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August 5, 2010

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Federal Election Commission  
999 E Street, NW  
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RECEIVED  
FEDERAL ELECTION  
COMMISSION  
2010 AUG -6 PM 3:21  
OFFICE OF GENERAL  
COUNSEL

RE: MUR 6311

Dear Mr. Jordan:

Americans for Prosperity, a 501(c)(4) social welfare organization organized as a non-profit corporation under the laws of Washington, D.C., ("AFP") received the complaint designated as MUR 6311 on June 22, 2010. It requested and was granted a 30 day extension, and hereby provides this response on behalf of AFP.

As an initial matter, the complaint claims that AFP violates the Federal Election Campaign Act by running advertisements the complainant avers are independent expenditures rather than issue advocacy. Every other allegation in the complaint begins by taking as an assumption that the advertisement in question is express advocacy and therefore it must have a disclaimer, must be reported, its funding sources must be disclosed, and that as a result AFP is a political committee. Because the advertisements complained of here are not express advocacy, the complaint on that count must be dismissed, and the other allegations should be similarly dismissed because of the "house of cards" nature of their reliance on a false premise.

In light of the First Amendment right to engage in grassroots issue advocacy firmly established in the wake of *Federal Election Commission v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTE LF*"), it becomes clear that the allegations contained in this complaint are totally baseless. This entire complaint stands upon a faulty premise which cannot survive the guidance of the United States Supreme Court. This complaint should be speedily dispatched lest it invite an avalanche of similar complaints each time an organization exercises constitutionally guaranteed rights to petition the government.

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This complaint amounts to nothing more than an attempt by incumbent politicians to intimidate, silence or diminish the voices of their policy opponents as dire consequences of the 2010 healthcare bill become more apparent and a series of upcoming votes related to healthcare and Medicare proceed through the legislative branch over the next few months. This is a blatant attempt to use the First Amendment's prohibition that "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" and twist it to have a regulatory agency function as censor of speech directly related to important public policy issues.

AFP is pleased to provide the Commission with the analysis below demonstrating why this advertisement is a genuine issue advertisement. As a result, the FEC has no constitutional, statutory or regulatory basis to assert any jurisdiction over this advertisement or AFP.

### **Americans for Prosperity's Advertising Is Not an Independent Expenditure.**

#### **The Ad Does Not Meet the Definition of "Express Advocacy" under 11 CFR 100.22(a)**

Under the FECA and its implementing regulations, an ad must contain express advocacy to be considered an independent expenditure. See, 2 U.S.C. §431(17); 11 C.F.R. §100.16. The AFP ads at issue here contain no express advocacy, either under the standard laid out by *WRTL II* (discussed ~~below~~) or under the definition of "express advocacy" contained in Commission regulations at 11 CFR § 100.22(a) or 11 CFR § 100.22(b).

Express advocacy is defined by Commission regulations at 11 C.F.R. §100.22(a) as follows:

Expressly advocating means any communication that--(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Ragan/Bush" or "Mondale!"...

The advertisements at hand do not satisfy the standard for "express advocacy" set out by the Commission in 11 C.F.R. §100.22(a). As an initial matter, the audio portion of the script does not meet this standard. There is no reference to an election, it contains no electoral position and encourages no electoral action. Even in the video portion of the script, there is only a reference to a website address www.novemberiscoming.com that appears for approximately 3 seconds, and calls for no action on the part of the viewer with respect to any election. It is a factual statement, and not a reference to electing, defeating, or supporting or opposing any candidate.

In fact, the ad references health care matters repeatedly and provides legislative office phone numbers. During the month of June, when this advertisement was airing, there were a number of significant healthcare matters pending issue in the House and Senate. For example, on June 14, 2010, the *Washington Post* reported, "Democrat fears 21 percent cut in Medicare payments." On June 24, 2010, the *New York Times* reported, "House Passes Plan to Stop Medicare Cuts to Doctors." This followed – as reported in these articles – significant legislative maneuvering in the House and Senate. Also in June of 2010, significant regulations implementing the health care bill were released by the Executive Branch, which were the subject of significant public debate.

The advertisements that are the subject of this complaint fall far short of the standard that the Commission has previously applied to determinations of what constitutes express advocacy. In MUR 5024, a complaint about a brochure that contained numerous references to a candidate's experience, character, and qualifications for office, including the phrase "New Jersey Needs New Leaders," three Commissioners took the position that "the slogan does not constitute a campaign slogan such as 'Dean for America,' because there is no information that the slogan appearing in these brochures was employed or adopted by any of Kean's opponents as part of their campaigns. There is simply no basis to conclude that this slogan is identified with any campaign or that readers can perform this identification." These three Commissioners concluded that the brochure at issue in MUR 5024 did not constitute express advocacy, and the Commission unanimously dismissed the complaint.

