



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

William Dalsen, Esq.
Michael R. Hackett, Esq.
Timothy W. Mungovan, Esq.
Proskauer Rose LLP
One International Place
Boston, MA 02110-2600

SEP 05 2014

RE: MUR 6660
Americans Elect

Dear Messrs. Dalsen, Hackett, and Mungovan:

On October 12, 2012, the Federal Election Commission notified your client, Americans Elect, of a Complaint alleging violations of the Federal Election Campaign Act of 1971, as amended. On August 26, 2014, the Commission found, on the basis of the information in the Complaint, and information provided by you, that there is no reason to believe your client violated 2 U.S.C. §§ 432, 433, 434, or 441b(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. 70426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (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 Roy Q. Lockett, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Mark Allen".

Mark Allen
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

PROSKAUER ROSE LLP

1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 **RESPONDENT:** Americans Elect

MUR: 6660

6
7 **I. INTRODUCTION**

8 This matter was generated by a Complaint filed with the Federal Election Commission
9 alleging two violations of the Federal Election Campaign Act of 1971, as amended (the "Act"),
10 by Americans Elect. First, it alleges that Americans Elect, a 501(c)(4) organization, should have
11 registered and reported with the Commission as a political committee because it aired more than
12 \$500,000 in television advertisements expressly advocating the election of Angus King, an
13 independent candidate in 2012 for a U.S. Senate seat in Maine. Second, it alleges that one of
14 those advertisements was coordinated between Americans Elect and King's campaign committee
15 because Eliot Cutler held positions with both Americans Elect — where he was a member of the
16 board — and the campaign committee — where he served as one of the campaign's statewide
17 chairmen. Compl. at 3-5 (Oct. 9, 2012). The Complaint alleges that the costs associated with
18 that advertisement therefore constitute a prohibited in-kind contribution from Americans Elect to
19 King and his campaign committee, Angus King for Senate, and its treasurer ("King
20 Committee").

21 Regarding the allegation that Americans Elect failed to register and report as a political
22 committee, Americans Elect asserts that it lacks the requisite major purpose of a political
23 committee — namely, the nomination or election of a clearly identified federal candidate.
24 Americans Elect Resp. at 6 (Nov. 13, 2012). It asserts that it spent the overwhelming majority of
25 its funds on developing an alternative nominating process and obtaining ballot access and only a
26 small percentage of its funds were devoted to making independent expenditures. *Id.* As to the

1404740404

1 coordination allegation, Americans Elect denies that the challenged advertisement of Americans
2 Elect supporting King resulted from any coordinated activity, providing several factually-
3 specific affidavits in support. *See id.*; Angus King and Committee Joint Resp. (Oct. 29, 2012)
4 (the “Joint Resp.”); Cutler Resp. (Oct. 29, 2012).

5 As discussed below, the available information indicates that the activities of Americans
6 Elect do not support a finding that the organization’s major purpose was the nomination and
7 election of particular federal candidates. Accordingly, the Commission finds no reason to
8 believe that Americans Elect violated 2 U.S.C. §§ 432, 433, and 434 by failing to organize,
9 register, and report as a political committee. The Commission has also determined to find no
10 reason to believe that Respondent made or accepted or received a prohibited corporate in-kind
11 contribution in violation of 2 U.S.C. § 441b(a).

12 **II. FACTUAL AND LEGAL ANALYSIS**

13 **A. Americans Elect is not a Political Committee**

14 1. Factual Background

15 Americans Elect was incorporated in April 2010 under the laws of the District of
16 Columbia and is a non-profit social welfare organization under section 501(c)(4) of the Internal
17 Revenue Code. Compl. at 3. Its stated purpose is “to encourage civic engagement by
18 developing a nonpartisan process for the American people, using an Internet-based convention,
19 directly to nominate qualified persons for President and Vice President of the United States in
20 the 2012 election” in an effort “to empower Americans to choose a Presidential ticket and
21 formulate an issues platform that is independent of the partisan interests of either major party.”
22 Compl., Ex. E at 2, 27 (Americans Elect 2010 IRS Form 990).

