

RECEIVED
FEDERAL ELECTION
COMMISSION

2013 FEB 26 AM 8:45

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

CELA

FIRST GENERAL COUNSEL'S REPORT

MUR: 6612
DATE COMPLAINT FILED: 7/24/12
DATE OF NOTIFICATION: 7/31/12
DATE OF LAST RESPONSE: 8/17/12
DATE ACTIVATED: 10/9/12

EXPIRATION OF SOL: 5/18/2017

COMPLAINANTS:

Citizens for Responsibility and Ethics in
Washington

Melanie Sloan

RESPONDENT:

Crossroads Grassroots Policy Strategies

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(17)
2 U.S.C. § 434(c)
2 U.S.C. § 434(g)
2 U.S.C. § 441d
11 C.F.R. § 100.16
11 C.F.R. § 100.22
11 C.F.R. § 109.10
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter involves allegations that Crossroads Grassroots Policy Strategies ("Crossroads GPS") violated the Federal Election Campaign Act, as amended (the "Act") by failing to report and include disclaimers on five independent expenditures.¹ As discussed below, none of the five communications contains express advocacy and disclaimers were not required.

¹ 2 U.S.C. §§ 434, 441d.

1 Accordingly, we recommend that the Commission find no reason to believe that Crossroads GPS
2 violated 2 U.S.C. § 434 and 11 C.F.R. § 109.10(c) by failing to report independent expenditures
3 or 2 U.S.C. § 441d and 11 C.F.R. § 110.11(a)(2) by failing to include proper disclaimers on
4 independent expenditures.²

5 II. FACTUAL AND LEGAL ANALYSIS

6 A. Facts

7 Crossroads GPS is a non-profit organization seeking section 501(c)(4) status with the
8 Internal Revenue Service. It was organized under Virginia law on June 2, 2010. In May, June,
9 and July 2012, Crossroads GPS aired five advertisements — “Why,”³ “Tax,”⁴ “Change,”⁵
10 “Disturbing,”⁶ and “Ants.”⁷ The ads feature three different candidates for U.S. Senate: Heidi
11 Heitkamp (North Dakota); Bob Kerrey (Nebraska); and Tim Kaine (Virginia). Crossroads GPS
12 did not file independent expenditure reports with the Commission for any of these ads.

² The Complaint's allegation that Crossroads GPS failed to include disclaimers rests entirely on the assertion that the cited advertisements are independent expenditures, 11 C.F.R. § 110.11(a)(2), and not on the basis that the ads' sponsor is a political committee, 11 C.F.R. § 110.11(a)(1). *See* Compl. ¶ 34 (“[a]ll of the television advertisements broadcast by Crossroads GPS were independent expenditures, but none of them included either the audio or written disclaimer”). In this report, we do not consider whether these ads required disclaimers on the basis that Crossroads GPS was a political committee.

³ “Why” is available at <http://www.youtube.com/watch?v=LEM94pWpBo4>. The script is attached to the response as Exhibit A.

⁴ “Tax,” which is an updated version of “Why,” is available at <http://www.youtube.com/watch?v=BZwjPQG7eEg>. The script is attached to the response as Exhibit B.

⁵ “Change” is available at http://www.youtube.com/watch?v=EW3hyhGrT_Y. The script is attached to the response as Exhibit C.

⁶ “Disturbing” is available at <http://www.youtube.com/watch?v=ow5dOMYaq0Q>. The script is attached to the response as Exhibit D.

⁷ “Ants” is available at <http://www.youtube.com/watch?v=CXOc0pOgMGY>. The script is attached to the response as Exhibit E.

1 **B. Analysis**

2 The Act places certain reporting requirements on persons who make independent
3 expenditures.⁸ It also requires that all independent expenditures include a disclaimer.⁹ The
4 threshold issue here is whether these five ads are independent expenditures.

