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**FEDERAL ELECTION COMMISSION**  
**999 E Street, N.W.**  
**Washington, D.C. 20463**

**FIRST GENERAL COUNSEL'S REPORT**

**CELA**

MUR: 6530

DATE COMPLAINT FILED: February 10, 2012

DATE OF NOTIFICATION: February 14, 2012

LAST RESPONSE RECEIVED: March 19, 2012

DATE ACTIVATED: April 24, 2012

EXPIRATION OF SOL: December 15, 2016 –  
December 31, 2016

**COMPLAINANT:**

Daniel J. Parker

**RESPONDENTS:**

Indiana Values SuperPAC, Inc. and Andrew  
Klingenstein in his official capacity as treasurer

**RELEVANT STATUTES AND  
REGULATIONS:**

2 U.S.C. § 431(4)(A)

2 U.S.C. § 433(a)

2 U.S.C. § 434(a)

2 U.S.C. § 434(b)

2 U.S.C. § 434(g)(2)

11 C.F.R. § 100.22

11 C.F.R. § 104.4(b)

11 C.F.R. § 104.5(e)

**INTERNAL REPORTS CHECKED:**

Disclosure Reports

**FEDERAL AGENCIES CHECKED:**

None

**I. INTRODUCTION**

The Complaint alleges that Indiana Values SuperPAC, Inc. (the "Committee"), an independent expenditure-only political committee, filed an inaccurate and untimely Statement of Organization with the Commission, in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). The Complaint further alleges that the Committee failed to file a 48-Hour Independent Expenditure notice in connection with a poll it conducted in mid-December

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2011, and failed to file a 2011 Year End Report. The Committee acknowledges that it filed its Statement of Organization several days late but denies the other allegations.

As discussed below, we recommend that the Commission:

- Dismiss the allegation that the Committee violated 2 U.S.C. § 433(a) by filing an untimely Statement of Organization, and send a letter of caution;
- Find no reason to believe that the Committee violated 2 U.S.C. § 433(a) by making a knowingly false statement in its Statement of Organization;
- Find no reason to believe that the Committee violated 2 U.S.C. § 434(g) by failing to file a 48-Hour Notice of an Independent Expenditure; and
- Find no reason to believe that the Committee violated 2 U.S.C. § 434(a) by not filing a 2011 Year End Report.

Finally, we recommend that the Commission close the file in this matter.

## II. FACTS

The Committee states that it filed Articles of Incorporation on December 16, 2011, and on January 5, 2012, it filed a Statement of Organization (FEC Form 1) ("Statement") with the Commission registering as an independent expenditure-only committee. Resp. at 1 (Mar. 19, 2012). The Statement, which the Commission received on January 10, 2012, indicates that the Committee became a political committee on December 21, 2011, the date on which the Committee received its first contribution — \$10,000 from an individual donor. *Id.*

On January 25, 2012, the Committee issued a press release announcing the results of a statewide poll of 500 registered voters in Indiana conducted from December 13-15, 2011, by the polling firm Public Opinion Strategies (the "December 13 poll"). See Resp. at 2-3; Brian Francisco, *Lugar Foes Doubt Poll Process, Results*, FORT WAYNE JOURNAL-GAZETTE, Jan. 26, 2012 (Compl., Ex. 1). The press release stated, in part, "This poll shows that by large margins,

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1 the people of Indiana want to return Senator Lugar's conservative voice to the Senate. Anyone  
2 who wants to make sure that the seat remains in conservative hands rolls the dice by voting for  
3 Mourdock in the primary." Resp. at 3.

