

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

Alternative drafts A, B, C and D of ADVISORY OPINION 2011-23 are now available for comment. This advisory opinion was requested by Thomas J. Josefiak, Esq. and Michael Bayes, Esq., on behalf of American Crossroads, and is scheduled to be considered by the Commission at its public meeting on December 1, 2011.

If you wish to comment on Alternative drafts A, B, C or D of ADVISORY OPINION 2011-23, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on November 30, 2011.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under those circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).**
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.**
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.**
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.**

FOR FURTHER INFORMATION

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Other inquiries:

To obtain copies of documents related to Advisory Opinion 2011-23, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
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Office of General Counsel
ATTN: Rosemary C. Smith, Esq.
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AGENDA DOCUMENT NO. 11-68



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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November 23, 2011

AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 12-1-11

FROM: Anthony Herman *AK*
General Counsel

Rosemary C. Smith *AK for RCS*
Associate General Counsel

Amy L. Rothstein *AK*
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Attorney

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Attorney

Subject: Draft AO 2011-23 (American Crossroads) - Alternative Drafts
A, B, C, and D

Attached are four alternative proposed drafts of the subject advisory opinion. We have been asked to have these drafts placed on the agenda for December 1, 2011.

Attachment

1 ADVISORY OPINION 2011-23

2

3 Thomas J. Josefiak, Esq.

4

4 Michmel Bayes, Esq.

5

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DRAFT A

10 Dear Messrs. Josefiak and Bayes:

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

15 The Commission concludes that advertisements that do not meet the content
16 prong of the coordinated communications test are not coordinated communications
17 regardless of whether a candidate may be featured in such an advertisement. The
18 Commission also concludes that, because the sample script of an advertisement in which
19 the opinions of the candidate's opponents are criticized meets the content prong of the
20 coordinated communications test, the advertisement would be a coordinated
21 communication. Finally, the Commission concludes that American Crossroads'
22 discussions with candidates featured in initial advertisements will not *automatically* cause
23 all subsequent advertisements by American Crossroads in support of those candidates or
24 in opposition to their opponents to be coordinated communications. If, however,
25 American Crossroads uses information obtained during those prior discussions in its
26 subsequent advertisements, then those subsequent advertisements will meet the conduct
27 prong of the coordinated communications test.

1 ***Background***

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

4 American Crossroads is a political committee registered with the Commission as
5 an independent expenditure-only committee. American Crossroads plans to pay for the
6 production and distribution of three different types of television and radio advertisements.
7 In so doing, American Crossroads wishes to avoid making contributions to any
8 candidates.

9 ***Advertisement Type 1***

10 The first type of advertisement that American Crossroads plans to produce will
11 show on-camera footage of, or voice-overs by, incumbent Members of Congress who are
12 candidates in the upcoming 2012 election. These "Type 1 advertisements" will feature a
13 candidate speaking about one or more legislative or policy issues that will likely be
14 debated and discussed in that candidate's upcoming re-election campaign. For example,
15 if a candidate focuses on job creation as a signature issue, American Crossroads would
16 run an advertisement that shows the candidate discussing job creation. Although the
17 focus of the advertisements will be on current legislative and policy issues, their purpose
18 will be to improve the public's perception of the featured candidate in advance of the
19 2012 campaign season.

20 American Crossroads states that "[t]hese advertisements would be fully
21 coordinated" with the candidate; American Crossroads plans to consult the featured
22 candidate regarding the advertisement's script and the candidate "would then appear in
23 the advertisement." American Crossroads "concedes" that its interactions with the

1 candidates appearing in these advertisements will meet one or more of the “conduct
2 standards” in the coordinated communications regulations at 11 CFR 109.21(d)(1)-(3),
3 but states that the advertisements will not meet any of the “content standards” at 11 CFR
4 109.21(c). Specifically, according to American Crossroads, these advertisements:

5 (1) will be broadcast outside of any applicable electioneering communication
6 windows;

7 (2) will not contain express advocacy or the functional equivalent of express
8 advocacy;

9 (3) will not disseminate, distribute, or republish campaign materials; and

10 (4) will not be distributed in the candidate’s jurisdiction within 90 days of the
11 primary or general election in which the candidate is running.

12 *Advertisement Type 2*

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

20 In criticizing the positions of the featured candidate’s opponents, Type 2
21 advertisements will refer to the opponents by name only, and not as “candidates” or
22 “opponents.” American Crossroads states that these advertisements will not impugn the
23 character, qualifications, or fitness for office of any of the featured candidate’s declared

1 electoral opponents, although the advertisements may describe the positions taken by the
2 opponents as “risky” or “dangerous,” or use another similar term.

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

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

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

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

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

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

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

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

28
29 *Narrator:* They’re just one and the same.

30
31 [on screen: Dangerous Plans For Families]

1
2 *Mary A* [speaking on camera]: “I’m Mary A. I approve this message to stop any
3 plan, from either side, that raises your taxes or burdens your children with more
4 debt.”
5

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

11 *Advertisement Type 3*

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

¹ 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.

1 production and distribution of the Type 1 and Type 2 advertisements and information
2 obtained in substantial discussions with the candidates in the production and distribution
3 of the Type 1 and Type 2 advertisements. This information could include the candidates'
4 campaign plans, projects, activities, or needs.

5 **Questions Presented**

6 1. *May American Crossroads, as an independent expenditure-only*
7 *committee, produce and distribute Type 1 advertisements featuring Federal candidates*
8 *provided that those advertisements are not coordinated communications under 11 CFR*
9 *109.21?*

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

15 3. *Given American Crossroads' prior discussions with featured candidates*
16 *regarding the Type 1 and Type 2 advertisements, would the Type 3 advertisements be*
17 *coordinated communications under 11 CFR 109.21?*

18 **Legal Analysis and Conclusions**

19 1. *May American Crossroads, as an independent expenditure-only*
20 *committee, produce and distribute Type 1 advertisements featuring Federal candidates*
21 *provided that those advertisements are not coordinated communications under 11 CFR*
22 *109.21?*

1 Yes, American Crossroads, as an independent-expenditure only committee, may
2 produce and distribute Type 1 advertisements featuring Federal candidates because those
3 advertisements are not coordinated communications under 11 CFR 109.21 and are
4 therefore not in-kind contributions.²

5 The Act provides that an expenditure “shall be considered to be a contribution” to
6 a candidate when it is made “by any person in cooperation, consultation, or concert, with,
7 or at the request or suggestion of,” a candidate, his or her authorized political committees,
8 or their agents. 2 U.S.C. 441a(a)(7)(B). Commission regulations set forth a three prong
9 test to determine whether a communication is coordinated and therefore an in-kind
10 contribution to a candidate. 11 CFR 109.21. First, the communication must be paid for
11 by someone other than a candidate, a candidate’s authorized committee, a political party
12 committee, or the authorized agents of either (the “payment prong”). 11 CFR
13 109.21(a)(1). Second, the communication must satisfy one of five content standards (the
14 “content prong”). 11 CFR 109.21(a)(2) and (c). Third, the communication must satisfy
15 one of five conduct standards (the “conduct prong”). 11 CFR 109.21(a)(3) and (d).³ A
16 communication must satisfy all three prongs to be a “coordinated communication.”

17 American Crossroads states that it will pay for the Type 1 advertisements. These
18 advertisements will therefore meet the payment prong of the coordinated communications
19 test. American Crossroads further states that the Type 1 advertisements will “satisfy one
20 or more of the . . . conduct standards.”

² American Crossroads does not inquire and the Commission expresses no opinion regarding the appropriate disclaimers for the Type 1 advertisements. *See, generally*, 11 CFR 110.11.

³ A sixth conduct standard, not material here, addresses the dissemination, distribution, or republication of campaign materials. 11 CFR 109.21(d)(6).

1 American Crossroads states, however, that the Type 1 advertisements will not
2 meet the content prong of the coordinated communication test. It asks the Commission to
3 assume that the Type 1 advertisements will not be electioneering communications, as
4 defined in 11 CFR 100.29; will not be broadcast in the featured candidate's jurisdiction
5 within 90 days of that candidate's primary or general election; will not contain express
6 advocacy or the functional equivalent of express advocacy; and will not disseminate,
7 distribute or republish campaign materials. *See* 11 CFR 109.21(c).⁴

8 Based on this assumption, the Type 1 advertisements do not meet all three prongs
9 of the test, will not be coordinated communications under 11 CFR 109.21, and thus will
10 not be in-kind contributions.⁵

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, based on the sample script provided by American Crossroads, it may not
17 produce and distribute Type 2 advertisements featuring Federal candidates and
18 comparing and contrasting their positions with the positions of their declared opponents

⁴ The Commission has not been asked and renders no opinion regarding whether the Type 1 advertisements will contain express advocacy or the functional equivalent of express advocacy, or whether they will disseminate, distribute or republish campaign materials.

⁵ American Crossroads also asks whether the Type 1 advertisements would be treated as in-kind contributions to the featured candidates under 11 CFR 109.20. This provision applies to "expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee." Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 FR 421, 425 (Jan. 3, 2003) ("2003 Coordination E&J") (emphasis added); *see also* Advisory Opinion 2011-14 (Utah Bankers Association). Because the expenditures at issue here would be made for communications, they would not be coordinated expenditures under 11 CFR 109.20. *Cf.* 11 CFR 109.21.

1 for election without making in-kind contributions to the featured candidates, because the
2 Type 2 advertisements are the functional equivalent of express advocacy and will meet
3 all three prongs of the coordinated communications test at 11 CFR 109.21.

