November 23, 2011

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Anthony Herman
       General Counsel

       Rosemary C. Smith
       Associate General Counsel

       Amy L. Rothstein
       Assistant General Counsel

       Jessica Selinkoff
       Attorney

       Esther Heiden
       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
Dear Messrs. Josefiak and Bayes:

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

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

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

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

Advertisement Type 1

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

American Crossroads states that “[t]hese advertisements would be fully coordinated” with the candidate; American Crossroads plans to consult the featured candidate regarding the advertisement’s script and the candidate “would then appear in the advertisement.” American Crossroads “concedes” that its interactions with the
candidates appearing in these advertisements will meet one or more of the "conduct standards" in the coordinated communications regulations at 11 CFR 109.21(d)(1)-(3), but states that the advertisements will not meet any of the "content standards" at 11 CFR 109.21(c). Specifically, according to American Crossroads, these advertisements:

1. will be broadcast outside of any applicable electioneering communication windows;
2. will not contain express advocacy or the functional equivalent of express advocacy;
3. will not disseminate, distribute, or republish campaign materials; and
4. will not be distributed in the candidate’s jurisdiction within 90 days of the primary or general election in which the candidate is running.

*Advertisement Type 2*

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

In criticizing the positions of the featured candidate’s opponents, Type 2 advertisements will refer to the opponents by name only, and not as “candidates” or “opponents.” American Crossroads states that these advertisements will not impugn the character, qualifications, or fitness for office of any of the featured candidate’s declared
electoral opponents, although the advertisements may describe the positions taken by the opponents as "risky" or "dangerous," or use another similar term.

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

- I’m Jane Doe. I approve this message to stop any plan, Republican or Democrat, that raises your taxes.

- I’m John Doe. I approve this message to work against any proposal that adds to the budget deficit.

- I’m Jane Doe. I approved this message so that I could promise you that I’ll keep fighting to create jobs in [Member’s state].

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

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

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

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

Narrator: Jane Y would also raise your taxes.

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

Narrator: They’re just one and the same.

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

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

Questions Presented

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

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

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

Legal Analysis and Conclusions

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

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

American Crossroads states that it will pay for the Type 1 advertisements. These advertisements will therefore meet the payment prong of the coordinated communications test. American Crossroads further states that the Type 1 advertisements will “satisfy one 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).
American Crossroads states, however, that the Type 1 advertisements will not meet the content prong of the coordinated communication test. It asks the Commission to assume that the Type 1 advertisements will not be electioneering communications, as defined in 11 CFR 100.29; will not be broadcast in the featured candidate’s jurisdiction within 90 days of that candidate’s primary or general election; will not contain express advocacy or the functional equivalent of express advocacy; and will not disseminate, distribute or republish campaign materials. See 11 CFR 109.21(c).4

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

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

No, based on the sample script provided by American Crossroads, it may not produce and distribute Type 2 advertisements featuring Federal candidates and 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.
for election without making in-kind contributions to the featured candidates, because the
Type 2 advertisements are the functional equivalent of express advocacy and will meet
all three prongs of the coordinated communications test at 11 CFR 109.21.

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

American Crossroads states that the Type 2 advertisements will not meet three of
the five standards: the advertisements will not be electioneering communications, as
defined in 11 CFR 100.29; they will not be broadcast in the candidate’s jurisdiction
within 90 days of that candidate’s primary or general election; and they will not
disseminate, distribute, or republish campaign materials. See 11 CFR 109.21(c)(1), (2),
and (4). The Commission therefore needs to consider only whether the proposed
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.
advertisements are either the functional equivalent of express advocacy or expressly advocate the election or defeat of a clearly identified candidate for Federal office. 11 CFR 109.21(c)(3) and (5). A communication is the functional equivalent of express advocacy if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 11 CFR 109.21(c)(5). In applying the functional equivalent of express advocacy content standard, the Commission follows the Supreme Court’s reasoning and application of the test as set forth in the Court’s controlling opinion in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) ("WRTL"), and in *Citizens United v. FEC*, 130 S. Ct. 876, 889-90 (2010). See Explanation and Justification for Final Rules on Coordinated Communications, 75 FR 55947, 55952-53 (Sept. 15, 2010) ("2010 Coordination E&J").

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

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

Instead, the Commission's analysis considers whether an advertisement contains
the "indicia of express advocacy" or is a "genuine issue ad." \textit{WRTL}, 551 U.S. at 470. In
the controlling opinion in \textit{WRTL}, Chief Justice Roberts noted the advertisements at issue
were "genuine issue ads" because the advertisements "focus on a legislative issue, take a
position on the issue, exhort the public to adopt that position, and urge the public to
contact public officials with respect to the matter.” WRTL, 551 U.S. at 470. In addition, Chief Justice Roberts noted the content of the advertisements in WRTL lacked “indicia of express advocacy” because they “do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.” Id.

