

AGENDA DOCUMENT NO. 11-68-A



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2011 NOV 30 P 4: 54

November 30, 2011

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Esther Heiden *EH*
Attorney

Subject: Revised Draft D of AO 2011-23 (American Crossroads)

For Meeting of 12-1-11

SUBMITTED LATE

Attached is a proposed revised Draft D of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for December 1, 2011.

Attachment

1 ADVISORY OPINION 2011-23

2

3 Thomas J. Josefiak, Esq.

4

Michael Bayes, Esq.

5

Holtzman Vogel PLLC

6

45 North Hill Drive

7

Suite 100

8

Warrenton, VA 20186

9

REVISED DRAFT D

10 Dear Messrs. Josefiak and Bayes:

11 The Commission is responding to your advisory opinion request on behalf of
12 American Crossroads concerning the application of the Federal Election Campaign Act
13 of 1971, as amended (the “Act”), and Commission regulations to television and radio
14 advertisements featuring incumbent Members of Congress who are candidates in the
15 2012 election.

16 The Commission concludes that an advertisement intended to improve the
17 public’s perception of a candidate for Congress in the upcoming Federal election, which
18 is paid for by a person other than the candidate or the candidate’s authorized committee
19 and both features and is otherwise fully coordinated with the candidate (with or without
20 reference to the candidate’s opponent[s]), would constitute an in-kind contribution to the
21 candidate, subject to the limitations, prohibitions, and reporting requirements of the Act
22 and Commission regulations. This is true even if the communication does not meet the
23 content prong of the Commission’s regulatory definition of “coordinated
24 communication” at 11 C.F.R. 109.21(c), as American Crossroads asks the Commission to
25 assume for purposes of this Advisory Opinion. Nothing in that or any other part of
26 section 109.21 was intended to forestall application of the statutory definition of
27 “contribution” in cases such as those posited by American Crossroads, where the
28 statutory definition plainly applies.

1 The Commission also concludes that American Crossroads' discussions with
2 candidates in connection to its production of the initial advertisements American
3 Crossroads describes will not *automatically* cause all subsequent advertisements by
4 American Crossroads in support of those candidates or in opposition to their opponents to
5 be coordinated communications under the Commission's regulations. If, however,
6 American Crossroads uses information obtained during those prior discussions in its
7 subsequent advertisements, then those subsequent advertisements will meet the conduct
8 prong of the coordinated communications test.

9 ***Background***

10 The facts presented in this advisory opinion are based on your letter received on
11 October 28 and your email dated November 3, 2011.

12 American Crossroads is a political committee registered with the Commission as
13 an independent expenditure-only committee. American Crossroads plans to pay for the
14 production and distribution of three different types of television and radio advertisements
15 supporting incumbent members of Congress who are Federal candidates and whose
16 legislative and policy positions, and re-election, are supported by American Crossroads.

17 *Advertisement Type 1*

18 The first type of advertisement that American Crossroads plans to produce will
19 show on-camera footage of, or voice-overs by, incumbent Members of Congress who are
20 candidates in the 2012 election. These "Type 1 advertisements" will feature a candidate
21 speaking about one or more legislative or policy issues that will likely be debated and
22 discussed in that candidate's upcoming re-election campaign. For example, if a
23 candidate's campaign website focuses on job creation as a signature issue, American

1 Crossroads would run an advertisement that shows the candidate discussing job creation.
2 The purpose of the advertisements will be to improve the public's perception of the
3 featured candidate in advance of the 2012 campaign season.

4 American Crossroads states that “[t]hese advertisements would be fully
5 coordinated” with the candidate; American Crossroads plans to consult the featured
6 candidate regarding the advertisement’s script and the candidate “would then appear in
7 the advertisement.”

8 *Advertisement Type 2*

9 The Type 2 advertisements that American Crossroads plans to run will be similar
10 to the Type 1 advertisements, except that the Type 2 advertisements will compare and
11 contrast the featured candidate’s position on one or more legislative or policy issues with
12 the position of that candidate’s declared opponents for election who might or might not
13 hold any elected or appointed office, and if they do currently hold office, it could be at
14 the Federal, State, or local level. These Type 2 advertisements will not urge the general
15 public to contact any candidate or officeholder for any purpose.

