



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP - 7 2011

Jan Witold Baran, Esq.
Caleb P. Burns, Esq.
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006

RE: MUR 6366
U.S. Chamber of Commerce
Bill Miller

Dear Messrs. Baran and Burns:

On September 8, 2010, the Federal Election Commission notified your clients, the U.S. Chamber of Commerce and Bill Miller, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On August 30, 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 the U.S. Chamber of Commerce and Bill Miller violated 2 U.S.C. § 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 Morgenheim, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Shonkwiler".

Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: U.S. Chamber of Commerce
Bill Miller

MUR 6366

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by

Ryan Miskell. *See* 2 U.S.C. § 437g(a)(1).

II. FACTUAL SUMMARY

This matter concerns allegations that the U.S. Chamber of Commerce ("the Chamber") made a prohibited corporate in-kind contribution to Jane Norton for Colorado Inc. ("Norton Committee" or "Committee"), Jane Norton's principal campaign committee for U.S. Senate in Colorado in 2010. Complainant alleges that the Chamber coordinated its expenditures for a television advertisement supporting Jane Norton with the Norton Committee via communications between the Chamber's Vice President, Bill Miller, and various Norton Committee representatives. Complainant also alleges that the Chamber coordinated fundraising for the electioneering communication through Charles and Judy Black.

A. Background

The Chamber is an unincorporated trade association that represents the interests of over three million businesses and business associations. Chamber Response at 1. It is organized under section 501(c)(6) of the Internal Revenue Code. *See* www.uschamber.com/about. Bill Miller is the Chamber's Senior Vice President for Political Affairs and Federation Relations. Miller Affidavit at ¶ 1.

On August 2, 2010, the Chamber sponsored a television advertisement entitled "Stand up to Washington," which supported Jane Norton's candidacy in the Colorado Republican Senate primary election.¹ Chamber Response at 2. Available at http://www.politico.com/blogs/bensmith/0810/Chamber_up_backing_Norton_in_CO.html. On July 29, 2010, the Chamber filed a Form 9 (24-Hour Notice of Disbursements/Obligations for Electioneering Communications) with the Commission, which disclosed that the Chamber spent \$250,000 on the advertisement and listed Bill Miller as a person "sharing/exercising control" over the electioneering communication.

B. Alleged Coordination

1. Complaint

The complaint alleges that the Chamber coordinated the "Stand up to Washington" advertisement with the Norton Committee, resulting in the Chamber making a prohibited corporate contribution. Complaint at 1. The complaint contends that the Chamber endorsed Ms. Norton on June 28, 2010 and that Bill Miller made the endorsement. On that same date, Bill Miller, Jane Norton, and Norton Committee campaign manager, Josh Penry, participated in a conference call to announce the endorsement. *Id.* The complaint alleges that the Chamber launched the "Stand up to Washington" advertisement after meeting with Ms. Norton and her staff and after formally endorsing her, resulting in *per se* coordination. *Id.* at 2. The complaint attaches several articles about the Chamber's endorsement of Jane Norton to support this assertion.

The complaint also contends that Bill Miller, who was listed as a person exercising control over the advertisement on the Form 9, communicated his support and endorsement of

¹ The complaint identifies the name of the advertisement as "Rock Ribbed Conservative," however the Chamber's response explains that the title was changed to "Stand up to Washington." Chamber Response at 2.

1 Jane Norton through Twitter and in person and had met with Ms. Norton and Committee
2 representatives to discuss their campaign strategy for use in the Chamber's issue advocacy
3 campaign. *Id.* at 2-3. Finally, the complaint asserts that "public information and knowledgeable
4 sources" indicate that Josh Penry and Bill Miller coordinated with Charles and Judy Black to
5 raise money for the advertisement, and that Judy Black is a representative of the Norton
6 Committee who is employed by a lobbying firm that works for the Chamber. *Id.* at 2.