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

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

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

The sample Type 2 advertisement bears “the indicia of express advocacy.” Id. at 470. It is “in essence” an advertisement that urges viewers to vote for the featured candidate and against any of that candidate’s opponents. The sample advertisement focuses on a legislative issue and takes a position on that issue through the featured candidate’s on-screen promise to “stop any plan, from either side that raises your taxes or
burdens your children with more debt." The Type 2 advertisement then casts the featured candidate's position in stark opposition to the position of her declared opponents.

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

The script's similarity with the "Jane Doe" advertisement is laid bare by its criticism of the featured candidate's opponent Jane Y. The advertisement script notes that "Jane Y would also raise your taxes." But because Jane Y is not a current officeholder, she could raise taxes only if she were elected to the public office for which she is the declared opponent to the featured candidate. The sample Type 2 advertisement, like the Jane Doe advertisement, contains no exhortation for viewers to address the condemned position, except, implicitly, by casting their votes against the candidate holding those positions. Thus, the unmistakable "essence" of the message of the advertisement is that viewers should reject not only certain tax plans, but reject Jane Y and the other challenger "politicians," as the advertisement calls them, as well, in favor of the featured candidate.
To be sure, the sample advertisement does not include all of the “indicia of express advocacy” identified by the controlling opinion in *WRTL*; it does not mention explicitly an election or candidacy or take a position on any candidate’s character, qualifications, accomplishments, or fitness for office. But the discussion of the featured candidate’s opponents renders the Type 2 advertisement susceptible of no reasonable interpretation other than as an appeal to vote for the featured candidate and against any of that candidate’s opponents. The sample advertisement not only mentions a “challenger,” but mentions several challengers and characterizes those challengers as “one and the same.” The advertisement then puts the following words on screen: “Dangerous Plans for Families.” Although this characterization is ostensibly about the opponents’ position on an issue, it is at the core electoral. While the incumbent featured candidate promises to “stop any plan,” “work against any proposal,” and “keep fighting to create jobs,” the non-incumbent challengers can only be “dangerous” if elected.

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

For these reasons, the Commission concludes that the proposed Type 2 advertisement is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate. As such, it is the functional
Because the proposed Type 2 advertisement is the functional equivalent of express advocacy, it satisfies the content prong of the coordinated communication test at 11 CFR 109.21(c)(5). Given that American Crossroads asks the Commission to assume that the payment and conduct prongs are also satisfied, these advertisements will therefore constitute coordinated communications and will be in-kind contributions to the featured candidates.

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

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

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

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

The specific information conveyed from the candidate to American Crossroads in
the course of their prior discussions – in certain circumstances – could result in the
communication meeting one of the five conduct standards. But the mere fact that the
candidate had prior discussions and coordinated with American Crossroads on its
previous advertisements would not by itself automatically render subsequent
communications coordinated. Rather, the facts regarding each communication would
need to be considered to determine if a particular communication met the conduct prong.
The conduct prong of the coordinated communication test is met when a candidate or a candidate’s authorized committee is materially involved in certain decisions about a public communication. 11 CFR 109.21(d)(2). The “material involvement” conduct standard requires the candidate’s involvement in decisions about: (1) the content of the communication; (2) the intended audience for the communication; (3) the means or mode of the communication; (4) the specific media outlet used for the communication; (5) the timing or frequency of the communication; or (6) the size or prominence of a printed communication, or the duration of a communication by means of broadcast, cable, or satellite. Id.

A candidate or a candidate’s authorized committee is “materially involved” in these decisions when the candidate or the authorized committee shares information about campaign “plans, projects, activities, or needs” with the person making the communication and this information is material to the decisions about the communication. 2003 Coordination E&J, 68 FR at 434. Although the “material involvement” standard would not be satisfied, for example, by a speech made by a candidate to the general public, it would be satisfied by remarks that a candidate addressed specifically to a select audience, some of whom later create, produce, or distribute public communications. Id. Moreover, the candidate’s involvement need not be traced directly to one specific communication; a candidate’s involvement is material to a decision regarding a communication if that communication is one of several communications and the candidate was materially involved in decisions regarding the strategy, such as the content, timing, or audience, of the communications. Id.
American Crossroads states that incumbent Members of Congress who are featured candidates for Federal office may convey information to American Crossroads about their campaign plans, projects, activities, or needs in discussions about the Type 1 and Type 2 advertisements. If American Crossroads later uses that information in making decisions about the content, means, mode, timing, duration, intended audience, frequency of, or specific media outlet used in connection with a Type 3 communication, it will satisfy the conduct prong of the coordinated communication test. Given that the Type 3 communications will contain express advocacy and will be paid for by American Crossroads, they therefore will also meet the content and payment prongs of the coordinated communications test. As such, the Type 3 advertisements will be in-kind contributions by American Crossroads to the candidate.