16 In criticizing the positions of the featured candidate’s opponents, Type 2
17 advertisements will refer to the opponents by name only, and not as “candidates” or
18 “opponents.” American Crossroads states that these advertisements will not impugn the
19 character, qualifications, or fitness for office of any of the featured candidate’s declared
20 electoral opponents, although the advertisements may describe the positions taken by the
21

1 opponents as “risky” or “dangerous,” or use another similar term.¹

2 These advertisements also will show the featured candidate on-camera promising
3 to take a certain position in the future on the issue addressed in the advertisement that is
4 at odds with the position of his or her opponents. This on-screen promise will include
5 language similar to the following examples provided by American Crossroads:

- 6 • I’m Jane Doe. I approve this message to stop any plan, Republican or
7 Democrat, that raises your taxes.
- 8 • I’m John Doe. I approve this message to work against any proposal that
9 adds to the budget deficit.
- 10 • I’m Jane Doe. I approved this message so that I could promise you that
11 I’ll keep fighting to create jobs in [Member’s state].

12 American Crossroads provides the following script as an example of a Type 2
13 advertisement:

14 *Narrator:* Some politicians simply defend the status quo and want to pay for it by
15 raising your taxes.

16
17 *Pres. Obama:* “The revenue components that we’ve discussed would be
18 significant.”

19
20 *Narrator:* John X agrees. He’d raise your tax rates, and use the money to pay for
21 the same old failed policies.

22
23 *Narrator:* Jane Y would also raise your taxes.

24
25 *Narrator:* And Bob Z wants to raise your taxes and take away your home
26 mortgage deduction.

¹ In the Commission’s view, referring to opponents’ positions as “risky” or “dangerous” without a call to action may take a position on that individual’s character, qualifications, or fitness for office. *Compare FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476 (2006) (advertisements that asked the viewer to call particular officeholders to tell them to oppose a particular legislative action were not the functional equivalent of express advocacy), with *Citizens United v. FEC*, ___ U.S. ___, 130 S.Ct. 876, 890 (2010) (*Hillary: The Movie* was the functional equivalent of express advocacy).

1
2
3
4
5
6
7
8
9

Narrator: They're just one and the same.

[*on screen:* Dangerous Plans For Families]

Mary A [speaking on camera]: "I'm Mary A. I approve this message to stop any plan, from either side, that raises your taxes or burdens your children with more debt."

10 For purposes of this example, Mary A is an incumbent Republican Senator running for
11 re-election in 2012, and John X, Jane Y, and Bob Z are all Democratic candidates for
12 Senate currently competing in the Democratic primary to face Mary A in the general
13 election. Bob X is a State executive branch officeholder; Jane Y is a private citizen; and
14 Bob Z is a State legislator.

15 *Advertisement Type 3*

16 The third type of advertisement will be produced and distributed by American
17 Crossroads after the Type 1 and Type 2 advertisements air. American Crossroads
18 characterizes these Type 3 advertisements as "independent expenditures,"² in support of
19 the same candidates featured in the Type 1 and 2 advertisements, or in opposition to those
20 candidates' opponents. In American Crossroads' discussions with featured candidates
21 about the Type 1 and Type 2 advertisements, the candidates will not have requested or
22 suggested that American Crossroads produce or air the Type 3 advertisements, and
23 American Crossroads will have no further contact with and will not consult the
24 candidates anew in connection with the Type 3 advertisements. In producing and
25 distributing the Type 3 advertisements, however, American Crossroads may rely on and
26 use the same information that it previously obtained from the featured candidates in

² The Commission understands this to mean the Type 3 advertisements will contain express advocacy. See 2 U.S.C. 431(17); 11 CFR 100.16 and 100.22.

1 producing and distributing the Type 1 and Type 2 advertisements. This includes
2 information obtained because of the candidates' prior material involvement in the
3 production and distribution of the Type 1 and Type 2 advertisements and information
4 obtained in substantial discussions with the candidates in the production and distribution
5 of the Type 1 and Type 2 advertisements. This information could include the candidates'
6 campaign plans, projects, activities, or needs.