1 In furtherance of this stated purpose, Americans Elect had an operating budget of over
2 \$35 million, to be used for the development of an alternative online nomination platform.
3 Americans Elect Resp. at 2, 6; Byrd Aff. ¶¶ 2, 3. By May 2012, Americans Elect was “in the
4 process of qualifying for ballot access in all 50 states and the District of Columbia.” Americans
5 Elect Resp. at 2. However, “[i]n May 2012, it became clear to the management of Americans
6 Elect that no person would meet the Americans Elect requirement of sufficient popular support
7 to qualify for consideration at the internet-based convention,” prompting the Board of Americans
8 Elect to begin withdrawing ballot access where possible and to begin the process of winding
9 down the organization. *Id.* at 2-3. Specifically, on June 26, 2012, the Board of Directors of
10 Americans Elect voted in favor of a resolution to dissolve the organization and directed its
11 corporate officers to implement a “dissolution plan.” Americans Elect Resp., Ex. B. That
12 resolution also accepted the resignations of seventeen members of Americans Elect, including
13 Eliot Cutler and four other outside Directors. *Id.* Cutler’s resignation letter cited as its basis the
14 anticipated dissolution of Americans Elect and the termination of its online convention.
15 Americans Elect Resp., Ex. A. Americans Elect also dissolved several internal committees, as
16 well as a subcommittee that focused on overseeing and approving implementation of the
17 Presidential Nomination Process Plan. Americans Elect Resp., Ex. B.¹

18 On August 6, 2012, “more than a month after Eliot Cutler terminated his relationship
19 with the management of Americans Elect,” the remaining Directors of Americans Elect
20 authorized the organization “to make independent expenditures in connection with federal

¹ Although Americans Elect passed a resolution to dissolve its operations on June 26, 2012, and substantially reduced the organization’s activities and staff, Americans Elect never in fact terminated. It retained a functioning board of directors and continued to operate in the same name and subject to the same corporate formalities, as demonstrated by its resolution to make independent expenditures and its activities in connection with that decision through October 2012.

CONFIDENTIAL

1 controlled by a candidate must register as a political committee only if (1) it crosses the \$1,000
2 threshold and (2) it has as its “major purpose” the nomination or election of federal candidates.

3 Because Americans Elect made \$1,349,297 in independent expenditures between
4 October 5, 2012 and October 31, 2012, its spending satisfies the statutory threshold for political
5 committee status. The remaining question is whether Americans Elect’s major purpose was the
6 nomination or election of one or more federal candidates. The Commission concludes it was not.

7 b. Major Purpose
8

9 The Commission has adopted a policy of determining on a case-by-case basis whether an
10 organization is a political committee, including whether its major purpose is the nomination or
11 election of federal candidates. Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007)
12 (“Supplemental E&J”). Under the Commission’s case-by-case approach, the Commission
13 considers the organization’s “overall conduct,” including its disbursements, activities, and
14 statements. Supplemental E&J at 5597.

15 Americans Elect’s public statements and organizational documents have represented that
16 the organization was devoted to the process of placing a yet unknown, directly nominated
17 presidential and vice-president candidate on the 2012 ballot in 50 states, not the nomination or
18 election of any clearly identified federal candidates. Americans Elect represents that they spent
19 “more than 96% of more than \$35 million” on this activity. Americans Elect Resp. at 6. The
20 D.C. Circuit has ruled that this activity does not constitute the nomination or election of a clearly
21 identified candidate. See *Unity08 v. FEC*, 596 F.3d 861, 868-69 (D.C. Cir. 2010) (holding that
22 organization seeking to hold an online nominating convention without supporting a clearly
23 identified candidate lacks requisite major purpose). Although Americans Elect reported making
24 \$1,349,297 in independent expenditures in October 2012, its spending on the activity alleged in

140470144041

1 the Complaint accounted for only a small percentage of its funds.² Americans Elect's
2 disbursements, activities, and statements, therefore, indicate that the organization's major
3 purpose was not the nomination or election of federal candidates.³

4 The Commission has therefore determined to find no reason to believe that Americans
5 Elect violated 2 U.S.C. §§ 432, 433, and 434 by failing to register and report as a political
6 committee.

7 **B. The Television Advertisement Supporting King's Election was not a**
8 **Coordinated Communication**

9
10 **I. Factual Background**

11 The Complaint also alleges that Americans Elect coordinated with King and the King
12 Committee a television advertisement supporting King's election that aired in October 2012.
13 Compl. at 2-5. This allegation was premised on the assumption that Eliot Cutler served
14 concurrent roles for both Americans Elect and the King Committee when the advertisement was
15 created, produced, and broadcast. *Id.*; see also Compl., Ex. B (text of advertisement); Compl.,
16 Ex. D (Maggie Haberman, *Americans Elect Airs \$500K in Maine Air Time in Support of King*
17 *(Updated)*, POLITICO (Oct. 5, 2012), available at [http://www.politico.com/blogs/burns-](http://www.politico.com/blogs/burns-haberman/2012/10/americans-elect-air-k-in-maine-air-time-in-support-137631.html)
18 [haberman/2012/10/americans-elect-air-k-in-maine-air-time-in-support-137631.html](http://www.politico.com/blogs/burns-haberman/2012/10/americans-elect-air-k-in-maine-air-time-in-support-137631.html)). The
19 Complaint alleges that beginning in December 2011 and continuing through the October 5, 2012,

