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FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6974

DATE COMPLAINT FILED: October 22, 2015

DATE OF NOTIFICATION: October 27, 2015

RESPONSE RECEIVED: December 17, 2015

DATE ACTIVATED: January 27, 2016

EXPIRATION OF SOL: April 9, 2020
(earliest)

ELECTION CYCLE: 2016

COMPLAINANT:

Matthew Bernstein

RESPONDENTS:

Foundation for a Secure and Prosperous America
and Susan Neithamer in her official capacity as
treasurer

RELEVANT STATUTES AND
REGULATION:

52 U.S.C. § 30101(17)

52 U.S.C. § 30102

52 U.S.C. § 30103

52 U.S.C. § 30104(a), (g)

11 C.F.R. § 100.22(a), (b)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in this matter alleges that the Foundation for a Secure and Prosperous America and Susan Neithamer in her official capacity as treasurer ("FSPA"), violated the Federal Election Campaign Act of 1974, as amended (the "Act"), by failing to report independent expenditures or to register and report as a political committee after disbursing over \$1 million for advertisements regarding Senator Rand Paul's position on then-ongoing negotiations between the United States and Iran. The advertisements aired while Paul was a candidate for the Republican Party's 2016 presidential nomination. We conclude that the referenced communications do not

1 constitute independent expenditures, and accordingly recommend that the Commission find no
2 reason to believe that FSPA violated the Act, and close the file.

3 **II. FACTUAL BACKGROUND**

4 FSPA was formed in 1997.¹ It is registered with the Internal Revenue Service as a non-
5 profit 501(c)(4) organization,² and is not registered with the Commission as a political
6 committee. It describes its mission as “informing the public and opinion leaders as to how we
7 can best assure that America remains secure and prosperous.”³ In 2015, President Obama’s
8 administration engaged in negotiations with Iran regarding the possibility of modifying sanctions
9 in exchange for oversight of Iran’s nuclear program, and Congress publicly weighed various
10 legislative actions. FSPA created a number of television advertisements and online videos that
11 highlighted Senator Rand Paul’s previous statements regarding the appropriate response to
12 developments in Iran’s nuclear program.

13 Rand Paul has been a sitting Senator from Kentucky since 2011. He currently serves on a
14 number of committees, including Homeland Security and Government Affairs as well as Foreign
15 Relations.⁴ Paul was also a candidate for the 2016 Republican presidential nomination.
16 According to its Response, FSPA and others considered Paul’s views (and potential votes) on the
17 negotiations with Iran as particularly important, especially in light of his perceived willingness to
18 stand apart from his Republican colleagues on such matters.⁵ FSPA asserts that it “sought to

¹ Resp. at 1 (Dec. 17, 2015).

² *Id.*

³ *Id.*

⁴ See U.S. SENATOR RAND PAUL OF KENTUCKY, <https://www.paul.senate.gov/about-rand/meet>.

⁵ Resp. at 3.

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1 influence the negotiations — and congressional approval of them — by persuading Senator Paul
2 to take a tougher stance on the President's diplomatic efforts and to reject the deal when it came
3 to a vote in the Senate.”⁶

4 Paul declared his candidacy for President during a speech in Kentucky on April 7, 2015.
5 In the four days that followed, he visited the early primary states of New Hampshire, South
6 Carolina, and Iowa. From April 8 through April 12, 2015, FSPA broadcast “Against Sanctions,”
7 one of the television advertisements at issue in this matter, nationally with particular focus on the
8 states in which Paul was making appearances.⁷ FSPA aired a second television advertisement,
9 “Consequences,” from August 7 through August 14, 2015, after announcing that it would “run in
10 heavy rotation on cable and satellite TV” in Iowa and New Hampshire.⁸ Paul made numerous
11 appearances in those states in August 2015.

12 FSPA's two television advertisements asserted that Paul supported President Obama's
13 negotiations with Iran, stressed that the possibility of nuclear weapons in Iran posed a grave
14 threat, told viewers that Paul was “wrong and dangerous,” and exhorted them to “tell him to stop
15 siding with Obama.”⁹ FSPA asserts that the distribution of the first advertisement, “Against
16 Sanctions,” “matched the locations where Senator Paul would be — and who he would be
17 listening to — in April.”¹⁰

⁶ *Id.* at 4. The Iran Nuclear Agreement Review Act of 2015 provided for Congressional review of any proposed agreement that the Obama administration reached with Iran. *See* Pub. L. No. 114-17, 129 Stat. 201.

