

RECEIVED

JAN 24 2012

Public Disclosure Commission

SMITH & LOWNEY, P.L.L.C.

2317 E. JOHN ST.

SEATTLE, WASHINGTON 98122

(206) 860-2976, FAX (206) 860-4187

January 24, 2012

Robert McKenna  
Washington State Attorney General  
1125 Washington St SE  
P O Box 40100  
Olympia, WA 98504-0100

Mark Lindquist  
Pierce County Prosecuting Attorney  
955 Tacoma Avenue South  
Tacoma, WA 98402

H Steward Menefee  
Grays Harbor County Prosecutor  
102 W Broadway, Room 102  
Montesano, WA 98563

Jon Tunheim  
Thurston County Prosecuting Attorney  
2000 Lakeridge Dr S.W., Building 2  
Olympia, WA 98502

David S. McEachran  
Whatcom County Prosecuting Attorney  
Courthouse Suite 201  
311 Grand Avenue  
Bellingham, WA 98225

Mark Roe  
Snohomish County Prosecutor  
3000 Rockefeller, M/S 504  
Everett, WA 98201

Michael Dorsey  
Mason County Prosecutor's Office  
P O Box 1666  
Shelton, WA 98584

Russell D. Hauge  
Kitsap County Prosecutor's Office, MS-35  
614 Division Street  
Port Orchard, WA 98366

Daniel Satterberg  
King County Prosecuting Attorney  
King County Courthouse, Room W554  
516 Third Avenue  
Seattle, WA 98104

**Re: First Notice of Intent to Sue for Violations of RCW 42.17**

Dear elected officials:

We represent Charles Kimbrough ("Notifer") in submitting this statutory notice of intent to sue.

Notifier has reason to believe that Americans for Prosperity,<sup>1</sup> along with the following listed individual donors and leaders, (collectively "AFP") have violated certain sections of RCW

<sup>1</sup> This Notice Letter covers both Americans for Prosperity ("AFP") and its affiliate Americans for Prosperity Foundation ("AFPP") (collectively "AFP"). Each is responsible for the violations stated herein.

JAN 24 2012

Public Disclosure Commission

Chapter 42.17. The following persons are believed to have acted in concert with AFP in orchestrating and/or executing these violations:

- David Koch, Charles Koch, Tim Phillips and John Flynn, of national AFP.
- Kirby Wilbur, Richard Alvord, WF Monkman, Ron Cohn, and Sarah Rindlaub of the Washington chapter of AFP.

Notifier intends to bring a citizens' action against these persons and entities under RCW 42.17.400(4) if you do not commence an action against each of them within the following notice periods specified by statute. At the expiration of 45 days from the date of this letter, a second notice of intent to sue will be sent to you if you have not yet filed suit against each of these persons and entities. If after 10 days following receipt of the second notice you still have not filed suit against each, Notifier will bring an action against them in Superior Court.

The bases of Notifier's belief that these entities and persons have violated certain sections of RCW Chapter 42.17 are as follows:

**1. Introduction.**

AFP acknowledges that it spent over \$40 million during the 2010 election cycle, including funding electioneering communications throughout the nation. AFP reported its spending on federal races, including funding electioneering communication in at least 45 U.S. House and Senate races. In contrast, it concealed its well orchestrated national campaign to elect republicans to state houses throughout the nation. In Washington State, AFP targeted 13 democrats in tight state house and senate races. Most of AFP's funds nationally came from anonymous sources, with over \$22 million in anonymous contributions in 2010, according to federal filings.

**2. During the period leading into the 2010 general election, AFP qualified as a political committee and failed to file mandatory reports.**

For the period leading up to the 2010 general election, AFP met the definition of a "political committee" under either prong of the applicable legal test. *See Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn.App. 586 (2002), *rev. denied*, 148 Wn.2d 1020 (2003) ("*EFF*"); Public Disclosure Commission ("*PDC*") Interpretation No. 07-02. An organization may become a political committee by either (1) expecting to receive or receiving contributions to further electoral goals, or by (2) expecting to make or making expenditures to further electoral political goals. *Id.* To the second prong only, the courts have added an additional requirement that the organization must also have as its "primary or one of the primary purposes ... to affect, directly or indirectly, government decision making by supporting or opposing candidates or ballot propositions". *Id.*; *State v. Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 509 (1976).