² Commissioners disagree about the approach for determining political committee status, but agree on the result in this case. Compare MUR 6589 (American Action Network), Statement of Reasons of Chairman Lee E. Goodman and Comm'rs Caroline C. Hunter and Matthew S. Petersen at 24-26; MUR 6538 (Americans for Job Security), Statement of Reasons of Chairman Lee E. Goodman and Comm'rs Caroline C. Hunter and Matthew S. Petersen at 24-26; MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Comm'rs Caroline C. Hunter and Matthew S. Petersen at 20-21, 24 with MURs 6538 & 6589 (Americans for Job Security and American Action Network), Statement of Reasons of Vice Chair Ann M. Ravel and Comm'rs Steven T. Walther and Ellen L. Weintraub at 3-4; MUR 6396 (Crossroads GPS), Statement of Reasons of Vice Chair Ann M. Ravel and Comm'rs Steven T. Walther and Ellen L. Weintraub at 3-4.

³ The available information does not indicate that Americans Elect engaged in any activity other than that alleged in the complaint related to the election of a federal candidate.

1 date of the Complaint, Cutler served as a member of Americans Elect's Board of Directors.
2 Compl. at 2. On March 8, 2012, the King Committee announced the appointment of Cutler as
3 one of the campaign's nine statewide chairs. *Id.* In view of Cutler's alleged dual roles, the
4 Complaint concludes that "[i]t is inconceivable that the pro-King Americans Elect
5 communications were made without substantial discussions, material involvement, or at the
6 request or suggestion of Cutler — an agent of the King campaign." Compl. at 5.

7 In response, Cutler represents in a sworn affidavit that he resigned from the board of
8 Americans Elect on June 26, 2012, and attaches a copy of his resignation letter. Aff. of Eliot R.
9 Cutler ¶¶ 2, 7, (Oct. 27, 2012); Cutler Resp., Ex. A. He further explains that in late April 2012,
10 he "agreed to serve as one of nine volunteer and largely honorary chairs" for the King
11 Committee, and that he also served the King Committee as a volunteer fundraiser beginning at
12 the same time. *Id.* ¶ 5. Concerning the Complaint's inference that he was a conduit for
13 communications between the King Committee and Americans Elect, Cutler represents that he
14 "had no conversations at any time" with anyone "at or in any way connected with Americans
15 Elect regarding the plans, projects, activities or needs of the King Campaign or that was material
16 to the creation, production or distribution of the TV ads"; and that he "never discussed with
17 anyone affiliated in any way with Americans Elect the content, intended audience, means or
18 mode of communication, specific media outlet used, time or frequency or size or prominence of
19 the TV ads." *Id.* ¶ 10. He also represents that he "never had any conversations or
20 communications with anyone affiliated with Americans Elect in any way suggesting or relating
21 to any assent of the [King Committee] to outside assistance, or with regard to any of the
22 activities listed in 11 C.F.R. § 109.3(b)(1) through (6) or that meets any of the content standards
23 set forth in 11 C.F.R. § 109.21(c)." *Id.*

UNCLASSIFIED

1 Cutler states that he spoke to Kahlil Byrd, the then-CEO of Americans Elect, on May 24
2 and June 11, 2012, concerning the future of Americans Elect. Cutler Aff. ¶ 6. As a result of
3 these conversations, Cutler believed that Americans Elect officers were engaged in on-going
4 discussions about what Americans Elect would do next, including possibly supporting state and
5 local candidates in 2012, 2013, and 2014 and making adjustments for the 2016 presidential
6 election. *Id.* Cutler also noted that Byrd made some “very general references to Angus King’s
7 candidacy for the U.S. Senate.” *Id.* But Cutler avers that he never discussed “with Mr. Byrd or
8 anyone else affiliated in any way with Americans Elect” any political campaign activities that
9 Americans Elect or its officers or staff might undertake. *Id.*

10 According to the Americans Elect Response, “Cutler had left the leadership of Americans
11 Elect nearly one and a half months before Americans Elect first considered making an
12 independent expenditure” supporting King. Americans Elect Resp. at 4-5. Americans Elect
13 made the decision to make the independent expenditures by a vote of its Board of Directors,
14 which was scheduled for August 6, 2012. *Id.* at 3. Americans Elect also submitted an affidavit
15 of Byrd, which represents that, after resigning, Cutler “had no further management role or
16 involvement with Americans Elect.” Byrd Aff. ¶ 6; *see also id.*, Ex. A (resignation letter of Eliot
17 Cutler dated June 26, 2012), Ex. B (resolution of June 26, 2012, accepting Cutler resignation).⁴
18 Further, Americans Elect demonstrates that it engaged in best practices to avoid coordination by
19 submitting sworn testimony that it informed and required directors and vendors to comply with a
20 very detailed non-coordination policy. Americans Elect Resp. at 5, Byrd Aff. ¶¶ 9-10, Ex. D
21 (copy of internal legal guidance concerning coordination), Ex. E (copy of Americans Elect
22 policy prohibiting coordination with respect to Maine senatorial election). In his affidavit, Byrd

⁴ Byrd states that he was at all relevant times the CEO of Americans Elect. Byrd Aff. ¶ 1.

