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FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 3, 2002

MEMORANDUM

AGENDA ITEM
For Meeting of: 12-05-02

SUBMITTED LATE

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Acting Associate General Counsel

John C. Vergelli
Acting Assistant General Counsel

Mark Allen
Attorney

Richard Ewell
Attorney

SUBJECT: Draft Final Rules and Explanation and Justification on Coordinated and Independent Expenditures

On September 24, 2002, the Commission published a notice of proposed rulemaking (NPRM) entitled "Coordinated and Independent Expenditures." That NPRM proposed rules to implement certain section of the Bipartisan Campaign Reform Act of 2002. See 67 Fed. Register 60,042. The Commission held a hearing on the NPRM on October 23-24, 2002. After reviewing the written comments as well as comments expressed during the hearing, and discussion with the Regulations Committee, the Office of the General Counsel has prepared for Commission consideration the attached draft Final Rules and Explanation and Justification.

Please also note that editing changes reflected in the text of the rules track the changes between the draft final rule text and the rule text proposed in the NPRM, instead of tracking the changes between the draft final rule text and the text of the pre-BCRA rules. This is a departure from normal practice, but in light of the substantial number of new sections that would be added by this rulemaking, this Office determined that a comparison with the rule text as proposed in the NPRM would be most useful.

Recommendation

The Office of General Counsel recommends that the Commission approve the attached Final Rules and Explanation and Justification for publication in the *Federal Register* and transmittal to Congress.

Attachment
Draft Final Rules and Explanation and Justification

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 102, 109, 110, and 114

[Notice 2002 -]

Coordinated and Independent Expenditures

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission is issuing final rules regarding payments for communications that are coordinated with a candidate, a candidate's authorized committee, or a political party committee. The final rules also address expenditures by political party committees that are made either in coordination with, or independently from, candidates. These final rules implement several requirements in the Bipartisan Campaign Reform Act of 2002 ("BCRA") that significantly amend the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"). Further information is contained in the Supplementary Information that follows.

DATES: [Insert date thirty days after publication in the Federal Register]

FOR FURTHER INFORMATION CONTACT: Mr. John Vergelli, Acting Assistant General Counsel, or Attorneys Mr. Mark Allen (coordinated party expenditures), and Mr. Richard Ewell (coordinated communications paid for by other political

committees and other persons), 999 E Street N.W., Washington, D.C., 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (March 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971 ("FECA" or "the Act"), as amended, 2 U.S.C. 431 et seq. This is one in a series of rulemakings the Commission is undertaking in order to implement the provisions of BCRA and to meet the rulemaking deadlines set out in BCRA.

Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the Commission to promulgate regulations to carry out BCRA, which is December 22, 2002. The final rules do not apply with respect to runoff elections, recounts, or election contests resulting from the November 2002 general election. 2 U.S.C. 431 note.

Because of the brief period before the statutory deadline for promulgating these rules, the Commission received and considered public comments expeditiously. The Notice of Proposed Rulemaking ("NPRM"), on which these final rules are based, was published in the Federal Register on September 24, 2002. 67 Fed. Register 60042 (September 24, 2002). The written comments were due by October 11, 2002. The Commission received 27 comments from 21 commenters. The names of the commenters and their comments are available at http:www.fec.gov/register.htm under "Coordinated and Independent Expenditures." A public hearing held on Wednesday, October 23, 2002, and Thursday, October 24, 2002, at which 14 witnesses testified. A transcript of those hearings is also available at http:www.fec.gov/register.htm.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the Federal Register at least 30 calendar days before they take effect. The final rules on coordinated and independent expenditures were transmitted to Congress on December >>, 2002.

Introduction

These final rules primarily address communications that are made in coordination with a candidate, an authorized committee of a candidate, or a political party committee. The regulations set forth the meaning of "coordination." They also set forth statutory requirements for political party committees with respect to the permitted timing of independent and coordinated expenditures, and transfers and assignments.

Explanation and Justification

1. Statutory Overview

FECA limits the amount of contributions to Federal candidates, their authorized committees, and other political committees. 2 U.S.C. 441a(a). Under FECA and the Commission's regulations, these contributions may take the form of money or "anything of value" (the latter is an "in-kind contribution" provided to a candidate or political committee.) See 11 CFR 100.52(d)(1). Candidates must disclose all contributions they receive. 2 U.S.C. 434(b)(2). Since the recipient does not actually receive a cash payment from an in-kind contribution, the recipient must report the value of an in-kind

contribution as both a contribution received and an expenditure made so that the receipt of the contribution will be reported without overstating the cash-on-hand in the committee's treasury. See 11 CFR 104.13.

