

**BEFORE THE UNITED STATES
FEDERAL ELECTION COMMISSION**

Campaign Legal Center
215 E Street, NE
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Democracy 21
2000 Massachusetts Avenue, NW
Washington, DC 20036
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v.

MUR No. _____

Martin O'Malley
c/o O' Say Can You See PAC
P.O. Box 468
Annapolis, MD 21404

COMPLAINT

1. This complaint is filed pursuant to 52 U.S.C. § 30109(a)(1) and is based on information providing reason to believe that Martin O'Malley has been "testing the waters" of a 2016 presidential campaign and has not complied with and will not comply with the requirement that "testing the waters" activities be paid for with funds that comply with the Federal Election Campaign Act's ("FECA") candidate contribution limits and restrictions, in violation of FECA provisions, 52 U.S.C. § 30101, *et seq.*, and Commission regulations.
2. "If the Commission, upon receiving a complaint . . . has reason to believe that a person has committed, or is about to commit, a violation of [FECA] . . . [t]he Commission shall make an investigation of such alleged violation" 52 U.S.C. § 30109(a)(2) (emphasis added); *see also* 11 C.F.R. § 111.4(a) (emphasis added).

FACTS

3. In July 2012, it was reported that Martin O'Malley had "set up a federal political action committee, a move likely to stoke talk about ambitions for national office in 2016," which he named O' Say Can You See PAC (FEC ID# C00525220).¹
4. O'Malley is reportedly considering a challenge to presumed candidate Hillary Clinton for the Democratic Party's 2016 presidential election nomination. Though O'Malley "hasn't officially declared his candidacy, . . . the formation of an O'Malley PAC and frequent trips to key presidential primary states such as Iowa and New Hampshire indicate a high likelihood he'll seek the office."²
5. O' Say Can You See PAC reported to the Commission total receipts exceeding \$1.4 million during the 2014 election cycle and reported receiving contributions exceeding \$2,700.³
6. The URL for the O' Say Can You See PAC website is <http://martinomalley.com>. The website prominently features O'Malley and no other candidates for public office—the website is dedicated wholly to the promotion of Martin O'Malley and to raising funds for the PAC.
7. O'Malley's PAC had 32 staffers "on the ground in eight key battleground states" in the 2014 cycle, including Iowa, New Hampshire, South Carolina, Nevada and Wisconsin.⁴ O'Malley's PAC "has helped fund his extensive travel over the past year and is paying

¹ John Wagner, *O'Malley launches federal PAC as national profile rises*, WASH. POST, July 26, 2012, http://www.washingtonpost.com/blogs/maryland-politics/post/omalley-launches-federal-pac-as-national-profile-rises/2012/07/26/gJQADPR6AX_blog.html.

² Ben Wolfgang, *O'Malley faces steep climb to 2016 White House bid*, WASH. TIMES, Oct. 19, 2014, <http://www.washingtontimes.com/news/2014/oct/19/martin-omalley-faces-steep-climb-to-2016-president/?page=all>.

³ See, e.g., O' Say Can You See PAC, 2014 Year-End Report (filed Jan. 31, 2015).

⁴ Wolfgang, *supra* note 2; see also John Wagner, *O'Malley, in wait-and-see mode, looks to spring to launch race against Clinton*, WASH. POST, Dec. 26, 2014, http://www.washingtonpost.com/local/md-politics/omalley-in-wait-and-see-mode-looks-to-spring-to-assess-chances-against-clinton/2014/12/26/5b28e066-86c3-11e4-b9b7-b8632ae73d25_story.html.

the salaries of a modest but growing political staff. Recent hires include senior adviser Bill Hyers, who managed New York Mayor Bill de Blasio’s campaign, and policy director Sarah Miller, who was on the policy team of Clinton’s 2008 presidential campaign.”⁵

