



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 21 2011

Cleta Mitchell, Esq.
Foley & Lardner LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D.C. 20007

RE: MUR 6346
Friends of Kelly Ayotte and
Theodore V. Koch, in his official
capacity as treasurer

Dear Ms. Mitchell:

On August 12, 2010, the Federal Election Commission notified your clients, Friends of Kelly Ayotte and Theodore V. Koch, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On September 15, 2011, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe Friends of Kelly Ayotte and Theodore V. Koch, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b. 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. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

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

Sincerely,

Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Friends of Kelly Ayotte and Theodore V. Koch, **MUR 6346**
in his official capacity as treasurer

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by Bryan Lanza. *See* 2 U.S.C. § 437g(a)(1).

II. FACTUAL SUMMARY

This matter concerns allegations that Friends of Kelly Ayotte ("Ayotte Committee" or "Committee"), Kelly Ayotte's principal campaign committee for U.S. Senate in New Hampshire in 2010, accepted an excessive and prohibited corporate in-kind contribution from Cornerstone Action, a New Hampshire-based 501(c)(4) organization. Complainant alleges that Cornerstone Action coordinated its expenditures for a television advertisement attacking Bill Binnie, one of Ms. Ayotte's Republican Senate primary opponents, with the Ayotte Committee. Complainant asserts that the Ayotte Committee was involved in the creation of Cornerstone Action's advertisement because the advertisement utilizes video footage of Binnie from a public event that was allegedly recorded by a former Ayotte campaign employee. Respondents maintain that Cornerstone did not obtain the video footage from the Ayotte Committee, and that it was publicly available material that could be downloaded from the YouTube website.

A. Background

On August 4, 2010, Cornerstone Action began airing a television advertisement entitled "The Feeling is Mutual," which criticized Bill Binnie, a candidate in the Republican primary election for Senate in New Hampshire. *See* <http://www.youtube.com/watch?v=Aq0tSsxtJA4>.

1 The advertisement includes several seconds of video footage of Bill Binnie displayed on a
2 television monitor with the on-screen caption, "BINNIE: 'I'm looking at a value-added tax.'
3 Speaking in Windham, New Hampshire, YouTube video posted May 20, 2010." *Id.* The
4 advertisement includes several similar video clips of Bill Binnie accompanied by on-screen
5 captions of Binnie's statements about policy issues. The advertisement is narrated by voiceover
6 with the following script:

7 Bill Binnie portrays himself as a conservative. Truth is he's shockingly liberal.
8 Binnie supports abortion to avoid the expense of disabled children. He's excited
9 about imposing gay marriage on New Hampshire. He's praised key elements of
10 Obama's healthcare bill. He's even said that he's open to imposing a European-
11 style value added tax on working families. With these shockingly liberal
12 positions, it's no wonder Bill Binnie says he doesn't like the Republican Party.
13 Now New Hampshire Republicans can tell Binnie the feeling is mutual.
14

15 Although neither the complaint nor the response indicate the amount spent on the advertisement,
16 there are press reports indicating that Cornerstone Action paid \$125,000 to broadcast it.¹ Sean
17 Sullivan, "Binnie Under Fire from Conservative Group," *Hotline on Call*, August 5, 2010
18 (available at http://hotlineoncall.nationaljournal.com/archives/2010/08/binnie_under_fl.php).

19 **B. Alleged Coordination**

20 The complaint alleges that Cornerstone Action coordinated its "The Feeling is Mutual"
21 advertisement with the Ayotte Committee, resulting in Cornerstone Action making, and the
22 Ayotte Committee accepting, a prohibited corporate and excessive in-kind contribution. The
23 complaint alleges that a former Ayotte Committee employee, Harold Parker, recorded the video
24 footage included in the Cornerstone Action advertisement. Complaint at 2. An attached
25 affidavit of Matt Mayberry, the Assistant Campaign Manager for Bill Binnie for U.S. Senate,

¹ With the exception of the last two sentences, the "The Feeling is Mutual" television ad is similar to a radio ad critical of Mr. Binnie that Cornerstone Action ran earlier in the summer of 2010. Available at <http://www.youtube.com/watch?v=k-25Z-mXoTk>.

