



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

APR 08 2011

VIA FAX (540- 341-8809) and FIRST CLASS MAIL

Jason Torchinsky, Esq.
Holtzman Vogel PLLC
98 Alexandria Pike Suite 53
Warrenton, VA 20186

RE: MUR 6311
Americans for Prosperity

Dear Mr. Torchinsky:

On June 21, 2010, the Federal Election Commission notified your client, Americans for Prosperity, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On April 5, 2011, the Commission found, on the basis of the information in the complaint, and information provided by your client, that there is no reason to believe Americans for Prosperity violated 2 U.S.C. §§ 433, 434, 441a, 441b, and 441d(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. 66,132 (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 Phillip A. Olaya, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Americans for Prosperity

MUR: 6311

I. FACTUAL BACKGROUND

This matter concerns allegations that Americans for Prosperity ("AFP") violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in connection with its broadcasting of television advertisements that criticize three Democratic House members who supported healthcare reform legislation. Specifically, the complaint alleges that the ads constitute independent expenditures that expressly advocate the defeat of the House members, but that AFP failed to report them to the Commission in violation of 2 U.S.C. § 434 and also failed to include the requisite disclaimers in violation of 2 U.S.C. § 441d(a). *See* Complaint at 4-7. The complaint also asserts that even if the ads do not constitute independent expenditures, they may have been coordinated in-kind corporate contributions in violation of 2 U.S.C. § 441b. *See id.* at 7-8. Finally, the complaint alleges that the ad campaign caused AFP to trigger political committee status, but that it failed to register and report with the Commission in violation of 2 U.S.C. §§ 433 and 434. *See id.* at 3-6, 8.

AFP maintains that the ads do not contain express advocacy under either 11 C.F.R. § 100.22(a) or (b), but rather are genuine issue ads that take a position on a legislative issue and encourage the public to contact their public officials to support AFP's position on that issue. *See* Response at 6-7. AFP notes that there is no reference in the audio portion of any of the ads that reference an election or encourage electoral

1 action, and that the alleged electoral reference in the video portion of the ad is limited to
2 identifying the website, www.novemberiscoming.com, lasts for only three seconds, calls
3 for no action on the part of the viewer with respect to any election, and does not advocate
4 electing, defeating, or supporting or opposing any candidate. *Id.* at 3.

5 In April 2010, AFP broadcast a series of television ads, entitled, "We Won't
6 Forget," that criticize three Democratic House members – Dina Titus of Nevada, Earl
7 Pomeroy of North Dakota, and Tom Perriello of Virginia – who supported healthcare
8 reform. The content of the ads are identical, but for the members they identify. The ads
9 first aired June 9, 2010, the day following primary election victories by those members,
10 and ran in each congressional district for one week. The ads identify these members by
11 name and with photographs, and discuss the economic consequences of their votes to
12 support healthcare reform. The audio portion of the ads states:

13 Americans opposed the healthcare takeover, but [House member]
14 ignored us and voted with Nancy Pelosi for big government
15 healthcare.

16
17 The cost?

18
19 One trillion dollars.

20
21 What did you get?

22
23 Five-hundred billion dollars in Medicare cuts, tax hikes on
24 businesses, and thousands of jobs lost.

25
26 And now, a non-partisan congressional committee says people
27 making less than \$200,000 will pay more in taxes.

28
29 [House member] cast [his] vote. Tell [him we] won't forget."

30 Americans for Prosperity, *We Won't Forget*, YOUTUBE (June 12, 2010),
31 http://www.youtube.com/watch?v=G25jqQwnjEg&feature=player_embedded.

1 The closing visual also displays a photo of the House member, a phone number to
2 the member's congressional office, and the website address,
3 www.novemberiscoming.com. A disclaimer at the bottom of the ads states, "PAID FOR
4 BY AMERICANS FOR PROSPERITY." *Id.*

5 The www.novemberiscoming.com website referenced in the ad belongs to AFP,
6 and includes a petition addressed to "Policymakers, Elected Officials, and Candidates,"
7 for visitors to complete. *See* AMERICANS FOR PROSPERITY,
8 <http://www.novemberiscoming.com> (last visited Nov. 22, 2010). The introduction to the
9 petition states, "Make sure your elected officials, policymakers, and candidates know that
10 they should not support big government programs or any other freedom-killing policies."
11 *Id.* The petition states, "You know that November is coming and voters care about the
12 issues. Left-wing policies continue to drive Obama's agenda for even bigger
13 government. We want you to oppose big government programs or any other freedom-
14 killing policies or we will remember in November." *Id.*¹

15 AFP made three \$100,000 ad buys to broadcast the commercials in the respective
16 congressional districts for one week. *See Americans for Prosperity Warns Titus:*
17 *'Nevadans Won't Forget' Crucial Vote*, AMERICANS FOR PROSPERITY (June 9, 2010),
18 [http://www.americansforprosperity.org/061010-americans-prosperity-warns-titus-](http://www.americansforprosperity.org/061010-americans-prosperity-warns-titus-%E2%80%98nevadans-won%E2%80%99t-forget%E2%80%99-crucial-votes)
19 [%E2%80%98nevadans-won%E2%80%99t-forget%E2%80%99-crucial-votes.](http://www.americansforprosperity.org/061010-americans-prosperity-warns-titus-%E2%80%98nevadans-won%E2%80%99t-forget%E2%80%99-crucial-votes)
20 Production costs for the ads themselves are unknown from the available information.

¹ Visitors signing the petition can select from among four issues to highlight for the recipient(s) of the petition, including: "Support efforts to repeal ObamaCare and replace it with real reform that puts patients first"; "Oppose Cap-and-Trade Energy Taxes and any related EPA regulation"; "Oppose any more Bailouts"; and "Oppose any attempts to regulate the Internet." *See* AMERICANS FOR PROSPERITY, <http://www.novemberiscoming.com> (last visited Nov. 22, 2010).

II. ANALYSIS

A. Political Committee Status

The Act defines a “political committee” as any committee, club, association, or other group of persons that receives “contributions”² or makes “expenditures” for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). An organization will not be considered a “political committee” unless its major purpose is “Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).” Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007). See *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 262 (1986).

The Act defines the term “expenditure” as, *inter alia*, “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i). The Act’s definition of expenditure when applied to communications made independently of a candidate or a candidate’s committee, reaches only funds used for communications “expressly advocating the election or defeat of a clearly identified candidate.” 2 U.S.C. § 431(17).

1. Section 100.22(a) analysis

The Commission has defined express advocacy in the regulations set forth at 11 C.F.R. § 100.22. Under Section 100.22(a),

² The term, “contribution,” is defined to include “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i). In the instant matter, the complaint does not allege that AFP sought contributions to run the ads at issue.

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 of 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,” “Reagan/Bush” or “Mondale!”

11 C.F.R. § 100.22(a).

AFP’s ads for “We Won’t Forget” do not use any of the words or phrases that urge the election or defeat of one or more clearly identifiable candidates. Nor do they contain slogans or words which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates. 11 C.F.R. § 100.22(a). While the opening and closing lines of the ads use the words, “voted” and “vote,” both references are to the named House members’ votes, not those of the voting public. Accordingly, the ads do not constitute express advocacy under part 100.22(a).

2. Section 100.22(b) analysis

The Commission regulations also define express advocacy as a communication that:

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 encourages some other kind of action.

11 C.F.R. § 100.22(b).

1 The ads at issue lack an unmistakable, unambiguous "electoral portion." Instead,
2 the ads identify members of Congress by name and with photographs, and discuss the
3 economic consequences of their votes to support healthcare reform. The closing visual
4 displays a photo of the House member, a phone number to the member's congressional
5 office, and the website address, www.novemberiscoming.com.³

6 The ad's exhortation, "Tell [him we] won't forget," is followed by the
7 incumbent's congressional office telephone number. The "tell him" language could be
8 interpreted as a request to call and express disapproval of the vote. The exhortation,
9 therefore, does not direct viewers to vote against the incumbent and may reasonably be
10 understood to be requesting a different position on future legislative votes relating to the
11 issue of healthcare. Indeed, the ads discuss the economic consequences of the members'
12 support for healthcare reform legislation by discussing the total cost of the legislation (\$1
13 trillion), cuts to Medicare (\$500 billion), tax increases for businesses and those who earn
14 less than \$200,000, and related job losses. Accordingly, the ads do not constitute express
15 advocacy under 11 C.F.R. § 100.22(b).

16 3. Conclusion

17 Because the ads do not constitute express advocacy under either 11 C.F.R.
18 § 100.22(a) or (b), there is no reason to believe AFP violated 2 U.S.C. §§ 433 or 434 by
19 either failing to register or report as a political committee or by failing to report
20 independent expenditures.

21

³ The website, www.novemberiscoming.com, contains an electronic petition regarding support for various issues. See AMERICANS FOR PROSPERITY, <http://www.novemberiscoming.com> (last visited Nov. 22, 2010).

1 **B. Disclaimers**

2 The Act requires a disclaimer whenever a political committee makes a
3 disbursement "for the purpose of financing any communication" via broadcast,
4 newspaper, magazine, outdoor advertising, mailing, or other general public political
5 advertising, or when any person makes a disbursement for the purpose of financing
6 communications expressly advocating the election or defeat of a clearly identified
7 candidate . . ." 2 U.S.C. § 441d(a). The regulations further require that "all public
8 communications" made by a political committee must include a disclaimer. 11 C.F.R.
9 § 110.11(a)(1). A public communication includes any broadcast, cable, or satellite
10 communication, telephone bank, mass mailing, or general public political advertising.
11 11 C.F.R. § 100.26.

12 Because the AFP ads do not include express advocacy, there is no basis in the
13 complaint or response to find that AFP triggered political committee status, so no
14 disclaimer is necessary. Accordingly, there is no reason to believe AFP violated 2 U.S.C.
15 § 441d(a) by failing to include a disclaimer for the ads.

16 **C. Coordination**

17 Finally, the complaint asserts that the ads may be coordinated with opponents of
18 the named candidates and therefore constitute in-kind contributions that either violate the
19 limits set forth by 2 U.S.C. § 441a or the prohibition on corporate contributions set forth
20 by 2 U.S.C. § 441b. *See* Complaint at 7-8. The complaint does not provide any specific
21 evidence of coordination or provide analysis under the payment, content, and conduct
22 prongs of the regulations. Instead, the complaint alleges that because AFP does not state
23 whether the ads were authorized by a candidate or committee, and because it did not file

1 independent expenditure reports to "certif[y] the actual independence" of the ads, they
2 may be coordinated in-kind contributions. *Id.* However, as discussed above, AFP was
3 not required to do either. Accordingly, there is no reason to believe AFP violated
4 2 U.S.C. §§ 441a or 441b.

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