4 The Committee did not provide the specific poll questions in its response. It states only  
5 that the "research" included questions about "general attitudes on whether the country was  
6 headed in the right direction; favorability of President Obama; support for Right-to-Life, Tea  
7 Party, and Occupy Wall Street movements; Republican *versus* Democrat leanings; and  
8 Conservative *versus* Liberal leanings" (emphasis in original). *Id.*

9 According to the press release and the FORT WAYNE JOURNAL-GAZETTE article, the  
10 December 13 poll showed that incumbent Senator Richard Lugar had a substantial lead over the  
11 presumptive Democratic nominee in a general election match-up and that Lugar's primary  
12 opponent, Richard Mourdock, tied with the Democrat in a general election. The press release  
13 and news article do not give any detail about specific poll questions, but the article notes that two  
14 individuals (Murdock's spokesman and the press secretary for the Indiana Democratic Party)  
15 "each said the survey was likely a biased 'push poll' in which respondents are asked questions  
16 designed to elicit certain answers." Compl., Ex. 1 at 2.

17 On January 31, 2012, the Committee filed its 2011 Year End Report. The Report  
18 disclosed a \$17,000 debt to "Public Opinion Strategies" for "Polling Services." On March 23,  
19 2012, the Committee filed a 48-Hour Independent Expenditure Notice listing a \$4,250 payment  
20 to Public Opinion Strategies occurring on January 31, 2012, for "Polling Services" in opposition  
21 to Richard Mourdock. On its 2012 April Quarterly Report, the Committee disclosed that on  
22 January 31, 2012 it made an independent expenditure opposing Mourdock in the amount of  
23 \$4,250.

**III. ANALYSIS**

The Complaint argues that the Committee's December 13 poll was an independent expenditure that triggered political committee status for the Committee and required a 48-Hour Notice at the time the polling occurred. Accordingly, the Complaint alleges that the Committee violated the Act by filing a late and "knowingly false" Statement of Organization and failing to file a 48-Hour Independent Expenditure notice.

**A. Statement of Organization and Political Committee Status**

The Complaint alleges that, even if the Committee "had formed" on December 21, 2011, the Statement of Organization was not timely filed, since it was filed with the Commission more than ten days later. Compl. at 1; *see* 2 U.S.C. § 433(a). The Complaint also asserts that "[t]he Form 1 for 'Indiana Values' indicates the formation of the committee on 12/21, which would represent a knowingly false statement," because the Committee's December 13 poll was an expenditure triggering political committee status. Compl. at 1.

Under the Act, a group that triggers political committee status is required to register with the Commission and publicly disclose all of its receipts and disbursements. 2 U.S.C. §§ 432, 433, 434. The group is required to file its Statement of Organization within ten days of becoming a political committee. 2 U.S.C. § 433(a). A filing sent by First Class Mail is considered filed on the date received by the Commission. 11 C.F.R. § 104.5(e). Here, the Commission received the Committee's Statement of Organization, which was sent by First Class Mail, on January 10, 2012.

Regardless of whether the Committee became a political committee on December 21, 2011, as asserted by the Committee, or became a political committee as a result of the December 13 poll as alleged in the Complaint, the Statement of Organization was not timely

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1 filed. In fact, the Committee acknowledges that it did not timely file the Statement of  
2 Organization "within 10 days of December 21, 2011," stating that the delay in the filing was  
3 "due primarily to the complications of arranging for a bank account to be opened for the  
4 [Committee] during the holiday season." Resp. at 2.

5 Nonetheless, we recommend that the Commission dismiss this allegation. Even if the  
6 Committee qualified as a political committee on December 13, 2011, the first day of the polling  
7 activity, the Statement would have been only 18 days late. Further, the late filing did not change  
8 the due date of the Committee's first disclosure report — which it timely filed on January 31,  
9 2012.<sup>1</sup> Under these circumstances, we believe that dismissal is the appropriate course of action,  
10 but recommend that the Commission issue a letter of caution to the Committee. See MUR 5251  
11 (Rogers) (Commission found reason to believe but took no further action where committee  
12 registered with the Commission five weeks late but timely filed its initial disclosure report). See  
13 also *Heckler v. Chaney*, 470 U.S. 821 (1985).