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

American Crossroads states that incumbent Members of Congress who are featured candidates for Federal office may convey information to American Crossroads about their campaign plans, projects, activities, or needs in discussions about the Type 1
and Type 2 advertisements. If that information is conveyed through an interactive

exchange of views or information and is material to American Crossroads’ later creation,

production, or distribution of a communication, it will satisfy the conduct prong of the

coordinated communication test. Given that the Type 3 communications will contain

express advocacy and will be paid for by American Crossroads, they will also meet the

content and payment prongs of the coordinated communications test. As such, the Type

3 advertisements will be in-kind contributions by American Crossroads to the candidate.

This response constitutes an advisory opinion concerning the application of the

Act and Commission regulations to the specific transaction or activity set forth in your

request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any

of the facts or assumptions presented, and such facts or assumptions are material to a

conclusion presented in this advisory opinion, then the requestor may not rely on that

conclusion as support for its proposed activity. Any person involved in any specific

transaction or activity which is indistinguishable in all its material aspects from the

transaction or activity with respect to which this advisory opinion is rendered may rely on

this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or

conclusions in this advisory opinion may be affected by subsequent developments in the

law including, but not limited to, statutes, regulations, advisory opinions, and case law.

On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission
Dear Messrs. Josefiak and Bayes:

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

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

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

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

Advertisement Type 1

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

American Crossroads states that “[t]hese advertisements would be fully coordinated” with the candidate; American Crossroads plans to consult the featured candidate regarding the advertisement’s script and the candidate “would then appear in the advertisement.” American Crossroads “concedes” that its interactions with the
candidates appearing in these advertisements will meet one or more of the “conduct standards” in the coordinated communications regulations at 11 CFR 109.21(d)(1)-(3), but states that the advertisements will not meet any of the “content standards” at 11 CFR 109.21(c). Specifically, according to American Crossroads, these advertisements:

1. will be broadcast outside of any applicable electioneering communication windows;
2. will not contain express advocacy or the functional equivalent of express advocacy;
3. will not disseminate, distribute, or republish campaign materials; and
4. will not be distributed in the candidate’s jurisdiction within 90 days of the primary or general election in which the candidate is running.

*Advertisement Type 2*

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

In criticizing the positions of the featured candidate’s opponents, Type 2 advertisements will refer to the opponents by name only, and not as “candidates” or “opponents.” American Crossroads states that these advertisements will not impugn the character, qualifications, or fitness for office of any of the featured candidate’s declared
electoral opponents, although the advertisements may describe the positions taken by the opponents as “risky” or “dangerous,” or use another similar term.

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

- I’m Jane Doe. I approve this message to stop any plan, Republican or Democrat, that raises your taxes.

- I’m John Doe. I approve this message to work against any proposal that adds to the budget deficit.

- I’m Jane Doe. I approved this message so that I could promise you that I’ll keep fighting to create jobs in [Member’s state].

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

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

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

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

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

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

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

*[on screen: Dangerous Plans For Families]*
Mary A [speaking on camera]: “I’m Mary A. I approve this message to stop any plan, from either side, that raises your taxes or burdens your children with more debt.”

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

Questions Presented

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

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

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

Legal Analysis and Conclusions

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

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

American Crossroads states that it will pay for the Type 1 advertisements. These
advertisements will therefore meet the payment prong of the coordinated communications
test. American Crossroads further states that the Type 1 advertisements will “satisfy one
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).
American Crossroads states, however, that the Type 1 advertisements will not meet the content prong of the coordinated communication test. It asks the Commission to assume that the Type 1 advertisements will not be electioneering communications, as defined in 11 CFR 100.29; will not be broadcast in the featured candidate’s jurisdiction within 90 days of that candidate’s primary or general election; will not contain express advocacy or the functional equivalent of express advocacy; and will not disseminate, distribute or republish campaign materials. See 11 CFR 109.21(c).

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

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

Yes, based on the sample script provided by American Crossroads, it may 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.
comparing and contrasting their positions with the positions of their declared opponents for election without making in-kind contributions to the featured candidates, because the Type 2 advertisements are neither express advocacy nor the functional equivalent of express advocacy and therefore will not meet all three prongs of the coordinated communications test at 11 CFR 109.21.

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

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

---

6 See also 2 U.S.C. 434(f)(3).
advertisements will meet one of the two remaining content standards because the
advertisements are either the functional equivalent of express advocacy or expressly
advocate the election or defeat of a clearly identified candidate for Federal office.

11 CFR 109.21(c)(3) and (5).7

Express Advocacy

A communication may expressly advocate the election or defeat of a Federal
candidate by using phrases — such as “vote for,” “re-elect,” “defeat,” or “reject” — or
campaign slogans “which in context can have no other reasonable meaning than to urge
the election or defeat of one or more clearly identified candidate(s).” 11 CFR 100.22(a).