140474040404

1 Americans Elect's costs in making the television advertisement supporting King's
2 election would constitute a prohibited corporate in-kind contribution from Americans Elect to
3 King if the advertisement was a "coordinated communication." 2 U.S.C. § 441a(a)(7)(B)(i);
4 11 C.F.R. § 109.21(b). Commission regulations provide a three-prong test to determine if a
5 communication is a coordinated communication. 11 C.F.R. §109.21(a). First, the
6 communication must be paid for, in whole or in part, by a person other than the candidate or
7 authorized committee (the payment prong). 11 C.F.R. § 109.21(a)(1). Second, the
8 communication must satisfy one of the five content standards (the content prong). 11 C.F.R.
9 § 109.21(a)(2), (c). Third, the communication must satisfy one of the five conduct standards (the
10 conduct prong). 11 C.F.R. § 109.21(a)(3), (d). A payment for a communication satisfying all
11 three prongs of the test is made for the purpose of influencing a federal election, and therefore it
12 is an in-kind contribution.

13 As Americans Elect concedes, both the payment and content prongs of the Commission's
14 coordinated communication regulation are met here. Americans Elect Resp. at 5. Americans
15 Elect is a third-party responsible for paying to air the advertisement, and the advertisement was a
16 public communication that refers to King, a clearly identified candidate for federal office,
17 broadcast in his jurisdiction within 90 days of the November 6, 2012, general election. *See*
18 11 C.F.R. § 109.21(a)(1), (c)(4)(i).

19 The record does not provide any reason to conclude, however, that the conduct prong is
20 met in this matter. The conduct prong will be satisfied if (1) the communication was created,
21 produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the
22 candidate or his campaign was materially involved in decisions regarding the communication;
23 (3) the communication was created, produced, or distributed after substantial discussions with

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

1 the campaign or its agents; (4) the parties contracted with or employed a common vendor that
2 used or conveyed material information about the campaign's plans, projects, activities or needs,
3 or used material information gained from past work with the candidate to create, produce, or
4 distribute the communication; (5) the payor employed a former employee or independent
5 contractor of the candidate who used or conveyed material information about the campaign's
6 plans, projects, activities or needs, or used material information gained from past work with the
7 candidate to create, produce, or distribute the communication; or (6) the payor republished
8 campaign material. *See* 11 C.F.R. § 109.21(d).

9 The Complaint bases its coordination allegation entirely on the assumption that Cutler
10 held concurrent positions as a board member of Americans Elect and co-chair of the King
11 Committee when the advertisement was created, produced, and broadcast. Although Cutler
12 acknowledges serving as one of the King Committee's nine voluntary chairs and as a voluntary
13 fundraiser for the King Committee beginning in late April 2012 prior to his late June resignation
14 from Americans Elect, there is no information to suggest that Americans Elect was considering
15 making expenditures on behalf of King at that time, and both Cutler and Byrd represent the
16 contrary in their affidavits. Moreover, all of the relevant parties that allegedly would have
17 participated in the coordinated activities have provided factually-specific affidavits from persons
18 with relevant knowledge denying that Cutler either was involved with or was authorized to act as
19 an agent regarding any of the activities that meet the conduct prong in connection with the
20 challenged advertisement. Further, as to the period prior to Cutler's June 26, 2012, resignation,
21 he represents under penalty of perjury that he "never" discussed the relevant advertisement with
22 Americans Elect or the King Committee "at any time." Cutler Aff. ¶ 10. Moreover, both

14054MUMUNAN

1 Americans Elect and the King Committee also deny, with factually-specific affidavits in support,
2 that they or their agents engaged in any such activities.

3 Based on the available information, including several factually-specific affidavits, the
4 record here does not reasonably suggest that the parties engaged in any activity that would
5 satisfy the conduct prong of the Commission's coordination regulation with respect to the
6 challenged advertisement. The Commission finds no reason to believe that Americans Elect
7 violated 2 U.S.C. § 441 b(a) by making a prohibited corporate in-kind contribution in the form of
8 a coordinated communication.

140247101010101