

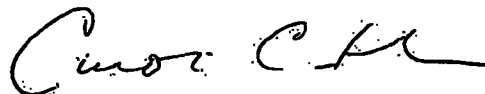
cause conciliation after briefs on probable cause have been delivered to the respondent. Requests for extensions of time are not routinely granted. Requests must be made in writing at least five days prior to the due date of the response and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days. Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at http://www.fec.gov/em/respondent_guide.pdf.

Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.¹

This matter will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B) and 30109(a)(12)(A), unless you notify the Commission in writing that you wish the matter to be made public. If you have any questions, please contact Dominique Dillenseger, the attorney assigned to this matter, at (202) 694-1650 or DDillenseger@fec.gov.

We look forward to your response.

On behalf of the Commission,



Caroline C. Hunter
Chair

Enclosure
Factual and Legal Analysis

¹ The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

201107141426081

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENT:** Indivisible Kentucky, Inc.

MUR: 7286

4
5 **I. INTRODUCTION**

6 This matter was generated by a complaint filed with the Federal Election Commission
7 (the "Commission") by Sarah Pickerel, Executive Director, Republican Party of Kentucky. *See*
8 52 U.S.C. § 30109(a)(1). Indivisible Kentucky, Inc., ("IKY") is an organization that operates
9 under Section 501(c)(4) of the Internal Revenue Code and was established in 2017, shortly after
10 the election of President Donald J. Trump. According to the Complaint, IKY made
11 disbursements in July 2017 for two billboards expressly advocating the defeat of Senator Mitch
12 McConnell but failed to report those payments as independent expenditures and include
13 disclaimers on its internet communications, in violation of the Federal Election Campaign Act of
14 1971, as amended (the "Act").¹ The Complaint also alleges that IKY knowingly and willfully
15 failed to disclose the identity of donors who made contributions to fund the independent
16 expenditures.²

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

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.

1 As discussed below, it appears that IKY paid for billboards expressly advocating the
2 defeat of a clearly identified federal candidate but failed to file any reports of independent
3 expenditures, which appear to have totaled more than \$10,000. Further, the available
4 information indicates that IKY solicited funds for the purpose of furthering the billboard
5 program. Accordingly, the Commission finds reason to believe that IKY violated 52 U.S.C.
6 § 30104(c) and (g) by failing to file reports of independent expenditures and identifying
7 contributors who made contributions to further the billboard program.

8 II. FACTUAL BACKGROUND

9 IKY was incorporated in Kentucky in 2017 as an exempt organization under Section
10 501(c)(4) of the Internal Revenue Code⁵ and has not registered with the Commission as a
11 political committee. IKY states it is part of the Indivisible movement, which is composed of
12 more than 6,000 local groups and led by a national 501(c)(4) organization, the Indivisible
13 Project.⁶ The project's mission is to "cultivate and lift up a grassroots movement of local groups
14 to defeat the Trump agenda, elect progressive leaders, and realize bold progressive policies."⁷
15 According to screenshots of IKY's website attached to the Complaint, during the summer of
16 2017, IKY engaged in a number of projects relating to healthcare reform, including holding a
17 "Rally for Healthcare for All," organizing phone calls and visits to the offices of Senators Mitch
18 McConnell and Rand Paul, and gathering to attend marches and town halls.⁸

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.

⁸ Compl. at Ex. 4.

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

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

12 The Response provides no specific information on the cost of the billboards, but publicly
13 available information provided by the Complaint indicates that IKY may have spent between
14 \$10,000 and \$20,000 on the billboards. In a news article attached to the Complaint, an IKY
15 spokesperson stated that IKY paid over \$10,000 for the billboards from funds raised by IKY and
16 an “anonymous benefactor.”¹⁵ The article notes that the billboards prompted a viral social media

⁹ Resp. at 2.

¹⁰ Compl. Exs. 1, 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*, Ex. 6.

¹⁵ See Compl., Ex. 5 (citing Thomas Novelly, *Anti-Trump Group Indivisible Kentucky Blasts Mitch McConnell on Billboards*, THE COURIER-JOURNAL (Jul. 27, 2017)). 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

10047474001

1 campaign in which individuals took pictures of the billboards and posted them on social media
2 with the hashtag #DitchMitch2020.¹⁶

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

13 III. LEGAL ANALYSIS

14 A. IKY's Billboards Constitute Independent Expenditures

15 An independent expenditure is an expenditure that expressly advocates the election or
16 defeat of a clearly identified Federal candidate and that is not made in concert or cooperation
17 with, or at the request or suggestion of, the candidate or his or her committee or agent, or a

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.* at Ex. 8.

1 political party committee or its agent.²⁰ In determining whether a communication contains
2 express advocacy, the Commission analyzes the message under 11 C.F.R. § 100.22. A
3 communication expressly advocates the election or defeat of a clearly identified candidate under
4 11 C.F.R. § 100.22(a)²¹ when it uses phrases such as “vote for the President,” “re-elect your
5 Congressman,” or “Smith for Congress,”; or “‘vote Pro-Life’ or ‘vote Pro-Choice’ accompanied
6 by a listing of clearly identified candidates described as Pro-Life or Pro-Choice”; or uses
7 campaign slogans or individual words, “which in context can have no other reasonable meaning
8 than to urge the election or defeat of one or more clearly identified candidate(s), such as posters,
9 bumper stickers, advertisements, etc., which say ‘Nixon’s the One,’ ‘Carter ’76,’ ‘Reagan/Bush,’
10 or ‘Mondale!’”²²

11 IKY’s billboards contained express advocacy under section 100.22(a). The billboard
12 called on readers to “#DitchMitch2020” and included a picture of Senator McConnell, clearly
13 identifying a candidate for re-election to the Senate in 2020. To “ditch” Senator McConnell in
14 2020 is a call to vote against him and defeat his candidacy.²³ Contrary to IKY’s assertion, the
15 presence of other statements on the billboard and on IKY’S website do not alter the nature of the
16 hashtag message as express advocacy. While other statements on the billboards —“WE’VE

²⁰ 52 U.S.C. § 30101(17).

²¹ The term “clearly identified” means “the candidate’s name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as ‘the President,’ ‘your Congressman,’ or the ‘the incumbent,’ or through an unambiguous reference to his or her status as a candidate such as ‘the Democratic presidential nominee’ or ‘the Republican candidate for Senate in the State of Georgia.’” 11 C.F.R. § 100.17 (emphasis omitted).

²² 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as “Smith for Congress” and “Bill McKay in ’94,” have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. *See Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,294-95 (July 6, 1995).

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.)*

1 HAD ENOUGH!' and "YOU MAKE US SICK!"— may also be construed as expressing
2 dissatisfaction with Senator McConnell's position on issues, they do not change the exhortation
3 to "ditch" McConnell in 2020. Accordingly, because IKY's billboards expressly advocate the
4 defeat of a clearly identified federal candidate, they constitute independent expenditures.

5 **B. There is Reason to Believe that IKY Failed to Report Its Independent**
6 **Expenditures**
7

8 Under the Act, persons, including unauthorized political committees, must file disclosure
9 reports when they make independent expenditures over a certain amount. Depending on the
10 amount and timing of the expenditures, a person may have to file a 24- or 48- hour report of
11 independent expenditures. If the person makes independent expenditures aggregating \$10,000 or
12 more within a calendar year with respect to a given election any time up to and including the
13 20th day before the election, the entity must file a 48-Hour Report disclosing those
14 expenditures.²⁴ If the person makes independent expenditures aggregating \$1,000 or more with
15 respect to a given election after the 20th day before the date of an election, but more than 24
16 hours before the date of the election, the person must file a 24-Hour Report disclosing those
17 expenditures.²⁵ In addition, if the person spends in excess of \$250 on independent expenditures
18 during a calendar year with respect to a given election, that person must also file a quarterly
19 report for any quarterly period in which the independent expenditures exceed \$250 and any

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).

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).

1003111412001

1 subsequent quarterly period during that calendar year when additional independent expenditures
2 are made.²⁶

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

10 Because the Commission concludes that that IKY’s billboards containing the phrase
11 “#DitchMitch2020” constituted independent expenditures, and publicly available information
12 indicates that IKY spent over \$10,000 on those communications, it appears that IKY should have
13 filed one or more quarterly and 48-Hour Reports disclosing those expenditures. Contrary to
14 IKY’s assertion,³⁰ the potential amount of expenditures is not *de minimis* when compared to
15 previous similar dismissals involving the failure to report independent expenditures and other
16 reporting violations.³¹ Further, the available information indicates that IKY solicited funds for

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.

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

1 the purpose of furthering the #DitchMitch2020 billboard campaign and should have disclosed the
2 contributions that it received for the purpose of financing those communications.³² While the
3 Complaint alleges that IKY's failure to disclose the contributions was knowing and willful, we
4 do not have specific information that IKY was aware that its conduct was unlawful.³³ Thus, the
5 Commission finds reason to believe that IKY violated 52 U.S.C. § 30104(c) and (g) by failing to
6 report independent expenditures and identify contributors.

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)).