



FEDERAL ELECTION COMMISSION
Washington, DC 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of)
)
Allen Lucas “Luke” Messer, *et al.*) MUR 7263
Theodore “Todd” Rokita, *et al.*) MUR 7264
)

**STATEMENT OF REASONS OF CHAIR ELLEN L. WEINTRAUB, VICE CHAIRMAN
MATTHEW S. PETERSEN, AND COMMISSIONERS CAROLINE C. HUNTER
AND STEVEN T. WALTHER**

These matters involve allegations that Allen Lucas “Luke” Messer and Theodore “Todd” Rokita, both incumbent candidates for the U.S. House of Representatives from Indiana during the 2018 election cycle, violated the Federal Election Campaign Act of 1971, as amended (the “Act”) in connection with their respective testing-the-waters activities for their 2018 Senate campaigns. The information before the Commission shows that Messer and Rokita were each testing-the-waters for a Senate candidacy while simultaneously running for re-election to their House seats.¹ The information also indicates that both candidates conducted their exploratory activities out of their respective House re-election committees, but that the funds raised and spent in connection with testing-the-waters activities were not clearly identified as such on the committees’ disclosure reports.

Based upon the failure to distinguish Senate activities from House activities, the Office of General Counsel (“OGC”) recommended that the Commission find reason to believe that both committees violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72(a), 100.131(a) by failing to accurately disclose receipts and disbursements for the candidates’ House and Senate campaigns

¹ Both candidates abandoned their House campaigns after declaring their Senate candidacies. *See* FEC Form 2, Statement of Candidacy, Allen Lucas Messer (Aug. 4, 2017), *available at* <http://docquery.fec.gov/pdf/526/201708040200245526/201708040200245526.pdf>; FEC Form 2, Statement of Candidacy, Theodore Edward Rokita (Aug. 15, 2017), *available at* <http://docquery.fec.gov/pdf/346/201708150200246346/201708150200246346.pdf>. Their committees also amended their Statements of Organization to reflect this change. *See* FEC Form 1, Statement of Organization, I Like Luke (Aug. 4, 2017), *available at* <http://docquery.fec.gov/pdf/531/201708040200245531/201708040200245531.pdf>; FEC Form 1, Statement of Organization, Hoosiers for Rokita (Aug. 14, 2017), *available at* <http://docquery.fec.gov/pdf/442/201708170200246442/201708170200246442.pdf>. Further, Hoosiers for Rokita filed a Miscellaneous Document informing the Commission that Rokita was no longer seeking election for his House seat. *See* Hoosiers for Rokita, Form 99 M. Report (Aug. 18, 2017), *available at* <http://docquery.fec.gov/pdf/539/201708230200256539/201708230200256539.pdf>.

and 11 C.F.R. § 110.8(d) by failing to maintain separate campaign organizations. For the reasons discussed below, the Commission exercises its prosecutorial discretion and dismisses these matters.²

The Act does not address whether individuals who have declared their candidacies for one federal office and are testing the waters for a second federal office need to establish separate campaign committees. Nor has the Commission addressed this precise issue in prior matters. In AO 1982-19 (Cranston Presidential Advisory Committee), for example, the Commission stated that separate organizations would be required for an established candidacy and an exploratory effort where donors sought to give the maximum contribution to both.³ That does not appear to be the case here. In AO 1994-37 (Schumer), the Commission stated that a House re-election campaign should be kept separate from funds raised and spent to test the waters for a gubernatorial run. There, however, the circumstances presented a concern regarding the separation of federal and non-federal funds. That situation is also not present here, where all the funds raised and expended by Messer and Rokita were federal.

Our reporting requirements, however, have remained consistent. Although a committee need only report receipts and disbursements for testing-the-waters activity once its candidate has actually decided to run for office,⁴ committees still have an obligation under 52 U.S.C. § 30104(b) to ensure that their reports are accurate.⁵ Accordingly, each committee should have made clear on the public record which receipts and disbursements were designated for its House re-election campaign and for its Senate exploratory activity.

In the future, similarly situated committees should ensure they report every receipt and every disbursement using election designations that clearly distinguish campaign and exploratory activity for different offices sought. Alternatively, to comply with the recordkeeping and reporting requirements of the Act, an individual may wish to establish a separate exploratory committee to accurately maintain records related to testing-the-waters efforts, although that is not required.

There is no allegation that respondents failed to comply with the regulations that require that testing-the-waters activities be funded with money that complies with the restrictions and

² *Heckler v. Chaney*, 470 U.S. 821 (1985).

³ Candidates are allowed to transfer money between their authorized committees so long as the candidate is not actively seeking more than one office. 11 C.F.R. § 110.3(c)(4); *see also* Transfers Between a Candidate's Committees, Federal Election Commission, <https://www.fec.gov/help-candidates-and-committees/making-disbursements/transfers/> (last accessed June 20, 2019).

⁴ 52 U.S.C. § 30104; *see also* 11 C.F.R. §§ 100.72(a); 100.131(a).

⁵ Commission regulations further require that an individual who is testing the waters keep records of the name of each contributor, the date of receipt, and amount of all funds received, and all payments made in connection with activities conducted under 11 C.F.R. §§ 100.72 and 100.131. *Id.* § 101.3.

limitations of the Act.⁶ Additionally, although the testing-the-waters activities were not clearly identified as such in the disclosure reports, the underlying activity was reported. Based on these facts and the lack of explicit guidance on this issue, the Commission has chosen to exercise our prosecutorial discretion to dismiss these matters. OGC also noted that Rokita filed a late Statement of Candidacy for his House re-election campaign and that Messer may have triggered his Senate candidacy prior to his official announcement.⁷ In light of our findings above, however, we do not believe that either of these potential violations merit the use of additional agency resources. Therefore, these allegations are also dismissed.⁸

6/20/19
Date

Ellen L. Weintraub
Ellen L. Weintraub
Chair

6/20/2019
Date

Matthew S. Petersen
Matthew S. Petersen
Vice Chairman

6/20/2019
Date

Caroline C. Hunter
Caroline C. Hunter
Commissioner

6/20/19
Date

Steven T. Walther
Steven T. Walther
Commissioner

⁶ See 11 C.F.R. §§ 100.72(a); 100.131(a).

⁷ OGC recommended that the Commission dismiss the allegation that Allen Lucas "Luke" Messer violated 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy for his 2018 Senate campaign and find no reason to believe that Rokita violated 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy for his 2018 Senate campaign.

⁸ *Heckler*, 470 U.S. at 831.