

1 **FEDERAL ELECTION COMMISSION**

2
3 **FIRST GENERAL COUNSEL'S REPORT**

4
5 **MUR: 7286**
6 **DATE OF COMPLAINT: 10/12/17**
7 **DATE OF NOTIFICATION: 10/13/17**
8 **DATE OF LAST RESPONSE: 11/30/17**
9 **DATE ACTIVATED: 1/02/18**

10
11 **EARLIEST SOL: 7/1/22**
12 **LATEST SOL: 10/15/22**
13 **ELECTION CYCLE: 2016**

14
15 **COMPLAINANT:** Sarah Pickerel
16 Executive Director, Republican Party of
17 Kentucky

18
19 **RESPONDENT:** Indivisible Kentucky, Inc.

20
21 **RELEVANT STATUTES**
22 **AND REGULATIONS:** 52 U.S.C. § 30101(4), (17)
23 52 U.S.C. § 30102
24 52 U.S.C. § 30103
25 52 U.S.C. § 30104(b), (c), (g)
26 52 U.S.C. § 30120
27 11 C.F.R. § 100.16(a)
28 11 C.F.R. § 100.22
29 11 C.F.R. § 109.10(b), (c)
30 11 C.F.R. § 110.11

31
32 **INTERNAL REPORTS CHECKED:** Disclosure Reports

33
34 **FEDERAL AGENCIES CHECKED:** None

35
36 **I. INTRODUCTION**

37 Indivisible Kentucky, Inc., ("IKY"), is an organization that operates under Section
38 501(c)(4) of the Internal Revenue Code and was established in 2017, shortly after the election of
39 President Donald J. Trump. According to the Complaint, IKY made disbursements in July 2017
40 for two billboards expressly advocating the defeat of Senator Mitch McConnell but failed to
41 report those payments as independent expenditures and include disclaimers on its internet

1 communications, in violation of the Federal Election Campaign Act of 1971, as amended (the
2 "Act").¹ The Complaint also alleges that IKY knowingly and willfully failed to disclose the
3 identity of donors who made contributions to fund the independent expenditures.²

4 IKY denies the allegations, contending that the billboards do not constitute independent
5 expenditures under the Act, and its internet communications do not require disclaimers.³
6 Further, IKY states that even if the Commission were to find that IKY violated the law, the
7 Commission should dismiss this matter based on the *de minimis* amount at issue.⁴

8 As discussed below, it appears that IKY paid for billboards expressly advocating the
9 defeat of a clearly identified federal candidate but failed to file any reports of independent
10 expenditures, which appear to have totaled more than \$10,000. Further, the available
11 information indicates that IKY solicited funds for the purpose of furthering the billboard
12 program. Accordingly, we recommend that the Commission find reason to believe that IKY
13 violated 52 U.S.C. § 30104(c) and (g) by failing to file reports of independent expenditures and
14 identifying contributors who made contributions to further the billboard program. Because we
15 lack information regarding the amount IKY spent on the independent expenditures and
16 contributions made to further these expenditures, an investigation is necessary, and we thus
17 recommend that the Commission authorize compulsory process.

18 Further, the present record does not indicate that IKY was required to place disclaimers
19 on its tweets or solicitations posted on its website. Because the tweets themselves do not appear

¹ Compl. at 2-4 (Oct. 12, 2017).

² *Id.* at 7, ¶ 7.

³ Resp. at 3-7 (Nov. 30, 2017).

⁴ *Id.* at 1.

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1 to constitute public communications, we recommend that the Commission find no reason to
2 believe that IKY violated 52 U.S.C. § 30120 by failing to include disclaimers in its tweets. With
3 respect to its solicitations on its website, IKY would have been required to include a disclaimer
4 on its website if it were a political committee, but we lack information that IKY is a political
5 committee. Given that we propose to investigate IKY's independent expenditures, we
6 recommend that the Commission take no action at this time with respect to the allegation that
7 IKY failed to include a disclaimer on its website. If during the course of the investigation
8 described above, we discover information regarding IKY's political committee status, we will
9 make the appropriate recommendation.

