



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT 20 2004

FIRST CLASS MAIL

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RE: MURs 5403 5466
America Coming Together, and Carl Pope,
as Treasurer

Dear Ms. Corley & Mr. Gold:

On January 1, 2004 and June 25, 2004, the Federal Election Commission notified your clients, America Coming Together, and Carl Pope, as Treasurer, of complaints alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). Copies of the complaints were forwarded to your clients at that time.

Upon further review of the allegations contained in the complaints, the Commission, on September 14 and 29, 2004, found that there is reason to believe that America Coming Together, and Carl Pope, as Treasurer, violated §§ 434, 441a, 441b(a) and C.F.R. §§ 102.5, 104.10, 106.1 and 106.6, provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. Please note that respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office

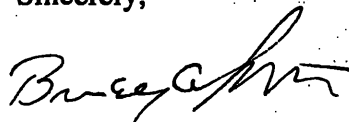
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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily 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 Mark Goodin, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith
Chairman

Enclosures

Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: America Coming Together and
Carl Pope, as Treasurer

MUR: 5403 5466

I. INTRODUCTION

These matters were generated by two complaints filed with the Federal Election Commission (“the Commission”) by the Center for Responsive Politics, the Campaign Legal Center, and Democracy 21, and a complaint filed by Bush-Cheney ’04, Inc. *See* 2 U.S.C. § 437g(a)(1). The three complaints received by the Commission allege that America Coming Together and Carl Pope, as Treasurer (collectively referred to as “ACT”) are violating federal campaign finance laws by spending millions of dollars, raised outside the limitations and prohibitions of the Federal Election Campaign Act of 1971, amended (“the Act”), to influence the upcoming presidential election. The complaints also allege that ACT is failing to allocate its federal and nonfederal activities in accordance with applicable regulations or to report all of its federal receipts and disbursements to the Commission. The Complaint also alleges that ACT is coordinating its activities with John Kerry for President, Inc. and Democratic party committees.

ACT argues in response to the complaints that, as a matter of law, its activities do not result in violations of the Act. Generally, ACT asserts that its solicitations are designed to raise funds for both federal and nonfederal activity and that it has properly paid for its direct mail solicitations with a 98-2 nonfederal/federal ratio, “reflecting the ratio of nonfederal to federal funds that ACT expected its fundraising program to generate.” *Resp. of ACT (MUR 5466) at 2.* ACT also contends that Advisory Opinion 2003-37 (“the ABC AO”), which is cited in the

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complaints, does not apply to ACT's activities. Furthermore, ACT denies that its activities have violated the prohibitions against coordination.

ACT appears to be a nonconnected political committee with federal and nonfederal accounts, as described in 11 C.F.R. § 102.5. The federal account of this committee is registered with the Commission and regularly files disclosure reports.¹ ACT must comply with the Act's contribution limitations, source prohibitions, and reporting requirements, but it also must comply with applicable statutory and regulatory provisions as interpreted in AO 2003-37, which addresses the application of the Act and regulations to various campaign activities of a registered political committee.

II. FACTUAL AND LEGAL ANALYSIS

A. FACTS

ACT is structured as an unincorporated political committee with federal and nonfederal accounts. The federal account is registered with the Commission as a political committee and the nonfederal account is a Section 527 organization.²

ACT is structured exactly like Americans for a Better Country ("ABC"), the organization whose various plans for fundraising, voter mobilization, and advertising activities were addressed in the ABC AO. While the ABC AO request was pending, ACT not only commented on that request,³ but also submitted its own request for an advisory opinion (AOR 2004-5). Subsequently, less than two weeks after the Commission issued the ABC AO, ACT withdrew its

¹ ACT registered with the Commission on July 29, 2003.

² In its filing with the IRS, ACT's 527 organization asserts that its purpose is "[t]o support candidates and committees at the national, state and local levels and to support national voter mobilization efforts." IRS Form 8871 (May 3, 2004).

³ Letter from Judith L. Corley and Laurence E. Gold (Counsel for ACT) to General Counsel (Feb. 4, 2004) (emphasizing, at page 17, that "the allocation rules the Commission has promulgated in Part 106 of its regulations are still good law").

own request "in light of the Commission's issuance of Advisory Opinion 2003-37, which addresses principal issues raised in ACT's request."⁴ Letter from Judith L. Corley and Laurence E. Gold (Counsel for ACT) to General Counsel (Feb. 27, 2004). ACT thus appeared to recognize that the ABC AO's interpretation of the Act and regulations provided guidance as to ACT's own conduct.

ACT has engaged in significant activity that must be paid for with funds subject to federal limits, prohibitions, and reporting requirements. ACT's fundraising solicitations indicate that contributions it receives will be used to attack or oppose a clearly identified federal candidate – indeed, some expressly advocate the defeat of George Bush. ACT's online contribution form states, "YES, I want to help implement ACT's strategy to mobilize voters, defeat George W. Bush, and elect progressive candidates. Please use my contribution to restore democracy in 2004!" ACT's direct mail fundraising solicitations focus almost exclusively on the 2004 presidential race. For example, the envelopes used by ACT to mail its fundraising solicitations state, "17 States, 25,000 Organizers, 200,000 Volunteers, 17 Million Doors Knocked on ... and a one-way ticket back to Crawford, Texas." The February 2004 version of ACT's direct mail solicitation states, "[I]f we can count on your personal support and active participation, 2004 will be a year of America Coming Together and George W. Bush going home." Similarly, the June 2004 version of ACT's solicitation asserts:

To keep their grasp on the White House and win other critical key House, Senate and local races, the Bush campaign and Republican National Committee and their powerful special interest allies are amassing a political fortune. By Election Day, they will have raised and spent over half a billion dollars to hold on to power.

⁴ Moreover, ACT submitted comments to the Commission in response to the then-pending notice of proposed rulemaking regarding political committee status, which stated that "in the recent ABC opinion, the FEC did not eliminate, even if it revised, the allocation process for nonparty committees." Letter from Judith L. Corley and Laurence E. Gold (Counsel for ACT) to Mai T. Dinh (Apr. 5, 2004).

We can't match them dollar-for-dollar. But, we can – and must – match them door-for-door. And in many critical states we'll be at work in places where the Kerry Campaign and the Democratic Party simply don't have the resources to operate.

(emphasis in original).

The Action Plan included in ACT's fundraising solicitations confirms these statements, declaring, "We know how many votes we need to defeat President Bush and elect progressive candidates and we're organizing a massive, interconnected program of voter contact to go out and find those votes." ACT's solicitations and other communications contain such statements as "when Election Day is over, we will have defeated George W. Bush," "[ACT is] about people like you and me making a personal commitment to defeating George W. Bush," and "We are ready to fight back and defeat Bush in 2004." While various ACT communications make generic references to unidentified progressive candidates or unknown state and local candidates, the Commission lacks information suggesting significant expenditures for any identified nonfederal candidate. Federal and limited nonfederal activity of the type engaged in by ACT was considered by the Commission in the ABC AO.

ACT receives services from two entities that have connections to John Kerry for President, Inc. First, ACT hired the Thunder Road Group in January 2004 to provide it with communications and research services. Jim Jordan, who served as John Kerry's campaign manager until November 9, 2003, created the Thunder Road Group shortly after leaving the Kerry campaign. Second, ACT hired the Dewey Square Group (a Boston-based consulting firm) to run a phone-bank operation. Principals of the Dewey Square Group include Michael Whouley, who managed voter turnout for Kerry during the Iowa caucus. According to press reports, Whouley and two other Dewey Square principals, Charles Campion and Charles Baker III, are providing communications and voter turnout advice free to the Kerry campaign.

B. ANALYSIS

1. Summary of the law

In the ABC AO, the Commission analyzed numerous proposed activities by a political committee with federal and nonfederal accounts, including solicitations and communications referring to a clearly identified federal candidate, voter identification and registration activities, get-out-the-vote (“GOTV”) activities, and fundraising. The Commission determined that many of these activities were covered by the allocation regulations in 11 C.F.R. Part 106, and as for other activities not specifically covered by Part 106, the Commission identified the appropriate allocation ratio called for by the Act, as clarified by the recent ruling in *McConnell v. FEC*, 540 U.S. 93 (2003). AO 2003-37 at 2. Specifically, the Commission concluded that:

- Communications by a registered political committee, including fundraising communications, that promote, support, attack, or oppose (“PASO”) a clearly identified federal candidate are “expenditures” that must be paid for with federal funds;
- Communications by a registered political committee for voter mobilization activities, even if they are not coordinated with a candidate and do not refer to any clearly identified federal candidate, must be funded at least partially with federal funds;⁵
- Funds received by a registered political committee from solicitations that promote, support, attack, or oppose federal candidates and “convey a plan” to promote, support, attack, or oppose federal candidates are treated as contributions; and
- Voter registration efforts of a registered political committee that target particular groups of voters must either be allocated or paid from federal funds.

⁵ The term “voter mobilization activity” refers generally to voter identification, voter registration, and GOTV activities. See 11 C.F.R. § 106.6(b)(2)(iii). The expenses for voter mobilization activity must be allocated between the federal and nonfederal accounts of the committee based on the ratio of federal expenditures to total federal and nonfederal disbursements made by the committee during the two-year federal election cycle. AO 2003-37 at 4 (citing 11 C.F.R. § 106.6(c)). Communications made by a political committee for voter mobilization activities that refer to more than one clearly identified federal candidate—or to federal candidates and nonfederal candidates (or the entire ticket)—must be allocated to each such candidate according to the benefit reasonably expected to be derived. AO 2003-37 at 3 (citing 11 C.F.R. § 106.1).

See AO 2003-37 at 2-4, 9-10, 13, 15, and 20.

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

Although the definition of "coordinated" in Section 109.20 potentially encompasses a variety of payments made by a person on behalf of a candidate or party committee, many issues regarding coordination involve communications. The Commission has promulgated separate regulations addressing "coordinated communications." 11 C.F.R. §§ 109.21-109.23. A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test: (1) the communication is paid for by a person other than a candidate, authorized committee, political party committee, or agent thereof; (2) the communication satisfies at least one of the four "content" standards described in Section 109.21(c); and (3) the communication satisfies at least one of the six "conduct" standards described in Section 109.21(d).

The "content" standards include: (1) an "electioneering communication"; (2) a "public communication" that disseminates campaign materials prepared by a candidate; (3) a communication that "expressly advocates" the election or defeat of a clearly identified federal candidate; and (4) certain "public communications," distributed 120 days or fewer before an election, which refer to a clearly identified federal candidate (or political party). 11 C.F.R. § 109.21(c).

Any one of six “conduct” standards will satisfy the third element of the three-part coordination test, “whether or not there is agreement or formal collaboration.” 11 C.F.R. §§ 109.21(d) and 109.21(e). These conduct standards include: (1) communications made at the “request or suggestion” of the relevant candidate or committee; (2) communications made with the “material involvement” of the relevant candidate or committee; (3) communications made after “substantial discussion” with the relevant candidate or committee; (4) specific actions of a “common vendor”; (5) specific actions of a “former employee”; and (6) specific actions relating to the dissemination of campaign material. 11 C.F.R. §§ 109.21(d)(1)-(6).

The regulations specify that a payment for a coordinated communication is made for the purpose of influencing a federal election, constitutes an in-kind contribution to the candidate or committee with whom or which it is coordinated, and must be reported as an expenditure made by that candidate or committee. 11 C.F.R. § 109.21(b)(1).

2. Allocation and reporting

ACT, as a political committee with federal and nonfederal accounts, must abide by the allocation regulations in 11 C.F.R. Part 106. As for activities not specifically covered therein, the Commission has identified—in the ABC AO—the appropriate allocation ratio. ACT’s activities “are indistinguishable in all ... material aspects” from the activities addressed in the ABC AO.⁶ 2 U.S.C. § 437f(c)(1)(B). There is reason to believe that ACT has financed some of its activities using nonfederal funds when those activities were required to be funded with at least some federal funds.

⁶ The interpretation of the Act “by the FEC through its regulations and advisory opinions is entitled to due deference and is to be accepted by the court unless demonstrably irrational or clearly contrary to the plain meaning of the statute.” *FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1115 (9th Cir. 1988).

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Because ACT's messages constitute public communications that promote, support, attack or oppose a clearly identified federal candidate, they must be funded from ACT's federal account. *See* AO 2003-37 at 9-10. Further, ACT appears to have used its nonfederal account to pay for the vast majority of its fundraising efforts. ACT's disclosure reports indicate that it uses a 98-2 ratio to allocate fundraising disbursements between its nonfederal and federal accounts. If ACT made a substantial portion of its fundraising disbursements in connection with the type of solicitations discussed above, it appears that the 98-2 ratio is not appropriate. Because ACT's solicitations convey a plan to use funds to support or oppose specific federal candidates, they must be funded from ACT's federal account. *See* AO 2003-37 at 9-10, 14-15, 19-20. Therefore, there is reason to believe that ACT has improperly used nonfederal funds for federal expenditures in violation of the Act and regulations, as interpreted by the Commission in AO 2003-37.

In addition, it appears that ACT raised funds in response to solicitations that conveyed a plan to use such funds to support or oppose specific federal candidates. These funds would qualify as federal contributions. *See* AO 2003-37 at 14-15, 19-20; *see also* *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995). There is reason to believe that these funds were improperly deposited into ACT's nonfederal accounts and not reported to the Commission.

ACT also allocates its voter mobilization activities by using a 98-2 allocation ratio. Because the Commission does not currently have access to all of ACT's voter mobilization communications, it is unclear whether ACT may use *any* nonfederal funds to fund its voter drive activity or, if it can, what the proper allocation ratio is. Some press reports indicate that ACT's voter registration efforts are targeted to previously identified Democratic voters, geographic areas that lean Democratic, and demographic groups that traditionally have voted Democratic;

however, as was the case in the ABC AO, this type of activity requires allocation between ACT's federal and nonfederal accounts. See AO 2003-37 at 11-13. In addition, other press reports suggest that ACT's canvassing communications may expressly advocate the defeat of President Bush, or attack or oppose the Bush administration. See William March, *Independent Groups Eager to Influence*, Tampa Tribune, May 9, 2004, at B1. Any such communications must be funded entirely with federal funds. 11 C.F.R. § 102.5(a)(1)(i).

Even if some of ACT's voter registration efforts are generic, rather than candidate-specific, there is reason to believe that ACT has overstated the nonfederal share of its voter registration expenses by applying an improper allocation ratio. The costs of ACT's fundraising solicitations, discussed *supra*, must be treated as federal expenditures and included in the numerator for purposes of calculating the allocation ratio under the "funds expended" method set forth in 11 C.F.R. § 106.6(c). Because there is reason to believe that ACT has considered such expenses to be nonfederal disbursements, there is reason to believe it improperly calculated its purported 98-2 allocation ratio. As a result, there is reason to believe that ACT and Carl Pope, as Treasurer, have understated the federal share of any allocable voter registration expenses, as well as administrative costs, and improperly used nonfederal funds for the purpose of influencing a federal election.

3. Coordinated communications

The Commission concludes that there is reason to investigate whether ACT made coordinated communications through its connections with Jim Jordan or the Dewey Square Group. ACT's connections with Jordan implicate the "former employee" "conduct" standard of the three-part coordinated communication test, and its connections with the Dewey Square Group implicate the "common vendor" "conduct" standard.

In the context of Jordan's activities, ACT meets the first prong of the three-part coordinated communication test because ACT—the entity that paid for the communications at issue—is a “person other than [the] candidate, authorized committee, political party committee, or agent of any of the foregoing.” 11 C.F.R. § 109.21(a)(1). ACT meets the second prong (the “content” standard) of this test because these communications at least qualify as “express advocacy” under Section 109.21(c)(3). Although the Complaint does not specify which solicitation of ACT meets the “content” standard, it refers to an attachment of “ACT’s ‘Action Plan’ mailed to solicit soft contributions [sic] to influence federal elections.”⁷ This attachment contains “express advocacy” communications, such as “when Election Day is over, we will have defeated George W. Bush,” “[ACT is] about people like you and me making a personal commitment to defeating George W. Bush,” “We are ready to fight back and defeat Bush in 2004.”⁸ Therefore, ACT’s communication appears to meet the “content” standard of the coordinated communications test.

Finally, the activities of a “former employee” provide a basis to investigate whether the third prong (the “conduct” standard) of the coordinated communication test is satisfied. *See* 11 C.F.R. § 109.21(d)(5). The first element of the two-part “former employee” “conduct” standard requires that the communication be paid for by a person (or the employer of a person, or agent thereof) who was an employee of the candidate (or his opponent) who is clearly identified in the communication during the current election cycle. *See* 11 C.F.R. § 109.21(d)(5)(i). Here, this first element is satisfied because there does not appear to be any dispute that Jordan is a former

⁷ This attachment appears to be a combination of printouts from ACT’s website (dated March 21 and 30, 2004), and a copy of an undated mailing from Ellen R. Malcolm, the President of ACT.

⁸ Because these statements meet the “express advocacy” “content” standard, we need not resolve at this stage whether these communications (and potentially others) may also meet the “content” standard of Section 109.21(c)(4), which addresses certain “public communications” distributed within 120 days of an election.

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employee of the Kerry campaign, that the communications at issue identify Kerry's opponent (Bush), and that these communications were paid for by Jordan's current "employer" (ACT through its relationship with Thunder Road Group). The second element of the "former employee" "conduct" standard requires that the former employee use or convey to the person paying for the communication information about the candidate's (or opponent's) "campaign plans, projects, activities, or needs" (or information used by the former employee in providing services to the candidate) and that the information be "material to the creation, production, or distribution of the communication." *See* 11 C.F.R. § 109.21(d)(5)(ii). Because Jordan held the position of manager of the Kerry campaign, he possessed inside information about that campaign. There is a basis to investigate whether Jordan used or conveyed to ACT information about the Kerry campaign's plans, projects, activities, or needs, or information he used in providing services to the candidate, and whether that information was material to the creation, production, or distribution of a communication by ACT. *See* 11 C.F.R. § 109.21(d)(5)(ii).

The activities of the Dewey Square Group as a "common vendor" provide an additional basis to investigate whether ACT engaged in coordinated communications. *See* 11 C.F.R. §§ 109.21(d)(4). Principals of the Dewey Square Group reportedly managed voter turnout for the Kerry campaign during the Iowa caucus and are currently providing communications and voter turnout advice to the Kerry campaign. The Dewey Square Group also has run a phone bank operation for ACT. Here, the first two elements of the "coordinated communication" test appear to be satisfied. ACT is making the relevant payment, and the "content" standard is met by a "public communication" under Section 109.21(c)(4). Such public communications include a "telephone bank to the general public" (11 C.F.R. § 100.26), and the candidate identification, timing, and jurisdictional tests of Section 109.21(c)(4) appear to be satisfied.

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Furthermore, there is a basis to investigate whether ACT has satisfied the “common vendor” “conduct” standard under Section 109.21(d)(4). The “common vendor” standard includes three elements: (1) that the person paying for the communication contract with a “commercial vendor”; (2) that the commercial vendor provide any one of certain services identified in the regulation; and (3) that the commercial vendor use or convey to the person paying for the communication certain information about the candidate’s “plans, projects, activities, or needs,” (or information used previously by the commercial vendor in providing services to the candidate) and that such information be “material to the creation, production, or distribution of the communication.” *See* 11 C.F.R. § 109.21(d)(4). Here, ACT has retained the Dewey Square Group, which qualifies as a “commercial vendor” under Section 116.1(c). *See* 11 C.F.R. § 109.21(d)(4)(i). This vendor appears to have provided voter identification services to the candidate (Kerry) or his opponent (Bush) who likely are clearly identified in the communications. *See* 11 C.F.R. § 109.21(d)(4)(ii)(G). Finally, there is reason to investigate whether Dewey Square Group principal Whouley, the manager of Kerry’s voter turnout efforts in the first caucus of the primary season, has used or conveyed to ACT information about the candidate’s “plans, projects, activities, or needs.” *See* 11 C.F.R. § 109.21(d)(4)(iii)(A).

III. CONCLUSION

The Commission finds reason to believe that America Coming Together and Carl Pope, as Treasurer, violated 2 U.S.C. §§ 434, 441a(f), 441b(a) and 11 C.F.R. §§ 102.5, 104.10, 106.1 and 106.6 by failing to attribute and report federal contributions, by failing to attribute and report expenditures made for multiple candidates, by failing to allocate and report shared administrative and fundraising activities, and by using prohibited funds to pay for the federal share of those expenses, which may have resulted in the making of prohibited and excessive contributions.

MURs 5403, 5466
America Coming Together and
Carl Pope, as Treasurer

Furthermore, the Commission finds reason to believe that America Coming Together and Carl Pope, as Treasurer, may have violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive contributions, in the form of coordinated expenditures, to John Kerry for President, Inc.

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