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## When “Testing the Waters” Tests the Limits of Coordination Restrictions: Revising FEC Regulations to Limit Pre-Candidacy Coordination

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**WHEN “TESTING THE WATERS” TESTS THE  
LIMITS OF COORDINATION RESTRICTIONS:  
REVISING FEC REGULATIONS TO LIMIT  
PRE-CANDIDACY COORDINATION**

*Marc E. Klepner\**

*During the preliminary stages of the 2016 presidential election, many prospective candidates took an active role in the Super PACs that would eventually support them after they became candidates. The regulatory system in place provides clear restrictions on Super PACs’ abilities to coordinate with candidates; however, what is less clear is whether such regulations restrict the behavior of individuals during pre-candidacy, known under Federal Election Commission (FEC) regulations as the “testing-the-waters” phase. This Note gives an overview of the laws and regulations governing Super PACs, as well as the regulations and FEC guidance concerning when an individual becomes a candidate. This Note then examines the lawfulness of noncandidate coordination with Super PACs through an analysis of FEC Advisory Opinion 2015-09. Lastly, this Note advocates for further regulation and proposes several new regulations that should be adopted by the FEC to restrict this type of precandidacy conduct.*

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#### INTRODUCTION

“Should I choose to be a candidate . . . [m]y lawyers love that, when I say, we’re exploring a campaign, should we choose to run [for President],” joked Governor Scott Walker while speaking to a crowd at the Conservative Political Action Conference in late February of 2015.<sup>1</sup> Although Governor Walker did not announce his candidacy until July 13, 2015,<sup>2</sup> during the preceding eight months, Governor Walker surely looked like a candidate, traveling the country courting major donors and party leadership,<sup>3</sup> giving

1. *Governor Scott Walker Remarks at CPAC* (C-SPAN television broadcast Feb. 26, 2015), <http://www.c-span.org/video/?324557-12/governor-scott-walker-remarks-cpac> [<https://perma.cc/J4MH-692M>].

2. See Samantha Lachman, *Scott Walker Announces He’s Running for President in 2016*, HUFFINGTON POST (July 13, 2015, 7:06 AM), [http://www.huffingtonpost.com/2015/07/13/scott-walker-2016-\\_n\\_6186362.html](http://www.huffingtonpost.com/2015/07/13/scott-walker-2016-_n_6186362.html) [<https://perma.cc/828D-84Y9>].

3. See Peter Hamby, *Scott Walker Backs Pathway to Citizenship at Private Dinner*, CNN (Mar. 27, 2015, 6:00 PM), <http://www.cnn.com/2015/03/26/politics/election-2016-scott-walker-immigration/> [<https://perma.cc/G2VS-UE4X>]; John McCormick, *Scott Walker Courting Mitt Romney Donors After Slamming Candidate Romney*, BLOOMBERG (June 10, 2015, 4:37 PM), <http://www.bloomberg.com/politics/articles/2015-06-10/walker-courting-romney-donors-after-slamming-candidate-romney> [<https://perma.cc/V8AY-BKBL>].

speeches in key primary states,<sup>4</sup> and even setting up an office in Iowa as early as February 2015.<sup>5</sup> However, instead of stating the obvious and announcing his candidacy, much to his lawyers' satisfaction, Governor Walker consistently maintained that he was simply "exploring" a run for the Presidency,<sup>6</sup> or as it is called under Federal Election Commission (FEC) regulations, "testing the waters."<sup>7</sup> All the while, the independent expenditure-only political action committee—commonly known as a Super PAC<sup>8</sup>—supporting Governor Walker raised over twenty million dollars by the end of June 2015.<sup>9</sup>

As Governor Walker not so subtly alluded by referencing his lawyers, this delay in officially declaring candidacy was no accident; rather, it was a calculated strategy. Unlike candidates and other PACs, Super PACs can raise unlimited funds from individuals, corporations, and labor unions and spend unlimited amounts in support of candidates.<sup>10</sup> On the other hand, Super PACs are restricted from coordinating with the candidates they support.<sup>11</sup> However, whether these coordination regulations apply to individuals before they officially become candidates is unclear.<sup>12</sup> Thus, Governor Walker's lawyers "love" when he avoids calling himself a candidate because, by purporting not to be a candidate, he can exploit the testing-the-waters phase to circumvent campaign finance restrictions that are triggered when an individual becomes a candidate.

Governor Walker is not alone in utilizing this creative pre-candidacy strategy. During the preliminary stages of the 2016 presidential election, many prospective candidates pushed the boundaries of campaign finance laws. Instead of using this pre-candidacy period to determine if candidacy is viable,<sup>13</sup> these prospective candidates exploited the testing-the-waters phase to prepare for candidacy without the burden of coordination restrictions. Such preparation took many forms. Several prospective candidates played an active role in the formation of a single-candidate

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4. See John DiStaso, *New Hampshire Primary Source: Is Scott Walker Serious About New Hampshire?*, WMUR9 (July 16, 2015, 6:00 AM), <http://www.wmur.com/politics/new-hampshire-primary-source-is-scott-walker-serious-about-new-hampshire/34188724> [<https://perma.cc/6RM9-TL8N>]; Andrew Shain, *2016 in SC: Scott Walker Visiting Four Cities This Month*, STATE (Mar. 2, 2015, 5:32 PM), <http://www.thestate.com/news/politics-government/politics-columns-blogs/the-buzz/article13741355.html> [<https://perma.cc/6MMC-7XR7>].

5. Jennifer Jacobs, *First 2016 Presidential Hopeful to Open an Iowa Office: Scott Walker*, DES MOINES REG. (Feb. 10, 2015, 5:36 PM), <http://www.desmoinesregister.com/story/news/elections/presidential/caucus/2015/02/10/scott-walker-first-to-open-iowa-office-among-white-house-hopefuls/23173785/> [<https://perma.cc/W84T-LAMD>].

6. See *Governor Scott Walker Remarks at CPAC*, *supra* note 1.

7. See *infra* note 76 and accompanying text.

8. See, e.g., Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1644 (2012).

9. See FEC Form 3X, Report of Receipts and Disbursements, Unintimidated PAC Inc., at 3 (July 31, 2015), <http://docquery.fec.gov/pdf/010/201507319000485010/20150731900485010.pdf> [<https://perma.cc/86XT-JTLG>].

10. See *infra* Part I.B.1.

11. See *infra* Part I.B.2.

12. See *infra* Part II.B.

13. See *infra* note 80.

Super PAC—a Super PAC that only supports one candidate—whose purpose was to support that individual during candidacy. This active involvement included appointing that Super PAC’s leadership, where such prospective candidates often placed close advisors and former aides at the helm.<sup>14</sup> Several candidates reportedly also shared their plans and strategies for candidacy with that Super PAC, developing their campaign platform in conjunction with the Super PAC’s leadership.<sup>15</sup> Lastly, and perhaps most commonly, many Super PACs filmed footage of prospective candidates during the pre-candidacy phase and subsequently used that footage to create advertisements supporting the candidates after they officially declared.<sup>16</sup> All of these actions would almost certainly be unlawful coordination had the individuals engaged in the conduct while they were officially candidates.<sup>17</sup>

The rise of this testing-the-waters circumvention strategy was well documented by the media,<sup>18</sup> and many accused these prospective candidates of violating campaign finance law;<sup>19</sup> but is this sort of pre-candidacy conduct illegal? On September 15, 2015, campaign finance lawyer Marc Elias, on behalf of House Majority PAC and Senate Majority PAC—two Democratic PACs—posed several questions to the FEC in an advisory opinion<sup>20</sup> request concerning the legality of this conduct.<sup>21</sup> In his request, Elias asked for clarification on whether testing-the-waters candidates are subject to existing coordination regulations and whether such conduct in and of itself triggers candidacy.<sup>22</sup> Despite the seemingly obvious need for guidance, the FEC promulgated Advisory Opinion 2015-09<sup>23</sup> in response to Elias’ request, but failed to obtain the required majority and left these questions unanswered.<sup>24</sup>

Part I of this Note examines the origin of Super PACs, discusses the regulations controlling Super PACs, and analyzes the relevant regulations

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14. *See infra* Part II.A.

15. *See infra* Part II.A.

16. *See infra* Part II.A.

17. *See infra* Parts I.B.2, II.B.2.

18. *See infra* Part II.A.

19. *See* PAUL S. RYAN, CAMPAIGN LEGAL CTR., “TESTING THE WATERS” AND THE BIG LIE: HOW PROSPECTIVE PRESIDENTIAL CANDIDATES EVADE CANDIDATE CONTRIBUTION LIMITS WHILE THE FEC LOOKS THE OTHER WAY 8–29 (2015), [http://www.campaignlegalcenter.org/sites/default/files/Testing\\_the\\_Waters\\_and\\_the\\_Big\\_Lie\\_2.19.15.pdf](http://www.campaignlegalcenter.org/sites/default/files/Testing_the_Waters_and_the_Big_Lie_2.19.15.pdf) [<https://perma.cc/GL4R-EFR7>]; *infra* note 149 and accompanying text.

20. An advisory opinion is the mechanism by which a requestor can ask the FEC to comment on certain specific proposed activities before engaging in said activities. *See* 2 U.S.C. § 437f (2012) (transferred to 52 U.S.C.A. § 30108 (West 2015)); *infra* Part II.B.3. An advisory opinion is compared with a matter under review, which is the mechanism by which the FEC administers its enforcement powers, determining whether an individual or group violated campaign finance law. *See* 2 U.S.C. § 437g (transferred to 52 U.S.C.A. § 30108).

21. *See infra* Part II.B.1.

22. *See infra* Part II.B.1.

23. FEC Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) (Nov. 13, 2015) [hereinafter AO 2015-09], <http://saos.fec.gov/aodocs/2015-09.pdf> [<https://perma.cc/8K62-4QJM>].

24. *See infra* Part II.B.3.

and FEC guidance governing when a testing-the-waters candidate becomes a candidate. Part II first gives an overview of the ways in which certain individuals—then prospective candidates, later official candidates—pushed the boundaries of permissible testing-the-waters conduct during preliminary stages of the 2016 presidential election. Part II then analyzes the legality of such testing-the-waters candidates' involvement with Super PACs through the lens of Advisory Opinion 2015-09. Lastly, Part II examines the effects of the deadlocked Advisory Opinion 2015-09. Part III discusses whether further regulation should be adopted. Finally, Part IV argues that such regulation is necessary and proposes several new regulations.

### I. AN OVERVIEW OF SUPER PACS AND BECOMING A CANDIDATE

Before discussing the legality of noncandidates' coordination with Super PACs, it is first important to understand how Super PACs came to be, how they function, and the regulations governing when an individual becomes a candidate. Part I.A gives an overview of Super PACs, focusing on the Supreme Court holdings that led to their emergence. Part I.B then discusses the current laws and regulations governing Super PACs. Finally, Part I.C explores the regulations and FEC guidance regarding how an individual becomes a candidate.

#### A. *The Origin of Super PACs*

A Super PAC is an FEC-registered political action committee that makes only independent expenditures—that is, expenditures in support or opposition of a candidate which are not coordinated with that candidate<sup>25</sup>—not contributions.<sup>26</sup> The origin of Super PACs begins with *Buckley v. Valeo*,<sup>27</sup> where the Supreme Court first made this important distinction between independent expenditures and contributions.<sup>28</sup> Deeply rooted in this distinction is the tension at the heart of campaign finance regulation: protecting the First Amendment right of free speech and preventing corruption.<sup>29</sup> In *Buckley*, the Court held that contributions, including both direct contributions and coordinated expenditures, may be limited because they give rise to the danger of quid pro quo corruption and the appearance of corruption.<sup>30</sup> Conversely, the *Buckley* Court, under a strict scrutiny standard of review, struck down limits on independent expenditures.<sup>31</sup> The Court reasoned that such expenditures do not present this same danger of corruption, and, thus, the restrictions were an unconstitutional burden on the First Amendment.<sup>32</sup>

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25. See 2 U.S.C. § 431(17) (transferred to 52 U.S.C.A. § 30101(17)); Briffault, *supra* note 8, at 1651.

26. Briffault, *supra* note 8, at 1651.

27. 424 U.S. 1 (1976).

28. Briffault, *supra* note 8, at 1651.

29. *Id.*

30. *Buckley*, 424 U.S. at 46.

31. *Id.* at 45–46, 75.

32. *Id.*

*Buckley* laid the groundwork for the Supreme Court's decision in *Citizens United v. FEC*.<sup>33</sup> In holding corporations may make unlimited independent expenditures,<sup>34</sup> the Court made two important determinations.<sup>35</sup> First, the Court clarified the type of corruption sufficient to justify First Amendment limitations, holding that preventing quid pro quo corruption or the appearance of quid pro quo corruption was the *only* legitimate justification for campaign finance limits.<sup>36</sup> The Court explicitly overruled two prior cases because the decisions were, in part, based on other corruption justifications<sup>37</sup>: *Austin v. Michigan Chamber of Commerce*,<sup>38</sup> where the Court upheld limits on corporate expenditures because of the "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form,"<sup>39</sup> later termed the "antidistortion rationale,"<sup>40</sup> and *McConnell v. FEC*,<sup>41</sup> where the Court upheld a soft-money ban reasoning that soft-money donations were likely to give donors preferential access to officeholders.<sup>42</sup>

The second important determination the Court made in *Citizens United* was ruling that independent expenditures categorically do not give rise to quid pro quo corruption or the appearance thereof.<sup>43</sup> The Court reasoned that "[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."<sup>44</sup> By holding that independent expenditures are impervious to corruption, the Court laid the groundwork for independent expenditure-only committees to emerge, as this holding opened the door for PACs to spend unlimited funds on independent expenditures.<sup>45</sup>

Although the *Citizens United* Court held that independent expenditures were incorruptible, the Court did not address one question that was necessary to answer before the modern-day Super PAC could emerge:

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33. 558 U.S. 310 (2010).

34. *Id.* at 365.

35. *Id.* at 357, 359.

36. *Citizens United*, 558 U.S. at 359–61. The Court later reaffirmed this holding in *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) ("[W]hile preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—'quid pro quo' corruption.>").

37. *See Citizens United*, 558 U.S. at 349–55, 360.

38. 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310.

39. *Id.* at 660.

40. *See Citizens United*, 558 U.S. at 313.

41. 540 U.S. 93 (2003), *overruled by Citizens United*, 558 U.S. 310.

42. *Id.* at 156.

43. *Citizens United*, 558 U.S. at 357. The Court offered the 100,000-page record in *McConnell v. FEC* as evidence, stating that the lack of examples of votes being exchanged for expenditures in *McConnell* "confirms *Buckley*'s reasoning that independent expenditures do not lead to, or create the appearance of, quid pro quo corruption." *Id.* at 360.

44. *Id.* at 357 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

45. *See Note, Working Together for an Independent Expenditure: Candidate Assistance with Super Pac Fundraising*, 128 HARV. L. REV. 1478, 1482 (2015) [hereinafter *Working Together*].

whether limits could be placed on contributions to independent expenditure-only groups. Within just a few months of *Citizens United*, the D.C. Circuit answered this question in *SpeechNow.org v. FEC*,<sup>46</sup> laying the final brick necessary for the formation of the modern-day Super PAC. Relying on the *Citizens United* holding that independent expenditures are impervious to corruption, the D.C. Circuit held that “the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations,” and, thus, any limitations on such contributions were unconstitutional.<sup>47</sup> Although the FEC did not appeal *SpeechNow.org*, nor has the Supreme Court otherwise specifically addressed contributions to independent expenditure-only committees, the holding in *SpeechNow.org* has been widely accepted and adopted.<sup>48</sup>

### B. Regulating the Modern-Day Super PAC

Super PACs are unique from other forms of PACs in both their abilities and limitations. Part I.B.1 gives an overview of the benefits of forming a Super PAC, as compared to other PACs. Part I.B.2 then discusses the restrictions placed on Super PACs.

