
CHAPTER I

Testing the Waters

Before deciding to campaign for federal office, an individual may first want to “test the waters”—that is, explore the feasibility of becoming a candidate. For example, the individual may want to travel around the state or district to see if there is sufficient support for his candidacy. An individual who merely conducts selected testing the waters activities that fall within the exemptions in FEC regulations that are discussed in Section I below (but does not campaign for office) does not have to register or report as a candidate even if the individual raises or spends more than \$5,000 on those activities (i.e., the dollar threshold that would normally trigger candidate registration (which is discussed in Chapter 2)). Nevertheless, the individual must comply with the contribution limits and prohibitions. 100.72(a) and 100.131(a); see also Advisory Opinion (AO) 1985-40.

Once an individual begins to campaign or decides to become a candidate, funds that were raised or spent to test the waters apply to the \$5,000 threshold for qualifying as a candidate. 100.72(a) and 100.131(a). Once that threshold is exceeded, the individual must register with the FEC (candidates for the House of Representatives)¹ or the Secretary of the Senate (candidates for the Senate), and begin to file reports (including in the first report all activity that occurred prior to reaching the \$5,000 threshold), as discussed in Chapter 2.

¹ The same guidance for “testing the waters” applies to individuals testing the waters for a Presidential candidacy. Once the threshold is exceeded, such individuals must register their candidacy with the FEC.

I. Testing the Waters vs. Campaigning

Testing the Waters

An individual may conduct a variety of activities to test the waters. Examples of permissible testing-the-waters activities include polling, travel and telephone calls undertaken to determine whether the individual should become a candidate. 100.72(a) and 100.131(a).

Campaigning

Certain activities, however, indicate that the individual has decided to become a candidate and is no longer testing the waters. In that case, once the individual has raised or spent more than \$5,000, he or she must register as a candidate. Note that, when an individual decides to run for office, funds that were raised and spent to test the waters apply to the \$5,000 threshold.

Campaigning (as opposed to testing the waters) is apparent, for example, when individuals:

- Make or authorize statements that refer to themselves as candidates (“Smith in 2012” or “Smith for Senate”);
- Use general public political advertising to publicize their intention to campaign;
- Raise more money than what is reasonably needed to test the waters or amass funds (seed money) to be used after candidacy is established;
- Conduct activities over a protracted period of time or shortly before the election; or
- Take action to qualify for the ballot.

100.72(b) and 100.131(b).

Also, once an individual files FEC Form 2, Statement of Candidacy, he or she is no longer considered to be “testing the waters” and must file FEC Form 1 (and subsequently file financial reports) under the rules described in Chapter 2, “Starting the Campaign.” AO 1979-51.

2. Contribution Limits and Prohibitions

Funds raised to test the waters are subject to the Act’s contribution limits. Moreover, the individual who is testing the waters may not accept funds from prohibited sources. 100.72(a) and 100.131(a).

Limits

Keep in mind that contribution limits apply to all the support given to an individual who is testing the waters, even donations from a family member or friend. (See the chart on contribution limits in Chapter 4.) The limits apply, for example, to:

- Gifts of money, goods and services;
- Loans (except bank loans);
- Certain staff advances until repaid (see Chapter 3 for more information on staff advances);
- Endorsements and guarantees of bank loans; and
- Funds given or personally loaned to the individual to pay for his or her living expenses during the testing-the-waters period (AO 1978-40). 100.52(a).

See Chapter 4 for more information on contribution limits.

Prohibitions

In observing the law’s prohibitions, the individual may not accept money from:

- Labor organizations (although funds from a labor separate segregated fund—also called a PAC—are permissible);
- Corporations, including nonprofit corporations (although funds from a corporate separate segregated fund—also called a PAC—are permissible);

- Foreign nationals; or
- Federal government contractors.

See Chapter 5 for more information on contribution prohibitions.

3. Recordkeeping and Accounting

Recordkeeping

An individual who tests the waters must keep financial records. If he or she later becomes a candidate, the money raised and spent to test the waters must be reported by the campaign as contributions and expenditures. 101.3. See Chapter 11 for more information on recordkeeping.

Separate Bank Account

Another consideration, though not a requirement, is the segregation of testing-the-waters funds from personal funds. It is advisable for the individual to set up a separate bank account for the deposit of receipts and the payment of expenses. If the individual later becomes a candidate, a campaign account must be established to keep the campaign funds separate from the individual’s personal funds. 102.10, 102.15, 103.2 and 103.3(a).

4. Example

Mr. Jones is interested in running for a seat in the U.S. House of Representatives but is unsure whether he has enough support within his district to make a successful bid. He therefore accepts up to \$2,500 from each of several relatives and friends and uses the money to pay for an opinion poll. He sees that good records are kept on the money raised and spent in his testing-the-waters effort. The poll results indicate good name recognition in the community, and Jones decides to run.

By making this decision, Jones has crossed the line from testing the waters to campaigning. The funds he raised earlier now automatically become contributions and the funds he spent, including

the polling costs, are now expenditures. These contributions and expenditures count toward the threshold that triggers candidate status.

Once his contributions or expenditures exceed \$5,000, he becomes a candidate and must register under the Act. The money raised and spent for testing the waters must be disclosed on the first report his principal campaign committee files.

Had Jones decided not to run for federal office, there would have been no obligation to report the monies received and spent for testing-the-waters activity, and the donations made to help pay for the poll would not have counted as contributions.

5. Organizing a Testing-the-Waters Committee

An individual may organize a “committee” for testing the waters. An “exploratory committee” or “testing-the-waters committee” is not considered a political committee and does not have to register or file reports as long as its activities are limited to testing the waters and it does not engage in campaigning. The name of the committee, and statements by committee staff, must not refer to the individual as a candidate. For example, an exploratory committee could not be called “Sam Jones for Congress,” which would indicate that Jones had already decided to run for federal office. Instead, the committee could be called “Sam Jones Congressional Exploratory Committee.” See AO 1981-32.

If the potential candidate decides to run for federal office and becomes a candidate under the Act, then he or she may designate the exploratory committee as the principal campaign committee and change the name of the committee as appropriate.