



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA FIRST CLASS MAIL

Cleta Mitchell, Esq.
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Washington Harbour
3005 K Street, N.W.
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Washington, D.C. 20007 5109

SEP -7 2011

RE: MUR 6430
Common Sense Issues, Inc.

Dear Ms. Mitchell:

On November 17, 2010, the Federal Election Commission notified your client, Common Sense Issues, Inc., 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 client, that there is no reason to believe Common Sense Issues, Inc. violated 2 U.S.C. §§ 434(c), 434(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. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

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

Sincerely,

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

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3

4 **RESPONDENT:** Common Sense Issues, Inc.

MUR: 6430

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6 **I. INTRODUCTION**

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

8 Commission by the Montana Democratic Party. See 2 U.S.C. § 437g(a)(1).

9 **II. FACTUAL AND LEGAL ANALYSIS**

10 **A. BACKGROUND**

11 Common Sense Issues, Inc. is a Cincinnati, Ohio based social welfare
12 organization established under section 501(c)(4) of the Internal Revenue Code. See
13 Common Sense Issues website, "About Us", <http://commonsenseissues.com> (last visited
14 May 4, 2011). According to its website, CSI desires "to advance awareness,
15 involvement, and citizen action" on a number of issues including life (defending the
16 whole life from conception to natural death), liberty (protecting individual and corporate
17 rights), natural family (defending the value and practicality of traditional marriage),
18 economic freedom (taxation, spending, and limited government), etc. *Id.* On its website,
19 CSI lists Colorado, Montana, South Dakota, and North Dakota as "priority states." See
20 Common Sense Issues website, available at <http://commonsenseissues.com> (last visited
21 May 4, 2011). The CSI website links to its state-affiliated websites, including one known
22 as Common Sense Montana. See *id.*, linking to www.commonsemtontana.com.

23 During the 2008 election, CSI reported making both independent expenditures
24 and electioneering communications and indicated that it was reporting these activities as

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1 a qualified nonprofit corporation ("QNC"). For 2010, CSI reported making independent
2 expenditures in the amount of approximately \$130,000 for races in the 4th Congressional
3 District of Kansas and for the U.S. Senate races of Alaska and Utah. See Common Sense
4 Issues, Inc. (C90009739) Forms 5, available at [http://query.nictusa.com/cgi-](http://query.nictusa.com/cgi-bin/fecimg/?C90009739)
5 [bin/fecimg/?C90009739](http://query.nictusa.com/cgi-bin/fecimg/?C90009739) (last visited May 4, 2011). CSI also made approximately
6 \$30,000 in electioneering communications for races in the South Dakota District for the
7 House of Representatives in 2010. See Common Sense Issues, Inc. (C30001457) Forms
8 9, available at <http://query.nictusa.com/cgi-bin/fecimg/?C30001457> (last visited May 4,
9 2011). CSI did not report any independent expenditures or electioneering
10 communications for federal races in Montana.

11 Steven Daines, who was the 2008 Republican nominee for Lieutenant Governor
12 in Montana never declared his candidacy for any federal office on the ballot in 2009 or
13 2010. Mr. Daines, however, is currently a candidate for the House of Representatives
14 from Montana for the 2012 election. See Steven Daines' Statement of Candidacy,
15 Amended February 9, 2011. Before becoming a candidate for the House of
16 Representatives, Daines was briefly a 2012 candidate for the U.S. Senate from Montana.
17 See Steven Daines' Statement of Candidacy, Filed November 12, 2010.

18 Starting in late 2009 and ending in February 2010, Daines was featured in a radio
19 advertisement run by CSI in Montana. See CSI Response at 1. The advertisement,
20 entitled "Montana sends an Ear Doctor" ("Ear Doctor"), can be heard at
21 <http://www.youtube.com/watch?v=JZLxbLKIHvk>. The ad criticizes Montana's current
22 U.S. Senators, Jon Tester and Max Baucus, for supporting federal health care legislation
23 passed in 2009. Senators Tester and Baucus are eligible to run for reelection in 2012 and

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- 1 2014, respectively. At the time the ad was run, there were ongoing public discussions
- 2 about possible revisions to, or even the possible repeal of, the health care reform
- 3 legislation.