⁷ Compl. at 2 (Oct. 22, 2015).

⁸ *Id.* at 3.

⁹ Resp. at 5-7.

¹⁰ *Id.* at 5.

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1 "Against Sanctions" contains the following content:¹¹

Audio	Video
Narrator: The Senate is considering tough new sanctions on Iran.	Text: "Senate Considering Tough New Negotiations on Iran"
President Obama says he'll veto them. And Rand Paul is standing with him.	Images of Obama and Paul, with launching missiles in background. Text: "He'll veto them. Rand Paul is Standing with Him."
Rand Paul supports Obama's negotiations with Iran.	Images of Obama and Paul with protestors in the background. Text: "Rand Paul Supports Obama's Negotiations with Iran."
But he doesn't understand the threat.	Text: "He doesn't understand the THREAT."
Paul: Our national security is not threatened by Iran having one nuclear weapon.	Image of Paul speaking. Text: "Our National Security is NOT THREATENED by Iran HAVING ONE NUCLEAR WEAPON"
Narrator: Rand Paul is wrong . . . and dangerous.	Images of protestors. Text: "RAND PAUL IS WRONG . . . and DANGEROUS."
Tell him to stop siding with Obama.	Images of Paul, Obama, and protestors. Text: "Tell him to STOP Siding with Obama."
Because even one Iranian bomb would be a disaster.	Images of explosions. Text: "One Iranian BOMB . . . Would be a DISASTER."
	Text: "PAID FOR BY FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA."

2 FSPA aired the second television advertisement, "Consequences," during the August
 3 2015 recess and focused its ad buy on Iowa and New Hampshire.¹² FSPA acknowledges in its
 4 Response that it targeted places "where Senator Paul would be" when the advertisement aired

¹¹ See FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA, <http://www.secureandprosperous.com/sanctions.html>.

¹² Compl. at 3.

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1 and asserts that during this time “public and congressional debate over the vote on the final deal
 2 with Iran intensified.”¹³

3 “Consequences” contains the following content:¹⁴

Audio	Video
Narrator: Rand Paul supported President Obama’s negotiations with Iran.	Images of Paul and Obama speaking. Text: “RAND PAUL SUPPORTED NEGOTIATIONS WITH IRAN.”
Paul: Well, I’m kind of one of the Senators who’s in favor of negotiations with Iran. I’ve been a big proponent of negotiation.	Video Clip of Paul interview. Text: “I’m kind of one of the senators in favor of negotiations with Iran. Video Clip of Paul interview. Text: “I’ve been a big proponent of negotiation.”
Narrator: Actions have consequences. Now Obama has made a nuclear deal with Iran, lifting the ballistic missile embargo and giving them a path to nuclear weapons. Call Rand Paul. Tell him to stop siding with Obama and to stand up to Iran.	Text: ACTIONS HAVE CONSEQUENCES. Images of Obama speaking, followed by footage of protestors. Text: “Death to America.” Images of missile truck and launch. Text: “LIFTING MISSILE EMBARGO Source: NBC’s ‘Meet the Press,’ 7/9/2015.” Image of Paul and Obama. Text: “Stop Supporting Obama’s Negotiations AND STOP THIS DEAL Call Sen. Rand Paul 202-224-4343 Text: PAID FOR BY FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA

4 FSPA maintains a YouTube channel that currently displays six videos, all posted between
 5 April 9, 2015 and August 6, 2015.¹⁵ Two of them appear to be identical to the television

¹³ Resp. at 6.

¹⁴ See FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA, <http://www.secureandprosperous.com/consequences.html>.

¹⁵ See Foundation for a Secure and Prosperous America, a Secure and Prosperous America, YOUTUBE, https://www.youtube.com/channel/UCzmVgN1_QZOzk11UsDlqVZA (last visited Apr. 25, 2016). The online

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1 advertisements described above. The remaining videos range from 10 to 57 seconds long, and
2 each contains the same thematic content, and similar or identical images and language, as the
3 television advertisements.