5 An "independent expenditure" is an expenditure by a person expressly advocating the
6 election or defeat of a clearly identified federal candidate that is not coordinated with a
7 candidate, a candidate's authorized committee, or their agents, or a political party committee or
8 its agents.¹⁰ Under the Commission's regulations, a communication expressly advocates the
9 election or defeat of a clearly identified federal candidate if it:

10 [u]ses phrases such as 'vote for the President,' 're-elect your Congressman,'
11 'support the Democratic nominee,' 'cast your ballot for the Republican challenger
12 for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in '94,' 'vote Pro-
13 Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified
14 candidates described as Pro-Life or Pro-Choice, 'vote against Old Hickory,'
15 'defeat' accompanied by a picture of one or more candidate(s), 'reject the
16 incumbent,' or communications of campaign slogan(s) or individual word(s),
17 which in context can have no other reasonable meaning than to urge the election
18 or defeat of one or more clearly identified candidate(s), such as posters, bumper
19 stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,'
20 'Reagan/Bush' or 'Mondale!'¹¹

21
22 Under the Commission's regulations, a communication also constitutes express advocacy if:

23 [w]hen taken as a whole and with limited reference to external events, such as the
24 proximity to the election, could only be interpreted by a reasonable person as
25 containing advocacy of the election or defeat of one or more clearly identified
26 candidate(s) because — (1) [t]he electoral portion of the communication is
27 unmistakable, unambiguous, and suggestive of only one meaning; and
28 (2) [r]easonable minds could not differ as to whether it encourages actions to elect

⁸ 2 U.S.C. §§ 434(c), 434(g); 11 C.F.R. § 109.10.

⁹ 2 U.S.C. § 441d; 11 C.F.R. § 110.11.

¹⁰ 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

¹¹ 11 C.F.R. § 100.22(a).

1 or defeat one or more clearly identified candidate(s) or encourages some other
2 kind of action.¹²

3
4 The Complaint does not allege — nor could it persuasively claim — that the ads contain
5 any of the phrases enumerated in 11 C.F.R. § 100.22(a), or words which in context can have no
6 reasonable meaning other than to urge the election or defeat of a candidate. The Complaint
7 instead suggests that these ads meet the standard for express advocacy set forth in 11 C.F.R.
8 § 100.22(b), based on two theories. We disagree.

9 First, the Complaint argues that, because none of the candidates featured in the ads was a
10 public official vested with legislative or policy-making authority, an advertisement that tells
11 them to support the repeal of the Affordable Care Act (“ObamaCare”), support balanced budgets,
12 or stop reckless spending must be construed as urging them to take certain positions if elected to
13 the Senate.¹³

14 As the Response points out, however, that is not a basis for finding express advocacy.¹⁴
15 A communication contains express advocacy under 11 C.F.R. § 100.22(b) if it “could only be
16 interpreted by a reasonable person as containing advocacy of the election or defeat” of a
17 candidate. In this case, even the Complaint’s proffered interpretation of the ads does not suggest
18 that they contain advocacy of a candidates’ election or defeat: the ads “tell [the candidate] what
19 her policies should be if she is elected to the Senate.”¹⁵ Telling a candidate what her policies
20 should be may presume that the candidate will be elected, but it does not implicitly advocate the
21 election or defeat of the candidate. And it certainly does not do so expressly.

¹² 11 C.F.R. § 100.22(b).

¹³ Compl. at 9-11.

¹⁴ Resp. at 3-4.

¹⁵ *Id.* at 9.

1 Second, the Complaint argues that the ads' lack of contact information for the candidates
2 demonstrates that their "actual intent was not to encourage viewers to tell [them] anything," but
3 to "encourage actions to defeat" the candidates.¹⁶ This argument is equally unavailing. "Why,"
4 for instance, talks about Heitkamp's purported view of health care, presents an argument that
5 ObamaCare conflicts with that view, and encourages the viewer to tell Heitkamp to reconcile the
6 two views by supporting the repeal of ObamaCare. Even construed in the manner most
7 favorable to the Complainant — that the failure to provide contact information is inconsistent
8 with the directive to tell Heitkamp to repeal ObamaCare — reasonable minds could differ as to
9 whether the ad encourages actions to defeat Heitkamp or some other action. Therefore, the mere
10 absence of contact information is not a basis for finding express advocacy.¹⁷ The same rationale
11 applies to the other communications.¹⁸

12 1. "Why" Is Not Express Advocacy

13 "Why" states: "Heidi Heitkamp promised: 'I would never vote to take away seniors'
14 health care, or limit anyone's care.' But Heidi endorsed ObamaCare, bragging: 'It's actually a

¹⁶ *Id.* at 9-11.