2. Overview of BCRA's Changes to the FECA and Commission Regulations

In BCRA, Congress revised the FECA's definition of "independent expenditure" in 2 U.S.C. 431(17). The revision added a reference to political party committees and their agents and reworked other aspects of the former definition. Corresponding revisions are being made to the regulations in 11 CFR 100.16.

Congress repealed the Commission's pre-BCRA regulations regarding "coordinated general public political communications" at former 11 CFR 100.23, and directed the Commission to adopt new regulations on "coordinated communications" in their place. Pub. L. 107-155, sec. 214(b), (c) (March 27, 2002). A new section 11 CFR 109.21 implements this Congressional mandate.

In addition, the new and revised rules implement several new restrictions found in BCRA on the timing of independent and coordinated expenditures made by committees of political parties. 2 U.S.C. 441a(d)(4). Those regulations are located in new 11 CFR part 109, subpart D. Similarly, Congress established new restrictions on transfers between committees of a political party. 2 U.S.C. 441a(d)(4). Those changes, as well as amendments to the rules on the assignment of coordinated party expenditure authority in pre-BCRA 11 CFR 110.7, are reflected in new 11 CFR part 109, subpart D.

Finally, Congress established new reporting obligations for independent expenditures. 2 U.S.C. 434(a)(5) and (g). These reporting obligations are being

addressed in a separate rulemaking. See discussion of 11 CFR part 109, subpart B, below and in the Notice of Proposed Rulemaking on Consolidated Reporting, 67 Fed. Register 64,555 (Oct. 21, 2002). The comments received regarding the reporting of independent expenditures will be addressed separately in the Explanation and Justification for the amended reporting rules.

11 CFR 100.16 Definition of Independent Expenditure

In light of several Congressional changes to the statutory definition of "independent expenditure" at 2 U.S.C. 431(17), the Commission is making several corresponding changes to the definition of the same term in 11 CFR 100.16. Most significantly, the statutory definition of "independent expenditure" is modified to exclude expenditures coordinated with a political party committee or its agents (in addition to the pre-BCRA exclusion of coordination with candidates). 2 U.S.C. 431(17).

Paragraph (a) of section 100.16 contains the revised pre-BCRA section 100.16. The first sentence of paragraph (a) is being changed by adding a reference to political party committees and their agents, thereby tracking BCRA's changes in 2 U.S.C. 431(17).

In BCRA, Congress deleted the term "consultation" from the list of activities that compromise the independence of expenditures. See 2 U.S.C. 431(17)(B). Notwithstanding that change, in the NPRM the Commission proposed the retention of the term "consultation" because it remains, post-BCRA, in other related provisions of the Act. Most importantly, the term "consultation" was used in a closely related provision added by BCRA itself. See 2 U.S.C. 441a(a)(7)(B)(ii) as amended by Pub. L. 107-155, sec. 214(a) (expenditures made in "cooperation, consultation, or concert, with, or at the

request or suggestion of, a national, State, or local committee of a political party"); see also 2 U.S.C. 441a(a)(7)(B)(i) (expenditures that are made in "cooperation, consultation, or concert with, or at the request or suggestion of" candidates, political committees, and agents thereof are contributions)(emphasis added).

Similarly, while Congress referred to expenditures "not made in concert or cooperation with . . . a political party committee or its agents" in 2 U.S.C. 431(17) (emphasis added), it did not refer to agents of a party committee in 2 U.S.C. 441a(a)(7)(B)(ii) when describing coordination with a party committee. The Commission proposed in the NPRM including agents of political party committees as persons who might take actions that would cause a communication to be coordinated with that party committee.

The Commission received one joint comment from two commenters[1] on each of the two proposals above, urging the Commission to include in the final rules both terms as proposed. The final rules retain the term "consultation" in paragraph (a) as an element in the regulatory definition of "independent expenditure," for the reasons outlined in the NPRM. The Commission is similarly including agents of a political party within the scope of its independent expenditure definition. 11 CFR 100.16(a).

In BCRA, Congress repealed the pre-BCRA regulatory definition of "coordinated general public political communication." See former 11 CFR 100.23 (January 1, 2001),

[1] For the purposes of this Explanation and Justification, all persons who expressed their views on the rules proposed in the NPRM are referred to as "commenters" without regard to whether those views were expressed to the Commission in writing or through testimony at the hearing.

repealed by Pub. L. 107-155, section 214(b) (March 27, 2002). Therefore, in one additional change to paragraph (a) of section 100.16, the Commission is deleting the term "coordinated general public political communication," and replacing it with references to a "coordinated communication" from section 109.21.

The Commission is also moving pre-BCRA 11 CFR 109.1(e), which clarifies the basic definition of "independent expenditure," to paragraph (b) of section 100.16, without other changes. This rule provides that expenditures made by a candidate's authorized committee on behalf of that candidate never qualify as independent expenditures.

