FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6462
Donald Trump, et al.	)	

STATEMENT OF REASONS OF MATTHEW S. PETERSEN

Commission regulations provide the ability to raise and spend funds to explore whether to run for federal office (i.e., "test the waters") without those funds being considered contributions and expenditures.[1] However, because any funds raised and spent during the testing-the-waters phase are retroactively deemed contributions and expenditures if one decides to become a candidate, these funds are subject to the contribution limits and source prohibitions set forth in the Federal Election Campaign Act. Thus, the Commission's "testing the waters" regulations furnish an opportunity to explore a potential candidacy without being subject to the regulatory requirements applicable to candidates, while ensuring that if one opts to become a candidate, he or she will not be in violation of the Act's limits.

This matter raised the question: what is the appropriate response if someone who allegedly fails to comply with the contribution limits or source prohibitions while "testing the waters" decides *not* to become a candidate? Does this violate the Act?

There are compelling reasons for not pursuing such an allegation. First, in several cases involving "draft" committees, courts repeatedly have held that the Act does not apply to political activities in support of persons who have not yet become candidates.[2] Thus, the Commission's jurisdiction may not even reach the conduct at issue here. But even assuming *arguendo* that it does, the Commission would not be vindicating any legitimate interest by employing its enforcement apparatus to go after individuals who decide not to run for federal office. As the Supreme Court reiterated in *Citizens United v. FEC*,[3] the anticorruption interest underlying the Act's contribution

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[1] 11 C.F.R. §§ 100.72, 100.131.

[2] *See Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010); *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281 (11th Cir. 1982); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981).

[3] 558 U.S. 310 (210).

limits and source prohibitions is "limited to *quid pro quo* corruption."[4] If a person never becomes a candidate—regardless of whether he or she raised and spent money in compliance with the Act's limits and prohibitions during the testing-the-waters period—the potential for *quid pro quo* corruption becomes moot, as does the Commission's interest in pursuing enforcement.

For these reasons, I concur with the statement of reasons from then-Vice Chairman Donald McGahn and Commissioner Caroline Hunter regarding the disposition of the alleged violation in this matter.

Feb. 22, 2017

MATTHEW S. PETERSEN
Commissioner

Date

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[4] *Id.* at 359.