



FEDERAL ELECTION COMMISSION
Washington, DC 20463

DEC 03 2012

Neil P. Reiff, Esq
Sandler, Reiff, Young & Lamb, PC
1025 Vermont Avenue, N.W.
Suite 300
Washington, D.C. 20005

RE: MUR 6533

Dear Mr. Reiff:

On February 28, 2012, the Federal Election Commission notified your clients, Perry Haney and Perry Haney for Congress Committee f/k/a Perry Haney for Congress Exploratory Committee and its treasurer ("Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On November 28, 2012, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe the Committee violated 2 U.S.C. § 434(a). In addition, the Commission voted to dismiss the allegations that Perry Haney violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a) and the Committee violated 2 U.S.C. § 433(a). Accordingly, the Commission closed its file in this matter.

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. 70,426 (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). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Mark Ailen, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 **RESPONDENTS:** Perry Haney MUR 6533
4 Perry Haney for Congress f/k/a Perry Haney
5 for Congress Exploratory Committee
6 and Terrance Snyder in his official capacity
7 as treasurer¹
8

9 **FACTUAL AND LEGAL ANALYSIS**

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11 **I. INTRODUCTION**

12 The Complaint in this matter, filed with the Federal Election Commission by the
13 Colorado Republican Committee, alleges that Perry Haney, a candidate for Congress in
14 Colorado's Sixth Congressional District in 2012, violated the Federal Election Campaign Act of
15 1971, as amended, (the "Act") by failing to timely register and report with the Commission after
16 he became a candidate. The Complaint alleges that Haney triggered the Act's \$5,000 candidate
17 threshold when he contributed \$50,000 to his campaign on July 19, 2011, or at the latest when a
18 video referring to Haney as a candidate was uploaded to the Haney for Congress YouTube
19 channel on August 31, 2011.

20 In a joint response, Respondents assert that Haney was "testing the waters" at the time of
21 the activity at issue and therefore was not subject to the Act's registration and reporting
22 requirements. Respondents state that the YouTube videos were not made available to the public
23 until Haney registered as a candidate with the Commission on December 14, 2011. Accordingly,
24 Respondents ask the Commission to dismiss the Complaint and close the file.

25 For the reasons set forth below, the Commission dismisses the allegation that
26 Respondents failed to timely register and report with the Commission, finds no reason to believe
27 that Respondents filed untimely disclosure reports with the Commission, and closes the file.

¹ The Commission separately notified Perry Haney for Congress and Perry Haney for Congress Exploratory Committee. On July 10, 2012, Perry Haney for Congress amended its Statement of Organization to name Terrance Snyder as treasurer.

II. ANALYSIS

An individual is deemed to be a "candidate" for purposes of the Act if he or she receives contributions or makes expenditures in excess of \$5,000. 2 U.S.C. § 431(2). Once an individual meets the \$5,000 threshold, a candidate has 15 days to designate a principal campaign committee by filing a Statement of Candidacy with the Commission. 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a). The principal campaign committee must then file a Statement of Organization within ten days of its designation, *see* 2 U.S.C. § 433(a), and must file disclosure reports with the Commission in accordance with 2 U.S.C. § 434(a) and (b).

The Commission has established limited exemptions from these thresholds, which permit an individual to test the feasibility of a campaign for federal office without becoming a candidate under the Act. Commonly referred to as "testing the waters" exemptions, Sections 100.72 and 100.131 of the Commission's regulations exclude from the definitions of "contribution" and "expenditure" funds received and payments made to determine whether an individual should become a candidate.² 11 C.F.R. §§ 100.72, 100.131. "Testing the waters" activities include, but are not limited to, payments for polling, telephone calls, and travel. 11 C.F.R. §§ 100.72(a), 100.131(a). An individual who is "testing the waters" need not register or file disclosure reports with the Commission unless and until the individual subsequently decides to run for federal office or conducts activities that indicate he or she has decided to become a candidate. *See id.*; Advisory Op. 1979-26 (Grassley).

² The Commission has emphasized the narrow scope of these exemptions to the Act's disclosure requirements. *See Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities*, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) ("The Commission has, therefore, amended the rules to ensure that the 'testing the waters' exemptions will not be extended beyond their original purpose. Specifically, these provisions are intended to be limited exemptions from the reporting requirements of the Act . . .").

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1 All funds raised and spent for "testing the waters" activities are, however, subject to the
2 Act's limitations and prohibitions. 11 C.F.R. §§ 100.72(a), 100.131(a). Once an individual
3 begins to campaign or decides to become a candidate, funds that were raised or spent to "test the
4 waters" apply to the \$5,000 threshold for qualifying as a candidate, and the candidate must
5 register with the Commission. *Id.* After an individual reaches candidate status, all reportable
6 amounts from the beginning of the "testing the waters" period must be disclosed on the first
7 financial disclosure report filed by the candidate's committee, even if the funds were received or
8 expended prior to the current reporting period. *See* 11 C.F.R. §§ 101.3, 104.3(a), 104.3(b).³

9 Certain activities may indicate that the individual has decided to become a candidate and
10 is no longer "testing the waters." Commission regulations set out five non-exclusive factors to
11 be considered in determining whether an individual has decided to become a candidate: whether
12 the potential candidate is (1) using general public political advertising to publicize his or her
13 intention to campaign for federal office; (2) raising funds in excess of what could reasonably be
14 expected to be used for exploratory activities or undertaking activity designed to amass
15 campaign funds that would be spent after he or she becomes a candidate; (3) making or
16 authorizing written or oral statements that refer to him or her as a candidate for a particular
17 office; (4) conducting activities in close proximity to the election or over a protracted period of
18 time; or (5) taking action to qualify for the ballot under state law. 11 C.F.R. §§ 100.72(b),
19 100.131(b). These regulations seek to draw a distinction between activities directed to an
20 evaluation of the feasibility of one's candidacy and conduct signifying that a decision to become
21 a candidate has been made. *See* Advisory Op. 1981-32 (Askew).

³ An individual does not become a candidate solely by voluntarily registering and reporting with the Commission, nor is such individual or the individual's committee required to file all disclosure reports under the Act and Commission regulations, unless the individual becomes a candidate under the Act and Commission regulations. 11 C.F.R. § 104.1(b).

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During Haney's asserted "testing the waters" period, he loaned \$1,000, \$50,000, and \$50,000 to his principal campaign committee, Perry Haney for Congress ("PHFC"), on June 6, July 19, and September 30, 2011, respectively. See PHFC 2011 Year End Report.

Three videos regarding Haney found on YouTube meet the description of the video described in the Complaint, that is, they contain the statement "Uploaded by HaneyForCongress on Aug 31, 2011."⁴ These videos begin with screen shots of statements attributed to "Perry's Mother" and Haney campaign website addresses. Haney's mother then speaks about Haney's experiences growing up, and the videos each end with another screen shot including a reference to Haney's "campaign" website addresses, as set forth below:

	Opening Screen Shot	Ending Screen Shot
Video #1 ⁵	Perry's Mother on Why He Became a Chiropractor www.sendachiropractortocongress.com www.perryhaneyforcongress.com	Send a Chiropractor to Congress! www.SendAChiropractorToCongress.com
Video #2 ⁶	Perry's Mother: "Perry Worked His Way Through College With Union Jobs" www.perryhaneyforcongress.com	Dr. Perry Haney www.perryhaneyforcongress.com
Video #3 ⁷	Perry's Mother: "Perry Grew Up In Hard Times in So. Colorado" www.perryhaneyforcongress.com	Dr. Perry Haney www.perryhaneyforcongress.com

The videos uploaded to PHFC's YouTube channel on August 31, 2011, contain clear references to Haney as a candidate by including the campaign website addresses

⁴ PHFC's YouTube channel, <http://www.youtube.com/user/HaneyForCongress>, see Resp. at 5, has been discontinued.

⁵ The screen below the video contains the text "Help make Dr. Haney the first chiropractor in Congress!" See <http://www.youtube.com/watch?v=dwl1nn8-ABJ>.

⁶ <http://www.youtube.com/watch?v=Adt28thI3Mk>.

⁷ <http://www.youtube.com/watch?v=-GYDz6iSYAw>.

