

1 **FEDERAL ELECTION COMMISSION**
2
3 **FIRST GENERAL COUNSEL’S REPORT**
4

5 MUR: 6696R
6 DATE COMPLAINT FILED: November 15, 2012;
7 April 24, 2013 (Amended)¹
8 DATE OF NOTIFICATION: November 28, 2012;
9 April 26, 2013 (Amended)
10 DATE OF LAST RESPONSE: August 17, 2018
11 DATE REMANDED: August 3, 2018
12

13 ELECTION CYCLE: 2012
14 EXPIRATION OF SOL: January 31, 2018
15

16 **COMPLAINANTS:** Citizens for Responsibility and Ethics in Washington
17 Melanie Sloan
18 Nicholas Mezlak
19

20 **RESPONDENT:** Crossroads Grassroots Policy Strategies²
21

22 **RELEVANT STATUTE** 52 U.S.C. § 30104(c)
23 **AND REGULATION:** 11 C.F.R. § 109.10
24

25 **INTERNAL REPORTS CHECKED:** Disclosure Reports
26

AGENCIES CHECKED: None

¹ CREW amended its original complaint on April 24, 2013, to substitute the name of one of the individual complainants; the substance of the complaint did not change. Consistent with the district court’s opinion, the citations to the complaint in this report refer to the Amended Complaint. Further, the respondents received notification of the amended complaint and, on May 14, 2013, Crossroads GPS filed a short response merely noting that the amended complaint presented no additional information or allegations. The citations to the Response in this report refer to Crossroad GPS’ response to the original complaint, filed on January 17, 2013. Crossroads GPS also filed a supplemental response on August 17, 2018, addressing the district court’s remand. Citations to the Supplemental Response refer to this August 2018 filing.

² Several individuals associated with Crossroads GPS—Steven Law, Karl Rove, Haley Barbour, and Caleb Crosby— were also designated as respondents in the MUR 6696 Complaint because they were alleged to have violated the criminal statute at 18 U.S.C. § 371 by conspiring to prevent disclosure of the donors’ identities. The Commission took no action on these allegations, as they implicate federal criminal law outside the scope of the Commission’s jurisdiction. Because those allegations were not remanded to the Commission for any further consideration, this report does not address them or the individual respondents designated in the MUR 6696 Complaint.

1 **I. INTRODUCTION**

2 This matter is before the Commission on remand from the United States District Court
3 for the District of Columbia following its decision in *Citizens for Responsibility and Ethics in*
4 *Washington* (“CREW”) v. *FEC*, No. 16-cv-259 (D.D.C. Aug. 3, 2018). At issue in the case was
5 the Commission’s dismissal of CREW’s administrative complaint alleging that Crossroads
6 Grassroots Policy Strategies (“Crossroads GPS”) violated 52 U.S.C. § 30104 and 11 C.F.R.
7 § 109.10(b)-(e) by failing to disclose contributors in its independent expenditure reports. The
8 district court concluded that the Commission’s dismissal was “contrary to law,” declared 11
9 C.F.R. § 109.10(e)(1) invalid, and remanded the case to the Commission to conform with the
10 court’s ruling within 30 days.³

11 In accordance with the remand, the Office of General Counsel (“OGC”) has reconsidered
12 the Complaint in light of the court’s interpretation of 52 U.S.C. § 30104(c). As reflected in the
13 record below, there is no dispute that Crossroads GPS made millions of dollars in independent
14 expenditures in 2012 and at least one donor indicated that he made a contribution to support a
15 specific federal candidate’s election. The record also supports an inference that numerous other
16 donors made contributions to Crossroads GPS for the purpose of influencing federal elections.
17 Thus, the record indicates that Crossroads GPS should have, but failed to, disclose contributions
18 under section 30104(c)(1). Further, the facts also support a reasonable inference that at least
19 some Crossroads GPS donors made contributions for the purpose of furthering an independent
20 expenditure under section 30104(c)(2). Nevertheless, Crossroads GPS appears to have relied on
21 the now-vacated regulation at 11 C.F.R. § 109.10(e)(1)(vi) during the relevant time period, and

³ *Citizens for Responsibility and Ethics in Washington v. FEC*, No. 16-cv-259 (Memo. Op.) (D.D.C. Aug. 3, 2018) at 4 [hereinafter *CREW*].

