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**FEDERAL ELECTION COMMISSION**  
**999 E Street, N.W.**  
**Washington, D.C. 20463**

**FIRST GENERAL COUNSEL'S REPORT**

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**MUR: 6431**  
**DATE COMPLAINT FILED: 11/15/2010**  
**DATE OF NOTIFICATION: 11/18/2010**  
**LAST RESPONSE RECEIVED: 2/11/2011**  
**DATE ACTIVATED: 3/15/2011**

**EXPIRATION OF SOL: 11/1/2015**

**COMPLAINANT:**

**Raymond Buckley**

**RESPONDENTS:**

**New Hampshire Republican Senate Majority  
Committee**  
**Friends of Kelly Ayotte and**  
**H. Scott Flegal, in his official capacity as treasurer**

**RELEVANT STATUTES  
AND REGULATIONS:**

**2 U.S.C. § 431(4)**  
**2 U.S.C. § 431(8)**  
**2 U.S.C. § 431(9)**  
**2 U.S.C. § 431(20)**  
**2 U.S.C. § 432**  
**2 U.S.C. § 433**  
**2 U.S.C. § 434**  
**2 U.S.C. § 441a**  
**2 U.S.C. § 441b**  
**2 U.S.C. § 441d**  
**2 U.S.C. § 441i**  
**11 C.F.R. § 100.17**  
**11 C.F.R. § 100.22**  
**11 C.F.R. § 100.24**  
**11 C.F.R. § 100.26**  
**11 C.F.R. § 109.21**

**INTERNAL REPORTS CHECKED:**

**Disclosure Reports**

**OTHER AGENCIES CHECKED:**

**New Hampshire State Disclosure Reports**

1 **I. INTRODUCTION**

2  
3 This matter stems from four advertisements in New Hampshire newspapers paid for with  
4 nonfederal funds by the New Hampshire Republican Senate Majority Committee ("RSMC").  
5 The newspaper advertisements featured Kelly Ayotte, a former state officeholder and a candidate  
6 for U.S. Senate, endorsing specific candidates for state office and urged readers to "Please Vote  
7 This Tuesday." These advertisements appeared in four separate New Hampshire newspapers on  
8 November 1, 2010, the day before Ms. Ayotte and the endorsed candidates appeared on the  
9 ballot for election.

10 The complaint alleges that the RSMC advertisements expressly advocated Ms. Ayotte's  
11 election to federal office, and as a result of making expenditures greater than \$1,000, RSMC was  
12 required to register and report as a federal political committee. The complaint notes that RSMC  
13 received funds from corporations, and that this would violate the Act's prohibition on corporate  
14 contributions. The complaint also alleges that RSMC failed to include the Act's required  
15 disclaimers on the advertisements. Further, the facts contained in RSMC's response suggest that  
16 the advertisements were coordinated with, and thus could constitute an in-kind contribution to,  
17 Kelly Ayotte and her campaign committee.

18 In its response, RSMC denies that its advertisements featuring Ayotte included express  
19 advocacy of a clearly identified federal candidate or that it became a political committee under  
20 the Act. Rather, RSMC claims that the advertisements were solely an endorsement of different  
21 state candidates by Ayotte and therefore were not expenditures that could trigger federal political  
22 committee status. Additionally, RSMC and Kelly Ayotte, in separate responses, deny that the  
23 advertisements were federal election activity ("FEA") and maintain that the advertisements were  
24 exempt from the Act's FEA requirements because they were endorsements of state candidates  
25 that did not promote, support, attack, or oppose ("PASO") a federal candidate.

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As discussed below, we recommend that the Commission find no reason to believe that RSMC violated the Act by failing to register and report as a federal political committee or by using nonfederal funds for federal election activity. We also recommend that the Commission find no reason to believe that RSMC made, or that Kelly Ayotte and her campaign committee received, either an excessive or prohibited contribution due to coordination. Further, we recommend that the Commission find no reason to believe that RSMC paid for Federal election activity with funds not subject to the Act's limitations, prohibitions, and reporting requirements. Finally, we recommend that the Commission find no reason to believe that RSMC failed to use the appropriate disclaimers required by the Act.

## **II. FACTUAL AND LEGAL ANALYSIS**

### **A. BACKGROUND**

The New Hampshire Republican Senate Majority Committee is a state political committee registered with the New Hampshire Secretary of State. See State of New Hampshire: 2010 Political Committee Registration – RSA 664:3, Republican Senate Majority Committee (Dec. 9, 2008) (hereinafter “RSMC N.H. Registration”), available at <http://www.sos.nh.gov/Pacs2010.html> (last visited August 26, 2011). The chairman of RSMC is Peter Bragdon, a state senator who served as the minority leader of the New Hampshire Senate in 2009-2010, and now serves as the president of the Senate. RSMC Response at 1-2. Bob Odell, who serves as RSMC's treasurer, is also a Republican state senator in New Hampshire. See RSMC N.H. Registration. According to disclosure reports filed with the New Hampshire Secretary of State, RSMC accepts contributions from sources prohibited by the Act, but permitted under state law, such as corporations. See RSMC Statement of Receipts and Expenditures (June 23, Aug. 25, Sept. 9 and 22, Oct. 13 and 27, and Nov. 10, 2010).

