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FEDERAL ELECTION  
COMMISSION

2011 OCT 28 PM 3:46

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October 28, 2011

Anthony Herman  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: *Advisory Opinion Request***

Dear Mr. Herman,

By and through the undersigned counsel, American Crossroads submits this advisory opinion request, pursuant to 2 U.S.C. § 437f, on the following questions.

#### **Basic Question Presented**

Consistent with the Federal Election Campaign Act, as amended, may American Crossroads produce and distribute television and/or radio issue advertisements featuring on-camera footage (or voice-over, in the case of radio advertisements) of incumbent Members of Congress who might face uncertain re-election prospects? Such advertisements would be thematically similar to the incumbent Members' own re-election campaign materials, and may use phrases or slogans that the Member has previously used. The purpose of these advertisements, while focused on current legislative and policy issues, would be to improve the public's perception of the featured Member of Congress in advance of the 2012 campaign season. If American Crossroads produces and distributes such advertisements, would it subsequently be limited in its ability to produce and distribute an independent expenditure in connection with the election of the previously featured incumbent Member of Congress and federal candidate?

#### **Background**

American Crossroads plans to produce and distribute television and/or radio advertisements featuring incumbent Members of Congress who are up for re-election in 2012. American Crossroads is registered with the Federal Election Commission as an independent expenditure-only committee in accordance with Advisory Opinion 2010-11 (Commonsense

Ten). Accordingly, American Crossroads is especially sensitive to the requirement that it not make contributions to any candidates or party committees through coordinated communications.

In recent weeks, several news media outlets reported that a Democratic state party committee has aired, and plans to continue airing, advertisements featuring an incumbent Member of Congress who is up for re-election in 2012. American Crossroads wishes to produce similar advertisements, featuring incumbent Members of Congress who are federal candidates and whose legislative and policy positions, and re-election, are supported by American Crossroads, but only if the Commission deems those actions to be consistent with the Federal Election Campaign Act, as amended.<sup>1</sup>

A similar matter was considered by the Commission in 2009, but with no clear resolution. In MUR 6037 (Jeff Merkley for Oregon), the Friends of Gordon Smith campaign filed a complaint alleging that Jeff Merkley, a candidate for U.S. Senate in Oregon, and his authorized campaign, accepted excessive in-kind contributions from the Democratic Party of Oregon in the form of two coordinated television advertisements featuring Merkley. MUR 6037 (Jeff Merkley for Oregon), First General Counsel's Report at 2. Mr. Merkley's campaign responded that the advertisements did not satisfy any of the content standards in the Commission's coordinated communication regulation, and were simply political party issue ads. The Office of General Counsel noted that "the issues addressed in Merkley's press releases and the [Democratic Party

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<sup>1</sup> The Commission recently provided an Advisory Opinion in response to a similar request in which the requestor sought to imitate the activities of a third party, but only if those activities were deemed permissible by the Commission. In that matter, the requestor included the third party's materials in its Advisory Opinion Request, as Exhibit A, to serve as an example of the activities the requestor planned to undertake, if permitted by the Commission. See Advisory Opinion Request 2011-12 at 4 ("Despite this, the Republican Super PAC is reportedly asking covered officials to solicit unlimited individual, corporate, and union contributions on its behalf. In light of this development, the PACs ask the Commission whether covered officials may solicit unlimited individual, corporate, and union contributions on their behalf as well. If the Commission does not find that such solicitations violate 2 U.S.C. § 4411, the PACs plan to ask covered officials to make such solicitations on their behalf.").

Examples of the advertisements that American Crossroads wishes to imitate are available at the following web addresses:

Television 1 - <http://www.youtube.com/watch?v=ORv0HDeCnvs>;

Television 2 - <http://www.youtube.com/watch?v=aGwaScQ-kIc>;

Television 3 -

[http://www.youtube.com/watch?feature=player\\_embedded&v=OTOI0k8MrfE](http://www.youtube.com/watch?feature=player_embedded&v=OTOI0k8MrfE)

Television 4 - <http://www.youtube.com/user/NebraskaDems#p/a/u/0/-vaupe1DSI8>

Radio 1 - <http://youtu.be/bHqwSMH9rEU>; and

Radio 2 - <http://youtu.be/s2uOmbdMONw>

of Oregon's] ads overlap, the time frames are consistent and the ads contain similar messages," but that the "similarities . . . do not appear to rise to a level sufficient to indicate republication of campaign materials." *Id.* at 11-12. The Office of General Counsel recommended that the Commission find no reason to believe that the advertisements in question constituted coordinated communications. That recommendation failed by a vote of 2-3, with one Commissioner recused. The Commission then voted to close the file and take no further action. No Statements of Reasons appear on the public record.

In light of these facts, American Crossroads asks the following questions:

### Question #1

The advertisements that American Crossroads plans to produce and distribute would feature an incumbent Members of Congress facing re-election in 2012, speaking on camera (or in voice-over, in the case of a radio advertisement) about one or more legislative or policy issues. The legislative or policy issues discussed will be issues that will likely also be debated and discussed in that Member's upcoming 2012 re-election campaign.

For example, if the incumbent Member's campaign website prominently features job creation as one of his or her signature issues, the American Crossroads advertisement would also feature that Member discussing job creation. Or, if the incumbent Member's campaign has chosen to focus on opposing reforms to Social Security and Medicare, the American Crossroads advertisement would feature that Member discussing his or her opposition to various Social Security and Medicare reform proposals.

In addition, any such advertisement produced by American Crossroads:

- (1) would be broadcast outside of any applicable electioneering communications windows;
- (2) would not contain express advocacy or the functional equivalent of express advocacy;
- (3) would not disseminate, distribute, or republish campaign materials;<sup>2</sup> and
- (4) would not be distributed in the incumbent's/candidate's jurisdiction within 90 days of his or her primary or general election.

These advertisements would be fully coordinated with incumbent Members of Congress facing re-election in 2012 insofar as each Member would be consulted on the advertisement script and would then appear in the advertisement. American Crossroads concedes that each advertisement would: (1) be paid for by a person other than the candidate or the candidate's authorized committee; and (2) satisfy one or more of the "request or suggestion," "material

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<sup>2</sup> American Crossroads' 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.

involvement," or "substantial discussion" conduct standards. See 11 C.F.R. §§ 109.21(a)(1), 109.21(d)(1) – (3). However, none of the "content" standards set forth at 11 C.F.R. § 109.21(c) would be satisfied.

American Crossroads seeks the Commission's confirmation that it may, as an independent expenditure-only committee, produce and distribute advertisements featuring incumbent Members of Congress who are also federal candidates, provided those communications do not qualify as "coordinated communications," as that term is used at 11 C.F.R. § 109.21. If the planned advertisements are not "coordinated communications" under 11 C.F.R. § 109.21, would the Commission alternatively treat these advertisements as in-kind contributions from American Crossroads to the featured incumbent Member of Congress/candidate pursuant to 11 C.F.R. §109.20(b)?

### **Question #2**

Would the Commission's response to Question #1 differ if an advertisement that meets the criteria set forth in Question #1 also includes the incumbent Member of Congress and candidate for re-election comparing and contrasting his or her position on one or more legislative or policy issues with the position(s) of his or her declared opponents for election in 2012? The advertisement would not refer to any of these opponents as "candidates" or "opponents," but would simply refer to them by name.

Specifically, American Crossroads plans to produce advertisements that, in addition to adhering to the criteria set forth in Question #1, also:

- (i) discuss an incumbent Member's position on one or more issues of national or local importance;
- (ii) contrast and criticize the position(s) taken by that Member's declared electoral opponents;
- (iii) feature the incumbent Member, on-camera, promising to take a certain position in the future.

With respect to (ii) above, American Crossroads' planned advertisements would not impugn the character, qualifications, or fitness for office of any of the Member's declared electoral opponents, nor would these advertisements urge the electoral opponents to take any particular position or action. In the course of contrasting and criticizing the positions taken by the Member's declared electoral opponents, may the opponents' positions be labeled "risky" or "dangerous" or other similar terms?

With respect to (iii) above, the incumbent Member's on-screen promise would include language similar to the following examples:

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

Finally, these advertisements would not urge the general public to contact any candidate or officeholder for any purpose.

As was the case in Question #1, these advertisements would be fully coordinated with incumbent Members of Congress facing re-election in 2012 insofar as the Member would be consulted on the advertisement script and would then appear in the advertisement. American Crossroads concedes that each advertisement would: (1) be paid for by a person other than the candidate or the candidate's authorized committee; and (2) satisfy one or more of the "request or suggestion," "material involvement," or "substantial discussion" conduct standards. See 11 C.F.R. §§ 109.21(a)(1), 109.21(d)(1) – (3).

Do any of the additional facts set forth in Question #2 cause one or more of the content standards set forth at 11 C.F.R. § 109.21(c) to be satisfied? If no, American Crossroads seeks the Commission's confirmation that it may, as an independent expenditure-only committee, produce and distribute advertisements as described in Question #2. If the planned advertisements are not "coordinated communications" under 11 C.F.R. § 109.21, would the Commission alternatively treat these advertisements as in-kind contributions from American Crossroads to the featured incumbent Member of Congress/candidate pursuant to 11 C.F.R. § 109.20(b)?

Would the Commission's response to any of the questions set forth in the paragraph above differ if the declared electoral opponent(s) are not federal officeholders, but are state or local officeholders? Would the Commission's response to any of the questions set forth in the paragraph above differ if the declared electoral opponent(s) do not hold any elected or appointed office?

### Question #3

If the Commission concludes that American Crossroads may produce and distribute the advertisements described in either Question #1 or Question #2, without those advertisements resulting in in-kind contributions to the featured incumbent Members of Congress (who are also federal candidates) pursuant to either 11 C.F.R. § 109.20 or § 109.21, American Crossroads poses the following additional question:

Would producing and distributing such advertisements in any way limit the ability of American Crossroads to subsequently produce and distribute an independent expenditure in

support of the same featured incumbent Member of Congress and federal candidate, or in opposition to an opponent of that individual?

With respect to the production and distribution of a subsequent independent expenditure, the incumbent Member of Congress and federal candidate featured in the previous issue advertisement (as described in Question #1 and/or Question #2) would not be newly consulted in any way, and would not have requested or suggested that American Crossroads produce and air any subsequent independent expenditures in connection with his or her election.

The incumbent Member of Congress and federal candidate would, however, have been involved in the production and distribution of the advertisement(s) set forth in Question #1 and #2, as described above. Given the individual's prior involvement and coordination in connection with the advertisements produced and distributed as set forth in Questions #1 and #2, would a subsequently produced independent expenditure be automatically rendered a coordinated communication?

For example, if the incumbent Member of Congress and federal candidate was materially involved in producing and distributing the advertisements described in Questions #1 and #2, insofar as the incumbent Member was consulted on the matters set forth at 11 C.F.R. § 109.21(d)(2)(i) – (vi), would that prior material involvement mean that the incumbent Member is also materially involved in any subsequent independent expenditure if American Crossroads relies on and uses the same information previously learned from the incumbent Member, but otherwise has no further contact with that incumbent Member about American Crossroads' public communications? If the incumbent Member of Congress and federal candidate conveyed to American Crossroads, via substantial discussions, information about his or her campaign plans, projects, activities, or needs in connection with the production and distribution of the advertisements described in Questions #1 and #2, would those prior substantial discussions lead to the legal conclusion that the incumbent Member also engaged in substantial discussions with respect to any subsequent independent expenditure in which American Crossroads relies on and uses the same information previously learned from the incumbent Member, but otherwise has no further contact with that incumbent Member about American Crossroads' public communications?

### **Conclusion**

In light of the foregoing, American Crossroads seeks guidance from the Commission in the form of an Advisory Opinion addressing whether it may proceed as set forth above. Because American Crossroads' potential window of opportunity to run such ads is rapidly closing, we respectfully request that the Commission expedite this Request for Advisory Opinion.

**Please do not hesitate to contact us if you have any questions or require any additional information.**

**Sincerely,**

A handwritten signature in black ink, appearing to read 'T. Josefiak', with a long horizontal flourish extending to the right.

**Thomas J. Josefiak**

**Michael Bayes**

**Counsel to American Crossroads**



Mike Bayes  
<jmbayes@holtzmanlaw.net>

11/03/2011 04:53 PM

To "ARothstein@fec.gov" <ARothstein@fec.gov>, "eheiden@fec.gov" <eheiden@fec.gov>  
cc Tom Josefiak <tomj@holtzmanlaw.net>, Mike Bayes <jmbayes@holtzmanlaw.net>  
Subject American Crossroads AOR

Amy & Esther,

As previously discussed, please find attached an advertisement script for consideration in connection with Question #2.

As always, please let us know if you have any questions.

Michael Bayes

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**Supplement to Advisory Opinion Request of American Crossroads.pdf**

***Supplement to Advisory Opinion Request of American Crossroads 2011 NOV -3 PM 4:44***

The following television advertisement script contains the characteristics set forth in Question #2 and is provided to assist the Commission in its consideration of that question.

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

***Pres. Obama:*** "the revenue components that we've discussed would be significant."

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

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

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

***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."

***Mary A is an incumbent U.S. Senator who is up for re-election in 2012. She is a Republican.***

***John X is a state executive branch officeholder who is running for U.S. Senate in 2012. He is a Democrat who is currently running in the Democratic primary and who hopes to face Mary A in the general election.***

***Jane Y is running for U.S. Senate in 2012. She is a private citizen, and a Democrat who is currently running in the Democratic primary and who hopes to face Mary A in the general election.***

***Bob Z is a state legislator who is running for U.S. Senate in 2012. He is a Democrat who is currently running in the Democratic primary and who hopes to face Mary A in the general election.***