¹⁷ In MURs 5910 and 5694 (Americans for Job Security), OGC relied on both of the theories advanced by the complainant here in recommending that the Commission find that an advertisement was express advocacy:

Since Knowles was not a public official at the time, he would not be in a position to influence economic policies impacting Alaskans. In this context, asking Knowles about 'his plans to bring our children back to Alaska' would be construed as asking him what his policies would be if elected to the U.S. Senate. In addition, unlike most of its other ads, AJS does not appear to have included a phone number or point of contact for viewers to reach Knowles. Under these circumstances, where the ad makes little sense outside of an electoral context, it is arguably subject to no other reasonable interpretation than to vote against Knowles.

First GCR at 13. The Commission split 3-3 on the recommendation, and it was not adopted. Certification, MURs 5910 and 5694 (Feb. 25, 2009). For the reasons expressed herein, we no longer find these theories persuasive.

¹⁸ In "Disturbing," this argument is premised on the fact that "the only contact information the advertisement provided was the phone number of Mr. Kerrey's campaign, demonstrating that the ad was directed toward taking political action." Compl. at 10. The argument that providing contact information demonstrates proof of express advocacy is no more convincing than the argument that the other ads contain express advocacy because of the absence of contact information.

1 budget saver.” The ad claims that ObamaCare will cut Medicare spending, restrict seniors’
2 care, and cause millions of Americans to lose their health care, and asks the viewer to “Tell
3 Heidi: support the full repeal of ObamaCare.”¹⁹

4 Recently, the Commission unanimously agreed that two similar advertisements were not
5 express advocacy. The first advertisement, “Health Care Crisis,” states that “President Obama
6 supports socialized medicine, but socialized medicine kills millions of people worldwide,” and
7 urges the viewer to “put an end to the brutality and say no to socialized medicine in the United
8 States.”²⁰ The second advertisement, “Ethics,” “criticizes President Obama based on statements
9 about his ‘budget and tax priorities’ and his nominees’ asserted lack of compliance with their tax
10 obligations.”²¹ It urges viewers to “[c]all President Obama and tell him you don’t approve of his
11 taxing behavior.”²² The Commission determined that these ads contain “no electoral
12 references.”²³

13 Like “Health Care Crisis” and “Ethics,” “Why” contains no electoral portion. It
14 highlights Heitkamp’s purported stance on health care and urges the viewer to call her and tell
15 her to support the repeal of ObamaCare. Accordingly, “Why” is not express advocacy under
16 11 C.F.R. § 100.22(b).

¹⁹ Resp., Ex. A.

²⁰ Advisory Op. 2012-11 (Free Speech) at 5.

²¹ *Id.* at 6.

²² *Id.*

²³ *Id.* at 5-6.

1 2. "Tax" Is Not Express Advocacy

2 "Tax" is an updated version of "Why" — the primary difference is a slight alteration in
3 how it characterizes ObamaCare.²⁴ For the reasons articulated above, "Tax" does not contain
4 express advocacy under 11 C.F.R. § 100.22(b).

5 3. "Change" Is Not Express Advocacy

6 "Change" states that "Heidi Heitkamp supports ObamaCare and predicted" that it would
7 "change the face of health care." The ad criticizes ObamaCare and declares, "[t]hat's not the
8 change we need" before asking the viewer to "[t]ell Heidi: ObamaCare is wrong for North
9 Dakota."²⁵ "Change" differs only slightly from "Why" and "Tax." For the reasons articulated
10 above, "Change" does not contain express advocacy under 11 C.F.R. § 100.22(b).²⁶

11 4. "Disturbing" Is Not Express Advocacy

12 "Disturbing" states: "Bob Kerrey supported the Wall Street bailout . . . while serving on
13 the board of a company that tried to exploit it." It claims that "[t]hese schemes were called a
14 disturbing trend by an independent watchdog" and concludes that "[f]or Bailout Bob Kerrey, it's
15 Wall Street ways, not Nebraska values." Finally, the ad urges the viewer, "Tell him: support
16 balanced budgets, not bailouts."²⁷

²⁴ Resp., Ex. B.

