



STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION

711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908 • (360) 753-1111 • FAX (360) 753-1112

Toll Free 1-877-601-2828 • E-mail: pdc@pdc.wa.gov • Website: www.pdc.wa.gov

**BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON**

IN RE COMPLIANCE
WITH RCW 42.17

AMERICANS FOR PROSPERITY,
AMERICANS FOR PROSPERITY
FOUNDATION, DAVID KOCH,
CHARLES KOCH, TIM PHILLIPS,
JOHN FLYNN, KIRBY WILBUR,
RICHARD ALVORD, WILLIAM R.
MONKMAN, RON COHN, AND
SARAH RINDLAUB

Respondents.

PDC CASE NO: 12-149

REPORT OF INVESTIGATION

I.

BACKGROUND

1.1 On December 1, 2011, Public Disclosure Commission (PDC) staff submitted a report of investigation to the Commission concerning two complaints against Americans for Prosperity (AFP) and its Washington State chapter (AFP-WA), the first filed on October 7, 2010 by Carrie Dolwick, and the second filed on November 10, 2010 by Dwight Pelz. The complaints, which were assigned PDC Case No. 11-019, concerned communications sponsored by AFP in October 2010 that identified thirteen incumbent Washington State legislators who were candidates for election or re-election in 2010. The complainants alleged that AFP-WA failed to register and report with the PDC as a political committee, failed to file special reports of independent expenditures or electioneering communications, and failed to list its top five contributors in independent expenditure political advertising. The report of investigation and exhibits in PDC Case No. 11-019 are incorporated by reference into this report.

- 1.2 At its regular meeting on December 8, 2011, the Public Disclosure Commission considered staff's recommendation to dismiss the two complaints filed against AFP-WA. Following a discussion and consideration, the Commission voted to continue consideration of the staff recommendation until its January 26, 2012 regular meeting. The Commission directed staff to re-open its investigation and gather additional information regarding: (1) who received the AFP communications that were the subject of the complaints, and (2) whether there were any other AFP communications directed to Washington residents during the two years prior to the timeframe involved in the complaints. The Commission also requested that staff and Respondents file briefing on the legal issues presented in the complaint, and authorized the complainants to do the same.
- 1.3 At the Commission's regular meeting on January 26, 2012, the Commission considered staff's supplemental report of investigation and the briefs filed on behalf of staff and the Respondents. Those briefs, and staff's supplemental report of investigation and exhibits, are incorporated by reference into this report. Following this consideration, the Commission dismissed the complaints against AFP-WA in PDC Case No. 11-019.
- 1.4 On February 8, 2012, PDC Executive Director Andrea McNamara Doyle entered an Order of Dismissal regarding PDC Case No. 11-019 on behalf of the Commission, a copy of which is attached. **(Exhibit 1, pp 5 – 9.)** In brief, the Order found and concluded that AFP was not a political committee during the period at issue, and therefore had no political committee reporting obligations; AFP's communications did not meet the legal definitions of "political advertising," "independent expenditures," or "electioneering communications" and therefore were not subject to the sponsor identification or related reporting requirements applicable to those types of communications.
- 1.5 On January 24, 2012, the Washington Attorney General's Office received a 45-day citizen action letter from Charles Kimbrough, submitted by his attorney, Knoll Lowney.¹ (Hereafter the "citizen action letter" or "letter.") The letter **(Exhibit 2)** alleged violations of RCW 42.17 by Americans for Prosperity, Americans for Prosperity Foundation, and the following named individuals, who were alleged to have acted in concert with AFP in executing the alleged violations:
- David Koch, Chairman of the AFP Foundation
 - Charles Koch, together with David Koch, a founder of the AFP-precursor group, Citizens for a Sound Economy
 - Tim Phillips, President of AFP

¹ Effective January 1, 2012, RCW 42.17.400 was recodified as RCW 42.17A.765.

- John Flynn, AFP Vice President and General Counsel
- Kirby Wilbur, former Washington State Director of AFP
- Richard Alvord
- W.R. Monkman
- Ron Cohn
- Sarah Rindlaub

II.