This is sometimes referred to as “magic words” express advocacy. See McConnell v.
FEC, 540 U.S. 93, 126 (2003) (citing Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976)).

A communication may also constitute express advocacy:

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

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

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

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

\textit{Functional Equivalent of Express Advocacy}

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

---

\textsuperscript{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.

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

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

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

Conversely, in finding that the communication at issue in Citizens United had no reasonable interpretation other than as an appeal to vote against then-Senator Hillary Clinton for president, the Court noted that the communication “would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency . . . the thesis of the film is that she is unfit for the 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.
Clinton] is ‘the most qualified to hit the ground running if elected President’” and reminds viewers “that ‘a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House.’” 130 S. Ct. at 890.

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

Although the sample script does not contain an explicit exhortation urging viewers to contact any public officials regarding the legislative issue, neither the *WRTL* nor *Citizens United* decisions identified this factor as being a necessary predicate in determining that a communication is susceptible of a reasonable interpretation other than an appeal to vote for or against a specific candidate. Moreover, although the sample script mentions individuals who are Federal candidates other than the featured candidate – none of whom is identified as such – the advertisement could be understood as an attempt to persuade those individuals to abandon their position on raising taxes, consistent with the advertisement’s overall theme of turning public opinion against tax increases.
For these reasons, the Commission concludes that the proposed Type 2 advertisement is “susceptible of [a] . . . reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate,” and thus is not the functional equivalent of express advocacy. See 11 CFR 109.21(c)(5). Because the proposed Type 2 advertisement is neither express advocacy nor the functional equivalent of express advocacy, it does not satisfy the content prong of the coordinated communication test at 11 CFR 109.21(c)(5). Consequently, Type 2 advertisements do not meet all three prongs of the coordination test, will not be coordinated communications under 11 CFR 109.21, and will not be in-kind contributions.  

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

As noted, a communication is coordinated with a candidate if the communication meets all three prongs of the coordinated communication test: the payment prong, the content prong, and the conduct prong. 11 CFR 109.21. The analysis of the payment prong and relevant content prong standards are set forth in the answers to Questions 1 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.
To meet the third prong of the test – the conduct prong – a communication must also meet one of the five conduct standards: (1) the communication is made at the request or suggestion of a candidate, candidate’s authorized committee, or political party committee; (2) a candidate, candidate’s authorized committee, or political party committee is materially involved in certain decisions regarding the production and distribution of the communication; (3) the communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication and the clearly identified candidate or the candidate’s opponent, the candidate’s authorized committee or the opponent’s authorized committee, or a political party committee; (4) the communication is made using certain information obtained from a vendor that has previously provided certain services to the candidate or the candidate’s opponent, the authorized committee of either, or a political party committee; and (5) the communication is made using certain information obtained from a former employee or independent contractor of the candidate or candidate’s opponent, the authorized committee of either, or a political party committee. 11 CFR 109.21(d)(1)-(5). A communication may be a “coordinated communication” even if there is no agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, or the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee. 11 CFR 109.21(e).

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

The conduct prong of the coordinated communication test is met when a candidate or a candidate’s authorized committee is materially involved in certain decisions about a public communication. 11 CFR 109.21(d)(2). The “material involvement” conduct standard requires the candidate’s involvement in decisions about:

1. the content of the communication;
2. the intended audience for the communication;
3. the means or mode of the communication;
4. the specific media outlet used for the communication;
5. the timing or frequency of the communication; or
6. the size or prominence of a printed communication, or the duration of a communication by means of broadcast, cable, or satellite. Id.

Although the “material involvement” standard would not be satisfied, for example, by a speech made by a candidate to the general public, it would be satisfied by remarks that a candidate addressed specifically to a select audience, some of whom later create, produce, or distribute public communications. 2003 Coordination E&J, 68 FR at 434. Moreover, the candidate’s involvement need not be traced directly to one specific communication; a candidate’s involvement is material to a decision regarding a communication if that communication is one of several communications and the candidate was materially involved in decisions regarding the strategy, such as the content, timing, or audience, of the several communications. Id. For example, if a candidate is
materially involved in the content or timing of a 10-part advertising campaign, then each of the 10 communications is considered coordinated. *Id.*

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

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

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

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.
The cited advisory opinions are available on the Commission’s website, www.fec.gov, or
directly from the Commission’s Advisory Opinion searchable database at

On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission
Dear Messrs. Josefiak and Bayes:

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

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

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

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

Advertisement Type 1

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

American Crossroads states that “[t]hese advertisements would be fully coordinated” with the candidate; American Crossroads plans to consult the featured candidate regarding the advertisement’s script and the candidate “would then appear in the advertisement.” American Crossroads “concedes” that its interactions with the
candidates appearing in these advertisements will meet one or more of the “conduct standards” in the coordinated communications regulations at 11 CFR 109.21(d)(1)-(3), but states that the advertisements will not meet any of the “content standards” at 11 CFR 109.21(c). Specifically, according to American Crossroads, these advertisements:

1. will be broadcast outside of any applicable electioneering communication windows;
2. will not contain express advocacy or the functional equivalent of express advocacy;
3. will not disseminate, distribute, or republish campaign materials; and
4. will not be distributed in the candidate’s jurisdiction within 90 days of the primary or general election in which the candidate is running.