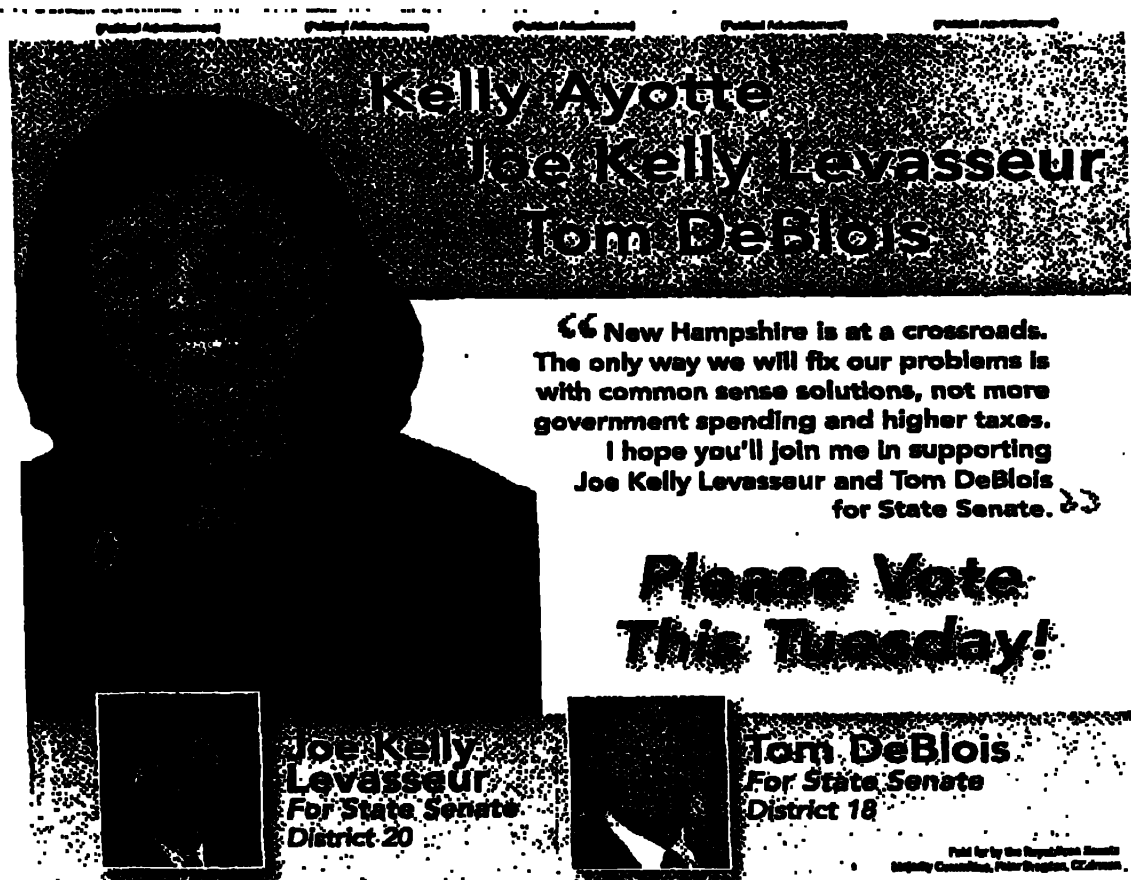
Kelly Ayotte is currently a U.S. Senator from New Hampshire and was the Republican candidate for U.S. Senator in 2010. Ayotte served as Attorney General for New Hampshire, until she resigned to explore a run for the U.S. Senate in 2009. Her principal campaign committee is Friends of Kelly Ayotte. H. Scott Flegal serves as the committee's treasurer.

In October of 2010, a consultant for RSMC, Michael Dennehy, suggested RSMC consider running advertisements in which Ayotte, who had a lead in the polls, would endorse New Hampshire state senate candidates. RSMC Response at 2; ~~see also~~ RSMC Response, Attachment, Affidavit of Peter Bragdon ¶¶ 6 and 7; Affidavit of Michael Dennehy ¶¶ 7 and 8. After RSMC approved this recommendation, Dennehy "contacted one of Ms. Ayotte's campaign consultants and asked whether Ms. Ayotte would be willing to endorse certain state senate candidates." RSMC Response, Affidavit of Michael Dennehy ¶ 8. "Ms. Ayotte's [campaign] consultant later informed [Dennehy] that [RSMC] could proceed with the endorsement advertisements for those candidates." *Id.*

The Ayotte committee directed RSMC that "no reference to Kelly Ayotte's federal candidacy appear[] anywhere in the newspaper ads, nor [should] her status as a former Attorney General [be] referenced in the ad." Ayotte Committee Response at 2. Dennehy, who worked with an RSMC political advertising consultant on the endorsement advertisements, states that the "Ayotte campaign did not propose any of the content or layout of the [RSMC's] advertisements." RSMC Response, Affidavit of Michael Dennehy at ¶¶ 9 and 10. However, Dennehy "did provide Ms. Ayotte's consultant with an exemplar of the advertisements before submitting them for publication and [the consultant's] response was that the advertisements were 'fine.'" RSMC Response, Affidavit of Michael Dennehy ¶ 10.