11 CFR 100.23 [Removed and reserved]

Prior to the enactment of BCRA, the Commission initiated a series of rulemakings in response to the Supreme Court's ruling on the appropriate application of the so-called "coordinated party expenditure" provisions of FECA. See Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604 (1996) ("Colorado I"). For example, the Commission addressed the issue of coordination when it promulgated former 11 CFR 100.23 (January 1, 2001) in December 2000. See Explanation and Justification of General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Register 76,138 (Dec. 6, 2000). Former section 100.23 defined a new term, "coordinated general public political communication," drawing from judicial guidance in Federal Election Commission v. The Christian Coalition, 52 F.Supp.2d 45, 85 (D.D.C. 1999) ("Christian Coalition"), to determine whether expenditures for communications by unauthorized committees, advocacy groups, and individuals were coordinated with candidates or

qualified as independent expenditures. Consistent with Christian Coalition, id. at 92, the Commission's regulations stated that such coordination could be found when candidates or their representatives influenced the creation or distribution of the communications by making requests or suggestions regarding, or exercising control or decision-making authority over, or engaging in "substantial discussion or negotiation" regarding, various aspects of the communications. Former 11 CFR 100.23(c)(2) (January 1, 2001). The regulations explained that "substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election." Former 11 CFR 100.23(c)(2)(iii) (January 1, 2001). The Commission provided an exception, however, for a candidate's or political party's response to an inquiry regarding the candidate's or party's position on legislative or public policy issues. See former 11 CFR 100.23(d) (January 1, 2001).

As explained above, Congress repealed 11 CFR 100.23 in BCRA and directed the Commission to promulgate new regulations to address coordinated communications. Those new regulations are discussed below in the Explanation and Justification for 11 CFR part 109. Accordingly, the Commission is now removing former section 100.23 from Title 11, Chapter 1, of the Code of Federal Regulations.

11 CFR 102.6(a)(1)(ii) Transfers

As a result of the enactment of 2 U.S.C. 441a(d)(4) and other provisions from BCRA affecting transfers between political party committees, the Commission revises 11 CFR 102.6(a)(1)(ii) to clarify the interaction of this section with those provisions of BCRA. Before BCRA, the Commission permitted unlimited transfers between or among

national party committees, State party committees and/or any subordinate committees. See pre-BCRA 11 CFR 102.6(a)(1)(ii).

First, in BCRA, Congress provided that a national committee of a political party, including a national Congressional campaign committee of a political party, may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. 441i(a); see Explanation and Justification for 11 CFR 300.10(a), 67 Fed. Register 49,122 (July 29, 2002).

Second, in BCRA's "Levin Amendment," Congress placed restrictions on how State, district, and local party committees raise "Levin funds" and prohibited certain transfers between political party committees. See 2 U.S.C. 441i(b)(2)(C)(i); Explanation and Justification for 11 CFR 300.31, 67 Fed. Register 49,124 (July 29, 2002).

Third, also in the Levin Amendment, Congress provided that a State, district, or local committee of a political party that spends Federal funds and Levin funds for the newly defined term, Federal election activity, must raise those funds solely by itself. These committees may not receive or use transferred funds for this purpose. 2 U.S.C. 441i(b)(2)(B)(iv); see Explanation and Justification for 11 CFR 300.34(a) and (b), 67 Fed. Register 49,127 (July 29, 2002).

Fourth, Congress provided in BCRA that a committee of a political party that makes coordinated party expenditures under 2 U.S.C. 441a(d) in connection with the general election campaign of a candidate shall not, during that election cycle, transfer any funds to, assign authority to make coordinated party expenditures under this subsection to, or receive a transfer from, a committee of the political party that has made or intends

to make an independent expenditure with respect to the candidate. 2 U.S.C. 441a(d)(4)(C); see Explanation and Justification for 11 CFR 109.35(c), below.

The Commission adds a new opening clause in paragraph (a)(1)(ii) of section 102.6 incorporating these restrictions by reference into the rules regarding the transfer of funds and the use of transferred funds.

The Commission received no comments on this section, and the final rule is unchanged from the proposed rule.

PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) and (d), and Pub. L. 107-155 sec. 214(c))

The Commission is reorganizing 11 CFR part 109 into four subparts in an effort to simplify and clarify its regulations while implementing the Congressional mandates in BCRA regarding payments for coordinated communications and coordinated expenditures by political party committees. Subpart A explains the scope of part 109 and defines the key term "agent." Subpart B, which addresses the reporting and recordkeeping requirements for independent expenditures is being addressed in a separate rulemaking. See Notice of Proposed Rulemaking on Consolidated Reporting, 67 Fed. Register 64,555 (Oct. 21, 2002). Subpart C addresses coordination between a candidate or a political party and a person making a communication. Subpart D sets forth provisions applicable only to political party committees, including those pertaining to independent expenditures and support of candidates through coordinated party expenditures. See 2 U.S.C. 441a(d). The special authority for coordinated expenditures

by political party committees, previously set forth in pre-BCRA 11 CFR 110.7, is being relocated to 11 CFR 109.32 and other sections in subpart D.