4 The Complaint describes FSPA as a "PAC" and alleges that the television advertisements
5 and online videos "represent expenditures which should have been reported to the FEC."¹⁶ The
6 Complaint asserts that FSPA spent more than \$1 million on the two television advertisements.¹⁷
7 The Complaint further alleges that FSPA solicited donations from the public during 2015.¹⁸ As
8 support for the alleged violations of the Act, the Complaint quotes FSPA's website regarding the
9 ad buys for "Against Sanctions" and "Consequences," notes that the website contains a
10 solicitation for contributions, and provides a list of videos featured on FSPA's YouTube channel.

11 III. LEGAL ANALYSIS

12 A. There is No Reason to Believe that FSPA's Television Advertisements were 13 Independent Expenditures

14 The Complaint alleges that FSPA's television advertisements were expenditures that
15 should have been reported to the FEC. "Independent expenditures" are expenditures made by a
16 person for a communication that "expressly advocates" the election or defeat of a clearly

videos are entitled "Dangerous," "In His Own Words," "Against Sanctions - 2," "Consequences," "Tick-Tick," and "Tick-Tick - Snapchat." According to the Complaint, the website previously displayed a seventh video, "Sanctions," which was removed due to a copyright claim by a photographer. Compl. at 3. The Response asserts that this video was "identical to the 'Against Sanctions' ad that ran on television, with the exception that one photographic image of Senator Paul was replaced in the version currently available online." Resp. at 8 n.4.

¹⁶ Compl. at 1.

¹⁷ *Id.*

¹⁸ *Id.* at 3. The Complaint includes what is represented as quoted language from FSPA's website providing instructions for making donations online and by mail, as well as a disclaimer providing that donations to FSPA are not tax-deductible or limited by law, and that tax rules do not require the disclosure of donors. *Id.* FSPA's website does not currently provide donation instructions, but it does include the disclaimer as quoted in the Complaint. See FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA, <http://www.secureandprosperous.com/> (last visited Apr. 20, 2016).

1 identified candidate that is not made in cooperation, consultation, or concert with, or at the
2 request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a
3 political party committee or its agents.¹⁹

4 A communication "expressly advocates" the election or defeat of a clearly identified
5 candidate when, among other things, it contains campaign slogans or individual words that "in
6 context can have no other reasonable meaning than to urge the election or defeat of one or more
7 clearly identified candidates."²⁰ In addition, a communication contains express advocacy if,
8 when taken as a whole and with limited reference to external events, it "could only be interpreted
9 by a reasonable person as containing advocacy of the election or defeat of one or more clearly
10 identified candidates," because it contains an "electoral portion" that is "unmistakable,
11 unambiguous, and suggestive of only one meaning" and "reasonable minds could not differ as to
12 whether it encourages actions to elect or defeat one or more clearly identified candidates or
13 encourages some other kind of action."²¹

14 The advertisements that FSPA aired on television, "Against Sanctions," and
15 "Consequences," do not contain express advocacy. Although it is apparent that FSPA
16 considered Paul's presidential campaign schedule when deciding where to target its messages,
17 focusing its ad buys on the early primary states where Paul was making appearances at the time
18 the advertisements aired, the advertisements themselves did not reference the presidential

¹⁹ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16. Independent expenditures must be reported to the Commission in accordance with 52 U.S.C. § 30104.

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

²¹ 11 C.F.R. § 100.22(b); *see also* Express Advocacy; Indep. Expenditures; Corp. and Labor Org. Expenditures, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) (explanation and justification) ("Express Advocacy E&J") ("Communications discussing or commenting on a candidate's character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.").