10 **II. FACTUAL BACKGROUND**

11 IKY was incorporated in Kentucky in 2017 as an exempt organization under Section
12 501(c)(4) of the Internal Revenue Code⁵ but is not registered with the Commission as a political
13 committee. IKY states it is part of the Indivisible movement, which is composed of more than
14 6,000 local groups and led by a national 501(c)(4) organization, the Indivisible Project.⁶ The
15 project's mission is to "cultivate and lift up a grassroots movement of local groups to defeat the
16 Trump agenda, elect progressive leaders, and realize bold progressive policies."⁷ According to
17 screenshots of IKY's website attached to the Complaint, during the summer of 2017, IKY
18 engaged in a number of projects relating to healthcare reform, including holding a "Rally for

⁵ Resp. at 1, n.2. IKY was incorporated on Feb. 27, 2017. See Kentucky Secretary of State Online Services, [https://app.sos.ky.gov/ftshow/\(S\(anhushs5an0rqkhfj0vmdgp3\)\)/default.aspx?path=ftsearch&id=0977690&ct=09&cs=99999](https://app.sos.ky.gov/ftshow/(S(anhushs5an0rqkhfj0vmdgp3))/default.aspx?path=ftsearch&id=0977690&ct=09&cs=99999) (last visited on Apr. 12, 2018).

⁶ *Id.* at 2, n.3.

⁷ Resp. at 2.

1 Healthcare for All,” organizing phone calls and visits to the offices of Senators Mitch McConnell
2 and Rand Paul, and gathering to attend marches and town halls.⁸

3 In July and August 2017, IKY also paid for two billboards that it placed next to an
4 interstate highway in Louisville, Kentucky.⁹ Each billboard displayed a large color photo of
5 Senator McConnell, the statement “Kentucky Deserves Better,” and the hashtag
6 “#DitchMitch2020.”¹⁰ Each also included the “We Are Indivisible Kentucky” logo for the
7 group, and the web address for the organization.¹¹

8 The billboards also contain the disclaimer: “Paid for by Indivisible Kentucky
9 IndivisibleKY.org and not authorized by any candidate or candidate’s committee.”¹² The
10 billboards differed only in the top-line caption. One billboard stated, “WE’VE HAD
11 ENOUGH!” and the other, “YOU MAKE US SICK!”¹³ On its website, IKY included a post
12 showing photos of the billboards with the headline: “Billboard Campaign: It’s Time to
13 #DitchMitch2020.”¹⁴

14 The Response provides no specific information on the cost of the billboards, but publicly
15 available information provided by the Complaint indicates that IKY may have spent between
16 \$10,000 and \$20,000 on the billboards. In a news article attached to the Complaint, an IKY

⁸ Compl. at Ex. 4.

⁹ Resp. at 2.

¹⁰ Compl. Exs. 1, 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*, Ex. 6.

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1 spokesperson stated that IKY paid over \$10,000 for the billboards from funds raised by IKY and
2 an “anonymous benefactor.”¹⁵ The article notes that the billboards prompted a viral social media
3 campaign in which individuals took pictures of the billboards and posted them on social media
4 with the hashtag #DitchMitch2020.¹⁶

5 Further, through its website and Twitter account, IKY appears to have solicited
6 contributions to place additional DitchMitch#2020 billboards. One blog post on IKY’s website,
7 entitled, “Billboard Campaign: It’s Time to #DitchMitch2020,” asks readers, “if you’re able,
8 could you donate \$5 or more to Indivisible Kentucky to help with our advertising campaign?
9 Indivisible Kentucky has set a goal of raising \$20,000 for a media purchasing blitz, starting with
10 the billboard advertising campaign.”¹⁷ IKY also issued a tweet that featured a photo of the
11 billboard and the text: “Here it is! Want to see more of these around the state? Donate now,
12 even \$5 helps.”¹⁸ In another tweet, IKY shows a photo of the billboard and a statement: “We
13 plan to do more of our awesome billboards, but need to do some fundraising first. Can you
14 help?”¹⁹

¹⁵ Thomas Novelly, *Anti-Trump Group Indivisible Kentucky Blasts Mitch McConnell on Billboards*, THE COURIER-JOURNAL (Jul. 27, 2017), Compl., Ex. 5. The article also noted that IKY began a social media campaign that went viral, which stated “We’re inviting citizens to join us in this effort by taking pictures of the billboards (not while driving, of course!) and post them to social media with the hashtag #DitchMitch2020.” *Id.* at 4, ¶ 17, Ex. 5.

¹⁶ *Id.*

¹⁷ Compl, Ex. 6 at 1.

¹⁸ *Id.*, Ex. 7.

¹⁹ *Id.*, Ex. 8.