1 for a number of prudential reasons, we recommend that the Commission exercise its
2 prosecutorial discretion to dismiss the allegations under *Heckler v. Chaney*.⁴

3 **II. FACTUAL BACKGROUND**

4 Crossroads GPS is a non-profit corporation formed in Virginia on June 2, 2010.⁵ At the
5 time of the allegations raised in the Complaint, Steven Law was Crossroads GPS's President and
6 Karl Rove was reportedly a co-founder, fundraiser, and uncompensated advisor.⁶

7 By 2012, Crossroads GPS had already spent millions of dollars on independent
8 expenditures. In 2010, it filed an October Quarterly Report and a Year-End Report showing that
9 it made a total of \$15.4 million in independent expenditures.⁷ Though the reports disclosed the
10 expenditures, they did not identify any contributors. On June 14, 2011, the Commission's
11 Reports Analysis Division ("RAD") sent Crossroads GPS two Requests for Additional
12 Information ("RFAs") regarding its 2010 October Quarterly Report and Year-End Report.⁸ The
13 RFAs noted that "Commission regulations require that you disclose identification information
14 for each individual who made a donation used to fund the independent expenditure."⁹ In
15 response, Crossroads GPS asserted that the RFAs misstated the law and, referring to the

⁴ 470 U.S. 821 (1985).

⁵ See Commonwealth of Va., State Corp. Comm'n, <https://sccfile.scc.virginia.gov/Business/0723872> (last visited Aug. 14, 2018).

⁶ See Am. Compl. at 3 (Aug. 24, 2013); Resp. (Jan. 17, 2013), Affidavit of Karl Rove ¶ 1 ("Rove Aff.").

⁷ Crossroads GPS, 2010 Year-End Report at 1 (Jan. 31, 2011) (reporting \$14 million in independent expenditures for fourth quarter 2010); Crossroads GPS, 2010 October Quarterly Report at 1 (Oct. 15, 2010) (reporting \$1.4 million in independent expenditures for third quarter 2010).

⁸ RFAI: October Quarterly 2010 (June 14, 2011); RFAI: Year-End 2010 (June 14, 2011).

⁹ *Id.* (citing 11 C.F.R. § 109.10(e)(1)(vi)).

1 language at 11 C.F.R. § 109.10(e)(1)(vi), stated that it neither solicited nor received contributions
2 “for the purpose of furthering the reported independent expenditure.”¹⁰

3 In 2012, Crossroads GPS filed an October Quarterly Report and a Year-End Report
4 showing that it made a total of \$71 million in independent expenditures.¹¹ As in 2010, the
5 reports disclosed the expenditures, but did not identify any contributors. RAD sent separate
6 RFAIs regarding each of the two reports. The RFAI regarding the October Quarterly Report
7 stated “[e]ach contributor who made a donation in excess of \$200 used to fund the independent
8 expenditure(s) must be itemized,” and cited to 11 C.F.R. § 109.10(e)(1)(vi).¹² The RFAI
9 regarding the Year-End Report similarly stated that “[e]ach contributor who made a donation in
10 excess of \$200 to further the independent expenditures must be itemized,” and again included a
11 citation to 11 C.F.R. § 109.10(e)(1)(vi).¹³ In response, Crossroads GPS reiterated its earlier
12 response that the RFAIs misstate the law and that it neither solicited nor received contributions
13 “for the purpose of furthering the reported independent expenditure.”¹⁴

14 Also in 2012, a series of news articles reported details from inside an August 30, 2012,
15 fundraiser for Crossroads GPS and American Crossroads, a political committee registered with
16 the Commission.¹⁵ Rove and American Crossroads fundraiser Haley Barbour, reportedly spoke

¹⁰ See Letter from Thomas Josefiak to FEC (June 19, 2011).

