



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 21 2011

Kevin Smith, Executive Director
Cornerstone Action
P.O. Box 4683
Manchester, N.H. 03108

RE: MUR 6346
Cornerstone Action

Dear Mr. Smith:

On August 12, 2010, the Federal Election Commission notified you of a complaint alleging that Cornerstone Action had violated 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 you, that there is no reason to believe Cornerstone Action violated 2 U.S.C. §§ 441a(a) and 441b. Additionally, the Commission was equally divided on whether to find reason to believe Cornerstone Action violated 2 U.S.C. § 434(g)(2). 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 no reason to believe finding, is enclosed for your information. A Statement of Reasons explaining the Commission's decision with respect to whether to find reason to believe Cornerstone Action violated 2 U.S.C. § 434(g)(2) will follow.

If you have any questions, please contact Kasey Morgenheim, 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****RESPONDENT: Cornerstone Action****MUR 6346****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 Cornerstone Action, a New Hampshire-based 501(c)(4) organization, made an excessive and prohibited corporate in-kind contribution to Friends of Kelly Ayotte ("Ayotte Committee" or "Committee"), Kelly Ayotte's principal campaign committee for U.S. Senate in New Hampshire in 2010. 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

Cornerstone Action incorporated as a non-profit corporation in New Hampshire in 2005 and is organized under section 501(c)(4) of the Internal Revenue Code. *See* Complaint Exhibit 1. According to its website, Cornerstone Action is an issue-oriented advocacy group that promotes traditional values, limited government, and free markets through education,

1 information, and advocacy. *See* www.nhcornerstone.org. Cornerstone Action appears to
2 conduct extensive legislative advocacy within the State of New Hampshire. *Id.* The group's
3 website tracks state legislation on a variety of issues and provides information on Cornerstone
4 Action-sponsored events, including pro-life and Tea Party rallies.

5 At various times, Cornerstone Action has conducted activities in connection with both
6 federal and state elections. For example, in 2010, Cornerstone Action filed independent
7 expenditure reports for a total of \$23,298 in expenditures for radio and newspaper
8 advertisements opposing Senate candidate Bill Binnie. Cornerstone Action also conducted
9 numerous activities in connection with 2010 New Hampshire state elections, including endorsing
10 candidates for state office. *See, e.g.,* Kevin Landrigan, "Social Conservative Group Blows
11 Jennifer's Horn," *Nashua Telegraph.com*, July 20, 2010 (available at
12 [http://blogs.nashuatelegraph.com/nhprimecuts/2010/07/20/social-conservative-group-blows-](http://blogs.nashuatelegraph.com/nhprimecuts/2010/07/20/social-conservative-group-blows-jennifers-horn/)
13 [jennifers-horn/](http://blogs.nashuatelegraph.com/nhprimecuts/2010/07/20/social-conservative-group-blows-jennifers-horn/)). Press accounts also reported that Cornerstone Action and the National
14 Organization for Marriage jointly spent \$450,000 on radio and television advertisements that
15 criticized New Hampshire Governor John Lynch in connection with the gubernatorial election
16 for signing a same-sex marriage bill. Norma Love, "Ad Criticizes NH Gov for Signing Gay
17 Marriage Law," *Boston Globe*, October 4, 2010 (available at
18 [http://www.boston.com/news/local/new_hampshire/articles/2010/10/04/ad_criticizes_nh_gov_for](http://www.boston.com/news/local/new_hampshire/articles/2010/10/04/ad_criticizes_nh_gov_for_signing_gay_marriage_law/)
19 [signing_gay_marriage_law/](http://www.boston.com/news/local/new_hampshire/articles/2010/10/04/ad_criticizes_nh_gov_for_signing_gay_marriage_law/)).

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

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

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

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

18 B. Alleged Coordination

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

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

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

12 Cornerstone Action's response states that it did not obtain the video footage in its "The
13 Feeling is Mutual" advertisement from the Ayotte Committee and denies that the Ayotte
14 Committee had involvement in any of its communications. Cornerstone Action Response at 2.
15 In the response, Kevin Smith states that he does not know whether an agent of the Ayotte
16 campaign originally filmed the video footage included in the advertisement. *Id.* The response
17 explains that Cornerstone Action obtained the footage from a link to a video posted on YouTube
18 included in a news article in the *Nashua Telegraph* on May 23, 2010. *Id.* See Kevin Landrigan,
19 "Outside Opinions Disputed," *Nashua Telegraph*, May 23, 2010 (available at
20 [http://www.nashuatelegraph.com/news/statenewengland/746598-227/outside-opinions-](http://www.nashuatelegraph.com/news/statenewengland/746598-227/outside-opinions-disputed.html)
21 [disputed.html](http://www.nashuatelegraph.com/news/statenewengland/746598-227/outside-opinions-disputed.html)) and YouTube video "binnie-2.mov" (available at
22 <http://www.youtube.com/watch?v=Yterozcbsyo>).

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1 Cornerstone Action contends that because the video footage was obtained from a public
2 source, YouTube, and not the Ayotte Committee, it falls within the publicly available source
3 exception to the “material involvement” conduct prong of the coordinated communications test.
4 Cornerstone Action Response at 2. *See* 11 C.F.R. § 109.21(d)(2). The response also argues that
5 the complaint does not allege that the Ayotte Committee was materially involved in Cornerstone
6 Action’s decision-making process regarding the advertisement and thus the allegation does not
7 satisfy the “material involvement” conduct prong of the coordinated communications test. *Id.*
8 at 2. *See* 11 C.F.R. § 109.21(d)(2). Finally, Smith disputes the complaint’s assertion that
9 he worked with Kelly Ayotte in the New Hampshire Governor’s office and that even if he
10 had such a relationship, it would not be relevant to establishing coordination.

11 Cornerstone Action Response at 1.

12 **III. ANALYSIS**

13 The Commission finds no reason to believe that Cornerstone Action violated 2 U.S.C.
14 §§ 441a(a) and 441b by making an excessive and prohibited in-kind contribution in the form of a
15 coordinated communication.

16 Under the Federal Election Campaign Act of 1971, as amended (“the Act”), a corporation
17 is prohibited from making any contribution in connection with a Federal election, and candidates
18 and political committees are prohibited from knowingly accepting corporate contributions.
19 2 U.S.C. § 441b. During the 2010 election cycle, individuals were prohibited from contributing
20 over \$2,400 per election to a candidate’s authorized political committee and authorized
21 committees were prohibited from accepting contributions from individuals in excess of \$2,400.
22 2 U.S.C. §§ 441a(a) and 441a(f). An expenditure made by any person “in cooperation,
23 consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized

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

A. Payment

The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied. Cornerstone Action's response acknowledges that it was responsible for the advertisement at issue in the complaint. Cornerstone Action Response at 1. The advertisement's disclaimer states that it was paid for by Cornerstone Action and the National Organization for Marriage.

B. Content

The content prong of the coordination regulation is also satisfied. The content prong is satisfied if the communication at issue meets at least one of the following content standards: (1) a communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office; or (4) a public communication, in relevant part, that refers to a clearly

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1 identified House or Senate candidate, and is publicly distributed or disseminated in the clearly
2 identified candidate's jurisdiction 90 days or fewer before the candidate's primary election.² See
3 11 C.F.R. § 109.21(c).

4 Cornerstone Action's advertisement identified Senate candidate Bill Binnie and was
5 broadcast on television on August 4, 2010, 41 days before the September 14, 2010 Republican
6 primary election in New Hampshire. Thus, the communication at issue in the complaint satisfies
7 the content prong by constituting a public communication referring to a clearly identified
8 candidate distributed within 90 days of an election.

9 **C: Conduct**

10 The Commission's regulations set forth the following six types of conduct between the
11 payor and the committee, whether or not there is agreement or formal collaboration, that satisfy
12 the conduct prong of the coordination standard: (1) the communication "is created, produced, or
13 distributed at the request or suggestion of a candidate or an authorized committee," or if the
14 communication is created, produced, or distributed at the suggestion of the payor and the
15 candidate or authorized committee assents to the suggestion; (2) the candidate, his or her
16 committee, or their agent is materially involved in the content, intended audience, means or
17 mode of communication, the specific media outlet used, or the timing or frequency of the
18 communication; (3) the communication is created, produced, or distributed after at least one
19 substantial discussion about the communication between the person paying for the
20 communication, or that person's employees or agents, and the candidate or his or her authorized
21 committee, his or her opponent or opponent's authorized committee, a political party committee,

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.

1 or any of their agents;³ (4) a common vendor uses or conveys information material to the
2 creation, production, or distribution of the communication; (5) a former employee or independent
3 contractor uses or conveys information material to the creation, production, or distribution of the
4 communication; and (6) the dissemination, distribution, or republication of campaign materials.⁴
5 11 C.F.R. § 109.21(d)(1)-(6).

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

19 Cornerstone Action has demonstrated that the video footage of Bill Binnie used in its
20 advertisement was obtained from a publicly available source, specifically a video on the

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.

1 YouTube website that was posted on May 20, 2010, and referenced in a news article in the
2 *Nashua Telegraph* several days later. The YouTube website indicates that the video was
3 uploaded by a user named "nhvoter," and there is no indication on the YouTube website that this
4 user was associated with the Ayotte campaign. *See*
5 <http://www.youtube.com/watch?v=Yterozcbsyo>.

6 Cornerstone Action has specifically denied that Cornerstone Action obtained the footage
7 from the Ayotte Committee and there is no information to suggest otherwise. Additionally, the
8 available information does not indicate that the Ayotte Committee was materially involved in
9 any decisions regarding Cornerstone Action's advertisement.

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

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