4 As noted above, to meet the content prong under 11 CFR 109.21(c), a
5 communication must satisfy one of five content standards: (1) the communication is an
6 electioneering communication, as defined in 11 CFR 100.29;⁶ (2) the communication is a
7 public communication that disseminates, distributes or republishes, in whole or in part, a
8 candidate's campaign materials; (3) the communication is a public communication that
9 expressly advocates the election or defeat of a clearly identified candidate for Federal
10 office; (4) the communication is a public communication that refers to a political party or
11 a clearly identified Federal candidate and that is aired in the candidate's jurisdiction
12 within a certain number of days before that candidate's election; or (5) the
13 communication is a public communication that is the functional equivalent of express
14 advocacy. 11 CFR 109.21(c).

15 American Crossroads states that the Type 2 advertisements will not meet three of
16 the five standards: the advertisements will not be electioneering communications, as
17 defined in 11 CFR 100.29; they will not be broadcast in the candidate's jurisdiction
18 within 90 days of that candidate's primary or general election; and they will not
19 disseminate, distribute, or republish campaign materials.⁷ See 11 CFR 109.21(c)(1), (2),
20 and (4). The Commission therefore needs to consider only whether the proposed
21 advertisements will meet one of the two remaining content standards because the

⁶ See also 2 U.S.C. 434(f)(3).

⁷ The Commission expresses no opinion on whether the advertisements disseminate, distribute or republish campaign materials because American Crossroads asks the Commission to assume for the sake of Question 2 that the advertisements do not do so.

1 advertisements are either the functional equivalent of express advocacy or expressly
2 advocate the election or defeat of a clearly identified candidate for Federal office.
3 11 CFR 109.21(c)(3) and (5).⁸

4 A communication is the functional equivalent of express advocacy if it is
5 “susceptible of no reasonable interpretation other than as an appeal to vote for or against
6 a clearly identified Federal candidate.”⁹ 11 CFR 109.21(c)(5). In applying the functional
7 equivalent of express advocacy content standard, the Commission follows the Supreme
8 Court’s reasoning and application of the test as set forth in the Court’s controlling
9 opinion in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) (“*WRTL*”),
10 and in *Citizens United v. FEC*, 130 S. Ct. 876, 889-90 (2010). See Explanation and
11 Justification for Final Rules on Coordinated Communications, 75 FR 55947, 55952-53
12 (Sept. 15, 2010) (“2010 Coordination E&J”).

13 As Chief Justice Roberts’s controlling opinion in *WRTL* instructs, in determining
14 whether a communication is the functional equivalent of express advocacy, the
15 Commission looks to the communication as a whole with limited reference to external
16 events or contextual factors. See *WRTL*, 551 U.S. at 473-74. The Commission “need not
17 ignore basic background information that may be necessary to put an ad in context – such
18 as whether an ad describes a legislative issue that is either currently the subject of
19 legislative scrutiny or likely to be the subject of such scrutiny in the near future – but the

⁸ Both of these content standards apply to any “public communication” as that term is defined at 11 CFR 100.26. See 11 CFR 109.21(c)(3) and (5); see also 2 U.S.C. 431(22). A “public communication” includes a “communication by means of any broadcast, cable, or satellite communication.” 11 CFR 100.26. The Type 2 advertisements, as television or radio communications, are “public communications.”

⁹ Because the Commission concludes that the Type 2 advertisement meets the functional equivalent of express advocacy content standard at 11 CFR 109.21(c)(5), it need not and does not analyze whether the advertisement would also meet the express advocacy content standard at 11 CFR 109.21(c)(3).

1 need to consider such background should not become an excuse for discovery or a
2 broader inquiry.” *Id.* at 474 (internal quotation marks and citations omitted).

3 The Commission does not consider the speaker’s subjective intent because it is
4 not relevant to a determination of whether a public communication is the functional
5 equivalent of express advocacy. *Id.* at 468 (“A test focused on the speaker’s intent could
6 lead to the bizarre result that identical ads aired at the same time could be protected
7 speech for one speaker, while leading to criminal penalties for another.”); *see also*
8 *Citizens United*, 130 S. Ct. at 889 (“the functional-equivalent test is objective”). Instead,
9 the analysis focuses on the content of the communication, in order to “rationally
10 separate[]’ election-related advocacy from other communications about which a
11 candidate *may coordinate* with an outside group, *such as issue advertisements*, by
12 filtering out non-electoral communications.” 2010 Coordination E&J, 75 FR at 55956
13 (emphasis added). Thus, even if American Crossroads’ subjective intent in producing
14 and distributing the Type 2 advertisements is to “improve the public’s perception of the
15 featured candidate in advance of the 2012 campaign season,” this subjective intent is not
16 relevant to the Commission’s analysis of the advertisements.¹⁰

17 Instead, the Commission’s analysis considers whether an advertisement contains
18 the “indicia of express advocacy” or is a “genuine issue ad.” *WRTL*, 551 U.S. at 470. In
19 the controlling opinion in *WRTL*, Chief Justice Roberts noted the advertisements at issue
20 were “genuine issue ads” because the advertisements “focus on a legislative issue, take a
21 position on the issue, exhort the public to adopt that position, and urge the public to

¹⁰ The Commission recently rejected an approach to coordinated communications that would have considered the parties’ intent as indicated through an explicit agreement to distribute a communication made for the purpose of influencing an election, regardless of the content of that communication. *See* 2010 Coordination E&J, 75 FR at 55956-57.

1 contact public officials with respect to the matter.” *WRTL*, 551 U.S. at 470. In addition,
2 Chief Justice Roberts noted the content of the advertisements in *WRTL* lacked “indicia of
3 express advocacy” because they “do not mention an election, candidacy, political party,
4 or challenger; and they do not take a position on a candidate’s character, qualifications, or
5 fitness for office.” *Id.*

6 The controlling opinion in *WRTL* distinguished between “genuine issue”
7 advertisements, such as the advertisements at issue in *WRTL*, and advertisements that are
8 the functional equivalent of express advocacy, such as the “Jane Doe” advertisement
9 example identified by the Court in *McConnell v. FEC*, 540 U.S. 93 (2003):

10 [T]hat ad ‘condemned Jane Doe’s record on a particular issue.’ *WRTL*’s ads do
11 not do so; they instead take a position on the filibuster issue and exhort
12 constituents to contact Senators Feingold and Kohl to advance that position.
13 Indeed, one would not even know from the ads whether Senator Feingold
14 supported or opposed filibusters.

15
16 *Id.* at n.6 (internal citation omitted); *see also McConnell*, 540 U.S. at 127 (“Little
17 difference existed, for example, between an ad that urged viewers to ‘vote against Jane
18 Doe’ and one that condemned Jane Doe’s record on a particular issue before exhorting
19 viewers to ‘call Jane Doe and tell her what you think’”). Finally, the controlling *WRTL*
20 opinion noted, “[i]n a debatable case,” the “tie goes to the speaker.” *WRTL*, 551 U.S. at
21 474 end n.7.

22 The sample Type 2 advertisement bears “the indicia of express advocacy.” *Id.* at
23 470. It is “in essence” an advertisement that urges viewers to vote for the featured
24 candidate and against any of that candidate’s opponents. The sample advertisement
25 focuses on a legislative issue and takes a position on that issue through the featured
26 candidate’s on-screen promise to “stop any plan, from either side that raises your taxes or

1 burdens your children with more debt.” The Type 2 advertisement then casts the featured
2 candidate’s position in stark opposition to the position of her declared opponents.

3 The sample Type 2 advertisement does not exhort the public to adopt any position
4 or take any action on that issue. Nor does the sample Type 2 advertisement urge the
5 public to contact public officials regarding to that issue. And an advertisement that
6 ostensibly addresses an issue without exhorting the public or elected officials to take
7 action on the issue while, at the same time, condemning the declared opponents’
8 positions as “dangerous” is more akin to an electoral advertisement, such as the “Jane
9 Doe” advertisement discussed in *McConnell* and *WRTL*, than to the genuine issue
10 advertisements that were the subject of the Court’s decision in *WRTL*. See *WRTL*, 551
11 U.S. at 470 n.6; *McConnell*, 540 U.S. at 127.

12 The script’s similarity with the “Jane Doe” advertisement is laid bare by its
13 criticism of the featured candidate’s opponent Jane Y. The advertisement script notes
14 that “Jane Y would also raise your taxes.” But because Jane Y is not a current
15 officeholder, she could raise taxes *only* if she were elected to the public office for which
16 she is the declared opponent to the featured candidate. The sample Type 2 advertisement,
17 like the Jane Doe advertisement, contains no exhortation for viewers to address the
18 condemned position, except, implicitly, by casting their votes against the candidate
19 holding those positions. Thus, the unmistakable “essence” of the message of the
20 advertisement is that viewers should reject not only certain tax plans, but reject Jane Y
21 and the other challenger “politicians,” as the advertisement calls them, as well, in favor of
22 the featured candidate.

1 To be sure, the sample advertisement does not include *all* of the “indicia of
2 express advocacy” identified by the controlling opinion in *WRTL*; it does not mention
3 explicitly an election or candidacy or take a position on any candidate’s character,
4 qualifications, accomplishments, or fitness for office. But the discussion of the featured
5 candidate’s opponents renders the Type 2 advertisement susceptible of no reasonable
6 interpretation other than as an appeal to vote for the featured candidate and against any of
7 that candidate’s opponents. The sample advertisement not only mentions a “challenger,”
8 but mentions several challengers and characterizes those challengers as “one and the
9 same.” The advertisement then puts the following words on screen: “Dangerous Plans
10 for Families.” Although this characterization is ostensibly about the opponents’ position
11 on an issue, it is at the core electoral. While the *incumbent* featured candidate promises
12 to “stop any plan,” “work against any proposal,” and “keep fighting to create jobs,” the
13 non-incumbent challengers can only be “dangerous” if *elected*.

