

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

FIRST GENERAL COUNSEL'S REPORT

MUR: 7261
DATE COMPLAINT FILED: July 10, 2017
DATE OF NOTIFICATION: July 13, 2017
LAST RESPONSE RECEIVED: September 1, 2017
DATE ACTIVATED: October 4, 2017

EXPIRATION OF SOL: June 13, 2022
ELECTION CYCLE: 2018

COMPLAINANT: Patricia A. Noonan

RESPONDENTS: Levi for Colorado and Paula Sandoval in her
official capacity as treasurer
Levi Tillemann

RELEVANT STATUTES AND 52 U.S.C. § 30102(e)
REGULATIONS: 52 U.S.C. § 30103(a)
52 U.S.C. § 30104(a)
11 C.F.R. § 100.72
11 C.F.R. § 100.131

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Complaint alleges that Levi Tillemann and his authorized committee, Levi for Colorado and Paula Sandoval in her official capacity as treasurer ("the Committee"), violated the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations by failing to file disclosure reports with the Commission after Tillemann became a candidate. The Complaint alleges that Tillemann's public statements and social media posts show that he became a candidate before he filed his Statement of Candidacy on July 9, 2017. Tillemann and

1 the Committee argue that he was merely “testing the waters” before he decided to become a
2 candidate.

3 The available information indicates that Tillemann became a candidate by May 24, 2017,
4 and he therefore should have filed his Statement of Candidacy by June 8, 2017. Consequently,
5 the Committee filed its Statement of Organization late and failed to file a 2017 July Quarterly
6 Report. However, based on the circumstances of this case, we recommend that the Commission
7 dismiss the allegations that Respondents violated 52 U.S.C. §§ 30102(e), 30103(a), and
8 30104(a).

9 **II. FACTUAL BACKGROUND**

10 Levi Tillemann is a Democratic candidate for Colorado’s Sixth Congressional District.¹
11 Tillemann filed his Statement of Candidacy with the Commission on July 9, 2017, and
12 designated Levi for Colorado as his authorized committee.² The Committee filed its Statement
13 of Organization the next day.³ The Committee had raised more than \$5,000 by May 24, 2017,
14 and spent more than \$5,000 by June 6, 2017.⁴

15 The Complaint implicitly argues that Tillemann’s public statements before he declared
16 his candidacy show that he had already decided to run for Congress and therefore could not rely
17 on the Act’s “testing the waters” exemptions.⁵ In support, the Complaint cites five examples of

¹ Response at 1-2 (Sept. 5, 2017).

² See FEC Form 2, Levi for Colorado (July 9, 2017).

³ See FEC Form 1, Levi for Colorado (July 10, 2017).

⁴ See 2017 October Quarterly Report, Levi for Colorado (Oct. 15, 2017).

⁵ The Complaint was signed and notarized on July 7, 2017, before the Committee filed its Statement of Organization and Tillemann filed his Statement of Candidacy, and alleges violations against the Levi for Colorado Exploratory Committee. See Complaint at 2 (July 10, 2017). According to the Committee’s 2017 October Quarterly Report, it and the Exploratory Committee are the same entity. 2017 October Quarterly Report at 5, Levi for Colorado.

1 activities that show Tillemann decided to become a candidate earlier than July 9, 2017:
2 statements on the Committee's Crowdpac page;⁶ similar statements on the Committee's official
3 website;⁷ statements Tillemann made on his personal Twitter account;⁸ content on Tillemann's
4 YouTube channel;⁹ and paid advertisements on Facebook allegedly supporting Tillemann's
5 candidacy.¹⁰

6 Respondents deny any violation occurred. They contend that none of Tillemann's
7 statements indicate that he had decided to run for Congress before June 27, 2017.¹¹ They also
8 argue that while the Committee did pay to "boost" its Facebook posts, it did so for "polling"
9 purposes, which is consistent with testing the waters activities.¹² Respondents explain that they
10 were measuring support for Tillemann by tracking "likes" on Facebook. As to the YouTube
11 videos, Respondents state that the Committee expended no money to create them, and they do
12 not contain any mention of Tillemann's election or candidacy. Finally, they argue that
13 Respondents complied with all filing requirements, and would report all testing the waters
14 activity in the Committee's October Quarterly Report.¹³

⁶ Compl. at 1, Ex. D. Crowdpac is a non-partisan, for-profit corporation created to help voters find and support candidates who share their priorities and positions on issues and donate to those candidates. *See* Advisory Op. 2014-17 (Crowdpac).