In MUR 5842, the Commission declined to find "express advocacy" under 11 CFR § 100.22(a) with respect to advertisements that said "Jim Marshall does not represent Georgia values" and "John Rarow not Representing Georgia Values." In a Statement of Reasons, two commissioners laid out three ways that a communications can be an "express advocacy" communication under 11 CFR 100.22(a):

- Enumerated "magic word phrases"
- Express advocacy under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (vote pro-life accompanied by candidates identified as pro-life)
- Campaign slogans or similar individual works that can only be reasonably understood as admonitions to vote for or against a particular federal candidate

See Statement of Reasons, Peterson and Hunter, MUR 5842, p. 11.

Just last year, the Commission and the Office of General Counsel declined to find express advocacy under 11 CFR § 100.22(a) in this advertisement:

[Narrator:] What will it take to get North Carolina moving? Experience. Leadership. Richard Burr. In Congress, Burr fought to keep jobs here, while attracting new businesses. He blocked unfair trade practices seven times, voting against giving China special trade status. A small businessman for 17 years, Burr has the leadership required to protect jobs of our working families. Call Richard Burr. Tell him thanks for being a conservative, common sense voice for North Carolina.

See Statement of Reasons of Commissioners Walther, Bauerly, and Weintraub, MURs 5910 & 5694, at 8-9 (reproducing the OGC recommendation). In its analysis of this advertisement, the Office of General Counsel stated, "...the ad does not contain words or 'in effect' explicit directives that urge the viewer to vote for Burr, see 11 C.F.R. § 100.22(a)..." With respect to the analysis in this same MUR, Commissioners Peterson, Hunter and McGahn said, with respect to 100.22(a)'s discussion of slogans, "To be clear, the mere use of some sort of slogan or other similar language is not enough to come within its regulatory reach. Instead, the regulation contemplates that the slogan or other similar language be that same as (or at least resemble) a slogan that is being used by the campaign of the referenced federal candidate."

Applying the text of 11 CFR § 100.22(a) and the Commission's treatment of "express advocacy" under 11 CFR § 100.22(a), it is clear that the advertisements that are the subject of this complaint are not express advocacy as defined in that section. There is no dispute that the advertisements at issue here do not contain "magic word phrases." Complainant makes much of the phrase "November is Coming" – which is simply a factual statement – or a mere slogan – that does not urge the viewer to take any action with respect to any election. There is no reference to electing, defeating or supporting or opposing any candidate. There is no "NoCFL" style advocacy urging voters to vote a certain way and then identifying those candidates who vote that way. As a result, it is clear that this complaint is baseless and is simply a political maneuver to silence important voices that oppose the positions of incumbent office holders – namely those of Americans for Prosperity and other organizations that oppose the federal government's increasing involvement in health care insurance coverage and medical treatment.

**The Ad Does Not Meet the Definition of "Express Advocacy" under 11 CFR 100.22(b)**

The complaint in this case only alleges a violation of 11 CFR § 100.22(a), not 100.22(b). However, even an analysis under 11 CFR § 100.22(b) would not find the advertisements the subject of this complaint to be express advocacy.

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Express advocacy is defined by Commission regulations at 11 C.F.R. §100.22(b) as follows:

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or communicates some other kind of action.

In many of the MURs referenced above, various Commissioners have taken differing positions about the meaning of 11 CFR 100.22(b). In MUR 5842, Commissioners Hunter and Peterson noted that a communication must contain an "electoral portion" with a "reference[] to a candidacy, an election opponent, or any other language regarding the federal election process." Furthermore, the Commissioners noted that a "lack of any call to action...further undermines the notion that the mailer contained an electoral portion." The underlying ads in this MUR are described *supra*.

In MUR 5694 and 5910, Commissioners Peterson, McGinn and Hunter said, "as long as 'reasonable minds' can plausibly interpret an ad in some way other than as encouraging actions to elect or defeat a clearly identified candidate, the ad does not contain 'express advocacy' as defined by section 100.22(b)." Again, the underlying ads at issue here are described *supra*.

