

**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

July 7, 2020

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2 **TO:** The Commission  
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4 **FROM:** Lisa J. Stevenson *LJS*  
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15  
16 **RE:** MURs 6917 and 6929 (Scott Walker, *et al.*)  
17 Office of General Counsel's Notice to the Commission Following the  
18 Submission of Probable Cause Brief  
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21 **I. INTRODUCTION**  
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23 On May 11, 2020, the Office of General Counsel ("OGC") notified counsel for  
24 Respondents that it was prepared to recommend that the Commission find probable cause to  
25 believe that Scott Walker and Scott Walker, Inc. and Kate Teasdale in her official capacity as  
26 treasurer (the "Committee") violated 52 U.S.C. § 30116(f) as well as 11 C.F.R. §§ 100.72(a) and  
27 100.131(a) by accepting excessive and prohibited contributions in connection with Our  
28 American Revival's ("OAR") efforts to support Walker's testing-the-waters activities. OGC also  
29 notified the Committee that it was prepared to recommend that the Commission find probable  
30 cause to believe that the Committee violated 52 U.S.C. § 30104(b) by failing to report in-kind  
31 contributions from OAR. Finally, OGC notified Walker that OGC is prepared to recommend  
32 that the Commission find probable cause to believe that Walker violated 52 U.S.C. § 30102(e)(1)  
33 and 11 C.F.R. § 101.1(a) by filing a late statement of candidacy.<sup>1</sup> OGC included with this  
34 notification a General's Counsel's Brief setting forth the factual and legal basis for the  
35 recommendation. On May 13, 2020, OGC circulated a copy of the General Counsel's Brief to  
36 the Commission.  
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<sup>1</sup> See 52 U.S.C. § 30109(a)(3), 11 C.F.R. § 111.16(a); *see also* Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel, 76 Fed. Reg. 63,570 (Oct. 13, 2011).

1 Respondents filed a reply brief on May 26, 2020, and requested a probable cause hearing  
2 pursuant to *Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64,919  
3 (Nov. 19, 2007). There was insufficient Commissioner support for granting Respondents'  
4 request for a probable cause hearing, in light of Respondents' unwillingness to agree to toll the  
5 statute of limitations, and Respondents were notified of the Commission's decision not to grant  
6 their request on June 25, 2020.

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8 Pursuant to the *Agency Procedure Following the Submission of Probable Cause Briefs by*  
9 *the Office of General Counsel*, 76 Fed. Reg. 63,570 (Oct. 13, 2011), OGC is hereby notifying the  
10 Commission that it intends to proceed with the recommendations to find probable cause to  
11 believe, based on the factual and legal analysis set forth in the General Counsel's Brief. In  
12 addition, an analysis of the arguments presented in Respondents' Reply Brief is included below.  
13 A copy of this Notice is being provided to Respondents at the same time that it is circulated to  
14 the Commission.

## 15 16 **II. ANALYSIS**

### 17 18 **A. The Commission Can Examine Pre-Candidacy Activity**

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20 Respondents argue without support that the Act does not authorize the Commission to  
21 examine actions that occurred before an individual becomes a candidate, stating that OGC has  
22 "inappropriately attempted to extend its regulatory scope to activities that fall well outside the  
23 FEC's jurisdiction to include the activities of someone who is not a federal candidate at the time  
24 of the activities but who then later becomes a candidate."<sup>2</sup> Respondents' argument that the  
25 Commission is without jurisdiction to examine pre-candidacy activities is meritless, as the  
26 Commission routinely evaluates pre-candidacy activities.<sup>3</sup> Indeed, the statute and regulations  
27 themselves require an examination of pre-candidacy activity to determine whether an individual  
28 timely filed his or her Statement of Candidacy, or whether a committee properly reported testing-  
29 the-waters activity to assess whether the candidate's actions before his or her candidacy  
30 announcement triggered obligations under the Act. Specifically, the Commission examines  
31 whether the amount of receipts accepted and disbursements made triggered candidacy; whether  
32 the candidate or committee made payments for polling, telephone calls, or travel directed to an  
33 evaluation of the feasibility of candidacy; whether the candidate engaged in activities signifying  
34 that a decision to become a candidate had been made; or whether the candidate made, or  
35 authorized, public statements referring to themselves as a candidate.<sup>4</sup>

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<sup>2</sup> Reply Brief at 2.

<sup>3</sup> See MUR 6735 (Joseph A. Sestak), MUR 6533 (Perry Haney), MUR 6449 (Jon Bruning); General Counsel's Brief at 17-18.

<sup>4</sup> See, e.g., 11 C.F.R. §§ 100.72(b), 100.131(b) (setting forth a non-exhaustive list of activities that the Commission may consider in determining whether an individual has decided to become a candidate).