8. In late January 2015, it was reported that O’Malley’s PAC added more staff, “retaining two operatives who worked in Iowa last year as he continues to weigh a 2016 White House bid.”⁶ O’Malley’s PAC “has hired Jake Oeth, a Des Moines-based consultant who most recently served as political director for Bruce Braley, the state’s unsuccessful Democratic nominee for U.S. Senate last year And O’Malley has kept Brad Elkins on the payroll as a Washington-based staffer for his PAC. Elkins worked last year as political director for Jack Hatch, the unsuccessful Democratic nominee for governor in Iowa.”⁷
9. O’Malley has been a frequent visitor to New Hampshire, visiting in June of 2014 to “rub shoulders with influential Democrats” at the Manchester Democrats Flag Day Dinner⁸ and visiting again in March 2015 for two days, appearing at the “Wild Irish Breakfast in Nashua on St. Patrick’s Day and address[ing] a major Democratic fundraiser in Concord the night before.”⁹ O’Malley has also been doing more than simply speaking at these events. At one 2013 event in New Hampshire, he left cards on the seats of the nearly

⁵ See Wagner, *O’Malley, in wait-and-see mode*, *supra* note 4.

⁶ John Wagner, *O’Malley, with eye on 2016, retains two political operatives with Iowa experience*, WASH. POST, Jan. 27, 2015, http://www.washingtonpost.com/local/md-politics/omalley-with-eye-on-2016-retains-two-political-operatives-with-iowa-experience/2015/01/27/43df6060-a63f-11e4-a7c2-03d37af98440_story.html.

⁷ *Id.*

⁸ Reuters, *Maryland Gov. O’Malley tests presidential waters in New Hampshire visit*, BALT. SUN, June 14, 2014, <http://www.baltimoresun.com/news/maryland/politics/blog/bs-md-omalley-new-hampshire-20140614-story.html>.

⁹ James Pindell, *Potential Democratic presidential candidate Martin O’Malley to visit N.H.*, BOSTON GLOBE, Jan. 29, 2015, <https://www.bostonglobe.com/metro/2015/01/29/potential-democratic-presidential-candidate-martin-malley-visit/w39eOdA1Mpg8ajVasJ6yhL/story.html>.

1,000 Democratic activists, inviting them to “stay in touch,” and offering the contact information for his political staffers.¹⁰

10. O’Malley made a two-day trip to Iowa in late-March 2015, where he “delivered a red meat political speech to a room packed with union workers,” attended a fundraiser and “criss-crossed the state, meeting with influential early Democratic voters.”¹¹ The trip was intended “to see if he can build on support for a White House bid . . . aides told The Des Moines Register” in early February.¹²
11. O’Malley is scheduled to return to Iowa in early April to “meet with party organizers and activists in Des Moines on April 9 at the Central Iowa Democrats for Action Kickoff event” and to “make an appearance at the Polk County Democrats’ annual Spring Awards dinner on April 10.”
12. Travel and public appearances are not the only things that indicate that O’Malley is testing the waters. He reportedly “has said publicly that he is weighing a 2016 presidential bid.”¹³ In February 2014, he said that he was moving ahead with laying the groundwork for a campaign regardless of whether Hillary Clinton’s is running, stating in an interview that he did not want to “squander this important period of preparation

¹⁰ John Wagner, *O’Malley recounts leadership of Baltimore in speech to New Hampshire Democrats*, WASH. POST, Nov. 17, 2013, http://www.washingtonpost.com/local/md-politics/omalley-recounts-leadership-of-baltimore-in-speech-to-new-hampshire-democrats/2013/11/17/ad97618e-4f8c-11e3-9fe0-fd2ca728e67c_story.html.

¹¹ Mark Preston, *Can this Democrat really beat Hillary Clinton?*, CNN, Mar. 25, 2015, <http://www.cnn.com/2015/03/25/politics/election-2016-martin-omalley-iowa/>.

¹² Jennifer Jacobs, *O’Malley looks to capitalize on Clinton’s Iowa absence*, DES MOINES REG., Feb. 3, 2015, <http://www.desmoinesregister.com/story/news/elections/presidential/caucus/2015/02/02/martin-omalley-hillary-clinton-iowa-democrat-caucus-president-iowa-poll/22753007/>.