11 CFR Part 109, Subpart A -- Scope and Definitions.

11 CFR 109.1 When Will this Part Apply?

New section 109.1 introduces the scope of part 109. Section 109.1 explains that the regulations in part 109 set forth the general reporting requirements for both "independent expenditures" and "coordinated communications." Note that the definition of "agent" found in pre-BCRA section 109.1 is being revised and moved to section 109.3. No comments were received regarding this section.

11 CFR 109.2 [Removed and reserved]

The Commission is moving the reporting requirements of pre-BCRA 11 CFR 109.2 to new 11 CFR 109.10, and reserving section 109.2 to avoid potential confusion regarding this move. The amendments to the reporting requirements in new 11 CFR 109.10 will be promulgated in a separate rulemaking document addressing a variety of new reporting requirements. See Notice of Proposed Rulemaking on Consolidated Reporting, 67 Fed. Register 64,555 (Oct. 21, 2002).

11 CFR 109.3 Definitions

The Commission proposed new 11 CFR 109.3 to define the term "agent," which is used throughout 11 CFR part 109. This definition of agent is based on the same

concept that the Commission used in framing the definition of "agent" in the revised "soft money" rules. See Final Rules and Explanation and Justification on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Register 49,081 (July 29, 2002). The definition of "agent" proposed in the NPRM focused on whether a purported agent has "actual authority, either express or implied," to engage in one or more specified activities on behalf of specified principals.

In the NPRM, the Commission listed those specific sets of activities, which vary slightly depending on whether the agent engages in those activities on behalf of a national, State, district, or local committee of a party committee, or on behalf of a Federal candidate or officeholder. See proposed 11 CFR 109.3(a) and (b), respectively. The activities specified in the NPRM closely paralleled the conduct activities associated with coordinated communications, as described in 11 CFR 109.21(b). These activities included requesting or suggesting that a communication be created, produced, or distributed; making or authorizing certain campaign-related communications; and being materially involved in decisions regarding specific aspects of communications. See proposed 11 CFR 109.3(a)(1) through (5) and (b)(1) through (5).

Several commenters requested additional clarification of the meaning of "material involvement," while other commenters suggested broadening this provision to include authority to be "materially involved" in discussions, in addition to decisions, regarding a communication. The Commission notes that the term "materially involved" is merely incorporated into the specified activities of an agent to preserve the parallel structure between the definition of "agent" and the coordination conduct standards in 11 CFR 109.21. See Explanation and Justification of 11 CFR 109.21(d)(2), below.

One commenter noted that because the proposed regulations contemplate the possibility that one candidate for Federal office might pay for a communication that is coordinated with a different candidate for Federal office, proposed 11 CFR 109.3(a)(5) should also be included as a specified activity in 11 CFR 109.3(b). The Commission agrees and is adding a new paragraph (b)(6) to 11 CFR 109.3 to make it clear that a person who works for one candidate and is authorized by that candidate to make a communication on behalf of other candidates based on material information derived from those other candidates, is to be considered an agent.

A number of commenters addressed the general scope of the definition. Seven commenters argued that the proposed definition would be overly broad because it would not expressly limit the definition of "agent" to situations where the person is acting within the scope of his or her "actual authority" as an agent. These commenters also urged the addition of a requirement that an agent's "coordination" conduct (see 11 CFR 109.21(d), below) toward a third party be based on information that was gained only due to his or her role as an agent. One of these commenters asserted that a person should not be considered an "agent" solely based on his or her authority to act, but should only become an agent when he or she takes some action. Two commenters expressed their opposition to any attempt to categorize specific campaign positions or groups of people as agents per se, and one additional commenter suggested that if the Commission does include a class of per se agents, it should identify the specific persons within the campaign who would be placed in this category.

Several commenters expressed concern as to a candidate's or political party committee's "liability" for a person who qualifies as an agent but takes actions beyond

the scope of his or her actual authority. Two other commenters expressed concerns that a principal would assume "liability" for a person who represents more than one candidate or group engaged in specified conduct while "wearing a different hat" (acting on behalf of a different person or group.) One of these commenters recommended an amendment to the rule text to provide that actions must be undertaken "on behalf of the principal" in order for liability to attach to the principal. Another commenter raised a particular concern with respect to common vendors that an "agent" who wears different hats for different groups might be deemed to engage in coordination per se by essentially sharing information within his or her own head.