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1 Each of the advertisements listed Ms. Ayotte's name followed by the names of the state  
2 candidates, set forth Ms. Ayotte's endorsement of the candidates and stated "Please Vote This  
3 Tuesday." An example is set forth below:



4  
5 RSMC ran the advertisements featuring Ayotte endorsing candidates for state senate on  
6 November 1, 2010, the day before the 2010 election, in at least four newspapers: the UNION  
7 LEADER, the CONCORD MONITOR, the NASHUA TELEGRAPH DAILY, and the FOSTER'S DAILY  
8 DEMOCRAT. See Complaint at 1, and Exhibit 1 (the "Ayotte advertisements"). The cost of these  
9 four advertisements appears to be approximately \$5,783. See Complaint at 2.

**B. LEGAL ANALYSIS**

**1. Political Committee Status**

Under the Act, groups that trigger political committee status are required to organize as a political committee, register with the Commission, and publicly disclose all of their receipts and disbursements. 2 U.S.C. §§ 432, 433, and 434. The Act defines a "political committee" as any committee, association, or other group of persons that receives "contributions" or makes "expenditures" which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A).<sup>1</sup> An organization that has made expenditures in excess of \$1,000, however, will not be considered a "political committee" unless, in addition, its "major purpose is Federal campaign activity (i.e., the nomination or election of a Federal candidate)." Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) ("Supplemental E & J"). See *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("MCFL").

**a. Expenditures By RSMC**

In determining whether an organization makes an expenditure, the Commission "analyzes whether expenditures for any of an organization's communications made independently of a candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." 72 Fed. Reg. at 5606. Under the Commission's regulations, a communication expressly advocates the election or defeat of a clearly identified candidate when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or individual words, "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified

<sup>1</sup> The term "expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). The term "contribution" is similarly defined by 2 U.S.C. § 431(8)(A)(i).

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1 candidate(s)....” See 11 C.F.R. § 100.22(a); *Buckley*, 424 U.S. at 44 n.52; see also *MCFL*, 479  
2 U.S. at 249.

3 The second part of the Commission’s regulation encompasses a communication that,  
4 when taken as a whole or with limited reference to external events, “could only be interpreted by  
5 a reasonable person as containing advocacy of the election or defeat of one or more clearly  
6 identified candidate(s) because” it contains an “electoral portion” that is “unmistakable,  
7 unambiguous, and suggestive of only one meaning” and “reasonable minds could not differ as to  
8 whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or  
9 encourages some other kind of action.” See 11 C.F.R. § 100.22(b).

10 The Ayotte advertisements do not contain express advocacy under either 11 C.F.R.  
11 § 100.22(a) or (b). The Ayotte advertisements do not contain express advocacy under 11 C.F.R.  
12 § 100.22(a) because even though they contain the phrase “vote” in the advertisement, it is not an  
13 individual word that “in context can have no other reasonable meaning than to urge the election  
14 or defeat of one or more clearly identified candidate(s)....” While the phrase “Please Vote This  
15 Tuesday!” urges viewers of the advertisement to vote, it does not clearly indicate that the voters  
16 should vote for or against Ayotte. Significantly, while the advertisement includes Kelly Ayotte’s  
17 name and picture, it does not indicate her status as a candidate for federal office, and contains a  
18 quotation in which she endorses specific candidates for state office, and specifies only the offices  
19 being sought by those state candidates. Thus, while the advertisement expressly advocates the  
20 election of the state candidates, it is unclear as to whether or not it advocates the election of Ms.  
21 Ayotte.

22 Likewise, the advertisements are not express advocacy under 11 C.F.R. § 100.22(b)  
23 because they do not contain an “electoral portion” that is “unmistakable, unambiguous, and  
24 suggestive of only one meaning” and “reasonable minds could not differ as to whether they

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1 encourage actions to elect or defeat one or more clearly identified candidate(s) or encourage  
2 some other kind of action." Despite containing an "electoral portion," the Ayotte advertisement  
3 is ambiguous as to whether the phrase "Please Vote This Tuesday!" applies to only the  
4 nonfederal candidates or to all of the featured candidates.

5 The Ayotte advertisements, therefore, do not qualify as express advocacy under  
6 11 C.F.R. § 100.22(a) or (b). Thus, RSMC did not exceed the \$1,000 threshold for political  
7 committee status by making express advocacy expenditures when it ran the Ayotte  
8 advertisements.

9 **b. Contributions by RSMC**

10 Under the Act, no person, including state political committees such as RSMC, could  
11 contribute more than \$2,400 to the campaign of a federal candidate, such as Ms. Ayotte.  
12 2 U.S.C. § 441a. Further, the Act prohibits corporations from making contributions from their  
13 general treasury funds in connection with any election of any candidate for federal office.  
14 2 U.S.C. § 441b. Finally, no candidate or political committee may knowingly accept an  
15 excessive or prohibited contribution. 2 U.S.C. §§ 441a and 441b.