¹³ John Wagner, *O’Malley invited to N.H. for Democratic dinner, as he weighs 2016 presidential bid*, WASH. POST, Sept. 18, 2013, http://www.washingtonpost.com/local/md-politics/omalley-invited-to-nh-for-democratic-dinner-as-he-weighs-2016-presidential-bid/2013/09/18/2ea2438c-2096-11e3-a45b-9131e6a4cadf_story.html.

because of horse-race concerns” and that he was doing “the thought work and the preparation work” necessary for a presidential run.¹⁴

SUMMARY OF THE LAW

I. “CANDIDATE” STATUS & “TESTING THE WATERS”

13. The term “candidate” is defined in FECA to mean “an individual who seeks nomination for election, or election, to Federal office” and for purposes of the statutory definition an individual is deemed to seek nomination for election, or election “if such individual has received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000” or “given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of \$5,000 or has made such expenditures aggregating in excess of \$5,000.” 52 U.S.C. § 30101(2) (emphasis added); *see also* 11 C.F.R. § 100.3(a).
14. The term “contribution” is defined in FECA to mean “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A)(i) (emphasis added); *see also* 11 C.F.R. §§ 100.51–100.56.
15. The term “expenditure” is defined in FECA to mean “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(9)(A)(i) (emphasis added); *see also* 11 C.F.R. §§ 100.110–100.114.

¹⁴ John Wagner, *Not waiting for Clinton, Md. Gov. O’Malley prepares for possible presidential bid*, WASH. POST, Feb. 1, 2014, http://www.washingtonpost.com/local/md-politics/not-waiting-for-clinton-md-gov-omalley-prepares-for-possible-presidential-bid/2014/02/01/d92fb132-8a85-11e3-833c-33098f9e5267_story.html.

16. The Commission has explained that under FECA, “an individual is deemed a ‘candidate’ . . . if he or she receives contributions or makes expenditures in excess of \$5,000 or gives consent to another person” to do so on his or her behalf. *See Payments Received for Testing the Waters Activities*, 50 Fed. Reg. 9992–93 (Mar. 13, 1985) (Final Rules and Explanation and Justification).¹⁵
17. The Commission has further explained: “The Act thus establishes automatic dollar thresholds for attaining candidate status which trigger its registration and reporting requirements.” However, “[t]hrough its regulations, the Commission has established limited exceptions to these automatic thresholds which permit an individual to test the feasibility of a campaign for Federal office without becoming a candidate under the Act.” *See Payments Received for Testing the Waters Activities*, 50 Fed. Reg. at 9992–93 (emphasis added).
18. These “limited exceptions” to the definitions of “contribution” and “expenditure” are commonly referred to as the “testing the waters” exceptions and are found at 11 C.F.R. §§ 100.72 and 100.131. In the absence of these regulatory exemptions, funds raised and spent for the activities described therein would be “contributions” and “expenditures” under federal law and would therefore trigger “candidate” status when they exceeded \$5,000.
19. Section 100.72(a), structured as a limited exception to the definition of “contribution,,: provides:

Funds received solely for the purpose of determining whether an individual should become a candidate are not contributions. . . . Only funds permissible under the Act may be used for such activities. The individual shall keep records of all such funds received. See 11 CFR 101.3. If the individual subsequently becomes a candidate, the funds received are contributions subject to the reporting requirements of the Act.

¹⁵ Available at http://www.fec.gov/law/cfr/ej_compilation/1985/50fr9992.pdf.

Such contributions must be reported with the first report filed by the principal campaign committee of the candidate, regardless of the date the funds were received.

11 C.F.R. § 100.72(a) (emphasis added).

20. Section 100.72(b) makes clear that the exception is “not applicable to individuals who have decided to become candidates[,]” nor “for activities relevant to conducting a campaign.” 11 C.F.R. § 100.72(b) (emphasis added). Examples of activities that indicate that an individual has decided to become a candidate include, but are not limited to:

- (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 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.

11 C.F.R. § 100.72(b) (emphasis added).

21. Section 100.131 creates a near-identical exception to the definition of “expenditure,” replacing the opening phrase “funds received” with the phrase “payments made.” 11 C.F.R. § 100.131.