ALLEGATIONS IN COMPLAINT

2.1 The violations alleged in the citizen action letter are as follows:

- In the period leading up to the 2010 general election, AFP was a "political committee" as defined in RCW 42.17.020(39) and relevant case law, and failed to register as such under RCW 42.17.040;
- AFP failed to report contributions, including contributions pledged but not received, and payments or promises to pay for reportable activity, as required under RCW 42.17.080, RCW 42.17.090, and RCW 42.17.565;
- Alternatively, if AFP were found not to constitute an in-state political committee with the requirement to register and report under RCW 42.17.040, RCW 42.17.080, and RCW 42.17.090, AFP was an out-of-state political committee, and failed to disclose contributions and expenditures as required under RCW 42.17.093;
- AFP's activity constituted independent expenditures, political advertising, and/or electioneering communications, and AFP failed to disclose this activity as required under RCW 42.17.100, RCW 42.17.103, and RCW 42.17.565; and
- The alleged independent expenditure political advertising and/or electioneering communications sponsored by AFP failed to correctly identify AFP as its sponsor, and failed to include the disclaimers and contributor listings required under RCW 42.17.510.

2.2 On January 25, 2012, the Attorney General's Office asked the Public Disclosure Commission (PDC) to review and possibly take action on matters related to the 45-day citizen action letter. On February 1, 2012, staff notified the Respondents of the complaint.

III.

FINDINGS

- 3.1 **Review of Allegations:** In reviewing the allegations contained in the citizen action letter, staff noted that the allegations appeared to be similar to those investigated in PDC Case No. 11-019, *i.e.*, whether activity in 2010 by AFP or its Washington State chapter required AFP to register as a political committee, or to report under any provision of RCW 42.17, and whether AFP's communications identifying Washington State candidates were subject to the disclaimer and sponsor identification requirements of RCW 42.17 for political advertising (including independent expenditure political advertising) or electioneering communications.
- 3.2 Staff noted that the citizen action letter was not accompanied by any documentary evidence, and cited no specific information that could distinguish its allegations from those in the complaints under PDC Case No. 11-019. The letter did not describe or provide copies of any communications beyond those addressed in PDC Case No. 11-019 that would meet the definition of "independent expenditure" by supporting or opposing a candidate. Similarly, the letter provided no evidence that any AFP communication identifying a state, local, or judicial candidate in Washington State met the statutory definition of "electioneering communication." Among other criteria, that definition requires that a communication be presented in a qualifying medium, and have a fair market value of five thousand dollars or more.
- 3.3 Although the letter alleged that AFP failed to report as an out-of-state political committee, it provided no evidence that AFP would be considered an out-of-state political committee under the relevant statute and rule, or assuming that AFP *did* qualify as an out-of-state political committee, that it conducted any reportable activity. Per WAC 390-16-049, a political committee may disclose reportable Washington State expenditures as an out-of-state political committee on PDC form C-5 only if the political committee is registered and has been actively filing campaign disclosure reports in one or more other states for the preceding two years, and only if the political committee has organizational documents showing that it was originally formed and is currently organized for the purpose of making expenditures in another state or soliciting contributions for use in another state's election campaigns. No information was provided that identified which state or states outside of Washington AFP was organized to campaign in, or where an alleged AFP

political committee was registered and reporting as a political committee.² Further, and as indicated above, no expense that would be reportable under RCW 42.17.093 was described, nor were copies of any communication supporting or opposing a Washington state candidate or political committee provided.

3.4 Finally, although the letter referred to all Respondents collectively as "AFP," it described Richard Alvord, W.R. Monkman, Ron Cohn and Sarah Rindlaub as being "of the Washington chapter of AFP." At the time of the complaint, staff was not aware of any formal relationship between the named individuals and AFP or AFP-WA. However, the individuals did appear as donors³ on an L-6 Grass Roots Lobbying report that AFP filed with the PDC on November 10, 2010, and amended on January 25, 2011 and January 31, 2011. **(Exhibit 3.)** As discussed below in paragraph 3.9, Mr. Cohn and Mr. Alvord (two individual donors named in the citizen action letter) contacted staff and stated that other than having made a donation to AFP, they had no relationship to the organization, and no involvement in its activities.

