



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADVISORY OPINION 2011-23 (AMERICAN CROSSROADS)

STATEMENT OF VICE CHAIR CAROLINE C. HUNTER and COMMISSIONERS DONALD F. McGAHN and MATTHEW S. PETERSEN

Today, the Commission considered an advisory opinion request from American Crossroads. Among other questions, the requester asked whether, as an independent-expenditure only political committee, it could pay for and produce issue-focused television advertisements featuring federal candidates who are materially involved in its creation and production, but which do not meet any of the content standards of the Commission's coordinated communications regulations.

The regulation at issue, 11 C.F.R. §109.21, addresses how the Commission determines if a communication has been coordinated with a federal candidate so as to constitute an in-kind contribution. As the Commission explained in 2003, 11 CFR 109.21 was enacted to implement the Bipartisan Campaign Reform Act's mandate to address in particular the issue of coordination with respect to communications.¹ Specifically, it provides that "a communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication:

- (1) Is paid for, in whole or in part, by a person other than that candidate, authorized committee, or political party committee;
- (2) Satisfies at least one of the content standards in [109.21(c)]; and
- (3) Satisfies at least one of the conduct standards in [109.21(d)]."

Despite litigation, the Commission's three-pronged coordinated communications framework has never been invalidated. Nevertheless, our colleagues supported an answer (Draft D) that completely ignored this regulatory framework and, instead, purported to rely solely on the generic statutory provision at 2 U.S.C. § 441a(a)(7)(B) in isolation.² But as the Commission has already explained, 11 CFR 109.20 was enacted to implement 2 U.S.C. § 441a(a)(7)(B) with respect to "expenditures *that are not made for communications* but that are coordinated with a candidate, authorized committee, or political party committee."³ Thus, 11 CFR 109.21 is the only proper analytical framework to determine whether *communications* are coordinated.

As the Explanation and Justification for the latest coordination rulemaking explains, a proposal was advanced in the Notice of Proposed Rulemaking whereby a communication would be considered coordinated if there was "a formal or informal agreement between a candidate . . .

¹ Final Rules on Coordinated and Independent Expenditures, Explanation and Justification, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (emphasis added) ("2003 E&J").

² 2 U.S.C. § 441a(a)(7)(B) treats as contributions "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents."

³ 2003 E&J at 426.

and a person paying for a 'public communication,' as defined in 11 CFR 100.26. Under the proposal, either the agreement or the communication would have had to be made for the purpose of influencing a Federal election."⁴ The Commission rejected this so-called "Explicit Agreement" test because, while "it is possible ... that a candidate's supporter would explicitly state that communications are being coordinated for the purpose of influencing an election, most cases meeting the Explicit Agreement standard would require other proof demonstrating that the agreement or communication was made for the purpose of influencing an election. In such cases, the Commission would need to investigate and evaluate the parties' subjective intent, a task that the Supreme Court has cautioned against."⁵ In other words, the Commission rejected the Explicit Agreement standard categorically – even in circumstances where there may be *prima facie* evidence of an intent to influence an election, because the need to protect genuinely independent speech trumped the need for a rule covering explicit agreements on issue ads.

The Commission's approach to coordinated communications is not, and has not been, an open question, even before the latest rulemaking. In MUR 6037 (Merkley), the Commission confirmed this approach in a nearly identical enforcement matter. There, the Democratic Party of Oregon paid for and produced several television ads in which then-Senate candidate Jeff Merkley appeared and spoke at length. Despite the fact that "[t]he issues addressed in Merkley's press releases and DPO's ads overlap, the time frames are consistent and the ads contain similar messages," the Office of General Counsel recommended finding no reason to believe that Merkley or the state party had violated the Act's coordinated expenditure limits because the ads did not meet any of the content standards under the Commission's coordinated communications regulations.⁶ No Commissioner disagreed with that analysis.

In this advisory opinion request, however, our colleagues supported Draft D, contrary to Commission precedent such as MUR 6037 and revised regulations governing coordinated communications adopted just last year. Draft D's approach would subject any communication that discusses an issue to an FEC investigation. There would be no "safe" issue ad an independent group could run without having to prove it did not coordinate. Moreover, there are many reasons why candidates can and should work with outside groups on important issues or legislation.

We cannot ignore Commission regulations and reassert the so-called "Explicit Agreement" coordination standard that the Commission rejected in the rulemaking only a year ago, and disregard prior Commission enforcement matters. To do otherwise would be arbitrary, ad hoc, case-by-case decision-making, and would chill independent speech by outside groups and, for that matter, Federal candidates who wish to collaborate with those groups on genuine issue discussions.⁷

⁴ Final Rules on Coordinated Communications, Explanation & Justification, 75 Fed. Reg. 55974, 55956 (Sept. 15, 2010).

⁵ *Id.* at 55956-55957 (internal citations omitted).

⁶ MUR 6037 (Merkley), First General Counsel's Report at 11-13.

⁷ See, e.g., Democratic National Committee, "14 Months," available at http://www.youtube.com/watch?feature=player_embedded&v=KonTCnV2w60 (featuring footage of President Obama and advocating passage of the American Jobs Act).