1 election or urge the viewer to vote in any manner. They contain no “electoral portion” at all, let
2 alone an “unmistakable, unambiguous” one.²² Instead, the advertisements encourage the viewer
3 to attempt to influence Paul’s views and votes on the Iran sanctions negotiations. Particularly in
4 light of the public debate regarding the appropriate congressional response to the Obama
5 administration’s ongoing negotiations with Iran, one could reasonably conclude that FSPA
6 intended for viewers to influence Paul’s actions as a sitting senator. Because the advertisements
7 did not directly or implicitly urge the election or defeat of Paul or any other candidate, and
8 because they can reasonably be interpreted as instead urging viewers to try to influence potential
9 legislation,²³ they did not contain express advocacy and FSPA was not required to report them as
10 independent expenditures.²⁴

11 **B. There is No Reason to Believe that FSPA’s Internet Videos were Independent**
12 **Expenditures**

13 The Complaint also asserts that FSPA’s online videos were expenditures that should have

²² See 11 C.F.R. § 100.22(b)(1).

²³ See, e.g., First Gen. Counsel’s Rpt. at 9, MUR 6729 (Checks and Balances for Econ. Growth) (advertisement criticizing candidate’s alignment with President Obama on certain issues not express advocacy because it “could reasonably be interpreted to encourage action to influence relevant legislation or other non-election-related activity”); Factual and Legal Analysis at 8, MUR 6122 (Nat’l Ass’n of Home Builders) (communication sent one week before election, highlighting candidate’s voting record and encouraging readers to “thank” candidate not express advocacy because it could reasonably be viewed as praising candidate’s “positions and encouraging him to maintain those positions in the future, and not as encouraging the reader to vote for or against [him] in the upcoming election”); Factual and Legal Analysis at 5-6, MUR 5854 (Lantern Project) (ads criticizing legislator’s votes on particular issues in months preceding general election were not express advocacy because they could reasonably be viewed as expressing the sponsoring organization’s view on the matter, they did not mention the legislator’s candidacy or political opponent, and they did not urge the viewer to take any action regarding the upcoming election).

²⁴ The Complaint alleges that the videos were “expenditures” that should have been reported to the Commission. Our analysis focuses on whether the videos qualify as “independent expenditures,” but it is likewise apparent that the videos do not meet that Act’s definition of “electioneering communications,” which also must be reported to the Commission. Such communications must be made via “broadcast, cable, or satellite” within 60 days before a general election or 30 days before a primary election. 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29(a). The first primary election took place in Iowa on February 1, 2016, long after the last television advertisement was aired in August 2015. See, e.g., Compl. at 3 (quoting FSPA’s website regarding the ad buy for “Consequences,” set to run from August 7-14, 2015).

1 been reported to the Commission. As is the case with FSPA's television advertisements, the
2 online videos contain no campaign slogans or other "individual words" — or an "electoral
3 portion" — that could reasonably be regarded as "unmistakable, unambiguous, and suggestive
4 of only one meaning," the election or defeat of a federal candidate.²⁵ They do not suggest that
5 the viewer vote in a particular manner or even reference Paul's candidacy for President. Instead,
6 like the television advertisements, the YouTube videos can reasonably be interpreted as
7 depicting a legislator's opinion and past statements regarding an issue of public interest, and
8 urging the viewer to attempt to influence that opinion.

9 For the same reasons that FSPA's television advertisements do not contain express
10 advocacy, FSPA's closely related internet videos likewise do not contain it. The internet videos
11 therefore do not meet the Act's definition of independent expenditures and FSPA was not
12 required to report them to the Commission. Further, even if the internet videos had contained
13 express advocacy, those that did not air on television would likely be exempt from the
14 Commission's independent expenditure reporting requirements under the Commission's
15 regulations, which exempt the costs associated with uncompensated "internet activity" from the
16 definition of "expenditure."²⁶

²⁵ 11 C.F.R. § 100.22(b); *see also* Express Advocacy E&J, 60 Fed. Reg. at 35,295.

²⁶ *See* 11 C.F.R. § 100.155. Although the language of the exemption focuses specifically on costs related to activities, equipment, and services used to access or distribute information online, the Commission determined in Advisory Opinion 2008-10 (VoterVoter.com) that the cost of creating an internet communication falls within the scope of the exemption "as long as the creator is not also purchasing TV airtime for the ad he or she created." Advisory Op. 2008-10 at 7.