On the other hand, eight commenters, including BCRA's principal sponsors, expressed concern that the scope of the proposed definition was underinclusive and would allow candidates or political parties to effectively coordinate communications with an outside spender through the use of conduits, including lower-level employees, consultants, or others with "apparent authority," who could sit in on a discussion and receive important information and convey that information to the third-party spender. BCRA's principal sponsors and two other commenters asserted that the definition of "agent" should not be drawn too narrowly because the analysis of whether a communication is coordinated should focus on whether the information was conveyed, not who conveyed it, or whether the conveyance was authorized. A different commenter suggested that the Commission's approach would create an incentive for a candidate, authorized committee, or a political party committee to share material information with staff members but make no effort to control the staff members' disclosures to outside entities. Three commenters urged that a person be deemed an agent if he or she discloses

information to an outside entity in the absence of a strictly enforced policy against such disclosure. One of these commenters indicated that a non-disclosure agreement might be employed to rebut the presumption of agency.

In the final rules, the Commission recognizes the Congressional determination that a spender can effectively coordinate a communication by acting in cooperation, consultation, or concert, with, or at the request or suggestion of, an agent as well as directly with a candidate, authorized committee, or political party committee. See, e.g., 2 U.S.C. 431(17) and 2 U.S.C. 441a(a)(7)(B)(i). In recognition of the concerns about overbreadth, the Commission is limiting the scope of the definition of "agent" in three ways. For the purposes of a coordination analysis under 11 CFR part 109, a person would only qualify as an "agent" when he or she: (1) receives actual authorization, either express or implied, from a specific principal to engage in the specific activities listed in 109.3; (2) engages in those activities on behalf of that specific principal; and (3) those activities would result in a coordinated communication if carried out directly by the candidate, authorized committee staff, or a political party official. Contrary to the assertions of several commenters, a principal would not assume "liability" for agents who act outside the scope of their actual authority, nor would a person be considered an "agent" of a candidate if that person approaches an outside spender on behalf of a different organization or person. See Restatement (Second) of Agency § 219(1). The Commission rejects, however, the argument that a person who has authority to engage in certain activities should be considered to be acting outside the scope of his or her authority any time the person undertakes unlawful conduct. It is a settled matter of agency law that liability may exist "for unlawful acts of [] agents, provided that the

conduct is within the scope of the agent's authority, whether actual or apparent." U.S. v. Investment Enterprises, Inc., 10 F.3d 263, 266 (5th Cir. 1993).

One commenter specifically requested an exemption for "all persons in the legislative offices of federal officeholders" unless the "person dealing with them knows that they are acting on behalf of the officeholder in her capacity as a candidate." The Commission has intentionally avoided promulgating a regulation based on apparent authority, which is the authority of an actor as perceived by a third party, because such authority is often difficult to discern and would place the definition of "agent" in the hands of a third party. Therefore, in the Commission's judgment, apparent authority is not, by itself, a sufficient basis for agency for the purposes of revised 11 CFR part 109. The commenter's suggested approach would necessitate a determination of agency solely on the basis of apparent authority and is therefore inconsistent with the structure and purpose of the regulations.

These limitations, however, are not intended to establish any presumption against the creation of an agency relationship. The grant and scope of the actual authority, whether the person is acting within the scope of his or her actual authority, and whether he or she is acting on behalf of the principal or a different person, are factual determinations that are necessarily evaluated on a case-by-case basis in accordance with traditional agency principles. For example, the issue of whether or not an authorized person is acting on behalf of the principal is an objective, fact-based examination that is not dependent on that person's own characterization of whether he or she is acting in an individual capacity or on behalf of a different principal.

As explained in the NPRM, the Commission's pre-BCRA regulations include a special definition of "person" for 11 CFR part 109. See pre-BCRA 11 CFR 109.1(b)(1). The Commission did not include this separate definition of the term "person" in the NPRM because the term is already defined in pre-BCRA 11 CFR 100.10 and the Commission was concerned that a separate definition of "person" in 11 CFR part 109 might be confusing or misinterpreted as permitting labor organizations, corporations not qualified under 11 CFR 114.10(c), or other entities or individuals otherwise prohibited from making contributions or expenditures under the Act and Commission regulations, to pay for coordinated communications or to make independent expenditures. See, e.g., 11 CFR 110.20 and 114.2. The Commission has specifically addressed these prohibitions in 11 CFR 109.22, below, and the Commission did not receive any comments on the inclusion of a separate definition of "person" in 11 CFR part 109. Therefore, no new definition of "person" is included in the final rules.

11 CFR Part 109, Subpart B -- Independent Expenditures

In the NPRM, the Commission included proposed 11 CFR 109.10 on reporting requirements for independent expenditures. The Commission announced in the NPRM its expectation that these rules would not be included in the final rule of this rulemaking but would instead be finalized in a separate rulemaking. Therefore, the Commission is not addressing section 109.10 in these final rules. While the Commission still proposes to include these provisions as part of 11 CFR part 109, subpart B, those rules are set forth and defined as part of a separate consolidated rulemaking on reporting requirements. See

Final Rules and Explanation and Justification for Reporting, 67 Fed. Register _____ (Dec. ___, 2002).

11 CFR 109.11 When is a Non-Authorization Notice (Disclaimer) Required? (2 U.S.C. 441d)

The Commission is moving the disclaimer requirements for independent expenditures from pre-BCRA 11 CFR 109.3 to new 11 CFR 109.11. There are no substantive changes to this section. Additional changes to disclaimer requirements are provided at 11 CFR 110.11, which the Commission addressed in a separate rulemaking in light of BCRA's changes to the statutory disclaimer requirement. See 2 U.S.C. 441d and Final Rules and Explanation and Justification for Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Register _____ (Dec. ___, 2002).

11 CFR Part 109, Subpart C – Coordination

11 CFR 109.20 What Does "Coordinated" Mean?

Congress did not define the term "coordinated" in FECA or in BCRA, but it did provide that an expenditure is 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," that candidate, the authorized committee of that candidate, or their agents. 2 U.S.C. 441a(a)(7)(B)(i). Similarly, in BCRA, Congress added a new paragraph to section 441a(a)(7)(B) to require that expenditures "made by any person (other than a

candidate or candidate's authorized committee) in cooperation, consultation, or concert, with, or at the request or suggestion of, a national, State, or local committee of a political party shall be considered to be contributions made to such party committee." 2 U.S.C. 441a(a)(7)(B)(ii). Also, as explained above, an expenditure is not "independent" if it is "made in cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate, authorized committee, or a political party committee. See 11 CFR 100.16.

New section 109.20(a) implements 2 U.S.C. 441a(a)(7)(B)(i) and (ii) by defining "coordinated" to mean "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." While the definition of "coordinated" in 11 CFR 109.20(a) potentially encompasses a variety of payments made by a person on behalf of a candidate or political party committee, paragraph (a) is not intended to change current Commission interpretations other than to recognize the addition of the concept of coordination with political party committees under 2 U.S.C. 441a(a)(7)(B)(ii). The Commission notes that it may provide additional guidance in this area through a subsequent rulemaking.

The Commission recognizes, however, that many issues regarding coordination involve communications, and in BCRA Congress required the Commission to address coordinated communications. Pub. L. 107-155, sec. 214(c) (March 27, 2002). Therefore, the regulations in 11 CFR 109.21, explained below, specifically address the meaning of the phrase "made in cooperation, consultation, or concert, with, or at the request or suggestion of" in the context of communications paid for by a person other than the candidate with

whom the communication was coordinated, that candidate's authorized committee, or a political party committee.

In addition, paragraph (b) of section 109.20 addresses expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee. It is the successor to pre-BCRA 11 CFR 109.1(c). Paragraph (b) is being revised from its predecessor to reflect the addition of the concept of coordination with political party committees under 2 U.S.C. 441a(a)(7)(B)(ii), as well as the replacement of the reference to former 11 CFR 100.23, see Pub. L. 107-155, section 214(b) (March 27, 2002), and grammatical changes to reflect the new location of the rule. The Commission emphasizes that the relocation of paragraph (b) is not intended to change or alter current Commission interpretations of its predecessor in pre-BCRA section 109.1(c). One commenter asserted that only express advocacy communications can constitute coordination, and urged the Commission to provide explicitly that non-communication expenditures will not be considered to be coordination. The Commission disagrees with the commenter's assertion because Congress has not so limited the statutory provisions relating to coordination. See 2 U.S.C. 431(17) and 441a(a)(7)(B)(i) and (ii). Therefore, the Commission is moving pre-BCRA 11 CFR 109.1(c), to section 109.20(b) with revisions to make it clear that these other expenditures, when coordinated, are also in-kind contributions (or coordinated party expenditures, if a political party committee so elects) to the candidate or political party committee with whom or with which they are coordinated. The exceptions contained in 11 CFR part 100, subpart C (exceptions to the definition of "contribution") and subpart E (exceptions to the definition of "expenditure") continue to apply.

11 CFR 109.21 What is a "Coordinated Communication"?

In BCRA, Congress expressly repealed 11 CFR 100.23, Pub. L. 107-155, sec. 214(b) (March 27, 2002), and instructed the Commission to promulgate new regulations on "coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees." Pub. L. 107-155, sec. 214(c) (March 27, 2002). Congress also mandated that the new regulations address four specific aspects of coordinated communications: (1) republication of campaign materials; (2) the use of a common vendor; (3) communications directed or made by a former employee of a candidate or political party; and (4) communications made after substantial discussion about the communication with a candidate or political party. See Pub. L. 107-155, sec. 214(c)(1) through (4) (March 27, 2002).