#### 1. Why So Super?: The Inapplicable Regulations

Under the Federal Election Campaign Act of 1971<sup>49</sup> (FECA), Super PACs are subject to the same federal organizational, registration, reporting, and disclosure requirements that apply to other PACs.<sup>50</sup> However, because Super PACs only make independent expenditures, they are not subject to FECA’s \$5000 contribution limit.<sup>51</sup> That said, any PAC can engage in unlimited independent spending, as non-Super PACs can make both contributions and independent expenditures.<sup>52</sup> However, PACs that make contributions—that is, non-Super PACs—can only engage in unlimited independent spending with funds raised in compliance with FECA and FEC regulations, which prohibit non-Super PACs from raising funds from corporations and labor organizations<sup>53</sup> and receiving donations from individuals in excess of \$5000 a year.<sup>54</sup> On the other hand, pursuant to

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46. 599 F.3d 686 (D.C. Cir. 2010).

47. *Id.* at 696.

48. Bradley A. Smith, *Super Pacs and the Role of “Coordination” in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 604 (2013); see *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Texans for Free Enter. v. Tx. Ethics Comm’n*, 732 F.3d 535, 538 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 699 (9th Cir. 2010).

49. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

50. Briffault, *supra* note 8, at 1646; see 2 U.S.C. §§ 432, 433, 434 (2012) (transferred to 52 U.S.C.A. §§ 30102, 30103, 30104 (West 2015)); 11 C.F.R. § 104.4 (2015).

51. See 2 U.S.C. § 441a(a)(2)(A) (transferred to 52 U.S.C.A. § 30116(a)(2)(A)).

52. Briffault, *supra* note 8, at 1647.

53. 11 C.F.R. § 114.2(b).

54. 2 U.S.C. § 441a(a)(1)(C) (transferred to 52 U.S.C.A. § 30116(a)(1)(C)). There is one exception to the rule that non-Super PACs can only spend funds raised within the contribution constraints of FECA and FEC regulations, however. A Hybrid PAC, created

*Citizens United* and *SpeechNow.org*, Super PACs can engage in unlimited independent spending with funds raised from individuals, corporations, and labor organizations that are not subject to contribution dollar restrictions.<sup>55</sup>

## 2. Restricting Super PACs: Coordination and the Independent-Only Requirement

Although Super PACs are seemingly given wide latitude to raise and spend funds, these independent expenditure-only committees have one obvious limitation: they can make only independent expenditures.<sup>56</sup> An independent expenditure is defined as an expenditure “expressly advocating<sup>[57]</sup> the election or defeat of a clearly identified candidate<sup>[58]</sup> . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents,”<sup>59</sup> or in other words, is not coordinated with such candidate.<sup>60</sup> Super PACs’ existence hinges on this coordination restriction—that is, the independence of an independent expenditure.<sup>61</sup>

The FEC promulgated a three-prong test for determining whether an expenditure is coordinated, which consists of the payment, content, and conduct prongs.<sup>62</sup> The payment prong is satisfied if the communication “[i]s paid for, in whole or in part, by a person other than that candidate, authorized committee, or political party committee.”<sup>63</sup> The content prong is satisfied if the communication is one of the types of communications listed

after *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011), may raise unlimited sums from individuals, corporations, and labor organizations for independent expenditures, like a Super PAC, and raise funds subject to the FECA and FEC regulation limitations for contributions, if it meets certain requirements, such as maintaining separate bank accounts. 11 C.F.R. § 114.10(a); Dave Levinthal, *Hybrid PACs Generating Few Greenbacks*, CTR. FOR PUB. INTEGRITY (Feb. 2, 2015, 2:07 PM), <http://www.publicintegrity.org/2015/02/01/16682/hybrid-pacs-generating-few-greenbacks> [<https://perma.cc/94G7-7UV8>].

55. See *supra* Part I.A.

56. Briffault, *supra* note 8, at 1647.

57. Express advocacy includes any communication that [w]hen taken as a whole . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
- (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22. For examples of communications containing express advocacy, see *id.*

58. “Clearly identified” means the candidate’s name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference. 2 U.S.C. § 431(18) (transferred to 52 U.S.C.A. § 30101(18)); 11 C.F.R. § 100.17. For examples of references to a clearly identified candidate, see 11 C.F.R. § 100.17.

59. 2 U.S.C. § 431(17) (transferred to 52 U.S.C.A. § 30101(17)); see also 11 C.F.R. § 100.16.

60. See 11 C.F.R. § 109.20(a) (defining coordinated).

61. See *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 38 (D.D.C. 2012); Smith, *supra* note 48, at 604–05; *Working Together*, *supra* note 45, at 1483.

62. See 11 C.F.R. § 109.21(a).

63. *Id.* § 109.21(a)(1).

in the regulation.<sup>64</sup> The conduct prong is the most relevant part of the test, as it deals with the actual interactions between candidates and Super PACs. The conduct prong is satisfied if: (1) the communication is created at the *request or suggestion* of the candidate or at the suggestion of a person paying for the communication and the candidate assents to the suggestion;<sup>65</sup> (2) the candidate is *materially involved* in decision making for the communication;<sup>66</sup> (3) the communication is created after one or more *substantial discussions* about the communication between the person or organization paying for the communication and the candidate;<sup>67</sup> (4) the person or organization paying for the communication contracts with a *commercial vendor* to produce or distribute the communication that provided certain services to the candidate during the previous 120 days;<sup>68</sup> or (5) the communication is paid for by a person or by the employer of a person who was an *employee or independent contractor* of the candidate during the previous 120 days.<sup>69</sup> The FEC specifies that neither agreement nor formal collaboration is required for a communication to be coordinated.<sup>70</sup>

A coordinated expenditure is treated as a contribution to the candidate.<sup>71</sup> Thus, a Super PAC could face severe consequences if it made a coordinated expenditure. As the Super PAC would no longer be making only independent expenditures, it would lose its ability to operate as a Super

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64. *See id.* § 109.21(c). These include electioneering communications, see *id.* § 100.29 for the definition, and certain public communications that are listed in *id.* § 109.21(c)(2)–(5).

65. *Id.* § 109.21(d)(1).

66. *Id.* § 109.21(d)(2). Material involvement includes playing a part in decisions regarding the content, intended audience, means or mode, the media outlet, the timing or frequency, the size of printed communications, or the duration of broadcast communications. *Id.*

67. *Id.* § 109.21(d)(3). A discussion is substantial if information about the candidate's campaign plans, projects, activities, or needs is conveyed to the person or group paying for the communication and that information is material to the creation, production, or distribution of the communication. *Id.*

68. *Id.* § 109.21(d)(4). These services include developing a media strategy or the content of the public communication; selecting audiences; polling; fundraising; producing a public communication; identifying voters or creating voter lists, mailing lists, or donor lists; selecting personnel, contractors, or subcontractors; and consulting or otherwise providing political or media advice. *Id.*

69. *Id.* § 109.21(d)(5).

70. *Id.* § 109.21(e). Additionally, the FEC also included several safe harbor provisions: candidates may respond to inquiries about legislative or policy issues; the person or group paying for the communication may use publicly available information to create the communication; candidates may endorse or solicit funds for other candidates, political committees, or other organizations; candidates may appear in a public communication in which he or she is clearly identified as the owner or operator of a business that existed prior to candidacy; and none of the conduct standards are satisfied if the vendor, political committee, former employee, or contractor implements a firewall. *Id.* §§ 109.21(d)(2)–(5), (f), (g), (h). However, the firewall safe harbor does not apply if, despite the firewall, the circumstances indicate that the person paying for the communication used or was conveyed information about the candidate's campaign plans, projects, activities, or needs and such information was material to the creation, production, or distribution of that communication. *Id.* § 109.21(h).

71. 2 U.S.C. § 441a(a)(7)(B)(i) (2012) (transferred to 52 U.S.C.A. § 30116(a)(7)(B)(i) (West 2015)).

PAC,<sup>72</sup> thus triggering the FECA contribution regulations placed on non-Super PACs.<sup>73</sup> Additionally, if the contribution (in this case, the coordinated expenditure) cost more than \$5000 or was paid for with funds raised from corporations or labor unions, the contribution would be unlawful, as it would contravene FECA's contribution restrictions.<sup>74</sup>

*C. Testing the Waters or Triggering Candidacy:  
Determining When an Individual Becomes a Candidate*

Before exploring how these Super PAC limits interact with testing-the-waters candidates, it is important to determine how an individual becomes a candidate. However, the answer to this question is not as cut-and-dried as it may seem. Part I.C.1 gives a basic overview of the laws and regulations governing testing-the-waters candidates' transition into candidacy. Part I.C.2 then discusses how the FEC, through advisory opinions and matters under review, has attempted to provide guidance on the enforcement of these laws and regulations.

1. Statutes and Regulations

According to FECA and FEC regulations, a candidate is an individual who, in seeking election to federal office, receives contributions or makes expenditures—or consents to another person doing so on their behalf—aggregating in excess of \$5000.<sup>75</sup> However, the FEC created an exemption to this \$5000 aggregate threshold for contributions and expenditures spent “for the purpose of determining whether an individual should become a candidate,” known as the testing-the-waters exemption.<sup>76</sup> That said, this exemption does not apply to payments made or 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.”<sup>77</sup> Once candidacy is triggered, the individual must file a statement of candidacy with the FEC within fifteen days, and all funds or payments exempt during the testing-the-waters phase are treated as contributions or expenditures and must be reported.<sup>78</sup> On the other hand, while in the testing-the-waters phase, individuals do not have to register with the FEC,

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72. Smith, *supra* note 48, at 605.

73. *See supra* Part I.B.2.

74. *See supra* notes 51–53 and accompanying text (explaining that contributions may not be made in excess of \$5000 or from funds raised from corporations or labor unions); 2 U.S.C. § 441a(f) (transferred to 52 U.S.C.A. § 30116(f)) (“No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section . . . .”); *see also Working Together, supra* note 45, at 1483 (“Because certain actors, such as corporations and labor organizations, cannot contribute money directly to federal candidates, a Super PAC’s contribution to a candidate would be illegal if the Super PAC had raised any of its funds from those prohibited sources.”).

75. 2 U.S.C. § 431(2) (transferred to 52 U.S.C.A. § 30101(2)); 11 C.F.R. § 100.3.

76. 11 C.F.R. §§ 100.72, 100.131.

77. *Id.*

78. *See* 2 U.S.C. §§ 432(e), 433 (transferred to 52 U.S.C.A. §§ 30102(e), 30103); 11 C.F.R. §§ 101.1, 101.3, 100.72, 100.131.

create an exploratory committee, or file disclosure reports, but may if they so choose.<sup>79</sup>

## 2. FEC Clarification or Confusion?

The FEC created the testing-the-waters exemption to afford individuals the opportunity to determine whether there is enough political support for a candidacy.<sup>80</sup> These regulations seek to draw a distinction between activities directed at evaluating one's candidacy and those merely confirming a private decision to become a candidate that has already been made.<sup>81</sup> An individual, who has raised or spent more than \$5000, becomes a candidate when he or she makes a private determination to run for federal office.<sup>82</sup> However, the FEC looks objectively at an individual's activities in determining whether this decision has been made, not to that individual's subjective decision-making process.<sup>83</sup> This section explores how the FEC conducts this objective analysis. Part I.C.2.a discusses how the FEC has expanded permissible testing-the-waters activities. Part I.C.2.b analyzes how the FEC has attempted to provide guidance on the type of conduct that triggers candidacy.

### a. Permissible Testing-the-Waters Activities

FEC regulations provide a nonexhaustive list of permissible testing-the-waters activities, which includes conducting polls, telephone calls, and travel.<sup>84</sup> Through advisory opinions and matters under review, the FEC has clarified and expanded what constitutes a permissible testing-the-waters activity.

In Advisory Opinion 1981-32, the FEC found that none of the fourteen testing-the-waters activities proposed by the requestor, former Governor Reubin Askew, would trigger candidacy.<sup>85</sup> The FEC further clarified permissible testing-the-waters "travel" by approving Askew's plans to travel throughout the country to speak to groups about public issues and attend briefings, as well as employ an assistant to help coordinate these travel arrangements.<sup>86</sup> The FEC also clarified the conducting polls exemption by approving Askew's plans to employ a "specialist in opinion research to conduct [his] polls."<sup>87</sup>

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79. See 11 C.F.R. §§ 101.3, 100.72, 100.131; FEC Matter Under Review 6819 (Kruclick for Congress), Factual and Legal Analysis, at 6 n.7 (Feb. 25, 2015) [hereinafter MUR 6819], <http://eqs.fec.gov/eqsdocsMUR/15044371517.pdf> [<https://perma.cc/89Y2-95PD>].

80. FEC Advisory Opinion 1981-32 (Askew), at 4 (Oct. 2, 1981) [hereinafter AO 1981-32], <http://saos.fec.gov/aodocs/1981-32.pdf> [<https://perma.cc/WUE3-USZ5>].

81. *Id.*

82. AO 2015-09, *supra* note 23, at 5.

83. FEC Matter Under Review 5363 (Sharpton), Factual and Legal Analysis, at 7–8 (Nov. 13, 2003) [hereinafter MUR 5363], <http://eqs.fec.gov/eqsdocsMUR/000007F9.pdf> [<https://perma.cc/5LHB-AVRX>].

84. 11 C.F.R. §§ 100.72, 100.131.

85. AO 1981-32, *supra* note 80, at 4.

86. *Id.* at 2–3.

87. *Id.* at 3.

Additionally, the FEC approved several more of Askew's plans, expanding permissible testing-the-waters activities to include: employing political and public relations consultants; renting office space and equipment; preparing and using letterhead stationery to correspond with persons who displayed an interest in Askew's potential campaign; supplementing the salary of a personal secretary for additional responsibility incurred during the testing-the-waters period; reimbursing the Governor's law firm for the activities of an associate attorney employed by the firm who would have additional responsibility during the testing-the-waters period; reimbursing the Governor's law firm for telephone costs, copying costs, and other incidental expenses; preparing and printing a biographical brochure and possibly photographs for use in connection with speaking appearances (not for the general public); and soliciting contributions for the limited purpose of engaging in such testing-the-waters activities (not for the future campaign).<sup>88</sup> Although this seemed to expand dramatically permissible testing-the-waters activities, the FEC did warn Askew that these activities must be solely for the purpose of determining whether candidacy was viable.<sup>89</sup>

In Advisory Opinion 1982-03, the FEC again classified several activities as falling within the testing-the-waters exemptions. Here, the FEC approved Senator Alan Cranston's plans to travel and speak to groups about public issues, to hire "independent contractors in such fields as polling, political consulting, public opinion, communications[,] or research," to compile and maintain information concerning persons who indicate interest in Senator Cranston's possible candidacy, and to organize advisory groups on issues requiring expertise.<sup>90</sup>

Similarly, in Advisory Opinion 1985-40, the FEC ruled that a testing-the-waters fund established by former U.S. Senator Howard Baker Jr. could send direct mail solicitations, as long as the mailings clearly indicated that Baker had not yet determined whether he would seek the presidential nomination, the funds raised would only be used for the purpose of testing-the-waters activities, and the solicitations did not result in amassing campaign funds for use during candidacy.<sup>91</sup>

#### *b. Triggering Candidate Status*

FEC regulations provide the following nonexhaustive list as examples of activities that indicate an individual has decided to become a candidate:

- (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

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88. *Id.* at 2–3.

