



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

NOV 23 2012

Scott E. Thomas, Esq.
Dickstein Shapiro, LLP
1825 Eye Street, NW
Washington, DC 20006-5403

RE: MUR 6530
Indiana Values SuperPAC
Andrew Klingenstein, in his official
capacity as treasurer

Dear Mr. Thomas:

On February 14, 2012, the Federal Election Commission notified your clients 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, and information supplied by your clients, the Commission, on November 8, 2012, found that there was no reason to believe your clients violated 2 U.S.C. § 434(a), and dismissed the allegations that your clients violated 2 U.S.C. §§ 433(a) and 434(g). The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed.

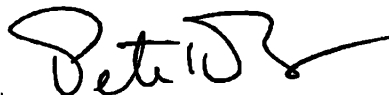
Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

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If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg", with a stylized flourish at the end.

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

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

MUR 6530

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Daniel J. Parker, alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), by Indiana Values SuperPAC, Inc. and Andrew Klingenstein, in his official capacity as treasurer (the "Committee").

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

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, the people of Indiana want to return Senator Lugar's conservative voice to the Senate. Anyone

1 who wants to make sure that the seat remains in conservative hands rolls the dice by voting for
2 Mourdock in the primary.” Resp. at 3.

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

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

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

B. 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.

1. 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, the Commission dismisses this allegation. Even if the Committee qualified
6 as a political committee on December 13, 2011, the first day of the polling activity, the
7 Statement would have been only 18 days late. Further, the late filing did not change the due date
8 of the Committee’s first disclosure report — which it timely filed on January 31, 2012.¹ See
9 MUR 5251 (Rogers) (Commission found reason to believe but took no further action where
10 committee registered with the Commission five weeks late but timely filed its initial disclosure
11 report). See also *Heckler v. Chaney*, 470 U.S. 821 (1985).

12 As to whether the Committee accurately reported the date on which it became a political
13 committee, the Act defines a “political committee” as any committee, association, or other group
14 of persons that receives “contributions” or makes “expenditures” which aggregate in excess of
15 \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). An organization that has made
16 expenditures in excess of \$1,000, however, will not be considered a “political committee” unless,
17 in addition, its “major purpose is Federal campaign activity (*i.e.*, the nomination or election of a
18 Federal candidate).” Supp. Explanation and Justification, Political Comm. Status, 72 Fed. Reg.
19 5595, 5597 (2007) (“Supp. E&J”). See *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v.*
20 *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

¹ 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.

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1 The term “expenditure” is defined to include “any purchase, payment, distribution, loan,
2 advance, deposit, or gift of money or anything of value, made by any person for the purpose of
3 influencing any election for Federal Office.” 2 U.S.C. § 431(9)(A)(i). In determining whether
4 an organization makes an expenditure, the Commission “analyze[s] whether expenditures for any
5 of an organization’s communications made independently of a candidate [see 2 U.S.C.
6 § 431(17)] constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader
7 definition at 11 C.F.R. § 100.22(b).” Supp. E&J, 72 Fed. Reg. at 5606.

8 The Committee asserts that although the Committee was incorporated on December 16,
9 2011, its first contribution — \$10,000 from one individual — was not received until
10 December 21, 2011; therefore “that was the date properly used for the [Committee’s]
11 organization date on the Statement of Organization.” Resp. at 1. The Committee concedes that
12 using this date, the Statement of Organization was filed ten days late. The Complaint asserts
13 that the Committee became a political committee on December 13, 2011 as a result of the
14 December 13 poll.² Even if political committee status was triggered by the poll, the Committee’s
15 Statement of Organization would have been no more than 18 days late. Under either scenario,
16 given the short delay in filing the Statement of Organization and the timely filing of the
17 Committee’s first disclosure report, the Commission exercises its prosecutorial discretion to
18 dismiss the allegation that the Committee violated 2 U.S.C. § 433(a) by failing to file an accurate
19 and timely Statement of Organization.³ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

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² The Committee did not provide the poll questions it utilized, and the Commission expresses no opinion as to whether the poll may have contained express advocacy that could have triggered political committee status on December 13.

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2. 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).

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 conducted for “multiple potential purposes,” and “could very well have ended up being used by [the Committee] only for internal strategy, fundraising, and planning”). The Committee appears to concede that it used the poll results to make independent expenditures, but contends that they were limited to the January 25, 2012 press release issued by the Committee. Resp. at 2-3. The Committee contends that the press release “utilized minimal resources” and that, even if it contained express advocacy, its associated costs “certainly did not trigger the \$10,000 threshold for filing a 48-hour Independent Expenditure Report.” *Id.* at 3. The Committee ultimately did include what it determined to be the “identifiable direct costs” of producing the press release (\$4,250) in its March 23, 2012 48-Hour Notice in which it also disclosed an unrelated \$12,000 independent expenditure. *See* 2 U.S.C. § 434(g)(2)(A). The Committee later disclosed the payment on Schedule E of its 2012 Amended April Quarterly Report (Apr. 26, 2012). *See* 2 U.S.C. § 434(b). Because the

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1 Commission does not have access to the content of the poll, it makes no determination as to
2 whether the "identifiable direct costs" of the poll were allocated properly and whether the
3 appropriate payment amount was disclosed on a 48-Hour Notice. However, given the
4 subsequent disclosures and the relatively low cost of the poll, the Commission exercises its
5 prosecutorial discretion to dismiss the allegation that the Committee violated 2 U.S.C. § 434(g)
6 by not filing a 48-Hour Notice of an Independent Expenditure in connection with the poll. *See*
7 *Heckler v. Chaney*, 470 U.S. 821 (1985).

8 3. **2011 Year End Report**

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

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