16 An expenditure made by any person "in cooperation, consultation, or concert, with, or at  
17 the request or suggestion of, a candidate, his authorized political committees or their agents"  
18 constitutes an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i). However, the Commission has  
19 exempted certain types of communications from being considered "coordinated  
20 communications" because they come within specified safe harbors. See 11 C.F.R. § 109.21(f)  
21 (2010) (safe harbor for responses to inquiries about legislative or policy issues); 11 C.F.R.  
22 § 109.21(g) (2010) (safe harbor for endorsements and solicitations by Federal candidates);  
23 11 C.F.R. § 109.21(h) (2010) (safe harbor for establishment and use of a firewall).<sup>2</sup>

<sup>2</sup> The Commission added an additional safe harbor for commercial transactions effective December 1, 2010. See Explanation and Justification: Coordinated Communications, 75 Fed. Reg. 55947, 55959-61 (Sept. 15, 2010).



1 A communication is coordinated with a candidate, a candidate's authorized committee, or  
2 agent of the candidate or committee when the communication satisfies the three-pronged test set  
3 forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person other than that  
4 candidate or authorized committee; (2) the communication satisfies at least one of the content  
5 standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of  
6 the conduct standards set forth in 11 C.F.R. § 109.21(d). "A payment for a communication  
7 satisfying all three prongs satisfies the statutory requirements for an expenditure in the specific  
8 context of coordinated communications, and thereby constitutes a contribution under 2 U.S.C.  
9 § 441a(7)(B)(i) and (ii)." Advisory Opinion 2003-25 (Weinzapfel) at 5, citing Final Rules and  
10 Explanation and Justification for Coordinated and Independent Expenditures, 68 Fed. Reg. 421,  
11 427 (Jan. 30, 2003) ("2003 Coordination E&J").

12 **i. Coordination**

13 **a. Payment**

14 In this matter, the first prong of the coordinated communication test is satisfied because  
15 RSMC is a third-party payor. See 11 C.F.R. § 109.21(a)(1). RSMC has admitted in its response  
16 that it has paid for the Ayotte advertisements and has detailed the steps it took to run the  
17 advertisements in affidavits from its chairman and its consultant.

18 **b. Content**

19 The second prong of this test, the content standard, is also satisfied. The content prong is  
20 satisfied if a communication meets at least one of the following content standards: (1) a  
21 communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a public  
22 communication that disseminates, distributes, or republishes, in whole or in part, campaign  
23 materials prepared by a candidate or the candidate's authorized committee; (3) a public  
24 communication that expressly advocates the election or defeat of a clearly identified candidate

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1 for federal office; or (4) a public communication,<sup>3</sup> in relevant part, that refers to a clearly  
2 identified House or Senate candidate, and is publicly distributed or disseminated in the clearly  
3 identified candidate's jurisdiction 90 days or fewer before the candidate's primary or general  
4 election. See 11 C.F.R. § 109.21(c).

5 The Ayotte advertisements satisfy the content standard because they are public  
6 communications that refer to a clearly identified candidate for federal office (Kelly Ayotte), and  
7 were disseminated in the clearly identified candidate's jurisdiction within 90 days of the  
8 November 2, 2010 general election. See 11 C.F.R. § 109.21(a)(4)(i). Specifically, the Ayotte  
9 advertisements appeared in the UNION LEADER, the CONCORD MONITOR, the NASHUA  
10 TELEGRAPH DAILY, and the FOSTER'S DAILY DEMOCRAT, all newspapers that are "public  
11 communications" under 11 C.F.R. § 100.26, and which are "disseminated" to the jurisdiction  
12 (i.e., New Hampshire) for which Ayotte was seeking election as a federal candidate. By using  
13 Ayotte's name and picture, the advertisements featured a "clearly identified" candidate.  
14 11 C.F.R. § 100.17. Finally, the advertisements were disseminated on November 1, 2010, one  
15 day before the November 2, 2010 general election.

16 c. Conduct

17 Although there is some dispute between the responses, the available information suggests  
18 that the third prong of this test, the conduct standard, also may have been satisfied. The conduct  
19 prong is satisfied where any of the following types of conduct occurs: (1) the communication  
20 was created, produced, or distributed at the request or suggestion of a candidate or his campaign;  
21 (2) the candidate or his campaign was materially involved in decisions regarding the

<sup>3</sup> 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. "[C]learly identified means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference . . . ." 11 C.F.R. § 100.17.

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1 communication; (3) the communication was created, produced, or distributed after substantial  
2 discussions with the campaign or its agents; (4) the parties contracted with or employed a  
3 common vendor that used or conveyed material information about the campaign's plans,  
4 projects, activities or needs, or used material information gained from past work with the  
5 candidate to create, produce, or distribute the communication; (5) the payor employed a former  
6 employee or independent contractor of the candidate who used or conveyed material information  
7 about the campaign's plans, projects, activities or needs, or used material information gained  
8 from past work with the candidate to create, produce, or distribute the communication; or (6) the  
9 payor republished campaign material. See 11 C.F.R. § 109.21(d).