1 **III. LEGAL ANALYSIS**

2 **A. IKY's Billboards Constitute Independent Expenditures**

3 An independent expenditure is an expenditure that expressly advocates the election or
4 defeat of a clearly identified Federal candidate and that is not made in concert or cooperation
5 with, or at the request or suggestion of, the candidate or his or her committee or agent, or a
6 political party committee or its agent.²⁰ In determining whether a communication contains
7 express advocacy, the Commission analyzes the message under either 11 C.F.R. § 100.22(a) or
8 §100.22(b). A communication expressly advocates the election or defeat of a clearly identified
9 candidate under 11 C.F.R. § 100.22(a) when it uses phrases such as those specifically
10 enumerated in the text of the regulation (*e.g.*, “vote for the President,” “re-elect your
11 Congressman,” “support the Democratic nominee”) or contains campaign slogans or individual
12 words that “in context can have no other reasonable meaning than to urge the election or defeat
13 of one or more clearly identified candidate(s) such as posters or bumper stickers which say
14 ‘Nixon’s the One,’ ‘Carter ’76,’ ‘Reagan/Bush,’ or ‘Mondale!’ ”²¹

15 IKY’s billboards contain express advocacy under section 100.22(a). Both display a large
16 photo of McConnell and the hashtag #DitchMitch2020. As the Complaint points out, “Ditch
17 Mitch,” was the campaign slogan used by groups and political committees that opposed
18 McConnell, including the Kentucky Democratic Party, during the 2014 general election.²²
19 Consequently, the phrase “#DitchMitch2020” is a type of campaign slogan under section

²⁰ 52 U.S.C. § 30101(17).

²¹ 11 C.F.R. § 100.22(a); *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); *FEC v. Mass. Citizens for Life* (“*MCFL*”) 479 U.S. 238, 249 (1986).

²² *See* Compl. Ex. 3.

1 100.22(a) that has no other reasonable meaning than urging the defeat of McConnell in 2020, the
2 year that the Senator is next up for re-election.²³ Contrary to IKY's assertion, the presence of
3 other statements on the billboard and on IKY'S website do not alter the nature of the hashtag
4 message as express advocacy. While other statements on the billboards —“WE'VE HAD
5 ENOUGH!” and “YOU MAKE US SICK!”— may also be construed as expressing
6 dissatisfaction with Senator McConnell's position on issues, they do not change the exhortation
7 to “ditch” McConnell in 2020. Accordingly, because IKY's billboards expressly advocate the
8 defeat of a clearly identified federal candidate, they constitute independent expenditures.

9 **B. There is Reason to Believe that IKY Failed to Report Its Independent**
10 **Expenditures**

11
12 Under the Act, persons, including unauthorized political committees, must file disclosure
13 reports when they make independent expenditures over a certain amount. Depending on the
14 amount and timing of the expenditures, a person may have to file a 24- or 48- hour report of
15 independent expenditures. If the person makes independent expenditures aggregating \$10,000 or
16 more within a calendar year with respect to a given election any time up to and including the
17 20th day before the election, the entity must file a 48-Hour Report disclosing those
18 expenditures.²⁴ If the person makes independent expenditures aggregating \$1,000 or more with
19 respect to a given election after the 20th day before the date of an election, but more than 24
20 hours before the date of the election, the person must file a 24-Hour Report disclosing those

²³ See Factual & Legal Analysis at 3, MUR 6646 (Christopher Kauffman) (Commission found that billboard containing the phrase “Fire Klobuchar” was a call to vote against Senator Klobuchar, who was a candidate for re-election to the Senate, and thus constituted express advocacy.)

²⁴ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 109.10(c). The person must file additional reports within 48 hours after each time it makes or contracts to make independent expenditures aggregating an additional \$10,000. 52 U.S.C. § 30104(g)(2)(B)..

1 expenditures.²⁵ In addition, if the person spends in excess of \$250 on independent expenditures
2 during a calendar year with respect to a given election, that person must also file a quarterly
3 report for any quarterly period in which the independent expenditures exceed \$250 and any
4 subsequent quarterly period during that calendar year when additional independent expenditures
5 are made.²⁶

6 Further, while a political committee must identify all contributors who made
7 contributions exceeding \$200 within the calendar year,²⁷ the Act requires a person, other than a
8 political committee, to identify contributors who made contributions in excess of \$200 “for the
9 purpose of furthering an independent expenditure.”²⁸ The Commission’s implementing
10 regulation provides that an independent expenditure report must include “[t]he identification of
11 each person who made a contribution in excess of \$200 to the person filing such report which
12 contribution was made for the purpose of furthering the reported independent expenditure.”²⁹

13 Because we conclude that IKY’s billboards containing the phrase “#DitchMitch2020”
14 constituted independent expenditures, and publicly available information indicates that IKY
15 spent over \$10,000 on those communications, it appears that IKY should have filed one or more
16 quarterly and 48-Hour Reports disclosing those expenditures. Contrary to IKY’s assertion,³⁰ the

²⁵ 52 U.S.C. § 30104(g)(1); 11 C.F.R. § 109.10(d). The person must file additional reports within 24 hours after each time it makes or contracts to make independent expenditures aggregating an additional \$1,000. 52 U.S.C. § 30104(g)(1)(B).