14 In a recent case, moreover, a court found that an advertisement contained indicia
15 of express advocacy and was the functional equivalent of express advocacy because,
16 among other reasons, the advertisement characterized a candidate’s position on an issue
17 as “horrendous.” See *The Real Truth About Obama, Inc. v. FEC*, __ F.Supp.2d __, 2011
18 WL 2457730 at *12 (E.D. Va. June 16, 2011), *appeal filed*, No. 11-1760 (4th Cir. July
19 15, 2011). The characterization of the opponents’ position here as “dangerous” is equally
20 indicative of express advocacy.

21 For these reasons, the Commission concludes that the proposed Type 2
22 advertisement is susceptible of no reasonable interpretation other than as an appeal to
23 vote for or against a clearly identified Federal candidate. As such, it is the functional

1 equivalent of express advocacy.¹¹ Because the proposed Type 2 advertisement is the
2 functional equivalent of express advocacy, it satisfies the content prong of the
3 coordinated communication test at 11 CFR 109.21(c)(5). Given that American
4 Crossroads asks the Commission to assume that the payment and conduct prongs are also
5 satisfied, these advertisements will therefore constitute coordinated communications and
6 will be in-kind contributions to the featured candidates.

7 3. *Given American Crossroads' prior discussions with featured candidates*
8 *regarding the Type 1 and Type 2 advertisements, would the Type 3 advertisements be*
9 *coordinated communications under 11 CFR 109.21?*

10 As explained below, in light of American Crossroads' prior discussions with
11 candidates regarding the Type 1 and Type 2 advertisements, the Type 3 advertisements
12 *may* be coordinated communications under 11 CFR 109.21.

13 As noted, a communication is coordinated with a candidate if the communication
14 meets all three prongs of the coordinated communication test: the payment prong, the
15 content prong, and the conduct prong. 11 CFR 109.21. If American Crossroads pays for
16 a public communication containing express advocacy, the payment and content prongs
17 would be met.

18 To meet the third prong of the test – the conduct prong – a communication must
19 also meet one of the five conduct standards: (1) the communication is made at the request
20 or suggestion of a candidate, candidate's authorized committee, or political party
21 committee; (2) a candidate, candidate's authorized committee, or political party

¹¹ The Commission has analyzed the sample Type 2 advertisement under 11 CFR 109.21 rather than under the coordinated expenditure provisions of 11 CFR 109.20 for the reasons set forth in the answer to Question 1, above.

1 committee is materially involved in certain decisions regarding the production and
2 distribution of the communication; (3) the communication is created, produced, or
3 distributed after one or more substantial discussions about the communication between
4 the person paying for the communication and the clearly identified candidate or the
5 candidate's opponent, the candidate's authorized committee or the opponent's authorized
6 committee, or a political party committee; (4) the communication is made using certain
7 information obtained from a vendor that has previously provided certain services to the
8 candidate or the candidate's opponent, the authorized committee of either, or a political
9 party committee; and (5) the communication is made using certain information obtained
10 from a former employee or independent contractor of the candidate or candidate's
11 opponent, the authorized committee of either, or a political party committee. 11 CFR
12 109.21(d)(1)-(5). A communication may be a "coordinated communication" even if there
13 is no agreement or formal collaboration between the person paying for the
14 communication and the candidate clearly identified in the communication, or the
15 candidate's authorized committee, the candidate's opponent, the opponent's authorized
16 committee, or a political party committee. 11 CFR 109.21(e).

17 The specific information conveyed from the candidate to American Crossroads in
18 the course of their prior discussions – in certain circumstances – *could* result in the
19 communication meeting one of the five conduct standards. But the mere fact that the
20 candidate had prior discussions and coordinated with American Crossroads on its
21 previous advertisements would not by itself automatically render subsequent
22 communications coordinated. Rather, the facts regarding each communication would
23 need to be considered to determine if a particular communication met the conduct prong.

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

10 A candidate or a candidate's authorized committee is "materially involved" in
11 these decisions when the candidate or the authorized committee shares information about
12 campaign "plans, projects, activities, or needs" with the person making the
13 communication and this information is material to the decisions about the
14 communication. 2003 Coordination E&J, 68 FR at 434. Although the "material
15 involvement" standard would not be satisfied, for example, by a speech made by a
16 candidate to the general public, it would be satisfied by remarks that a candidate
17 addressed specifically to a select audience, some of whom later create, produce, or
18 distribute public communications. *Id.* Moreover, the candidate's involvement need not
19 be traced directly to one specific communication; a candidate's involvement is material to
20 a decision regarding a communication if that communication is one of several
21 communications and the candidate was materially involved in decisions regarding the
22 strategy, such as the content, timing, or audience, of the communications. *Id.*

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

12 Alternatively, the conduct prong of the coordinated communication test is met
13 after one or more “substantial” discussions about the communication between the person
14 paying for the communication and the candidate clearly identified in the communication
15 or that candidate’s authorized committee. 11 CFR 109.21(d)(3). A discussion is
16 “substantial” if information about the candidate’s “plans, projects, activities, or needs is
17 conveyed to a person paying for the communication, and that information is material to
18 the creation, production, or distribution of the communication.” *Id.* The word “discuss”
19 is given its plain and ordinary meaning, which “the Commission understands to mean an
20 interactive exchange of views or information.” 2003 Coordination E&J, 68 FR at 435.

21 American Crossroads states that incumbent Members of Congress who are
22 featured candidates for Federal office may convey information to American Crossroads
23 about their campaign plans, projects, activities, or needs in discussions about the Type 1

1 and Type 2 advertisements. If that information is conveyed through an interactive
2 exchange of views or information and is material to American Crossroads' later creation,
3 production, or distribution of a communication, it will satisfy the conduct prong of the
4 coordinated communication test. Given that the Type 3 communications will contain
5 express advocacy and will be paid for by American Crossroads, they will also meet the
6 content and payment prongs of the coordinated communications test. As such, the Type
7 3 advertisements will be in-kind contributions by American Crossroads to the candidate.

8 This response constitutes an advisory opinion concerning the application of the
9 Act and Commission regulations to the specific transaction or activity set forth in your
10 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
11 of the facts or assumptions presented, and such facts or assumptions are material to a
12 conclusion presented in this advisory opinion, then the requestor may not rely on that
13 conclusion as support for its proposed activity. Any person involved in any specific
14 transaction or activity which is indistinguishable in all its material aspects from the
15 transaction or activity with respect to which this advisory opinion is rendered may rely on
16 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
17 conclusions in this advisory opinion may be affected by subsequent developments in the
18 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
19

1 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission

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

DRAFT B

9
10 Dear Messrs. Josefiak and Bayes:

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

15 The Commission concludes that advertisements that do not meet the content
16 prong of the coordinated communications test are not coordinated communications
17 regardless of whether a candidate may be featured in such an advertisement. The
18 Commission also concludes that, although the sample script of an advertisement criticizes
19 the opinions of the candidate's opponents, the advertisement does not meet the content
20 prong of the coordinated communications test and would not be a coordinated
21 communication. Finally, the Commission concludes that American Crossroads'
22 discussions with candidates featured in initial advertisements will not *automatically* cause
23 all subsequent advertisements by American Crossroads in support of those candidates or
24 in opposition to their opponents to be coordinated communications. If, however,
25 American Crossroads uses information obtained during those prior discussions in its
26 subsequent advertisements, then those subsequent advertisements will meet the conduct
27 prong of the coordinated communications test.

1 ***Background***

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

4 American Crossroads is a political committee registered with the Commission as
5 an independent expenditure-only committee. American Crossroads plans to pay for the
6 production and distribution of three different types of television and radio advertisements.
7 In so doing, American Crossroads wishes to avoid making contributions to any
8 candidates.

9 ***Advertisement Type 1***

10 The first type of advertisement that American Crossroads plans to produce will
11 show on-camera footage of, or voice-overs by, incumbent Members of Congress who are
12 candidates in the upcoming 2012 election. These "Type 1 advertisements" will feature a
13 candidate speaking about one or more legislative or policy issues that will likely be
14 debated and discussed in that candidate's upcoming re-election campaign. For example,
15 if a candidate focuses on job creation as a signature issue, American Crossroads would
16 run an advertisement that shows the candidate discussing job creation. Although the
17 focus of the advertisements will be on current legislative and policy issues, their purpose
18 will be to improve the public's perception of the featured candidate in advance of the
19 2012 campaign season.

20 American Crossroads states that "[t]hese advertisements would be fully
21 coordinated" with the candidate; American Crossroads plans to consult the featured
22 candidate regarding the advertisement's script and the candidate "would then appear in
23 the advertisement." American Crossroads "concedes" that its interactions with the

1 candidates appearing in these advertisements will meet one or more of the “conduct
2 standards” in the coordinated communications regulations at 11 CFR 109.21(d)(1)-(3),
3 but states that the advertisements will not meet any of the “content standards” at 11 CFR
4 109.21(c). Specifically, according to American Crossroads, these advertisements:

5 (1) will be broadcast outside of any applicable electioneering communication
6 windows;

7 (2) will not contain express advocacy or the functional equivalent of express
8 advocacy;

9 (3) will not disseminate, distribute, or republish campaign materials; and

10 (4) will not be distributed in the candidate’s jurisdiction within 90 days of the
11 primary or general election in which the candidate is running.

12 *Advertisement Type 2*

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

20 In criticizing the positions of the featured candidate’s opponents, Type 2
21 advertisements will refer to the opponents by name only, and not as “candidates” or
22 “opponents.” American Crossroads states that these advertisements will not impugn the
23 character, qualifications, or fitness for office of any of the featured candidate’s declared

1 electoral opponents, although the advertisements may describe the positions taken by the
2 opponents as “risky” or “dangerous,” or use another similar term.

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

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

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

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

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

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

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

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

28
29 *Narrator:* They’re just one and the same.