10 The available information suggests that an agent of Ayotte's campaign committee may  
11 have been materially involved in decisions regarding the communication. 11 C.F.R.  
12 § 109.21(d)(2). A candidate or committee is "materially involved in decisions" if the candidate  
13 or committee "conveys approval or disapproval of the other person's plans." 2003 *Coordination*  
14 *E&J* at 434. In Advisory Opinion 2003-25 (Weinzapfel), the Commission concluded that the  
15 appearance of a federal candidate in a television advertisement endorsing and paid for by a non-  
16 federal candidate satisfied the "material involvement" conduct standard because "[g]iven the  
17 importance of and potential campaign implications for each public appearance by a Federal  
18 candidate, it is highly implausible that a Federal candidate would appear in a communication  
19 without being materially involved in one or more of the listed decisions [in 11 C.F.R.  
20 § 109.21(d)(2).]" The opinion noted that the endorsing candidate planned to review the script for  
21 "appropriateness." See also Advisory Opinions 2004-1 (Bush/Kerr) and 2004-29 (Akin);  
22 Conciliation Agreement in MUR 5410 (Oberweis) (" . . . [t]he Commission has found that a  
23 candidate's appearance in a communication would be sufficient to conclude that the candidate

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1 was materially involved in decisions regarding that communication . . ." [citing to AO s 2003-25,  
2 2004-1, and 2004-29.)).

3 RSMC provided an affidavit indicating that the advertisements featuring Ayotte were  
4 reviewed and approved by an agent of the Ayotte Committee. The apparent approval of the  
5 advertisements by the Ayotte campaign represents the same level of campaign involvement as  
6 the review of advertisements for "appropriateness" in AO 2003-25 (Weinzapfel), which the  
7 Commission concluded was material involvement. Although RSMC states that no one from the  
8 Ayotte campaign proposed any content for the advertisements, it gave an Ayotte campaign  
9 committee consultant the opportunity to approve or disapprove the communication, and the  
10 Ayotte campaign's representative indicated that the advertisements were "fine." RSMC  
11 Response at 2-3 and Dennehy Affidavit ¶¶ 8-10.

12 The Ayotte Committee acknowledges that Kelly Ayotte agreed to endorse the two local  
13 candidates, but generally denies that it reviewed or approved the ads prior to their dissemination  
14 or publication. Ayotte Committee Response at 2. The Ayotte Committee, however, did not  
15 include supporting affidavits or any other documentation, and does not otherwise address any  
16 contact that the Committee's consultants may have had with RSMC. Moreover, although the  
17 Ayotte Committee denies reviewing or approving the advertisements, it does not deny all contact  
18 with RSMC or provide evidence that would rebut RSMC's affidavit indicating that an agent of  
19 the Ayotte Committee approved an "exemplar" of the advertisement. Thus, there is credible  
20 evidence that the Ayotte Committee was materially involved in approving the RSMC  
21 advertisements.

22 **ii. Endorsement Safe Harbor**

23 The Commission has delineated several exceptions to the general definition of  
24 "coordinated communication." See 11 C.F.R. § 109.21(f)-(h). In particular, the regulation

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1 exempts from the definition of "coordinated communication" public communications in which a  
2 Federal candidate endorses another candidate for Federal or non-Federal office unless the  
3 communication promotes, supports, attacks, or opposes the endorsing candidate or another  
4 candidate who seeks election to the same office as the endorsing candidate. 11 C.F.R.  
5 § 109.21(g)(1). In creating that safe harbor, the Commission quoted Senator Feingold in the  
6 legislative history as stating that BCRA was not intended to prohibit endorsing communications  
7 "so long as those advertisements do not support, attack, promote, or oppose the Federal  
8 candidate." Coordinated Communications: Explanation and Justification, 71 Fed. Reg. 33196,  
9 33202 (June 8, 2006) ("2006 Coordinated Communications E&J") (quoting 148 Cong. Reg.  
10 S2143 (March 20, 2002) (Feingold)).

11 The Commission has applied the safe harbor for endorsements in the context of a  
12 candidate for Congress endorsing a local candidate. See Advisory Opinion 2007-34 (Jackson).  
13 In AO 2007-34, the Commission concluded that the appearance of the federal candidate,  
14 Congressman Jesse Jackson Jr., on a billboard with a local candidate for state's attorney qualified  
15 for the safe harbor because it did not PASO Representative Jackson. The billboard included  
16 pictures of both the Congressman and the local candidate with the words: "Justice has no color.  
17 Larry Saffredin - For State's Attorney - Vote February 5<sup>th</sup>." The billboard identified  
18 Representative Jackson only by his picture and did not mention his name or office. The  
19 Commission concluded that the billboard did not PASO Representative Jackson.

20 Ms. Ayotte's name and image plays a more prominent role in the advertisements at issue  
21 in this matter than those of Representative Jackson played in the billboard at issue in AO 2007-  
22 34. For example, Kelly Ayotte's name is listed at the top of the advertisement alongside the  
23 endorsed state candidates in a manner that could be mistaken as a slate card or ticket. The  
24 placement of Ayotte's name could lead to the impression that the general exhortation to "Please

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1 Vote This Tuesday!" applied to all the listed candidates, and not just the endorsed state  
2 candidates. In contrast, the billboard in AO 2007-34 included a general exhortation to "Vote  
3 February 5<sup>th</sup>," but the exhortation to vote could only apply to Larry Suffredin because he was the  
4 only person identified by name in the text. In addition, the size and placement of the  
5 photographs of the federal candidates in the Ayotte advertisements differ from the depiction of  
6 Representative Jackson in the billboard. Whereas Ayotte's picture is the largest and most  
7 visually prominent in the advertisements, Representative Jackson's photograph is the same size  
8 as the endorsed local candidate.

9 The use of Kelly Ayotte's name and picture in the advertisement, even if they appeared  
10 prominently, does not change the nature of the advertisement from that of an endorsement. The  
11 general exhortation to vote on "This Tuesday" appears after Ayotte's endorsement, and is asking  
12 voters to join Ayotte in supporting the endorsed state candidates, not to support Ayotte. When  
13 adopting the endorsement safe harbor for coordinated communications the Commission  
14 concluded that "endorsements . . . are not made for the purpose of influencing the endorsing . . .  
15 candidate's own election." 2006 Coordinated Communications E&J, 71 Fed. Reg. at 33202.  
16 Moreover, the endorsement safe harbor "applies regardless of the timing and proximity to an  
17 election of the endorsement." *Id.* at 33201. As an endorsement of state candidates by a federal  
18 candidate, the Ayotte advertisements are made for the purpose of influencing the election of the  
19 New Hampshire state candidates and not the election of Ms. Ayotte to the office of U.S. Senator.

20 Thus, it appears that the Ayotte advertisements would qualify for the endorsement safe  
21 harbor of 11 C.F.R. § 109.21(g)(1) because the advertisements do not promote or support Ayotte.

### 22 iii. Conclusion

23 The Ayotte advertisements appear to satisfy the payment, content, and conduct prongs  
24 and therefore may be considered coordinated communications. 2 U.S.C. § 441a(a)(7)(B)(i);

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11 C.F.R. § 109.21(a). However, the advertisements are endorsements of state candidates, and qualify for the exemption of 11 C.F.R. § 109.21(g)(1) because they do not PASO Ayotte. Accordingly, we recommend that the Commission find no reason to believe that New Hampshire Republican Senate Majority Committee violated 2 U.S.C. § 441a or § 441b by making excessive or prohibited in-kind contributions in the form of coordinated expenditures, and also find no reason to believe that Friends of Kelly Ayotte, and H. Scott Flegal, in his official capacity as treasurer, violated §§ 441a, 441b, or 434 by knowingly accepting or failing to report an excessive or prohibited in-kind contribution.

**c. Major Purpose**

In assessing whether a group has the major purpose to be required to register and report as a political committee, (*i.e.*, federal campaign activity in support of the nomination or election of a federal candidate), the Commission examines the group's statements as to its purpose and its spending. Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) ("Supplemental E&J").

Although RSMC may have satisfied the statutory threshold by making in excess of \$1,000 in contributions through its coordinated communications, *see* 2 U.S.C. § 431(4), RSMC does not appear to have federal campaign activity as its major purpose. Rather, RSMC is a New Hampshire political committee that has a purpose "to support the political activities of NH Senate Republicans and the election of Republican state senate candidates," *see* RSMC N.H. Registration (Dec. 9, 2008), and "to achieve the election of a Republican majority to the New Hampshire Senate in 2010." RSMC Response at 1. Moreover, RSMC raised and spent approximately \$130,000 during the 2010 elections and there is no indication that it spent significantly more on federal campaign activity than whatever allocable portion of the \$5,873 spent on the Ayotte advertisements might be treated as a contribution to Ms. Ayotte. Given the

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1 limited amount spent on the Ayotte advertisements, RSMC's spending cannot be considered so  
2 extensive that its major purpose may be considered federal campaign activity. RSMC therefore  
3 cannot be considered a political committee under the Act because it does not have federal  
4 campaign activity as its major purpose. *See Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262.

5 Accordingly, we recommend that the Commission find no reason to believe that the New  
6 Hampshire Republican Senate Majority Committee violated 2 U.S.C. §§ 432, 433, and 434 by  
7 failing to organize, register, and report as a political committee.