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1 www.perryhaneyforcongress.com and www.sendachiropractortocongress.com.⁸ In a sworn
2 declaration, however, Respondents aver that the videos were uploaded initially in “unlisted”
3 form available by a private hyperlink only to “a small group of advisors, interested election
4 officials, a few donors and campaign supporters active in the exploratory committee” in order “to
5 obtain their reaction and advice.” Resp. at 3; Bradley Scott Revare Decl. ¶¶ 4-6 (Apr. 11,
6 2012).⁹ The “purpose of sharing the video with these people was to obtain their reaction and
7 advice just like pre-viewing a television advertisement before it is aired.” Revare Decl. ¶ 7.
8 Respondents do not state how many individuals comprised the “small group” that was provided
9 access to Haney’s campaign videos, but the available information does not indicate that the
10 videos were available without restriction before December 2011.

11 On December 14, 2011, Haney issued a press release announcing his campaign and filed
12 with the Commission a Statement of Candidacy for the Sixth District of Colorado, designating
13 PHFC as his principal campaign committee. On the same day, PHFC filed a Statement of
14 Organization with the Commission. On February 1, 2012, PHFC filed an amended 2011 Year
15 End Report covering June 6, 2011, through December 31, 2011,¹⁰ disclosing \$111,975 in receipts
16 (\$101,000 of which was loans from the candidate) and \$78,893 in disbursements during Haney’s
17 asserted “testing the waters” period.

⁸ The websites have been discontinued and are unavailable except for limited portions of www.perryhaneyforcongress.com, which do not contain statements suggesting that Haney was acting as a candidate before he registered with the Commission in December 2011.

⁹ Revare describes himself as the supervisor of “the creation of the Perry Haney exploratory and campaign website, YouTube account and the content placed thereon.” Revare Decl. ¶ 1.

¹⁰ PHFC initially filed a 2011 Year End Report on January 31, 2012, covering September 1 to December 31, 2011.

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1 The Commission concludes that the August 2011 YouTube postings do not indicate that
2 Haney had decided to become a candidate in advance of the date that is reflected in Respondents'
3 filings with the Commission.¹¹ Under these circumstances, the mere preparation, rather than
4 dissemination, of campaign materials in advance of a declaration of candidacy does not by itself
5 provide adequate evidence to support a reason to believe that Haney decided to become a
6 candidate at that time. It is the Commission's view that the purpose identified in the Response
7 for creating the videos containing Haney's statements as a candidate — to prepare for a
8 campaign if one were to ensue — is consistent with testing the waters activities. See 11 C.F.R.
9 §§ 100.72(a), 100.131(a).

10 The Commission is aware, however, of other statements that Haney is reported to have
11 made indicating that he became a candidate earlier than the December 14, 2011 date he reported
12 on his Statement of Candidacy. See, e.g., *Campaigning for the Chiropractic Cause — Perry*
13 *Haney, DC, MD, Sets His Sights on a Congressional Seat and a Chance To Build a Brighter*
14 *Future for Health Care*, DYNAMIC CHIROPRACTIC, Nov. 18, 2011, available at
15 <http://www.dynamicchiropractic.com/mpacms/dc/article.php?id=55620>. Even if Haney's
16 candidacy was triggered by these statements, however, the Commission is not aware of any
17 statement indicating that he was a candidate early enough so that his principal campaign
18 committee was required to file a disclosure report prior to the 2011 Year End Report. Under
19 these circumstances, because Respondents timely filed their initial disclosure report, the
20 Commission dismisses as a matter of prosecutorial discretion the allegation that Perry Haney did
21 not timely register with the Commission in violation of 2 U.S.C. § 432(e)(1) and 11 C.F.R.

¹¹ The amount of receipts and disbursements of PHFC during Haney's asserted "testing the waters" period, including the \$101,000 that Haney loaned to PHFC, do not alter that conclusion.

1 § 101.1(a), and the allegation that Perry Haney for Congress f/k/a Perry Haney for Congress
2 Exploratory Committee and Terrance Snyder in his official capacity as treasurer failed to timely
3 file a Statement of Organization in violation of 2 U.S.C. § 433(a). *See Heckler v. Chaney*,
4 470 U.S. 821 (1985). And, because Respondents timely filed the 2011 Year End Report, the
5 Commission finds no reason to believe that Perry Haney for Congress f/k/a Perry Haney for
6 Congress Exploratory Committee and Terrance Snyder in his official capacity as treasurer
7 violated 2 U.S.C. § 434(a).

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