JAN 24 2012

Public Disclosure Commission

**A. AFP meets the “receiving” prong of the political committee test because it solicited and received contributions to influence the 2010 legislative races.**

In the months preceding the 2010 general election, AFP solicited contributions from individual donors and other organizations to fund electoral work across the nation, including within Washington State.

It also solicited donations from Washington State citizens to fund an independent expenditure campaign designed to influence several close races for the Washington State Legislature. AFP solicited and received over \$32,250 in contributions from these Washington residents.

**B. AFP also qualifies as a political committee under the “making expenditures” prong of the test.**

During the period leading up to the 2010 election, AFP made campaign expenditures in tight races across the nation, including in Washington State. During this period, AFP had as a “primary or one of the primary purposes ... to affect, directly or indirectly, government decision making by supporting or opposing candidates or ballot propositions.” *EFF*. This is true both across the nation and in Washington State in particular. For example, AFP acknowledges that it spent over \$40 million in the 2010 election cycle, including funded electioneering communications in at least 100 races across the country, including 45 federal elections.

**C. AFP failed to file necessary reporting as a political committee.**

As a political committee, AFP was required to file mandatory reporting of various kinds, and failed to do so. Each such failure constitutes a separate violation of RCW 42.17. In addition to timely registering as a political committee, AFP was required to submit monthly reports if the political committee “has received a contribution or made an expenditure in the preceding calendar month and either the total contribution received or total expenditure made since the last such report exceeds two thousand dollars.” WAC 42.17.080(2)(c). Further, a political committee must file periodic reports on certain dates relative to the election at issue: (1) on the twenty-first day before an election, (2) the seventh day before an election, and (3) the tenth day of the first month after an election.” *Id.* § 42.17.080(2)(a)-(b). Each periodic report must include an accounting of the political committee’s “funds on hand” at the beginning of the reporting period, including “[t]he surplus or deficit of contributions over expenditure; the source and amount of any loans to be used for the political committee’s benefit, among other information. RCW 42.17.090(1).<sup>2</sup> AFP submitted none of this required reporting.

---

<sup>2</sup> Political committees are required to file campaign finance reports pursuant to RCW 42.17.080(1) and (2). These reports must disclose contributions, including pledges. RCW 42.17.090, RCW 42.17.020 15(a)(i) (defining contribution to include pledges). 42.17.565 “A payment for *or promise to pay* for any electioneering communication shall be reported to the commission by the sponsor on forms the commission shall develop by rule to include, at a minimum, the following information.” (emphasis added). AFP failed to properly report such contributions.

JAN 24 2012

Public Disclosure Commission

3. **Alternatively, AFP failed to properly register as an out-of-state political committee.**

The out-of-state political registration requirements would apply to AFP only if it was not otherwise required to report under RCW 42.17.040 through 42.17.090. If AFP was not otherwise required to report, Notifier alleges that AFP was required to register and report as an out-of-state political committee because it is an "out-of-state political committee organized for the purpose of supporting or opposing candidates or ballot propositions in another state" and made an expenditure supporting or opposing a Washington state candidate. RCW 42.17.093. As an out-of-state political committee, AFP was required to report all in-state contributions of over \$25 and all out-of-state contributions above \$2,500. See RCW 42.17.080 and RCW 42.17.093. AFP failed to comply with these requirements.

4. **AFP failed to timely report its receipt of contributions received and/or earmarked for political activities, and failed to properly report the expenditure of such funds.**

AFP raised funds and conducted an independent expenditure campaign, consisting of reportable electioneering communications, without filing a single report with the Washington State Public Disclosure Commission ("PDC"). The entities and people identified in this notice letter concealed the source and use of these campaign funds until after the election was over, defeating the purpose of the Fair Campaign Practices Act, RCW 42.17.

The purposes of RCW 42.17 state that it is public policy of the State of Washington "(1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided; ... (10) That the public's right to know of the financing of political campaigns ... far outweighs any right that these matters remain secret and private. ... The provisions of this chapter shall be liberally construed to promote complete disclosure of all information regarding the financing of political campaigns and lobbying..." RCW 42.17.010

**A. Independent Expenditures.**

Alternatively, if AFP was not considered a political committee, its contributions and expenditures were reportable as independent expenditures, electioneering communications, and/or political advertising "An entity not subject to disclosure requirements governing political committees may be required nonetheless to disclose certain information about its 'independent expenditures' and 'political advertising.'" *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 998 (9<sup>th</sup> Cir. 2010), *cert denied*, 131 S.Ct. 1477, 179 L.Ed.2d 302 (2011).