The Commission is promulgating new 11 CFR 109.21 to comply with this Congressional mandate. This rule applies to communications coordinated with candidates, their authorized committees, political party committees, or the agents of any of the foregoing. Paragraph (a) of this section begins by defining "coordinated communication." Paragraph (b) spells out the treatment of "coordinated communications" as in-kind contributions, which must be reported. Next, paragraph (c) sets out the content standard for coordinated communications. Paragraph (d) establishes conduct standards for the coordination analysis. Paragraph (e) addresses the Congressional guidance that an agreement or formal collaboration is not required for a communication to be considered "coordinated." Paragraph (f) provides a safe harbor for certain inquiries as to legislative and policy issues.

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2 1. 11 CFR 109.21(a) Definition

3 Paragraph (a) of new section 109.21 sets forth the required elements of a
4 "coordinated communication," which comprise a three-pronged test. For a
5 communication to be "coordinated," all three prongs of the test must be satisfied. While
6 no one of these elements standing alone fully answers the question of whether a
7 communication is for the purpose of influencing a Federal election, see 11 CFR
8 100.52(a), 100.111(a), the satisfaction of all three prongs of the test set out in new
9 11 CFR 109.21 justifies the conclusion that payments for the coordinated communication
10 are made for the purpose of influencing a Federal election, and therefore constitute in-
11 kind contributions. Nevertheless, the Commission notes that the inclusion of one prong
12 of its test, the content standard, could function efficiently as an initial threshold for the
13 coordination analysis.

14 Under the first prong, in paragraph (a)(1), the communication must be paid for by
15 someone other than a candidate, an authorized committee, a political party committee, or
16 an agent of any of the foregoing. However, a person's status as a candidate does not
17 exempt him or her from this section with respect to payments he or she makes for
18 communications on behalf of a different candidate. Under paragraph (a)(2), the second
19 prong of the three-pronged test is a "content standard" regarding the subject matter of the
20 communication. Under paragraph (a)(3), the third prong of the test is a "conduct
21 standard" regarding the interactions between the person paying for the communication
22 and the candidate or political party committee. A sentence proposed in the NPRM

regarding republication of campaign materials is being moved from proposed paragraph (a)(3) in the NPRM to paragraph (c)(2) in the final rules.

Of the seven commenters who specifically commented on this three-part structure for the regulations, two expressed general support for the approach. The other five, including BCRA's principal sponsors, urged the Commission to emphasize the actual conduct and minimize the importance of any content standard. The final rules, however, maintain the same structure as the proposed rules for the reasons described below. The Commission recognizes that a content requirement may serve to exclude some communications that are made with the subjective intent of influencing a Federal election, thereby potentially narrowing the reach of 2 U.S.C. 441a(a)(7)(B)(i) and (ii), but the Commission believes that a content standard provides a clear and useful component of a coordination definition in that it helps ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a federal election.

2. 11 CFR 109.21(b) Treatment as an In-Kind Contribution; Reporting.

Under the Act and the Commission's regulations, a "contribution" is defined as "a 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," subject to a number of specific exceptions. See 11 CFR 100.52(a), et seq.; see also 2 U.S.C. 431(8)(A), et seq. An "expenditure" is similarly defined as "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," and is also subject to a list of

specific exceptions. See 11 CFR 100.111(a), et seq.; see also 2 U.S.C. 431(9)(A), et seq. Thus, a "payment" that is "made for the purpose of influencing any election for Federal office" qualifies as either an "expenditure," a "contribution," or both, unless it is specifically excepted.

As explained above, the coordination provisions in the statute, 2 U.S.C. 441a(a)(7)(B)(i) and (ii), state that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate or a political party committee "shall be considered to be a contribution" to that candidate or political party committee. Several commenters argued that the Commission must first determine whether or not the payment for a communication constitutes an "expenditure" before proceeding to a coordination analysis. The Commission disagrees. Rather, when read as whole sentences, 2 U.S.C. 441a(a)(7)(B)(i) and (ii) conclude only that a contribution exists when three requirements are met: (1) there must be some conduct to differentiate the activity from an "independent expenditure," see 2 U.S.C. 431(17); (2) there must be some form of payment; and (3) that payment must be made for the purpose of influencing any election for Federal office. The Commission has determined that a payment that satisfies the content and conduct standards of 11 CFR 109.21 satisfies the statutory requirements for an expenditure in the specific context of coordinated communications, and thereby constitutes a contribution under 2 U.S.C. 441a(a)(7)(B)(i) and (ii).