1           **B.       Respondents’ Statute of Limitations Arguments Understate the**  
 2           **Commission’s Authority and Do Not Extinguish the Clear Violations**  
 3           **Uncovered by OGC’s Investigation**  
 4

5           Respondents argue that because OAR made many of its testing-the-waters expenditures  
 6 more than five years ago, the Commission must dismiss this matter.<sup>5</sup> This argument misstates  
 7 the Commission’s ability to address violations that occurred more than five years ago. The  
 8 Commission has acted in prior matters to address violations of the Act which were more than  
 9 five years old and can do so here.<sup>6</sup> Respondents cite the five-year statute of limitations contained  
 10 within 28 U.S.C. § 2462, which it argues limits the Commission’s time to bring “an action, suit  
 11 or proceeding for the *enforcement of any civil fine, penalty, or forfeiture*” (emphasis added).  
 12 But, assuming this limitation applies in the relevant jurisdiction,<sup>7</sup> the agency’s ability to seek  
 13 equitable remedies is not subject to such limitations.<sup>8</sup> Thus, regardless of whether the five-year  
 14 statute of limitations invoked by Respondents impedes the Commission’s ability to seek a civil  
 15 penalty, it does not prevent the Commission from pursuing equitable remedies, including  
 16 requiring disclosure of excessive and prohibited contributions, and it does not prevent the  
 17 Commission from making a probable cause to believe finding.  
 18

19           Furthermore, Respondents’ statute of limitations arguments fail to address the  
 20 Committee’s obligation to report its receipt of in-kind contributions in the form of the testing-  
 21 the-waters expenditures on its first disclosure report, which was filed on September 30, 2015.<sup>9</sup>  
 22 Because the Committee did not disclose OAR’s payment of testing-the-waters expenditures,  
 23 OGC has recommended that the Commission find probable cause to believe that the Committee  
 24 violated 52 U.S.C. § 30104(b) by failing to report in-kind contributions from OAR.<sup>10</sup>  
 25

26           Furthermore, to the extent Respondents’ statute of limitations argument incorporates the  
 27 argument that the Commission should decline to pursue even equitable remedies as an exercise

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<sup>5</sup> Reply Brief at 3-4.

<sup>6</sup> See generally Conciliation Agreement, MUR 6538R (Americans for Job Security) (addressing equitable remedies).

<sup>7</sup> Compare *Citizens for Responsibility and Ethics in Washington v. FEC*, 209 F.Supp.3d 77, n.3 (D.D.C. 2016) (rejecting an argument that the FEC cannot pursue equitable remedies after five years on the basis that no “authoritative policy or rule” barring equitable enforcement was before the court).

<sup>8</sup> *FEC v. Christian Coal.*, 965 F. Supp. 66, 71 (D.D.C. 1997) (holding that injunctive relief is not a penalty); *FEC v. Nat’l Republican Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995) (same).

<sup>9</sup> The Commission would still be able to seek a civil monetary penalty from the Committee for these reporting violations until mid-October 2020 because the Committee tolled the statute of limitations for 15 days in connection with a request to extend their time to respond to the Commission’s reason-to-believe findings. The Commission would be able to seek equitable remedies after the expiration of the Commission’s ability to seek to civil penalties. See Conciliation Agreement, MUR 6538R (Americans for Job Security).

<sup>10</sup> General Counsel’s Brief at 25.

1 of prosecutorial discretion,<sup>11</sup> that argument is unpersuasive. The violations at issue in this matter  
2 are contrary to central provisions of the Act regulating the size of contributions, limits that the  
3 Supreme Court has consistently upheld in recognition of the important anticorruption purposes  
4 served by such limits.<sup>12</sup> These violations also took place in the context of the 2016 presidential  
5 race in connection with Walker’s significant candidacy. The Commission has already expended  
6 the resources to establish the violations and, as discussed below, Respondents do not contest  
7 them outside of arguing that the statute of limitations has run and that the full extent of the  
8 violations has not been precisely accounted.

9  
10 **C. The General Counsel’s Brief Documents Walker’s Concerted Efforts to Use**  
11 **OAR to Gauge Support for a Presidential Candidacy**  
12

13 Respondents fail to respond to the conclusions reached in the General Counsel’s Brief,  
14 supported by overwhelming evidence, including voluminous contemporaneous documentary  
15 evidence, demonstrating that Walker used resources provided by OAR to evaluate and promote a  
16 potential candidacy. While Respondents spend a significant portion of their brief outlining  
17 Walker’s history of being a sought-after public speaker,<sup>13</sup> they do not address the specific  
18 activities and statements outlined in the General Counsel’s Brief which formed the basis of  
19 OGC’s recommendations. Respondents do not address why Walker after having had a  
20 successful public speaking schedule for many years, suddenly required an organization to usher  
21 hundreds of thousands of dollars of political consulting associated with early primary states,  
22 offered by individuals who were experienced in running political campaigns, to assist him in  
23 continuing to give speeches across the country.<sup>14</sup> Respondents also fail to address the numerous  
24 instances where it appears that Walker explicitly stated that he was considering a campaign.<sup>15</sup>  
25 These activities—Walker traveling the country stating that he was considering a campaign and  
26 building a team of political consultants to later run that campaign—form the basis for probable  
27 cause to believe.

