



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
) MUR 6346
 Cornerstone Action, et al.)
)

**STATEMENT OF REASONS
OF CHAIR CYNTHIA L. BAUERLY AND
COMMISSIONERS STEVEN T. WALTHER AND ELLEN L. WEINTRAUB**

In this matter, the General Counsel recommended that the Commission find reason to believe that Cornerstone Action, a New Hampshire-based 501(c)(4) organization, failed to file a 48-hour independent expenditure report for an advertisement attacking Bill Binnie, a candidate in the New Hampshire Republican Senate primary, in violation of Section 434(g)(2) of the Federal Election Campaign Act of 1971, as amended ("the Act"). We supported the recommendation to find reason to believe and supported the authorization of a very brief investigation to determine the cost of the advertisement, which attacked a candidate, contained an unmistakable and unambiguous reference to an election, and encouraged voters to vote against the candidate.¹

Background

On August 4, 2010, Cornerstone Action began airing a television advertisement entitled "The Feeling is Mutual," which criticized Bill Binnie, a candidate for the Republican primary

¹ Chair Bauerly and Commissioners Walther and Weintraub voted in favor of a motion to approve the General Counsel's independent expenditure reporting recommendation. Vice Chair Hunter and Commissioners McGahn and Petersen dissented. Certification in MUR 6346, dated September 19, 2011.

The General Counsel also recommended that the Commission find no reason to believe that Cornerstone Action coordinated its expenditures with Friend of Kelly Ayotte, Kelly Ayotte's principal campaign committee for U.S. Senate in New Hampshire, for the same ad attacking Bill Binnie, one of Ms. Ayotte's Republican Senate primary opponents, in violation of 2 U.S.C. 441a and 441b. For the reasons set out in the report, the Commission, by a vote of 6-0, supported the recommendations to find no reason to believe that Cornerstone Action violated 2 U.S.C. § 441a(a) and 441b by making an excessive and prohibited in-kind contribution in the form of a coordinated communication and no reason to believe that the Ayotte Committee violated 2 U.S.C. §§ 441a(f) and 441b by receiving an excessive and prohibited in-kind contribution. See First General Counsel's Report at 7-11. Certification in MUR 6346, dated September 19, 2011.

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election for Senate in New Hampshire in 2010.² The advertisement included video clips of Binnie accompanied by various on-screen captions of his statements about policy issues. The advertisement was narrated by a voiceover with the following script:

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

Cornerstone Action filed independent expenditure reports for other ads totaling \$23,298 in August and September 2010, including \$18,170.50 for a radio advertisement opposing Binnie and \$5,127 for a newspaper advertisement opposing Binnie,³ but no report was filed for the ad at issue in this matter. Cornerstone Action appears to have paid \$125,000 to broadcast "The Feeling is Mutual."⁴ The advertisement was first broadcast on August 4, 2010, 41 days prior to the Republican primary and was initially scheduled to run beyond the first airing.⁵ The Commission does not have information regarding the actual dates the advertisement was aired.

Legal Analysis

Real-time reporting of independent expenditures in the days before an election has been integral to the Act for more than thirty years.⁶ The Act has long required that persons making independent expenditures aggregating \$1,000 or more *after* the 20th day, but more than 24 hours, before an election file a report with the Commission within 24 hours. 2 U.S.C. § 434(g)(1)(A). This requirement was upheld in *Buckley v. Valeo*, 424 U.S. 1, 80-82 (1976), where the Court noted that the purposes for this disclosure include: (1) furthering Congress's "effort to achieve 'total disclosure' by reaching 'every kind of political activity' to ensure that voters are fully informed;" (2) to "achieve through publicity the maximum deterrence to corruption and undue influence possible;" and (3) aiding the Commission in law enforcement, particularly in ensuring that limits on individual contributions to candidates are not circumvented. *Id.* at 76. In 2002,

² See <http://www.youtube.com/watch?v=Aq0tSsxtJA4> (last visited Oct. 4, 2011).

³ See <http://query.nictusa.com/pdf/469/10030414469/10030414469.pdf#navpanes=0>, <http://query.nictusa.com/pdf/PAPER/10991130573.pdf#navpanes=0>.

⁴ Sean Sullivan, "Binnie Under Fire from Conservative Group," *Hotline on Call*, August 5, 2010, available at http://hotlineoncall.nationaljournal.com/archives/2010/08/binnie_under_fi.php (last visited Oct. 4, 2011).