30
31 *[on screen: Dangerous Plans For Families]*

1
2 *Mary A* [speaking on camera]: “I’m *Mary A*. I approve this message to stop any
3 plan, from either side, that raises your taxes or burdens your children with more
4 debt.”
5

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

11 *Advertisement Type 3*

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

¹ 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.

1 production and distribution of the Type 1 and Type 2 advertisements and information
2 obtained in substantial discussions with the candidates in the production and distribution
3 of the Type 1 and Type 2 advertisements. This information could include the candidates'
4 campaign plans, projects, activities, or needs.

5 **Questions Presented**

6 1. *May American Crossroads, as an independent expenditure-only*
7 *committee, produce and distribute Type 1 advertisements featuring Federal candidates*
8 *provided that those advertisements are not coordinated communications under 11 CFR*
9 *109.21?*

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

15 3. *Given American Crossroads' prior discussions with featured candidates*
16 *regarding the Type 1 and Type 2 advertisements, would the Type 3 advertisements be*
17 *coordinated communications under 11 CFR 109.21?*

18 **Legal Analysis and Conclusions**

19 1. *May American Crossroads, as an independent expenditure-only*
20 *committee, produce and distribute Type 1 advertisements featuring Federal candidates*
21 *provided that those advertisements are not coordinated communications under 11 CFR*
22 *109.21?*

1 Yes, American Crossroads, as an independent-expenditure only committee, may
2 produce and distribute Type 1 advertisements featuring Federal candidates because those
3 advertisements are not coordinated communications under 11 CFR 109.21 and are
4 therefore not in-kind contributions.²

5 The Act provides that an expenditure “shall be considered to be a contribution” to
6 a candidate when it is made “by any person in cooperation, consultation, or concert, with,
7 or at the request or suggestion of,” a candidate, his or her authorized political committees,
8 or their agents. 2 U.S.C. 441a(a)(7)(B). Commission regulations set forth a three prong
9 test to determine whether a communication is coordinated and therefore an in-kind
10 contribution to a candidate. 11 CFR 109.21. First, the communication must be paid for
11 by someone other than a candidate, a candidate’s authorized committee, a political party
12 committee, or the authorized agents of either (the “payment prong”). 11 CFR
13 109.21(a)(1). Second, the communication must satisfy one of five content standards (the
14 “content prong”). 11 CFR 109.21(a)(2) and (c). Third, the communication must satisfy
15 one of five conduct standards (the “conduct prong”). 11 CFR 109.21(a)(3) and (d).³ A
16 communication must satisfy all three prongs to be a “coordinated communication.”

17 American Crossroads states that it will pay for the Type 1 advertisements. These
18 advertisements will therefore meet the payment prong of the coordinated communications
19 test. American Crossroads further states that the Type 1 advertisements will “satisfy one
20 or more of the . . . conduct standards.”

² American Crossroads does not inquire and the Commission expresses no opinion regarding the appropriate disclaimers for the Type 1 advertisements. *See, generally*, 11 CFR 110.11.

³ A sixth conduct standard, not material here, addresses the dissemination, distribution, or republication of campaign materials. 11 CFR 109.21(d)(6).

1 American Crossroads states, however, that the Type 1 advertisements will not
2 meet the content prong of the coordinated communication test. It asks the Commission to
3 assume that the Type 1 advertisements will not be electioneering communications, as
4 defined in 11 CFR 100.29; will not be broadcast in the featured candidate's jurisdiction
5 within 90 days of that candidate's primary or general election; will not contain express
6 advocacy or the functional equivalent of express advocacy; and will not disseminate,
7 distribute or republish campaign materials. *See* 11 CFR 109.21(c).⁴

8 Based on this assumption, the Type 1 advertisements do not meet all three prongs
9 of the test, will not be coordinated communications under 11 CFR 109.21, and thus will
10 not be in-kind contributions.⁵

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 Yes, based on the sample script provided by American Crossroads, it may
17 produce and distribute Type 2 advertisements featuring Federal candidates and

⁴ The Commission has not been asked and renders no opinion regarding whether the Type 1 advertisements will contain express advocacy or the functional equivalent of express advocacy, or whether they will disseminate, distribute or republish campaign materials.

⁵ American Crossroads also asks whether the Type 1 advertisements would be treated as in-kind contributions to the featured candidates under 11 CFR 109.20. This provision applies to "expenditures *that are not made for communications* but that are coordinated with a candidate, authorized committee, or political party committee." Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 FR 421, 425 (Jan. 3, 2003) ("2003 Coordination E&J") (emphasis added); *see also* Advisory Opinion 2011-14 (Utah Bankers Association). Because the expenditures at issue here would be made for communications, they would not be coordinated expenditures under 11 CFR 109.20. *Cf.* 11 CFR 109.21.

1 comparing and contrasting their positions with the positions of their declared opponents
2 for election without making in-kind contributions to the featured candidates, because the
3 Type 2 advertisements are neither express advocacy nor the functional equivalent of
4 express advocacy and therefore will not meet all three prongs of the coordinated
5 communications test at 11 CFR 109.21.

6 As noted above, to meet the content prong under 11 CFR 109.21(c), a
7 communication must satisfy one of five content standards: (1) the communication is an
8 electioneering communication, as defined in 11 CFR 100.29;⁶ (2) the communication is a
9 public communication that disseminates, distributes or republishes, in whole or in part, a
10 candidate's campaign materials; (3) the communication is a public communication that
11 expressly advocates the election or defeat of a clearly identified candidate for Federal
12 office; (4) the communication is a public communication that refers to a political party or
13 a clearly identified Federal candidate and that is aired in the candidate's jurisdiction
14 within a certain number of days before that candidate's election; or (5) the
15 communication is a public communication that is the functional equivalent of express
16 advocacy. 11 CFR 109.21(c).

17 American Crossroads states that the Type 2 advertisements will not meet three of
18 the five standards: the advertisements will not be electioneering communications, as
19 defined in 11 CFR 100.29; they will not be broadcast in the candidate's jurisdiction
20 within 90 days of that candidate's primary or general election; and they will not
21 disseminate, distribute, or republish campaign materials. See 11 CFR 109.21(c)(1), (2),
22 and (4). The Commission therefore needs to consider only whether the proposed

⁶ See also 2 U.S.C. 434(f)(3).

1 advertisements will meet one of the two remaining content standards because the
2 advertisements are either the functional equivalent of express advocacy or expressly
3 advocate the election or defeat of a clearly identified candidate for Federal office.
4 11 CFR 109.21(c)(3) and (5).⁷

5 *Express Advocacy*

6 A communication may expressly advocate the election or defeat of a Federal
7 candidate by using phrases — such as “vote for,” “re-elect,” “defeat,” or “reject” — or
8 campaign slogans “which in context can have no other reasonable meaning than to urge
9 the election or defeat of one or more clearly identified candidate(s).” 11 CFR 100.22(a).
10 This is sometimes referred to as “magic words” express advocacy. *See McConnell v.*
11 *FEC*, 540 U.S. 93, 126 (2003) (citing *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976)).

12 A communication may also constitute express advocacy:

13 When taken as a whole and with limited reference to external events, such as the
14 proximity to the election, [the communication] could only be interpreted by a
15 reasonable person as containing advocacy of the election or defeat of one or more
16 clearly identified candidate(s) because

- 17
- 18 (1) The electoral portion of the communication is unmistakable,
19 unambiguous, and suggestive of only one meaning; and
 - 20
 - 21 (2) Reasonable minds could not differ as to whether it encourages actions
22 to elect or defeat one or more clearly identified candidate(s) or encourages
23 some other kind of action.
 - 24

25 11 CFR 100.22(b).

⁷ Both of these content standards apply to any “public communication” as that term is defined at 11 CFR 100.26. *See* 11 CFR 109.21(c)(3) and (5); *see also* 2 U.S.C. 431(22). A “public communication” includes a “communication by means of any broadcast, cable, or satellite communication.” 11 CFR 100.26. The Type 2 advertisements, as television or radio communications, are “public communications.”

1 The sample Type 2 advertisement does not contain express advocacy under
2 11 CFR 100.22.⁸ The advertisement does not contain individual words, phrases, or
3 campaign slogans of the type demonstrating express advocacy under 11 CFR 100.22(a).⁹
4 Nor does the advertisement contain an “unmistakable” and “unambiguous” electoral
5 portion about which reasonable minds could not differ as to whether it encourages
6 actions to elect or defeat a clearly identified candidate as required by 11 CFR 100.22(b).
7 Thus, the Commission concludes that the Type 2 advertisement does not expressly
8 advocate the election or defeat of a clearly identified candidate for Federal office under
9 11 CFR 100.22.

10 *Functional Equivalent of Express Advocacy*

11 The Type 2 advertisement also is not the functional equivalent of express
12 advocacy. A communication is the functional equivalent of express advocacy if it is
13 “susceptible of no reasonable interpretation other than as an appeal to vote for or against
14 a clearly identified Federal candidate.” 11 CFR 109.21(c)(5). In applying the functional
15 equivalent of express advocacy content standard, the Commission follows the Supreme
16 Court’s reasoning and application of the test as set forth in the Court’s controlling
17 opinion in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) (“*WRTL*”),
18 and in *Citizens United v. FEC*, 130 S. Ct. 876, 889-90 (2010). See Explanation and
19 Justification for Final Rules on Coordinated Communications, 75 FR 55947, 55952-53
20 (Sept. 15, 2010) (“2010 Coordination E&J”).

⁸ The Commission’s conclusions in this advisory opinion are limited to the description and script presented in the request. Advertisements that contain information beyond that described in the request are outside of the scope of this advisory opinion.

⁹ The Commission assumes for purposes of answering Question 2 that the Type 2 advertisements do not contain campaign slogans under 11 CFR 100.22(a).

1 As Chief Justice Roberts’s controlling opinion in *WRTL* instructs, in determining
2 whether a communication is the functional equivalent of express advocacy, the
3 Commission should avoid contextual factors. *See WRTL*, 551 U.S. at 473-74. The
4 Commission “need not ignore basic background information that may be necessary to put
5 an ad in context – such as whether an ad describes a legislative issue that is either
6 currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in
7 the near future – but the need to consider such background should not become an excuse
8 for discovery or a broader inquiry.” *Id.* at 474 (internal quotation marks and citations
9 omitted).

10 The Commission also does not consider the speaker’s subjective intent because it
11 is not relevant to a determination of whether a public communication is the functional
12 equivalent of express advocacy. *Id.* at 468 (“A test focused on the speaker’s intent could
13 lead to the bizarre result that identical ads aired at the same time could be protected
14 speech for one speaker, while leading to criminal penalties for another.”); *see also*
15 *Citizens United*, 130 S. Ct. at 889 (“the functional-equivalent test is objective”). Instead,
16 the analysis focuses on the content of the communication, in order to “rationally
17 separate[]’ election-related advocacy from other communications about which a
18 candidate *may coordinate* with an outside group, *such as issue advertisements*, by
19 filtering out non-electoral communications.” 2010 Coordination E&J, 75 FR at 55956
20 (emphasis added). Thus, even if American Crossroads’ subjective intent in producing
21 and distributing the Type 2 advertisements is to “improve the public’s perception of the

1 featured candidate in advance of the 2012 campaign season,” this subjective intent is not
2 relevant to the Commission’s analysis of the advertisements.¹⁰

3 In concluding that advertisements may reasonably be interpreted as something
4 other than an appeal to vote for or against a specific candidate, the Commission’s
5 determination may include the fact that the advertisements “focus on a legislative issue,
6 take a position on the issue, exhort the public to adopt that position, and urge the public
7 to contact public officials with respect to the matter.” *WRTL*, 551 U.S. at 470. In
8 addition, Chief Justice Roberts noted the content of the advertisements in *WRTL* lacked
9 “indicia of express advocacy” because they “do not mention an election, candidacy,
10 political party, or challenger; and they do not take a position on a candidate’s character,
11 qualifications, or fitness for office.” *Id.* Finally, the controlling *WRTL* opinion noted,
12 “Discussion of issues cannot be suppressed simply because the issues may also be
13 pertinent in an election. Where the First Amendment is implicated, the tie goes to the
14 speaker, not the censor.” *WRTL*, 551 U.S. at 474; *see also* 551 U.S. 474 n.7 (“[I]n a
15 debatable case, the tie is resolved in favor of protecting speech.”).

16 Conversely, in finding that the communication at issue in *Citizens United* had no
17 reasonable interpretation other than as an appeal to vote against then-Senator Hillary
18 Clinton for president, the Court noted that the communication “would be understood by
19 most viewers as an extended criticism of Senator Clinton’s character and her fitness for
20 the office of the Presidency . . . the thesis of the film is that she is unfit for the
21 Presidency.” Furthermore, the Court noted the communication “asks whether [Senator

¹⁰ The Commission recently rejected an approach to coordinated communications that would have considered the parties’ intent as indicated through an explicit agreement to distribute a communication made for the purpose of influencing an election, regardless of the content of that communication. *See* 2010 Coordination E&J, 75 FR at 55956-57.

1 Clinton] is ‘the most qualified to hit the ground running if elected President’” and
2 reminds viewers “that ‘a vote for Hillary is a vote to continue 20 years of a Bush or a
3 Clinton in the White House.’” 130 S. Ct. at 890.

4 Here, the sample Type 2 advertisement is not the functional equivalent of express
5 advocacy because it is susceptible of a reasonable interpretation other than as an appeal to
6 vote for or against a specific candidate. Specifically, the sample script could be
7 interpreted as a communication to sway public opinion on the legislative issue of taxes
8 and to convince viewers that raising taxes is part of a set of “the same old failed policies”
9 and “dangerous . . . for families.” Additionally, the sample script does not mention any
10 election, candidacy, political party, or challenger; does not take a position on any
11 candidate’s character, qualifications, or fitness for office; and does not characterize a vote
12 for any particular candidate as a vote for a particular result.

13 Although the sample script does not contain an explicit exhortation urging
14 viewers to contact any public officials regarding the legislative issue, neither the *WRTL*
15 nor *Citizens United* decisions identified this factor as being a necessary predicate in
16 determining that a communication is susceptible of a reasonable interpretation other than
17 an appeal to vote for or against a specific candidate. Moreover, although the sample
18 script mentions individuals who are Federal candidates other than the featured candidate
19 – none of whom is identified as such – the advertisement could be understood as an
20 attempt to persuade those individuals to abandon their position on raising taxes,
21 consistent with the advertisement’s overall theme of turning public opinion against tax
22 increases.

1 For these reasons, the Commission concludes that the proposed Type 2
2 advertisement is “susceptible of [a] . . . reasonable interpretation other than as an appeal
3 to vote for or against a clearly identified Federal candidate,” and thus is not the functional
4 equivalent of express advocacy. *See* 11 CFR 109.21(c)(5). Because the proposed Type 2
5 advertisement is neither express advocacy nor the functional equivalent of express
6 advocacy, it does not satisfy the content prong of the coordinated communication test at
7 11 CFR 109.21(c)(5). Consequently, Type 2 advertisements do not meet all three prongs
8 of the coordination test, will not be coordinated communications under 11 CFR 109.21,
9 and will not be in-kind contributions.¹¹

10 3. *Given American Crossroads’ prior discussions with featured candidates*
11 *regarding the Type 1 and Type 2 advertisements, would the Type 3 advertisements be*
12 *coordinated communications under 11 CFR 109.21?*

13 As explained below, in light of American Crossroads’ prior discussions with
14 candidates regarding the Type 1 and Type 2 advertisements, the Type 3 advertisements
15 *may* be coordinated communications under 11 CFR 109.21.

16 As noted, a communication is coordinated with a candidate if the communication
17 meets all three prongs of the coordinated communication test: the payment prong, the
18 content prong, and the conduct prong. 11 CFR 109.21. The analysis of the payment
19 prong and relevant content prong standards are set forth in the answers to Questions 1
20 and 2, above.

¹¹ The Commission has analyzed the sample Type 2 advertisement under 11 CFR 109.21 rather than under the coordinated expenditure provisions of 11 CFR 109.20 for the reasons set forth in the answer to Question 1, above.

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

21 The specific information conveyed from the candidate to American Crossroads in
22 the course of their prior discussions – in certain circumstances – *could* result in the
23 communication meeting one of the five conduct standards. But the mere fact that the

1 candidate had prior discussions and coordinated with American Crossroads on its
2 previous advertisements would not by itself automatically render subsequent
3 communications coordinated. Rather, the facts regarding each communication would
4 need to be considered to determine if a particular communication met the conduct prong.

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

14 Although the "material involvement" standard would not be satisfied, for
15 example, by a speech made by a candidate to the general public, it would be satisfied by
16 remarks that a candidate addressed specifically to a select audience, some of whom later
17 create, produce, or distribute public communications. 2003 Coordination E&J, 68 FR at
18 434. Moreover, the candidate's involvement need not be traced directly to one specific
19 communication; a candidate's involvement is material to a decision regarding a
20 communication if that communication is one of several communications and the
21 candidate was materially involved in decisions regarding the strategy, such as the content,
22 timing, or audience, of the several communications. *Id.* For example, if a candidate is

1 materially involved in the content or timing of a 10-part advertising campaign, then each
2 of the 10 communications is considered coordinated. *Id.*

3 American Crossroads states that incumbent Members of Congress who are
4 featured candidates for Federal office may be materially involved as to the content,
5 means, mode, timing, duration, intended audience, frequency of, or specific media outlet
6 in producing and distributing the Type 1 and Type 2 advertisements. However, because
7 the material involvement conduct standard applies to discrete communications (whether
8 they are singular communications or a series of communications, as described in the
9 example in the 2003 Coordination E&J), a candidate's material involvement with respect
10 to specific Type 1 and Type 2 advertisements will not result in per se material
11 involvement as to the Type 3 advertisements. Nonetheless, if at the time the Type 1 and
12 Type 2 ads are created, the candidate's material involvement also extends specifically to
13 the content, means, mode, timing, duration, intended audience, frequency of, or specific
14 media outlet for the Type 3 advertisements, the material involvement conduct standard
15 will be met for the Type 3 advertisements.

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

1 is given its plain and ordinary meaning, which “the Commission understands to mean an
2 interactive exchange of views or information.” 2003 Coordination E&J, 68 FR at 435.

3 American Crossroads states that incumbent Members of Congress who are
4 featured candidates for Federal office may convey information to American Crossroads
5 about their campaign plans, projects, activities, or needs in discussions about the Type 1
6 and Type 2 advertisements. If that information is conveyed through an interactive
7 exchange of views or information and is material to American Crossroads’ later creation,
8 production, or distribution of a communication, it will satisfy the substantial discussion
9 conduct standard of the coordinated communication test. Provided that the Type 3
10 communications also satisfy the content prong and will be paid for by American
11 Crossroads, they will be considered coordinated communications and, consequently, in-
12 kind contributions by American Crossroads to the candidate.