28  
29 Respondents do not dispute that OAR, through its consultants and staff, suggested that  
30 Walker use meetings that OAR set up with donors to gauge interest in a potential presidential  
31 candidacy.<sup>16</sup> Instead, Respondents argue that OAR fundraisers “sought to feed off media

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<sup>11</sup> See Reply Brief at 4-5.

<sup>12</sup> *E.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 207 (2014) (“As *Buckley* explained, Congress may permissibly seek to rein in ‘large contributions [that] are given to secure a political quid pro quo from current and potential office holders.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam))); *id.* (“In addition to ‘actual quid pro quo arrangements,’ Congress may permissibly limit ‘the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions’ to particular candidates.” (quoting *Buckley*, 424 U.S. at 27)).

<sup>13</sup> See Reply Brief at 7-8.

<sup>14</sup> See General Counsel’s Brief at 5-16.

<sup>15</sup> See *id.* at 8 & n.29 (documenting numerous occasions where OAR secured meetings where Walker asked people to join his team “should he decide to run for higher office”).

<sup>16</sup> See Reply Brief at 9.

1 speculation at the time and use donor interest in Governor Walker’s potential presidential  
2 interests to help drive attention and funding to OAR” to explain the repeated references to a  
3 prospective Walker campaign in meetings that were ostensibly set up to solicit support for  
4 OAR.<sup>17</sup> Respondents do not explain how feeding speculation about a Walker campaign would  
5 garner support for OAR, unless, as is apparently the case here, Walker was encouraging donors  
6 who supported his potential candidacy to support him through OAR until his campaign was  
7 officially announced.<sup>18</sup> That OAR ceased in large part to function following Walker’s official  
8 announcement of his candidacy further confirms that Walker used OAR to test the waters.<sup>19</sup>  
9

10 Respondents also claim that OGC has not identified specific expenditures tied to testing-  
11 the-waters activities. As outlined in the General Counsel’s Brief, OGC’s investigation revealed  
12 OAR provided support for Walker’s testing-the-waters activities when it researched, arranged,  
13 and facilitated Walker’s travel to private meetings throughout the United States where he  
14 repeatedly told attendees that he was looking to secure their support for an eventual candidacy.<sup>20</sup>  
15 The Brief identifies the amount of money paid to the consultants who researched these private  
16 meetings and crafted the “ask” where Walker would communicate his consideration of a  
17 presidential campaign.<sup>21</sup> The General Counsel’s Brief also identifies expenditures to political  
18 consultants who were experienced in running campaigns and appeared to be building out the  
19 framework for an eventual campaign.<sup>22</sup> The General Counsel’s Brief also identifies travel  
20 expenses associated with Walker’s private meetings.<sup>23</sup> These expenses are not only sufficiently  
21 particularized to support a probable cause finding, but the accounting issue Respondents rely  
22 upon is irrelevant to whether the Commission should require them to disclose the excessive and  
23 prohibited contributions at issue, information Respondents have withheld.  
24

#### 25 **D. Respondents’ Arguments Concerning Walker’s Late Statement of Candidacy** 26 **Are Meritless** 27

28 Respondents concede that Walker filed his Statement of Candidacy form eight days late,  
29 but argue that a letter that Walker elected to send the Commission should be considered an  
30 effective Statement of Candidacy.<sup>24</sup> This argument is without merit. The Commission’s  
31 regulations provide that once an individual becomes a candidate, the candidate has fifteen days

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17 *Id.*

18 General Counsel’s Brief at 9, Attach. 21.

19 *Id.* at 12-13.

20 *Id.* at 20-22.

21 *Id.* at 20-21.

22 *Id.* at 21-22.

23 *Id.* at 6-10 & nn. 22, 26, 30, 33, 34, 36; *id.* at 24.

24 *See* Reply Brief at 11-12.

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1 to designate a principal campaign committee by filing a Statement of Candidacy.<sup>25</sup> It does not  
2 provide candidates with discretion to select their method of communicating a candidacy to the  
3 Commission for candidates, such as Walker, who are required to file reports electronically with  
4 the Commission. The Commission can and should proceed with finding probable cause to  
5 believe that Walker filed his Statement of Candidacy late.

6  
7 **III. RECOMMENDATIONS**  
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- 9
- 10 1. Find probable cause to believe that Scott Walker and Scott Walker, Inc. and Kate  
11 Teasdale in her official capacity as treasurer violated 52 U.S.C. § 30116(f) as well as  
12 11 C.F.R. §§ 100.72(a) and 100.131(a) by accepting excessive and prohibited  
13 contributions in connection with OAR's efforts to support Walker's testing-the-  
14 waters activities;
  - 15 2. Find probable cause to believe that Scott Walker, Inc. and Kate Teasdale in her  
16 official capacity as treasurer violated 52 U.S.C. § 30104(b) by failing to report in-  
17 kind contributions from OAR; and
  - 18 3. Find probable cause to believe that Scott Walker violated 52 U.S.C. § 30102(e)(1)  
19 and 11 C.F.R. § 101.1(a) by failing to file a timely Statement of Candidacy.  
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<sup>25</sup> 52 U.S.C. § 30102(e); 11 C.F.R. § 101.1(a).