⁵ *Id.*

⁶ This reporting requirement was first enacted in 1976 for independent expenditures made after the fifteenth day prior to the election, 2 U.S.C. § 434(e)(2); Pub. L. No. 94-283, Title I, § 104, 90 Stat. 480 (1976), and was amended four years later to require reporting for expenditures made after the twentieth day prior to the election, 2 U.S.C. § 434(e)(2); Pub. L. No. 96-187, Title I, § 104, 93 Stat. 1348 (1980).

Congress expanded independent expenditure reporting to require that persons who make independent expenditures aggregating \$10,000 or more up to and including the 20th day before an election file a report within 48 hours.⁷

The Act defines an independent expenditure as any expenditure that expressly advocates the election or defeat of a clearly identified candidate and is not made in concert with a candidate, political party, or their respective agents. 2 U.S.C. § 431(17). The Commission has defined express advocacy in the regulations set forth at 11 C.F.R. § 100.22. Under Section 100.22(a):

Expressly advocating means any communication that – (a) uses *phrases* such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in '94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one of more candidate(s), “reject the incumbent,” or communications of campaign slogan(s), or *individual word(s)*, which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon’s the One,” “Carter ’76,” “Reagan/Bush” or “Mondale!”

11 C.F.R. § 100.22(a) (emphasis added). Under Section 100.22(b), a communication contains express advocacy if:

When taken as a whole and with limited reference to external events, such as the proximity to the election, [it] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because – (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b).

“The Feeling is Mutual” advertisement is an independent expenditure that should have been reported by Cornerstone Action because it expressly advocated the defeat of Bill Binnie and was made independently of a candidate or party.

This ad used individual words that in context can have no reasonable meaning other than to urge the defeat of Mr. Binnie in the upcoming Republican Senate primary. 11 C.F.R. § 100.22(a). The ad was exclusively about Binnie’s views. It exaggerated and mocked the policy statements Binnie made in the context of his race in the Republican Senate primary. It

⁷ 2 U.S.C. § 434(g)(2)(A), Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 212(a), 116 Stat. 81 (2002).

labeled his positions as "shockingly liberal" and stated, "It's no wonder Bill Binnie says he doesn't like the Republican Party. Now New Hampshire Republicans can tell Binnie the feeling is mutual." The ad was directed at New Hampshire Republicans, the only viewers who were eligible to vote in the election in which Binnie was on the ballot, and called for them to take on action, now. The only way that these Republican viewers could tell Binnie, a non-incumbent primary candidate, that "the feeling is mutual" – that the party does not like him – was to vote against him in the upcoming primary.

Section 100.22(a) express advocacy includes communications that contain "in effect an explicit directive" to vote for or against a candidate. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986). For example, in MUR 5831 (Softer Voices), all six Commissioners found reason to believe that the advertisement at issue was express advocacy under both 11 C.F.R. §§ 100.22(a) and (b) where the advertisement depicted Senator Rick Santorum and his opponent Bob Casey, attacked Casey's qualifications while praising Santorum's, and concluded "[c]an we really risk Bob Casey learning on the job?" MUR 5831 Factual and Legal Analysis at 6-8. The Commission concluded that the ad exhorted viewers to defeat Casey because the only way the viewer could "risk Bob Casey learning on the job" would be by voting for him for the job of Senator. *Id.* at 8. Similarly, singling out New Hampshire Republicans before a Republican primary election and exhorting them to "tell Binnie the feeling is mutual," in context, can have no other reasonable meaning than to urge Binnie's defeat. Therefore, Cornerstone Action's "The Feeling is Mutual" advertisement contains express advocacy under 11 C.F.R. 100.22(a).

Cornerstone Action's "The Feeling is Mutual" advertisement is also express advocacy under 11 C.F.R. § 100.22(b). Our colleagues contend that the ad is not express advocacy because "reasonable minds" could determine that the advertisement did not encourage action to elect or defeat Binnie, but rather encouraged some other kind of action. But there is no credible alternative for what that call to action might be. The advertisement is all about Binnie, a non-incumbent primary candidate with no power to affect any legislative issue.

Forty-one days before the New Hampshire primary, Cornerstone Action began a six-figure media buy, urging New Hampshire Republicans to express their party's rejection of Bill Binnie: "Bill Binnie says he doesn't like the Republican Party. Now New Hampshire Republicans can tell Binnie the feeling is mutual." The script of the advertisement and the context (the proximity to a Republican primary election) make it clear that the ad calls on New Hampshire Republicans to cast a vote against Binnie in the primary election.