*Advertisement Type 2*

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

In criticizing the positions of the featured candidate’s opponents, Type 2 advertisements will refer to the opponents by name only, and not as “candidates” or “opponents.” American Crossroads states that these advertisements will not impugn the character, qualifications, or fitness for office of any of the featured candidate’s declared
electoral opponents, although the advertisements may describe the positions taken by the opponents as "risky" or "dangerous," or use another similar term.

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

- I'm Jane Doe. I approve this message to stop any plan, Republican or Democrat, that raises your taxes.

- I'm John Doe. I approve this message to work against any proposal that adds to the budget deficit.

- I'm Jane Doe. I approved this message so that I could promise you that I'll keep fighting to create jobs in [Member’s state].

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

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

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

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

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

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

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

*[on screen: Dangerous Plans For Families]*
Mary A [speaking on camera]: “I’m Mary A. I approve this message to stop any plan, from either side, that raises your taxes or burdens your children with more debt.”

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

Questions Presented

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

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

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

Legal Analysis and Conclusions

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

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

American Crossroads states that it will pay for the Type 1 advertisements. These advertisements will therefore meet the payment prong of the coordinated communications test. American Crossroads further states that the Type 1 advertisements will “satisfy one 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).
American Crossroads states, however, that the Type 1 advertisements will not meet the content prong of the coordinated communication test. It asks the Commission to assume that the Type 1 advertisements will not be electioneering communications, as defined in 11 CFR 100.29; will not be broadcast in the featured candidate’s jurisdiction within 90 days of that candidate’s primary or general election; will not contain express advocacy or the functional equivalent of express advocacy; and will not disseminate, distribute or republish campaign materials. See 11 CFR 109.21(c).\

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

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

Yes, based on the sample script provided by American Crossroads, it may produce and distribute Type 2 advertisements featuring Federal candidates and 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.
for election without making in-kind contributions to the featured candidates, because the
Type 2 advertisements are neither express advocacy nor the functional equivalent of
express advocacy and therefore will not meet all three prongs of the coordinated
communications test at 11 CFR 109.21.

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

American Crossroads states that the Type 2 advertisements will not meet three of
the five standards: the advertisements will not be electioneering communications, as
defined in 11 CFR 100.29; they will not be broadcast in the candidate’s jurisdiction
within 90 days of that candidate’s primary or general election; and they will not
disseminate, distribute, or republish campaign materials.7 See 11 CFR 109.21(c)(1), (2),
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.
advertisements will meet one of the two remaining content standards because the
advertisements are either the functional equivalent of express advocacy or expressly
advocate the election or defeat of a clearly identified candidate for Federal office.

11 CFR 109.21(c)(3) and (5).

Express Advocacy

A communication may expressly advocate the election or defeat of a Federal
candidate by using phrases — such as “vote for,” “re-elect,” “defeat,” or “reject” — or
campaign slogans “which in context can have no other reasonable meaning than to urge
the election or defeat of one or more clearly identified candidate(s).” 11 CFR 100.22(a).

This is sometimes referred to as “magic words” express advocacy. See McConnell v.
FEC, 540 U.S. 93, 126 (2003) (citing Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976)).

A communication may also constitute express advocacy:

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

1. The electoral portion of the communication is unmistakable,
unambiguous, and suggestive of only one meaning; and

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

11 CFR 100.22(b).

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

Functional Equivalent of Express Advocacy

The Type 2 advertisement also is not the functional equivalent of express advocacy. A communication is the functional equivalent of express advocacy if it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.” 11 CFR 109.21(c)(5). In applying the functional 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).
Court’s reasoning and application of the test as set forth in the Court’s controlling
and in *Citizens United v. FEC*, 130 S. Ct. 876, 889-90 (2010). See Explanation and
Justification for Final Rules on Coordinated Communications, 75 FR 55947, 55952-53

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

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

(emphasis added). Thus, even if American Crossroads' subjective intent in producing
and distributing the Type 2 advertisements is to “improve the public’s perception of the
featured candidate in advance of the 2012 campaign season,” this subjective intent is not
relevant to the Commission’s analysis of the advertisements. 11

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

On balance, the Commission concludes that the sample Type 2 advertisement is
not the functional equivalent of express advocacy. The content of the advertisement is
consistent with a genuine issue advertisement. It focuses on a legislative issue and takes
a position on that issue through the featured candidate’s on-screen promise to “stop any
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.
Although the sample Type 2 advertisement does not have some of the content identified in *WRTL* as consistent with a genuine issue advertisement – such as exhorting the public to adopt a position or take an action on an issue, or urging the public to contact public officials on an issue – it does not have many of the indicia of express advocacy identified by the controlling opinion in *WRTL*. *See* *WRTL*, 551 U.S. at 470. For example, it does not mention an election or candidacy, or take a position on any candidate’s character, qualifications, accomplishments, or fitness for office. In a debatable case, the tie goes to the speaker.