7 **Questions Presented**

8 1. *May American Crossroads, as an independent expenditure-only*
9 *committee, produce and distribute Type 1 advertisements featuring Federal candidates*
10 *provided that those advertisements are not coordinated communications under 11 CFR*
11 *109.21? If the advertisements are not "coordinated communications" under 11 CFR*
12 *109.21, would the Commission alternatively treat these advertisements as in-kind*
13 *contributions from American Crossroads to the featured candidate?*

14 2. *May American Crossroads produce and distribute Type 2 advertisements*
15 *featuring Federal candidates and comparing their positions with the positions of their*
16 *declared opponents for election in 2012 where the advertisements would refer to the*
17 *declared opponents by name but would not refer to them as "candidates" or*
18 *"opponents" without making in-kind contributions to the featured candidates?*

19 3. *If the Commission finds that the advertisements in Questions 1 and 2 are*
20 *not in-kind contributions, would producing and distributing such advertisements in any*
21 *way limit the ability of American Crossroads to subsequently produce and distribute an*
22 *independent expenditure in support of the same featured incumbent or in opposition to an*
23 *opponent of that individual?*

1 ***Legal Analysis and Conclusions***

2 1. *May American Crossroads, as an independent expenditure-only*
3 *committee, produce and distribute Type 1 advertisements featuring Federal candidates*
4 *provided that those advertisements are not coordinated communications under 11 CFR*
5 *109.21? If the advertisements are not “coordinated communications” under 11 CFR*
6 *109.21, would the Commission alternatively treat these advertisements as in-kind*
7 *contributions from American Crossroads to the featured candidate?*

8 As explained below, the proposed Type 1 advertisements, according to American
9 Crossroads, are “fully coordinated” with Federal candidates and for the purpose of
10 influencing Federal elections. Thus, the advertisements are contributions under the Act,
11 and subject to the limitations, prohibitions, and reporting obligations of the Act. The
12 Commission would treat the Type 1 advertisements as contributions regardless of
13 whether they would satisfy the three-pronged test under 11 CFR 109.21.

14 American Crossroads has made the following representations regarding Type 1
15 advertisements:

- 16 • The advertisements will be “fully coordinated with incumbent Members of
17 Congress facing re-election in 2012;”
- 18 • The purpose of the advertisements “would be to improve the public’s perception
19 of the featured Member of Congress in advance of the 2012 campaign season;”
- 20 • The advertisements “would feature an incumbent Member of Congress facing re-
21 election in 2012, speaking on camera (or in voice-over, in the case of a radio
22 advertisement) about one or more legislative or policy issues” that “will likely

- 1 also be debated and discussed in that Member’s upcoming 2012 re-election
2 campaign;”
- 3 • If the incumbent’s *campaign* website (not their office holder’s website) features a
4 “signature issue,” the advertisement “would also feature that Member discussing”
5 that issue or proposed reforms related to that issue;
 - 6 • Each Member “would be consulted on the advertisement script;” and
 - 7 • The proposed advertisements may also include phrases or slogans that the
8 Member previously used.

9 Question 1 as presented by American Crossroads, focuses on the Commission’s
10 coordination regulations at 11 CFR part 109. The Commission regulation at 11 CFR
11 109.21 sets forth a test to determine whether a communication paid for by a third party
12 constitutes a “coordinated communication” and therefore will be treated as an in-kind
13 contribution to the candidate. *See* 11 CFR 109.20. Nevertheless, the making of a
14 coordinated communication is not the only way in which a person may make an in-kind
15 contribution. To fully analyze the question, the Commission starts with the relevant
16 statutory provisions.

17 The Act defines “contribution” to include “any gift, subscription, loan, advance,
18 or deposit of money or *anything of value* made by any person for the purpose of
19 influencing any election for Federal office.” 2 U.S.C. 431(8)(A)(i) (emphasis added).
20 The proposed ads both provide the featured Member of Congress something “of value”
21 and are for the purpose of influencing an election for Federal office, and thus meet the
22 statutory test under 2 U.S.C. 431(8)(A)(i). While truly independent speech may not
23 always benefit a candidate’s campaign, the same cannot be said for speech that is “fully

1 coordinated with incumbent Members of Congress facing re-election in 2012.” *See Cao*
2 *v. FEC*, 619 F.3d 410, 433 (5th Cir. 2010) (en banc) (coordination ensures that message
3 “virtually always works in the candidate’s favor”). Moreover, the timing, the narrow
4 focus only on incumbent Members of Congress who are candidates for re-election, and
5 the stated goal to “improve the public’s perception of the featured Member” (as opposed
6 to, for example, effectuating legislative change), leave no doubt that the proposed
7 advertisements are for the purpose of influencing Federal elections. American
8 Crossroads’ representations, taken together, demonstrate that the proposed
9 advertisements would provide something “of value,” and are for the purpose of
10 influencing a Federal election, and thus are contributions under the Act.