¹¹ Crossroads GPS, 2012 Year-End Report at 1 (Jan. 31, 2013) (reporting \$50.4 million in independent expenditures for fourth quarter 2012); Crossroads GPS, 2012 October Quarterly Report at 1 (Oct. 15, 2012) (reporting \$20.5 million in independent expenditures for third quarter 2012).

¹² RFAI: October Quarterly 2012 (Oct. 25, 2012).

¹³ RFAI: Year-End 2012 (Apr. 9, 2013).

¹⁴ See Letter from Caleb Crosby to FEC (Apr. 10, 2013).

¹⁵ See Sheelah Kolhatkar, *Exclusive: Inside Karl Rove's Billionaire Fundraiser*, BLOOMBERG BUSINESSWEEK (Aug. 31, 2012) (Exhibit B of Amended Complaint) [hereinafter *Rove Fundraiser*]; Sheelah Kolhatkar, *Exclusive: How Karl Rove's SuperPAC Plays the Senate*, BLOOMBERG BUSINESSWEEK (Sept. 4, 2012) (Exhibit D of Amended

1 before 70 potential donors, and Rove gave an extensive briefing on a plan to gain a Republican
2 Senate majority in 2012.¹⁶ Crossroads GPS' representatives also reportedly solicited
3 contributions in connection with the presidential race and various Senate races that year.¹⁷ With
4 respect to the U.S. Senate race in Ohio, the reporter wrote:

5 Rove stated that he'd had a call from an unnamed out-of-state donor who told
6 him, "I really like Josh Mandel," referring to the Ohio treasurer attempting to
7 unseat Democrat Sherrod Brown. The donor, Rove said, had asked him what his
8 budget was in the state; Rove told him \$6 million. "I'll give ya \$3 million,
9 matching challenge," Rove said the donor told him. "Bob Castellini, owner of
10 the Cincinnati Reds, is helping raise the other \$3 million for that one."

11 Crossroads GPS later reported making \$6,363,711 in independent expenditures in Ohio.

12 In addition, at the same fundraiser, Rove spoke to the potential donors about which
13 Senate seats Republicans could win and Crossroads GPS showed attendees advertisements
14 targeting Senate candidates in Ohio, Virginia, Montana, Florida, Massachusetts, and Nevada.¹⁸
15 The speakers also solicited attendees for contributions.¹⁹ After the fundraiser, Crossroads GPS
16 filed 32 reports disclosing independent expenditures for broadcasting advertisements in Virginia,
17 Montana, and Nevada.

18 **III. PROCEDURAL BACKGROUND**

19 On November 14, 2012, CREW filed a Complaint with the Commission alleging that
20 Crossroads GPS knowingly and willfully failed to disclose donors in the independent

Complaint) [hereinafter *Rove SuperPAC*]; *Interview with Sheelah Kolhatkar*, DEMOCRACY NOW (Sept. 5, 2012) (Exhibit C of Amended Complaint).

¹⁶ *See Rove Fundraiser*.

¹⁷ *See id.*; *Rove SuperPAC*.

¹⁸ *See Rove Fundraiser*.

¹⁹ *Id.*

1 expenditure reports that it filed with the Commission, in violation of 2 U.S.C. § 434(c)
2 (subsequently re-codified at 52 U.S.C. § 30104(c)) and 11 C.F.R. § 109.10(b)-(e).²⁰ In making
3 its allegations, the Complaint set forth the respective requirements at 52 U.S.C. § 30104(c)(1)
4 and (2) that persons who make more than \$250 in independent expenditures during a calendar
5 year file reports with the Commission identifying each contributor giving more than \$200 during
6 that year; and that the report identify each person who contributed more than \$200 “for the
7 purpose of furthering an independent expenditure.”²¹ The Complaint also noted that the
8 Commission regulation at 11 C.F.R. § 109.1(e)(1)(vi) which interprets these statutory provisions,
9 explains that the reports must identify each person who contributed more than \$200 “for the
10 purpose of furthering the reported independent expenditure.”²²

11 Based on these requirements, the Complaint specifically alleged that: (1) the unnamed
12 donor who proposed the \$3 million matching challenge for the Ohio Senate race and donors who
13 made the matching contributions should have been identified in Crossroads GPS's independent
14 expenditure reports; and (2) individuals present at the August 30, 2012, fundraiser made
15 contributions for the purpose of furthering the advertisements in Virginia, Montana, and Nevada,
16 and should have been identified in Crossroads GPS's independent expenditure reports.²³ The
17 Complaint relied upon the RFAIs sent to Crossroads GPS in 2010 and 2012, to assert that

²⁰ Compl. (Nov. 14, 2012).

²¹ Am. Compl. at 4.

²² *Id.* at 5.

²³ *Id.* at 11-14.

1 Crossroads GPS was on notice of its obligation to disclose its donors and thus, that the violations
2 were knowing and willful.²⁴

3 In response to the Complaint, Respondents disputed the allegations by relying on the
4 Commission's regulatory test, which says contributors only need to be identified if they made
5 contributions for the purpose of furthering "the reported independent expenditure."²⁵ In a sworn
6 affidavit provided with the response, Karl Rove conceded that the reporter's description of his
7 conversation with the Ohio donor was "substantially accurate."²⁶ Rove stated that the
8 conversation took place in Spring 2012 and that the "donor indicated that he was a supporter of
9 Josh Mandel, and offered to donate funds toward [Crossroads'] budget in the State of Ohio."²⁷
10 Rove asserted that the conversation did not include any specific direction as to how the money
11 would be used and that there was no discussion of independent expenditures during the
12 conversation.²⁸ Nevertheless, Rove admitted that he understood "that the donor intended the
13 funds to be used in some manner that would aid the election of Josh Mandel."²⁹ Rove stated that
14 the unnamed donor ultimately never made a \$3 million contribution; rather, the donor
15 contributed a larger amount to Crossroads GPS "not in any way earmarked" for use in Ohio or
16 elsewhere.³⁰ Furthermore, Crossroads GPS represented that, in addition to \$6.4 million in

²⁴ *Id.* at 11-14, 16.

²⁵ *See* Resp. at 11-14 (citing 11 C.F.R. § 109.10(e)(1)(vi)).

²⁶ Rove Aff. ¶ 3.

²⁷ *Id.* ¶ 5.

²⁸ *Id.* ¶¶ 6-10.

²⁹ *Id.* ¶ 10.

³⁰ *Id.* ¶ 14.

1 independent expenditures, it also spent \$3.6 million on electioneering communications and
2 “[o]ther issue and policy advocacy ads [that] . . . were not required to be reported.”³¹

3 Crossroads GPS also contended that no donor specifically contributed to any particular
4 independent expenditure in Virginia, Montana, or Nevada.³² Crossroads GPS stated that 13 of
5 the 14 advertisements shown at the fundraiser and highlighted by the Complaint were fully “paid
6 for and aired” prior to the fundraiser, and the 14th was not publicly aired at all.³³

7 In its analysis of the MUR 6696 Complaint, OGC applied the Commission’s regulatory
8 interpretation of the statute at 11 C.F.R. § 109.10(e)(1)(vi) and concluded that there were no
9 facts suggesting that a donor made a contribution for the purpose of furthering a specific
10 communication and thus no violation of the regulatory requirements. OGC therefore
11 recommended that the Commission find no reason to believe that Crossroads GPS violated 2
12 U.S.C. § 434(c)(2) and 11 C.F.R. § 109.10(e)(1)(vi).³⁴ OGC also recommended that the
13 Commission exercise its prosecutorial discretion to dismiss the allegation that Crossroads GPS
14 violated 2 U.S.C. § 434(c)(1) because 11 C.F.R. § 109.10(e) is silent on any separate requirement
15 under that statutory provision and so “a Respondent could raise equitable concerns about
16 whether a filer has fair notice of the requisite level of disclosure required by law if the

³¹ Resp. at 8.

