candidacy. If filming the footage triggers candidacy, then SMP, HMP, and the New Super PACs would not be able to rely on the legal argument that the coordination rules are inapplicable pre-candidacy. Thus, SMP and HMP seek confirmation as to whether this activity would trigger candidacy for Senate Contender and House Contender, so it knows whether the New Super PACs can permissibly engage in this activity.

III. Post-Candidacy Questions

Finally, SMP and HMP would like to know whether they and the New Super PACs may utilize Senate Contender, House Contender, and their "agents" for certain fundraising activities, after Senate Contender and House Contender have filed their Form 2s.

***Question 11**: Can individuals who are "agents" of Senate Contender and House Contender solicit soft money for SMP, HMP, and the New Super PACs, as long as the steps below are taken to ensure that the fundraising is not undertaken in their capacity as "agents"?*

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[66] *See* First General Counsel's Report (Thompson), *supra* note 54. The FEC OGC cited numerous statements by Senator Thompson as well as a statement of an adviser of Senator Thompson as indicia that the Senator had decided to run for president. A majority of the FEC's Commissioners ultimately disagreed with the OGC on whether Senator Thompson had triggered candidacy. *See* Statement of Reasons (Thompson), *supra* note 54.
[67] 11 C.F.R. § 100.72(b)(3).
[68] Factual and Legal Analysis (Sharpton), *supra* note 65.
[69] FEC Adv. Op. 1981-32 (Askew).

The FEC has been clear that a "principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals."[70] This "requirement ensures that liability will not attach due solely to the agency relationship, but only to the agent's performance of prohibited acts for the principal."[71] The purpose of the requirement is to allow individuals to raise funds for multiple organizations.[72] In at least two instances, the FEC has determined that an individual who is an "agent" of a federal officeholder may solicit soft money for a state party as long as the solicitations are "exclusively" on behalf of the party and "not on the authority" of the officeholder.[73]

SMP, HMP, and the New Super PACs would like the individuals described below to solicit funds on their behalf:

- A campaign employee who works primarily as a fundraiser;
- A campaign employee who works primarily in a capacity other than as a fundraiser;
- A campaign consultant who works primarily as a fundraiser;
- A campaign consultant who works primarily in a capacity other than as a fundraiser;
- A campaign volunteer who serves in an officer position with the campaign;
- A campaign volunteer who serves on the campaign's finance committee;
- A campaign volunteer who serves on a host committee for an upcoming fundraising event; and
- A campaign volunteer who raises funds for an upcoming fundraiser, but who is not serving on a host committee or finance committee.

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[70] Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 F.R. 49064, 49083 (July 29, 2002).
[71] *Id.*
[72] *See* Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 F.R. 4975, 4979 (Jan. 31, 2006) ("In order to preserve an individual's ability to raise funds for multiple organizations, the Commission's current regulations specifically require an agent to be acting on behalf of a candidate or party committee to be subject to BCRA's soft money prohibition.").
[73] *See* FEC Adv. Ops. 2003-10 (Reid), 2007-5 (Iverson).

For purposes of this opinion, SMP and HMP stipulate that each individual listed above has actual authority to solicit, receive, direct, transfer, or spend funds on behalf of Senate Contender's and/or House Contender's campaigns.[74]

SMP, HMP, and the New Super PACs would contact each individual, orally or in writing, and ask him or her to become a "New Senate Super PAC Fundraiser" or "New House Super PAC Fundraiser." SMP, HMP, and the New Super PACs would do so on their own, not at the request or suggestion of Senate Contender, House Contender, or their agents. (If a request or suggestion came from Senate Contender, House Contender, or their agents that a particular individual solicit funds for the New Super PACs, the New Super PACs would *not* ask that the individual solicit soft money funds on its behalf). SMP, HMP, and the New Super PACs would confirm with the individual, prior to any soft money solicitation, that the individual had not been asked to solicit soft money by Senate Contender, House Contender, or their agents. In the conversation with the donor where soft money funds are solicited, the individual would identify himself or herself as a "SMP or New Senate Super PAC Fundraiser" or "HMP or New House Super PAC Fundraiser," and not use his or her campaign title. The individual would inform the donor that he or she was making the solicitation on his or her own and not at the direction of Senate Contender, House Contender, or their agents. The individual would not use campaign resources (including campaign letterhead or email) to make the soft money solicitation for SMP, HMP, and the New Super PACs, nor would the individual solicit funds for the campaign and SMP, HMP, and the New Super PACs during a single solicitation.

Under these circumstances, would the individual be permitted to solicit soft money funds for the New Super PACs because he or she was doing so exclusively on behalf SMP, HMP, and the New Super PACs and not on the authority of Senate Contender, House Contender, or their agents?

Question 12: *Does 11 C.F.R. § 300.64 require that there be a minimum number of expected attendees before the candidate can permissibly speak, attend, or be featured as a special guest?*

The FEC's regulations permit federal officeholders and candidates to attend "events" where soft money funds are raised, as long as they follow the steps set forth in 11 C.F.R. § 300.64 to avoid any soft money solicitations.

SMP, HMP, and the New Super PACs propose to invite prospective donors to an event where:

- Funds are solicited in connection with the event either in amounts exceeding $5,000 per contributor or from corporations or labor unions.

[74] *See* 11 C.F.R. § 300.2(m).

- Prospective attendees are sent (or emailed) a written invitation.
- The invitation lists Senate Contender or House Contender as a "special guest" and includes a written disclaimer indicating that "All funds solicited in connection with this event are by [SMP or New Senate Super PAC or HMP or New House Super PAC], and not by [Senate Contender or House Contender]."
- The invitation includes the date and time when the event is to be held.
- There is a program for the event, which includes formal remarks by Senate Contender or House Contender and an introduction by the event host(s) or some other person.
- Senate Contender or House Contender complies with 11 C.F.R. § 300.64(b)(2) at the event itself.
- Neither Senate Contender, House Contender, nor their agents disseminate publicity for the event or otherwise extend invitations to the event.

SMP and HMP believe that events like this are most effective when the number of attendees is small, so that attendees have a more personal experience. May Senate Contender or House Contender appear, speak, or be a featured guest at the event described above, if the number of expected attendees is two? If not, what would the minimum number of expected attendees be?

Very truly yours,

Marc E. Elias
Ezra W. Reese
Jonathan S. Berkon
Rachel L. Jacobs