11 In addition to the Act’s definition of “contribution” in 2 U.S.C. 431(8)(A)(i), the
12 Act also specifies that an expenditure to purchase services will be treated as a
13 contribution to a candidate when the expenditure is made “by any person in cooperation,
14 consultation, or concert, with, or at the request or suggestion of,” a candidate, his or her
15 authorized political committees, or their agents. 2 U.S.C. 441a(a)(7)(B).³ *See Buckley v.*
16 *Valeo*, 424 U.S. 1, 46 n.53 (1976) (“all expenditures placed in cooperation with or with
17 the consent of a candidate” are contributions under the Act); S. REP. NO. 93-689, at 18
18 (1974) (where an “advertisement was placed in cooperation with the candidate’s
19 campaign organization,” it is “as if there had been a direct contribution enabling the
20 candidate to place the advertisement himself”).

³ “Expenditure” means “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).

1 The Act draws “a functional, not a formal, line” between expenditures made in
2 cooperation, consultation, or concert with, or at the request or suggestion of a candidate,
3 his or her authorized political committee, or their agents and those that are genuinely
4 independent. *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431,
5 442-43 (2001) (“*Colorado IP*”). Such an approach is necessary to “prevent attempts to
6 circumvent the Act through prearranged or coordinated expenditures amounting to
7 disguised contributions.” *Buckley*, 424 U.S. at 47. The “absence of prearrangement and
8 coordination of an expenditure with the candidate or his agent . . . alleviates the danger
9 that expenditures will be given as a *quid pro quo* for improper commitments from the
10 candidate.” *SpeechNow.org v. FEC*, 599 F.3d 686, 693 (D.C. Cir. 2010) (quoting
11 *Citizens United v. FEC*, ___ U.S. ___, 130 S.Ct. 876, 908 (2010)); accord *Buckley*,
12 424 U.S. at 47. “By definition, an independent expenditure is political speech presented
13 to the electorate that is not coordinated with a candidate.” *Citizens United*, 130 S. Ct. at
14 910.

15 Here, American Crossroads has stated that the Type 1 advertisements will be
16 “fully coordinated” with the candidates who appear in them and who will also help craft
17 their scripts. The Fifth Circuit, sitting en banc, recently found that coordination under
18 2 U.S.C. 441a(a)(7)(B) was present based merely on the candidate having had *awareness*
19 of an advertisement’s content, along with the opportunity to provide input solely as to
20 timing. *See Cao*, 619 F.3d at 433. Moreover, the court relied on the candidate and
21 party’s admissions to find coordination without application of the Commission’s
22 “coordinated communication” regulations. *Id.* at 430, 430 n.26. As in *Cao*, the facts

1 presented here by American Crossroads leave no doubt that the statutory test has been
2 satisfied.

3 This is true regardless of whether the proposed Type 1 advertisements would meet
4 the test for “coordinated communications” under the Commission’s regulations.
5 Even if (as American Crossroads has asked the Commission to assume) an advertisement
6 is not a “coordinated communication” as that term is defined in the Commission’s
7 regulations, it may still be an in-kind contribution under the Act.⁴ While the coordinated
8 communications regulation provides an important tool to allow the Commission to
9 determine whether certain communications are in-kind contributions, the coordination
10 rules do not constitute the entire universe of potential in-kind contributions. The
11 Supreme Court views coordination on a spectrum, at one end of which the payor simply
12 pays the candidate’s bills. *See Colorado II*, 533 U.S. at 444-45. Such an expenditure is
13 always an in-kind contribution, even if it involves a communication that is not a
14 “coordinated communication” as set forth at 11 CFR 109.21. Thus, if a third party
15 simply paid a candidate’s bill for a media advertisement, such payment would constitute
16 a contribution under the Act. 2 U.S.C. 441a(a)(7)(B)(i). Similarly, if advertisement
17 services or space were provided to a candidate at less than the usual and normal rates,
18 that discount would constitute an in-kind contribution, as it provides something of value
19 to the candidate’s campaign. 11 CFR 100.52(d)(1). Additionally, the Act treats
20 republication of a campaign’s materials, in whole or in part, as a coordinated expenditure.
21 2 U.S.C. 441a(a)(7)(B)(iii); *see also* Advisory Opinion 2006-01 (Pac for a Change).

⁴ Rather than citing to the Act, American Crossroads asks whether the Type 1 advertisements would be treated as in-kind contributions to the featured candidates under 11 CFR 109.20. Because the Type 1 advertisements fall under the plain language of the Act, it is unnecessary to address this question.

1 Under the facts as set forth by American Crossroads, the Act requires American
2 Crossroads' expenditures for each Type 1 advertisement to be classified as a contribution
3 – no less than it would if American Crossroads simply paid the bill for advertising
4 produced by the candidate him or herself or their campaign.⁵ The regulatory
5 “coordinated communication” analysis is unnecessary here, because American
6 Crossroads has stated that the Type 1 advertisements will be “fully coordinated” with the
7 candidates who appear in them. American Crossroads further states: “Such
8 advertisements would be thematically similar to the incumbent Members’ own re-election
9 campaign materials, and may use phrases or slogans that the Member has previously
10 used. The purpose of these advertisements . . . would be to improve the public’s
11 perception of the featured Member of Congress in advance of the 2012 campaign
12 season.” Thus, American Crossroads has acknowledged that the ads are for the purpose
13 of influencing a Federal election. On their face, these advertisements meet the
14 requirements of both 2 U.S.C. 431(8)(A)(i) and 441a(a)(7)(B). In these circumstances, it
15 is not necessary to analyze a communication’s content under 11 C.F.R. 109.21(c),
16 because, as communications for the purpose of influencing a Federal election, the
17 advertisements are plainly within the Commission’s jurisdiction to regulate.⁶

18 The Commission would be ignoring *Buckley* and its progeny on independent
19 speech if a candidate could write an advertisement script, appear in the advertisement in
20 advance of the election, and the Commission were to find those communications were not

⁵ Cf. also Factual and Legal Analysis in MUR 4762 at 11 (providing election-related phone bank services to a political committee prior to receiving payment resulted in prohibited in-kind contributions).

⁶See Explanation and Justification for Final Rules on Coordinated Communications, 75 FR 55947, 55956 (Sept. 15, 2010) (purpose of content standard is to separate election-related advocacy from other activity falling outside the Act).

1 “placed in cooperation with or with the consent of a candidate.” *Buckley*, 424 U.S. at 46,
2 n.53. The Commission cannot construe the Act, which it is charged with enforcing, to
3 reach a result that is so obviously contrary to the Act’s stated purpose.

4 Nothing in 11 CFR 109.21 precludes the Commission from applying 2 U.S.C.
5 431(8)(A)(i) and 2 U.S.C. 441a(a)(7)(B) to find that certain communications are in-kind
6 contributions under the Act in order to prevent circumvention of the Act's limits on
7 contributions.⁷ To the contrary, the Commission is obligated to do so. *See FEC v.*
8 *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (agency may not
9 through rulemaking or adjudication construe a statute in a manner that is “inconsistent
10 with the statutory mandate or that frustrate[s] the policy that Congress sought to
11 implement”); *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (same); *see also id.* at
12 925 (striking down previous version of coordinated communication regulation as
13 inconsistent with goals of BCRA).

14 For these reasons, the Commission concludes that the proposed Type 1
15 advertisements would be in-kind contributions under the Act. Accordingly, the Type 1
16 advertisements are subject to the prohibitions, limitations, and reporting obligations of

⁷ Although analysis of the Commission’s “coordinated communication” regulations is not necessary, the Commission also questions American Crossroads’ representation that the Type 1 advertisements would not be “coordinated communications” because they would not meet the content prong at 11 CFR 109.21(c). While American Crossroads has not provided specific scripts of Type 1 communications, the request states that the proposed advertisements “may include phrases or slogans that the featured incumbent Member of Congress has previously used, but these phrases or slogans would not be derived from that Member’s own campaign materials.” Phrases or slogans already used by a candidate may constitute express advocacy or its functional equivalent. 11 CFR 100.22; *Buckley*, 424 U.S. at 44 n.52 (providing “Smith for Congress” as an example of express words of advocacy). In fact, even paraphrasing a campaign slogan in a negative light can constitute express advocacy under section 100.22(b). *See Real Truth About Obama, Inc. v. FEC*, No. 3:08-CV-483, 2011 WL 2457730, at *12 (E.D. Va. June 16, 2011) (finding that a communication was express advocacy under section 100.22(b) where it discussed a candidate’s purported record on a particular issue and then “co-opt[ed] his] presidential campaign slogan in a manner designed to make him less attractive as a candidate” by saying “Is this the change you can believe in?”).