³² *Id.* at 5-6.

³³ *Id.* at 6.

³⁴ First General Counsel’s Rpt. at 11-12, MUR 6696 (Crossroads GPS).

1 Commission attempted to impose liability.”³⁵ On November 17, 2015, the Commission
2 deadlocked on whether to approve OGC’s recommendation.³⁶

3 On February 16, 2016, CREW filed suit in the United States District Court for the
4 District of Columbia, arguing that the Commission’s dismissal was contrary to law.³⁷ Ruling on
5 cross-motions for summary judgment, the court held that the Commission’s dismissal was indeed
6 contrary to law because OGC’s recommendation to the Commission³⁸ relied on a regulation that
7 was inconsistent with the plain text of the Federal Election Campaign Act of 1971, as amended
8 (the “Act”).³⁹ The court remanded MUR 6696 back to the Commission for action consistent
9 with its ruling. Following the remand, Crossroads GPS submitted a Supplemental Response to
10 the Commission, arguing that CREW’s Complaint should nonetheless still be dismissed.

11 **IV. LEGAL ANALYSIS**

12 The Complaint alleged that Crossroads GPS knowingly and willfully failed to disclose
13 persons who made contributions for the purpose of furthering the \$6 million in independent
14 expenditures made in the 2012 Ohio Senate race.⁴⁰ It also alleged that Crossroads GPS
15 knowingly and willfully failed to disclose persons who made contributions at the August 30,
16 2012, fundraiser for the purpose of furthering an independent expenditure.⁴¹

³⁵ *Id.* at 13.

³⁶ Certification, MUR 6696 (Crossroads GPS) (Nov. 17, 2015). No Statement of Reasons was issued in connection with the Commission vote.

³⁷ *See* 52 U.S.C. § 30109(a)(8).

³⁸ In the absence of a Statement of Reasons by the controlling Commissioners, the court used the Office of General Counsel’s analysis to evaluate a dismissal.

³⁹ *CREW* at 22.

⁴⁰ Am Compl. at 11-14.

⁴¹ *Id.* at 15.

1 An independent expenditure is an expenditure that expressly advocates the election or
2 defeat of a clearly identified federal candidate and that is not made in coordination with the
3 candidate (or related parties).⁴² Under 52 U.S.C. § 30104(c)(1), “every person or entity other
4 than a political committee who makes independent expenditures in an aggregate amount or value
5 in excess of \$250 during a calendar year” must file a statement containing information required
6 under § 30104(b)(3)(A) for all contributions received by such person. Section 30104(b)(3)(A)
7 requires the identification of every “person (other than a political committee) who makes a
8 contribution . . . during the reporting period in excess of \$200 within the calendar year.”⁴³
9 Furthermore, under 52 U.S.C. § 30104(c)(2)(C), non-political committees must include in their
10 statements “the identification of each person who made a contribution in excess of \$200 to the
11 person filing such statement which was made for the purpose of furthering *an* independent
12 expenditure.”⁴⁴ Commission regulations similarly require non-political committees to report
13 independent expenditures, but 11 C.F.R. § 109.10(e)(1)(vi) requires “[t]he identification of each
14 person who made a contribution in excess of \$200 to the person filing such report, which
15 contribution was made for the purpose of furthering *the* reported independent expenditure.”⁴⁵

16 The district court reviewed the language and history of Section 30104(c), as well as the
17 language and history of the implementing regulation at Section 109.10(e)(1)(vi), and concluded
18 that “52 U.S.C. §§ 30104(c)(1) and (c)(2)(C) unambiguously require separate and
19 complementary requirements to identify individuals who contribute over \$200 to reporting non-

⁴² 52 U.S.C. § 30101(17).

⁴³ *Id.* § 30104(c)(1).

⁴⁴ *Id.* § 30104(c)(2)(C) (emphasis added).

⁴⁵ 11 C.F.R. 109.10(e)(1)(vi) (emphasis added).

1 political committees and mandate significantly more disclosure than that required by the
2 challenged regulation, 11 C.F.R. § 109.10(e)(1)(vi).⁴⁶ For that reason, the court struck down
3 section 109.10(e)(1)(vi), and directed the Commission to reconsider the Complaint in terms of
4 the statutory language of 52 U.S.C. § 30104(c).⁴⁷ As discussed fully below, given the court's
5 ruling, we conclude that Crossroads GPS should have disclosed its contributors, as alleged in the
6 Complaint. We recommend, however, that the Commission exercise its prosecutorial discretion
7 to dismiss the allegations.

8 **A. Crossroads GPS Should Have Disclosed Its Contributions in Its Disclosure**
9 **Reports**

10 As noted above, OGC's recommendation in MUR 6696 relied upon the conclusion that
11 Crossroads GPS did not violate the *regulatory* requirement that non-political committees report
12 only contributions in excess of \$200 which were made for the purpose of furthering "the reported
13 independent expenditure."⁴⁸ However, the district court explained that the statute requires non-
14 political committees to identify every person (other than a political committee) who makes a
15 contribution during the reporting period in excess of \$200 within the calendar year.⁴⁹ As such,
16 Crossroads GPS should have disclosed all contributors *i.e.* persons who provided funds for the
17 purpose of influencing a federal election,⁵⁰ in its independent expenditure reports.
18

⁴⁶ *CREW* at 92.

⁴⁷ *Id.* at 112.

⁴⁸ *See* 11 C.F.R. § 109.10(e)(1)(vi).

⁴⁹ *See* 52 U.S.C. § 30104(c)(1).

⁵⁰ *See id.* § 30101(8)(A); *see also CREW* at 36 (stating that contributions disclosed under section 30104(c)(1) need not be earmarked for a specific political purpose "so long as the purpose is in connection with a federal election.").

1 The record contains numerous facts indicating that Crossroads GPS received funds that
2 were given for the purpose of influencing a federal election. First, Crossroads GPS admits that at
3 least one unnamed donor expressed a purpose to support a federal candidate, Josh Mandel, when
4 offering his \$3 million matching challenge.⁵¹ Further, another donor, Bob Castellini, who
5 allegedly assisted the donor to raise the other \$3 million, may have been another contributor.⁵²

6 The donors at the August 2012 fundraiser would have known that they were contributing
7 for such a purpose, as Crossroads GPS was already an established organization that spent \$15.4
8 million on independent expenditures in 2010. More importantly, however, Rove explicitly spoke
9 at the fundraiser about efforts to elect Republicans to the Senate and donors were shown fourteen
10 political advertisements while they were solicited for contributions. In fact, eleven out of the
11 fourteen advertisements shown at the fundraiser were paid for by Crossroads GPS.⁵³ Those
12 eleven advertisements included an independent expenditure that expressly advocated the defeat
13 of Representative Shelley Berkley, a Senate candidate for Nevada, and other advertisements that
14 targeted President Obama and Senate candidates, who were all running for election in 2012.⁵⁴
15 These facts support a reasonable inference that Crossroads GPS received contributions from
16 attendees of the fundraisers that were made for the purpose of influencing the 2012 Senate
17 elections. Under these circumstances, the factual record indicates that Crossroads GPS failed to

⁵¹ This unnamed donor eventually gave an even greater amount, and although Crossroads GPS argues that it was not explicitly tied to Ohio, Rove conceded that the donor's general purpose was to aid in the election of Mandel. *See Rove Aff.* ¶ 10.

⁵² *See Rove SuperPAC.*

⁵³ Resp. of Crossroads GPS to Mem. Op. at 4 (Aug. 17, 2018) ("Supp. Resp.").