3.5 **Request for Evidence:** To better understand the allegations in his citizen action letter, and to obtain any evidence in his possession, staff sought to interview Mr. Kimbrough. **(Exhibit 4.)** On February 1, 2012, through his attorney, Mr. Kimbrough declined to make himself available for an interview. **(Exhibit 5.)**

3.6 On February 7, 2012, staff contacted Mr. Kimbrough's counsel to seek copies of any evidence Mr. Kimbrough possessed to support his allegations. **(Exhibit 6.)** In response, Mr. Kimbrough's counsel stated that he was confident that his client had no evidence not already possessed by the PDC and reviewed in PDC Case No. 11-019. He stated, "Your investigation went much farther than anything we're aware of." He reiterated that his client would not participate in an interview with staff; however, if staff would draw up written questions to Mr. Kimbrough, he offered to facilitate a response.

² Staff's review of Federal Election Commission (FEC) filings indicates that AFP has disclosed reportable electioneering communications in federal candidate races. Under FEC rules, a sponsor of an electioneering communication is a category that is separate and distinct from that of a political committee. Generally, political committees registered with the FEC are not subject to the disclosure requirements for electioneering communications. Rather, a political committee registers by filing an FEC Form 1 either as a Separate Segregated Fund or as a Nonconnected PAC. The political committee then files regular reports of its receipts and disbursements, either quarterly or monthly. Staff found no evidence that AFP was registered and reporting with the FEC as a political committee.

³ Of the ten donors listed on AFP's November 10, 2010 L-6 filing, Mr. Alvord, Mr. Monkman, Mr. Cohn and Ms. Rindlaub were unique in that each gave \$2,500 or more to AFP. Mr. Alvord and Mr. Monkman gave the largest donations, at \$10,000 each.

3.7 On February 16, 2012, staff submitted a written request to Mr. Kimbrough for the following:

1. Copies of all communications in his possession that were sponsored by Americans for Prosperity, its Washington State chapter, or the Americans for Prosperity Foundation, and that clearly identify a candidate for a state, local, or judicial office in Washington State;
2. Documents or other information showing that during 2010 Americans for Prosperity, its chapters or affiliates, collectively or separately, sponsored electioneering communications as defined by RCW 42.17.020(20), i.e., a *"broadcast, cable, or satellite television or radio transmission, United States postal service mailing, billboard, newspaper, or periodical that: (a) Clearly identifies a candidate for a state, local, or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate's name; (b) Is broadcast, transmitted, mailed, erected, distributed, or otherwise published within sixty days before any election for that office in the jurisdiction in which the candidate is seeking election; and (c) Either alone, or in combination with one or more communications identifying the candidate by the same sponsor during the sixty days before an election, has a fair market value of five thousand dollars or more."* (Emphasis added);
3. Documents or other information showing that Americans for Prosperity, its chapters or affiliates, collectively or separately, was a "receiver of contributions" to support or oppose candidates or ballot propositions, rather than to pay for issue advocacy or similar activity;
4. Documents or other information showing the purpose(s) for which Americans for Prosperity, its chapters or affiliates solicited funds from Washington State residents;
5. Documents or other information showing that spending money to support or oppose candidates or ballot propositions are one of the primary purposes of Americans for Prosperity, its chapters or affiliates, either collectively or separately;
6. Any other documents or other information showing that Americans for Prosperity, its chapters or affiliates, collectively or separately, constitute a "political committee" under RCW 42.17;
7. Documents or other information showing that Americans for Prosperity, its chapters or affiliates, collectively or separately, failed to report contributions pledged but not received;
8. Documents or other information showing that Americans for Prosperity, its chapters or affiliates, collectively or separately, failed to report orders placed, debts, obligations, payments, or promises to pay for activity reportable under RCW 42.17;

9. Documents or other information showing that Americans for Prosperity, its chapters or affiliates, collectively or separately, is an "out-of-state political committee organized for the purpose of supporting or opposing candidates of ballot propositions in another state";
10. Documents or other information showing the purpose(s) for which Americans for Prosperity, its chapters or affiliates solicited funds from residents of states besides Washington;
11. Documents or other information showing that any expenditure by Americans for Prosperity, its chapters or affiliates constituted a monetary or in-kind contribution to any state, local, or judicial candidate in the 2010 Washington State elections; and
12. Documents or other information showing how David Koch, Charles Koch, Tim Phillips, John Flynn, Kirby Wilbur, Richard Alvord, William R. Monkman, Ron Cohn, or Sarah Rindlaub acted in concert with Americans for Prosperity to orchestrate or execute any alleged violation of RCW 42.17.

(Exhibit 7.)

- 3.8 On February 23, 2012, Mr. Kimbrough, through counsel, replied via email, stating that all documents or information on the topics discussed in the citizen action letter were already in the staff's possession, or were referenced in the letter. Staff replied the same day, seeking confirmation whether Mr. Kimbrough possessed any documentary evidence or other specific information staff did not already possess, or that was not considered in staff's investigation of PDC Case No. 11-019. Counsel replied as follows:

"I am sorry I was not clear. My client does not possess documentary evidence or other specific information not possessed by PDC staff. However, we believe that a violation occurred, and the information possessed by the PDC confirms that belief. I am sorry that we cannot be of more help, but we have complied with the statutory notice requirement and we wish you luck in your investigation of this matter."

(Exhibit 8.)

- 3.9 **Response by AFP and Other Respondents:** Staff invited the entities and individuals named in the citizen action letter to respond to the complaint. Although none of the individuals submitted a written response to the allegations, two AFP donors contacted staff to explain their relationship to the organization. On March 8, 2012, Ron Cohn stated that he had no information about the allegations, and could add nothing to the record except to confirm that he made a monetary donation to AFP. **(Exhibit 9, p 1.)** On March 12,

2012, Richard Alvord stated that he had no information about the alleged violations. Mr. Alvord said that he has no involvement in AFP, other than having donated to the organization, and that he does not know who the group's officers or other decision makers are. He compared his donation to AFP to a donation to fund research into Multiple Sclerosis; he stated that he had no more of a connection to AFP than to the MS Society. **(Exhibit 9, p 2.)**

- 3.10 On March 8, 2012, staff received a response from AFP's Counsel, Jason Torchinsky. **(Exhibit 10.)** In the response, Mr. Torchinsky stated the following:

"Mr. Kimbrough has acknowledged that the facts underlying the allegations in the present case are the same as the facts underlying the allegations levied against AFP in PDC Case 11-019, which was dismissed by a unanimous vote of the Commission following a lengthy investigation. In Case 11-019, the Commission reached the unanimous conclusion that AFP did not violate Ch. 42.17 RCW. Despite Mr. Kimbrough's admission that the facts underlying his allegations are the same as those in PDC Case 11-019, he has indicated that he believes these same facts constitute violations of Ch. 42.17 RCW. As the Commission has already found, they do not..."

Mr. Torchinsky pointed to the following conclusions from the Public Disclosure Commission's Order of Dismissal entered February 8, 2012:

- *'AFP was not a political committee as defined at RCW 42.17.020(39) during the periods at issue in this case. . . . Because AFP was not a political committee, it was also not required to report under RCW 42.17.020, RCW 42.17.080 or RCW 42.17.090.'*
- *'AFP's communications were not "political advertising" as defined at RCW 42.17.020(38). . . . AFP's communications at issue in this case were not "independent expenditures" as defined at RCW 42.17.020(28). . . . AFP was not required to provide disclosure of the top five contributors as required at RCW 42.17.510(2) because AFP's communications were not independent expenditures.'*
- *'The communications at issue in this case were not "electioneering communications" as defined at RCW 42.17.020. . . . AFP was not required to provide disclosure of the top five contributors as required at RCW 42.17.510(2) because AFP's communications were not electioneering communications. . . . AFP was not required to file special reports under RCW 42.17.565 because AFP's communications were not electioneering communications.'*

In conclusion, Mr. Torchinsky stated:

...As consistently maintained in its submissions to the Commission, AFP has conducted all activities in full compliance with Ch. 42.17 RCW. Thus, AFP respectfully requests that the Commission dismiss these meritless allegations."

IV.

SCOPE

4.1 PDC staff reviewed the following documents, and information obtained from communications with counsel and witnesses:

1. The report of investigation and exhibits in PDC Case No. 11-019, Americans for Prosperity Washington, dated December 1, 2011;
2. The supplemental report of investigation and exhibits in PDC Case No. 11-019, dated January 23, 2012;
3. A legal brief authored by Senior Assistant Attorney General Linda Dalton on behalf of PDC staff, dated January 23, 2012;
4. A legal brief authored by John White and Jason Torchinsky on behalf of Americans for Prosperity Washington, received January 20, 2012;
5. The PDC's Order of Dismissal in PDC Case No. 11-019, entered on February 8, 2012;
6. A 45-day citizen action letter filed by Knoll Lowney on behalf of Charles Kimbrough, received by the Washington Attorney General on January 24, 2012, and forwarded to the PDC on January 25, 2012;
7. Federal Election Commission reports and data;
8. An L-6 Grass Roots Lobbying report that AFP filed with the PDC on November 10, 2010, and amended on January 25, 2011 and January 31, 2011;
9. PDC staff letters and email correspondence to Knoll Lowney, dated February 1, 2012, February 16, 2012, and February 23, 2012;
10. Email correspondence from Knoll Lowney to PDC staff, dated February 1, 2012, February 23, 2012, and February 24, 2012;
11. Email correspondence from Kirby Wilbur to PDC staff, dated March 7, 2012;
12. A response to the citizen action letter, received from Jason Torchinsky on March 8, 2012;
13. Email correspondence from Jason Torchinsky to PDC staff, dated March 7, 2012, March 8, 2012, March 9, 2012, March 12, 2012, and March 14, 2012;
14. PDC staff's notes of a telephone conversation with Knoll Lowney on February 8, 2012;

15. PDC staff's notes of a telephone message left by Ron Cohn on March 8, 2012;
16. PDC staff's notes of a telephone conversation with Jason Torchinsky on March 9, 2012; and
17. PDC staff's notes of a telephone conversation with Richard Alvord on March 12, 2012.

V.

LAW AND OTHER AUTHORITY

RCW 42.17.020(38) defines "political advertising" to include *"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."*

RCW 42.17.020(28) defines "independent expenditure" as an expenditure that meets several specified criteria, including that it pays in whole or in part for political advertising that either specifically names the candidate supported or opposed, or clearly and beyond any doubt identifies the candidate without using the candidate's name.

RCW 42.17.020(39) defines a "political committee" as *"any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition."*

PDC Interpretation 07-02, Primary Purpose Test Guidelines, distills relevant case law and other legal guidance (AGO 1973 no. 14, *State v. Dan Evans Committee*, and *Evergreen Freedom Foundation v. Washington Education Association*) concerning the definition of "political committee" in RCW 42.17.020(39). As discussed in the Interpretation, a person is a political committee if that person becomes a "receiver of contributions" to support or oppose candidates or ballot propositions, or if expenditures to support or oppose candidates or ballot propositions become one of the person's primary purposes.

RCW 42.17.040 requires every political committee to timely register with the Public Disclosure Commission.

RCW 42.17.080 and 090 require political committees to file timely, accurate reports of contributions, including contributions pledged but not received, and expenditures, including debts, orders placed and obligations. The reports are filed monthly following an excess of \$200 in contribution or expenditure activity, except during the five months before the election, during which time summary reports of receipts and expenditures are required to be filed 21 days and again 7 days before each election in which the committee is participating. Any contributions received and expenditures made prior to the date of registration must be disclosed on the day the registration is filed. Reports of contributions must include the name and address of any contributor who has given more than \$25 in the aggregate.

RCW 42.17.093 requires an out-of-state political committee organized for the purpose of supporting or opposing candidates or ballot propositions in another state that is not otherwise required to report under RCW 42.17.040 through 42.17.090 to report with the commission when the committee makes an expenditure supporting or opposing a Washington state candidate or political committee.

WAC 390-16-049 establishes the criteria for a political committee to disclose its expenditures in support of or opposition to a Washington State candidate or ballot proposition as an out-of-state committee, on PDC form C-5. Among other criteria, to report as an out-of-state committee, a political committee must *"Be currently registered and actively filing campaign disclosure reports in one or more other states and has been so filing for the preceding two years"* and must *"Have organizational documents showing it was originally formed and is currently organized for the purpose of making expenditures in another state or soliciting contributions for use in another state's election campaigns."*

RCW 42.17.100 requires sponsors of independent expenditures to file a special report with the Public Disclosure Commission within five days of making a qualifying expenditure that by itself or when added to all other such independent expenditures made during the same election campaign by the same sponsor equals one hundred dollars or more. For the purposes of this section the term "independent expenditure" means 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 pursuant to RCW 42.17.060, 42.17.080, or 42.17.090.

RCW 42.17.103 requires sponsors of independent expenditure political advertising that is presented to the public within twenty-one days of an election, and that has a fair market value of one thousand dollars or more, to deliver a special report to the commission within twenty-four hours of, or on

the first working day after, the date the political advertising is first published, mailed, or otherwise presented to the public.

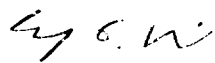
RCW 42.17.020(20) defines an "electioneering communication" as any broadcast, cable, or satellite television or radio transmission, United States postal service mailing, billboard, newspaper, or periodical that (a) clearly identifies a candidate for a state, local, or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate's name; (b) is broadcast, transmitted, mailed, erected, distributed, or otherwise published within sixty days before any election for that office in the jurisdiction in which the candidate is seeking election; and (c) either alone, or in combination with one or more communications identifying the candidate by the same sponsor during the sixty days before an election, has a fair market value of five thousand dollars or more.

WAC 390-05-505 excludes from the definition of "electioneering communication" "in-person leaflet/pamphlet drops at street addresses," as well as "Communications conveyed in a manner not specified in RCW 42.17.020(20)."

RCW 42.17.565 requires sponsors of electioneering communications to electronically file special reports with the Commission within 24 hours of presenting a qualifying communication to the public, on the first working day after.

RCW 42.17.510(2) requires independent expenditure political advertising and electioneering communications sponsored by any person other than a bona fide political party to include the statement, "*No candidate authorized this ad. It is paid for by (name, address, city, state).*" In addition, if the advertisement or communication is sponsored by a political committee, it must include the statement "*Top Five Contributors,*" followed by a listing of the names of the five persons or entities making the largest contributions in excess of seven hundred dollars reportable under RCW 42.17 during the twelve-month period before the date of the advertisement or communication.

Respectfully submitted this 14th day of March, 2012.



Tony Perkins
Lead Political Finance Specialist
Public Disclosure Commission

EXHIBIT LIST

- Exhibit 1** The PDC's Order of Dismissal in PDC Case No. 11-019, entered on February 8, 2012.
- Exhibit 2** A 45-day citizen action letter against AFP and other respondents, filed by Knoll Lowney on behalf of Charles Kimbrough, received by the Washington Attorney General on January 24, 2012, and forwarded to the PDC on January 25, 2012.
- Exhibit 3** An amended L-6 Grass Roots Lobbying report filed with the PDC on January 31, 2011 by AFP.
- Exhibit 4** PDC staff letter to Knoll Lowney dated February 1, 2012.
- Exhibit 5** Email from Knoll Lowney to PDC staff, sent on February 1, 2012.
- Exhibit 6** Record of PDC staff's telephone conversation with Knoll Lowney on February 8, 2012.
- Exhibit 7** PDC staff email to Knoll Lowney sent on February 16, 2012.
- Exhibit 8** Email from Knoll Lowney to PDC staff, sent on February 23, 2012.
- Exhibit 9** PDC staff's record of a voice message left by Ron Cohn on March 8, 2012, and a record of PDC staff's telephone conversation with Richard Alvord on March 12, 2012.
- Exhibit 10** A response to the citizen action letter, received from Jason Torchinsky on March 8, 2012.