## 8 2. Federal Election Activity

9 The complaint alleges that RSMC received corporate funds to run the Ayotte  
10 advertisements, which consequently may have violated the Act's requirement that FEA be paid  
11 for with federally permissible funds. Both RSMC and the Ayotte Committee claim that the  
12 advertisements were not FEA, and therefore the costs associated with the advertisement did not  
13 need to be paid for with funds subject to the Act's limitations and prohibitions. *See* 2 U.S.C.  
14 § 441i(b)(1). Section 441i(b)(1) provides, in relevant part, that "an amount that is expended or  
15 disbursed for Federal election activity . . . by an association or similar group of candidates for  
16 State or local office or of individuals holding State or local office, shall be made from funds  
17 subject to the limitations, prohibitions, and reporting requirements of this Act." RSMC is a  
18 political committee registered with the State of New Hampshire that is "an association . . . of  
19 candidates for State office" because its Chairperson and Treasurer are both State Senators in  
20 New Hampshire, and thus is covered by 2 U.S.C. § 441i(b)(1). While RSMC would be required  
21 to pay for any FEA with funds subject to the limitations, prohibitions, and reporting requirements  
22 of the Act, the Ayotte advertisements do not qualify as FEA under the two potentially applicable  
23 types of FEA: (1) public communications that refer to a clearly identified Federal candidate that



PASOs that candidate under 2 U.S.C. § 431(20)(A)(iii), or (2) get-out-the-vote ("GOTV") activity under 2 U.S.C. § 431(20)(A)(ii).

**a. Public Communications that PASO a Federal Candidate**

As discussed above, public communications that refer to a clearly identified candidate for Federal office and PASO that candidate qualify as FEA. 2 U.S.C. § 431(20)(A)(iii). At the time of the Ayotte advertisements, Commission regulations further stated that FEA included "[a] public communication that refers to a clearly identified candidate for Federal office, regardless of whether a candidate for State or local election is also mentioned or identified, and that promotes or supports, or attacks or opposes any candidate for Federal office. This restriction applies whether or not the communication expressly advocates a vote for or against a Federal candidate." 11 C.F.R. § 100.24(b)(3). Further, Commission regulations provide that FEA does not include "[a] public communication that refers solely to one or more clearly identified candidates for State or local office and that does not promote or support, or attack or oppose a clearly identified candidate for Federal office; provided, however, that such a public communication shall be considered a Federal election activity if it constitutes voter registration activity, generic campaign activity, get-out-the-vote activity, or voter identification." 11 C.F.R. § 100.24(c)(1). Both the Act and the Commission regulations reflect the Congressional intent that the FEA provisions would not prohibit "spending non-Federal money to run advertisements that mention that [state candidates] have been endorsed by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or oppose the Federal candidate." Statement of Sen. Feingold, 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002).

While the complaint argues that the RSMC advertisements could be viewed as presenting Ms. Ayotte's name in a manner that could be interpreted as being part of a slate of candidates to

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1 be voted for on election day, this conclusion is not supported by a careful reading of the  
2 advertisement. *See supra* Part II.B.1.b.ii. The ad, when read as a whole, indicates that Ms.  
3 Ayotte, without any indication of her status as a federal candidate, is endorsing the state  
4 candidates in a manner similar to the situation in AO 2007-34 (Jackson); *see also* Advisory  
5 Opinion 2003-25 (Weinzapfel); MUR 5600 (Michigan Senate State Democratic Committee) and  
6 MURs 5387 and 5446 (Welch for Wisconsin). The advertisement, while urging readers to vote  
7 for the specific state candidates, is similar to the advisory opinion and matters where the  
8 Commission concluded that a federal candidate making an endorsement is not necessarily  
9 promoted or supported by being identified in that capacity.

10 **b. Get-Out-The-Vote**

11 The Act defines Federal election activity to include "get-out-the-vote" or GOTV activity.  
12 2 U.S.C. § 431(20)(A)(ii). At the time of the Ayotte advertisements, the Commission regulations  
13 defined GOTV to mean "contacting registered voters by telephone, in person, or by other  
14 individualized means, to assist them in engaging in the act of voting . . ." 11 C.F.R.  
15 § 100.24(b)(3) (2010).<sup>4</sup> In Advisory Opinion 2006-19 (Los Angeles County Democratic Party  
16 Central Committee), the Commission concluded that a mailer endorsing non-federal candidates,  
17 advertising the date of municipal and federal primary elections, and targeted to Democrats within  
18 a certain county would not be considered get-out-the-vote activity. The Commission based its  
19 conclusion on four specific facts: (1) the mailers promoted only non-federal candidates; (2) the  
20 communication would be made "several" (four) days prior to the election, and thus was more  
21 likely to be a "general exhortation" to vote; (3) the mailer was a form letter, and there is no  
22 indication that the activity was targeted to any subset of Democratic voters; and (4) the mailer

<sup>4</sup> The Commission recently revised its FEA regulations, in particular its definitions of "voter registration" and "get-out-the-vote" activities. *See* Final Rules: Definition of Federal Election Activity, 75 Fed. Reg. 55257 (Sept. 10, 2010). The effective date of the new regulations was December 1, 2010, after the activity at issue in this report.

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1 contained only the date of the election, and not information such as the hours and location of the  
2 individual voter's polling place.

3 The D.C. Circuit in *Shays III* specifically relied on AO 2006-19 in concluding that the  
4 current definitions of "get-out-the-vote activity" and "voter registration activity" contained in  
5 11 C.F.R. § 100.24(a)(2)-(a)(3) permit party committees to use purely non-federal funds for  
6 FEA, directly counter to BCRA's purpose. *Shays v. FEC*, 528 F.3d 914, 932 (D.C. Cir. 2008).  
7 The court identified two concerns about the current regulations. First, the "actual assistance"  
8 requirement in both definitions "exclud[es] efforts that actively encourage people to vote or  
9 register to vote and dramatically narrow[] which activities are covered." Second, both  
10 definitions' "individual means" requirement "entirely exclud[es] mass communications targeted  
11 to many people." *Id.* at 931-32. The court pointed to AO 2006-19 as evidence of its concerns  
12 that the regulations might allow state party committees to spend non-federal funds on multiple  
13 direct mailings targeted to potentially sympathetic voters and automated telephone calls  
14 "exhorting recipients to get out the vote." *Id.*

15 Although AO 2006-19 had been criticized by the court in *Shays III* and has been  
16 superseded by the Commission's more recent rulemaking defining GOTV, *see* Final Rules:  
17 Definition of Federal Election Activity, 75 Fed. Reg. 55257 (Sept. 10, 2010), that Advisory  
18 Opinion provided the most relevant Commission guidance on the extent of GOTV activities.  
19 Based on the regulatory definition at the time, and its application by the Commission in  
20 AO 2006-19, the Ayotte advertisements do not appear to be GOTV activity. Specifically, the  
21 Ayotte advertisements were run in newspapers and were not exhortations to vote that were made  
22 using the individualized means contemplated by the then applicable definition of GOTV.  
23 *See* 11 C.F.R. § 100.24(b)(3). Moreover, the advertisements, on the whole, were even less  
24 directly connected to the election than the mailers in AO 2006-19. For example, although the

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1 Ayotte advertisements appeared the day before the election, they did not promote any federal  
2 candidates, *see supra* Part II.B.1.b.ii., were not target to a particular segment of the electorate,  
3 and included only the date of the election, and not any information regarding the polling  
4 locations or times.

5 Accordingly, we recommend that the Commission find no reason to believe that the New  
6 Hampshire Republican Senate Majority Committee violated 2 U.S.C. § 441i(b)(1) by making  
7 disbursements for federal election activity from funds not subject to the limitations, prohibitions,  
8 and reporting requirements of the Act.

### 9 3. Disclaimer

10 The complaint also alleges that RSMC failed to include the proper disclaimer for the  
11 Ayotte advertisements. In particular, the complaint alleges that the Ayotte advertisements should  
12 have included the disclaimer required by 2 U.S.C. § 441d and 11 C.F.R. § 110.11 because the  
13 advertisement was express advocacy. As discussed above, *see supra* Part II.B.1.a., the Ayotte  
14 advertisements do not contain express advocacy and are therefore not subject to the Act's  
15 disclaimer requirements. *See* 11 C.F.R. § 110.11(a)(2). Additionally, RSMC is not a political  
16 committee under the Act, and consequently would not be required to include disclaimers  
17 pursuant to 11 C.F.R. § 110.11(a)(1). The Ayotte advertisements were also not required to  
18 include a disclaimer because they do not solicit contributions, *see* 11 C.F.R. § 110.11(a)(3), and  
19 they do not qualify as an electioneering communication. *See* 11 C.F.R. § 110.11(a)(4); *see also*  
20 11 C.F.R. § 100.29(a) (electioneering communications limited to broadcast, cable, or satellite  
21 communications).

22 Accordingly, we recommend that the Commission find no reason to believe that the New  
23 Hampshire Republican Senate Majority Committee violated 2 U.S.C. § 441d and 11 C.F.R.  
24 § 110.11 by failing to include adequate disclaimers.

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**III. RECOMMENDATIONS**

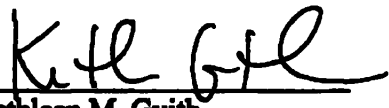
1. Find no reason to believe that the New Hampshire Republican Senate Majority Committee violated 2 U.S.C. §§ 441a or 441b by making excessive in-kind contributions;
2. Find no reason to believe that the New Hampshire Republican Senate Majority Committee violated 2 U.S.C. § 441(b)(1) by making disbursements for federal election activity from funds not subject to the limitations, prohibitions, and reporting requirements of the Act;
3. Find no reason to believe that the New Hampshire Republican Senate Majority Committee violated 2 U.S.C. §§ 432, 433, and 434 by failing to organize, register, and report as a political committee;
4. Find no reason to believe that the New Hampshire Republican Senate Majority Committee violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11 by failing to include adequate disclaimers;
5. Find no reason to believe that Friends of Kelly Ayotte, and H. Scott Flegal, in his official capacity as treasurer, violated §§ 441a, 441b, or 434 by knowingly accepting or failing to report an excessive or prohibited in-kind contribution;
6. Approve the attached Factual and Legal Analysis;
7. Approve the appropriate letters; and


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8. Close the file.

8-29-11  
DATE

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