²⁶ See 52 U.S.C. § 30104(c)(2); 11 C.F.R. § 109.10(b)..

²⁷ 52 U.S.C. § 30104(b)(3)(A).

²⁸ 52 U.S.C. § 30104(c)(2)(C).

²⁹ 11 C.F.R. § 109.10(e)(1)(vi).

³⁰ Resp. at 10.

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1 potential amount of expenditures is not *de minimis* when compared to previous similar dismissals
2 involving the failure to report independent expenditures and other reporting violations.³¹
3 Further, the available information indicates that IKY solicited funds for the purpose of furthering
4 the #DitchMitch2020 billboard campaign and should have disclosed its contributions made for
5 the purpose of financing those communications.³² While the Complaint alleges that IKY's
6 failure to disclose its contributions was knowing and willful, we do not have specific information
7 that IKY was aware that its conduct was unlawful.³³ Thus, we recommend that the Commission
8 find reason to believe that IKY violated 52 U.S.C. § 30104(c) and (g) by failing to report
9 independent expenditures and identify contributors.

³¹ See, e.g., MUR 6861 (Williams) (dismissing failure to disclose independent expenditures and use proper disclaimers due to *de minimis* amount in violation (\$3,134)); MUR 6838 (Aossey) (taking no further action and issuing letter of caution for failure to disclose \$3,250 in independent expenditures for communications with partial and false disclaimers); MURs 6486 and 6491 (Mark Hicks and JW Management) (taking no further action after investigation showed that an inexperienced and elderly respondent spent \$10,500 (a non-*de minimis* amount) on two billboards and failed to report independent expenditures); MUR 6377 (Harry Reid Votes) (dismissing with caution failure to disclose independent expenditures for radio ads costing \$2,135 and partial disclaimers); MUR 6642(Kaufman) (taking no further action after investigation indicated that local politician spent \$3,000 on one billboard reading "FIRE KLOBUCHAR!" and failed to report independent expenditure); MUR 6205 (Fort Bend Democrats) (EPS dismissal where the federal portion of the expenses for door hangers was "modest" and may have exceeded the \$1,000 political committee threshold for expenditures by approximately \$500).

³² See, e.g., Factual & Legal Analysis at 8, MUR 6816 (Americans for Job Security) (Commission found reason to believe that AJS failed to disclose donor that made contributions for the purpose of furthering independent expenditures).

³³ A violation of the Act is knowing and willful if the "acts were committed with full knowledge of all the relevant facts and a recognition that the action is prohibited by law." 122 Cong. Rec. 12,197, 12,199 (May 3, 1976). This does not require proving knowledge of the specific statute or regulation the respondent allegedly violated. *United States v. Danielczyk*, 917 F. Supp. 2d 573, 578 (E.D. Va. Jan. 9, 2013) (quoting *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish a violation is willful, government needs to show only that defendant acted with knowledge that conduct was unlawful, not knowledge of specific statutory provision violated)). Rather, it is sufficient to demonstrate that a respondent "acted voluntarily and was aware that his conduct was unlawful." *Id.* (citing jury instructions in *United States v. Edwards*, No. 11-61 (M.D.N.C. 2012), *United States v. Acevedo Vila*, No. 08-36 (D.P.R. 2009), *United States v. Fieger*, No. 07-20414 (E.D. Mich. 2008), and *United States v. Alford*, No. 05-69 (N.D. Fla. 2005)).

1 **C. Disclaimer Allegations Regarding IKY's Tweets and Website**

2
3 The Act and Commission regulations require that all public communications, as defined
4 in 11 C.F.R. § 100.26, made by a political committee; electronic mail of more than 500
5 substantially similar communications when sent by a political committee; and all Internet
6 websites of political committees available to the general public include a disclaimer.³⁴ In
7 addition, any person who makes a disbursement for a public communication that expressly
8 advocates the election or defeat of a clearly identified candidate or solicits a contribution must
9 include a disclaimer on any such communications.³⁵ A "public communication" includes
10 "general public political advertising," but does not include communications over the Internet,
11 except for "communications placed for a fee on another person's web site."³⁶ Tweets do not
12 appear to constitute "public communications" under 11 C.F.R. § 100.26 because the contents are
13 posted for free on a third party's website.³⁷

14 IKY's tweets appear to be exempt from the disclaimer requirements because the
15 communications were not placed for a fee on another person's website. Thus, we recommend
16 that the Commission find no reason to believe that IKY violated 52 U.S.C. § 30120 by failing to
17 include disclaimers on its Twitter communications. Further, unless IKY was a political
18 committee, it was not required to place a disclaimer on solicitations posted on its own website

³⁴ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(1).

³⁵ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2), (3).

³⁶ 11 C.F.R. § 100.26.

³⁷ See 11 C.F.R. § 110.11(a)(1). We note, however, that the Commission has been divided on the issue of whether the Twitter profiles of political committees constitute websites of political committees and require disclaimers. See Certification, MUR 6911 (Lois Frankel for Congress, *et al.*) (failing by a vote of 3-3 to approve OGC's recommendations to find no reason to believe that respondents violated the disclaimer requirements with respect to Twitter communications); see also Advisory Op. 2017-05 (Great America PAC) (not approving a response to the question of whether a political committee's Twitter profile page must include a disclaimer).

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1 because such communications are not public communications.³⁸ Because we lack sufficient
2 information indicating that IKY triggered political committee status, we recommend that the
3 Commission take no action at this time with respect to the allegation that IKY failed to include a
4 disclaimer on its website. If we discover information pertaining to IKY's political committee
5 status while investigating IKY's failure to report its independent expenditure, we will make the
6 appropriate recommendation.

7 **IV. PROPOSED DISCOVERY**

8 We propose to seek information regarding the costs for IKY's billboard advertising
9 campaign and the solicitations seeking contributions to further those communications. We
10 intend to conduct this investigation through voluntary means, but recommend that the
11 Commission authorize the use of compulsory process, including the issuance of appropriate
12 interrogatories, document subpoenas, and deposition subpoenas, as necessary.

13 **V. RECOMMENDATIONS**

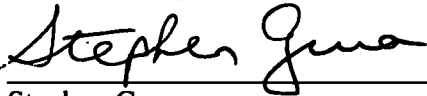
14 1. Find reason to believe that Indivisible Kentucky, Inc. violated 52 U.S.C. § 30104(c) and
15 (g);

³⁸ The Complaint does not allege that IKY violated the Act by failing to register and report as a political committee. However, in asserting that IKY acknowledges that its billboards contained express advocacy by including disclaimers, the Complaint suggests that IKY may be "confused as to its status as a political committee." Compl. at 3, ¶ 15. As described above, the record shows that IKY satisfied the statutory threshold for becoming a political committee by making independent expenditures in excess of \$1,000. See 52 U.S.C. § 30101(4)(A). Notwithstanding the threshold for contributions and expenditures, an organization will be considered a political committee only if its "major purpose is Federal campaign activity (*i.e.* the nomination or election of a Federal candidate)." See Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) ("Supplemental E&J"); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *MCFL*, 479 U.S. at 238, 262 (1986). Here, we lack sufficient information to determine whether IKY's major purpose is federal campaign activity because we do not have information on IKY's overall fundraising and spending. IKY's tax returns for 2017 are not yet available, and IKY's Response provides no information regarding its finances. Further, the public record suggests that IKY may have engaged in significant issue advocacy relating to healthcare, tax reform, and the Kentucky Open Records Act, as well as advocacy on behalf of Kentucky state candidates. See Compl., Ex. 4; *Indivisible Kentucky Website*, [https://indivisibleky.org/category/articles/\[4/11/2018 5:02:48 PM\]](https://indivisibleky.org/category/articles/[4/11/2018 5:02:48 PM]). Under these circumstances, we make no recommendation as to whether IKY should have registered and reported as a political committee. If we discover any relevant information during the proposed investigation of IKY's failure to report its independent expenditures, we will make the appropriate recommendation.

2. Find no reason to believe that Indivisible Kentucky, Inc. violated 52 U.S.C. § 30120 by failing to include disclaimers on its Twitter communications;
3. Take no action at this time with respect to the allegation that Indivisible Kentucky, Inc. violated 52 U.S.C. § 30120 by failing to include disclaimers on solicitations posted on its website;
4. Approve the attached Factual and Legal Analysis;
5. Authorize the use of compulsory process; and
6. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

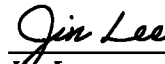
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5.2.18

Date



Jin Lee
Acting Assistant General Counsel



Dominique Dillenseger
Attorney

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