22. Sections 110.2(l) and 9034.10 establish certain activities as *de facto* “testing the waters” activities—payments for:

- Polling expenses for determining the favorability, name recognition, or relative support level of the candidate involved;
- Compensation paid to employees, consultants, or vendors for services rendered in connection with establishing and staffing offices in States where Presidential primaries, caucuses, or preference polls are to be held, other than offices in the candidate’s home state and in or near the District of Columbia;
- Administrative expenses, including rent, utilities, office supplies and equipment, in connection with establishing and staffing offices in States where Presidential primaries, caucuses, or preference polls are to be held, other than offices in the candidate’s home state and in or near the District of Columbia; or

- Expenses of individuals seeking to become delegates in the Presidential nomination process.

11 C.F.R. §§ 110.2(l)(1) and 9034.10(a).

23. These regulations, 11 C.F.R. §§ 110.2(l) and 9034.10, make clear that payments for such activities benefiting presidential candidates, paid for by federal multicandidate committees before the individual announces her candidacy, constitute in-kind “contributions” from the multicandidate committee to the candidate subject to the \$5,000 limit on contributions from multicandidate committees to candidates—unless reimbursed by the candidate. The Commission has explained:

These provisions 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. . . . The focus of the final rules, therefore, is those expenses paid by multicandidate political committees prior to actual candidacy under the law, i.e., during the “testing the waters” phase and before.

Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47386, 47387, 47407 (Aug. 8, 2003) (Final Rules and Explanation and Justification).

24. In Advisory Opinion 1985-40, the Commission concluded that travel expenses and hospitality suite rentals for a prospective presidential candidate’s attendance at state and regional Republican Party meetings and conferences, described as “cattle shows” that would “be attended by party officials, party activists, elected officeholders, political consultants, and the press,” constituted “testing the waters” expenses. Similarly, the Commission concluded that expenses related to the prospective candidate’s “travel to early primary and convention states to meet privately with Republican Party leaders to seek their views on whether he should seek the 1988 Republican presidential nomination” constituted “testing the waters” activities. Finally, the Commission concluded that

expenses related to setting up “steering committees in certain states, such as Iowa and New Hampshire, which will hold early caucuses and primaries in connection with the 1988 Republican presidential nomination” constituted “testing the waters” activities. FEC Advisory Opinion 1985-40 at 6–9.

II. Registration & Reporting Requirements

25. No later than 15 days after becoming a candidate, a candidate for federal office must “designate in writing a political committee . . . to serve as the principal campaign committee of such candidate” by filing a Statement of Candidacy using the Commission’s Form 2. 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1. Such a committee must file a statement of organization no later than 10 days after designation as the candidate’s authorized principal campaign committee. 52 U.S.C. § 30103.
26. The treasurer of a political committee must file reports of receipts and disbursements pursuant to 52 U.S.C. § 30104.
27. All funds received or payments made in connection with “testing the waters” activities conducted under 11 C.F.R. §§ 100.72(a) and 100.131(a) prior to becoming a candidate are “considered contributions or expenditures under the Act and shall be reported . . . in the first report filed by such candidate’s principal campaign committee.” 11 C.F.R. § 101.3. An individual “testing the waters” must keep records of the “name of each contributor, the date of receipt and amount of all contributions received and all expenditures made in connection with” “testing the waters” activities. *Id.*

III. CONTRIBUTION LIMITS & RESTRICTIONS

28. A presidential candidate’s principal campaign committee, together with any other committees authorized by the candidate, may not accept contributions from an individual

that, in the aggregate, exceed \$2,700 per election. 52 U.S.C. § 30116(a)(1)(A).¹⁶

Candidates may not accept contributions from political party committees and other multicandidate PACs that exceed \$5,000 per election. 52 U.S.C. § 30116(a)(2).