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

1 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission

1 ADVISORY OPINION 2011-23

2

3 Thomas J. Josefiak, Esq.

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DRAFT C

10 Dear Messrs. Josefiak and Bayes:

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

15 The Commission concludes that advertisements that do not meet the content
16 prong of the coordinated communications test are not coordinated communications
17 regardless of whether a candidate may be featured in such an advertisement. The
18 Commission also concludes that, although the sample script of an advertisement criticizes
19 the opinions of the candidate's opponents, the advertisement does not meet the content
20 prong of the coordinated communications test and would not be a coordinated
21 communication. Finally, the Commission concludes that American Crossroads'
22 discussions with candidates featured in initial advertisements will not *automatically* cause
23 all subsequent advertisements by American Crossroads in support of those candidates or
24 in opposition to their opponents to be coordinated communications. If, however,
25 American Crossroads uses information obtained during those prior discussions in its
26 subsequent advertisements, then those subsequent advertisements will meet the conduct
27 prong of the coordinated communications test.

1 ***Background***

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

4 American Crossroads is a political committee registered with the Commission as
5 an independent expenditure-only committee. American Crossroads plans to pay for the
6 production and distribution of three different types of television and radio advertisements.
7 In so doing, American Crossroads wishes to avoid making contributions to any
8 candidates.

9 ***Advertisement Type 1***

10 The first type of advertisement that American Crossroads plans to produce will
11 show on-camera footage of, or voice-overs by, incumbent Members of Congress who are
12 candidates in the upcoming 2012 election. These "Type 1 advertisements" will feature a
13 candidate speaking about one or more legislative or policy issues that will likely be
14 debated and discussed in that candidate's upcoming re-election campaign. For example,
15 if a candidate focuses on job creation as a signature issue, American Crossroads would
16 run an advertisement that shows the candidate discussing job creation. Although the
17 focus of the advertisements will be on current legislative and policy issues, their purpose
18 will be to improve the public's perception of the featured candidate in advance of the
19 2012 campaign season.

20 American Crossroads states that "[t]hese advertisements would be fully
21 coordinated" with the candidate; American Crossroads plans to consult the featured
22 candidate regarding the advertisement's script and the candidate "would then appear in
23 the advertisement." American Crossroads "concedes" that its interactions with the

1 candidates appearing in these advertisements will meet one or more of the “conduct
2 standards” in the coordinated communications regulations at 11 CFR 109.21(d)(1)-(3),
3 but states that the advertisements will not meet any of the “content standards” at 11 CFR
4 109.21(c). Specifically, according to American Crossroads, these advertisements:

5 (1) will be broadcast outside of any applicable electioneering communication
6 windows;

7 (2) will not contain express advocacy or the functional equivalent of express
8 advocacy;

9 (3) will not disseminate, distribute, or republish campaign materials; and

10 (4) will not be distributed in the candidate’s jurisdiction within 90 days of the
11 primary or general election in which the candidate is running.

12 *Advertisement Type 2*

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

20 In criticizing the positions of the featured candidate’s opponents, Type 2
21 advertisements will refer to the opponents by name only, and not as “candidates” or
22 “opponents.” American Crossroads states that these advertisements will not impugn the
23 character, qualifications, or fitness for office of any of the featured candidate’s declared

1 electoral opponents, although the advertisements may describe the positions taken by the
2 opponents as “risky” or “dangerous,” or use another similar term.

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

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

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

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

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

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

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

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

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29 *Narrator:* They’re just one and the same.

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31 *[on screen: Dangerous Plans For Families]*

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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.”

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

Advertisement Type 3

The third type of advertisement will be produced and distributed by American Crossroads after the Type 1 and Type 2 advertisements air. American Crossroads characterizes these Type 3 advertisements as “independent expenditures,”¹ in support of the same candidates featured in the Type 1 and 2 advertisements, or in opposition to those candidates’ opponents. In American Crossroads’ discussions with featured candidates about the Type 1 and Type 2 advertisements, the candidates will not have requested or suggested that American Crossroads produce or air the Type 3 advertisements, and American Crossroads will have no further contact with and will not consult the candidates anew in connection with the Type 3 advertisements. In producing and distributing the Type 3 advertisements, however, American Crossroads may rely on and use the same information that it previously obtained from the featured candidates in producing and distributing the Type 1 and Type 2 advertisements. This includes information obtained because of the candidates’ prior material involvement in the

¹ 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.

1 production and distribution of the Type 1 and Type 2 advertisements and information
2 obtained in substantial discussions with the candidates in the production and distribution
3 of the Type 1 and Type 2 advertisements. This information could include the candidates'
4 campaign plans, projects, activities, or needs.

5 **Questions Presented**

6 1. *May American Crossroads, as an independent expenditure-only*
7 *committee, produce and distribute Type 1 advertisements featuring Federal candidates*
8 *provided that those advertisements are not coordinated communications under 11 CFR*
9 *109.21?*

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

15 3. *Given American Crossroads' prior discussions with featured candidates*
16 *regarding the Type 1 and Type 2 advertisements, would the Type 3 advertisements be*
17 *coordinated communications under 11 CFR 109.21?*

18 **Legal Analysis and Conclusions**

19 1. *May American Crossroads, as an independent expenditure-only*
20 *committee, produce and distribute Type 1 advertisements featuring Federal candidates*
21 *provided that those advertisements are not coordinated communications under 11 CFR*
22 *109.21?*

1 **Yes, American Crossroads, as an independent-expenditure only committee, may**
2 **produce and distribute Type 1 advertisements featuring Federal candidates because those**
3 **advertisements are not coordinated communications under 11 CFR 109.21 and are**
4 **therefore not in-kind contributions.²**

5 **The Act provides that an expenditure “shall be considered to be a contribution” to**
6 **a candidate when it is made “by any person in cooperation, consultation, or concert, with,**
7 **or at the request or suggestion of,” a candidate, his or her authorized political committees,**
8 **or their agents. 2 U.S.C. 441a(a)(7)(B). Commission regulations set forth a three prong**
9 **test to determine whether a communication is coordinated and therefore an in-kind**
10 **contribution to a candidate. 11 CFR 109.21. First, the communication must be paid for**
11 **by someone other than a candidate, a candidate’s authorized committee, a political party**
12 **committee, or the authorized agents of either (the “payment prong”). 11 CFR**
13 **109.21(a)(1). Second, the communication must satisfy one of five content standards (the**
14 **“content prong”). 11 CFR 109.21(a)(2) and (c). Third, the communication must satisfy**
15 **one of five conduct standards (the “conduct prong”). 11 CFR 109.21(a)(3) and (d).³ A**
16 **communication must satisfy all three prongs to be a “coordinated communication.”**

17 **American Crossroads states that it will pay for the Type 1 advertisements. These**
18 **advertisements will therefore meet the payment prong of the coordinated communications**
19 **test. American Crossroads further states that the Type 1 advertisements will “satisfy one**
20 **or more of the . . . conduct standards.”**

² American Crossroads does not inquire and the Commission expresses no opinion regarding the appropriate disclaimers for the Type 1 advertisements. *See, generally*, 11 CFR 110.11.

³ A sixth conduct standard, not material here, addresses the dissemination, distribution, or republication of campaign materials. 11 CFR 109.21(d)(6).

1 American Crossroads states, however, that the Type 1 advertisements will not
2 meet the content prong of the coordinated communication test. It asks the Commission to
3 assume that the Type 1 advertisements will not be electioneering communications, as
4 defined in 11 CFR 100.29; will not be broadcast in the featured candidate's jurisdiction
5 within 90 days of that candidate's primary or general election; will not contain express
6 advocacy or the functional equivalent of express advocacy; and will not disseminate,
7 distribute or republish campaign materials. *See* 11 CFR 109.21(c).⁴

8 Based on this assumption, the Type 1 advertisements do not meet all three prongs
9 of the test, will not be coordinated communications under 11 CFR 109.21, and thus will
10 not be in-kind contributions.⁵

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 Yes, based on the sample script provided by American Crossroads, it may
17 produce and distribute Type 2 advertisements featuring Federal candidates and
18 comparing and contrasting their positions with the positions of their declared opponents

⁴ The Commission has not been asked and renders no opinion regarding whether the Type 1 advertisements will contain express advocacy or the functional equivalent of express advocacy, or whether they will disseminate, distribute or republish campaign materials.

⁵ American Crossroads also asks whether the Type 1 advertisements would be treated as in-kind contributions to the featured candidates under 11 CFR 109.20. This provision applies to "expenditures *that are not made for communications* but that are coordinated with a candidate, authorized committee, or political party committee." Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 FR 421, 425 (Jan. 3, 2003) ("2003 Coordination E&J") (emphasis added); *see also* Advisory Opinion 2011-14 (Utah Bankers Association). Because the expenditures at issue here would be made for communications, they would not be coordinated expenditures under 11 CFR 109.20. *Cf.* 11 CFR 109.21.

1 for election without making in-kind contributions to the featured candidates, because the
2 Type 2 advertisements are neither express advocacy nor the functional equivalent of
3 express advocacy and therefore will not meet all three prongs of the coordinated
4 communications test at 11 CFR 109.21.

5 As noted above, to meet the content prong under 11 CFR 109.21(c), a
6 communication must satisfy one of five content standards: (1) the communication is an
7 electioneering communication, as defined in 11 CFR 100.29;⁶ (2) the communication is a
8 public communication that disseminates, distributes or republishes, in whole or in part, a
9 candidate's campaign materials; (3) the communication is a public communication that
10 expressly advocates the election or defeat of a clearly identified candidate for Federal
11 office; (4) the communication is a public communication that refers to a political party or
12 a clearly identified Federal candidate and that is aired in the candidate's jurisdiction
13 within a certain number of days before that candidate's election; or (5) the
14 communication is a public communication that is the functional equivalent of express
15 advocacy. 11 CFR 109.21(c).

16 American Crossroads states that the Type 2 advertisements will not meet three of
17 the five standards: the advertisements will not be electioneering communications, as
18 defined in 11 CFR 100.29; they will not be broadcast in the candidate's jurisdiction
19 within 90 days of that candidate's primary or general election; and they will not
20 disseminate, distribute, or republish campaign materials.⁷ See 11 CFR 109.21(c)(1), (2),
21 and (4). The Commission therefore needs to consider only whether the proposed

⁶ See also 2 U.S.C. 434(f)(3).