⁵⁴ *Id.*

1 fulfill the disclosure requirements of 52 U.S.C. § 30104(c)(1), which include reporting “all
2 contributions” over \$200 in 2012.⁵⁵

3 In addition, there is reason to believe that Crossroads GPS violated section 30104(c)(2)
4 by failing to identify persons who made contributions in excess of \$200 for the purpose of
5 furthering an independent expenditure. The district court stated that such persons should be
6 identified, “without any further requirement that the donor had to know precisely the form the
7 expenditure would take or the manner the expenditure would be described in the filed
8 statement.”⁵⁶ As described above, Crossroads GPS clearly showcased at least one of its
9 independent expenditures at the August 2012 event where Crossroads GPS solicited
10 contributions from attendees; these facts suggest that Crossroads GPS may have sought funding
11 to further independent expenditures in general. If a donor provided funds in excess of \$200 for
12 such purpose, he or she should have been identified as such.

13 Moreover, the unnamed donor who pledged \$3 million to aid Josh Mandel's Senate race
14 should also have been disclosed under section 30104(c)(2). Although Rove denies that he
15 discussed independent expenditures with the unnamed donor during the conversation he had in
16 the Spring of 2012,⁵⁷ his statements leave open the question of whether there were any other
17 discussions with the donor about Crossroads GPS' plans in Ohio, especially given that
18 Crossroads GPS subsequently spent \$6 million in independent expenditures in Ohio — the
19 amount the donor sought to raise in his matching challenge. While the donor could conceivably

⁵⁵ RAD issued an RFAI on this subject to Crossroads GPS in 2011, but the Complaint does not raise any allegation that Crossroads GPS failed to disclose contributions in its 2010 reports. As such, there are no facts in the record upon which OGC can make a recommendation for that election cycle.

⁵⁶ *CREW* at 82.

⁵⁷ *See Rove Aff.* ¶¶ 6-10.

1 have made his donation “for the purpose of” aiding Josh Mandel through electioneering
2 communications or other non-independent expenditure advocacy, it strains credulity to believe
3 that the donor did not intend for even \$201 of a multi-million dollar contribution to be used for
4 communications expressly advocating on behalf of Josh Mandel or in opposition to his opponent.
5 This is particularly true where Crossroads GPS ultimately spent nearly twice as much on
6 independent expenditures in Ohio as it did on other types of advocacy communications. The
7 factual record therefore indicates that Crossroads GPS also failed to fulfill the disclosure
8 requirements of 52 U.S.C. § 30104(c)(2).

9 **B. The Commission Should Exercise Its Prosecutorial Discretion and Dismiss**
10 **the Reporting Violations**

11
12 Despite this evidence that Crossroads GPS failed to satisfy its disclosure obligations, we
13 do not recommend that the Commission pursue enforcement action with regard to these
14 allegations, as a matter of prosecutorial discretion. Under 52 U.S.C. § 30111(e), “any person
15 who relies upon any rule or regulation prescribed by the Commission in accordance with the
16 provisions of this section and who acts in good faith in accordance with such rule or regulation
17 shall not, as a result of such act, be subject to any sanction provided by this Act” Here,
18 Crossroads GPS has claimed this safe harbor provision should apply to the extent 11 C.F.R.
19 § 109.10(e)(1) can be presumed to cover *all* donor disclosure requirements for non-political
20 committees.⁵⁸

21 In 1980, the Commission issued its Explanation and Justification for 11 C.F.R. § 109.2,
22 which was the predecessor to current Section 109.10, stating that “[t]his section has been
23 amended to incorporate the changes set forth at 2 U.S.C. 434(c)(1) and (2) [re-codified as 52

⁵⁸ Supp. Resp. at 18-22.

1 U.S.C. § 30104(c)(1) and (2)] regarding reporting requirements for persons, other than a political
2 committee, who make independent expenditures.” Consequently, it was not unreasonable for a
3 filer to assume that the Commission’s implementing regulation set forth all of the legal
4 requirements for reporting independent expenditures. In fact, although Crossroads GPS received
5 multiple RFAs warning that its contributor reporting might be deficient, all of those notices
6 cited only to the regulatory requirements. CREW itself suggests that reliance on 11 C.F.R.
7 § 109.10(e)(1)(vi) was widespread, since a large majority of non-political committees likely
8 failed to disclose contributions in accordance with the text of 52 U.S.C. § 30104(c).⁵⁹ These
9 factors make it very likely that Crossroads GPS is covered by the Act’s safe harbor. Even if a
10 court were to determine otherwise, however, the argument itself would complicate any attempt to
11 bring an enforcement action.