29. Contributions made from a candidate's personal funds to her campaign are not subject to any limits, though they must still be reported. *See* 11 C.F.R. § 110.10; *see also* FEC Advisory Opinions 1991-09, 1990-09 and 1985-33.
30. Candidate committees may not accept contributions from corporations or labor organizations. 52 U.S.C. § 30118(a).
31. A federal candidate, officeholder, or any entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of a candidate is prohibited from soliciting, receiving, directing, transferring or spending funds in connection with a federal election unless the funds are subject to the limitations, prohibitions, and reporting requirements of FECA. 52 U.S.C. § 30125(e)(1).

CAUSES OF ACTION

COUNT I:

There is reason to believe that Martin O'Malley has been "testing the waters" of a 2016 presidential campaign and has not complied and will not comply with the requirement that "testing the waters" activities be paid for with funds that comply with FECA's candidate contribution limits in violation of provisions of FECA.

32. FECA and Commission regulations and advisory opinions make clear that activities engaged in for the purpose of determining whether an individual should become a candidate constitute "testing the waters" and must be paid for with funds that comply

¹⁶ As prescribed by statute under 52 U.S.C. § 30116(c), the \$2,000 limit has been adjusted for changes in the cost of living at the beginning of every odd-numbered year since 2002, most recently in this month. *See* Price Index Adjustments for Expenditure Limitations and Lobbying Bundling Disclosure Threshold, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015).

with FECA's contribution limits and restrictions, and must be reported by an individual who becomes a candidate on that candidate's first disclosure report.

33. Whether or not someone is "testing the waters," and thus subject to the candidate contribution limits and prohibitions of federal law, is a fact-based question and cannot be dismissed solely based on a person's statements during public appearances that they are not "testing the waters."
34. Based on published reports detailed above, complainants have reason to believe that Martin O'Malley and/or his agents have engaged in activities for the purpose of determining whether he should become a candidate, including but not limited to:
- Telephone calls for the purpose of determining whether an individual should become a candidate;
 - Travel for the purpose of determining whether an individual should become a candidate;
 - Compensation paid to employees, consultants, or vendors for services rendered in connection with establishing and staffing offices in states other than the candidate's home state and in or near the District of Columbia;
 - Administrative expenses, including rent, utilities, office supplies and equipment, in connection with establishing and staffing offices in states other than the candidate's home state and in or near the District of Columbia;
 - Travel expenses to attend, address and rent hospitality suites at state political party conferences where the individual "indicates his potential interest in, and his ongoing consideration of whether to seek" his party's nomination;
 - Travel expenses for private meetings with state party leadership to gauge support of a possible candidacy; and
 - Expenses to set up "steering committees" in early caucus/primary states with the understanding that the committee will become the official campaign organization in the event the individual runs for office.
35. Based on published reports detailed above, complainants have reason to believe that payments have been made for Martin O'Malley's "testing the waters" activities—*i.e.*, activities for the purpose of determining whether to run for president—using funds not in compliance with the candidate contribution limits established by 52 U.S.C. § 30116(a) , including payments made by O'Malley and/or O' Say Can You See PAC and/or others,

in violation of federal law candidate contribution limits established by 52 U.S.C. § 30116(a).

PRAYER FOR RELIEF

36. Wherefore, the Commission should find reason to believe that Martin O'Malley has violated 52 U.S.C. § 30101, *et seq.*, including 52 U.S.C. §§ 30116(a), and conduct an immediate investigation under 52 U.S.C. § 30109(a)(2). Further, the Commission should determine and impose appropriate sanctions for any and all violations, should enjoin the respondents from any and all violations in the future, and should impose such additional remedies as are necessary and appropriate to ensure compliance with the FECA.

March 31, 2015

Respectfully submitted,

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VERIFICATION

The complainants listed below hereby verify that the statements made in the attached Complaint are, upon their information and belief, true.

Sworn to pursuant to 18 U.S.C. § 1001.

For Complainant Campaign Legal Center

J. Gerald Hebert

Sworn to and subscribed before me this ____ day of March, 2015.

Notary Public

For Complainant Democracy 21

Fred Wertheimer

Sworn to and subscribed before me this ____ day of March, 2015.

Notary Public