Finally, even if the advertisement did not contain express advocacy, there would still be sufficient basis to authorize a limited investigation as the broadcast of the advertisement may have been an unreported electioneering communication. Broadcast advertisements that air thirty days before a primary election, refer to a clearly identified federal candidate, and are targeted to the relevant electorate are electioneering communications. 2 U.S.C. § 434(f)(3).⁸ We know that the advertisement was first aired 41 days before the New Hampshire Republican primary and

⁸ Any broadcast advertisement that contains express advocacy qualifies as an independent expenditure, and therefore is not an electioneering communication. See 2 U.S.C. § 434(f)(3)(B)(ii).

was scheduled to run beyond the first airing, but we do not know how long the advertisement actually aired. If the advertisement ran within 30 days of the primary election, it likely should have been reported as an electioneering communication.⁹

For these reasons, we voted to authorize a limited investigation to determine the cost and timing of the advertisement. Consistent with Congress and the Supreme Court, we ardently support full and complete reporting in a timely manner. In its decision in *Citizens United*, the Court stated that “[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁰ It is our belief that an investigation into this matter was necessary to ensure these goals are upheld.

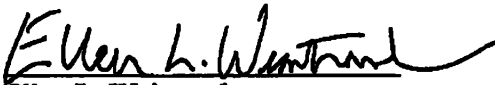
10/21/11
Date


Cynthia L. Bauerly
Chair

10/21/11
Date


Steven T. Walther
Commissioner

10/20/11
Date


Ellen L. Weintraub
Commissioner

⁹ Electioneering communications aggregating more than \$10,000 in a calendar year are subject to disclosure requirements under the Act, 2 U.S.C. § 434(f).

¹⁰ *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6346
Cornerstone Action, Friends of Kelly)
Ayotte and Theodore V. Koch, in his)
official capacity as treasurer)

CERTIFICATION

I, Shelley E. Garr, recording secretary of the Federal Election Commission executive session, do hereby certify that on September 15, 2011, the Commission took the following actions in the above-captioned matter:

1. Failed on a vote of 3-3 to:
 - a. Find reason to believe that Cornerstone Action violated 2 U.S.C. § 434(g)(2).
 - b. Authorize the use of compulsory process as to all Respondents and witnesses in this matter, including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary.
 - c. Approve the section of the Factual and Legal Analyses as recommended in the First General Counsel's Report dated June 21, 2011, that supports the reason to believe finding.

Commissioners Bauerly, Walther, and Weintraub voted affirmatively for the motion.

Commissioners Hunter, McGahn II, and Petersen dissented.

2. Decided by a vote of 6-0 to:
 - a. Find no reason to believe that Cornerstone Action violated 2 U.S.C. §§ 441a(a) and 441b.
 - b. Find no reason to believe that Friends of Kelly Ayotte and Theodore V. Koch, in his official capacity as treasurer, violated §§ 441a(f) and 441b.

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- c. Approve those sections of the Factual and Legal Analyses, as recommended in the First General Counsel's Report dated June 21, 2011, which support findings 1 and 2.
- d. Approve the appropriate letters.
- e. Close the file.

Commissioners Bauerly, Hunter, McGahn II, Petersen, Walther, and Weintraub voted affirmatively for the decision.

Attest:

September 19, 2011
Date

Shelley E. Gao
Shelley E. Gao
Deputy Secretary of the Commission

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 21 2011

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

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

Dear Ms. Mitchell:

On August 12, 2010, the Federal Election Commission notified your clients, Friends of Kelly Ayotte and Theodore V. Koch, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On September 15, 2011, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe Friends of Kelly Ayotte and Theodore V. Koch, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Shonkwiler", with a long horizontal line extending to the right.

Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 **RESPONDENTS:** Friends of Kelly Ayotte and Theodore V. Koch, **MUR 6346**
6 in his official capacity as treasurer
7

8
9 **I. GENERATION OF MATTER**

10 This matter was generated by a complaint filed with the Federal Election Commission by
11
12 Bryan Lanza. See 2 U.S.C. § 437g(a)(1).

13 **II. FACTUAL SUMMARY**

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

25 **A. Background**

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

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

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

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

19 B. Alleged Coordination

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

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

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

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

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

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

3 **III. ANALYSIS**

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

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

10 2 U.S.C. § 441b. During the 2010 election cycle, individuals were prohibited from contributing
11 over \$2,400 per election to a candidate’s authorized political committee and authorized
12 committees were prohibited from accepting contributions from individuals in excess of \$2,400.

13 2 U.S.C. §§ 441a(a) and 441a(f). An expenditure made by any person “in cooperation,
14 consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized
15 political committees or their agents” constitutes an in-kind contribution. 2 U.S.C.

16 § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, a candidate’s authorized
17 committee, or agent of the candidate or committee when the communication satisfies the three-
18 pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person
19 other than that candidate or authorized committee; (2) the communication satisfies at least one of
20 the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at
21 least one of the conduct standards set forth in 11 C.F.R. § 109.21(d). The Commission’s
22 regulations at 11 C.F.R. § 109.21 provide that coordinated communications constitute in-kind

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

3 **A. Payment**

4 The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied.

5 The advertisement's disclaimer states that it was paid for by Cornerstone Action and the National
6 Organization for Marriage.

7 **B. Content**

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

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

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

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

3 **C. Conduct**

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

20 11 C.F.R. § 109.21(d)(1)-(6).

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

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

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

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

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

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

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

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

SEP 21 2011

Bryan Lanza, Campaign Manager
Bill Binnie for U.S. Senate
P.O. Box 600
Portsmouth, N.H. 03802

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

Dear Mr. Lanza:

On September 15, 2011, the Federal Election Commission reviewed the allegations in your complaint dated August 5, 2010, and found that, on the basis of the information provided in your complaint, and information provided by the respondents, there is no reason to believe Cornerstone Action violated 2 U.S.C. §§ 441a(a) and 441b. The Commission also found that there is no reason to believe Friends of Kelly Ayotte and Theodore V. Koch, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b. Additionally, the Commission was equally divided on whether to find reason to believe Cornerstone Action violated 2 U.S.C. § 434(g)(2). Accordingly, on September 15, 2011, the Commission closed the 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 Analyses, which more fully explain the Commission's no reason to believe findings, are enclosed. A Statement of Reasons providing a basis for 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.

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MUR 6346 (Cornerstone Action)
Bryan Lanza, Campaign Manager
Page 2

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 2 U.S.C. § 437g(a)(8).

Sincerely,

Anthony Herman
General Counsel

A handwritten signature in cursive script, appearing to read "Mark Shonkwiler", followed by a horizontal line extending to the right.

BY: Mark Shonkwiler
Assistant General Counsel

Enclosures
Factual and Legal Analyses

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1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 **RESPONDENT:** Cornerstone Action

MUR 6346

6
7
8 **I. GENERATION OF MATTER**

9
10 This matter was generated by a complaint filed with the Federal Election Commission by
11 Bryan Lanza. *See* 2 U.S.C. § 437g(a)(1).

12 **II. FACTUAL SUMMARY**

13 This matter concerns allegations that Cornerstone Action, a New Hampshire-based
14 501(c)(4) organization, made an excessive and prohibited corporate in-kind contribution to
15 Friends of Kelly Ayotte (“Ayotte Committee” or “Committee”), Kelly Ayotte’s principal
16 campaign committee for U.S. Senate in New Hampshire in 2010. Complainant alleges that
17 Cornerstone Action coordinated its expenditures for a television advertisement attacking Bill
18 Binnie, one of Ms. Ayotte’s Republican Senate primary opponents, with the Ayotte Committee.
19 Complainant asserts that the Ayotte Committee was involved in the creation of Cornerstone
20 Action’s advertisement because the advertisement utilizes video footage of Binnie from a public
21 event that was allegedly recorded by a former Ayotte campaign employee. Respondents
22 maintain that Cornerstone did not obtain the video footage from the Ayotte Committee, and that
23 it was publicly available material that could be downloaded from the YouTube website.

24 **A. Background**

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

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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_fa](http://www.boston.com/news/local/new_hampshire/articles/2010/10/04/ad_criticizes_nh_gov_for_signing_gay_marriage_law/)
19 [r_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-nXoTk>.

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-
21 disputed.html](http://www.nashuatelegraph.com/news/statenewengland/746598-227/outside-opinions-
21 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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1 political committees or their agents” constitutes an in-kind contribution. 2 U.S.C.
2 § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, a candidate’s authorized
3 committee, or agent of the candidate or committee when the communication satisfies the three-
4 pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person
5 other than that candidate or authorized committee; (2) the communication satisfies at least one of
6 the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at
7 least one of the content standards set forth in 11 C.F.R. § 109.21(d). The Commission’s
8 regulations at 11 C.F.R. § 109.21 provide that coordinated communications constitute in-kind
9 contributions from the party paying for such communications to the candidate, the candidate’s
10 authorized committee, or the political party committee which coordinates the communication.

11 **A. Payment**

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

16 **B. Content**

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

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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.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.

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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. §§ 441(a) and 441b by making an
22 excessive and prohibited in-kind contribution in the form of a coordinated communication.

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1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 **RESPONDENTS:** Friends of Kelly Ayotte and Theodore V. Koch, **MUR 6346**
6 in his official capacity as treasurer
7

8
9 **I. GENERATION OF MATTER**

10 This matter was generated by a complaint filed with the Federal Election Commission by
11 Bryan Lanza. See 2 U.S.C. § 437g(a)(1).
12

13 **II. FACTUAL SUMMARY**

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

25 **A. Background**

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

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

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

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

19 **B. Alleged Coordination**

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

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

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

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

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

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

3 **III. ANALYSIS**

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

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

10 2 U.S.C. § 441b. During the 2010 election cycle, individuals were prohibited from contributing
11 over \$2,400 per election to a candidate's authorized political committee and authorized
12 committees were prohibited from accepting contributions from individuals in excess of \$2,400.

13 2 U.S.C. §§ 441a(a) and 441a(f). An expenditure made by any person "in cooperation,
14 consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized
15 political committees or their agents" constitutes an in-kind contribution. 2 U.S.C.

16 § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, a candidate's authorized
17 committee, or agent of the candidate or committee when the communication satisfies the three-
18 pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person
19 other than that candidate or authorized committee; (2) the communication satisfies at least one of
20 the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at
21 least one of the conduct standards set forth in 11 C.F.R. § 109.21(d). The Commission's
22 regulations at 11 C.F.R. § 109.21 provide that coordinated communications constitute in-kind

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

3 **A. Payment**

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

7 **B. Content**

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

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

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

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

3 **C. Conduct**

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

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

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

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

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

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

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

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

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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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1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 **RESPONDENT:** Cornerstone Action

MUR 6346

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7
8 **I. GENERATION OF MATTER**

9
10 This matter was generated by a complaint filed with the Federal Election Commission by
11 Bryan Lanza. *See* 2 U.S.C. § 437g(a)(1).

12 **II. FACTUAL SUMMARY**

13 This matter concerns allegations that Cornerstone Action, a New Hampshire-based
14 501(c)(4) organization, made an excessive and prohibited corporate in-kind contribution to
15 Friends of Kelly Ayotte (“Ayotte Committee” or “Committee”), Kelly Ayotte’s principal
16 campaign committee for U.S. Senate in New Hampshire in 2010. Complainant alleges that
17 Cornerstone Action coordinated its expenditures for a television advertisement attacking Bill
18 Binnie, one of Ms. Ayotte’s Republican Senate primary opponents, with the Ayotte Committee.
19 Complainant asserts that the Ayotte Committee was involved in the creation of Cornerstone
20 Action’s advertisement because the advertisement utilizes video footage of Binnie from a public
21 event that was allegedly recorded by a former Ayotte campaign employee. Respondents
22 maintain that Cornerstone did not obtain the video footage from the Ayotte Committee, and that
23 it was publicly available material that could be downloaded from the YouTube website.

24 **A. Background**

25 Cornerstone Action incorporated as a non-profit corporation in New Hampshire in 2005
26 and is organized under section 501(c)(4) of the Internal Revenue Code. *See* Complaint Exhibit

27 1. According to its website, Cornerstone Action is an issue-oriented advocacy group that
28 promotes traditional values, limited government, and free markets through education,

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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_fo](http://www.boston.com/news/local/new_hampshire/articles/2010/10/04/ad_criticizes_nh_gov_for_signing_gay_marriage_law/)
19 [r_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-rtXoTk>.

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 Lanerigan,
19 “Outside Opinions Disputed,” *Nashua Telegraph*, May 23, 2010 (available at
20 <http://www.nashuatelegraph.com/news/statenewengland/746598-227/outside-opinions->
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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1 political committees or their agents” constitutes an in-kind contribution. 2 U.S.C.
2 § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, a candidate’s authorized
3 committee, or agent of the candidate or committee when the communication satisfies the three-
4 pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person
5 other than that candidate or authorized committee; (2) the communication satisfies at least one of
6 the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at
7 least one of the conduct standards set forth in 11 C.F.R. § 109.21(d). The Commission’s
8 regulations at 11 C.F.R. § 109.21 provide that coordinated communications constitute in-kind
9 contributions from the party paying for such communications to the candidate, the candidate’s
10 authorized committee, or the political party committee which coordinates the communication.

11 **A. Payment**

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

16 **B. Content**

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

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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.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.

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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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