12 Indeed, given the narrower disclosure obligation under the regulation, the Commission
13 considered then-Representative Chris Van Hollen’s 2011 petition to revise Section
14 109.10(e)(1)(vi), arguing that it “requires disclosure only of those contributors who state a
15 specific intent to fund a specific (‘the reported’) independent expenditure.”⁶⁰ In response, this
16 Office submitted to the Commission a draft notice of proposed rulemaking proposing to amend
17 section 109.10(e)(1)(vi). The proposal would have required disclosure of all contributors who
18 make a contribution for the purpose of furthering “an” independent expenditure,⁶¹ but the
19 Commission did not approve the proposal for publication in the *Federal Register*. Crossroads

⁵⁹ Plaintiff’s Motion for Summary Judgment at 24-25, *CREW v. FEC*, No. 16-cv-259 (Sept. 11, 2017).

⁶⁰ Rep. Chris Van Hollen, Petition for Rulemaking at 3 (Apr. 21, 2011).

⁶¹ See Draft Notice of Proposed Rulemaking for Independent Expenditure Reporting at 7 (Dec. 15, 2011).

1 GPS thus could have reasonably relied on the failed rulemaking to determine that it was in
2 compliance with the regulation in effect at that time.⁶²

3 Further, bringing an enforcement action against Crossroads GPS here could reasonably
4 raise prudential concerns about whether Crossroads GPS had notice of what standard would
5 apply to its reporting. The Commission itself has never found reason to believe as to a
6 respondent based on the view that 52 U.S.C. § 30104(c)(1) set forth a reporting requirement
7 separate from those under subsection (c)(2) and has not publicized this view as controlling.

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15 Finally, pursuing an enforcement action here would give retroactive effect to the court's
16 opinion with regard to Crossroads GPS only, while similarly situated organizations would avoid
17 disclosure for past election cycles. For example, after the dismissal of the complaint in this
18 matter, the Commission, in another matter involving similar allegations, found no reason to
19 believe that a non-profit corporation violated 52 U.S.C. § 30104(c)(2) and 11 C.F.R.

⁶² Given Crossroads GPS's reasonable reliance on the regulatory requirement, we do not recommend that the Commission find that it acted knowingly and willfully.

1 § 109.10(e)(1)(vi) and dismissed the allegation that the respondent violated 52 U.S.C.

2 § 30104(c)(1).⁶³

3 For the foregoing reasons, we recommend the Commission exercise its prosecutorial
4 discretion to dismiss these allegations. *Heckler v. Chaney*, 470 U.S. 821 (1985).

5 **V. RECOMMENDATIONS**

- 6 1. Dismiss in the exercise of prosecutorial discretion the allegation that Crossroads
7 Grassroots Policy Strategies violated 52 U.S.C. § 30104(c)(1);
- 8 2. Dismiss in the exercise of prosecutorial discretion the allegation that Crossroads
9 Grassroots Policy Strategies violated 52 U.S.C. § 30104(c)(2);
- 10 3. Approve the attached Factual and Legal Analysis;
- 11 4. Approve the appropriate letters; and
- 12 5. Close the file.

13 Lisa J. Stevenson
14 Acting General Counsel

15
16
17 Date: 8.24.18 *Kathleen M. Guith by Jd*
18 Kathleen M. Guith
19 Associate General Counsel

20
21
22 *Jin Lee*
23 Jin Lee
24 Acting Assistant General Counsel

25
26
27 *Amanda Andrade*
28 Amanda Andrade
29 Attorney

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⁶³ See Certification, MUR 7083 (Ending Spending) (Mar. 8, 2018).