"MONTANA SENDS AN EAR DOCTOR"

<u>Voice</u>	<u>Statements</u>
Male voice:	Is this where I can find Montana Senators?
Female voice:	Max Baucus and Jon Tester, yes sir, this is the U.S. Capitol.
Male voice:	I'm an ear doctor for Montana; I need to give them a hearing test.
Female Voice:	But sir, they have doctors.
Male voice:	Tax payers back home sent me.
Female Voice:	Oh?
Male voice:	It's about health care, our senators den't hear us anymore.
Female Voice:	Why do you have that mega phone?
Male voice:	It's what we call a hearing aid.
Daines:	I'm Steve Daines, a fifth-generation Montanan, and like you, I'm disappointed with just how out of touch Max Baucus and Jon Tester are with Montana's taxpayers. They've turned a deaf ear to us on health care, creating a bill forcing every one of us to buy insurance or face fines, and also forcing us to fund abortion on demand. That's just wrong, and we need to let them know it.
Female Voice:	Shhhh, they've just gone into another secret meeting.
Male voice:	Oh, so they can hear?
Female Voice:	Yes sir, they're just ignoring you.
Announcer:	Go to CommonSenseMontana.com today and tell your senators to listen to you and vote no on Obamacare. That's "w-w-w-dot-CommonSenseMontana-dot-com." Paid for by Common Sense Issues.

- 4
- 5 **B. LEGAL ANALYSIS**
- 6 The issue in this matter is whether the CSI advertisement attacking Senators
- 7 Baucus' and Tester's position on health care reform was a coordinated communication
- 8 benefitting Steven Daines' subsequent federal candidacy. Although the complaint asserts
- 9 that Daines "produced and aired" the advertisement, that "he [Daines] is using soft
- 10 money," and that "Daines has spent soft money," see Complaint 1-3, the available

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1 information indicates that it was CSI, and not Daines, who produced, aired, and paid for
2 the advertisement. While Daines served as CSI's spokesperson in the ad, there is no
3 evidence that Daines was an officer of CSI, or that he established, financed, or controlled
4 CSI.

5 1. Prohibited Corporate Contribution

6 Under the Act, a corporation is prohibited from making any payment for a
7 coordinated communication, *see* 11 C.F.R. § 109.21(b)(1),¹ because that would constitute
8 an in-kind contribution to the candidate or his or her authorized committee with whom it
9 was coordinated. *See* 2 U.S.C. § 441b.² Corporations may make independent
10 expenditures and electioneering communications, *see Citizens United v. FEC*, 130 S. Ct.
11 876, 913 (2010); however, they must comply with the Act's applicable reporting
12 requirements. *id.*; 2 U.S.C. §§ 434(c) and 434(f). During the 2010 election cycle,
13 individuals were prohibited from contributing over \$2,400 per election to a candidate's
14 authorized political committee and authorized committees were prohibited from

¹ The Commission recently revised the content standard in 11 C.F.R. § 109.21(c) in response to the D.C. Circuit's decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). The Commission added a new standard to the content prong of the coordinated communications rule. 11 C.F.R. § 109.21(c)(5) covers communications that are the functional equivalent of express advocacy. *See Explanation and Justification for Coordinated Communications*, 75 Fed. Reg. 55947 (Sept. 15, 2010). The effective date of the new content standard is December 1, 2010, under the terms at issue in this matter. The new standard would not change the analysis in this Report.

² The Ninth Circuit Court of Appeals recently found a challenge to a similar city-level prohibition is unlikely to prevail. *See Thalheimer v. San Diego*, No. 10-55322 at 30-35 (9th Cir. June 9, 2011) (“[T]here is nothing in the explicit holdings or broad reasoning of *Citizens United* that invalidates the anti-circumvention interest in the context of limitations on direct candidate contributions.”). A variety of courts in other Circuits have also addressed the constitutionality of bans on corporate contributions after *Citizens United*. *See, e.g., U.S. v. Danielczyk*, No. 1:11cr85 at 15 (E.D. Va. June 7, 2011) (“[I]f corporations and individuals have equal political speech rights, then they must have equal direct donation rights.”); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010) (“*Beaussonn* and other cases applying the closely drawn standard to contribution limits remain good law.”); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, (8th Cir. 2011) (“[W]e find that Minnesota Citizens is unlikely to prevail on its challenge to Minnesota’s ban on direct corporate contributions.”), *rehearing granted en banc and opinion vacated*, No. 10-3126 (8th Cir., Jul. 12, 2011) (*en banc*).

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1 accepting contributions from individuals in excess of \$2,400. 2 U.S.C. §§ 441a(a) and
2 441a(f). CSI did not violate section 441b(a)'s prohibition on corporate contributions
3 because the "Ear Doctor" advertisement was not a coordinated communication or other
4 type of in-kind contribution.

5 An expenditure made by any person "in cooperation, consultation, or concert,
6 with, or at the request or suggestion of, a candidate, his authorized political committees
7 or their agents" constitutes an in-kind contribution to the candidate's authorized
8 committee. 2 U.S.C. § 441a(a)(7)(B)(i). A communication is coordinated with a
9 candidate, a candidate's authorized committee, or agent of the candidate or committee
10 when the communication satisfies the three-pronged test set forth in 11 C.F.R.
11 § 109.21(a): (1) the communication is paid for by a person other than that candidate or
12 authorized committee; (2) the communication satisfies at least one of the content
13 standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least
14 one of the conduct standards set forth in 11 C.F.R. § 109.21(d). Here, Daines was never a
15 federal candidate during the election cycle in which the communication was aired.
16 Daines was not testing the waters. As coordination can only occur between the payor and
17 either a party committee or a federal candidate, candidate's authorized committee, or an
18 agent of the candidate or committee, no coordination could have occurred here.
19 Similarly, without a reference to a federal candidate or the republication of a federal
20 candidate's campaign materials, the content prong of the coordinated communications
21 definition cannot be satisfied. 11 C.F.R. 109.21(c). Daines only became a federal
22 candidate in the following election cycle, more than nine months after the ads had run.

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1 The content prong can be satisfied by any one of the following types of content:

- 2 • A communication that constitutes an electioneering communication
3 pursuant to 11 C.F.R. § 100.29. 11 C.F.R. § 109.21(c)(1).
4
- 5 • A public communication that disseminates, distributes, or republishes, in
6 whole or in part, campaign materials prepared by a candidate or the
7 candidate's authorized committee. 11 C.F.R. § 109.21(c)(2).
8
- 9 • A public communication that expressly advocates, as defined by 11 C.F.R.
10 § 100.22, the election or defeat of a clearly identified federal candidate.
11 11 C.F.R. § 109.21(c)(3).
12
- 13 • A public communication that satisfies paragraph (c)(4)(i), (ii), (iii), or (iv)
14 of this section pertaining to references to Presidential, Vice-Presidential,
15 House, Senate, or political parties. 11 C.F.R. § 109.21(c)(4).
16

17 First, the "Ear Doctor" advertisement does not appear to meet the first standard
18 established by the content prong because it is not an electioneering communication. *See*
19 11 C.F.R. § 109.21(c)(1). The next election in which either of Montana's senators would
20 appear on the ballot is in November 2012, more than two years from the time the radio
21 advertisement was apparently last aired. Thus, the advertisement would not be
22 considered an electioneering communication because it was aired more than two years
23 before any federal election any of the mentioned potential candidates, including Daines,
24 well in advance of any applicable time period for electioneering communications. *See*
25 2 U.S.C. § 434(f)(3); 11 C.F.R. 100.29(a)(2) (defining electioneering communications as
26 public communications aired within 30 days of a primary election or 60 days of a general
27 election). For similar reasons, the "Ear Doctor" advertisement also does not meet the
28 other time-based standard of the content prong that applies to communications
29 referencing a House or Senate candidate within 90 days of an election because the
30 advertisement was aired more than two years before any relevant election. *See* 11 C.F.R.

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1 § 109.21(c)(4)(i). Additionally, there is no information suggesting that CSI used the "Ear
2 Doctor" advertisement to disseminate, distribute, or republish campaign material under
3 11 C.F.R. § 109.21(c)(2).

4 Finally, the "Ear Doctor" advertisement does not appear to meet the content
5 standard for a coordinated communication because it does not contain express advocacy.³
6 See 11 C.F.R. § 109.21(c)(3). The "Ear Doctor" advertisement does not contain express
7 advocacy because it does not include specific words or phrases of express advocacy
8 pursuant to 11 C.F.R. § 100.22(a). The advertisement also cannot be considered express
9 advocacy under 11 C.F.R. § 100.22(b) because it could not only be interpreted by a
10 reasonable person as containing advocacy for the election or defeat of a clearly identified
11 federal candidate. The "Ear Doctor" advertisement appears to be an issue advertisement
12 focused on health care reform, and not an advertisement containing express advocacy,
13 because it does not contain an unambiguous electoral portion. See 11 C.F.R. § 100.22(b).
14 Despite contrasting Daines' views on health care reform with those held by the Senators
15 from Montana, the advertisement is not express advocacy under 11 C.F.R. § 100.22(b)
16 because it focuses on the apparent divergence of opinion between Montana's citizens and
17 their senators and it also does not use Daines' position on health care reform to comment
18 on his character, qualifications, or accomplishments. See Express Advocacy;
19 Independent Expenditures; Corporate and Labor Organization Expenditures: Explanation
20 and Justification, 60 Fed. Reg. 35292, 35295 (July 6, 1995).

³ At the time "Ear Doctor" was aired, Daines was not a candidate for federal office and therefore could not be considered a "clearly identified candidate." See *infra* Part II.B.2.

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1 An advertisement must satisfy all three elements of the three-pronged test set
2 forth in 11 C.F.R. § 109.21(a) to be a coordinated communication. Because Daines was
3 not and never became a federal candidate in the election cycle during which the
4 communication was aired and moreover, the advertisement did not satisfy the content
5 prong of the three-pronged test, the advertisement was not a coordinated communication,
6 as defined in 11 C.F.R. § 109.21(a).

7 Accordingly, the Commission finds no reason to believe that Common Sense
8 Issues, Inc. violated 2 U.S.C. § 441b by making an in-kind contribution.

9 **2. Reporting Requirements**

10 In addition to allegations of a prohibited in-kind contribution resulting from a
11 coordinated communication, the complaint also alleges that CSI's use of "soft money" to
12 air this advertisement may also be a violation of the Act. See Complaint at 2. To the
13 extent that the complaint appears to suggest that CSI was prohibited by the Act from
14 airing "Ear Doctor" because of CSI's status as a corporation, that issue was squarely
15 rejected by *Citizens United v. FEC*. 130 S. Ct. at 913.⁴ Additionally, because the "Ear
16 Doctor" advertisement was not express advocacy, see Part II.B.1., *supra*, CSI was not
17 required to report the costs associated with "Ear Doctor" to the Commission as an
18 independent expenditure pursuant to 2 U.S.C. § 434(c). CSI also had no obligation to
19 report the costs associated with "Ear Doctor" as an electioneering communication
20 pursuant to 2 U.S.C. § 434(f) because the advertisement was not an electioneering
21 communication for the reasons set forth in Part II.B.1., *supra*.

⁴ The "Ear Doctor" advertisement does not even appear to be the type of advertisement that would have been covered by the Act prior to *Citizens United*.

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- 1 Accordingly, the Commission finds no reason to believe that Common Sense**
- 2 Issues, Inc. violated 2 U.S.C. §§ 434(c) and 434(f).**

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