1 the Act and Commission regulations.⁸ American Crossroads, like all nonconnected
2 PACs, may make such contributions from a segregated “contribution” account. *See*
3 *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). The Commission recently issued
4 guidance for nonconnected political committees seeking to solicit and accept unlimited
5 contributions to one bank account for use in making independent expenditures in Federal
6 elections, while maintaining a separate bank account subject to the statutory amount
7 limitations and source prohibitions for making contributions to Federal candidates. *See*
8 *Reporting Guidance for Political Committees that Maintain a Non-Contribution Account*
9 (Oct. 5, 2011), *available at*
10 <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

11 2. *May American Crossroads produce and distribute Type 2 advertisements*
12 *featuring Federal candidates and comparing their positions with the positions of their*
13 *declared opponents for election in 2012 where the advertisements would refer to the*
14 *declared opponents by name but would not refer to them as “candidates” or*
15 *“opponents” without making in-kind contributions to the featured candidates?*

16 No, while American Crossroads may produce and distribute Type 2
17 advertisements, it may not do so without making in-kind contributions to the featured
18 candidates.

19 As explained above, an advertisement that is fully coordinated with a candidate
20 and made for the express purpose of influencing a Federal election is an in-kind
21 contribution under the Act. 2 U.S.C. 431(8)(A)(i) and 441a(a)(7)(B); *see Buckley*,
22 424 U.S. at 46 n.53. The proposed Type 2 advertisements, like the Type 1

⁸ A political committee may contribute up to \$5,000 per election to a candidate committee. 2 U.S.C. 441a(a)(2)(A).

1 advertisements, would feature an incumbent Member of Congress who also was
2 consulted on the script. American Crossroads concedes, moreover, that each
3 advertisement’s purpose would be to “improve the public’s perception of the featured
4 Member of Congress in advance of the 2012 campaign season.” Therefore, each Type 2
5 advertisement would be an in-kind contribution.

6 Even if it were necessary to analyze the Type 2 advertisements under the
7 Commission’s “coordinated communication” regulations, they would satisfy the content
8 prong under 11 CFR 109.21(c) because the proposed scripts are the functional equivalent
9 of express advocacy and would therefore meet all three prongs of the coordinated
10 communications test at 11 CFR 109.21.⁹ A communication is the functional equivalent of
11 express advocacy if it is “susceptible of no reasonable interpretation other than as an
12 appeal to vote for or against a clearly identified Federal candidate.” 11 CFR
13 109.21(c)(5); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) (“*WRTL*”);
14 *Citizens United*, 130 S. Ct. at 889-90. See Explanation and Justification for Final Rules
15 on Coordinated Communications, 75 FR 55947, 55952-53 (Sept. 15, 2010) (“2010
16 Coordination E&J”). To determine whether a communication is the functional equivalent
17 of express advocacy requires an objective evaluation of the communication as a whole
18 with limited reference to external events or contextual factors. See *WRTL*, 551 U.S. at
19 473-74; *Citizens United*, 130 S. Ct. at 889 (“the functional-equivalent test is objective”).

⁹ American Crossroads concedes that each advertisement would meet the payment and conduct prongs of the coordinated communications test at 11 CFR 109.21(a)(1) and 109.21(d)(1)-(3). It also states that the Type 2 advertisements will not meet three of the five content standards at 11 CFR 109.21(c)(1), (2), and (4).

1 The sample Type 2 advertisement bears “the indicia of express advocacy.”
2 *WRTL*, 551 U.S. at 470. The sample advertisement focuses on a legislative issue and
3 takes a position on that issue through the featured candidate’s on-screen promise to “stop
4 any plan, from either side, that raises your taxes or burdens your children with more
5 debt.” The Type 2 advertisement then casts the featured candidate’s position in stark
6 opposition to the position of her declared opponents. The advertisement script notes that
7 “Jane Y would also raise your taxes.” But because Jane Y is not a current officeholder,
8 she could raise taxes *only* if she were elected to the public office for which she is the
9 declared opponent to the featured candidate. The sample Type 2 advertisement contains
10 no exhortation for viewers to address the condemned position, except, implicitly, by
11 casting their votes against the candidate holding those positions. Thus, the unmistakable
12 message of the advertisement is that viewers should reject not only certain tax plans, but
13 reject Jane Y and the other challenger “politicians,” as the advertisement calls them, in
14 favor of the featured candidate.

15 An advertisement that ostensibly addresses an issue without exhorting the public
16 or elected officials to take action on the issue while, at the same time, condemning the
17 declared opponents’ positions as “dangerous” is more akin to an electoral advertisement,
18 such as the “Jane Doe” advertisement discussed in *McConnell* and *WRTL*, than to the
19 genuine issue advertisements that were the subject of the Court’s decision in *WRTL*. *See*
20 *WRTL*, 551 U.S. at 470 n.6; *McConnell*, 540 U.S. at 127. For these reasons, the
21 Commission concludes that the sample Type 2 advertisement contains the functional
22 equivalent of express advocacy, and thus meets the content prong at 11 CFR
23 109.21(c)(5).

1 3. *If the Commission concludes that American Crossroads may produce and*
2 *distribute the advertisements described in either Question #1 or Question #2, without*
3 *those advertisements resulting in in-kind contributions to the featured incumbent*
4 *Members of Congress (who are also Federal candidates) pursuant to either 11 CFR*
5 *109.20 or 109.21, American Crossroads poses the following additional question: Would*
6 *producing and distributing such advertisements in any way limit the ability of American*
7 *Crossroads to subsequently produce and distribute an independent expenditure in*
8 *support of the same featured incumbent Member of or in opposition to an opponent of*
9 *that individual?*

10 As explained above, the advertisements described in both Questions #1 and #2
11 constitute in-kind contributions under the Act. American Crossroads states that for
12 Question #3, the Federal candidate “would not be newly consulted in any way, and would
13 not have requested or suggested that American Crossroads produce and air any
14 subsequent independent expenditures.” Due to this representation that Type 3
15 advertisements would not be “fully coordinated,” the Commission would analyze these
16 advertisements under the Commission’s “coordinated communication” regulation at
17 109.21. The Commission concludes that in light of American Crossroads’ prior
18 discussions with candidates regarding the Type 1 and Type 2 advertisements, the Type 3
19 advertisements *may* be coordinated communications under 11 CFR 109.21 and treated as
20 in-kind contributions under the Act.

21 A communication is a “coordinated communication” if the communication meets
22 all three prongs of the coordinated communication test: the payment prong, the content
23 prong, and the conduct prong. 11 CFR 109.21. If American Crossroads pays for a public

1 communication containing express advocacy, the payment and content prongs would be
2 met.¹⁰

3 To meet the third prong of the test – the conduct prong – a communication must
4 also meet one of the five conduct standards: (1) the communication is made at the request
5 or suggestion of a candidate, candidate’s authorized committee, or political party
6 committee; (2) a candidate, candidate’s authorized committee, or political party
7 committee is materially involved in certain decisions regarding the production and
8 distribution of the communication; (3) the communication is created, produced, or
9 distributed after one or more substantial discussions about the communication between
10 the person paying for the communication and the clearly identified candidate or the
11 candidate’s opponent, the candidate’s authorized committee or the opponent’s authorized
12 committee, or a political party committee; (4) the communication is made using certain
13 information obtained from a vendor that has previously provided certain services to the
14 candidate or the candidate’s opponent, the authorized committee of either, or a political
15 party committee; or (5) the communication is made using certain information obtained
16 from a former employee or independent contractor of the candidate or candidate’s
17 opponent, the authorized committee of either, or a political party committee. 11 CFR
18 109.21(d)(1)-(5). A communication may be a “coordinated communication” even if there
19 is no agreement or formal collaboration between the person paying for the
20 communication and the candidate clearly identified in the communication, or the
21 candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized
22 committee, or a political party committee. 11 CFR 109.21(e).

¹⁰ As explained above, because American Crossroads asks whether it may run independent expenditures, we assume the communications will contain express advocacy and thus satisfy the content prong.

1 The specific information conveyed from the candidate to American Crossroads in
2 the course of their prior discussions – in certain circumstances – could result in the
3 communication meeting one of the five conduct standards. The facts regarding each
4 communication would need to be considered to determine if a particular communication
5 met the conduct prong.

6 The conduct prong of the coordinated communication test is met when a
7 candidate or a candidate’s authorized committee is materially involved in certain
8 decisions about a public communication. 11 CFR 109.21(d)(2). The “material
9 involvement” conduct standard requires the candidate’s involvement in decisions about:
10 (1) the content of the communication; (2) the intended audience for the communication;
11 (3) the means or mode of the communication; (4) the specific media outlet used for the
12 communication; (5) the timing or frequency of the communication; or (6) the size or
13 prominence of a printed communication, or the duration of a communication by means of
14 broadcast, cable, or satellite. *Id.*

15 A candidate or a candidate’s authorized committee is “materially involved” in
16 these decisions when the candidate or the authorized committee shares information about
17 campaign “plans, projects, activities, or needs” with the person making the
18 communication and this information is material to the decisions about the
19 communication. *See* Explanation and Justification for Final Rules on Coordinated and
20 Independent Expenditures, 68 FR 421, 434 (Jan. 3, 2003) (“2003 Coordination E&J”).
21 Although the “material involvement” standard would not be satisfied, for example, by a
22 speech made by a candidate to the general public, it would be satisfied by remarks that a
23 candidate addressed specifically to a select audience, some of whom later create,

1 produce, or distribute public communications. *Id.* Moreover, the candidate's
2 involvement need not be traced directly to one specific communication; a candidate's
3 involvement is material to a decision regarding a communication if that communication is
4 one of several communications and the candidate was materially involved in decisions
5 regarding the strategy, such as the content, timing, or audience, of the communications.
6 *Id.*

7 American Crossroads states that incumbent Members of Congress who are
8 featured candidates for Federal office may convey information to American Crossroads
9 about their campaign plans, projects, activities, or needs in discussions about the Type 1
10 and Type 2 advertisements. If American Crossroads later uses that information in
11 making decisions about the content, means, mode, timing, duration, intended audience,
12 frequency of, or specific media outlet used in connection with a Type 3 communication,
13 it will satisfy the conduct prong of the coordinated communication test. Given that the
14 Type 3 communications will contain express advocacy and will be paid for by American
15 Crossroads, they therefore will also meet the content and payment prongs of the
16 coordinated communications test. As such, the Type 3 advertisements will be treated as
17 in-kind contributions by American Crossroads to the candidate.

18 Alternatively, the conduct prong of the coordinated communication test is met
19 after one or more "substantial" discussions about the communication between the person
20 paying for the communication and the candidate clearly identified in the communication
21 or that candidate's authorized committee. 11 CFR 109.21(d)(3). A discussion is
22 "substantial" if information about the candidate's "plans, projects, activities, or needs is
23 conveyed to a person paying for the communication, and that information is material to

1 the creation, production, or distribution of the communication.” *Id.* The word “discuss”
2 is given its plain and ordinary meaning, which “the Commission understands to mean an
3 interactive exchange of views or information.” 2003 Coordination E&J, 68 FR at 435.

4 American Crossroads states that incumbent Members of Congress who are
5 featured candidates for Federal office may convey information to American Crossroads
6 about their campaign plans, projects, activities, or needs in discussions about the Type 1
7 and Type 2 advertisements. If these discussions are material to American Crossroads’
8 later creation, production, or distribution of a communication, that will satisfy the
9 conduct prong of the coordinated communication test. Given that the Type 3
10 communications will contain express advocacy and will be paid for by American
11 Crossroads, they will also meet the content and payment prongs of the coordinated
12 communications test. As such, the Type 3 advertisements will be treated as in-kind
13 contributions by American Crossroads to the candidate.

14 This response constitutes an advisory opinion concerning the application of the
15 Act and Commission regulations to the specific transaction or activity set forth in your
16 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
17 of the facts or assumptions presented, and such facts or assumptions are material to a
18 conclusion presented in this advisory opinion, then the requestor may not rely on that
19 conclusion as support for its proposed activity. Any person involved in any specific
20 transaction or activity which is indistinguishable in all its material aspects from the
21 transaction or activity with respect to which this advisory opinion is rendered may rely on
22 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or

1 conclusions in this advisory opinion may be affected by subsequent developments in the
2 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
3 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
4 directly from the Commission's Advisory Opinion searchable database at
5 <http://www.fec.gov/searchao>.

6
7
8
9
10
11
12
13

On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission