

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS REGARDING ALLEGED COORDINATION OF
EXPENDITURE BY MOVEON.ORG VOTER FUND WITH JOHN KERRY FOR
PRESIDENT, INC.

MUR 5754

Respondent: **MoveOn.org Voter Fund**

The complainant alleges that MoveOn.org Voter Fund made excessive contributions to John Kerry for President, Inc. ("Kerry for President") in the form of coordinated expenditures (under Section 109.20) or coordinated communications (under Section 109.21). Specifically, the complainant alleges that MoveOn Voter Fund ("MOVF")¹ "illegally coordinate[ed]" a "joint media buy" with the Kerry campaign in March 2004. Complaint at 51-54. See Complaint at 51-54 and 61. The complaint, the responses to it, and the public record, however, contain insufficient information to warrant an investigation into whether MOVF's expenditures were made in cooperation, consultation, or concert with, or at the request or suggestion of Kerry for President.

Under the Federal Election Campaign Act of 1971, as amended ("the Act"), an expenditure is coordinated if it is made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate or party committee; such expenditures constitute in-kind contributions. See 2 U.S.C. §§ 441a(a)(7)(B)(i) and (ii); 11 C.F.R. § 109.20(a) and (b). "Coordinated communications" are separately addressed in sections 109.21-109.23 of the Commission's regulations. Specifically, a communication is coordinated with a candidate,

Although the text of the Complaint refers to MoveOn.org (a 501(c)(4) organization), the attachment to the Complaint refers in several places to MoveOn.org Voter Fund (a 527 organization not registered with the Commission). See, e.g., Complaint at 51 and Attachment K at 3.

an authorized committee, a political party committee, or agent² 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

² For the purposes of this section of the regulations, an “agent” is defined as “any person who has actual authority either express or implied to engage in any of a number of defined activities relating to the creation or production of a communication.” 11 C.F.R. § 109.2.

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)

ANALYSIS

The allegations in the complaint satisfy the first two elements of the coordinated communications test under section 109.21 but fail to provide a basis to investigate whether the conduct standard was met. First, MOVF — 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). Second, MOVF admits that all of its “advertising met this [content] standard” of Section 109.21(c). Resp. of MOVF at 5; *see* Complaint at 53-54 and Attachment K.

However, the complaint does not contain sufficient information on which to base an investigation into whether MOVF satisfied the “conduct” standard of the coordinated communications test, nor does it even specifically identify which “conduct” standard would apply to the activity complained of. Although the complainant alleges that “MoveOn.org has made no secret of its ongoing communications with Democratic party officials . . . and the elected Democratic leadership in the Senate and House,” it does not connect any such discussions to MOVF’s alleged “coordinated communications.” *See* Complaint at 26. Similarly, the allegations of the attendance of the candidate (by conference call) and his wife (in person) at a “house party” sponsored by MoveOn.org does not provide a connection between that event and any alleged “coordinated communications.” *See* Complaint at 26. Additionally, there is no allegation that MOVF used a “former employee” of the Kerry campaign in connection with MOVF’s communications. *See* 11 C.F.R. § 109.21(d)(5).

1 In contrast to the rather vague allegations contained in the complaint, MOVF's response
2 includes declarations specifically denying each of the elements that would satisfy the "conduct"
3 standards. See Resp. of MOVF and attachments thereto (Decl. of Wes Boyd, President of
4 MOVF; Decl. of Bill Zimmerman, president of media consultant to MOVF, and Decl. of Eli
5 Pariser, former campaign director of MOVF).

6 Based on the above, the Commission finds there is no reason to believe that MOVF
7 violated the Act by making excessive contributions to Kerry for President, Inc. in the form of
8 coordinated expenditures.

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