7 **2. Chamber Response**

8 The Chamber and Bill Miller deny coordinating the advertisement with the Norton
9 Committee. Chamber Response at 1. The attached affidavit of Bill Miller states that he is aware
10 of the requirements of the coordination regulations and that he complied with the Chamber's
11 coordination policy, which establishes a firewall that prohibits Chamber personnel involved in
12 the creation of independent expenditures and electioneering communications from discussing
13 information about a campaign that may be material to the creation, production, or dissemination
14 of such communications with candidates and their representatives. See Exhibit A and Miller
15 Affidavit at ¶ 3. Mr. Miller states that as part of the Chamber's endorsement decision-making
16 process, he participated in a telephone call with Norton campaign manager Josh Penry and a
17 meeting with Jane Norton and Judy Black, Ms. Norton's sister, and her husband Charles Black, a
18 Republican political consultant, but that he only recalls speaking about the Chamber's potential
19 endorsement and not any information about the Committee's plans, projects, or needs that would
20 have been material to the creation, production, or dissemination of any Chamber electioneering
21 communication. Miller Affidavit at ¶ 5. Mr. Miller avers that he did not participate in the June
22 28, 2010 conference call to announce the Chamber's endorsement and that at no time before,
23 during, or after the call did he discuss with Ms. Norton or the Norton Committee the Chamber's

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1 advertising or the Committee's non-public plans, projects, activities, or needs material to any
2 future electioneering communication by the Chamber. Further, Mr. Miller is not aware of any
3 other Chamber representative who had such a discussion. *Id.* at ¶¶ 6-7.

4 The Chamber's response contends that the conduct prong of the coordinated
5 communications analysis is not satisfied by the facts alleged in the complaint. Chamber
6 Response at 6. *See* 11 C.F.R. § 109.21(d). Mr. Miller's affidavit states he participated in the
7 creation and distribution of the advertisement at issue, but did so without any knowledge of the
8 Norton Committee's non-public plans, projects, activities, or needs material to any future
9 electioneering communication. Miller Affidavit at ¶ 8. Miller explains that while a separately
10 incorporated affiliate of the Chamber, the Institute for Legal Reform ("ILR"), has retained Judy
11 Black's employer, Brownstein Hyatt Farber Schreck, LLP ("Brownstein"), to lobby on its behalf,
12 Mr. Miller has not worked with the ILR, Ms. Black, or Brownstein, and is not aware of any
13 involvement by Ms. Black or Brownstein in the Chamber's "Stand up to Washington"
14 advertisement. *Id.* at ¶ 9.

15 The response asserts that the Chamber had an established firewall to prevent its personnel
16 from obtaining information about Ms. Norton's campaign plans, projects, activities, or needs
17 material to the creation, production, or distribution of the communication. Because Mr. Miller
18 claims to have adhered to the firewall, the conduct standards are not satisfied unless there is
19 specific information that despite the firewall, such information was used or conveyed to the
20 Chamber. The Chamber maintains that no such information exists. Chamber Response at 8. *See*
21 11 C.F.R. § 109.21(h).

22 The Chamber contends that the two facts alleged in the complaint – that Mr. Miller and
23 the Chamber learned of the Norton Committee's campaign plans through the endorsement

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1 conference call and that the ILR retained Brownstein for lobbying services – do not support the
2 claim that the “Stand up to Washington” advertisement was coordinated and are speculative.
3 Chamber Response at 6-7. The response asserts that the advertisement was prepared and
4 disseminated independently of the Norton Committee and does not satisfy the “request or
5 suggestion,” “material involvement,” or “substantial discussion” conduct prongs of the
6 coordinated communications analysis. *Id.* at 7. *See* 11 C.F.R. § 109.21(d)(1)-(3). The “common
7 vendor” prong is also not satisfied because there is no allegation that Brownstein was retained as
8 a vendor to the Norton Committee and neither Brownstein nor Judy Black participated in the
9 production or dissemination of the Chamber’s advertisement. Chamber Response at 7. *See*
10 11 C.F.R. § 109.21(d)(4).

11 **III. ANALYSIS**

12 The Commission finds no reason to believe that the Chamber of Commerce and Bill
13 Miller violated 2 U.S.C. § 441b by making a prohibited in-kind contribution in the form of a
14 coordinated communication.

15 Under the Federal Election Campaign Act of 1971, as amended (“the Act”), a corporation
16 is prohibited from making any contribution in connection with a Federal election, and candidates
17 and political committees are prohibited from knowingly accepting corporate contributions.
18 2 U.S.C. § 441b. An expenditure made by any person “in cooperation, consultation, or concert,
19 with, or at the request or suggestion of, a candidate, his authorized political committees or their
20 agents” constitutes an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i).

21 A communication is coordinated with a candidate, a candidate’s authorized committee, or
22 agent of the candidate or committee when the communication satisfies the three-pronged test set
23 forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person other than that

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1 candidate or authorized committee; (2) the communication satisfies at least one of the content
2 standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of
3 the conduct standards set forth in 11 C.F.R. § 109.21(d). The Commission's regulations at
4 11 C.F.R. § 109.21 provide that coordinated communications constitute in-kind contributions
5 from the party paying for such communications to the candidate, the candidate's authorized
6 committee, or the political party committee which coordinates the communication.

7 While it appears that the Chamber's "Stand up to Washington" advertisement satisfies the
8 payment and content prongs of the coordinated communications analysis, there is no available
9 information indicating that the conduct prong is satisfied.

10 A. Payment

11 The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied.
12 The Chamber's response acknowledges that it was responsible for the advertisement at issue in
13 the complaint. Chamber Response at 2. The Chamber filed a Form 9 with the Commission on
14 July 29, 2010, disclosing that it spent \$250,000 on the "Stand up to Washington" advertisement.

15 B. Content

16 The content prong of the coordination regulation is also satisfied. The content prong is
17 satisfied if the communication at issue meets at least one of the following content standards:

18 (1) a communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a
19 public communication that disseminates, distributes, or republishes, in whole or in part,
20 campaign materials prepared by a candidate or the candidate's authorized committee; (3) a
21 public communication that expressly advocates the election or defeat of a clearly identified
22 candidate for Federal office; or (4) a public communication, in relevant part, that refers to a
23 clearly identified House or Senate candidate, and is publicly distributed or disseminated in the

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1 clearly identified candidate's jurisdiction 90 days or fewer before the candidate's primary
2 election.² See 11 C.F.R. § 109.21(c).

3 The Chamber's advertisement identified Senate candidate Jane Norton and was broadcast
4 on television on August 2, 2010, eight days before the August 10, 2010 Republican primary
5 election in Colorado. Thus, the communication at issue in the complaint satisfies the content
6 prong by constituting a public communication referring to a clearly identified candidate
7 distributed within 90 days of an election.

8 C. Conduct

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

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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.
5 11 C.F.R. § 109.21(d)(1)-(6).

6 The complaint alleges that the Chamber aired the "Stand up to Washington"
7 advertisement after enlisting Jane Norton and other representatives of the Chamber, including
8 Bill Miller, met with representatives of the Norton Committee, including Jane Norton, Judy
9 Black, and Josh Penry. The complaint also suggests that the Chamber and the Norton
10 Committee communicated about the Committee's campaign strategy. Complaint at 2-3.

11 The Chamber and Bill Miller have specifically denied facts that would give rise to a
12 conclusion that the conduct prong is satisfied pursuant to 11 C.F.R. § 109.21(d), and Mr. Miller
13 has provided a sworn affidavit supporting the denial. See Miller Affidavit. Namely, the
14 respondents have specifically rebutted any implication that the advertisement was created at the
15 request or suggestion of, with the material involvement of, or after substantial discussions with,
16 the candidate or her agents, thereby negating the existence of conduct at 11 C.F.R.
17 § 109.21(d)(1)-(3). See Chamber Response at 7. In addition, the Chamber has provided
18 documentation of a firewall policy that existed at the time of the communication and appears to
19 satisfy the safe harbor criteria at 11 C.F.R. § 109.21(h); i.e., the policy appears to have been
20 designed to prohibit the flow of information between its employees and consultants and those of

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).

1 federal candidates, and it was distributed to relevant employees and consultants. *See* Miller
2 Affidavit Exhibit A.

3 The available information also indicates that the Chamber and the Norton Committee did
4 not share a common vendor and that no former Norton Committee employee worked with the
5 Chamber on its advertisement. *See* 11 C.F.R. § 109.21(d)(4)-(5). While the complaint alleges
6 that Judy Black, a representative of the Norton campaign, was employed by a lobbying firm that
7 worked for the Chamber, the Chamber's response clarifies that Brownstein was retained by the
8 ILR, a separate entity, and thus not a vendor to the Chamber. The response also asserts that
9 Brownstein had no involvement with the "Stand up to Washington" advertisement.

10 Given the speculative nature of the complaint, the respondents' specific denials, and the
11 absence of any other information suggesting coordination, it appears that the conduct prong of
12 the coordinated communications regulations has not been met. Accordingly, the Commission
13 finds no reason to believe that the U.S. Chamber of Commerce and Bill Miller violated 2 U.S.C.
14 § 441b by making a prohibited in-kind contribution in the form of a coordinated communication.

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