



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

JUL 5 2005

William J. McGinley, Esq.
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037

RE: MUR 5546
Progress for American Voter Fund

Dear Mr. McGinley:

On October 5, 2004, the Federal Election Commission notified your client of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, information provided by your client, and publicly-available information, the Commission, on June 21, 2005, found that there is reason to believe your client violated 2 U.S.C. § 441a(a)(1)(A), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath.

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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact April Sands, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Chairman

Enclosures

Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENT: Progress for America Voter Fund**

MUR: 5546

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6 **I. INTRODUCTION**

7 The Complaint alleges that Progress for America Voter Fund ("PFA-VF") made
8 coordinated expenditures in support of President Bush's 2004 re-election campaign that
9 constituted illegal in-kind contributions to Bush-Cheney '04, Inc. and the Republican National
10 Committee ("RNC"). Specifically, the Complaint asserts that PFA-VF may have coordinated its
11 expenditures by utilizing the services of a direct mail and phone bank specialist named Tom
12 Synhorst whose company, Feather, Larson & Synhorst, was a major vendor to both Bush-Cheney
13 '04 and the RNC.

14 **II. FACTUAL AND LEGAL ANALYSIS**

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16 **A. FACTS**

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18 Progress for America Voter Fund is a Section 527 organization that does not maintain a
19 federal account and is not registered with the Commission.¹ PFA-VF was formed on May 27,
20 2004. PFA-VF's officers include Brian McCabe, as President, Mary Anne Carter, as Treasurer,
21 and Ralph R. Brown, as Secretary.

22 In its Post-General Election Report filed with the IRS on December 2, 2004, PFA-VF
23 reported \$7,031,973 in receipts and \$6,628,627 in disbursements for the period from October 14,

¹ By law, a 527 organization is "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). The "exempt function" of 527 organizations is the "function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State, or local public office or office in a political organization," or the election or selection of presidential or vice presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore, an organization that avails itself of 527 status has effectively declared that its primary purpose is influencing elections of one kind or another.

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1 2004 through November 22, 2004. PFA-VF also filed numerous electioneering communication
2 reports with the Commission during the Fall of 2004 for millions of dollars in broadcast
3 advertisements that promoted or supported Republican Presidential nominee President Bush
4 and/or attacked or opposed Democratic Presidential nominee John Kerry.

5 In its Response to the Complaint in this matter, PFA-VF challenges the sufficiency of the
6 allegations set forth in the Complaint and, without addressing any of the specific factual
7 allegations, denies that any of its activities were coordinated with Bush-Cheney '04, Inc. or the
8 RNC.

9 **B. ANALYSIS**

10 **1. Summary of Coordination Law**

11 Under the Act, an expenditure made by any person "in cooperation, consultation, or
12 concert, with, or at the request or suggestion of" a candidate or party committee constitutes an in-
13 kind contribution. *See* 2 U.S.C. §§ 441a(a)(7)(B)(i) and (ii). The regulations that implement the
14 preceding statutory provisions define "coordinated" and prescribe the treatment of a
15 "coordinated" expenditure as an in-kind contribution. *See* 11 C.F.R. § 109.20(a) and (b).

16 Although the definition of "coordinated" in Section 109.20 potentially encompasses a
17 variety of payments made by a person on behalf of a candidate or party committee, many issues
18 regarding coordination involve communications. The Commission therefore has promulgated
19 separate regulations addressing "coordinated communications." 11 C.F.R. §§ 109.21-109.23. A
20 communication is coordinated with a candidate, an authorized committee, a political party
21 committee, or agent thereof if it meets a three-part test:

- 22 (1) the communication is paid for by a person other than that candidate, authorized
23 committee, political party committee, or agent thereof;

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- 1 (2) the communication satisfies at least one of the four “content” standards described
2 in Section 109.21(c);² and
- 3 (3) the communication satisfies at least one of the six “conduct” standards described
4 in Section 109.21(d).

5 **2. Alleged Coordination by PFA-VF**

6
7 a. The Payment Standard

8 The standard for payment by a party other than a candidate, authorized committee,
9 political party, or agent thereof would, by definition, be satisfied by any communications paid
10 for by PFA-VF or The Leadership Forum (“TLF”).

11 b. The Content Standard

12 The “content” standard includes: (1) an “electioneering communication;” (2) a “public
13 communication” that disseminates campaign materials prepared by a candidate; (3) a
14 communication that “expressly advocates” the election or defeat of a clearly identified federal
15 candidate; and (4) certain “public communications,” distributed 120 days or fewer before an
16 election, which refer to a clearly identified federal candidate (or political party). 11 C.F.R.
17 § 109.21(c). The materials received to date substantiate that most, if not all, of PFA-VF’s
18 communications would meet either the first (“electioneering communication”) or fourth (“public
19 communications” mentioning a candidate within 120 days of an election) subparts of the content
20 standard.

² In *Shays v. FEC*, 337 F. Supp. 2d 28, (D.D.C. Sept. 18, 2004) (notice of appeal filed Sept. 28, 2004) the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court’s opinion. In a subsequent ruling, the Court explained that the “deficient rules technically remain ‘on the books,’” and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 02-CV-1984, 340 F. Supp. 2d 39 (D.D.C. Oct. 19, 2004).

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1 For example, the following television advertisement entitled "Finish It" was paid for by

2 PFA-VF:³

3

Audio	Visual
ANNOUNCER: These people want to kill us.	<i>On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers and victims of terrorist attacks.</i>
They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans.	<i>On screen: Pictures showing 9/11 attack on Twin Towers and terrorist attacks in Russia and Spain.</i>
John Kerry has a 30-year record of supporting cuts in defense and intelligence and endlessly changed positions on Iraq.	<i>On screen: Still Picture of Kerry; 30 years cuts in defense and intelligence</i>
Would you trust Kerry against these fanatic killers? President Bush didn't start this war, but he will finish it.	<i>On screen: Would you trust Kerry? Pictures of President Bush addressing the US military.</i>
Progress for America Voter Fund is responsible for the content of this message.	<i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund & Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for America Voter Fund Is Responsible For The Content Of This Ad.</i>

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³ Jeanne Cummings, *Who Funded That Negative Ad?*, WALL ST. J., July 7, 2004, at A4. Ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-03.mplarge.wmv>.

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1 PFA-VF reportedly spent \$15 million on the Ashley's Story ad below:⁴

2

Audio	Visual
<p>LYNN FAULKNER: My wife, Wendy, was murdered by terrorists on Sept. 11.</p>	<p><i>On screen: Lynn Faulkner; picture of Wendy Faulkner with her two daughters.</i></p>
<p>ANNOUNCER: The Faulkners' daughter Ashley closed up emotionally. But when President George W. Bush came to Lebanon, Ohio, she went to see him as she had with her mother four years before.</p>	<p><i>On screen: picture of Ashley reading a book; Bush at a campaign rally in Ohio.</i></p>
<p>LINDA PRINCE: He walked toward me and I said, "Mr. President, this young lady lost her mother in the World Trade Center."</p>	<p><i>On screen: Linda Prince; Family Friend</i></p>
<p>ASHLEY FAULKNER: And he turned around and he came back and he said, "I know that's hard. Are you all right?"</p>	<p><i>On screen: Ashley Faulkner</i></p>
<p>LINDA PRINCE: Our President took Ashley in his arms and just embraced her. And it was at that moment that we saw Ashley's eyes fill up with tears.</p>	<p><i>On screen: President Bush embracing Ashley Faulkner.</i></p>
<p>ASHLEY FAULKNER: He's the most powerful man in the world and all he wants to do is make sure I'm safe, that I'm OK.</p>	<p><i>On screen: Lynn Faulkner; picture of President Bush with a fire fighter.</i></p>
<p>LYNN FAULKNER: What I saw was what I want to see in the heart and in the soul of the man who sits in the highest elected office in our country.</p>	<p><i>Footage of a newspaper with President Bush embracing a girl captioned "Bush comforts daughter of 9/11 victim."</i></p>
<p>ANNOUNCER: Progress for America Voter Fund is responsible for the content of this message.</p>	<p><i>On screen: PFAvoterfund.com. Paid For By Progress For America Voter Fund & Not Authorized By Any Candidate Or Candidate's Committee; 877-792-3800; Progress for</i></p>

⁴ <http://www.washingtonpost.com/wp-dyn/articles/A28697-2004Nov5.html>; ad available at <http://www.pfavoterfund.org/media/PFA-04-TV-02.mplarge.wmv>; <http://www.washingtonpost.com/wp-dyn/articles/A29189-2004Nov5.html>.

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	<i>America Voter Fund Is Responsible For The Content Of This Ad.</i>
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2 In thirty electioneering communications reports filed with the Commission, PFA-VF
3 listed \$72,070,250 in donations received and \$29,810,435 in electioneering communications
4 made covering the period from June 23 through October 29, 2004. It appears that PFA-VF's
5 primary activity was to fund television advertisements that clearly identified then-Republican
6 Presidential candidate George Bush, then-Democratic Presidential Candidate John Kerry, or
7 both.⁵ The thirty electioneering communications reports PFA-VF filed with the Commission
8 listed President Bush and Senator John Kerry.

9 Because PFA-VF reported spending millions of dollars for electioneering
10 communications that satisfy the "content" standard, an analysis of the "conduct" standard is
11 required to assess whether there is reason to believe any of the expenditures were coordinated.

12 c. The Conduct Standard⁶

13 Any one of six "conduct" standards will satisfy the third element of the three-part
14 coordination test, "whether or not there is agreement or formal collaboration." 11 C.F.R.
15 §§ 109.21(d) and (e). These conduct standards include: (1) communications made at the
16 "request or suggestion" of the relevant candidate or committee; (2) communications made with
17 the "material involvement" of the relevant candidate or committee; (3) communications made

⁵ See <http://www.pfavoterfund.com/> for audio and video.

⁶ Because TLF appears to have made no disbursements for communications that satisfy the "content" standard, it is not necessary to examine the "conduct" standard. Notwithstanding this point, there is no information which suggests that TLF would satisfy the "conduct" standard.

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1 after “substantial discussion” with the relevant candidate or committee; (4) specific actions of a
2 “common vendor”; (5) specific actions of a “former employee”; and (6) specific actions relating
3 to the dissemination of campaign material. 11 C.F.R. §§ 109.21(d)(1)-(6). It is the fourth prong,
4 actions taken through a “common vendor,” which warrants further investigation in this matter.

5 It appears that PFA-VF and Bush-Cheney '04 utilized a common vendor. The Complaint
6 alleges that Tom Synhorst, a direct-mail and phone-bank specialist, is a key strategic adviser to
7 PFA-VF and is also partner in a firm that has major contracts with both Bush-Cheney '04 and the
8 RNC. Publicly available information reveals that Bush-Cheney and the RNC disbursed millions
9 of dollars to Feather, Larson & Synhorst (FLS) during 2004. Public information also indicates
10 that PFA-VF disbursed hundreds of thousands of dollars to FYI Messaging, LLC and DCI
11 Group, LLC, two limited liability corporations registered in the State of Arizona under
12 Synhorst's name.

13 The “common vendor” subpart of the “conduct” standard regulation requires “[t]hat
14 commercial vendor, including any owner, officer, or employee of the commercial vendor” to
15 have provided one of the specified types of services discussed below. 11 C.F.R. § 109.21(d)(4).
16 The applicable rules defining common vendors emphasize substance over form; where entities
17 such as FLS, FYI Messaging and DCI Group appear to be closely related, including possible
18 overlapping personnel (such as Mr. Synhorst), their particular organizational form will not
19 prevent an investigation of whether the entities used information in the same manner as a
20 common vendor. 11 C.F.R. § 109.21(d)(4).

21 In explaining its regulation, the Commission explicitly addressed situations such as
22 Mr. Synhorst's apparent simultaneous involvement with FLS and its work for Bush-Cheney '04
23 and his involvement with FYI Messaging and DCI Group and their work for PFA-VF in which

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1 “a commercial vendor may qualify as a common vendor under 11 C.F.R. § 109.21(d)(4) even
2 after reorganizing or shifting personnel.” Explanation & Justification (“E&J”), 68 Fed. Reg.
3 421, 435 (Jan. 3, 2003). The Commission stated the regulation “focus[es] on the use or
4 conveyance of information used by a vendor, including its owners, officers, and employees, in
5 providing services to a candidate [or committee], rather than the particular structure of the
6 vendor.” *Id.* This would seem to describe Mr. Synhorst’s simultaneous involvement with FLS
7 and its work for Bush-Cheney ’04 and his involvement with FYI Messaging and DCI Group and
8 their work for PFA-VF. *See* 11 C.F.R. § 109.21(d)(4)(iii).

9 Three elements must be present for a commercial vendor to be defined as a “common
10 vendor” under 11 C.F.R. § 109.21(d)(4). First, the person paying for the communication must
11 have employed or contracted with a commercial vendor to create, produce, or distribute the
12 communication. 11 C.F.R. § 109.21(d)(4)(i). FYI Messaging is a direct-mail firm associated
13 with DCI Group. DCI Group, LLC is a lobby and public relations firm. Brian McCabe,
14 President of PFA-VF is a former DCI employee. Both organizations were founded by Thomas
15 Synhorst and are engaged in the regular business of media consulting and advertising production;
16 thus, they qualify as commercial vendors. 11 C.F.R. § 116.1(c).

17 Second, that commercial vendor must have provided any of certain enumerated services
18 to the clearly identified candidate during the current election cycle. 11 C.F.R. § 109.21(d)(4)(ii).
19 Based on disclosure reports, both Bush-Cheney ’04 and the RNC paid FYI Messaging and DCI
20 Group millions of dollars in 2003. Given the publicly advertised nature of their services, these
21 two organizations appear to have provided the type of services to Bush-Cheney ’04, including
22 development of media strategies, developing the content of public communications, producing
23 public communications, identifying voters or developing voter lists, mailing lists or donor lists,

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1 and media consulting, that would qualify under the common vendor regulations. 11 C.F.R.
2 §§ 109.21(d)(4)(ii)(A), (E), (F), (G) and (I).

3 Finally, that commercial vendor must have used or conveyed to the person paying for the
4 communication:

5 (A) Information about the clearly identified candidate's campaign plans, projects,
6 activities or needs . . . and that information is material to the creation, production, or
7 distribution of the communication; or (B) Information used previously by the commercial
8 vendor in providing services to the candidate who is clearly identified in the
9 communication, or his or her authorized committee, . . . , or an agent of the foregoing, and
10 that information is material to the creation, production, or distribution of the
11 communication.

12
13 11 C.F.R. § 109.21(d)(4)(iii). With regard to the allegations of coordination involving PFA-VF
14 and Feather, Larson & Synhorst ("FLS"), Bush-Cheney '04 appears to rely on its contract with
15 FLS to ensure that it has not violated BCRA and Commission regulations. Although there is no
16 indication that FLS took steps to isolate its activities from similar activities performed by FYI
17 Messaging and DCI Group, the Commission has stated it "does not agree that the mere existence
18 of a confidentiality agreement or ethical screen should provide a *de facto* bar to the enforcement
19 of the limits on coordinated communications imposed by Congress" because such "arrangements
20 are unlikely to prevent the circumvention of the rules." "E&J," 68 Fed. Reg. 421, 435 (Jan. 3,
21 2003).

22 Because the first two parts of the "common vendor" test are met, there is a sufficient
23 basis to investigate whether the use or exchange of information occurred as described in
24 11 C.F.R. § 109.21(d)(4)(iii). If it did, all three parts of the coordination test will be met, and a
25 portion of the costs of the coordinated communications would be a contribution from PFA-VF to
26 Bush-Cheney '04. 2 U.S.C. § 441a(a)(7)(B)(i). Any portion of such an in-kind contribution

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- 1 which exceeds \$2,000 would constitute an excessive contribution in violation of 2 U.S.C.
- 2 § 441a(a)(1)(A). Therefore, the Commission finds reason to believe that Progress for America
- 3 Voter Fund violated 2 U.S.C. § 441a(a)(1)(A).

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