



# AMERICANS FOR PROSPERITY.

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VIA E-MAIL ([lfraser@fec.gov](mailto:lfraser@fec.gov)) AND U.S. MAIL

May 9, 2013

Ms. Lynn M. Fraser  
Director, Alternative Dispute Resolution Office  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

RE: *Sua sponte* submission

Dear Ms. Fraser:

Per your e-mail dated May 3, 2013, Americans for Prosperity (AFP) appreciates this opportunity to provide additional information regarding the above-referenced matter. AFP incorporates by reference its original *sua sponte* submission, a copy of which is enclosed for your convenience.

For the reasons set forth below, AFP respectfully recommends an ADR settlement in which the Commission dismisses this matter or takes no further action.

## A) Background

As discussed in AFP's *sua sponte* submission, this matter arises out of a relatively small radio ad buy that AFP began disseminating on September 17, 2012 on three local radio stations in Pennsylvania. The ad discussed the legislative issue of "President Obama's health care law" and "the President's . . . healthcare law," and thus technically constituted an electioneering communication ("EC") under 2 U.S.C. § 434(f)(3).

AFP included a disclaimer at the end of the ad containing AFP's website address, its telephone number, and the fact that the ad was "Paid for by Americans for Prosperity." AFP inadvertently omitted the additional language required by 11 C.F.R. §§ 110.11(b)(3) and (c)(4)(i) for ECs, namely that the ad was "not authorized by any candidate or candidate's committee" and that AFP was "responsible for the content of this advertising."

Although the total cost of the five-day ad buy was \$9,990, AFP immediately discovered the incomplete disclaimer and took remedial action by notifying the radio stations and correcting the disclaimer. Thus, the ad with the incomplete disclaimer only ran for a day and a half, at most, or 30 percent of the total ad buy.

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### **B) "Pre-" and "Post-Dispute" Resolution Measures**

AFP filed eight FEC Form 9 EC reports (ID C30001051) (including for the ad at issue here) and eleven Form 5 independent expenditure reports (ID C90013285) during the 2012 election cycle. Many of these reports contained multiple communications. In addition, AFP has sponsored and reported ECs in prior cycles.

To the best of AFP's knowledge, of all of these public communications AFP has sponsored, the radio ad at issue in this matter is the only one that did not contain a complete disclaimer. AFP is committed to 100% compliance and its oversight here was truly an outlier. Moreover, although AFP unfortunately did not discover the error before the ad was disseminated, the fact that it discovered the error the next day and filed this *sua sponte* is evidence that AFP generally has strong compliance measures in place.

Notwithstanding AFP's excellent record and its meticulous internal procedures to ensure compliance, AFP took the following measures after discovering the incomplete disclaimer to ensure that this oversight did not happen again:

1. AFP's legal department began having two attorneys review each ad whenever it referenced a clearly identified Federal candidate to ensure that the requisite disclaimer was used. (The ad at issue in this matter was reviewed by only one attorney.)
2. AFP's legal department asked the marketing department staffer who was responsible for handling broadcast ads, including the one at issue here, to flag for AFP's reviewing attorneys any ads that referenced a clearly identified Federal candidate to ensure the attorneys would pay extra attention to the requisite disclaimer.

In addition, as a "post-dispute" resolution measure, AFP would like to attend one of the Commission's upcoming compliance conferences to reinforce its understanding of all of its compliance obligations under the Federal Election Campaign Act of 1971, as amended and the Commission's implementing regulations.

### **C) Proposed Penalty**

AFP respectfully proposes that no monetary penalty is warranted in this matter. AFP understands that, under its normal enforcement process, the Commission generally seeks a civil penalty equal to ten percent of the amount spent on the ad when there is an incomplete disclaimer. See Request for Comment on Enforcement Process, 78 Fed. Reg. 4081, 4087 (Jan. 18, 2013) ("Violations of 2 U.S.C. 441d(c) (incomplete disclaimer)—10 percent of cost of communication or \$2,750 if cost is unavailable.")

Additionally, given that AFP filed its *sua sponte* immediately and provided the Commission with all of the information needed to resolve this matter, AFP believes a 75 percent

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*sua sponte* discount is warranted. See Policy Regarding Self-Reporting of Campaign Finance Violations, 72 Fed. Reg. 16,695, 16,697 (April 5, 2007).

Lastly, given the "pre-" and "post-dispute" measures AFP has taken and proposed above, it is AFP's understanding of the Commission's ADR practice that approximately an additional 50 percent discount is offered. Thus, given that the allocable portion of the ad buy here with the incomplete disclaimer only amounted to \$2,997, the ADR penalty would yield only \$112 ( $\$2,997 \times .10 \times .75 \times .5$ ), and this is not a penalty the Commission typically seeks.

#### D) ADR Precedent

AFP believes its proposed resolution of this matter is consistent with the Commission's ADR precedents. AFP offers the following illustrative (but non-exhaustive) examples:

1. ADR 347 (Kaloogian for Congress) – The respondent authorized candidate committee included an incomplete "paid for by" disclaimer in its television advertisement. The respondent subsequently revised the disclaimer.

The ADR settlement approved by the Commission involved an admonishment and no further action by the Commission.

2. ADR 272 (Otis-Wilborn) – The respondent sponsored a newspaper advertisement promoting the Kerry/Edward ticket without including the requisite disclaimer.

The ADR settlement approved by the Commission involved the Commission taking no further action.

3. ADR 604 (Rhode Island State Central Committee) – The respondent filed a *sua sponte* submission revealing that it filed inaccurate disclosure reports over three election cycles which overstated its cash-on-hand balance by more than \$44,000. The respondent corrected the errors by filing amended reports.

The ADR settlement approved by the Commission involved a dismissal of the matter.

4. ADR 547 (Great River Energy Action Team) – The respondent filed a *sua sponte* submission revealing that it made excessive contributions totaling \$4,500 over two election cycles due to its oversight that it had an affiliated PAC that had also made contributions to the same candidates. Respondent took remedial action by requesting and receiving refunds for all of the excessive contributions.

The ADR settlement approved by the Commission involved a dismissal of the matter.

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**E) Dispute Resolution**

Per your May 3 e-mail, I would be pleased to meet with you to discuss this matter on any of the following dates and times. If any of these times is not convenient for you, please do not hesitate to contact me to propose an alternative:

Tuesday, May 14 at 1 p.m.  
Wednesday, May 15 at 3 p.m.  
Monday, May 20 at 10 a.m.

I look forward to resolving this matter with you, and thank you in advance for your consideration.

Sincerely,



John Flynn  
Vice President and General Counsel  
Americans for Prosperity

Enclosure

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