An "independent expenditure" is "any expenditure that is made in support of or in opposition to any candidate or ballot proposition and is not otherwise required to be reported." Wash. Rev. Code § 42.17.100(1). Disclosure requirements are triggered if, in a given election, such an expenditure equals more than \$100 or if its value cannot reasonably be estimated. *Id.* § 42.17.100(2). If an expenditure crosses this valuation threshold, an entity must submit "an initial report of all independent expenditures made

JAN 24 2012

Public Disclosure Commission

during the campaign" up until that point in time. *Id.* The required two-page report must include the name and address of the person filing the report; the name and address of each person to whom an independent expenditure was made in the aggregate amount of more than fifty dollars; the amount, date, and purpose of each such expenditure; and the total sum of all independent expenditures made during the campaign. *Id.* § 42.17.100(5). After submitting the initial report, the regulated entity must submit monthly update reports, but this requirement applies only if "the reporting person has made an independent expenditure since the date of the last previous report filed." *Id.* § 42.17.100(3)(c). Finally, three updates to the initial report are required on certain dates pegged to the election at issue: (1) the twenty-first day before the election, (2) the seventh day before the election, and (3) the tenth day of the month after the election. *Id.* § 42.17.100(3). The entity's reporting obligations cease after the post-election report is filed. *Id.*

*Human Life of Washington, 624 F.3d. at 998-999.* AFP made none of these disclosures.

#### **B. Electioneering Communications.**

AFP's campaign constituted both an independent expenditure campaign and political advertising. It violated the laws by failing to report electioneering communications pursuant to RCW 42.17.565. "A payment for or promise to pay for any electioneering communication shall be reported by the sponsor," and include the detailed information specified under RCW 42.17.565. The information must be reported electronically within twenty four hours of the electioneering communication.

#### **C. Political Advertising.**

AFP also failed to comply with political advertising laws. As the Ninth Circuit described:

In addition to disclosures for independent expenditures, the Disclosure Law sets forth requirements for "political advertising," defined as "any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign." *Id.* § 42.17.020(38). An advertisement must identify its sponsor: written political advertising must include the sponsor's name and address; radio and television ads must state the sponsor's name; and advertising undertaken as an independent expenditure must state that the advertisement was not approved by any candidate. See *id.* § 42.17.510(1)-(4). The Disclosure Law requires special reports for political advertising made twenty-one days before an election and that has a fair market value of \$ 1,000 or more. *Id.* § 42.17.103(1). Such special reports must include the name and address of the person making the expenditure; the name and address of the person to whom the expenditure was made; a detailed description of the expenditure; the date that the expenditure was made and that the advertising was presented to the public; the

JAN 24 2012

Public Disclosure Commission

amount of the expenditure; and the name of the candidate or ballot proposition supported or opposed by the expenditure. *Id.* § 42.17.103(3).

*Human Life of Washington, 624 F.3d. at 998-999.*

AFP's political advertisements did not state the sponsor's name and address, as required. Its only statement as to the source of the funding for the electioneering communication was "Paid for by Americans for Prosperity Washington," a non-existent organization, listing a Washington state address. The failure to state the correct sponsor name and address, and the false representation as to this information, constitutes a violation of RCW 42.17.510 ("The use of an assumed name for the sponsor of electioneering communication, independent expenditures, or political advertising shall be unlawful."); 42.17.510(a) (requiring statement of sponsor name and address).

If AFP meets the definition of a political committee, then the advertisements also failed to provide information on the top five donors to the campaign, as required by RCW 42.17.510(2)(b).

Instead of complying with these laws, AFP waited until after the election and then falsely reported this electoral campaign as a "lobbying campaign."

Notifier intends to sue for all violations, including those yet to be uncovered and those committed subsequent to the date of this notice of intent to sue. Notifier believes that this Notice sufficiently states grounds for filing suit against the entities and persons listed herein. We intend, at the close of the notice periods, or shortly thereafter, to file a citizen action against the above-named persons and entities under RCW 42.17.400(4) for violations of the Public Disclosure Act, RCW Chapter 42.17. If you have any questions or concerns regarding this Notice, please contact the undersigned attorney.

Very Truly Yours,

**SMITH & LOWNEY, P.L.L.C.**

By 

Knoll D. Lowney  
2317 E. John St.  
Seattle, WA 98122  
(206) 860-8288