With respect to court review of 11 CFR § 100.22(b), the regulation has not fared well. As noted in June of 2010, 100.22(b) "has been ruled unconstitutional by every federal court that has considered it on its merits." See, e.g., *Virginia Society for Human Life v. Federal Election Commission*, 263 F.3d 379 (4<sup>th</sup> Cir. 2001); *Me. Right to Life Comm., Inc. v. Federal Election Commission*, 914 F. Supp. 8, 11 (D. Maine), *aff'd per curiam*, 98 F.3d 1 (1<sup>st</sup> Cir. 1996), *cert. denied*, 522 U.S. 810 (1997) ("MLC") ("It is obvious that subpart (b) of the FEC regulation comes directly from" Furgatch.); *Right to Life of Dutchess Co., Inc. v. Federal Election Commission*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) (finding that 11 CFR § 100.22(b)'s definition of 'express advocacy' is not authorized by FECA).

Because Americans for Prosperity is a corporation located in the Fourth Circuit, 100.22(b) cannot be constitutionally enforced against it in light of *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4<sup>th</sup> Cir. 2001). The most recent Fourth Circuit litigation to consider 11 CFR 100.22(b) is currently pending. It is our understanding that *Real Truth About Obama v. Federal Election Commission* is pending before the Fourth Circuit with an application for en banc hearing which raises constitutionality of 11 CFR §

100.22(b). In the district court, the Commission initially prevailed on the preliminary injunction and was affirmed by the Fourth Circuit, but the Supreme Court vacated that decision and remanded for further consideration in light of *Citizens United v. Federal Election Commission*. Plaintiffs in that case have asked for en banc consideration of the preliminary injunction.

Because the advertisement itself at issue here does not meet the 100.22(b) standard and because of the questionable constitutional status of 11 CFR 100.22(b), Americans for Prosperity believes that the Commission should not consider taking any further steps with respect to this matter under a 100.22(b) theory of enforcement. Should the Commission decide to move forward with any further action on this complaint under an 11 CFR 100.22(b) theory, Americans for Prosperity will take all necessary steps to defend its constitutional rights and further raise the constitutional questions presented by this regulation.

**The Ad Is a Genuine Issue Ad as Defined by Wisconsin Right to Life**

Under the standard laid out by the Supreme Court in *WRTL II*, and the definitions of independent expenditure and express advocacy contained in Commission regulations, in particular at 11 C.F.R. § 100.22(a), this ad is clearly a genuine issue ad, and therefore not an independent expenditure. While *WRTL II* did not specifically address whether an advertisement is an "independent expenditure," it logically follows that an advertisement that meets *WRTL II*'s standard for "true grassroots issue advocacy" is clearly not an independent expenditure.

This advertisement is a genuine issue ad subject to a number of reasonable interpretations other than to vote for or against a clearly identified candidate. The Supreme Court stated that a genuine issue ad is one that (1) focuses on a legislative issue; (2) takes a position on the issue and exhorts the public to adopt that position; (3) urges the public to contact their public officials with respect to the matter; and (4) lacks indicia of express advocacy. See, *WRTL II* at 2667.

**Focuses on a legislative issue**

The subject advertisements are legislative advocacy on health care. They focus on the spring 2010 health care legislation, the members' votes on that issue, and the continuing impact of the law. Finally, the ads provide the legislative phone number, encourage the viewer to contact the member and remind them of the consequences of the legislation.

As noted above, the "Doc Fix" legislation that was before the House and Senate in June of 2010 addresses some of the Medicare cuts in the April legislation, and in June of 2010 the Executive Branch began issuing regulations that implement this genuine piece of legislation.

Nearly everyone expects that health care and health care related legislation will continue to be a matter of public concern through 2010 and beyond. In fact, the "Doc Fix" adopted in June of 2010 is only a six month temporary change in the law. Medicare payments to doctors will need to be addressed again in December of 2010 by the current incumbent members of the House and Senate.

Takes a position on the issue and exhorts the public to adopt that position

This ad explicitly takes a position on the issues involved. It asks the viewer to call his or her member of Congress to remind them about the consequences of the spring 2010 healthcare votes right during a time when a number of healthcare legislative and executive branch decisions are pending. It is clear that this advertisement is an attempt to get these particular members of Congress to consider their future votes on healthcare-related matters by explaining the consequences of past votes on the issue.