89. *Id.* at 4–5.

90. FEC Advisory Opinion 1982-03 (Cranston), at 2, 4 (Mar. 15, 1982), <http://saos.fec.gov/aodocs/1982-03.pdf> [<https://perma.cc/P784-UQX3>].

91. FEC Advisory Opinion 1985-40 (Republican Majority Fund), at 4 (Jan. 24, 1986) [hereinafter AO 1985-40], <http://saos.fec.gov/aodocs/1985-40.pdf> [<https://perma.cc/8XTX-AUAH>].

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.<sup>92</sup>

The listed activities do not technically, in and of themselves, trigger candidate status, but rather are tools used by the FEC to objectively analyze whether an individual has decided to run for office.<sup>93</sup> Even if the FEC determines that such a decision has been made, candidate status is only triggered if the individual has satisfied the \$5000 contribution and expenditure threshold.<sup>94</sup>

The first candidacy-triggering activity concerns general public political advertising.<sup>95</sup> This type of advertising “includes communications by broadcast, satellite or cable, newspaper, magazine, outdoor advertising facility, mass mailings, phone banks, and Internet communications.”<sup>96</sup> In Matter Under Review 6224, the FEC found that appearing at a cocktail reception of a prominent businessman the day after the Republican state convention and meeting with farmers and ranchers did not constitute general public political advertising.<sup>97</sup>

The second candidacy-triggering activity concerns raising excessive funds and amassing funds for use during candidacy.<sup>98</sup> The FEC has never ruled that an amount was in excess of what could reasonably be expected to test the waters. In Matter Under Review 5934, the FEC ruled that raising

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92. 11 C.F.R. §§ 100.72, 100.131 (2015).

93. *E.g.*, FEC Matter Under Review 6449 (Bruning et al.), Factual and Legal Analysis, at 6 (2013) [hereinafter MUR 6449], <http://eqs.fec.gov/eqsdocsMUR/13044331943.pdf> [<https://perma.cc/AKJ7-VDDA>].

94. FEC Matter Under Review 6650 (Citizens to Elect Soren Simonsen et al.), Factual and Legal Analysis, at 3 (July 3, 2014), <http://eqs.fec.gov/eqsdocsMUR/14044361946.pdf> [<https://perma.cc/YQ48-J7BX>]; *see also* FEC Matter Under Review 6736 (Art Halvorson et al.), Factual and Legal Analysis, at 3 (Jan. 16, 2015), <http://eqs.fec.gov/eqsdocsMUR/15044370777.pdf> (ruling that even though Halvorson, the subject of the review, had engaged in activities that exceeded the scope of those permitted under the testing-the-waters exemption, he had not received contributions or made expenditures in excess of \$5000 and, thus, had not triggered candidate status) [<https://perma.cc/PHD9-DNW5>]; MUR 6819, *supra* note 79, at 7 (ruling that Krulick, the subject of the review, did not trigger candidate status through certain Facebook posts indicating he had already decided to run because he had not yet reached the \$5000 threshold). Even a voluntary filing of a statement of candidacy does not trigger candidate status unless this \$5000 threshold is met. 11 C.F.R. § 104.1.

95. *See supra* note 92 and accompanying text.

96. FEC Matter Under Review 6224 (Fiorina), Factual and Legal Analysis, at 9 (July 14, 2010) [hereinafter MUR 6224] (citing 2 U.S.C § 431(22) (2012) (transferred to 52 U.S.C.A. § 30101(22) (West 2015))), <http://eqs.fec.gov/eqsdocsMUR/10044274140.pdf> [<https://perma.cc/T4EX-WYDT>]; *accord* 11 C.F.R. § 100.26.

97. MUR 6224, *supra* note 96, at 8–9. The FEC did note, however, that the lack of evidence demonstrating that the subject of the review actually announced her intention to run for the U.S. Senate and that the events were publicized through general public political advertising were factors in their analysis. *Id.* at 9–10.

98. *See supra* note 92 and accompanying text.

funds as high as \$9,528,494 for testing the waters was not unreasonable.<sup>99</sup> Additionally, in this matter, the First General Counsel's Report suggested that raising \$9,528,494, but only spending \$2,923,607, was indicative of amassing campaign funds for candidacy; however, the FEC failed to rule as such.<sup>100</sup> In Matter Under Review 6224, the FEC ruled that hiring consultants and low-level staffers to sell T-shirts and hats at a party convention and collecting online donations was insufficient to demonstrate amassing funds for eventual candidacy.<sup>101</sup> In making this determination, the FEC emphasized that the complainant failed to demonstrate that these actions were for purposes other than testing the waters.<sup>102</sup> On the other hand, the FEC has ruled that soliciting funds for use against a specifically named opponent does indicate the individual is amassing funds impermissibly for candidacy.<sup>103</sup>

The third candidacy-triggering activity concerns "written or oral statements that refer to [the individual] as a candidate for a particular office."<sup>104</sup> For example, the FEC ruled that the Reverend Al Sharpton became a candidate when, in chapter one of his book entitled "Mr. President," he wrote, among other things, "I am seeking the Presidency of the United States in 2004."<sup>105</sup> Other phrases that have been found to trigger candidate status include: "Would you help me serve you . . . as I now seek the U.S. Senate?";<sup>106</sup> "I'm ready to run" and "I can't imagine any

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99. Compare FEC Matter Under Review 5934 (Thompson), First General Counsel's Report, at 5 (Oct. 14, 2008) [hereinafter MUR 5934 First General Counsel's Report], <http://eqs.fec.gov/eqsdocsMUR/10044272108.pdf> (recommending that Senator Thompson violated the law by raising excessive funds) [<https://perma.cc/KF6S-N62H>], with FEC Matter Under Review 5934 (Thompson), Statement of Reasons, at 3 (Mar. 10, 2009) [hereinafter MUR 5934 Statement of Reasons], <http://eqs.fec.gov/eqsdocsMUR/29044230161.pdf> (dismissing the complaint) [<https://perma.cc/4C75-Y3LS>]. The FEC has ruled other large sums were insufficient to move beyond what could reasonably be expected for exploratory activities. See MUR 6224, *supra* note 96, at 6 (finding \$611,799.25 was not unreasonable).

100. Compare MUR 5934 First General Counsel's Report, *supra* note 99, at 5 (suggesting that raising \$9,528,494, but only spending \$2,923,607 was indicative of amassing funds for candidacy), with MUR 5934 Statement of Reasons, *supra* note 99, at 3 (dismissing the complaint).

101. MUR 6224, *supra* note 96, at 6-7.

102. *Id.* at 7.

103. See MUR 6449, *supra* note 93, at 8 (finding Jon Bruning became a candidate by sending an email soliciting funds to "defeat Ben Nelson in 2012"); FEC Matter Under Review 5693 (Aronsohn et al.), General Counsel's Report #2, at 9 (Nov. 7, 2007) [hereinafter MUR 5693], <http://eqs.fec.gov/eqsdocsMUR/28044205053.pdf> (finding Paul Aronsohn became a candidate by sending a solicitation letter stating every dollar received could help "prepare for this fight against [incumbent] Scott Garrett") [<https://perma.cc/WZT8-LHYL>].

104. See *supra* note 92 and accompanying text.

105. MUR 5363, *supra* note 83, at 4 (quoting AL SHARPTON & KAREN HUNTER, *AL ON AMERICA* 4, 7 (Kensington 2002)).

106. FEC Matter Under Review 6735 (Sestak et al.), Factual and Legal Analysis, at 7 (July 18, 2014) (quoting Email from Joe Sestak (Aug. 27, 1013)), <http://eqs.fec.gov/eqsdocsMUR/14044364180.pdf> [<https://perma.cc/C7WW-E6GZ>].

conditions under which I would not run”;<sup>107</sup> and “[I am] ready to begin fighting for our future . . . now. . . . [I] will *immediately* work for the benefit of Colorado.”<sup>108</sup> Additionally, if an individual or his advisors inform the media that the individual will announce candidacy on a certain date in the future, candidacy is triggered immediately, not on the official announcement date.<sup>109</sup> Lastly, once candidacy is triggered, subsequent attempts to retract statements do not destroy candidate status.<sup>110</sup>

However, not every statement that refers to the individual as a candidate triggers candidate status. The FEC generally analyzes the context in which each statement was made. A statement that triggers candidate status “requires some objective deliberateness, not a mere ‘slip up.’”<sup>111</sup> Additionally, any statements must be authorized, as unauthorized statements by the media that refer to an individual as a candidate are not dispositive.<sup>112</sup> Moreover, a statement’s audience and purpose are also relevant. In Matter Under Review 6776, the FEC dismissed allegations against a testing-the-waters candidate who created a proposal that referred to him as a candidate several times, reasoning that the proposal was “privately presented” to the National Republican Congressional Committee to obtain their view on the feasibility of his candidacy.<sup>113</sup>

In addition to context, the FEC also analyzes the content of statements, determining whether any statements at issue unambiguously refer to the individual as a candidate.<sup>114</sup> In Matter Under Review 5934, the FEC examined several statements made by Senator Fred Thompson: “[I do not] have any big announcement tonight,” but “I plan on seeing a whole lot more of you, how ‘bout that?”;<sup>115</sup> “[I am] testing the waters” and “the waters feel pretty warm to me”; “[y]ou’re either running or not running . . . I think the steps we’ve taken are pretty obvious”;<sup>116</sup> and “[w]e are going to be

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107. MUR 6449, *supra* note 93, at 7 (quoting Don Walton, *Bruning Says He’s Actively Exploring a Senate Campaign*, LINCOLN J. STAR, (Nov. 5, 2010), [http://journalstar.com/news/local/govt-and-politics/bruning-says-he-s-actively-exploring-a-senate-campaign/article\\_88d3c204-e8f9-11df-805c-001cc4c002e0.html](http://journalstar.com/news/local/govt-and-politics/bruning-says-he-s-actively-exploring-a-senate-campaign/article_88d3c204-e8f9-11df-805c-001cc4c002e0.html) [https://perma.cc/A66E-8Y7E]).

108. MUR 5693, *supra* note 103, at 8–9 (omission in original) (emphasis added).

109. AO 2015-09, *supra* note 23, at 6–7.

110. *Id.*

111. FEC Matter Under Review 5672 (Davis et al.) & 5733 (Davis et al.), Statement of Reasons, at 3 (Mar. 13, 2007), <http://eqs.fec.gov/eqsdocsMUR/00005C4A.pdf> [https://perma.cc/RVW7-JCCC].

112. MUR 6224, *supra* note 96, at 10.

113. FEC Matter Under Review 6776 (Niger Innis et al.), Factual and Legal Analysis, at 10 (Dec. 19, 2014), <http://eqs.fec.gov/eqsdocsMUR/15044370340.pdf> [https://perma.cc/6A7V-HR99].

114. See MUR 5934 Statement of Reasons, *supra* note 99, at 2–3.

115. MUR 5934 First General Counsel’s Report, *supra* note 99, at 7 (quoting Michael Shear, *Thompson Moves from ‘If’ He’ll Run to ‘How’*, WASH. POST (July 2, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/01/AR2007070101238.html> [https://perma.cc/N9QR-65G9]).

116. MUR 5934 Statement of Reasons, *supra* note 99, at 2 (quoting Erik Schelzig, *Fred Thompson Defends His Lobbying Past*, WASH. POST (June 26, 2007, 5:41 PM), [http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062601055\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062601055_pf.html) [https://perma.cc/N3YZ-ULCQ]).

getting in if we get in, and of course, we are in the testing the waters phase,' adding, 'we're going to be making a statement shortly that will cure all of that.'"<sup>117</sup> The FEC found that although Senator Thompson "tested the boundaries of the testing the waters exemption,"<sup>118</sup> he did not trigger candidate status because, unlike Al Sharpton, as discussed in Matter Under Review 5363,<sup>119</sup> Senator Thompson's statements were ambiguous.<sup>120</sup>

Although according to FEC regulations, testing-the-waters activities conducted in close proximity to an election or over a protracted period of time may indicate the individual has decided to become a candidate, the FEC has since weakened this provision's determinativeness. The FEC has explained that this factor is relevant,<sup>121</sup> but that there is no maximum length of time that automatically triggers candidate status.<sup>122</sup>

## II. TESTING THE WATERS OR PREPARING FOR CANDIDACY?: ANALYZING THE LEGALITY OF PRE-CANDIDACY COORDINATION

Despite the FEC's attempts to clarify when candidacy is triggered through regulations, advisory opinions, and matters under review,<sup>123</sup> when an individual becomes a candidate remains largely uncertain. Adding to this ambiguity, it is also unclear how restrictions regulating Super PACs, all of which refer only to a "candidate,"<sup>124</sup> correlate with testing-the-waters candidates. Part II.A discusses how, during the early stages of the 2016 presidential election, individuals used these ambiguities to strategically circumvent campaign finance restrictions on coordination. Part II.B then examines the FEC's analysis of these issues in Advisory Opinion 2015-09 and the effects of that opinion.

### A. *Pre-Candidacy Coordination in Action: Examples from the 2016 Presidential Election*

During the preliminary stages of the 2016 presidential election, several—then prospective, later official—candidates seemingly exploited the testing-the-waters phase by strategically avoiding candidate status. For example, on January 6, 2015, two PACs that support Jeb Bush were formed: Right to Rise PAC, a non-Super PAC, and Right to Rise Super PAC, a single-

117. *Id.* (quoting John King, *Thompson: Roe 'Bad Law and Bad Medicine'*, CNN (Aug. 17, 2007, 10:53 AM), <http://politicalticker.blogs.cnn.com/2007/08/18/thompson-on-running-we%E2%80%99ll-be-in/comment-page-8/> [<https://perma.cc/68KG-GZ9Z>]).

118. *Id.*

119. See MUR 5363, *supra* note 83, at 4; *supra* note 105 and accompanying text.

120. MUR 5934 Statement of Reasons, *supra* note 99, at 2–3.

121. See AO 1981-32 *supra* note 80, at 5 (stating that time period has relevance, as had Governor Askew engaged in certain activities over a protracted period of time, the length of time would have diminished the activities' usefulness in testing the waters and suggested Governor Askew was trying to build a base of support).

122. *E.g.*, AO 2015-09, *supra* note 23, at 6.