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1 **C. There is No Reason to Believe that FSPA is a Political Committee**

2 The Complaint also appears to allege that FSPA violated the Act by failing to register as
3 a political committee with the Commission.²⁷ The Act defines a “political committee” as any
4 committee, club, association or other group of persons that receives “contributions” or makes
5 “expenditures” for the purpose of influencing a federal election which aggregate in excess of
6 \$1,000 during a calendar year.²⁸ In *Buckley*, the Supreme Court concluded that the term
7 “political committee” encompassed only organizations “that are under the control of a candidate
8 or the major purpose of which is the nomination or election of a candidate.”²⁹ The Commission
9 interprets the Court’s “major purpose” test as limiting political committee status under the Act to
10 those organizations that have not only crossed the \$1,000 threshold but also have federal
11 campaign activity as their major purpose.³⁰ Political committees must organize, register, and
12 report receipts and disbursements to the Commission in accordance with 52 U.S.C. §§ 30102,
13 30103, and 30104(a).

14 FSPA contends that it is not a political committee within the meaning of the Act,³¹ and
15 the record provides no evidence to the contrary. As addressed above, FSPA’s videos should not
16 be considered “expenditures” made for the purpose of influencing a federal election. And
17 although FSPA solicits donations, the solicitation language highlighted by the Complaint does

²⁷ See, e.g., Compl. at 1 (referring to FSPA as a “PAC” and an “Independent Expenditure PAC.”); *id.* at 3 (noting that FSPA’s website includes a solicitation for donations). The Complaint seems generally to treat FSPA as an existing political committee and to focus on allegations that its advertisements should have been reported, however FSPA’s Response asserts that “[t]he Complaint’s primary allegation is that FSPA should have registered and reported as a political committee” when it ran the advertisements concerning Paul. Resp. at 1.

²⁸ 52 U.S.C. 30101(4)(A).

²⁹ *Buckley*, 424 U.S. at 79; see also *Mass. Citizens for Life*, 479 U.S. at 262.

³⁰ Political Committee Status, 72 Fed. Reg. 5595, 5597, 5601 (Feb. 7, 2007) (explanation and justification).

³¹ Resp. at 11-15.

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1 not suggest that any such donations should be treated as contributions: The Complaint states that
2 FSPA's website provides information regarding how to donate online or via mail, along with a
3 disclaimer stating that "Contributions to FSPA are not deductible as charitable contributions.
4 There is no limit on the amount that can be contributed, and there is no public disclosure under
5 the tax rules of the identity of donors."³² This language provides no basis for concluding that
6 FSPA solicited or received contributions for the purpose of influencing a federal election.³³
7 There is no available information to suggest that FSPA met the \$1,000 threshold through other
8 means.³⁴ Further, there is no basis to conclude that FSPA's "major purpose" is federal campaign
9 activity. We therefore recommend that the Commission find no reason to believe that FSPA
10 violated the Act by failing to register and report as a political committee.

11 IV. CONCLUSION

12 For the foregoing reasons, we recommend that the Commission find no reason to believe
13 that Foundation for a Secure and Prosperous America and Susan Neithamer in her official
14 capacity as treasurer violated the Act, and close the file.

15 V. RECOMMENDATIONS

- 16
17 1. Find no reason to believe that Foundation for a Secure and Prosperous America
18 and Susan Neithamer in her official capacity as treasurer violated 52 U.S.C.
19 §§ 30102, 30103, or 30104.
20
21 2. Approve the attached Factual and Legal Analysis;
22

³² Compl. at 3. FSPA's website does not currently appear to provide donation instructions, but it does contain the disclaimer as alleged in the complaint. See FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA, <http://www.secureandprosperous.com/> (last visited Apr. 20, 2016).

³³ See also Resp. at 14 (asserting that FSPA received no funds that would qualify as "contributions" within the meaning of the Act, and that the solicitation language on FSPA's website does not "suggest[] that funds given to FSPA will be used to support or defeat candidates or otherwise qualify as regulated 'contributions'").

³⁴ FSPA has not filed any disclosures with the Commission since 2010, when it reported a total of \$111,406.80 in independent expenditures made to support two federal candidates. See FSPA, FEC Form 5, Report of Indep. Expenditures and Contributions (Oct. 15, 2010).

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