



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Edwin Wee
P.O. Box 1936
Media, PA 19063

JUL 18 2014

Re: MUR 6735
Joseph Sestak, *et al.*

Dear Mr. Wee:

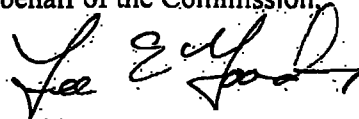
On May 14, 2013, the Federal Election Commission ("the Commission") notified your clients, Joseph Sestak, Friends of Joe Sestak f/k/a Sestak for Senate and Margaret Infantino in her official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"), and provided your clients with a copy of the complaint. On November 14, 2013, the Commission further notified your clients of additional information it received from the complainant and provided a copy of the additional information to you.

After reviewing the allegations contained in the complaint, and information you provided, the Commission, on July 10, 2014, found that there is reason to believe that Joseph Sestak violated 2 U.S.C. § 432(e)(1). The Commission further found that there is no reason to believe Friends of Joe Sestak f/k/a Sestak for Senate violated the Act in connection with this matter. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel to enter into negotiations directed towards reaching a conciliation agreement with Joseph Sestak in settlement of this matter prior to a finding of probable cause to believe. Pre-probable cause conciliation is not mandated by the Act or the Commission's regulations, but is a voluntary step in the enforcement process that the Commission is offering to your client as a way to resolve this matter at an early stage and without the need for briefing the issue of whether or not the Commission should find probable cause to believe that your client violated the law.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519. In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

On behalf of the Commission,



Lee E. Goodman
Chair

Enclosures
Factual and Legal Analysis

cc: Joseph A. Sestak, Jr.
P.O. Box 1936
Media, PA 19063

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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5 RESPONDENTS: Joseph A. Sestak MUR: 6735
6 Friends of Joe Sestak and Edwin Wee
7 in his official capacity as treasurer, f/k/a
8 Sestak for Senate and Margaret Infantino
9 in her official capacity as treasurer
10

11 **I. GENERATION OF MATTER**

12 This matter was generated by a complaint filed by Rob Gleason, Chair of the Republican
13 Party of Pennsylvania. *See* 2 U.S.C. § 437g(a)(1).

14 **II. FACTUAL BACKGROUND**

15 Joseph Sestak is a former Member of Congress from Pennsylvania's 7th Congressional
16 District and was a candidate for the U.S. Senate from Pennsylvania in 2010. Sestak lost the 2010
17 general election, but his campaign committee — Sestak for Senate — continued to file regular
18 disclosure reports with the Commission through the end of 2012. *See* Sestak for Senate 2012
19 Year End Report (Jan. 31, 2013). On its 2012 Year End Report, for the period ending
20 December 31, 2012, Sestak for Senate disclosed \$8,644 ending cash on hand. *Id.* On March 26,
21 2013, Sestak for Senate filed an Amended Statement of Organization changing its name to
22 Friends of Joe Sestak (the "Committee").

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A. Friends of Joe Sestak's Financial Activity

As of March 30, 2014, Friends of Joe Sestak has disclosed that it raised a total of \$1,376,984 and spent a total of \$178,714, leaving it with a cash on hand balance of \$1,207,090.¹ Friends of Joe Sestak 2014 April Quarterly Report at 3-4 (Apr. 12, 2014).

Two weeks after Friends of Joe Sestak filed its 2013 July Quarterly Report, the Reports Analysis Division ("RAD") sent Sestak a "Disavowal Notice" notifying him that Friends of Joe Sestak appeared to have received contributions or made expenditures in support of his 2016 candidacy in excess of \$5,000. Letter from Nataliya Ioffe, RAD, FEC, to Joseph A. Sestak (July 26, 2013) ("Disavowal Notice"). The Disavowal Notice asked Sestak to either disavow the Committee's activities or file a Statement of Candidacy. *Id.* Friends of Joe Sestak responded to the Disavowal Notice, stating that it is a "testing the waters committee" that has not conducted any "candidate activities" under Commission regulations. Letter from Edwin Wee, Treasurer, Friends of Joe Sestak to RAD, FEC (Aug. 30, 2013).

B. The Committee's Solicitations

As part of its alleged testing the waters activities, Friends of Joe Sestak has been soliciting contributions via the e-mail address info@joesestak.com. *See* Supp. Compl., Attachs. D, E (Nov. 13, 2013). Between June and October 2013, the Committee sent at least eight fundraising e-mails in which Sestak or the Committee characterized Sestak as "seek[ing] the U.S. Senate." *Id.*, Attach. D (providing copies of e-mails dated June 24, June 26, Aug. 27,

¹ The first report filed under the name Friends of Joe Sestak was the 2013 April Quarterly Report, which disclosed \$8,644 beginning cash on hand, as well as \$460,250 in receipts and \$10,185 in disbursements for the first quarter. Friends of Joe Sestak 2013 April Quarterly Report at 3-4 (Apr. 15, 2013). In the second quarter, the Committee disclosed \$209,619 in receipts and \$50,264 in disbursements. Friends of Joe Sestak 2013 July Quarterly Report at 3-4 (July 13, 2013). Its receipts were \$335,346 and its disbursements were \$40,234 during the third quarter. Friends of Joe Sestak 2013 October Quarterly Report at 3-4 (Oct. 15, 2013). In the final quarter of 2013, the Committee's receipts were \$150,326 and its disbursements were \$37,743. Friends of Joe Sestak 2013 Year End Report at 3-4 (Jan. 31, 2013).

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13 The Committee has also solicited contributions via e-mails comparing Sestak to
14 incumbent Senator Pat Toomey. One e-mail asked recipients, “While the telecom special
15 interest is supporting Toomey, we have the opportunity to make our choice clear. Who would
16 you rather have?” and then presented them with the option of either “[a] U.S. Senate ideologue”
17 or “[a] Navy Admiral.” *Id.*, Attach. D (E-mail from Team Sestak (June 24, 2013, 10:09 AM)).
18 Another message invited recipients to attend a “competing fundraiser” to be held on the same
19 evening that “a top Comcast executive is holding a fundraiser against Joe for Senator Toomey[.]”
20 *Id.*, Attach. D, (E-mail from Edwin Wee (July 3, 2013, 2:20 PM)). Yet another e-mail directly
21 compared the fundraising efforts of Toomey and Sestak: “Your help will assist my catch-up
22 efforts since the Senator has raised \$3 million from 2 and 1/2 years of fundraising (I have raised
23 \$750K these past months)[.]” *Id.*, Attach. D (E-mail from Joe Sestak (Aug. 27, 2013,

10:58 AM)). As with the other solicitations, none of these messages includes any suggestion that the effort involved either testing the waters or an exploratory committee.

C. Allegations and Responses

Based on the Committee's 2013 receipts and disbursements and the language of its fundraising e-mails, the Complaint alleges that Respondents have violated and continue to violate the Act by failing to file a Statement of Candidacy after triggering candidate status. Compl. at 2-3 (May 14, 2013); Supp. Compl. at 2-4. Specifically, the Complaint alleges that Sestak triggered candidate status on February 9, 2013 — the date on which Friends of Joe Sestak exceeded \$5,000 in contributions — and therefore should have filed a Statement of Candidacy by February 24, 2013. Compl. at 3. The Complaint further alleges that Sestak is raising these funds to use in his campaign rather than for testing the waters activities, and that Sestak's statements indicate that he has already decided to be a candidate.² Compl. at 3; Supp. Compl. at 1, 3-5.

Respondents filed two collective Responses denying the allegation and asserting that they are "solely conducting testing the waters activities." Resp. at 1 (June 7, 2013); Supp. Resp. at 1 (Dec. 17, 2013). In support of this assertion, they contend that:

- The amount of funds that Respondents raised "is not 'unreasonable' to test the waters for a Pennsylvania statewide race — where the last race was one of the top ten most expensive races in the country." Resp. at 2; Supp. Resp. at 3.
- "Respondents have given no indication that [Sestak] has decided to become a candidate — and all the Respondents' activities reflect such." Resp. at 1; Supp. Resp. at 1.

² The Complaint also alleges that the Respondents' violations are knowing and willful because they failed to file a Statement of Candidacy after receiving the Disavowal Notice and the Complaint. Supp. Compl. at 5-6.

- 1 • All fundraising by Respondents has been conducted by clearly stating that the committee
2 is a “testing the waters” or “exploratory” committee.³ Resp. at 2; Supp. Resp. at 3.

3 Respondents further assert that they were “guided by the FEC compliance office”
4 throughout the process of forming the exploratory committee and conducting testing the waters
5 activities. Resp. at 1; Supp. Resp. at 1. In their Responses, they state that they initially called
6 the compliance office on December 26, 2012 — before initiating any testing the waters activities.
7 *Id.* They claim that, during this call, a “compliance officer directed the name of the committee to
8 be ‘Friends of Joe Sestak’” and advised them that an example of an “unreasonable” amount of
9 fundraising would be “\$10 million for a race in North Dakota.” Resp. at 1-2. Respondents
10 further claim that the compliance officer “directed the Respondents not to make any statements
11 that Joe Sestak is a candidate” and advised that they use language such as “‘seeking the U.S.
12 Senate’ rather than ‘running for U.S. Senate.’” Supp. Resp. at 2. Respondents state that they
13 were in contact with the compliance office several times between December 26, 2012, and
14 May 23, 2013, and that these phone calls “confirm[ed] that the Respondents’ fundraising process
15 was ‘reasonable,’ in compliance with testing the waters regulations, and that the Respondents
16 complied with every FEC law and regulation[.]” Resp. at 2; Supp. Resp. at 2, Attach. C (listing
17 the dates and times of these phone calls).

18 Notwithstanding Respondents’ assertion, RAD maintains detailed telephone logs of all
19 contacts with committees, and it has no record of any telephone calls from Friends of Joe Sestak

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³ Respondents also assert that all funds raised comply with the Act’s contribution limits and prohibitions; Respondents kept and disclosed the Committee’s financial transactions; funds have been kept in a segregated testing the waters bank account; testing the waters activity did not begin less than 90 days before the relevant election; and Respondents have not taken any action to qualify for the ballot. Resp. at 2-3; Supp. Resp. at 3.

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1 until May 28, 2013, when the committee inquired about the Complaint in this matter.⁴

2 III. LEGAL ANALYSIS

3 Under the Federal Election Campaign Act of 1971, as amended (the “Act”), “an
4 individual who seeks nomination for election, or election, to Federal office” is a candidate and
5 “shall be deemed to seek nomination for election, or election” when he receives contributions or
6 makes expenditures in excess of \$5,000. 2 U.S.C. § 431(2). A candidate is required to designate
7 in writing a principal campaign committee within fifteen days of reaching this \$5,000 threshold.
8 *Id.* § 432(e)(1). The designated principal campaign committee, in turn, is required to file a
9 Statement of Organization within ten days of designation or, alternatively, report any change in
10 information previously submitted on its Statement of Organization within ten days of the change.
11 *Id.* § 433(a), (c).

12 The Commission has created a limited exemption to the definitions of contribution and
13 expenditure — and therefore to the \$5,000 candidacy threshold — to allow individuals to
14 conduct certain activities designed to evaluate a potential candidacy (*e.g.*, to “test the waters”).
15 *See* 11 C.F.R. §§ 100.72, 100.131. Funds received and payments made “solely for the purpose
16 of determining whether an individual should become a candidate” are not considered
17 contributions or expenditures under the Act. *Id.* These funds, however, are subject to the
18 limitations and prohibitions of the Act. *Id.*

19 An individual who is testing the waters is not required to register with the Commission
20 unless the individual conducts activities that indicate he or she has decided to become a
21 candidate. *See id.* Commission regulations describe five non-exhaustive examples of activities

⁴ It is possible that instead of contacting the Office of Compliance, Respondents spoke to staff from either the Office of Communication's Information Division or the Office of the General Counsel's Policy Division. The Commission is informed, however, that none of the Information or Policy Division's staff recalls any contact with the Committee between December 2012 and May 2013.

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that indicate that an individual is not merely testing the waters, but has decided to become a candidate for federal office:

- (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; and
- (5) The individual has taken action to qualify for the ballot under State law. *Id.*

In this matter, statements in Committee fundraising e-mails that refer to Sestak as a candidate indicate that he had decided to run for federal office.

A. Statements Referring to Candidacy

The statements in Respondents' fundraising e-mails publicly and specifically refer to Sestak as a Senate candidate, thus indicating his decision to run for office as a United States Senator and the inapplicability of the testing the waters exemption to the Committee's contributions and expenditures.

First, as detailed above, Respondents sent at least eight e-mails from the Committee's email address over the course of four months clearly establishing that Sestak had decided to "seek" election to the U.S. Senate, including emails from the Committee as early as June 24 and 26, 2013, soliciting supporters to "... support Joe Sestak to seek the U.S. Senate" and an email from Sestak on August 27, 2013, asking, "Would you help me serve you, again? Whether in the Navy, in Congress or as I now seek the U.S. Senate . . ." *See* Supp. Compl., Attachs. D, E.

1 Although Respondents draw a distinction between the phrases “seeking office” and
2 “running for office,” Supp. Resp. at 2, the plain text of the Act defines a candidate as an
3 individual “who seeks . . . election[] to Federal office.” 2 U.S.C. § 431(2). Accordingly, when
4 the Commission considered the use of the term “seeking” in a previous matter, it concluded that
5 an individual had crossed the line from testing the waters to candidate status when, among other
6 things, he wrote that “I am seeking the Presidency of the United States.” Factual & Legal
7 Analysis at 4, 7, MUR 5363 (Sharpton).

8 Furthermore, when characterizing Sestak’s purpose for soliciting funds as part of an
9 effort to “seek” federal office, those messages did not indicate in any respect that Sestak was
10 simply testing the waters for a potential run or exploring the option of candidacy. *See* Supp.
11 Compl., Attachs. D, E. Instead, the messages stated that Sestak was seeking office in
12 combination with other phrases further indicating that Sestak had decided to become a candidate
13 for federal office, such as “I will win because of you [] and your support.” Supp. Compl.,
14 Attach. D (E-mail from Joe Sestak (Aug. 29, 2013, 10:10 AM)).

15 Respondents do not dispute the authenticity of the e-mails. Instead, they claim that the
16 “FEC compliance office” provided advice concerning the language of the e-mails and
17 “confirmed . . . that the Respondents complied with every FEC law and regulation[.]” *See* Resp.
18 at 2. These assertions are inconsistent with other information in the record before the
19 Commission. The Office of Compliance’s Reports Analysis Division maintains detailed
20 telephone contact logs, but has no record that it received any call from the Committee at the
21 times the Committee identifies in its Supplemental Response, or discussing the topic of testing
22 the waters on the occasion that the Committee did contact that office. Likewise, although the
23 Information Division does not maintain formal records concerning telephone inquiries from the

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1 public, none of its staffers recall speaking with the Committee during the relevant timeframe and
2 the dates and times also do not correspond to any emails that the Information Division sent in
3 response to email inquiries. Moreover, the Division indicates that it does not offer advice
4 concerning testing the waters or exploratory committee status outside the scope of the guidance
5 published in the Commission's regulations and Campaign Guide.

6 Furthermore, despite the Committee's assertion that all of its fundraising materials
7 explicitly state that it is a testing the waters or exploratory committee, Supp. Resp. at 2-3, none
8 of the e-mails attached to the Supplemental Complaint contain any such information.⁵ See Supp.
9 Compl., Attachs. D, E.

10 Given Sestak and the Committee's own statements concerning Sestak's purpose in
11 soliciting funds, the Commission concludes that under the Act and the Commission's testing the
12 waters regulation, consistent with prior Commission decisions, Sestak had decided to run for
13 federal office and thus became a candidate.⁶

14 **B. Conclusion**

15 The Commission found reason to believe that Sestak violated 2 U.S.C. § 432(e)(1) by
16 failing to file a Statement of Candidacy within 15 days of becoming a candidate. That Section
17 does not apply liability to the campaign committee of a candidate; however, and the Committee
18 is properly registered and filing reports with the Commission in accordance with 2 U.S.C.

⁵ The Committee submitted a copy of its website's "contributions" page, which identifies Friends of Joe Sestak as an exploratory committee. See Supp. Resp., Attach. B. Possibly, then, the Committee's assertion is premised on the view that its fundraising e-mail solicitations provide a link to this contributions page. This is simply surmising, however, as the Committee did not make that claim, and further, it is not known whether all of the fundraising e-mails in fact provide a link to that page. Even if so, Sestak and the Committee's references to Sestak's ambitions for federal office in the communications submitted with the Complaints in this matter provide ample reason to believe that Sestak had decided to run for office, regardless of any statements contained on the Committee's contributions webpage.

⁶ It is possible that Sestak or the Committee previously made similar statements that are not reflected in the current record. Nonetheless, because the Committee has filed all reports required regardless of the date on which Sestak concluded he would run for office, further investigation to confirm that date is not warranted here.

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- 1 §§ 433(a) and 434(b). The Commission therefore found no reason to believe that the Committee
- 2 violated the Act in connection with this matter.⁷

⁷ The Complainant further alleges that the violation is knowing and willful based on Sestak's failure to file a Statement of Candidacy following the Respondents' receipt of the Complaint and RAD's Disavowal Notice. Supp. Compl. at 4-5. The Commission did not make such a finding, as there is no basis to conclude on the current record that the Respondents intentionally rejected a known legal obligation.

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