14 As to whether the Committee accurately reported the date on which it became a political  
15 committee, the Act defines a "political committee" as any committee, association, or other group  
16 of persons that receives "contributions" or makes "expenditures" which aggregate in excess of  
17 \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). An organization that has made  
18 expenditures in excess of \$1,000, however, will not be considered a "political committee" unless,  
19 in addition, its "major purpose is Federal campaign activity (*i.e.*, the nomination or election of a  
20 Federal candidate)." Supp. Explanation and Justification, Political Comm. Status, 72 Fed. Reg.

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<sup>1</sup> The Complaint asserts that the late filing of the Statement "suggests that [the Committee] did this to avoid filing a year-end report, in order to frustrate public disclosure." Compl. at 1. Since the Committee, in fact, filed its 2011 Year End Report on time, this assertion lacks merit.

5595, 5597 (2007) ("Supp. E&J"). See *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

The term "expenditure" is defined to include "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." 2 U.S.C. § 431(9)(A)(i). In determining whether an organization makes an expenditure, the Commission "analyze[s] whether expenditures for any of an organization's communications made independently of a candidate [see 2 U.S.C. § 431(17)] constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." Supp. E&J, 72 Fed. Reg. at 5606.

The Committee asserts that although the Committee was incorporated on December 16, 2011, its first contribution — \$10,000 from one individual — was not received until December 21, 2011. Accordingly, "that was the date properly used for the [Committee's] organization date on the Statement of Organization." Resp. at 1. In response to the argument that the December poll was an expenditure that made the Committee a "political committee" pursuant to the Act, the Committee explains that the poll was originally planned for use by Indiana Values, Inc., a "pre-existing separately incorporated 501(c)(4) organization." *Id.* at fn. 1. "Only in late January of 2012, as the results of the polling were being prepared for release to the press, did [Committee counsel] recommend that the polling services be paid for by [the Committee] instead." *Id.*<sup>2</sup> Crediting the Committee's assertion — and there is no record

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<sup>2</sup> The Response also states that the Committee "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 [the Committee] any earlier than December 21." Resp. at fn. 1.

evidence to counter it — the December 13 poll would not have triggered political committee status.<sup>3</sup>

In short, there is no basis to conclude that the date the Committee became a political committee is other than the date listed in its Statement. We therefore recommend that the Commission find no reason to believe that the Committee made a false statement concerning its formation date.

**B. 48-Hour Notice**

The Complaint also alleges that the Committee failed to file a 48-Hour Independent Expenditure Notice reporting the costs of the December 13 poll. *See* 2 U.S.C. § 434(g).

A political committee that makes independent expenditures aggregating \$10,000 or more with respect to a given election at any time during a calendar year up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours. 2 U.S.C. § 434(g)(2)(A). The committee must ensure that the Commission receives such reports, known as 48-Hour Notices, by the end of the second day “following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated.” 11 C.F.R. § 104.4(b)(2).

As discussed above, *see supra* p. 6, the Response asserts that the December 13 poll was not originally intended for use by the Committee. *See* Resp. at 3 (noting that the poll was

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<sup>3</sup> Thus, we do not consider whether the December 13 poll was a “push poll” that may have constituted an expenditure. And, in any event, the record fails to provide sufficient information to determine whether the December 13 poll was in fact a “push poll” and an expenditure that triggered political committee status. The Committee denies that the December 13 poll was an expenditure, but it did not provide the specific poll questions in its response. The information in the Complaint regarding the content of the poll is limited to the FORT WAYNE JOURNAL-GAZETTE article, which indicates that the vendor asked questions asked about registered voter preferences concerning three candidates. *See* Compl., Ex. 1. Other than unsupported assertions quoted in the news article that the December 13 poll was a “push poll” designed to elicit certain answers, there is no information to indicate that the pollsters advocated the election of Senator Lugar or the defeat of his opponents either in conducting the poll or in the framing of the questions. *See* 11 C.F.R. § 100.22.

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1 conducted for "multiple potential purposes," and "could very well have ended up being used by  
2 [the Committee] only for internal strategy, fundraising, and planning"). Further, there is no  
3 information to suggest that the December 13 poll itself contained any express advocacy. *See*  
4 *supra* at fn. 3. Therefore, based on the available information, it appears that no 48-Hour Notice  
5 was required at the time the polling was conducted.

6 The Committee appears to concede that it used the poll results to make independent  
7 expenditures, but contends that they were limited to the January 25, 2012 press release issued by  
8 the Committee. Resp. at 2-3. The Committee contends that the press release "utilized minimal  
9 resources" and that, even if it contained express advocacy, its associated costs "certainly did not  
10 trigger the \$10,000 threshold for filing a 48-hour Independent Expenditure Report." *Id.* at 3.

11 The Committee states that it plans to treat "identifiable direct costs" of producing the press  
12 release as independent expenditures on its 2012 April Quarterly Report, including a "reasonable  
13 portion of the polling research."<sup>4</sup> *Id.* at 4. Ultimately, the Committee filed a 48-Hour Notice on  
14 March 23, 2012, disclosing a January 31, 2012, payment in the amount of \$4,250 to Public  
15 Opinion Strategies in connection with the poll. Although this expenditure, standing alone, did  
16 not require a 48-Hour Notice, the Committee filed the Notice when it made an unrelated  
17 independent expenditure in the amount \$12,000, thereby surpassing the \$10,000 threshold for  
18 reporting its cumulative independent expenditures to date. *See* 2 U.S.C. § 434(g)(2)(A). The  
19 Committee later disclosed the payment on Schedule E of its 2012 Amended April Quarterly  
20 Report (Apr. 26, 2012). *See* 2 U.S.C. § 434(b).

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<sup>4</sup> The Response states that, assuming the \$17,000 "bill from the polling firm . . . 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 the benefit was "in the nature of overhead." Resp. at fn. 7. Based on the content of the questions (which are not included in the Complaint or Response), the Committee states that a reasonable allocation method based on Commission regulations would attribute \$4,250 to the press release. *Id.*



For these reasons, we recommend that the Commission find no reason to believe that the Committee violated 2 U.S.C. § 434(g) by not filing a 48-Hour Notice of an Independent Expenditure in connection with the poll.

**C. 2011 Year End Report**

Finally, the Complaint alleges that the Committee failed to file a 2011 Year End Report. See 2 U.S.C. § 434(a) (requiring committee treasurers to file reports of receipts and disbursements "in accordance with the provisions of this subsection"). However, the Committee states — and we have confirmed — that the report "was filed in a timely fashion" on January 31, 2012. Resp. at 2; <http://query.nictusa.com/pdf/392/12951394392/12951394392.pdf#navpanes=0> (last visited July 20, 2012). Therefore, we recommend that the Commission find no reason to believe that the Committee violated 2 U.S.C. § 434(a) by not filing its 2011 Year End Report.

**IV. RECOMMENDATIONS**

1. Dismiss the allegation that Indiana Values SuperPAC, Inc. and Andrew Klingenstein in his official capacity as treasurer violated 2 U.S.C. § 433(a) by filing an untimely Statement of Organization, and issue a letter of caution.
2. Find no reason to believe that Indiana Values SuperPAC, Inc. and Andrew Klingenstein in his official capacity as treasurer violated 2 U.S.C. § 433(a) by making a knowingly false statement in the Statement of Organization.
3. Find no reason to believe that Indiana Values SuperPAC, Inc. and Andrew Klingenstein in his official capacity as treasurer violated 2 U.S.C. § 434(g) by not filing a 48-Hour Notice of an Independent Expenditure.
4. Find no reason to believe that Indiana Values SuperPAC, Inc. and Andrew Klingenstein in his official capacity as treasurer violated 2 U.S.C. § 434(a) by not filing a 2011 Year End Report.
5. Approve the attached Factual and Legal Analysis.
6. Approve the appropriate letters.

7. Close the file.

Anthony Herman  
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Daniel A. Petalas  
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7-23-12  
Date

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