1 states that he accompanied Bill Binnie to a Windham Republican Party meeting in Windham,
2 New Hampshire on April 20, 2010, and that he observed Harold Parker, who he believes to have
3 been a field director for the Ayotte campaign at the time, filming the meeting on a “flip-style”
4 video camera; and that the video footage allegedly filmed by Parker is the same footage that
5 appears in the Cornerstone Action advertisement. Complaint Exhibit 3, Mayberry Affidavit
6 at ¶¶ 4-8.

7 The complaint also alleges that Kevin Smith, the Executive Director of Cornerstone
8 Action and Cornerstone Policy Research, has long-standing personal and professional ties to
9 Kelly Ayotte, and also asserts that Smith and Ayotte worked together in the New Hampshire
10 Governor’s office in 2003. Complaint at 2. The complaint argues that the relationship between
11 Smith and Ayotte makes it “reasonable to conclude” that Cornerstone Action became aware of,
12 and was provided with, the footage by the Ayotte Committee. Complaint at 5.

13 The Ayotte Committee contends that there was no coordination between the Committee
14 and Cornerstone Action. Ayotte Committee Response at 1. The Committee’s response includes
15 a letter from Brooks Kochvar, a representative of the Ayotte Committee, to Bill Binnie, dated
16 August 4, 2010. *See* Ayotte Committee Response Exhibit A. The letter states that the accusation
17 of coordination between the Committee and Cornerstone Action is false and that the Committee
18 first learned of the Cornerstone Action advertisement in the press on August 4, 2010. *Id.* at 1.
19 The letter disputes the allegation that Cornerstone Action supported Kelly Ayotte, as
20 Cornerstone’s Chairman endorsed another candidate in the Republican primary election. *Id.*
21 The letter further states that the Ayotte Committee did not provide the video footage in the
22 advertisement, and notes that a link to the video was included in a *Nashua Telegraph* article over

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two months prior to the dissemination of the Cornerstone Action advertisement and was available for any member of the public to download. *Id.*

III. ANALYSIS

The Commission finds no reason to believe that Friends of Kelly Ayotte and Theodore V. Koch, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b by receiving an excessive and prohibited in-kind contribution in the form of a coordinated communication.

Under the Federal Election Campaign Act of 1971, as amended ("the Act"), a corporation is prohibited from making any contribution in connection with a Federal election, and candidates and political committees are prohibited from knowingly accepting corporate contributions.

2 U.S.C. § 441b. During the 2010 election cycle, individuals were prohibited from contributing over \$2,400 per election to a candidate's authorized political committee and authorized committees were prohibited from accepting contributions from individuals in excess of \$2,400.

2 U.S.C. §§ 441a(a) and 441a(f). An expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" constitutes an in-kind contribution. 2 U.S.C.

§ 441a(a)(7)(B)(i). A communication is coordinated with a candidate, a candidate's authorized committee, or agent of the candidate or committee when the communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person other than that candidate or authorized committee; (2) the communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d). The Commission's regulations at 11 C.F.R. § 109.21 provide that coordinated communications constitute in-kind

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1 contributions from the party paying for such communications to the candidate, the candidate's
2 authorized committee, or the political party committee which coordinates the communication.

3 **A. Payment**

4 The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied.
5 The advertisement's disclaimer states that it was paid for by Cornerstone Action and the National
6 Organization for Marriage.

7 **B. Content**

8 The content prong of the coordination regulation is also satisfied. The content prong is
9 satisfied if the communication at issue meets at least one of the following content standards: (1)
10 a communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a public
11 communication that disseminates, distributes, or republishes, in whole or in part, campaign
12 materials prepared by a candidate or the candidate's authorized committee; (3) a public
13 communication that expressly advocates the election or defeat of a clearly identified candidate
14 for Federal office; or (4) a public communication, in relevant part, that refers to a clearly
15 identified House or Senate candidate, and is publicly distributed or disseminated in the clearly
16 identified candidate's jurisdiction 90 days or fewer before the candidate's primary election.² See
17 11 C.F.R. § 109.21(c).

18 Cornerstone Action's advertisement identified Senate candidate Bill Binnie and was
19 broadcast on television on August 4, 2010, 41 days before the September 14, 2010 Republican
20 primary election in New Hampshire. Thus, the communication at issue in the complaint satisfies

² A "public communication" is defined as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general public political advertising. 11 C.F.R. § 100.26.

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1 the content prong by constituting a public communication referring to a clearly identified
2 candidate distributed within 90 days of an election.