²⁵ *Id.*, Ex. C.

²⁶ In other contexts the use of the word "change" may form the basis for an ad's electoral portion, such as where it is a derivative of a candidate's slogan. See *Real Truth About Obama v. FEC*, No. 3:08-cv-00483, 2008 WL 4416282, at *13-14 (E.D. Va. Sept. 24, 2008) (relying in part on the use of "terminology satirizing the motto of the [2008] Obama campaign – Change" to determine that "reasonable people could not differ" that the ad promotes the defeat of then-Senator Obama), *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010), *remanded and decided*, 796 F. Supp. 2d 736, *affirmed sub nom. Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311). Here, however, the mere use of the word "change" does not create an electoral portion within the ad.

²⁷ Resp., Ex. D.

1 Like "Ethics," "Disturbing" criticizes a candidate for the alleged distance between his
2 statements and actions on a particular issue and exhorts viewers to tell the candidate how they
3 feel about that issue. There is no electoral portion, nor is the advocacy contained in the ad
4 limited to a single reasonable interpretation. Accordingly, "Disturbing" is not express advocacy.

5 5. "Ants" Is Not Express Advocacy

6 "Ants" states: "Tim Kaine left Virginia for Washington . . . and was a cheerleader for
7 massive spending." The ad then intercuts clips of Kaine advocating for stimulus spending ("the
8 stimulus is working," "the stimulus is critically important," "these are investments that will put
9 people to work right away") with statements about the stimulus's purported failure. It concludes:
10 "Tell Tim Kaine: For real job growth, stop backing reckless spending."²⁸

11 "Ants," like "Health Care Crisis," contains no electoral portion. While it criticizes Kaine
12 for "cheerleading" on behalf of stimulus spending, it does not clearly advocate Kaine's defeat in
13 an election. Therefore, "Ants" is not express advocacy under 11 C.F.R. § 100.22(b).

14 C. Conclusion

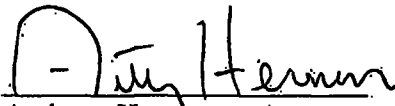
15 As set forth above, because none of the five Crossroads GPS advertisements expressly
16 advocates the election or defeat of a clearly identified federal candidate, no disclaimer was
17 required (on that basis) and Crossroads GPS was not required to include the ads in independent
18 expenditure reports filed with the Commission. Accordingly, we recommend that the
19 Commission find no reason to believe that Crossroads GPS violated 2 U.S.C. § 434 and
20 11 C.F.R. § 109.10(c) or 2 U.S.C. § 441d and 11 C.F.R. § 110.11(a)(2).

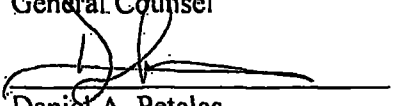
²⁸ Resp., Ex. E.

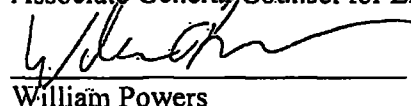
1 **III. RECOMMENDATIONS**

- 2 1. Find no reason to believe that Crossroads Grassroots Policy Strategies
3 violated 2 U.S.C. § 434 and 11 C.F.R. § 109.10(c).
4
5 2. Find no reason to believe that Crossroads Grassroots Policy Strategies
6 violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11(a)(2).
7
8 3. Approve the attached Factual and Legal Analysis.
9
10 4. Approve the appropriate letter.
11
12 5. Close the file.

13
14 2/25/13
15 Date

16 
17 Anthony Herman
18 General Counsel

19 
20 Daniel A. Petalas
21 Associate General Counsel for Enforcement

22 
23 William Powers
24 Assistant General Counsel

25 
26 Peter Reynolds
27 Attorney
28
29
30
31
32
33