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

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

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

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

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

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

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

American Crossroads states that incumbent Members of Congress who are
featured candidates for Federal office may convey information to American Crossroads
about their campaign plans, projects, activities, or needs in discussions about the Type 1
and Type 2 advertisements. If American Crossroads later uses that information in
making decisions about the content, means, mode, timing, duration, intended audience,
frequency of, or specific media outlet used in connection with a Type 3 communication,
it will satisfy the conduct prong of the coordinated communication test. Given that the
Type 3 communications will contain express advocacy and will be paid for by American
Crossroads, they therefore will also meet the content and payment prongs of the
coordinated communications test. As such, the Type 3 advertisements will be in-kind
contributions by American Crossroads to the candidate.
Alternatively, the conduct prong of the coordinated communication test is met after one or more “substantial” discussions about the communication between the person paying for the communication and the candidate clearly identified in the communication or that candidate’s authorized committee. 11 CFR 109.21(d)(3). A discussion is “substantial” if information about the candidate’s “plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.” Id. The word “discuss” is given its plain and ordinary meaning, which “the Commission understands to mean an interactive exchange of views or information.” 2003 Coordination E&J, 68 FR at 435.

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

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


On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission
Dear Messrs. Josefiak and Bayes:

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

The Commission concludes that an advertisement intended to improve the public’s perception of a candidate for Congress in the upcoming Federal election, which is paid for by a person other than the candidate or the candidate’s authorized committee and both features and is otherwise fully coordinated with the candidate (with or without reference to the candidate’s opponent[s]), would constitute an in-kind contribution to the candidate, subject to the limitations, prohibitions, and reporting requirements of the Act and Commission regulations. This is true even if the communication does not meet the content prong of the Commission’s regulatory definition of “coordinated communication” at 11 C.F.R. 109.21(c), as American Crossroads asks the Commission to assume for purposes of this Advisory Opinion. Nothing in that or any other part of section 109.21 was intended to forestall application of the statutory definition of “contribution” in cases such as those posited by American Crossroads, where the statutory definition plainly applies.
The Commission also concludes that American Crossroads’ discussions with candidates in connection to its production of the initial advertisements American Crossroads describes will not automatically cause all subsequent advertisements by American Crossroads in support of those candidates or in opposition to their opponents to be coordinated communications under the Commission’s regulations. If, however, American Crossroads uses information obtained during those prior discussions in its subsequent advertisements, then those subsequent advertisements will meet the conduct prong of the coordinated communications test.

Background

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

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

Advertisement Type 1

The first type of advertisement that American Crossroads plans to produce will show on-camera footage of, or voice-overs by, incumbent Members of Congress who are candidates in the 2012 election. These “Type 1 advertisements” will feature a candidate speaking about one or more legislative or policy issues that will likely be debated and discussed in that candidate’s upcoming re-election campaign. For example, if a candidate’s campaign website focuses on job creation as a signature issue, American
Crossroads would run an advertisement that shows the candidate discussing job creation. The purpose of the advertisements will be to improve the public’s perception of the featured candidate in advance of the 2012 campaign season.

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

**Advertisement Type 2**

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

In criticizing the positions of the featured candidate’s opponents, Type 2 advertisements will refer to the opponents by name only, and not as “candidates” or “opponents.” American Crossroads states that these advertisements will not impugn the character, qualifications, or fitness for office of any of the featured candidate’s declared electoral opponents, although the advertisements may describe the positions taken by the
opponents as “risky” or “dangerous,” or use another similar term.¹

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

- I’m Jane Doe. I approve this message to stop any plan, Republican or Democrat, that raises your taxes.

- I’m John Doe. I approve this message to work against any proposal that adds to the budget deficit.

- I’m Jane Doe. I approved this message so that I could promise you that I’ll keep fighting to create jobs in [Member’s state].

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

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

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

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

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

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

---

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).
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.”

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,”² 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

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

Questions Presented

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

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

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

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

The proposed Type 1 advertisements are, according to American Crossroads, “fully coordinated” with Federal candidates, and the advertisements are for the purpose of influencing Federal elections. Thus, the advertisements are contributions under the Act, and subject to the limitations, prohibitions, and reporting obligations of the Act. The Commission would treat the Type 1 advertisements as contributions regardless of whether they would be “coordinated communications” under 11 CFR 109.21.