⁷ The Commission expresses no opinion on whether the advertisements disseminate, distribute or republish campaign materials because American Crossroads asks the Commission to assume for the sake of Question 2 that the advertisements do not do so.

1 advertisements will meet one of the two remaining content standards because the
2 advertisements are either the functional equivalent of express advocacy or expressly
3 advocate the election or defeat of a clearly identified candidate for Federal office.
4 11 CFR 109.21(c)(3) and (5).⁸

5 *Express Advocacy*

6 A communication may expressly advocate the election or defeat of a Federal
7 candidate by using phrases — such as “vote for,” “re-elect,” “defeat,” or “reject” — or
8 campaign slogans “which in context can have no other reasonable meaning than to urge
9 the election or defeat of one or more clearly identified candidate(s).” 11 CFR 100.22(a).
10 This is sometimes referred to as “magic words” express advocacy. *See McConnell v.*
11 *FEC*, 540 U.S. 93, 126 (2003) (citing *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976)).

12 A communication may also constitute express advocacy:

13 When taken as a whole and with limited reference to external events, such as the
14 proximity to the election, [the communication] could only be interpreted by a
15 reasonable person as containing advocacy of the election or defeat of one or more
16 clearly identified candidate(s) because

17
18 (1) The electoral portion of the communication is unmistakable,
19 unambiguous, and suggestive of only one meaning; and

20
21 (2) Reasonable minds could not differ as to whether it encourages actions
22 to elect or defeat one or more clearly identified candidate(s) or encourages
23 some other kind of action.
24

25 11 CFR 100.22(b).

⁸ Both of these content standards apply to any “public communication” as that term is defined at 11 CFR 100.26. *See* 11 CFR 109.21(c)(3) and (5); *see also* 2 U.S.C. 431(22). A “public communication” includes a “communication by means of any broadcast, cable, or satellite communication.” 11 CFR 100.26. The Type 2 advertisements, as television or radio communications, are “public communications.”

1 The sample Type 2 advertisement does not contain express advocacy under
2 11 CFR 100.22.⁹ The advertisement does not contain individual words, phrases, or
3 campaign slogans of the type demonstrating express advocacy under 11 CFR 100.22(a).¹⁰
4 Nor does the advertisement mention any candidacy or Federal election or discuss any
5 candidate's character, qualifications, or accomplishments in a context that has no
6 reasonable meaning other than to encourage actions to elect or defeat that candidate, such
7 as would constitute express advocacy under 11 CFR 100.22(b). *See e.g., Final Rules on*
8 *Express Advocacy, Independent Expenditures, Corporate and Labor Organization*
9 *Expenditures*, 60 FR 35292, 35295 (July 6, 1995). More generally, the advertisement
10 does not contain an "unmistakable" and "unambiguous" electoral portion about which
11 reasonable minds could not differ as to whether it encourages actions to elect or defeat a
12 clearly identified candidate as required by 11 CFR 100.22(b). Thus, the Commission
13 concludes that the Type 2 advertisement does not expressly advocate the election or
14 defeat of a clearly identified candidate for Federal office under 11 CFR 100.22.

15 *Functional Equivalent of Express Advocacy*

16 The Type 2 advertisement also is not the functional equivalent of express
17 advocacy. A communication is the functional equivalent of express advocacy if it is
18 "susceptible of no reasonable interpretation other than as an appeal to vote for or against
19 a clearly identified Federal candidate." 11 CFR 109.21(c)(5). In applying the functional
20 equivalent of express advocacy content standard, the Commission follows the Supreme

⁹ The Commission's conclusions in this advisory opinion are limited to the description and script presented in the request. Advertisements that contain information beyond that described in the request are outside of the scope of this advisory opinion.

¹⁰ The Commission assumes for purposes of answering Question 2 that the Type 2 advertisements do not contain campaign slogans under 11 CFR 100.22(a).

1 Court's reasoning and application of the test as set forth in the Court's controlling
2 opinion in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) ("WRTL"),
3 and in *Citizens United v. FEC*, 130 S. Ct. 876, 889-90 (2010). See Explanation and
4 Justification for Final Rules on Coordinated Communications, 75 FR 55947, 55952-53
5 (Sept. 15, 2010) ("2010 Coordination E&J").

6 As Chief Justice Roberts's controlling opinion in *WRTL* instructs, in determining
7 whether a communication is the functional equivalent of express advocacy, the
8 Commission looks to the communication as a whole with limited reference to external
9 events or contextual factors. See *WRTL*, 551 U.S. at 473-74. The Commission "need not
10 ignore basic background information that may be necessary to put an ad in context – such
11 as whether an ad describes a legislative issue that is either currently the subject of
12 legislative scrutiny or likely to be the subject of such scrutiny in the near future – but the
13 need to consider such background should not become an excuse for discovery or a
14 broader inquiry." *Id.* at 474 (internal quotation marks and citations omitted).

15 The Commission does not consider the speaker's subjective intent because it is
16 not relevant to a determination of whether a public communication is the functional
17 equivalent of express advocacy. *Id.* at 468 ("A test focused on the speaker's intent could
18 lead to the bizarre result that identical ads aired at the same time could be protected
19 speech for one speaker, while leading to criminal penalties for another."); see also
20 *Citizens United*, 130 S. Ct. at 889 ("the functional-equivalent test is objective"). Instead,
21 the analysis focuses on the content of the communication, in order to "rationally
22 separate[]' election-related advocacy from other communications about which a
23 candidate *may coordinate* with an outside group, *such as issue advertisements*, by

1 filtering out non-electoral communications.” 2010 Coordination E&J, 75 FR at 55956
2 (emphasis added). Thus, even if American Crossroads’ subjective intent in producing
3 and distributing the Type 2 advertisements is to “improve the public’s perception of the
4 featured candidate in advance of the 2012 campaign season,” this subjective intent is not
5 relevant to the Commission’s analysis of the advertisements.¹¹

6 Instead, the Commission’s analysis considers whether an advertisement contains
7 the “indicia of express advocacy” or is a “genuine issue ad.” *WRTL*, 551 U.S. at 470. In
8 the controlling opinion in *WRTL*, Chief Justice Roberts noted the advertisements at issue
9 were “genuine issue ads” because the advertisements “focus on a legislative issue, take a
10 position on the issue, exhort the public to adopt that position, and urge the public to
11 contact public officials with respect to the matter.” *WRTL*, 551 U.S. at 470. In addition,
12 Chief Justice Roberts noted the content of the advertisements in *WRTL* lacked “indicia of
13 express advocacy” because they “do not mention an election, candidacy, political party,
14 or challenger; and they do not take a position on a candidate’s character, qualifications, or
15 fitness for office.” *Id.* Finally, the controlling *WRTL* opinion noted, “[i]n a debatable
16 case,” the “tie goes to the speaker.” *WRTL*, 551 U.S. at 474 and n.7.

17 On balance, the Commission concludes that the sample Type 2 advertisement is
18 not the functional equivalent of express advocacy. The content of the advertisement is
19 consistent with a genuine issue advertisement. It focuses on a legislative issue and takes
20 a position on that issue through the featured candidate’s on-screen promise to “stop any
21 plan, from either side that raises your taxes or burdens your children with more debt.”

¹¹ The Commission recently rejected an approach to coordinated communications that would have considered the parties’ intent as indicated through an explicit agreement to distribute a communication made for the purpose of influencing an election, regardless of the content of that communication. See 2010 Coordination E&J, 75 FR at 55956-57.

1 Although the sample Type 2 advertisement does not have some of the content
2 identified in *WRTL* as consistent with a genuine issue advertisement – such as exhorting
3 the public to adopt a position or take an action on an issue, or urging the public to contact
4 public officials on an issue – it does not have many of the indicia of express advocacy
5 identified by the controlling opinion in *WRTL*. See *WRTL*, 551 U.S. at 470. For
6 example, it does not mention an election or candidacy, or take a position on any
7 candidate’s character, qualifications, accomplishments, or fitness for office. In a
8 debatable case, the tie goes to the speaker.

9 For these reasons, the Commission concludes that the proposed Type 2
10 advertisement is “susceptible of [a] . . . reasonable interpretation other than as an appeal
11 to vote for or against a clearly identified Federal candidate,” and thus is not the functional
12 equivalent of express advocacy. See 11 CFR 109.21(c)(5). Because the proposed Type 2
13 advertisement is neither express advocacy nor the functional equivalent of express
14 advocacy, it does not satisfy the content prong of the coordinated communication test at
15 11 CFR 109.21(c)(5). Consequently, Type 2 advertisements do not meet all three prongs
16 of the coordination test, will not be coordinated communications under 11 CFR 109.21,
17 and will not be in-kind contributions.¹²

18 3. *Given American Crossroads’ prior discussions with featured candidates*
19 *regarding the Type 1 and Type 2 advertisements, would the Type 3 advertisements be*
20 *coordinated communications under 11 CFR 109.21?*

¹² The Commission has analyzed the sample Type 2 advertisement under 11 CFR 109.21 rather than under the coordinated expenditure provisions of 11 CFR 109.20 for the reasons set forth in the answer to Question 1, above.

1 As explained below, in light of American Crossroads' prior discussions with
2 candidates regarding the Type 1 and Type 2 advertisements, the Type 3 advertisements
3 *may* be coordinated communications under 11 CFR 109.21.

4 As noted, a communication is coordinated with a candidate if the communication
5 meets all three prongs of the coordinated communication test: the payment prong, the
6 content prong, and the conduct prong. 11 CFR 109.21. If American Crossroads pays for
7 a public communication containing express advocacy, the payment and content prongs
8 would be met.

9 To meet the third prong of the test – the conduct prong – a communication must
10 also meet one of the five conduct standards: (1) the communication is made at the request
11 or suggestion of a candidate, candidate's authorized committee, or political party
12 committee; (2) a candidate, candidate's authorized committee, or political party
13 committee is materially involved in certain decisions regarding the production and
14 distribution of the communication; (3) the communication is created, produced, or
15 distributed after one or more substantial discussions about the communication between
16 the person paying for the communication and the clearly identified candidate or the
17 candidate's opponent, the candidate's authorized committee or the opponent's authorized
18 committee, or a political party committee; (4) the communication is made using certain
19 information obtained from a vendor that has previously provided certain services to the
20 candidate or the candidate's opponent, the authorized committee of either, or a political
21 party committee; and (5) the communication is made using certain information obtained
22 from a former employee or independent contractor of the candidate or candidate's
23 opponent, the authorized committee of either, or a political party committee. 11 CFR

1 109.21(d)(1)-(5). A communication may be a “coordinated communication” even if there
2 is no agreement or formal collaboration between the person paying for the
3 communication and the candidate clearly identified in the communication, or the
4 candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized
5 committee, or a political party committee. 11 CFR 109.21(e).

6 The specific information conveyed from the candidate to American Crossroads in
7 the course of their prior discussions – in certain circumstances – *could* result in the
8 communication meeting one of the five conduct standards. But the mere fact that the
9 candidate had prior discussions and coordinated with American Crossroads on its
10 previous advertisements would not by itself automatically render subsequent
11 communications coordinated. Rather, the facts regarding each communication would
12 need to be considered to determine if a particular communication met the conduct prong.

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

22 A candidate or a candidate’s authorized committee is “materially involved” in
23 these decisions when the candidate or the authorized committee shares information about

1 campaign “plans, projects, activities, or needs” with the person making the
2 communication and this information is material to the decisions about the
3 communication. 2003 Coordination E&J, 68 FR at 434. Although the “material
4 involvement” standard would not be satisfied, for example, by a speech made by a
5 candidate to the general public, it would be satisfied by remarks that a candidate
6 addressed specifically to a select audience, some of whom later create, produce, or
7 distribute public communications. *Id.* Moreover, the candidate’s involvement need not
8 be traced directly to one specific communication; a candidate’s involvement is material to
9 a decision regarding a communication if that communication is one of several
10 communications and the candidate was materially involved in decisions regarding the
11 strategy, such as the content, timing, or audience, of the communications. *Id.*

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

1 Alternatively, the conduct prong of the coordinated communication test is met
2 after one or more “substantial” discussions about the communication between the person
3 paying for the communication and the candidate clearly identified in the communication
4 or that candidate’s authorized committee. 11 CFR 109.21(d)(3). A discussion is
5 “substantial” if information about the candidate’s “plans, projects, activities, or needs is
6 conveyed to a person paying for the communication, and that information is material to
7 the creation, production, or distribution of the communication.” *Id.* The word “discuss”
8 is given its plain and ordinary meaning, which “the Commission understands to mean an
9 interactive exchange of views or information.” 2003 Coordination E&J, 68 FR at 435.

10 American Crossroads states that incumbent Members of Congress who are
11 featured candidates for Federal office may convey information to American Crossroads
12 about their campaign plans, projects, activities, or needs in discussions about the Type 1
13 and Type 2 advertisements. If that information is conveyed through an interactive
14 exchange of views or information and is material to American Crossroads’ later creation,
15 production, or distribution of a communication, it will satisfy the conduct prong of the
16 coordinated communication test. Given that the Type 3 communications will contain
17 express advocacy and will be paid for by American Crossroads, they will also meet the
18 content and payment prongs of the coordinated communications test. As such, the Type
19 3 advertisements will be in-kind contributions by American Crossroads to the candidate.

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your
22 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
23 of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity which is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the
7 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
8 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
9 directly from the Commission's Advisory Opinion searchable database at
10 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission

1 ADVISORY OPINION 2011-23

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3 Thomas J. Josefiak, Esq.

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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).

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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 The proposed Type 1 advertisements are, according to American Crossroads,
9 “fully coordinated” with Federal candidates, and the advertisements are for the purpose
10 of influencing Federal elections. Thus, the advertisements are contributions under the
11 Act, 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 be “coordinated communications” 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. Colo. 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).

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. The regulatory “coordinated
5 communication” analysis is unnecessary here, because American Crossroads has stated
6 that the Type 1 advertisements will be fully coordinated with the candidates who appear
7 in them. Also, the ads are for the purpose of influencing a Federal election. On their
8 face, these advertisements meet the requirements of both 2 U.S.C. 431(8)(A)(i) and
9 441a(a)(7)(B).⁵ The Commission would be ignoring *Buckley* and its progeny on
10 independent speech if a candidate could write an advertisement script, appear in the
11 advertisement in advance of the election, and the Commission were to find those
12 communications were not “placed in cooperation with or with the consent of a
13 candidate.” *Buckley*, 424 U.S. at 46, n.53. The Commission cannot construe the Act,
14 which it is charged with enforcing, to reach a result that is so obviously contrary to the
15 Act's stated purpose.

16 Nothing in 11 CFR 109.21 precludes the Commission from applying 2 U.S.C.
17 431(8)(A)(i) and 2 U.S.C. 441a(a)(7)(B) to find that certain communications are in-kind
18 contributions under the Act in order to prevent circumvention of the Act's limits on
19

⁵ In these circumstances, as with the Type 1 advertisements described by American Crossroads, there is no need to analyze a communication's content, as required under 11 C.F.R. 109.21(c), because the communication is plainly for the purpose of influencing a federal election, and thus within the Commission's jurisdiction to regulate. See 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 contributions.⁶ To the contrary, the Commission is obligated to do so. *See FEC v.*
2 *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (agency may not
3 through rulemaking or adjudication construe a statute in a manner that is “inconsistent
4 with the statutory mandate or that frustrate[s] the policy that Congress sought to
5 implement”); *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (same); *see also id.* at
6 925 (striking down previous version of coordinated communication regulation as
7 inconsistent with goals of BCRA). Moreover, to conclude that these “fully coordinated”
8 communications are not contributions under the Act and our regulations would lead to an
9 “absurd result.” *Yankee Network v. F.C.C.*, 107 F.2d 212, 219 (D.C. Cir. 1939). And the
10 canons of statutory construction make clear that “absurd results are to be avoided.”
11 *United States v. Turkette*, 452 U.S. 576, 580 (1981).

12 For these reasons, the Commission concludes that the proposed Type 1
13 advertisements would be in-kind contributions under the Act. Accordingly, the Type 1
14 advertisements are subject to the prohibitions, limitations, and reporting obligations of
15 the Act and Commission regulations.⁷ American Crossroads, like all nonconnected

⁶ 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?”).

⁷ A political committee may contribute up to \$5,000 per election to a candidate committee. 2 U.S.C. 441a(a)(2)(A).

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

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

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

18 As explained above, an advertisement that is fully coordinated with a candidate
19 and made for the express purpose of influencing a Federal election is an in-kind
20 contribution under the Act. 2 U.S.C. 431(8)(A)(i) and 441a(a)(7)(B); *see Buckley*,
21 424 U.S. at 46 n.53. The proposed Type 2 advertisements, like the Type 1
22 advertisements, would feature an incumbent Member of Congress who also was
23 consulted on the script. American Crossroads concedes, moreover, that each

1 advertisement's purpose would be to "improve the public's perception of the featured
2 Member of Congress in advance of the 2012 campaign season." Therefore, each Type 2
3 advertisement would be an in-kind contribution.

4 Even if it were necessary to analyze the Type 2 advertisements under the
5 Commission's "coordinated communication" regulations, they would satisfy the content
6 prong under 11 CFR 109.21(c) because the proposed scripts are the functional equivalent
7 of express advocacy and would therefore meet all three prongs of the coordinated
8 communications test at 11 CFR 109.21.⁸ A communication is the functional equivalent of
9 express advocacy if it is "susceptible of no reasonable interpretation other than as an
10 appeal to vote for or against a clearly identified Federal candidate." 11 CFR
11 109.21(c)(5); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) ("*WRTL*");
12 *Citizens United*, 130 S. Ct. at 889-90. See Explanation and Justification for Final Rules
13 on Coordinated Communications, 75 FR 55947, 55952-53 (Sept. 15, 2010) ("2010
14 Coordination E&J"). To determine whether a communication is the functional equivalent
15 of express advocacy requires an objective evaluation of the communication as a whole
16 with limited reference to external events or contextual factors. See *WRTL*, 551 U.S. at
17 473-74; *Citizens United*, 130 S. Ct. at 889 ("the functional-equivalent test is objective").

18 The sample Type 2 advertisement bears "the indicia of express advocacy."
19 *WRTL*, 551 U.S. at 470. The sample advertisement focuses on a legislative issue and
20 takes a position on that issue through the featured candidate's on-screen promise to "stop

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

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

21 3. *If the Commission concludes that American Crossroads may produce and*
22 *distribute the advertisements described in either Question #1 or Question #2, without*
23 *those advertisements resulting in in-kind contributions to the featured incumbent*

1 *Members of Congress (who are also Federal candidates) pursuant to either 11 CFR*
2 *109.20 or 109.21, American Crossroads poses the following additional question: Would*
3 *producing and distributing such advertisements in any way limit the ability of American*
4 *Crossroads to subsequently produce and distribute an independent expenditure in*
5 *support of the same featured incumbent Member of or in opposition to an opponent of*
6 *that individual?*

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

18 A communication is a “coordinated communication” if the communication meets
19 all three prongs of the coordinated communication test: the payment prong, the content
20 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.⁹

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).

⁹ 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>.

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On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission