



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 19 2014

Dan Backer, Esq.
717 King Street, Suite 300
Alexandria, VA 22314

RE: MUR 6776

Niger Innis, Niger Innis Action Fund (a.k.a. Niger Innis
for Congress Exploratory Committee), Niger Innis for
Congress and Dan Backer in his official capacity as
treasurer

Dear Mr. Backer:

On January 29, 2014, the Federal Election Commission (the "Commission") notified your clients, Niger Innis, Niger Innis Action Fund (a.k.a. Niger Innis for Congress Exploratory Committee), Niger Innis for Congress and you in your official capacity as treasurer ("Respondents"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, information supplied by you and your clients, and other available information, the Commission, on December 16, 2014, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009).

If you have any questions, please contact Ana J. Peña-Wallace, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

RESPONDENTS: Niger Innis **MUR 6776**
Niger Innis Action Fund (a.k.a.
Niger Innis for Congress Exploratory Committee)¹
Niger Innis for Congress and Dan Backer in his
official capacity as treasurer

FACTUAL AND LEGAL ANALYSIS

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission by Gregory Smith alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act").² The Complaint in this matter alleges that Niger Innis, the Niger Innis Action Fund, the Niger Innis for Congress Exploratory Committee, and Niger Innis for Congress and Dan Backer in his official capacity as treasurer (the "Committee") (collectively "Respondents"), violated the Act by failing to file a Statement of Candidacy within 15 days of Innis becoming a candidate for the 2014 election for the U.S. House of Representatives in Nevada. The Complaint alleges that Innis, who filed a Statement of Candidacy with the Commission on January 9, 2014, had crossed over to candidate status at least six months earlier when he developed a sophisticated campaign proposal for discussions with the National Republican Congressional Committee ("NRCC"), maintained a committee website soliciting contributions, held a "high-level fundraising event" with a stated goal of raising \$50,000, and made or authorized statements in the press concerning his candidacy.³

¹ Complainant names two exploratory committees as respondents, Compl. at 1, but Respondents state that Innis's exploratory committee was the "Niger Innis Action Fund" and that Innis did not maintain two exploratory committees. Resp. at 3 (Feb 12, 2014).

² See 52 U.S.C. § 30109(a)(1) (formerly 2 U.S.C. § 437g(a)(1)).

³ Compl. at 1-2.

1 Respondents in a joint response deny that Innis was a candidate prior to January 2014,
2 asserting that Innis was only “testing the waters” prior to that date, that their level of fundraising
3 was not unreasonable for exploring a possible race against an incumbent, and that Innis’s testing
4 the waters activity was not conducted over a protracted period of time because a “six[sic] month
5 period of test[ing] the waters activity is usual and expected.”⁴ Respondents explain that
6 consulting with a committee like the NRCC on the feasibility of Innis’s candidacy was expected
7 and that Innis appeared regularly in the media as a “public commentator on social issues”
8 separate and apart from his testing the waters activity.⁵ Finally, Respondents assert that all
9 solicitations, including a website and the fundraising event flyer referenced in the Complaint,
10 stated that they were intended “to gauge support and raise funds” for Innis’s “exploratory”
11 committee and were permissible under the Act.⁶

12 As discussed below, under the circumstances, the Commission concludes that further
13 enforcement action would not be an efficient use of the Commission’s resources and exercises its
14 prosecutorial discretion to dismiss the allegation that Innis violated 52 U.S.C. § 30102(c)(1)
15 (formerly 2 U.S.C. § 432(c)(1)) or 11 C.F.R. § 101.1(a), that the Committee violated 52 U.S.C.
16 §§ 30103 or 30104(a) (formerly 2 U.S.C. §§ 433(a) or 434(a)), and that the Niger Innis Action
17 Fund (a.k.a. the Niger Innis for Congress Exploratory Committee) violated the Act.

⁴ Resp. at 2-4.

⁵ Resp. at 2-3.

⁶ Resp. at 2-4.

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Factual Background**

3 Niger Innis was a candidate for Congress in the 2014 primary election for the 4th
4 Congressional District of Nevada.⁷ Innis filed his Statement of Candidacy on January 9, 2014,
5 and established Niger Innis for Congress as his principal campaign committee by filing a
6 Statement of Organization the same day.⁸ The Committee then filed its first disclosure report
7 with the Commission, the 2014 April Quarterly Report, on April 15, 2014, disclosing activity
8 dating back to October 2013.

9 In its April Quarterly report, the Committee disclosed 30 contributions totaling
10 \$53,876.00 that it received between October 25, 2013 and January 8, 2014, and sixteen
11 disbursements totaling \$14,159.42 made between October 29, 2013 and January 2, 2014.⁹ The
12 contributions ranged from \$250 to \$2,600 from individuals, and one \$5,000 payment from a
13 political committee.¹⁰ The disbursements included payments in amounts ranging from \$73 to
14 \$2,000 for “campaign administration services,” “legal and compliance consulting services,” and
15 expense reimbursements.¹¹

16 The Complaint alleges that Innis decided to become a candidate by July 2013, well
17 before actually filing his statement of candidacy in January 2014.¹² Complainant states that Innis

⁷ Resp. at 2; Compl. at 1.

⁸ The Complaint was signed on January 16, 2014, and was received at the Commission on January 23, 2014.

⁹ *See* 2014 April Quarterly Rpt., Niger Innis for Congress.

¹⁰ *Id.* at 5-33.

¹¹ *Id.* at 34-58.

¹² Compl. at 1-2.

1 “has been touting and planning a run for Congress” and was no longer testing the waters by July
2 2013, but rather was actively campaigning for the Congressional seat during the six months prior
3 to announcing his candidacy.¹³ In support of the allegations, the Complainant identifies a
4 proposal titled “Innis for Congress; NRCC Proposal” (“NRCC Proposal”) dated July 19, 2013,
5 an Innis exploratory committee website that included a portal for accepting contributions, an
6 invitation/flyer advertising a November 2013 fundraiser benefiting Innis, and a press article
7 purportedly illustrating Innis’s general public political advertising.¹⁴

8 The NRCC Proposal evaluates the feasibility of Innis’s candidacy for Congress.¹⁵ The
9 proposal, seeking the NRCC’s support, presents a “strategic campaign plan” that would involve
10 building a “‘new’ Republican voter base” in the district and getting certain candidates elected to
11 local and state offices.¹⁶

12 The proposal highlights Innis’s work with various social issues, and states that he is “the
13 right candidate, at the right time, to bring together a blended coalition of registered voters” and
14 that “Innis will boldly lead a candidacy that will immediately set the Democrats on the
15 defensive.”¹⁷ In discussing his skills and qualifications, the proposal addresses Innis’s ability for
16 “[p]lain talk,” and that “[n]o candidate is better prepared to talk to the people of CD04 than

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*, Ex. 1 at 5.

¹⁶ *Id.*, Ex. 1 at 5. The NRCC proposal states that Innis is the right “candidate” for the 4th Congressional District and proposes a three-stage strategy that includes minority outreach to build a new voter base. *Id.* at 1, 5-6.

¹⁷ *Id.* at 2.

1 Niger Innis.”¹⁸ The proposal declares that “Niger Innis is the candidate with the potential to”
2 hold the rural vote, close the registered voter gap, and get votes in urban precincts.¹⁹ The
3 Complaint concludes that the “[p]roposal shows that Mr. Innis had done much of the analysis
4 necessary to determine whether to run in NV4 as early as July 2013” and thus any purported
5 “testing the waters” activities conducted after that time “do not seem to be legitimate.”²⁰

6 The Complaint also points to Innis’s exploratory committee website that contained a
7 contribution portal, which according to the Complainant, solicited contributions “in support of a
8 run for Congress already planned and in motion.”²¹ A printout displaying that portal was
9 attached to the Complaint. The printout, dated January 13, 2014, contains language stating “[i]f
10 you support Niger Innis as he explores a possible campaign for Congress,” signing the petition or
11 making a contribution would “help [Innis] make the decision to run.”²² The single-page printout
12 includes an area to “sign the petition,” including a space for entering a name, e-mail address, and
13 zipcode, a button labeled “Contribute to Niger” and indicates that it was paid for by the “Niger
14 Innis Action Fund.”²³

15 Additionally, the Complaint includes a copy of a flyer announcing a “private reception to
16 support Niger Innis and the Niger Innis Congressional Exploratory Committee” held on

¹⁸ *Id.* at 3 (adding that “[i]t is this personal, hands-on, caring approach that will lead Innis . . . to earn the vote and support of the people”).

¹⁹ *Id.* at 5.

²⁰ Compl. at 1-2.

²¹ *Id.* at 1.

²² Compl., Ex. 2.

²³ *Id.*

1 November 5, 2013 along with a press article discussing this fundraiser.²⁴ The flyer names
2 supporters such as Sheldon Adelson and special guest Herman Cain, lists ticket fees ranging
3 from \$500 to \$2,600, and includes language concerning federal political contribution limits. The
4 press article discussing the fundraiser includes statements attributable to Innis that address the
5 factors in consideration for a potential candidacy. According to the article, Innis stated that his
6 “ability to raise money will determine whether he officially runs for Congress” and that the event
7 was “expected to attract more than 200 people and raise at least \$50,000.”²⁵ Innis also indicated
8 that he needed “to raise \$2 million to be competitive against [likely Democratic nominee]
9 Horsford.”²⁶ The Complaint also included a page from Innis’s personal website with an article
10 dated after the November 5th fundraiser titled “Niger Innis Weighs in On Potential
11 Congressional Run,” inviting readers to watch an Innis television appearance and to view
12 Herman Cain’s speech from the fundraiser.²⁷ Although the article does not refer to Innis as a
13 candidate, the Complaint alleges that the Innis campaign’s activities — specifically, a “high-
14 level fundraising event,” a website soliciting contributions over the internet, and the NRCC
15 proposal — exceed testing the waters activities.²⁸

16 Respondents submitted a joint response to the Complaint denying the allegations and
17 asserting that Innis conducted testing the waters activities from July 2013 through December

²⁴ Compl., Exs. 3-4.

²⁵ Compl., Ex. 4 at 2-3.

²⁶ *Id.* at 3.

²⁷ Compl., Ex. 5.

²⁸ Compl. at 1-2.

1 2013 “for the purpose of gauging support and raising funds.”²⁹ Respondents note that a six-
2 month testing the waters period is “usual and expected to properly explore the feasibility of
3 challenging a Congressional incumbent.”³⁰ According to the Respondents, these activities
4 properly included privately presenting a proposal to the NRCC “for the sole purpose of exploring
5 the feasibility of becoming a candidate.”³¹ Respondents assert that it is not out of the ordinary
6 for someone to consult with the NRCC, “a political committee who [*sic*] is devoted to
7 maintaining and increasing the 232 member Republican majority in the United States House of
8 Representatives, on the feasibility of running for office.”³²

9 Further, Respondents argue that it was proper to both “gauge support and raise funds for
10 . . . testing the waters activity” through the Innis exploratory committee’s website and to host a
11 fundraiser.³³ Respondents note that there are no prohibitions against hosting a “high-level
12 fundraising event” for the purpose of testing the waters and that while a \$50,000 goal “may seem
13 great,” raising such amounts was necessary in order to determine whether Innis should run for
14 federal office.³⁴ Regarding Innis’s media appearances, Respondents state that Innis did not
15 purchase any public air time, but rather was a “regular public commentator on social issues.”³⁵

²⁹ Resp. at 2.

³⁰ *Id.*

³¹ *Id.* Respondents note that the document at issue “is clearly marked as a proposal, and a proposal is, by definition, an act of stating something for consideration.”

³² *Id.* at 2-3.

³³ *Id.* at 3-4.

³⁴ *Id.*

³⁵ *Id.* at 3.

1 Statements by Innis after the November 5th fundraiser specifically mention his potential
2 candidacy. For example, after the fundraiser, Innis posted a letter on his exploratory committee
3 website to supporters stating “[a]s I prepare to declare for the race, please know that your support
4 at this early stage is of utmost importance.”³⁶

5 **B. Legal Analysis**

6 Under the Act, “an individual who seeks nomination for election, or election, to Federal
7 office” is a candidate and “shall be deemed to seek nomination for election, or election” when he
8 receives contributions or makes expenditures in excess of \$5,000.³⁷ A candidate is required to
9 designate in writing a principal campaign committee within fifteen days of reaching this \$5,000
10 threshold.³⁸ The designated principal campaign committee, in turn, is required to file a
11 Statement of Organization within ten days of designation or, alternatively, report any change in
12 information previously submitted on its Statement of Organization within ten days of the
13 change.³⁹

14 The Commission has created a limited exemption to the definitions of contribution and
15 expenditure — and therefore to the \$5,000 candidacy threshold — to allow individuals to
16 conduct certain activities designed to evaluate a potential candidacy (*e.g.*, to “test the waters”).⁴⁰
17 Funds received and payments made “solely for the purpose of determining whether an individual

³⁶ See Complaint, Ex.2 at NIGER INNIS EXPLORATORY COMMITTEE FOR CONGRESS, *A Letter from Niger Innis*, formerly available at <http://nigerinnisforcongressexploratorycommittee.com>.

³⁷ 52 U.S.C. § 30101(2) (formerly 2 U.S.C. § 431(2)).

³⁸ 52 U.S.C. § 30102(e)(1) (formerly 2 U.S.C. § 432(e)(1)).

³⁹ 52 U.S.C. § 30103(a),(c) (formerly 2 U.S.C. § 433(a), (c)).

⁴⁰ See 11 C.F.R. §§ 100.72, 100.131.

1 should become a candidate” are not considered contributions or expenditures under the Act.⁴¹
2 These funds, however, are subject to the limitations and prohibitions of the Act.⁴² After an
3 individual reaches candidate status, all reportable amounts from the beginning of the “testing the
4 waters” period must be disclosed on the first financial disclosure report filed by the candidate’s
5 committee, even if the funds were received or expended prior to the current reporting period.⁴³

6 An individual who is testing the waters is not required to register with the Commission
7 unless and until he or she both surpasses the statutory threshold and decides to run for federal
8 office, a decision that may be indicated by certain activities.⁴⁴ Commission regulations describe
9 five non-exhaustive examples of activities that indicate that an individual is not merely testing
10 the waters, but has decided to become a candidate for federal office:

- 11 (1) The individual uses general public political advertising to publicize his or her
12 intention to campaign for Federal office;
13
14 (2) The individual raises funds in excess of what could reasonably be expected to be
15 used for exploratory activities or undertakes activities designed to amass
16 campaign funds that would be spent after he or she becomes a candidate;
17
18 (3) The individual makes or authorizes written or oral statements that refer to him or
19 her as a candidate for a particular office;
20
21 (4) The individual conducts activities in close proximity to the election or over a
22 protracted period of time; and
23
24 (5) The individual has taken action to qualify for the ballot under State law.⁴⁵

⁴¹ See 11 C.F.R. §§ 100.72, 100.131.

⁴² See 11 C.F.R. §§ 100.72, 100.131.

⁴³ See 52 U.S.C. § 30104(a) (formerly 2 U.S.C. § 434(a)); 11 C.F.R. §§ 100.72(a), 100.131(a), 101.3, 104.3(a).

⁴⁴ See 11 C.F.R. §§ 100.72(b), 100.131(b).

⁴⁵ *Id.*

1 These regulations seek to draw a distinction between activities directed to an evaluation of the
2 feasibility of one's candidacy and conduct signifying that a decision to become a candidate has
3 been made.⁴⁶ The Complaint alleges that Innis triggered candidate status by July 2013, several
4 months before he registered as a candidate with the Commission, based on activities that
5 included making public statements, the development of a proposal with the NRCC, a "high-
6 level" fundraiser that aimed to raise at least \$50,000, and website solicitations.

7 The NRCC Proposal alone would not be sufficient to conclude that Innis decided to
8 become a candidate at an earlier point. The document sets forth a possible campaign strategy
9 and refers to Innis as a "candidate" at various points. However, it is clearly labeled a "proposal"
10 and according to Respondents, was "privately presented" to the NRCC. The proposal does not
11 state that Innis had already concluded that he would run either, but rather explores Innis's
12 chances, if he were to run, outlines a strategic campaign plan that Innis could follow, and was
13 presented to the NRCC to obtain a view on "the feasibility of [Innis] becoming a candidate for
14 federal office."⁴⁷ Therefore, based on the available information, the proposal appears to have
15 been a private statement by Innis for the purpose of pitching himself as a viable candidate to a
16 large and influential political organization that could weigh in on his political prospects and
17 ultimately support his campaign efforts. The Commission has advised that using the services of
18 political consultants and opinion research specialists are permissible testing the waters activities

⁴⁶ See Advisory Op. 1981-32 (Askew) at 4 ("AO 1981-32").

⁴⁷ Resp. at 2.

1 if they are undertaken to explore the feasibility of becoming a candidate.⁴⁸ The Commission has
2 also found that “the mere preparation, rather than the dissemination, of campaign materials in
3 advance of a declaration of candidacy does not by itself provide adequate evidence to support a
4 reason to believe that [an individual] decided to become a candidate at that time.”⁴⁹ Here, there
5 is no information that the NRCC Proposal was prepared after Innis had already made a final
6 decision to become a federal candidate, or that the proposal was intended to be distributed
7 publicly. Instead, the proposal and the discussions with the NRCC that may have followed
8 appear to have been yet another aspect of Innis’s testing the waters activity, akin to hiring
9 political consultants or pollsters to evaluate the prospects of a potential candidacy and the
10 preparation of a campaign plan for a possible future campaign.

11 Further, neither the fact that Innis held a fundraiser nor the amount that Innis raised at the
12 November fundraiser, on its own, would be sufficient to conclude that he had become a candidate for
13 federal office at an earlier point. According to its 2014 April Quarterly Report, the Committee received
14 contributions totaling \$53,876 between October 25, 2013 and January 8, 2014, with most of those
15 contributions received in October and November, in close proximity to the November 5 fundraiser.
16 \$53,876 is within the range that the Commission has found to be reasonable for testing the waters

⁴⁸ See AO 1981-32 at 2-4 (concluding that hiring political consultants to assist with advice on the potential and mechanics of constructing a national campaign organization and employing a specialist in opinion research to conduct polls for the purpose of determining the feasibility of a national campaign were within the scope of the testing the waters exemption as long as the prospective candidate conducted the activities while continuing to deliberate his decision to become a candidate); *see also* Factual & Legal Analysis at 5-6, MUR 6196 (Kennedy) (concluding that having discussions with political consultants to determine the viability of a potential candidacy and commissioning a poll to assess name recognition were within the “testing the waters” exemption).

⁴⁹ See F&LA at 6, MUR 6533 (Perry Haney for Congress) (concluding that Haney’s creation of videos containing clear references to him as a candidate that were only shared with a small group of individuals and were created for the purpose of preparing for a campaign if one were to ensue was consistent with testing the waters activities).

1 activity without additional indicia of candidate status. In the past, the Commission has either dismissed
2 or found no reason to believe in matters where a committee raised over \$100,000 where there were no
3 additional indicia of candidate status.⁵⁰ Thus, the amount and duration of Respondents' fundraising do
4 not alone suggest candidate status for Innis prior to January 2014.

5 It appears, however, that Innis made statements in a two week period in November 2013
6 that mentioned his potential candidacy. For example, after the November 5th fundraiser, Innis
7 posted a letter on his exploratory committee website to supporters stating, "[a]s I prepare to
8 declare for the race, please know that your support at this early stage is of utmost importance."⁵¹
9 Here, Innis's statements may not be enough to indicate that Innis had become a candidate in
10 November 2013, but may raise the question of whether he decided to become a candidate before
11 he filed his Statement of Candidacy on January 9, 2014.

12 Nevertheless, even if Innis may have become a candidate as early as November 2013, the
13 Committee filed its first disclosure report with the Commission at the end of the first quarter in 2014 and
14 disclosed activity dating back to October 2013. Therefore, under the circumstances, the Commission
15 concludes that further enforcement action would not be an efficient use of resources and exercises its
16 prosecutorial discretion to dismiss the allegation that Innis violated 52 U.S.C. § 30102(e)(1) (formerly
17 2 U.S.C. § 432(e)(1)) or 11 C.F.R § 101.1(a), the Committee violated 52 U.S.C. § 30103(a) or 30104(a)
18 (formerly 2 U.S.C. §§ 433(a) or 434(a)), or that the Niger Innis Action Fund (a.k.a. the Niger Innis for
19 Congress Exploratory Committee) violated the Act.

⁵⁰ See, e.g., MUR 6224 (Fiorina) (no reason to believe where U.S. Senate candidate's campaign committee raised in excess \$3.5 million in contributions during the "testing the waters" phase of a campaign); MUR 5703 (Rainville) (no reason to believe where a U.S. Representative candidate's campaign raised \$100,000); MUR 5661 (Butler) (no reason to believe where a U.S. Senate candidate's campaign raised \$100,000); MUR 2710 (Judge Harvey Sloane) (no reason to believe where a U.S. Senate candidate's campaign committee raised \$200,000).

⁵¹ See Complaint, Ex.2 at NIGER INNIS EXPLORATORY COMMITTEE FOR CONGRESS, *A Letter from Niger Innis*, formerly available at <http://nigerinnisforcongressexploratorycommittee>.