3 **C. Conduct**

4 The Commission's regulations set forth the following six types of conduct between the
5 payor and the committee, whether or not there is agreement or formal collaboration, that satisfy
6 the conduct prong of the coordination standard: (1) the communication "is created, produced, or
7 distributed at the request or suggestion of a candidate or an authorized committee;" or if the
8 communication is created, produced, or distributed at the suggestion of the payor and the
9 candidate or authorized committee assents to the suggestion; (2) the candidate, his or her
10 committee, or their agent is materially involved in the content, intended audience, means or
11 mode of communication, the specific media outlet used, or the timing or frequency of the
12 communication; (3) the communication is created, produced, or distributed after at least one
13 substantial discussion about the communication between the person paying for the
14 communication, or that person's employees or agents, and the candidate or his or her authorized
15 committee, his or her opponent or opponent's authorized committee, a political party committee,
16 or any of their agents;³ (4) a common vendor uses or conveys information material to the
17 creation, production, or distribution of the communication; (5) a former employee or independent
18 contractor uses or conveys information material to the creation, production, or distribution of the
19 communication; and (6) the dissemination, distribution, or republication of campaign materials.⁴
20 11 C.F.R. § 109.21(d)(1)-(6).

³ A "substantial discussion" includes informing the payor about the campaign's plans, projects, activities, or needs, or providing the payor with information material to the communication. See 11 C.F.R. § 109.21(d)(3).

⁴ The last standard applies only if there was a request or suggestion, material involvement, or substantial discussion that took place after the original preparation of the campaign materials that are disseminated, distributed, or republished.

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1 The material involvement and substantial discussion standards of the conduct prong are
2 not satisfied “if the information material to the creation, production, or distribution of the
3 communication was obtained from a publicly available source.” 11 C.F.R. § 109.21(d)(2) and
4 (3). *See also Explanation and Justification for the Regulations on Coordinated*
5 *Communications*, 71 Fed. Reg. 33190, 33205 (June 8, 2006) (explaining that “[u]nder the new
6 safe harbor, a communication created with information found . . . on a candidate’s or political
7 party’s Web site, or learned from a public campaign speech . . . is not a coordinated
8 communication”). However, to qualify for the safe harbor for the use of publicly available
9 information, the person or organization paying for communication “bears the burden of showing
10 that the information used in creating, producing or distributing the communication was obtained
11 from a publicly available source.” *Id.* As one way of meeting this burden, the person or
12 organization paying for the communication may demonstrate that the information used in the
13 communication was obtained from a publicly available website. *Id.*

14 The available information indicates that the video footage of Bill Binnie used in
15 Cornerstone Action’s advertisement was obtained from a publicly available source, specifically a
16 video on the YouTube website that was posted on May 20, 2010, and referenced in a news article
17 in the *Nashua Telegraph* several days later. The YouTube website indicates that the video was
18 uploaded by a user named “nhvoter,” and there is no indication on the YouTube website that this
19 user was associated with the Ayotte campaign. *See*
20 <http://www.youtube.com/watch?v=Yterozcbsyo>.

21 The Ayotte Committee has specifically denied that Cornerstone Action obtained the
22 footage from the Committee and there is no information to suggest otherwise. Additionally, the

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1 available information does not indicate that the Ayotte Committee was materially involved in
2 any decisions regarding Cornerstone Action's advertisement.

3 The available information also does not indicate that the various other tests for the
4 conduct prong were satisfied. There is no available information indicating that the Cornerstone
5 Action advertisement was created at the request or suggestion of the Ayotte Committee, that the
6 Ayotte Committee was materially involved in the content or distribution of the advertisement,
7 or that the advertisement was created after a substantial discussion about the communication
8 between representatives of Cornerstone Action and the Ayotte Committee. There is nothing to
9 suggest that Cornerstone Action and the Ayotte Committee shared a common vendor or that a
10 former Ayotte Committee employee worked with Cornerstone Action on its advertisement.
11 There is also no basis on which to conclude that the footage would constitute republication of
12 campaign material, because the available information does not establish that the video footage
13 constituted Ayotte Committee campaign materials. Accordingly, the Commission finds no
14 reason to believe that Friends of Kelly Ayotte and Theodore V. Koch, in his official capacity as
15 treasurer, violated 2 U.S.C. §§ 441a(f) and 441b by receiving an excessive and prohibited in-kind
16 contribution in the form of a coordinated communication.

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