123. See *supra* Part I.C.2.

124. See *supra* Part I.B.2.

candidate Super PAC<sup>125</sup> (later renamed and subsequently referred to in this Note as “Right to Rise USA”).<sup>126</sup> Bush did not officially file his statement of candidacy with the FEC until June 15, 2015,<sup>127</sup> more than six months after initially announcing he was “actively explor[ing] the possibility” of running for president.<sup>128</sup> During this period, Jeb Bush traveled around the country, speaking in front of crowds and headlining at least thirty-nine Right to Rise USA fundraisers as the event’s “featured guest.”<sup>129</sup> By June 30, 2015—two weeks after Bush officially declared—Right to Rise USA had already raised over \$103 million.<sup>130</sup> Throughout this period, however, other than one slip-up, Bush consistently maintained that he had not yet made a decision to run.<sup>131</sup>

Mike Murphy, a top advisor during Jeb Bush’s 1998 and 2002 gubernatorial campaigns and someone Bush himself calls “a good friend,”<sup>132</sup> heads Right to Rise USA.<sup>133</sup> On June 17, 2015—two days after Bush filed his statement of candidacy—*Buzzfeed* reporters listened in on a call between Murphy and a group of donors, in which Murphy admitted to coordinating with the Bush campaign during Bush’s testing-the-waters phase.<sup>134</sup> Murphy stated he “[couldn’t] coordinate [with Jeb Bush’s campaign] *any more*,” but added he was “well informed as of a week ago.”<sup>135</sup> Murphy then went on to describe campaign strategy, explaining

125. Robert Costa, *Jeb Bush and His Allies Form Leadership PAC and Super PAC, Both Dubbed Right to Rise*, WASH. POST (Jan. 6, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/01/06/jeb-bush-forms-new-pac-right-to-rise/> [https://perma.cc/CL5F-6MJ4].

126. See FEC Form 1, Statement of Organization, Right to Rise USA (June 12, 2015), <http://docquery.fec.gov/pdf/367/15951468367/15951468367.pdf> [https://perma.cc/HBE3-CS6T].

127. FEC Form 2, Statement of Candidacy, Jeb Bush (June 15, 2015), <http://docquery.fec.gov/pdf/747/15031431747/15031431747.pdf> [https://perma.cc/2G7T-L386].

128. Costa, *supra* note 125.

129. Michael C. Bender, *Jeb Bush Tries to Win Without Speaking to His Favorite Strategist*, BLOOMBERG (June 26, 2015, 6:00 AM), <http://www.bloomberg.com/politics/articles/2015-06-26/does-anyone-believe-jeb-bush-isn-t-talking-to-his-super-pac-chief-> [https://perma.cc/U5TW-BC7R].

130. FEC Form 3X, Report of Receipts and Disbursements, Right to Rise USA, at 2 (July 31, 2015), <http://docquery.fec.gov/pdf/819/201507319000471819/201507319000471819.pdf> [https://perma.cc/E9EB-98N6].

131. Eric Lichtblau & Nick Corasaniti, *Jeb Bush, Taking His Time, Tests the Legal Definition of Candidate*, N.Y. TIMES (June 3, 2015), [http://www.nytimes.com/2015/06/04/us/politics/jeb-bush-taking-his-time-tests-the-legal-definition-of-candidate.html?\\_r=1](http://www.nytimes.com/2015/06/04/us/politics/jeb-bush-taking-his-time-tests-the-legal-definition-of-candidate.html?_r=1) [https://perma.cc/8V4K-MSKF].

132. Bender, *supra* note 129.

133. Ed O’Keefe, *Meet the People Who Will Try to Get Jeb Bush Elected President*, WASH. POST (June 15, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/15/a-guide-to-jeb-bushs-family-friends-donors-staff-and-super-pac-friends/> [https://perma.cc/324S-8WP7].

134. Andrew Kaczynski & Ilan Ben-Meir, *We Crashed Jeb Bush’s Super PAC’s Donor Call, and Here’s What They Said*, BUZZFEED (June 17, 2015, 6:53 PM), <http://www.buzzfeed.com/andrewkaczynski/we-crashed-jeb-bushs-super-pacs-donor-call-and-heres-what-th#.dnNonn24M0> [https://perma.cc/4MAH-66YC].

135. *Id.* (emphasis added) (quoting Mike Murphy).

what Bush's message would focus on as the presidential race continued.<sup>136</sup> Murphy also credited Bush with creating part of the Super PAC's strategy, stating, "[O]ne of the new ideas that, you know, the governor had—he's such an innovator—is we're going to be the first super PAC to really be able to do just positive advertising."<sup>137</sup> Similarly, other sources reported that Murphy was "deeply involved in Bush's steps, courting donors, selecting staff[,] and developing strategy."<sup>138</sup>

Bush is not alone in participating in forming a single-candidate Super PAC and sharing plans and strategies. For example, there is evidence that John Kasich played a similar role with the Super PAC that supports him, New Day for America. In April of 2015, Kasich helped form a 527 organization<sup>139</sup> called New Day for America.<sup>140</sup> Kasich did not file a statement of candidacy with the FEC until July 23, 2015.<sup>141</sup> That same day, the 527 organization registered with the FEC and became a Super PAC.<sup>142</sup> Prior to this split, Kasich reportedly played a significant role in determining the Super PAC's leadership and staff,<sup>143</sup> as well as had substantial discussions about long-term strategy with those who would go on to work for the Super PAC.<sup>144</sup> Kasich's role in creating New Day for America is

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136. *Id.* ("Murphy said Bush's message would focus on three things: how to 'make this country an economic superpower again'; that Bush wants [to] 'blow up the machine in Washington'; and 'the world is more chaotic than ever, we need an experienced president, who's had the life training to make our country safer, in a world that's become more unstable.'").

137. *Id.* (quoting Mike Murphy). However, a spokesperson for Right to Rise USA later said Murphy was referring to "Governor Bush's historical preference for positive advertising." Matea Gold, *It's Bold, but Legal: How Campaigns and Their Super PAC Backers Work Together*, WASH. POST (July 6, 2015), [https://www.washingtonpost.com/politics/here-are-the-secret-ways-super-pacs-and-campaigns-can-work-together/2015/07/06/bda78210-1539-11e5-89f3-61410da94eb1\\_story.html](https://www.washingtonpost.com/politics/here-are-the-secret-ways-super-pacs-and-campaigns-can-work-together/2015/07/06/bda78210-1539-11e5-89f3-61410da94eb1_story.html) [<https://perma.cc/TA66-DMK6>].

138. Thomas Beaumont, *Jeb Bush Prepares to Give Traditional Campaign a Makeover*, ASSOCIATED PRESS (Apr. 21, 2015, 6:19 PM), <http://bigstory.ap.org/article/409837aa09ee405493ad64a94b8c2c3d/bush-preparing-delegate-many-campaign-tasks-super-pac> [<https://perma.cc/G3ZD-ZRVQ>].

139. A 527 organization is a group formed under section 527 of the Internal Revenue Code, which is not registered with the FEC, but can raise and spend unlimited funds, as long as such funds are used for issue advocacy rather than express advocacy. *See* Briffault, *supra* note 8, at 1648; *supra* note 57 (defining express advocacy).

140. *Kasich Forms New Political Organization As He Mulls 2016 Run*, NBC NEWS (Apr. 20, 2015, 1:49 PM), <http://www.nbcnews.com/politics/2016-election/kasich-forms-new-political-organization-he-mulls-2016-run-n345001> [<https://perma.cc/W439-TADV>].

141. FEC Form 2, Statement of Candidacy, John R. Kasich (July 23, 2015), <http://docquery.fec.gov/pdf/022/201507230300013022/201507230300013022.pdf> [<https://perma.cc/67Y8-QUZJ>].

142. FEC Form 1, Statement of Organization, New Day for America (July 23, 2015), <http://docquery.fec.gov/pdf/003/201507230300013003/201507230300013003.pdf> [<https://perma.cc/DK8E-ZKKD>].

143. *See* Mark Halperin, *John Kasich's Super-PAC Hires Fred Davis As Media Strategist*, BLOOMBERG (June 9, 2015, 10:00 PM), <http://www.bloomberg.com/politics/articles/2015-06-10/exclusive-john-kasich-s-super-pac-hires-fred-davis-as-media-strategist> [<https://perma.cc/6DRD-K7MY>].

144. *See* Darrel Rowland, *Super-PAC Rules Are Super-Vague*, COLUMBUS DISPATCH (Oct. 5, 2015, 6:11 AM), <http://www.dispatch.com/content/stories/local/2015/10/05/super-pac-rules-are-super-vague.html> [<https://perma.cc/W95W-48GF>].

further evidenced by a video posted on New Day for America's website shortly after it became a Super PAC and Kasich filed his statement of candidacy. In the video, Kasich alludes to the fact that he helped create the Super PAC supporting him by stating "that's why I'm announcing that *we created* the New Day for America Committee . . . I hope you'll visit *our website* at [NewDayforAmerica.com](http://NewDayforAmerica.com)."<sup>145</sup>

In addition to planning and strategizing, candidates also pushed the boundaries of the testing-the-waters exemptions by having the Super PAC that supports them film footage of them discussing their achievements and qualifications for office during the testing-the-waters phase, for use in creating communications after the individuals officially became candidates. Filming this type of footage with a Super PAC *during candidacy* would almost certainly be restricted under coordination regulations.<sup>146</sup> Jeb Bush, Carly Fiorina, John Kasich, and Scott Walker all filmed footage during the testing-the-waters phase that was later used by the Super PACs supporting them in advertisements after they filed their statements of candidacy.<sup>147</sup>

### B. FEC Advisory Opinion 2015-09

The media has been quick to highlight the actions of these then-prospective candidates, but did these individuals violate campaign finance law? Jeb Bush and his lawyers maintain that Bush acted in compliance with the law.<sup>148</sup> Some campaign finance watchdog groups disagree, however, and filed complaints with the FEC against several candidates and urged the Department of Justice to take action.<sup>149</sup> Then, on September 11,

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145. See Complaint Against John R. Kasich Before the FEC, American Democracy Legal Fund, at 8 (July 3, 2015) [hereinafter Complaint Against Kasich] (quoting John R. Kasich), <http://americandemocracy.org/wp-content/uploads/Kasich-FEC-Complaint.pdf> [https://perma.cc/R9X4-MGDD]; see also New Day for America, *It's Time for a New Day for America*, VIMEO (Apr. 2015), <https://vimeo.com/125411715> [https://perma.cc/GYL6-XC57].

146. It is highly unlikely that appearing in a communication would not satisfy the conduct prong of the coordination regulations. See *supra* note 66 and accompanying text; *infra* note 280 and accompanying text.

147. Seth McLaughlin, *Candidates' Super PAC Footage Tests Spirit of Campaign Finance Laws*, WASH. TIMES (Sept. 21, 2015), <http://www.washingtontimes.com/news/2015/sep/21/carly-fiorina-jeb-bush-john-kasich-super-pac-films/?page=allscott> [https://perma.cc/6BUK-WJV3]; Andrew Perez, *Election 2016: Republican Candidates Fiorina, Bush, Walker Filmed Ads with Super PACs Backing Their Campaigns*, INT'L BUS. TIMES (Sept. 15, 2015, 4:34 PM), <http://www.ibtimes.com/election-2016-republican-candidates-fiorina-bush-walker-filmed-ads-super-pacs-backing-2098050> [https://perma.cc/3C6U-8YMG].

148. See, e.g., Ed O'Keefe, *Campaign Finance Watchdogs Push Justice Dept. to Investigate Jeb Bush's PAC*, WASH. POST (May 27, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/05/27/campaign-finance-watchdogs-push-justice-dept-to-investigate-jeb-bushs-pac/> [https://perma.cc/SGZ9-UD5S].

149. See Complaint Against Jeb Bush Before the FEC, American Democracy Legal Fund (Sept. 21, 2015), <http://americandemocracy.org/wp-content/uploads/ADLF-Complaint-vs-Jeb-and-Jeb-Inc.pdf> [https://perma.cc/38SR-8AJ7]; Complaint Against Kasich, *supra* note 145; Complaint Against Jeb Bush Before the FEC, Campaign Legal Center & Democracy 21 (Mar. 31, 2015), [http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Jeb%20Bush\\_Complaint\\_3.31.15.pdf](http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Jeb%20Bush_Complaint_3.31.15.pdf) [https://perma.cc/4WZR-7CC7];

2015, campaign finance lawyer Marc Elias filed an advisory opinion request with the FEC on behalf of Senate Majority PAC (SMP) and House Majority PAC (HMP)—two Democratic PACs—in the hopes that the FEC would address some of these issues.<sup>150</sup> Part II.B.1 gives an overview of the questions Elias asked in his advisory opinion request. Part II.B.2 then explores the FEC’s analysis of those questions by examining the different draft advisory opinions issued prior to the final vote on the request. Lastly, Part II.B.3 discusses the effect Advisory Opinion 2015-09 has on the legality of the conduct described in the advisory opinion request.

1. Asking the Right Questions:  
Advisory Opinion Request 2015-09

In Advisory Opinion Request 2015-09, Elias, on behalf of SMP and HMP, asked twelve questions, four of which are relevant to this Note. Question 7—by inquiring whether the conduct proposed in Question 1 would trigger candidacy—asks if candidacy is triggered when “an individual, who would not otherwise be a candidate, participates in forming a Super PAC (either directly or through agents), whose purpose is to support the individual’s prospective candidacy,” once that Super PAC raised more than \$5000.<sup>151</sup> Elias explains that such participation would include appointing the Super PAC’s leadership, who would then raise funds in unlimited amounts and spend such funds on independent expenditures in support of the individual after he or she became a candidate.<sup>152</sup>

The other relevant questions concern noncandidates’ ability to coordinate with the single-candidate Super PAC that will support them during candidacy and how this could affect candidate status:

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?<sup>153</sup>

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Complaint Against Scott Walker Before the FEC, Campaign Legal Center & Democracy 21 (Mar. 31, 2015), [http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Scott%20Walker\\_Complaint\\_3.31.15.pdf](http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Scott%20Walker_Complaint_3.31.15.pdf) [<https://perma.cc/4JFJ-HAF9>].

150. See FEC Advisory Opinion Request 2015-09 (Sept. 11, 2015) [hereinafter AOR 2015-09], <http://saos.fec.gov/aodocs/1320488.pdf> [<https://perma.cc/8Y8N-E4JQ>].

151. *Id.* at 4, 13. Question 7 is actually phrased in terms of whether the conduct described in Question 1 would trigger candidate status. *Id.* at 13 (“Question 7: Would the activities described in Question 1 trigger candidacy once the New Super PACs had raised more than \$5,000?”). Question 1 asks, “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?” *Id.* at 4. However, a discussion of Question 1 is beyond the scope of this Note.

152. *Id.* at 5.

153. *Id.* at 6.

The advisory opinion request adds further detail, stating that the noncandidates will share information about whether the Super PAC should sponsor positive or negative advertising and the campaign's messaging and scheduling plans.<sup>154</sup> Furthermore, the advisory opinion request clarifies this question, asking whether such pre-candidacy behavior would satisfy the conduct prong under 11 C.F.R. § 109.21(d).<sup>155</sup> Two other questions are relevant to this Note:

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?<sup>156</sup>

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?<sup>157</sup>

In response to the request, the FEC initially released two draft advisory opinions—“Draft A” and “Draft B”—the only difference between the two being the answer to two questions unrelated to this Note.<sup>158</sup> The FEC also received a joint comment from two of the watchdog groups that filed complaints with the FEC,<sup>159</sup> the Campaign Legal Center and Democracy 21.<sup>160</sup> The FEC briefly discussed the advisory opinion request in an open meeting on October 29, 2015 (with Elias present), but decided to push off a vote until November 10th to allow the FEC time to release more draft opinions and for interested parties to comment.<sup>161</sup> Between the two meetings, the FEC released four more draft opinions—“Draft C,” “Draft D,”<sup>162</sup> “Draft E,” and “Draft F”—and received comments from Elias (on behalf of SMP and HMP)<sup>163</sup> and Charles Spies (the lawyer who represents

154. *Id.*

155. *Id.*; *see supra* notes 65–69 and accompanying text.