Urges the public to contact their public officials with respect to the matter

This ad encourages the public to contact his or her member of Congress, and provides a Congressional district office phone number, not a campaign office phone number. The text of the script says "[Representative] cast his vote....tell him [state] won't forget." This call to action is clearly an exhortation to call the congressional office number that accompanies this audio statement and is clearly visible on the screen. In *WRTL II*, the Supreme Court simply said that a characteristic of a true grassroots issue advertisement was one that "take[s] a position on a legislative issue and exhort[s] the public to adopt that position and to contact public officials with respect to the matter." *WRTL II* at 2667.

Lacks indicia of express advocacy

The advertisement does not contain the indicia of express advocacy. It does not contain the words "vote for", "support", "elect", or any similar words. Nor does the ad comment on any candidate's fitness for office. *WRTL II* requires that the ad be subject to no other reasonable interpretation other than to vote for or against the candidate in the context of determining whether an ad is a grassroots issue ad, and the same guideline logically applies to determine if an ad "expressly advocates" a candidate's election or defeat. The web address [www.novemberiscoming.com](http://www.novemberiscoming.com) is a factual statement and not a direct reference to taking any particular position with respect to the election or defeat of a candidate.

As we have already noted [NovemberIsComing.com](http://NovemberIsComing.com) is displayed in graphics only for less than 3 seconds. This phrase – and no phrase or word even referencing an election at all and certainly no words of express advocacy – are present in the audio portion of the advertisement.

For all of the above reasons, the advertising subject to this inquiry is not an independent expenditure.

**Americans for Prosperity is not required to file with the Commission as a political committee.**

Complainant alleges that Americans for Prosperity is required to file with the Federal Election Commission by virtue of being a political committee. A group is only required to register with the Commission if it makes expenditures in excess of \$1,000 or receives contributions in excess of \$1,000 for the purpose of influencing a federal election *and* whose major purpose is the influencing of elections. See *Buckley v. Valeo*, 424 U.S. 1 (1976). Americans for Prosperity was not formed and is not operated for the purpose of influencing federal elections and any contributions received by the group have not been for that purpose.

In fact, the Americans for Prosperity is a 501(c)(4) social welfare organization:

...committed to educating citizens about economic policy and mobilizing these citizens as advocates in the public policy process. AFP is an organization of grassroots leaders who engage citizens in the name of limited government and free markets on the local, state and federal levels. The grassroots activists of AFP advocate for public policies that champion the principles of entrepreneurship and fiscal and regulatory restraint.

See <http://www.americansforprosperity.org/about> (visited July 1, 2010).

Americans for Prosperity was founded in 2004, and since that time has spent millions of dollars on legislative and grassroots advocacy in nearly every state in the country arguing for lower taxes and free market principles.

Americans for Prosperity – over six years – has spent millions of dollars on its efforts and this is the first time in the organization's history that anyone has even alleged that it spent money for the purpose of influencing elections. In fact, Americans for Prosperity maintains an internal Board of Directors-approved policy that the organization does not take positions with respect to the election or defeat of candidates for public office – even in the wake of the Supreme Court's ruling in *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

For these reasons, Americans for Prosperity is not a federal political committee.

#### **Americans for Prosperity is not Required to File Independent Expenditure Reports**

As discussed above, Americans for Prosperity did not air an independent expenditure. As a result, no independent expenditure report was required.

#### **Television Advertisement was not Required to have a Disclaimer**



Certain political advertising is required to contain specific disclaimers. However, disclaimer requirements only apply to public communications made by political committees, public communications by any person that contain express advocacy, public communications that solicit a contribution, and all electioneering communications. See, 11 C.F.R. 110.11 (a). As discussed above, Americans for Prosperity is not a political committee, and therefore is not required to provide a disclaimer on all of their materials. Nor does this advertisement contain express advocacy (*see supra*). Further, these advertisements neither solicit contributions nor were they aired within any electioneering communications reporting time period.

The advertisement subject to this complaint does not fall into any of the categories of communications requiring an FECA required disclaimer; therefore, it is not required to contain such disclaimers.

#### **Conclusion**

For the foregoing reasons, Americans for Prosperity respectfully requests that the Commission expeditiously dismiss the complaint, take no further action in this matter, and use this complaint as a vehicle to demonstrate that the Federal Election Commission will not violate the First Amendment and act as censor silencing the policy views of those who oppose the views of incumbent office holders.

Please do not hesitate to contact me at 540-341-8038 (telephon) or 540-341-8800 (fax) with questions or concerns.

Sincerely,



Jason Torchinsky

Counsel for Americans for Prosperity