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

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

• If the incumbent’s campaign website (not their office holder’s website) features a “signature issue,” the advertisement “would also feature that Member discussing” that issue or proposed reforms related to that issue;

• Each Member “would be consulted on the advertisement script;” and

• The proposed advertisements may also include phrases or slogans that the Member previously used.

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

The Act defines “contribution” to include “any gift, subscription, loan, advance, or deposit 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(8)(A)(i) (emphasis added). The proposed ads both provide the featured Member of Congress something “of value” and are for the purpose of influencing an election for Federal office, and thus meet the statutory test under 2 U.S.C. 431(8)(A)(i). While truly independent speech may not always benefit a candidate’s campaign, the same cannot be said for speech that is “fully
coordinated with incumbent Members of Congress facing re-election in 2012.” See Cao
v. FEC, 619 F.3d 410, 433 (5th Cir. 2010) (en banc) (coordination ensures that message
“virtually always works in the candidate’s favor”). Moreover, the timing, the narrow
focus only on incumbent Members of Congress who are candidates for re-election, and
the stated goal to “improve the public’s perception of the featured Member” (as opposed
to, for example, effectuating legislative change), leave no doubt that the proposed
advertisements are for the purpose of influencing Federal elections. American
Crossroads’ representations, taken together, demonstrate that the proposed
advertisements would provide something “of value,” and are for the purpose of
influencing a Federal election, and thus are contributions under the Act.

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

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

Here, American Crossroads has stated that the Type 1 advertisements will be “fully coordinated” with the candidates who appear in them and who will also help craft their scripts. The Fifth Circuit, sitting en banc, recently found that coordination under 2 U.S.C. 441a(a)(7)(B) was present based merely on the candidate having had *awareness* of an advertisement’s content, along with the opportunity to provide input solely as to timing. *See Cao*, 619 F.3d at 433. Moreover, the court relied on the candidate and party’s admissions to find coordination without application of the Commission’s “coordinated communication” regulations. *Id.* at 430, 430 n.26. As in *Cao*, the facts
presented here by American Crossroads leave no doubt that the statutory test has been satisfied.

This is true regardless of whether the proposed Type 1 advertisements would meet the test for "coordinated communications" under the Commission's regulations.

Even if (as American Crossroads has asked the Commission to assume) an advertisement is not a "coordinated communication" as that term is defined in the Commission's regulations, it may still be an in-kind contribution under the Act. While the coordinated communications regulation provides an important tool to allow the Commission to determine whether certain communications are in-kind contributions, the coordination rules do not constitute the entire universe of potential in-kind contributions. The Supreme Court views coordination on a spectrum, at one end of which the payor simply pays the candidate's bills. See Colorado II, 533 U.S. at 444-45. Such an expenditure is always an in-kind contribution, even if it involves a communication that is not a "coordinated communication" as set forth at 11 CFR 109.21. Thus, if a third party simply paid a candidate's bill for a media advertisement, such payment would constitute a contribution under the Act. 2 U.S.C. 441a(a)(7)(B)(i). Similarly, if advertisement services or space were provided to a candidate at less than the usual and normal rates, that discount would constitute an in-kind contribution, as it provides something of value to the candidate's campaign. 11 CFR 100.52(d)(1). Additionally, the Act treats republication of a campaign's materials, in whole or in part, as a coordinated expenditure. 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.
Under the facts as set forth by American Crossroads, the Act requires American
Crossroads’ expenditures for each Type 1 advertisement to be classified as a contribution
– no less than it would if American Crossroads simply paid the bill for advertising
produced by the candidate him or herself or their campaign. The regulatory “coordinated
communication” analysis is unnecessary here, because American Crossroads has stated
that the Type 1 advertisements will be fully coordinated with the candidates who appear
in them. Also, the ads are for the purpose of influencing a Federal election. On their
face, these advertisements meet the requirements of both 2 U.S.C. 431(8)(A)(i) and
441a(a)(7)(B). The Commission would be ignoring Buckley and its progeny on
independent speech if a candidate could write an advertisement script, appear in the
advertisement in advance of the election, and the Commission were to find those
communications were not “placed in cooperation with or with the consent of a
candidate.” Buckley, 424 U.S. at 46, n.53. The Commission cannot construe the Act,
which it is charged with enforcing, to reach a result that is so obviously contrary to the
Act’s stated purpose.

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

---

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).
contributions. To the contrary, the Commission is obligated to do so. See FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981) (agency may not through rulemaking or adjudication construe a statute in a manner that is "inconsistent with the statutory mandate or that frustrate[s] the policy that Congress sought to implement"); Shays v. FEC, 528 F.3d 914, 925 (D.C. Cir. 2008) (same); see also id. at 925 (striking down previous version of coordinated communication regulation as inconsistent with goals of BCRA). Moreover, to conclude that these "fully coordinated" communications are not contributions under the Act and our regulations would lead to an "absurd result." Yankee Network v. F.C.C., 107 F.2d 212, 219 (D.C. Cir. 1939). And the canons of statutory construction make clear that "absurd results are to be avoided."

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

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

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

As explained above, an advertisement that is fully coordinated with a candidate and made for the express purpose of influencing a Federal election is an in-kind contribution under the Act. 2 U.S.C. 431(8)(A)(i) and 441a(a)(7)(B); see Buckley, 424 U.S. at 46 n.53. The proposed Type 2 advertisements, like the Type 1 advertisements, would feature an incumbent Member of Congress who also was consulted on the script. American Crossroads concedes, moreover, that each
advertisement’s purpose would be to “improve the public’s perception of the featured
Member of Congress in advance of the 2012 campaign season.” Therefore, each Type 2
advertisement would be an in-kind contribution.

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

The sample Type 2 advertisement bears “the indicia of express advocacy.”

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

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

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

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

A communication is a “coordinated communication” if the communication meets all three prongs of the coordinated communication test: the payment prong, the content prong, and the conduct prong. 11 CFR 109.21. If American Crossroads pays for a public
communication containing express advocacy, the payment and content prongs would be met.\(^9\)

To meet the third prong of the test – the conduct prong – a communication must also meet one of the five conduct standards: (1) the communication is made at the request or suggestion of a candidate, candidate’s authorized committee, or political party committee; (2) a candidate, candidate’s authorized committee, or political party committee is materially involved in certain decisions regarding the production and distribution of the communication; (3) the communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication and the clearly identified candidate or the candidate’s opponent, the candidate’s authorized committee or the opponent’s authorized committee, or a political party committee; (4) the communication is made using certain information obtained from a vendor that has previously provided certain services to the candidate or the candidate’s opponent, the authorized committee of either, or a political party committee; or (5) the communication is made using certain information obtained from a former employee or independent contractor of the candidate or candidate’s opponent, the authorized committee of either, or a political party committee. 11 CFR 109.21(d)(1)-(5). A communication may be a “coordinated communication” even if there is no agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, or the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized 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.
The specific information conveyed from the candidate to American Crossroads in the course of their prior discussions – in certain circumstances – could result in the communication meeting one of the five conduct standards. The facts regarding each communication would need to be considered to determine if a particular communication met the conduct prong.

The conduct prong of the coordinated communication test is met when a candidate or a candidate’s authorized committee is materially involved in certain decisions about a public communication. 11 CFR 109.21(d)(2). The “material involvement” conduct standard requires the candidate’s involvement in decisions about:

1. the content of the communication;
2. the intended audience for the communication;
3. the means or mode of the communication;
4. the specific media outlet used for the communication;
5. the timing or frequency of the communication; or
6. the size or prominence of a printed communication, or the duration of a communication by means of broadcast, cable, or satellite. *Id.*

A candidate or a candidate’s authorized committee is “materially involved” in these decisions when the candidate or the authorized committee shares information about campaign “plans, projects, activities, or needs” with the person making the communication and this information is material to the decisions about the communication. See Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 FR 421, 434 (Jan. 3, 2003) (“2003 Coordination E&J”).

Although the “material involvement” standard would not be satisfied, for example, by a speech made by a candidate to the general public, it would be satisfied by remarks that a candidate addressed specifically to a select audience, some of whom later create,
produce, or distribute public communications. *Id.* Moreover, the candidate’s involvement need not be traced directly to one specific communication; a candidate’s involvement is material to a decision regarding a communication if that communication is one of several communications and the candidate was materially involved in decisions regarding the strategy, such as the content, timing, or audience, of the communications. *Id.*

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

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

is given its plain and ordinary meaning, which “the Commission understands to mean an

interactive exchange of views or information.” 2003 Coordination E&J, 68 FR at 435.

American Crossroads states that incumbent Members of Congress who are

featured candidates for Federal office may convey information to American Crossroads

about their campaign plans, projects, activities, or needs in discussions about the Type 1

and Type 2 advertisements. If these discussions are material to American Crossroads’

later creation, production, or distribution of a communication, that will satisfy the

conduct prong of the coordinated communication test. Given that the Type 3

communications will contain express advocacy and will be paid for by American

Crossroads, they will also meet the content and payment prongs of the coordinated

communications test. As such, the Type 3 advertisements will be treated as in-kind

contributions by American Crossroads to the candidate.

This response constitutes an advisory opinion concerning the application of the

Act and Commission regulations to the specific transaction or activity set forth in your

request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any

of the facts or assumptions presented, and such facts or assumptions are material to a

conclusion presented in this advisory opinion, then the requestor may not rely on that

conclusion as support for its proposed activity. Any person involved in any specific

transaction or activity which is indistinguishable in all its material aspects from the

transaction or activity with respect to which this advisory opinion is rendered may rely on

this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.


On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission