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March 19, 2012

Confidential

Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

MUR 6530

Dear Mr. Jordan:

On behalf of Indiana Values SuperPAC, Inc., the undersigned responds to the complaint dated January 30, 2012, filed by a Daniel J. Parker. The complaint seems to allege that the Indiana Values SuperPAC Statement of Organization contained inaccurate information about its date of formation and was filed late, and that there has been a failure to file a 2011 Year End report and a 48-hour Independent Expenditure Report.

My law firm was assisting with the formation of Indiana Values SuperPAC, so I am familiar with the relevant facts. Working with Andrew Klingenstein and others involved with the group's start-up, we were able to get Articles of Incorporation filed on December 16, 2011. The first contribution to the SuperPAC (\$10,000 from an individual donor), though, was not received until December 21, 2011, and that was the date properly used for the SuperPAC's organization date on the Statement of Organization.¹

¹ A SuperPAC like Indiana Values SuperPAC becomes a "political committee" when it either receives more than \$1,000 in "contributions" or makes more than \$1,000 in "expenditures" during a particular calendar year. 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5(a). As the Commission is fully aware, what type of spending activity triggers the "expenditure" part of the "political committee" definition is hotly-debated (*see* Final Rules and Explanation and Justification, "Political Committee Status [et al.]," 69 Fed. Reg. 68056 at 68064-65 (Nov. 23, 2004); *see also The Real Truth About Obama, Inc. v. FEC*, No. 11-1760 (4th Cir., current appeal filed Jul. 15, 2011)), and this firm is ready to fully dispute on constitutional and statutory construction grounds that the preliminary polling research that was undertaken in mid-December of 2011 was activity that would trigger "political committee" status for Indiana Values SuperPAC any earlier than December 21. But, there is a threshold reason why the preliminary polling activity should not be deemed any kind of "expenditure" by Indiana Values SuperPAC:

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It is true that Indiana Values SuperPAC did not get its Statement of Organization filed within 10 days of December 21, 2011.² This was due primarily to the complications of arranging for a bank account to be opened for the SuperPAC during the holiday season. Nonetheless, the Statement of Organization was not overly late, and there is no discernable harm to the public by the delay of 10 days. We respectfully request the Commission to take no action against Indiana Values SuperPAC for this minor matter.

As for the complainant's assertion that Indiana Values SuperPAC was trying to "avoid" filing a 2011 Year End Report, the record belies this, obviously. The report was filed in a timely fashion on Jan. 31, 2012.

Finally, regarding the complainant's concern about 48-hour independent expenditure reporting, the only activity of relevance by Indiana Values SuperPAC was the distribution in late January 2012 to a few willing reporters of a press release that contained the following statement by Andrew Klingenstein:

Washington, D.C. January 25, 2012 - A statewide poll conducted by Public Opinion Strategies (POS) shows Indiana Senator Richard Lugar easily beating the presumptive Democratic challenger Joe Donnelly in a general election, while Lugar's primary challenger Richard Mourdock is locked in a dead heat.

The poll, taken from a sample of 500 statewide registered voters from December 13-15th, 2011 (margin of error +/- 4.38%) reveals that Lugar beats the Democratic challenger by a margin of 58% to 32%. By contrast, Mourdock is exactly tied with Donnelly—42% to 42%.

The original plan was for the research to be used to assist Indiana Values, Inc.—a pre-existing, separately incorporated 501(c)(4) organization. Only in late January of 2012, as the results of the polling were being prepared for release to the press, did this firm recommend that the polling services be paid for by Indiana Values SuperPAC instead. Thus, back in mid-December, there was no "written contract . . . or agreement" for *Indiana Values SuperPAC* to make an expenditure (even defined broadly to reach any payment "for the purpose of influencing" an election). See 2 U.S.C. § 431(9)(A)(i), (ii); 11 C.F.R. §§ 100.111(a), 100.112. This means there was no "expenditure" prior to December 21, 2011—the date that an incoming "contribution" triggered "political committee" status.

² A new committee is to file its Statement of Organization "within 10 days after becoming a political committee within the meaning of section 431(4)." 2 U.S.C. § 433(a). A filing sent by USPS First Class Mail, as occurred in this case (postmarked Jan. 5, 2012), is considered filed on the date of receipt by the FEC (Jan. 10, 2012). 11 C.F.R. § 104.5(e).

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"This poll shows that by large margins, the people of Indiana want to return Senator Lugar's conservative voice to the Senate. Anyone who wants to make sure that the seat remains in conservative hands rolls the dice by voting for Mourdock in the primary," said Andy Klingenstein, Treasurer of Indiana Values SuperPAC, Inc.

The preparation of the press release utilized minimal resources. Mostly, this consisted of the volunteer time of Andrew Klingenstein to draft it and reach out to a few press contacts, though there was brief review of the draft press release by a representative of the polling firm that had conducted the referenced research as well by this law firm. Assuming *arguendo* that the press release rises to the level of "expressly advocating" within the meaning of the "independent expenditure" definition,³ its associated costs certainly did not trigger the \$10,000 threshold for filing a 48-hour Independent Expenditure Report.⁴

The underlying polling research referenced in the press release was not part of the production cost of the press release itself.⁵ That research (originally undertaken with the expectation of being used by and paid for by the separate 501(c)(4) organization) was conducted for multiple potential purposes. It included questions about: general attitudes on whether the country was headed in the right direction; favorability of President Obama; support for Right-to-Life, Tea Party, and Occupy Wall Street movements; Republican *versus* Democrat leanings; and Conservative *versus* Liberal leanings. The outcome of the research, obviously, was not knowable when it was initiated, and it could very well have ended up being used by Indiana Values SuperPAC only for internal strategy, fundraising, and planning. The research costs are

³ See 2 U.S.C. § 431(17); 11 C.F.R. §§ 100.16, 100.22.

⁴ 2 U.S.C. § 434(g)(2) imposes the 48-hour Independent Expenditure Report obligation when a committee like Indiana Values SuperPAC makes or contracts to make independent expenditures aggregating \$10,000 or more in the period up to the 20th day before an election. See also 11 C.F.R. § 104.4(b)(2) and (f).

⁵ Though the FEC's independent expenditure reporting regulations do not clarify which specific costs should be included on reports (11 C.F.R. § 100.16(a) only refers to "an expenditure by a person for a communication expressly advocating"), the analogous regulations for "electioneering communications" (11 C.F.R. § 104.20(a)(2)) specify that only "direct costs of producing or airing" need be reported. The only expenses covered in the latter regulation are: (A) "[c]osts charged by a vendor, such as studio rental time, staff salaries, costs of video or audio recording media, and talent" or (B) "[t]he cost of airtime on broadcast, cable or satellite radio and television stations, studio time, material costs, and the charges for a broker to purchase the airtime."

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most appropriately characterized as "overhead expenses which are required to be reported as operating expenses by the committee."⁶

That said, Indiana Values SuperPAC plans to treat identifiable direct costs of producing the press release as "independent expenditures" on the upcoming 2012 April Quarterly report, and it will include a reasonable portion of the polling research as part of such independent expenditure. Most assuredly, though, the amount of any reported independent expenditure activity stemming from the press release will be well below the \$10,000 threshold applicable to 48-hour reporting.⁷

In view of the foregoing, respondent Indiana Values SuperPAC respectfully requests that the Commission make no finding of violations and that this matter be dismissed.

If you have any questions or would like follow-up regarding the facts described herein, please contact me.

Sincerely,

DICKSTEIN SHAPIRO LLP



Scott E. Thomas

ST/kb

⁶ Advisory Opinion 1999-37 (X-PAC expenses for securing domain, purchasing software content, and purchasing hardware considered overhead unless directly attributable to a particular express advocacy communication), relying on 11 C.F.R. § 106.1(c)(1). *See also*, 11 C.F.R. § 106.4(d) ("The purchase of opinion poll results by an unauthorized political committee for its own use, in whole or in part, is an overhead expenditure by the political committee under § 106.1(c)(1) to the extent of the benefit derived by the committee.").

⁷ Assuming the bill from the polling firm (the \$17,000 reported on the Indiana Values SuperPAC Year End Report Schedule D) is at issue, this law firm would advise putting only half of the survey questions in the realm of content described in the press release (since only half relate to the Lugar/Mourdock comparisons), and would further advise dividing the usage of that content in half because Indiana Values SuperPAC itself was benefitting from such usage for strategy and planning purposes in the nature of overhead (*see n. 6*). Thus, using one of the "reasonable" allocation methods contemplated at 11 C.F.R. § 106.4(e), only \$4,250 would be attributable to the press release issued by Indiana Values SuperPAC in January.