156. AOR 2015-09, *supra* note 150, at 7.

157. *Id.* at 16.

158. Compare Draft A, FEC Advisory Opinion 2015-09, at 25–29 (Oct. 28, 2015), <http://saos.fec.gov/aodocs/201509.pdf> [<https://perma.cc/VHY5-WNGU>], with Draft B, FEC Advisory Opinion 2015-09, at 27–29 (Oct. 28, 2015), [http://saos.fec.gov/aodocs/201509\\_1.pdf](http://saos.fec.gov/aodocs/201509_1.pdf) [<https://perma.cc/XS4U-KKTK>].

159. *See supra* notes 145, 149.

160. *See* Comments from the Campaign Legal Center & Democracy 21, Advisory Opinion Request 2015-09 (Oct. 27, 2015) [hereinafter Comments from CLC & Democracy 21], <http://saos.fec.gov/aodocs/1322339.pdf> [<https://perma.cc/UW9C-VNU7>].

161. Transcript of Record, FEC Open Meeting (Oct. 29, 2015) [hereinafter Transcript], [http://www.fec.gov/agenda/2015/documents/transcripts/Open\\_Meeting\\_Captions\\_2015\\_10\\_29.txt](http://www.fec.gov/agenda/2015/documents/transcripts/Open_Meeting_Captions_2015_10_29.txt) [<https://perma.cc/79FP-RP8V>].

162. Draft D simply states that the questions are hypothetical, and thus, the FEC cannot answer through their advisory opinion powers. *See* Draft D, FEC Advisory Opinion 2015-09, at 7–19 (Nov. 5, 2015), [http://saos.fec.gov/aodocs/201509\\_3.pdf](http://saos.fec.gov/aodocs/201509_3.pdf) [<https://perma.cc/B3NK-86AJ>].

163. *See* Comments from Marc E. Elias et al., Advisory Opinion Request 2015-09 (Nov. 9, 2015) [hereinafter Comments from Elias], <http://saos.fec.gov/aodocs/1322574.pdf> [<https://perma.cc/SZR9-3WP5>].

Right to Rise USA,<sup>164</sup> but who was acting on his own behalf).<sup>165</sup> Draft C, the draft supported by the Republican commissioners,<sup>166</sup> and Draft E, the draft supported by two of the Democratic commissioners,<sup>167</sup> are the two drafts most relevant for analyzing the proposed questions. At the open meeting on November 10, 2015, the FEC discussed the draft opinions and passed Draft F by unanimous vote.<sup>168</sup>

## 2. Exploring Legality Under Existing Regulations

It is first important to establish that there are two different ways in which these questions can be examined: (1) whether the existing coordination regulations apply to the interactions between testing-the-waters candidates and Super PACs, and (2) whether such interactions trigger candidate status, simultaneously making coordination regulations applicable to those individuals as candidates. Through analyzing FEC draft opinions and comments by others, Part II.B.2.a examines whether existing coordination regulations apply to testing-the-waters candidates, while Part II.B.2.b examines whether such behavior is regulated through triggering candidacy. Lastly, Part II.B.2.c discusses the jurisdictional issues surrounding the FEC regulating noncandidates.

### a. *Unlawful Testing-the-Waters Coordination?*

FEC coordination regulations do not mention individuals who are not candidates, testing the waters or otherwise.<sup>169</sup> Such regulations define coordinated as “made in cooperation, consultation or concert with, or at the request or suggestion of, a *candidate*, a *candidate’s* authorized committee, or a political party committee.”<sup>170</sup> Additionally, the conduct prong of the coordinated communication regulation<sup>171</sup> exclusively refers to conduct between the creator of the communication and a *candidate* or a *candidate’s* authorized committee.<sup>172</sup> A plain reading of these regulations could lead to the conclusion that such coordination regulations do not apply to individuals prior to candidacy.<sup>173</sup>

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164. See *supra* note 126 and accompanying text.

165. See Comments from Charles R. Spies & James E. Tyrrell III, Advisory Opinions Request 2015-09 (Nov. 4, 2015) [hereinafter Comments from Spies & Tyrrell], <http://saos.fec.gov/aodocs/1322503.pdf> [<https://perma.cc/J3UT-2GCN>].

166. See Certification, FEC Advisory Opinion 2015-09 (SMP and HMP), at 1 (Nov. 10, 2015) [hereinafter Certification], <http://saos.fec.gov/aodocs/1323173.pdf> [<https://perma.cc/C49M-3NJG>].

167. See *id.* at 2.

168. See *id.* at 1.

169. 11 C.F.R. §§ 109.20, 109.21 (2015).

170. *Id.* § 109.20(a) (emphasis added). Furthermore, the regulations governing coordinated communications provide “[a] communication is coordinated *with a candidate* . . . when the communication . . .” *Id.* § 109.21(a) (emphasis added).

171. See *supra* notes 65–69 and accompanying text.

172. See 11 C.F.R. § 109.21(d).

173. See Draft C, FEC Advisory Opinion 2015-09, at 5 (Nov. 5, 2015) [hereinafter Draft C], [http://saos.fec.gov/aodocs/201509\\_2.pdf](http://saos.fec.gov/aodocs/201509_2.pdf) [<https://perma.cc/GA9Y-CYGB>].

Draft C utilizes this same plain meaning analysis in answering Questions 2 and 3 in the affirmative, finding that the proposed Super PAC may use information it receives about an individual's plans, projects, activities, or needs from that individual and may film the individual discussing their achievements to create public communications after the individual becomes a candidate.<sup>174</sup> Draft C asserts that Elias's inclusion of "an individual, *who would not otherwise be a candidate*,"<sup>175</sup> within the questions of Advisory Opinion Request 2015-09, establishes that the individual is only contemplating candidacy and, thus, cannot be a candidate.<sup>176</sup> Draft C asserts this despite subsequently receiving a comment from Elias stating that such language does not establish that the individual is only contemplating candidacy.<sup>177</sup> Working based off of this assumption and making no mention of the possibility of coordination restrictions applying to testing-the-waters activities, Draft C simply states that coordination regulations do not apply because the individuals in question are not candidates.<sup>178</sup>

In his advisory opinion request, Elias makes a different argument, asserting that "[t]he regulatory language does not exempt coordinating conduct that takes place prior to individuals becoming candidates."<sup>179</sup> Furthermore, Elias argues that the policy underlying the coordination rules does not support exempting pre-candidate coordination, stating it would be inconsistent with the regulatory scheme and would allow individuals contemplating candidacy to finance their activities with funds that do not comply with federal restrictions.<sup>180</sup> Lastly, Elias argues that because 11 C.F.R. § 100.2(l)—which requires presidential candidates to reimburse certain pre-candidacy expenses paid for by multicandidate PACs during a specified time period<sup>181</sup>—specifically incorporates the language of the conduct standard of the coordinated communication regulations,<sup>182</sup> 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."<sup>183</sup> Adding to Elias's argument, 11 C.F.R. § 9034.10, which requires presidential candidates who accept federal funds to reimburse multicandidate PACs for certain pre-candidacy expenses, adopts this same language.<sup>184</sup> "These provisions [11

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174. *See id.* at 15.

175. *Id.* at 14 (emphasis added).

176. *Id.* at 12–14, 19.

177. Comments from Elias, *supra* note 163, at 6.

178. *See* Draft C, *supra* note 173, at 15.

179. AOR 2015-09, *supra* note 150, at 7.

180. *Id.*

181. 11 C.F.R. § 110.2(l)(1)(i) (2015) ("The expenditure is made on or after January 1 of the year immediately following the last Presidential election year . . .").

182. *See supra* notes 62–70 and accompanying text.

183. AOR 2015-09, *supra* note 150, at 7.

184. *Compare* 11 C.F.R. § 9034.10(a)(2) ("(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 . . . if . . . (2) With respect to the goods or services involved, the candidate accepted or received them, *requested*

C.F.R. §§ 100.2(1), 9034.10] 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.”<sup>185</sup> This is arguably analogous to the conduct described in Advisory Opinion Request 2015-09, where prospective candidates, through coordination, would defray costs to single-candidate Super PACs that should be treated as contributions. These provisions and the rationale behind them could demonstrate that the FEC did intend for noncandidate behavior to be included in determining whether a PAC made a coordinated communication, but the regulations just have not been updated to reflect the emergence of Super PACs.

Because Draft E frames the issues in terms of triggering candidate status,<sup>186</sup> it does not address whether coordination regulations apply to testing-the-waters candidates,<sup>187</sup> despite being urged to do so in a comment submitted by Elias on behalf of SMP and HMP.<sup>188</sup> Rather, Draft E only states that the FEC “need not and does not address whether material involvement in a communication by an individual before he or she becomes a candidate might meet the conduct standards in 11 C.F.R. § 109.21(d).”<sup>189</sup>

*b. Triggering Candidate Coordination Regulations?*

These questions can also be examined by determining whether the described conduct triggers candidate status, subjecting the individuals to coordination regulations as candidates. Draft E analyzes the relevant questions posed in Advisory Opinion Request 2015-09 through this lens.

First, Draft E answers Question 7 by stating that an individual would trigger candidate status by participating in the formation of a single-candidate Super PAC whose purpose is to support that individual’s candidacy.<sup>190</sup> Draft E reasons that, because the proposed prospective candidate will participate in the formation of the single-candidate Super PAC whose stated purpose is to support the individual in candidacy, appoint that Super PAC’s leadership, and (borrowing from Question 2) share plans and activities used to create independent expenditures in

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*or suggested* their provision, was *materially involved* in the decision to provide them, or was involved in *substantial discussions* about their provision . . . .” (emphasis added)), with 11 C.F.R. § 109.21(d)(1)–(3) (“(d) Any one of the following types of conduct satisfies the conduct standard of this section . . . (1)(i) The communication is created, produced, or distributed at the *request or suggestion* of a candidate . . . (2) A candidate . . . is *materially involved* in decisions regarding [the communication] . . . (3) The communication is created, produced, or distributed after one or more *substantial discussions* about the communication [with] . . . the candidate . . . .” (emphasis added)).

185. Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47,386, 47,407 (July 31, 2003) (codified as amended in scattered parts of 11 C.F.R.).

186. See *infra* Part II.B.2.b.

187. See Draft E, FEC Advisory Opinion 2015-09, at 19 n.10 (Nov. 6, 2015) [hereinafter Draft E], [http://saos.fec.gov/aodoes/201509\\_4.pdf](http://saos.fec.gov/aodoes/201509_4.pdf) [<https://perma.cc/6F39-LZ9R>].

188. Comments from Elias, *supra* note 163, at 7.

189. Draft E, *supra* note 187, at 19 n.10.

190. *Id.* at 7.

support of the individual after he becomes a candidate, the individual has given consent to the Super PAC to receive contributions and make expenditures on his behalf.<sup>191</sup> Thus, Draft E argues, the proposed conduct would trigger candidate status once the Super PAC raised more than \$5000 because under FECA and FEC regulation, an individual meets the definition of a candidate if another person or committee, who has obtained consent from the individual to receive contributions or make expenditures on behalf of such individual, receives contributions or makes expenditures aggregating in excess of \$5000.<sup>192</sup> In support of this conclusion, Draft E cites FEC Advisory Opinion 1984-40, where the FEC concluded that a steering committee organized by the requestor's "political associates and representatives" could trigger candidacy status if such committee engaged in activities on behalf of the individual's candidacy.<sup>193</sup>

This assertion arguably conflicts with Matter Under Review 6775, where the FEC dismissed an allegation that Hillary Clinton had triggered candidate status when her authorized committee from a past election (Ready for Hillary) rented its mailing list to a Super PAC (Ready for Hillary PAC), whose purpose was to encourage Hillary to run for office in 2016, and gave that Super PAC permission to use the hillaryclinton.com URL.<sup>194</sup> The complaint alleged that

by conveying the mailing list to Ready for Hillary PAC and permitting it to use the hillaryclinton.com URL, Clinton and Friends of Hillary were acting "in furtherance" of Ready for Hillary PAC's stated goals and therefore, gave their consent for Ready for Hillary PAC to accept contributions and make expenditures on Clinton's behalf.<sup>195</sup>

triggering candidate status. However, the FEC did not find that Clinton became a candidate.<sup>196</sup> Draft E states that Advisory Opinion Request 2015-09 is distinguishable from Matter Under Review 6775 for four reasons. First, Ready for Hillary PAC's purpose was only to encourage Clinton to run, not support her if she did. Second, Clinton and Ready for Hillary's activities were confined to evaluating potential candidacy. Third, there was no evidence that renting the mailing list or Ready for Hillary's other activities were designed to amass funds for after Clinton became a candidate. Finally, Clinton played no role in the formation of Ready for Hillary PAC.<sup>197</sup>

Draft E further asserts that the prospective candidates' active participation in forming and operating a single-candidate Super PAC by itself triggers candidate status because such conduct indicates that the

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191. *Id.* at 7–8.

192. *Id.* (citing 52 U.S.C.A. § 30101(2) (West 2015)); *accord* 11 C.F.R. § 100.3 (2015).

193. Draft E, *supra* note 187, at 8–9 (citing AO 1985-40, *supra* note 91, at 10).

194. FEC Matter Under Review 6775 (Ready for Hillary PAC et al.), Factual and Legal Analysis, at 2–4 (Feb. 12, 2015) [hereinafter MUR 6775], <http://eqs.fec.gov/eqsdocsMUR/15044371447.pdf> [<https://perma.cc/FAH7-UZJN>].

195. *Id.* at 5.

196. *Id.* at 7.

197. *Id.* (citing MUR 6775, *supra* note 194, at 7–8).

individual has decided to become a candidate and is no longer merely testing the waters. Draft E reasons that “[b]ecause independent expenditures, by definition, are made only after the individual becomes a candidate, an individual’s formation of a [Super PAC] whose purpose is to make such expenditures necessarily means that the individual would not be forming the [Super PAC] merely” to determine the feasibility of candidacy.<sup>198</sup> Furthermore, Draft E asserts that any funds raised by the Super PAC would be spent after he or she became a candidate, and therefore, pursuant to 11 C.F.R. § 100.72(b)(2),<sup>199</sup> the individual would trigger candidate status.<sup>200</sup>

Draft E, in answering Question 10, asserts that, assuming the prospective candidate raised or spent more than \$5000, the filming of a noncandidate discussing their achievements and qualifications for office by a Super PAC, for use in public communications supporting that noncandidate’s candidacy, would trigger candidate status because such conduct would indicate that the individual has decided to become a candidate.<sup>201</sup> By quoting 11 C.F.R. §§ 100.72(b) and 100.131(b), which provides that examples of candidate triggering activities include “us[ing] general public political advertising to publicize his or her intention to campaign for Federal office”<sup>202</sup> and “mak[ing] or authoriz[ing] written or oral statements that refer to him or her as a candidate for a particular office,”<sup>203</sup> Draft E implies that the conduct described in Question 10 satisfies such regulations and, thus, triggers candidate status.<sup>204</sup>

Although in discussing whether filming such footage would trigger candidate status, Draft E cites Advisory Opinion 1981-32, it fails to provide the relevant analysis. In this advisory opinion, as discussed in Part I.B.1, the FEC approved fourteen activities proposed by Governor Askew. However, the FEC expressed concern with respect to two relevant activities:

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.

13. Preparation and printing of a biographical brochure and possibly photographs to be used in connection with speaking appearances by Governor Askew.<sup>205</sup>

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198. *Id.* at 11 (citing 11 C.F.R. § 100.72(a) (2015)).

199. Title 11, section 100.72(b)(2) of the C.F.R. provides that “amass[ing] campaign funds that would be spent after he or she becomes a candidate” is an example of an activity indicating that the individual as decided to become a candidate. 11 C.F.R. § 100.72(b)(2).

200. Draft E, *supra* note 187, at 11.

201. *Id.* at 15.

202. 11 C.F.R. §§ 100.72(b)(3), 100.131(b)(3).

203. *Id.* §§ 100.72(b)(4), 100.131(b)(4).

204. *See* Draft E, *supra* note 187, at 15.

205. AO 1981-32, *supra* note 80, at 2–3.

The FEC explained that these activities “appear to project Governor Askew to the public as a person qualified to be taken seriously as a presidential contender, rather than as a means to ascertain if he would be so perceived by the public.”<sup>206</sup> The opinion continues by stating that if either activity

take[s] place in a factual context indicating that Governor Askew has moved beyond the deliberative process of deciding to become a candidate, and into the process of *planning and scheduling public activities designed to heighten his political appeal to the electorate*, then it is the Commission’s opinion that the activity would cease to be within the exemption, and candidacy would arise.<sup>207</sup>

The proposed filming during the testing-the-waters phase is analogous to the activities proposed in Advisory Opinion 1981-32, as they both involve noncandidate involvement in the creation of media supporting them. Unlike in Advisory Opinion 1981-32, however, given that the requestor proposes to use the footage after the featured individual announces his candidacy,<sup>208</sup> candidate status is arguably triggered. Filming such footage would seemingly demonstrate that the individual has moved beyond deciding whether to become a candidate and into participating in activities “designed to heighten his political appeal to the electorate.”<sup>209</sup> Although an in-depth analysis is missing from Draft E, the reasoning in Advisory Opinion 1981-32 seems to inform Draft E, as the draft opinion frames its answer to Question 10 in terms of whether the proposed filming would be used to evaluate prospective candidacy or to create campaign advertising.<sup>210</sup>

That said, Matter Under Review 6533 is seemingly at odds with Advisory Opinion 1981-32. In Matter Under Review 6533, the FEC dismissed a complaint against an individual, finding he had not triggered candidate status when videos that included references to him as a candidate were uploaded to YouTube.<sup>211</sup> The FEC reasoned that during the period at issue, the videos were only available to a “small group” of individuals who viewed the videos to “obtain their reaction and advice.”<sup>212</sup> The FEC concluded that “[u]nder these circumstances, the *mere preparation, rather than dissemination*, of campaign materials in advance of a declaration of candidacy does not by itself” trigger candidate status.<sup>213</sup> Draft E distinguished Advisory Opinion Request 2015-09 from Matter Under Review 6533 by asserting that there is no indication that the proposed footage would be used for testing the waters (like obtaining reaction and

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206. *Id.* at 4–5.

207. *Id.* at 5 (emphasis added).

208. Comments from Elias, *supra* note 163, at 7.

209. AO 1981-32, *supra* note 80, at 5.

210. See Draft E, *supra* note 187, at 16.

211. FEC Matter Under Review 6533 (Perry Haney et al.), Factual and Legal Analysis, at 6 (Dec. 3, 2012) [hereinafter MUR 6533], <http://eqs.fec.gov/eqsdocsMUR/12044322928.pdf> [<https://perma.cc/YQT6-VLAT>].

212. *Id.* at 5.

213. *Id.* at 6 (emphasis added).

advice of a small group); rather, the filming proposed in Advisory Opinion Request 2015-09 would be used to promote the individual's candidacy.<sup>214</sup>

Thus, in answering Question 3, Draft E concludes that the Super PAC may not film the noncandidate and then use the footage in a public communication because doing so would constitute a coordinated communication and an unlawful contribution from the Super PAC.<sup>215</sup> The coordination analysis is much simpler once it is deemed that this conduct triggers candidate status because coordination regulations, without question, apply to candidates.<sup>216</sup>

Draft E implements this same candidacy triggering analysis in answering Question 2, finding that a public communication created by a Super PAC from information about a noncandidate's plans and strategies, which is aired after the noncandidate becomes a candidate, would be a coordinated communication and an unlawful contribution because the individual would be a candidate.<sup>217</sup> However, in making this determination, Draft E reasons that the individual would become a candidate by filming the footage, that is, through the conduct proposed in Question 3, not by sharing strategies and plans, as proposed in Question 2 (Questions 2 and 3 were answered together).<sup>218</sup> Draft E never directly addresses (granted the FEC was never directly asked) whether candidate status is triggered when an individual shares information about his plans, activities, or needs with a Super PAC for subsequent use in creating a public communication after the individual becomes a candidate.<sup>219</sup> In reality, all Draft E states with regard to Question 2 is that a communication created from information provided by an individual who is a candidate (for some other reason) is a coordinated communication under FEC regulations.<sup>220</sup> This, in actuality, is just a simple analysis of 11 C.F.R. § 109.21.<sup>221</sup> Although Draft E potentially alludes to this type of conduct triggering candidate status by mentioning it as one of three factors in its analysis of Question 7<sup>222</sup> (whether participating

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214. Draft E, *supra* note 187, at 16.

215. *Id.* at 17. Draft E gives an analysis of how the proposed activity in Question 2 would satisfy the coordinated communication regulation in 11 C.F.R. § 109.21, including an explanation of how the conduct would be "material involvement" under the conduct prong. *See id.* at 18–19; *see also supra* note 66 (explaining the definition of material involvement).

216. *See* Draft E, *supra* note 187, at 17.

217. *See id.*

218. *See id.* at 16–17.

219. *See id.* at 17–20.

220. *See id.*

221. *See supra* Part I.B.2. Draft E gives an analysis of how the proposed activity in Question 3 would satisfy the coordinated communication regulation in 11 C.F.R. § 109.21, including an explanation of how the conduct would be a "substantial discussion" under the conduct prong. *See* Draft E, *supra* note 187, at 18–19; *see also supra* note 67 (explaining the definition of a substantial discussion).

222. *See* Draft E, *supra* note 187, at 8 ("Here, Requestors propose to have the prospective candidates (1) participate in the formation of [Super PACs] whose stated purpose is to 'support the individuals' candidacies if they decide to run for office' . . . (2) appoint the [Super PAC's] leadership . . . and (3) *share . . . information about their strategic plans, projects, activities, or needs' and 'campaign messaging and scheduling plans' to enable the Single-Candidate Committees 'immediately' to run communications after the prospective*

in forming a Super PAC triggers candidate status), this fact is not dispositive, and thus, Draft E does not truly address whether the conduct described in Question 2 would trigger candidacy.

As discussed in Part II.B.2.a, Draft C bases its conclusions on the assumption that Advisory Opinion Request 2015-09 presupposes the individuals are not candidates. Draft C asserts that when the individual's state of mind is unknown, an objective analysis is conducted; however, Draft C concludes that, because the advisory opinion request includes "an individual, *who would not otherwise be a candidate*"<sup>223</sup> within its questions, it is actually known that the individual is only contemplating candidacy, and thus, an objective candidacy triggering analysis is unwarranted.<sup>224</sup> That said, Draft C does not completely foreclose on the possibility of the conduct described in Questions 1 and 3 triggering candidate status. Draft C suggests that

if the prospective candidates' states of mind were unknown . . . [a]n individual's active participation in the formation and operation of the contemplated [Super PACs], the sole purpose of which is to support that individual's federal candidacy, or in the filming of video intended to be used to promote that individual's federal candidacy, *could evidence*<sup>225</sup>

that a decision to seek office has been made.<sup>226</sup> However, Draft C then displays skepticism toward this statement by quoting Matter Under Review 6533,<sup>227</sup> where the FEC found that "the *mere preparation, rather than dissemination*, of campaign materials in advance of a declaration of candidacy" did not trigger candidacy.<sup>228</sup>

### *c. Jurisdictional Issues*

During the first open meeting discussing Advisory Opinion Request 2015-09, FEC Commissioner Lee Goodman raised concerns that the FEC did not have jurisdiction over an individual's activities before he or she becomes a candidate.<sup>229</sup> Commissioner Goodman characterized the FEC's jurisdiction over individuals testing the waters as "retroactive jurisdiction . . . we only assert . . . if you become a candidate later."<sup>230</sup> Commissioner Ellen L. Weintraub, however, disagreed with this characterization, stating that "the testing the waters regulations do not extend the statute retroactively backwards . . . where we otherwise wouldn't have jurisdiction," but rather the regulations are "an exemption to what would otherwise be absolutely considered under the statute to be candidate

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*candidates become candidates*, including 'independent expenditures in support of' the candidates . . ." (emphasis added)).

223. AOR 2015-09, *supra* note 150, at 4, 6–7 (emphasis added).

224. Draft C, *supra* note 173, at 12–13.

225. *Id.* at 13 (emphasis added).

226. *Id.*

227. *Id.*

228. See MUR 6533, *supra* note 211, at 6.

229. See Transcript, *supra* note 161.

230. *Id.*

activities” to allow “candidates a little bit of opportunity to . . . see if they could raise money for a viable candidacy.”<sup>231</sup> Later, Charles Spies submitted a comment echoing Commissioner Goodman’s jurisdictional concerns.<sup>232</sup>

The jurisdictional issues raised by Commissioner Goodman and Spies stem from two circuit court cases. In *FEC v. Machinists Non-Partisan Political League*<sup>233</sup> and *FEC v. Florida for Kennedy Committee*,<sup>234</sup> the D.C. and Eleventh Circuits, respectively, held that the FEC lacked jurisdiction over draft groups—groups created to encourage an individual to run for office—because draft groups’ activities are not related in any way to a person who had decided to become a candidate.<sup>235</sup>

Elias, on the other hand, submitted a comment arguing that the FEC does have jurisdiction. He asserted that “for thirty years, the [FEC’s] jurisdiction over individuals ‘testing-the-waters’ for candidacy by imposing limits and source restrictions on the funds that can be used to pay for such activities has been unquestioned.”<sup>236</sup> He then contended that no court case has successfully challenged the FEC’s jurisdiction already in existence, nor has any court suggested that the holding in *Machinists Non-Partisan Political League* applies to testing-the-waters candidates.<sup>237</sup> Building on Elias’s point, the FEC has seemingly asserted unchallenged jurisdiction over testing-the-waters candidates in 11 C.F.R. §§ 100.72, 100.131, 110.2(l), and 9034.10. Furthermore, 11 C.F.R §§ 110.2(l) and 9034.10 assert jurisdiction not through certain behavior triggering candidate status; rather, the provisions act as a reach-back for certain expenditures made before candidacy to be considered contributions if and when candidacy is triggered.<sup>238</sup>

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231. *Id.*

232. Comments from Spies & Tyrrell, *supra* note 165, at 1 (“We echo Commissioner Goodman’s stated concerns about the Commission’s assertion of jurisdiction over an individual, or a group supporting an individual, prior to his or her becoming a candidate.”).

233. 655 F.2d 380 (D.C. Cir. 1981).

234. 681 F.2d 1281 (11th Cir. 1982).

235. *Fla. for Kennedy Comm.*, 681 F.2d at 1287 (“[The draft committee] can be subject to the FEC’s jurisdiction only if Senator Kennedy was a candidate during the period of [the draft committee’s] activities.”); *Machinists Non-Partisan Political League*, 655 F.2d at 395–96.

236. Comments from Elias, *supra* note 163, at 7.

237. *Id.*

238. See 11 C.F.R. §§ 110.2(l), 9034.10 (2015); Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47,386, 47,407 (July 31, 2003) (codified as amended in scattered parts of 11 C.F.R.) (“The covered expenses in the new rules at 11 CFR 110.2(l) and 9034.10 would not trigger candidacy themselves, but would count as contributions in-kind and/or qualified campaign expenses if and when the individual benefiting becomes a candidate.”). However, these regulations provide a cure if the candidate reimburses the multicandidate PAC within thirty days of becoming a candidate. 11 C.F.R. §§ 110.2(l), 9034.10.

### 3. Not Getting the Answers: Effects of a Deadlocked Advisory Opinion

An advisory opinion requires a majority vote of four or more commissioners to be passed.<sup>239</sup> FEC advisory opinions may be relied on by the advisory opinion requester and any person or group involved in activities which are “indistinguishable in all its material aspects with respect” to the activities described in such advisory opinion.<sup>240</sup> Any person or group who satisfies this requirement and, in good faith, relies on an advisory opinion obtains a safe harbor against sanctions.<sup>241</sup> That said, advisory opinions include a disclaimer that requestors may not rely on an advisory opinion if there is a change in facts material to the advisory opinion’s conclusions or subsequent developments in the law contravene the opinion.<sup>242</sup>

On November 10, 2015, the FEC voted on the draft opinions for Advisory Opinion Request 2015-09.<sup>243</sup> The commissioners voted on Draft C and Draft E, but both failed to obtain a majority.<sup>244</sup> Ultimately, after some minor, unrelated amendments, the FEC passed Draft F by unanimous vote;<sup>245</sup> however, Draft F does not answer any of the discussed questions, but rather simply states that “[t]he Commission could not approve a response to the remaining questions by the required four affirmative votes.”<sup>246</sup> This failure to obtain a majority is unsurprising, as the structure of the FEC—comprised of three Republican commissioners and three Democrat commissioners—makes the commission prone to deadlock.<sup>247</sup>

That said, the effects of deadlocked FEC advisory opinions—both when the FEC refuses to answer the questions or is completely deadlocked and fails to pass any opinion—are unclear. The FEC has not directly addressed this issue and few courts have weighed in. The courts that have weighed in have held that a deadlocked advisory opinion does not act as a safe harbor

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239. 2 U.S.C. § 437c(c) (2012) (transferred to 52 U.S.C.A. § 30106(c) (West 2015)).

240. *Id.* § 437f(c)(1) (transferred to 52 U.S.C.A. § 30108(c)(1)); 11 C.F.R. § 112.5.

241. 2 U.S.C. § 437f(c)(1)(2) (transferred to 52 U.S.C.A. § 30108(c)(1)(2)) (providing that such individuals or groups shall not be subject to any sanction provided by “this Act or by chapter 95 or chapter 96 of Title 26”); 11 C.F.R. § 112.5.

242. *See, e.g.*, AO 2015-09, *supra* note 23, at 9. Subsequent developments in the law include, but are not limited to, statutes, regulations, advisory opinions, and case law. *Id.*

243. Certification, *supra* note 166, at 1.

244. *Id.* at 1–2. Draft C failed by a vote of three-to-three, and Draft E failed by a vote of two-to-four. *Id.*

245. *Id.* at 1–3.

246. AO 2015-09, *supra* note 23, at 9.

247. *See* R. SAM GARRETT, CONG. RESEARCH SERV., DEADLOCKED VOTES AMONG MEMBERS OF THE FEDERAL ELECTION COMMISSION (FEC): OVERVIEW AND POTENTIAL CONSIDERATIONS FOR CONGRESS 8 (2009), <http://www.campaignfreedom.org/wp-content/uploads/2009/08/CRS-2009-FEC-Votes.pdf> (finding every deadlock studied involved party-line votes) [<https://perma.cc/R74N-9DYU>]. Even FEC Commissioner Lee Goodman admits that “Congress set [the FEC] up to gridlock.” Eric Lichtblau, *F.E.C. Can’t Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), [http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html?login=email&\\_r=0&mtref=undefined&assetType=nyt\\_now](http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html?login=email&_r=0&mtref=undefined&assetType=nyt_now) [<https://perma.cc/U6A5-345U>].

from enforcement.<sup>248</sup> In *Chamber of Commerce of the United States v. FEC*,<sup>249</sup> the D.C. Circuit held that a deadlocked FEC advisory opinion did not prevent the FEC from enforcing its rules at any time.<sup>250</sup> After a deadlocked advisory opinion, the requestor or any person who intends on engaging in indistinguishable conduct may seek a declaratory judgment from a court to enjoin the FEC from bringing an enforcement proceeding against it in the future.<sup>251</sup> In *Hispanic Leadership Fund, Inc. v. FEC*,<sup>252</sup> when deciding whether to grant a declaratory judgment, the Eastern District Court of Virginia held that the deadlocked FEC advisory opinion warranted neither *Skidmore* nor *Chevron* deference, as there was no basis for giving deference to one draft opinion over another, leaving the court to decide the case for itself.<sup>253</sup> Citing this decision, then-FEC Vice Chair Ann Ravel and FEC Commissioner Ellen L. Weintraub argued in a written statement that “[t]he failure to issue an advisory opinion results in ‘no ruling, interpretation, nor opinion of the agency,’”<sup>254</sup> leaving the requestor and others intending to engage in indistinguishable behavior in essentially the same position they were in before submitting the advisory opinion request.<sup>255</sup>

On the other hand, others argue that a deadlocked advisory opinion is “nearly as good as a win.”<sup>256</sup> Many argue that a deadlocked advisory opinion, in actuality, acts as a de facto license or green light to proceed with the proposed activity, as the requestor or other persons can be confident that the FEC will be unable to obtain the majority required for bringing an enforcement proceeding.<sup>257</sup> This confidence is arguably not unfounded, as

248. *Chamber of Commerce of the U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995); *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 419 (E.D. Va. 2012).

249. 69 F.3d 600 (D.C. Cir. 1995).

250. *Id.* at 603. In holding that the FEC theoretically still could obtain a majority and exercise its enforcement powers, the court acknowledged that there was no immediate danger of enforcement because the FEC had already deadlocked on the issue. *Id.* Still, the court cited a change of mind or replacement of a commissioner as possible ways in which a majority vote might occur after a deadlock. *Id.*

251. Kristy Eagan, Note, *Dark Money Rises: Federal and State Attempts to Rein in Undisclosed Campaign-Related Spending*, 40 FORDHAM URB. L.J. 801, 844 (2012); see *Hispanic Leadership Fund*, 897 F. Supp. 2d at 419.

252. 897 F. Supp. 2d 407 (E.D. Va. 2012).

253. *Id.* at 428.

254. Statement on Judicial Review of Deadlocked Commission Votes, FEC Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub 4 (June 17, 2014) (quoting *Hispanic Leadership Fund*, 897 F. Supp. 2d at 428), <http://eqs.fec.gov/eqsdocsMUR/14044354045.pdf> [<https://perma.cc/EQH9-HV96>].

255. See *id.*

256. Anthony Herman, *The FEC: Where a “Tie” Can Be (Almost) a “Win”*, INSIDE POL. L. (Mar. 20, 2014), <http://www.insidepoliticallaw.com/2014/03/20/the-fec-where-a-tie-can-be-almost-a-win/> [<https://perma.cc/GNX3-EE7C>].

257. Michael M. Franz, *The Federal Election Commission As Regulator: The Changing Evaluations of Advisory Opinions*, 3 UC IRVINE L. REV. 735, 763 (2013) (“Conflict and deadlocks send a signal that the law can be skirted, and with little likelihood of penalty after the fact.”); Nicholas Confessore, *Democrats Lay Groundwork to Expand Use of ‘Super PACs’*, N.Y. TIMES (Sept. 14, 2015), <http://www.nytimes.com/2015/09/15/us/politics/democrats-look-to-expand-use-of-super-pacs.html> (“Should the commission deadlock[,] . . . ‘most of the aggressive lawyers will say it gives them a green light’ to

even Ann Ravel, who was then the FEC Chairwoman, admitted that the FEC is “worse than dysfunctional,” and “[t]he likelihood of the laws being enforced is slim.”<sup>258</sup> Additionally, some criticize *Hispanic Leadership Fund* and *Chamber of Commerce*, arguing that, even if the FEC could somehow reach a majority, “basic notions of fairness would almost certainly stand in the way of a Commission” bringing an enforcement proceeding, especially against the requestor.<sup>259</sup>

Elias (and SMP and HMP) will likely interpret the FEC’s indecision in Advisory Opinion 2015-09 as a de facto license to proceed with the proposed activities. From the very beginning, Elias wrote in his advisory opinion request that, although he had “serious doubts about the permissibility of many of the activities[,] . . . the PACs cannot cede strategic advantage to their political competitors.”<sup>260</sup> The Campaign Legal Center and Democracy 21 even accused Elias of submitting his advisory opinion request for the purpose of obtaining a deadlocked opinion that he could use as de facto authorization.<sup>261</sup> Nevertheless, in a concurring opinion, Commissioner Weintraub issued a warning to those who might interpret the deadlocked advisory opinion as de facto approval. She stated that there was more agreement within the FEC about prospective candidates’ involvement in Super PACs triggering candidate status than one might think and that “political actors and the practitioners who counsel them would be well-advised to take notice and act accordingly.”<sup>262</sup>

Commissioner Weintraub’s warning aside—as even she admitted that she knows better than to predict how her warnings would play out in an enforcement context<sup>263</sup>—it seems as though the deadlocked advisory opinion did very little to clear up whether the testing-the-waters candidate/Super PAC interactions described in the advisory opinion request trigger candidate status or constitute illegal coordination. Even if Advisory Opinion 2015-09 has no effect on the legal status of the behavior—and in theory, the FEC could still conduct an enforcement proceeding—political actors will likely bet on the FEC’s inability to obtain a majority and treat the advisory opinion as de facto authorization. Thus, the ultimate result of

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engage in similar tactics.”) [<https://perma.cc/EM2J-YQ2Y>]; Herman, *supra* note 256 (“All but the most risk adverse parties should be comfortable treating the failure to obtain an advisory opinion . . . as a license to go forward with the activity . . . . [T]he requestor can virtually rest assured that the conduct . . . will not be the subject of an enforcement proceeding . . .”).

258. Lichtblau, *supra* note 247. For a humorous look at the FEC’s dysfunction, see *The Federal Election Commission: An Enormously Dysfunctional Agency* (Comedy Central television broadcast Nov. 12, 2015), <http://www.cc.com/video-clips/t2knjp/the-daily-show-with-trevor-noah-the-federal-election-commission--an-enormously-dysfunctional-agency> [<https://perma.cc/RPY9-D9EY>].

259. Herman, *supra* note 256.

260. AOR 2015-09, *supra* note 150, at 4.

261. Comments from CLC & Democracy 21, *supra* note 160, at 1.

262. Statement of Commissioner Ellen L. Weintraub Concurring in Part, FEC Advisory Opinion 2015-09 (SMP and HMP), at 2 (Nov. 13, 2015), <http://saos.fec.gov/aodocs/1322762.pdf> [<https://perma.cc/HW99-327N>].

263. *Id.*

Advisory Opinion 2015-09 is that the legal status of the described conduct—including both the questions of candidate status and pre-candidacy coordination—is largely unclear under current regulations.

### III. DEBATING THE NEED FOR FURTHER REGULATION

With political actors likely to interpret Advisory Opinion 2015-09 as de facto authorization, the question of whether steps should be taken to restrict individuals' pre-candidacy involvement with Super PACs emerges. This part explores the differing views on the constitutionality and desirability of restricting pre-candidacy coordination, with Part III.A focusing on those opposing such restrictions and Part III.B focusing on those supporting them.

#### A. First Amendment Defenders

Any restriction in campaign finance must strike the proper balance between protecting the First Amendment and preventing corruption.<sup>264</sup> Opponents of regulating testing-the-waters candidates' involvement with Super PACs would argue that any such limit would impermissibly burden the First Amendment.<sup>265</sup> Opponents would assert that restrictions on such behavior could not be narrowly tailored to prevent quid pro quo corruption or the appearance thereof, as required by the Supreme Court.<sup>266</sup> Although the Court held that groups and individuals' interactions with candidates present a sufficient danger of corruption, opponents would contend that the Court did not recognize this threat of corruption in noncandidates.<sup>267</sup> Additionally, opponents would argue that current FEC regulations sufficiently guard against corruption, as individuals cannot coordinate with Super PACs once they become candidates, which is when such individuals would actually benefit from Super PAC expenditures.<sup>268</sup>

Furthermore, opponents would assert that, by narrowing the justifications sufficient to restrict First Amendment rights, the *Citizens United* Court expanded First Amendment protections of political speech and heightened the rigor required to prove sufficient corruption.<sup>269</sup> Opponents would contend that even if the Court found that noncandidate behavior could potentially present the narrow form of corruption required, limitations on testing-the-waters candidates' interactions with Super PACs could not be sustained. Such regulations, opponents would argue, would be overly inclusive, essentially giving the FEC authority to regulate the daily

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264. See *supra* Part I.A.

265. Comments from Spies & Tyrrell, *supra* note 165, at 1–2. In his comment, Spies criticized regulating testing-the-waters candidates' interactions with Super PACs, arguing that *Citizens United* made it clear that “political speech must prevail against laws that would suppress it by design or inadvertence.” *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 312 (2010)).

266. See *supra* Part I.A. Spies criticized Draft A (which eventually became Draft E) as being “hardly narrowly tailored, and . . . not serv[ing] any compelling government interest.” Comments from Spies & Tyrrell, *supra* note 165, at 1.

267. See *supra* Part I.A.

268. See *supra* Part I.B.1.

269. See *supra* note 36 and accompanying text.

activities and relationships of any individual and restrict indispensable political speech.<sup>270</sup> This, they would assert, would be an unsustainable burden on the First Amendment and contravene the Court's expansive protections of political speech.<sup>271</sup> Furthermore, in his comment to the FEC, Charles Spies argued that such regulations would have unintended consequences on other organizations, such as extending testing-the-waters restrictions to apply to noncandidates' interactions with other groups, such as nonprofit corporations.<sup>272</sup> These arguments echo those made by opponents of broad coordination regulations, who assert that such regulations impermissibly interfere with normal political communications and lead to overenforcement.<sup>273</sup>

Opponents also would likely raise the jurisdictional issues discussed in Part II.B.1.d. Lastly, opponents would assert that increasing restrictions on testing-the-waters activities would contradict the purpose of the testing-the-waters exemptions, which were created so as to not discourage individuals from pursuing a variety of activities to determine if candidacy is viable.<sup>274</sup> Further regulating testing-the-waters candidates, opponents would contend, would discourage individuals from considering candidacy, as they would want to avoid accidentally or unknowingly subjecting themselves to regulations with potentially harsh penalties.

### B. Corruption and Ensuring Independence

On the other hand, proponents of regulating testing-the-waters candidates' interactions with Super PACs would argue that such regulations are essential for preventing the type of corruption articulated by the Supreme Court.<sup>275</sup> Proponents would assert that an individual's participation in forming a Super PAC that will support him, sharing plans and strategy for candidacy, and coordinating to create public communications presents exactly the type of danger of quid quo pro or appearance of quid quo pro corruption the Court described.<sup>276</sup> In fact, proponents would contend, this is clearly demonstrated by current FEC

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270. See Robert F. Bauer, *The Right to "Do Politics" and Not Just to Speak: Thinking About the Constitutional Protections for Political Action*, 9 DUKE J. CONST. L. & PUB. POL'Y 67, 72–76 (2013) (explaining arguments against strict coordination regulations in general).

271. See *supra* Part I.A.

272. Comments from Spies & Tyrrell, *supra* note 165, at 1–2. In making this assertion, Spies references the Clinton Foundation, which perhaps could lead to the conclusion that this argument is more of a jab from Spies, who represents Jeb Bush's Super PAC, directed at Elias, who represents Hillary Clinton, instead of an actual concern. See *id.*; Maggie Haberman, *Clinton Hires Campaign Lawyer Ahead of Likely Run*, N.Y. TIMES (Mar. 4, 2015), <http://www.nytimes.com/politics/first-draft/2015/03/04/clinton-hires-campaign-lawyer-ahead-of-likely-run/> (explaining Elias represents Hillary Clinton) [<https://perma.cc/H2HY-UBJ6>].

273. Bauer, *supra* note 270, at 72.

274. See AO 1981-32, *supra* note 80, at 4.

275. See *supra* note 36 and accompanying text (explaining that the prevention of quid quo pro corruption or the appearance thereof is the only legitimate justification for campaign finance limits).

276. See *supra* note 36 and accompanying text.

regulations, which limit how a candidate may engage in these exact activities.<sup>277</sup> Such regulations restrict Super PAC expenditures created from a substantial discussion with a candidate, which is defined in FEC regulations as receiving information about such candidate's campaign plans, projects, activities, or needs.<sup>278</sup> Additionally, such regulations restrict a candidate's ability to appear in Super PAC advertisements.<sup>279</sup> According to the FEC, such conduct makes it highly implausible that the candidate was not materially involved with its creation,<sup>280</sup> which is restricted by FEC regulation.<sup>281</sup> Proponents would argue that these very same dangers of corruption are not alleviated merely because the individuals have taken care not to trigger candidate status.<sup>282</sup>

Additionally, proponents would assert that allowing such pre-candidacy involvement with Super PACs threatens the requirement that Super PACs only make expenditures that are independent. Proponents would argue that *Citizens United* and *SpeechNow.org* emphasized the noncoordinated nature of independent expenditures, which quells concerns of corruption.<sup>283</sup> As the District Court for the District of Columbia put it, “[T]here can be little doubt that the *independence* of independent expenditures is the lynchpin that holds together the principle that no limits can be placed on contributions for such expenditures,” and without such independence, “the doctrine carefully crafted in *Citizens United* and *SpeechNow* would begin to tumble back to Earth.”<sup>284</sup> In differentiating between coordinated and independent expenditures, the Supreme Court characterized independent expenditures as those that are “truly,”<sup>285</sup> “wholly,”<sup>286</sup> or “totally”<sup>287</sup> independent.<sup>288</sup> Proponents would argue that failing to regulate pre-candidacy involvement in Super PACs that will support that individual in candidacy allows Super PACs to disguise coordinated expenditures as independent expenditures. This, proponents would assert, enables Super

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277. See *supra* Part I.B.2; see also Draft E, *supra* note 187, at 18–19 (explaining how Questions 2 and 3 in Advisory Opinion Request 2015-09 satisfy the coordination regulation in 11 C.F.R. § 109.21).

278. See *supra* note 67 and accompanying text.

279. FEC Advisory Opinion 2003-25 (Weinzapfel for Mayor Committee), at 6 (Oct. 17, 2003), <http://saos.fec.gov/aodocs/2003-25.pdf> [<https://perma.cc/A8J2-BKTS>].

280. *Id.* But see 11 C.F.R. § 109.21(g) (2015) (creating a safe harbor for certain public communications where the candidate merely endorses other candidates or solicits funds for other persons).

281. See *supra* note 66 and accompanying text.

282. See AOR 2015-09, *supra* note 150, at 7 (arguing that the policy underlying the coordination rules does not support exempting pre-candidate coordination, as it would be inconsistent with the regulatory scheme and would allow individuals contemplating candidacy to finance their activities with funds that do not comply with federal restrictions).

283. See *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 38 (D.D.C. 2012).

284. *Id.*

285. *McConnell v. FEC*, 540 U.S. 93, 221 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

286. *Id.*

287. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

288. Paul S. Ryan, *Two Faulty Assumptions of Citizens United and How to Limit the Damage*, 44 U. Tol. L. Rev. 583, 585 (2013).

PACs to evade contribution and expenditure limits and continue to reap the benefits of being a Super PAC,<sup>289</sup> even though the PAC is no longer an independent expenditure-only committee.

Proponents would argue that the true independence of Super PAC expenditures is essential for the functionality of campaign finance law in a post-*Citizens United* political and regulatory landscape.<sup>290</sup> Although Super PACs would not be able to coordinate with individuals after the individual became a candidate, this restriction, proponents would argue, is insufficient to maintain true independence. Proponents would reason that Super PACs would already have all the information needed to operate in a coordinated manner and make expenditures, rendering any subsequent coordination unnecessary and, ultimately, existing coordination regulations ineffective.<sup>291</sup> These arguments mirror those made by proponents of stricter coordination regulations, who argue that existing coordination regulations undermine the Supreme Court's emphasis on true independence and do not effectively guard against corruption.<sup>292</sup> Proponents of further testing-the-waters regulations, like their counterparts arguing for stricter coordination restrictions, would assert that current FEC regulations "are based on an older model of independent committee—in which the committee had independent existence long before the current election; had a set of political, ideological, and policy goals in addition to the election of a specific candidate" and was not "functionally tied to the candidate."<sup>293</sup>

#### IV. UPDATING THE OUTDATED: PROPOSING NEW REGULATIONS

New regulations should be adopted to restrict testing-the-waters candidates' interaction with Super PACs that will support them in candidacy. The failure of regulators to update regulations adequately in response to rapid changes in campaign finance post-*Citizens United* and *SpeechNow.org*<sup>294</sup> has resulted in individuals subverting campaign finance restrictions.<sup>295</sup> The exploitation of these antiquated regulations has undermined the key facet of *Citizens United* that allows for Super PACs to exist: the independence of an independent expenditure.<sup>296</sup> With the politically divided FEC likely to remain stagnant,<sup>297</sup> individuals will

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289. See *supra* Part I.B.

290. See *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 38 (D.D.C. 2012); *Working Together*, *supra* note 45, at 1497–98.

291. See *supra* Part II.A.

292. See Ryan, *supra* note 288, at 585; *Working Together*, *supra* note 45, at 1497–98; Trevor Potter & Bryson B. Morgan, Symposium, *Campaign Finance: Remedies Beyond the Court*, DEM. J. (2013), <http://democracyjournal.org/magazine/27/campaign-finance-remedies-beyond-the-court/> [<https://perma.cc/AW87-RQ4Y>].

293. Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 92 (2013) (arguing for stricter coordination regulations).

294. See *supra* Part I.A–B.

295. See *supra* Part II.A.

296. See *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 38 (D.D.C. 2012); Smith, *supra* note 48, at 605; *Working Together*, *supra* note 45, at 1483.

297. See *supra* notes 247, 258 and accompanying text.

continue to delay candidacy to exploit impermissibly the testing-the-waters phase to prepare for candidacy in an otherwise unlawful manner. These individuals will continue to create Super PACs run by people of their choosing that are equipped with plans, strategies, and content to make so-called “independent” expenditures not subject to the spending, fundraising, or source restrictions that nearly identical expenditures would be subject to.<sup>298</sup>

New regulations are necessary not to combat *Citizens United*, but rather to ensure that the regulatory scheme in place effectively enforces that decision. Although the FEC will likely still face enforcement issues even with new regulations, adopting clear and comprehensive regulations will help facilitate better enforcement and act as a strong deterrent against such conduct. This part proposes two sets of regulations designed to restrict this conduct, both of which should be adopted by the FEC. Part IV.A discusses the first proposal, which revises the coordination regulations. Part IV.B discusses the second proposal, which updates the testing-the-waters regulations concerning triggering candidacy.

*A. Proposal #1:  
Curbing Testing-the-Waters Coordination*

To incorporate pre-candidacy coordination into existing coordination regulations, the FEC should adopt the following regulation:

For the purposes of 11 CFR 109.21(d)(1) through (d)(3), “candidate” shall include an individual who satisfies all of the following:

- (1) The individual engaged in conduct, while not yet a candidate under 11 CFR 100.3, that would otherwise satisfy 11 CFR 109.21(d)(1), (d)(2), or (d)(3), but for the individual not being a candidate under 11 CFR 100.3;
- (2) Subsequent to the conduct described in subsection (1), the individual became a candidate under 11 CFR 100.3;
- (3) The conduct described in subsection (1) occurred on or after January 1 of the year immediately following the last election for the Federal office in which such individual subsequently became a candidate under 11 CFR 100.3; and
- (4) The individual is:
  - (ii) The clearly identified candidate in a communication that satisfies 11 CFR 109.21(c); or
  - (iii) The opponent of the clearly identified candidate in a communication that satisfies 11 CFR 109.21(c).<sup>299</sup>

This regulation would essentially add a reach-back period to three subparts of the conduct prong in FEC coordination regulation 11 C.F.R.

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298. *See supra* notes 52–54.

299. The author of this Note created this proposed regulation.

§ 109.21 by incorporating certain noncandidates into the definition of candidates for the purpose of those subparts.<sup>300</sup> The regulation would only apply when the candidate would otherwise have satisfied 11 C.F.R. §§ 109.21(d)(1), (d)(2), or (d)(3) but for the fact that the conduct—(d)(1) the request or suggestion; (d)(2) the material involvement; or (d)(3) the substantial discussion—occurred when he or she was not yet a candidate. In other words, this regulation would expand the coordination regulations to instances where the coordination occurred while the individual was not a candidate and that individual subsequently reaped the benefits of a communication during candidacy, which, in reality, was coordinated, but was not subject to the limitations normally placed on such expenditures. Thus, this regulation would prevent individuals and Super PACs from exploiting pre-candidacy to circumvent coordination regulations and help ensure the independence of independent expenditures.

This proposed regulation avoids several of the criticisms described in Part III.A. First, the proposed regulation is not overly broad, as it only encompasses conduct during a specified period of time. This time period—starting on or after January 1st of the year of the last election for the specific office in which the individual eventually runs—only targets a portion of the time between elections, the period of time in which individuals are most likely to be preparing for candidacy. Additionally, the language of the regulation provides for the time period to differ depending on which federal election is at issue.

Similarly, the proposed regulation is not overly broad because it would apply to only individuals who actually become candidates and benefit from a coordinated expenditure that satisfies existing regulations. Thus, the proposed regulation would not expand the types of activities covered by coordination regulations nor be overly encompassing by regulating those who never become candidates. This combats the related criticisms of a lack of jurisdiction,<sup>301</sup> as the proposed regulation would only regulate candidates' noncandidate conduct, not assert jurisdiction over noncandidates.

This regulation is also consistent with current FEC regulations: 11 C.F.R. §§ 110.2(l) and 9034.10 assert similar reach-back jurisdiction over pre-candidacy interactions with multicandidate PACs<sup>302</sup> and provide for the same applicable time period.<sup>303</sup> Additionally, 11 C.F.R. §§ 110.2(l) and 9034.10 were adopted to combat similar conduct, as they “were designed to address situations where unauthorized political committees closely associated with a particular individual planning to run for [office] defray costs that are properly treated as in-kind contributions.”<sup>304</sup>

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300. *See supra* notes 65–67 and accompanying text.

301. *See supra* Part II.B.2.c.

302. *See supra* note 238 and accompanying text.

303. *See supra* note 181.

304. *See supra* note 185.

*B. Proposal #2:  
Triggering Candidacy*

The FEC should also update the existing testing-the-waters regulations concerning triggering candidate status. Providing for noncandidates' involvement with Super PACs to trigger candidate status would further prevent evasion of campaign finance law. Such behavior would trigger all regulations applicable to candidates, including those beyond restrictions on coordination.<sup>305</sup> This section proposes three candidacy-triggering regulations. Part IV.B.1 proposes two regulations that add certain conduct to the existing list of activities that trigger candidacy. Part IV.B.2 proposes a regulation that would create a rebuttable presumption of candidacy for certain other conduct.

1. Adding to the List

The FEC should adopt the following two regulations as subparts (b)(6) and (b)(7), respectively, of 11 C.F.R. §§ 100.72 and 100.131. These new subparts would add to the nonexhaustive list of "activities that indicate an individual has decided to become a candidate"<sup>306</sup>:

- (6) The individual, either directly or through his or her agents, participates in the formation of an independent expenditure-only political action committee ("Super PAC") whose purpose is, in whole or in part, to support that individual during candidacy. This participation includes, but is not limited to, appointing that Super PAC's leadership.
- (7) The individual, either directly or through his or her agents, shares plans, strategies, projects, activities, or needs for candidacy with a Super PAC whose purpose is, in whole or in part, to support that individual during candidacy.<sup>307</sup>

These additions would not change the structure or enforcement of the existing testing-the-waters regulations.<sup>308</sup> Thus, the regulations would not raise jurisdictional issues, but rather would only update the existing regulations to reflect changes in campaign finance that have occurred with the rise of Super PACs. These regulations are necessary because the regulation proposed in Part IV.A would only apply in instances where the noncandidate's conduct led to the creation of a communication.

These regulations strike a balance between being over- and underinclusive. To trigger candidate status, the testing-the-waters candidate must engage in the listed conduct with a Super PAC whose purpose is to support that candidate *during candidacy*. This potentially could provide an

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305. *See supra* Part I.B.2.

306. *See supra* note 92.

307. The author of this Note created these proposed regulations.

308. *See supra* Part I.C.

avenue for circumvention, as Super PACs could avoid revealing that their purpose is to support a particular candidate until after the individual otherwise becomes a candidate. That said, if the FEC brought an enforcement proceeding after the individual otherwise became a candidate—for example, through a formal declaration of candidacy—support by such Super PAC after this formal announcement would be strong evidence that the Super PAC’s purpose was to support that individual’s candidacy when the conduct in question initially occurred. Additionally, the regulation proposed in Part IV.A would guard against total circumvention. Even if an individual avoided triggering candidate status, the reach-back period proposed in that regulation could potentially incorporate such pre-candidacy conduct into the coordinated expenditure restrictions. Despite these potential issues, this qualifier is necessary. Without it, the regulation would be overinclusive, as it could potentially apply to all individuals’ interactions with any Super PAC. It also is necessary to ensure the proposed regulations are consistent with current FEC regulations, which emphasize that only actions targeted toward candidacy trigger candidate status.<sup>309</sup>

On the other hand, the regulations avoid being underinclusive by applying only to a Super PAC whose purpose is, *in whole or in part*, to support such individual’s candidacy. This prevents Super PACs from circumventing the regulations by simply supporting more than one candidate. Additionally, this extra restriction is important because the danger of corruption is present regardless of whether the Super PAC is a single-candidate Super PAC or supports more than one candidate.

## 2. The Rebuttable Presumption

The FEC should adopt the following regulation as subpart (c) of 11 C.F.R. §§ 100.72 and 100.131:

- (c) An individual’s participation in the planning or production of a communication, of the kind described in 11 CFR 109.21(c), with an independent expenditure-only political action committee (“Super PAC”) whose purpose is, in whole or in part, to support that individual during candidacy, in a manner that satisfies 11 CFR 109.21(d)(1), (d)(2), or (d)(3), creates a rebuttable presumption that the individual has become a candidate. In the context of enforcement, an expenditure for such communication by the Super PAC, in satisfaction of 11 CFR 109.21, after the individual makes a formal announcement of candidacy or files a statement of candidacy with the FEC, is strong evidence that the individual became a candidate when he or she participated in the planning or production of such communication.<sup>310</sup>

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309. *See supra* Part I.C.2.b.

310. The author of this Note created this proposed regulation.

This regulation would create a rebuttable presumption of candidacy in instances where an individual participated in the planning or production of a communication of the type listed in the content prong of the coordination regulation<sup>311</sup> and in a manner described in the conduct prong of the coordination regulation<sup>312</sup> with a Super PAC whose purpose is to support such individual's candidacy. Thus, for example, the filming of a prospective candidate by a Super PAC whose purpose is to support that individual's candidacy would create a rebuttable presumption of candidacy. In an enforcement proceeding, the individual could then provide evidence that he had not yet decided to become a candidate and that his participation in the planning or production of such communication was not geared toward his candidacy.

Because the new regulation would encompass a broad variety of conduct, the proposed regulation would only create a rebuttable presumption of candidacy. Under this presumption, candidacy would be easier to dispel, as compared to the regulations proposed in Part IV.B.1 and 11 C.F.R. §§ 100.72 and 100.131. That said, the proposed regulation provides that, if such Super PAC makes an expenditure in satisfaction of the coordinated communication regulations<sup>313</sup> after the individual otherwise becomes a candidate, the presumption becomes more difficult to rebut. This provision ensures enforcement in the most obvious cases of coordination. Furthermore, the requirement that the Super PAC's purpose must be, *in whole or in part*, to support that individual *during candidacy* provides the same balance of inclusiveness as the regulations proposed in Part IV.B.1. Additionally, although this regulation does not simply add to an existing list like the regulations proposed in Part IV.B.1, there are no jurisdictional issues because this proposal regulates testing-the-waters candidates in the same manner as existing regulations.

Lastly, it is important to note how this proposed regulation relates to the coordination regulation proposed in Part IV.A. Technically, an individual who satisfies the regulation proposed in Part I.A also would satisfy the proposed regulation in this section. Triggering candidate status would essentially preempt the need for the regulation proposed in Part IV.A, as existing coordination regulations would apply to that individual as a candidate. Nevertheless, the regulation proposed in this section would be more encompassing. Unlike the regulation proposed in Part IV.A, the described conduct could have legal significance before the airing of a communication and triggering candidate status would subject an individual to regulations beyond coordination restrictions.<sup>314</sup> Additionally, although satisfying the proposed regulation in Part IV.A would be strong evidence that candidacy was triggered when the individual engaged in the conduct, doing so still would create only a rebuttable presumption under the regulation proposed in this section. Thus, adopting both sets of regulations

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311. *See supra* note 64.

312. *See supra* notes 65–69 and accompanying text.

313. *See supra* Part I.B.2.

314. *See supra* Part II.B.2.

would give the FEC multiple tools to combat pre-candidacy coordination. The two regulations, however, also could be alternatives for the FEC to choose from when considering adopting new regulations. While perhaps more difficult to enforce, the regulation proposed in this section would have more legal consequences; on the other hand, while easier to enforce, the regulation proposed in Part IV.A only would regulate coordination.

#### CONCLUSION

The current campaign finance regulatory system fails to adequately address the post-*Citizens United* political realities. The failure of regulators to revise regulations to keep pace with the rapid developments in campaign finance has allowed political actors to exploit these outdated regulations. By abusing the testing-the-waters phase to prepare for candidacy in an otherwise unlawful manner, candidates have undermined the Supreme Court's holding *Citizens United* and transformed independent expenditure-only committees into coordinated campaign machines. Adopting the proposed regulations will help align the regulatory system with the spirit of *Citizens United* and better equip the FEC with the tools to operate in the modern campaign finance and political landscape.