⁷ Compl. at Ex. E.

⁸ *Id.* at Ex. C.

⁹ *Id.* at Ex. B.

¹⁰ *Id.* at Ex. A.

¹¹ Resp. at 1-2.

¹² *Id.* at 2.

¹³ *Id.* at 3. The Committee filed its 2017 October Quarterly Report on October 15, 2017, covering its activity from May 18, 2017, through September 30, 2017. The Response was filed before the Committee's October Quarterly Report was due.

1 **III. LEGAL ANALYSIS**

2 According to the Act, an individual becomes a candidate if: (a) such individual receives
3 contributions or makes expenditures in excess of \$5,000, or (b) such individual gives his or her
4 consent to another person to receive contributions or make expenditures on behalf of such
5 individual and if such person has received such contributions or has made such expenditures in
6 excess of \$5,000.¹⁴ Once the \$5,000 threshold has been met, the candidate has fifteen days to
7 designate a principal campaign committee by filing a Statement of Candidacy with the
8 Commission.¹⁵ The principal campaign committee must file a Statement of Organization within
9 ten days of its designation,¹⁶ and must file disclosure reports with the Commission in accordance
10 with 52 U.S.C. § 30104(a) and (b).¹⁷

11 The Commission has established limited “testing the waters” exemptions that permit an
12 individual to test the feasibility of a campaign for federal office without becoming a candidate
13 under the Act.¹⁸ These exemptions exclude from the definition of “contribution” and
14 “expenditure” those funds received and payments made solely to determine whether an
15 individual should become a candidate.¹⁹ These regulations seek to draw a distinction between
16 activities directed to an evaluation of the feasibility of one’s candidacy and conduct signifying

¹⁴ 52 U.S.C. § 30101(2).

¹⁵ *Id.* § 30102(e)(1); 11 C.F.R. § 101.1(a).

¹⁶ *See* 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

¹⁷ *See, e.g.,* Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak); Factual and Legal Analysis at 5, MUR 6449 (Jon Bruning); Factual and Legal Analysis at 2, MUR 5363 (Alfred C. Sharpton).

¹⁸ *See* 11 C.F.R. §§ 100.72, 100.131; Factual and Legal Analysis at 7, MUR 6775 (Hillary Clinton); Factual and Legal Analysis at 8, MUR 6776 (Niger Innis); Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak).

¹⁹ *See* 11 C.F.R. §§ 100.72(a), 100.131(a).

1 that a decision to become a candidate has been made.²⁰ Testing the waters activities include, but
2 are not limited to, payments for polling, telephone calls, and travel, and only funds permissible
3 under the Act may be used for such activities.²¹ An individual who is testing the waters need not
4 register or file disclosure reports with the Commission unless and until the individual
5 subsequently decides to run for federal office.²²

6 The testing the waters exemption is not available to individuals who have made a
7 decision to become a candidate.²³ Commission regulations set forth a non-exhaustive list of
8 activities that indicate that an individual is no longer testing the waters and has decided to
9 become a candidate. Such indicia include: (1) using general public political advertising to
10 publicize his or her intention to campaign for federal office; (2) raising funds in excess of what
11 could reasonably be expected to be used for exploratory activities or undertaking activity
12 designed to amass campaign funds that would be spent after he or she becomes a candidate;
13 (3) making or authorizing written or oral statements that refer to him or her as a candidate for a
14 particular office; (4) conducting activities in close proximity to the election or over a protracted
15 period of time;²⁴ and (5) taking action to qualify for the ballot under state law.²⁵

²⁰ See Advisory Op. 1981-32 (Askew) ("AO 1981-32").

²¹ *Id.*

²² *Id.*; see also Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) ("AO 2015-09").

²³ See AO 2015-09 at 5; see also Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (exemption "explicitly limited 'solely' to activities designed to evaluate a potential candidacy").

²⁴ The Commission has advised that there is no specific time limit for such activities, and the length of time spent testing the waters is but one factor in determining whether an individual becomes a candidate. AO 2015-09 at 6.

²⁵ 11 C.F.R. §§ 100.72(b), 100.131(b).

1 A review of Tillemann's activity prior to his candidacy announcement reveals
2 information that he had decided to become a candidate as early as May 11, 2017.²⁶ On that day,
3 the Committee changed its Facebook cover photo to a logo almost identical to the one Tillemann
4 is now using for his campaign, both of which include "U.S. Congress" near Tillemann's name.²⁷
5 Videos posted to Levi for Colorado's YouTube page contain the same logo, and were posted
6 beginning on June 1, 2017.²⁸ The logos are pictured below:



Testing the waters logo



Current Committee logo

7 It appears that Tillemann also posted videos with similar content and the "U.S. Congress" logo to
8 his personal YouTube page.²⁹ Two of these videos, posted on June 9, 2017, included a link to

²⁶ Although the Complaint alleges that the Committee's payments to Facebook violated the testing the waters rules because payments for "general public political advertising" are prohibited during the testing the waters period, the available information does not suggest that those expenditures were made "to publicize [Tillemann's] intention to campaign for Federal office," as required by Commission regulations. *See id.* The article the Complaint cites as evidence that the Committee paid for political advertising specifically states that Tillemann was not a declared candidate and was only considering a run. *See* Compl. at Ex. A.

²⁷ *See* Levi for Colorado, FACEBOOK (May 11, 2017) <https://www.facebook.com/leviforcolorado/>.

²⁸ *See, e.g.,* Levi for Colorado, *The Coal-Job Lie: What Republican Lawmakers Don't Want You To Know About Coal*, YOUTUBE (June 7, 2017), <https://www.youtube.com/watch?v=uGYpDXNOvis&t=1s>. The YouTube page contains five videos, posted between May 26 and July 6, 2017, on topics including clean energy and Pride Day. The content of the videos appears to be general statements on policy issues or current events, and does not directly discuss Tillemann's candidacy. However, the page's profile picture features the "Levi Tillemann U.S. Congress" logo, and each video posted on or after June 1, 2017, also bore the logo.

²⁹ *See, e.g.,* Levi Tillemann, *Trump's war on the environment isn't about protecting coal jobs . . .*, YOUTUBE (June 9, 2017), <https://www.youtube.com/watch?v=xpgZ2UknxBU>.

1 the Committee's Crowdpac page with the statement "Help us fight back by contributing \$5
2 today."³⁰

3 In AO 1981-32 (Askew), the Commission explained that "any name selected for the
4 testing the waters effort must avoid expressions such as 'Askew for President,' [] 'Askew in
5 '84,'" or other names with "similar types of campaign connotations."³¹ Applying that standard,
6 the Commission recently found that solicitations with "repeated references" to "Larsen for
7 Congress" as a campaign logo were evidence that Larsen had decided to run for Congress.³²
8 Similarly, Tillemann's logo during his purported testing the waters period was almost identical to
9 the logo used in his campaign, and there is no qualitative difference between "Levi Tillemann
10 U.S. Congress" and the expressions in Askew and Larsen that the Commission cited as evidence
11 an individual had decided to become a candidate.³³

12 In addition to his logo, Tillemann made public statements prior to his candidacy
13 announcement indicating that he had decided to run. On June 13, 2017, Tillemann used his
14 personal Twitter account to post the following tweet:³⁴

³⁰ *Id.*

³¹ AO 1981-32 at 4.

³² Factual and Legal Analysis at 8-9, MUR 6999 (Larsen)

³³ Further, Tillemann's inclusion of the statement "help us fight back by contributing \$5 today" in a video featuring this logo further supports the conclusion that Tillemann had already decided to run. *See id.* (citing MUR 2615 (Wieder) (Wieder's use of letterhead that referred to Wieder as a candidate to raise funds supported finding that Wieder was no longer testing the waters)).

³⁴ Levi Tillemann (@levitd), TWITTER (June 13, 2017), <https://twitter.com/levitd/status/874658245549228032>.



(((Levi Tillemann))) @levitd · Jun 13

Replying to @wtylersandberg @JasonCrowCO6

If you think that's "hot fire" @RepMikeCoffman's gonna have a bad time.
Coming for you next @wtylersandberg #2018 #victory



2



2



4



In the tweet, Tillemann stated that Representative Mike Coffman, the Sixth District's sitting member of Congress, is "gonna have a bad time," and directed a comment at Tyler Sandberg, a Coffman campaign operative, that Tillemann was "coming for you next."³⁵ The tweet was in response to Sandberg's Tweet of a Tillemann interview in which Tillemann discussed Jason Crow, another Democratic candidate for Colorado's Sixth District.³⁶

The Commission has explained that the testing the waters exemption "becomes inapplicable once the public activities of the individual take on a partisan political quality which would indicate that a decision has been made to seek nomination for election, or election, to a Federal office."³⁷ Tillemann's tweet, including the "#victory #2018" hashtags and partisan tone, is a strong indication that he had made a decision to run, because the only way he could be victorious in 2018 regarding Mike Coffman would be if he won his primary election against Crow and faced Coffman as a candidate in the general election. The tweet's mentions of both prospective primary and general election opponents, and the incumbent candidate's campaign staffer, make it clear that Tillemann was referring to a victory in the race for Colorado's Sixth District. Moreover, the "#victory #2018" hashtags are similar to language the Commission previously indicated in AO 1981-32 would cross the testing the waters line ("Askew in '84").

³⁵ *Id.*

³⁶ Tyler Sandberg (@wtylersandberg), TWITTER (June 13, 2017), <https://twitter.com/wtylersandberg/status/874655399504424960>.

³⁷ AO 1981-32 at 4.

1 By May 24, 2017, Tillemann had decided to become a candidate and crossed the \$5,000
2 threshold. Thus, Tillemann should have filed his Statement of Candidacy by June 8, 2017, and
3 the Committee should have filed its Statement of Organization within the next ten days. In
4 addition, the Committee's first disclosure report should have been the 2017 July Quarterly
5 Report, and it violated 52 U.S.C. § 30104(a) by failing to file it. Therefore, it appears that
6 Tillemann violated 52 U.S.C. § 30102(e), and that the Committee violated 52 U.S.C.
7 §§ 30103(a) and 30104(a).

8 Although it appears that Respondents violated the Act's filing and reporting
9 requirements, we recommend that the Commission dismiss this matter pursuant to its
10 prosecutorial discretion. It appears that Respondents missed their deadlines to file as a candidate
11 and register as a candidate committee by about a month. It is also true that these violations
12 resulted in the Committee's failure to file a 2017 July Quarterly Report, and in other cases, the
13 Commission has pursued Committees when untimely registration resulted in missed disclosure
14 reports.³⁸ In this case, however, the amount of activity and the resulting civil penalty for the
15 violations would be modest.³⁹ Accordingly, we recommend the Commission exercise its

³⁸ See, e.g., MUR 6449 (Bruning) (finding reason to believe that respondents did not timely file Statements of Candidacy and Organization and authorizing pre-probable cause conciliation); MUR 5693 (Aronsohn) (same); MUR 5363 (Sharpton) (same); see also MUR 6785 (Kwasman for Congress) (dismissing as a matter of prosecutorial discretion because the Statement of Candidacy was filed only a few days late and did not cause the committee to miss filing a scheduled disclosure report); MUR 6533 (Perry Haney) (dismissing as a matter of prosecutorial discretion because regardless of the dates of statements that may have triggered candidacy, the committee still timely filed its initial disclosure report).

³⁹ The Commission recently exercised its prosecutorial discretion and dismissed similar allegations in MUR 6999 (Larsen) and issued a letter of caution, finding that the amount in violation did not warrant the additional use of Commission resources. The proposed civil penalty in MUR 6999 was \$1,400 based on \$19,423 in late reported receipts and disbursements and failure to timely file a Statement of Candidacy and a Statement of Organization. Using the same formula in this matter would result in an out-the-door civil penalty of \$2,200 on \$38,393 in late reported receipts and disbursements and late-filed statements. Although the amount in violation is larger here than in MUR 6999, other circumstance in that case were more serious—Larsen had run for office four times and was late filing his Statement of Candidacy by at least 147 days. Thus, we believe that MUR 6999 is an apt comparator case.

prosecutorial discretion and dismiss this matter pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985), and issue a cautionary letter.


IV. RECOMMENDATIONS

1. Dismiss the allegation that Levi Tillemann violated 52 U.S.C. § 30102(e);
2. Dismiss the allegation that Levi for Colorado and Paula Sandoval in her official capacity as treasurer violated 52 U.S.C. §§ 30103(a) and 30104(a);
3. Approve the attached Factual and Legal Analysis;
4. Approve the appropriate letters, including a letter of caution to Respondents;
5. Close the file.


Lisa J. Stevenson
Acting General Counsel

Kathleen M. Guith
Associate General Counsel for Enforcement

1.2.18
Date


Stephen Gura
Deputy Associate General Counsel


Lynn Y. Tran
Assistant General Counsel


Derek H. Ross
Attorney

Attachment
Factual and Legal Analysis