A. 11 CFR 109.21(b)(1) General Rule

Paragraph (b)(1) of section 109.21 provides that a payment for a coordinated communication is made "for the purpose of influencing" an election for Federal office,

the same phrase used by Congress in the definition of both "expenditure" and "contribution." 2 U.S.C. 431(8)(A) and (9)(A). Paragraph (b)(1) also states the general rule that a payment for a coordinated communication constitutes an in-kind contribution to the candidate, authorized committee, or political party committee with whom or with which it is coordinated, unless excepted under subpart C of 11 CFR part 100. Please note that this section encompasses electioneering communications under 11 CFR 100.29(a)(1), in addition to other communications. Congress expressly provided that when these communications are coordinated with a candidate, authorized committee, or political party committee, they must be treated like other coordinated communications in that disbursements for these communications are in-kind contributions to the candidate or party committee with whom or which they were coordinated. See 2 U.S.C. 441a(a)(7)(C). Under BCRA, these coordinated electioneering communications, like other coordinated communications, must be treated as expenditures by the candidate, authorized committee, or political party committee with whom or with which they are coordinated. Id.

B. 11 CFR 109.21(b)(2) In-Kind Contributions Resulting From Conduct Described in Paragraphs (d)(4) or (d)(5) of this Section.

Paragraph (b)(2) clarifies the application of the general rule of paragraph (b)(1) in a particular circumstance. Under the general rule in paragraph (b)(1), a candidate's authorized committee or a political party committee receives an in-kind contribution, subject to the contribution limits, prohibitions, and reporting requirements of the Act. As explained below, two of the conduct standards, found in paragraphs (d)(4) and (d)(5) of

section 109.21, do not focus on the conduct of the candidate, the candidate's authorized committee or agents, but focus instead on the conduct of a common vendor or a former employee with respect to the person paying for the communication. To avoid the result where a candidate, authorized committee, or political party committee might be held responsible for receiving or accepting an in-kind contribution that did not result from its conduct or the conduct of its agents, the Commission explicitly provides that the candidate, the candidate's authorized committee, or political party committee does not receive or accept in-kind contributions that result from conduct described in the conduct standards of paragraphs (d)(4) and (d)(5) of this section. This treatment is generally analogous to the handling of republished campaign materials under new 11 CFR 109.23 and the Commission's pre-BCRA regulations. See former 11 CFR 109.1(d)(1). However, please note that the person paying for a communication that is coordinated because of conduct described in paragraphs (d)(4) or (d)(5) still makes an in-kind contribution for purposes of the contribution limitations, prohibitions, and reporting requirements of the Act.

One commenter suggested that the text of paragraph (b)(2) should be clarified to indicate that a candidate or political party committee receives and accepts an in-kind contribution resulting from a coordinated communication in which an agent of either engages in the conduct described in paragraphs (d)(1) through (d)(3). The Commission agrees and is incorporating that suggested change into the final rules.

C. 11 CFR 109.21(b)(3) Reporting of Coordinated Communications

Paragraph (b)(3) of 11 CFR 109.21 provides that a political committee, other than a political party committee, must report payments for coordinated communications as in-kind contributions made to the candidate or political party committee with whom or which they are coordinated. Paragraph (b)(3) also clarifies that the recipient candidate, authorized committee, or political party committee with which a communication is coordinated must report the payor's payment for that communication as an in-kind contribution received under 11 CFR 104.13 and must also report making a corresponding expenditure in the same amount. 11 CFR 104.13.

3. 11 CFR 109.21(c) Content Standards

The NPRM sought comments as to whether content standards should be included in the coordinated communications rules, and if so, what the appropriate standard should be. A number of alternative content standards were included in the NPRM. Two commenters opposed the inclusion of any content standard, arguing that to do so would inappropriately narrow the scope of the rules when the conduct of the person paying for the communication and the candidate or political party committee is sufficient, by itself, to eliminate the independence of the communication, thereby creating an in-kind contribution under 2 U.S.C. 441a(a)(7)(B)(i) and (ii). Several other commenters, however, generally supported the inclusion of a content standard, although they disagreed as to what that standard should be.

The Commission is including content standards in the final rules on coordinated communications to limit the new rules to communications whose subject matter is reasonably related to an election. In the NPRM, the Commission proposed three distinct content standards, in paragraph (c), along with three alternatives for a fourth standard. The three proposed standards were an "electioneering communication" standard, a standard encompassing the republication of candidate campaign materials, and a standard for communications that "expressly advocate" the election or defeat of a clearly identified candidate for Federal office. In addition, the three alternative content standards ranged from a minimal threshold that would have encompassed any "public communication" that refers to a "clearly identified candidate" (Alternative A), a public communication that "promoted, supported, attacked, or opposed" a candidate for Federal office (Alternative B), and a public communication that was made during a specific time period shortly before an election, was directed to a specific group of voters, and discussed the views or record of a candidate (Alternative C). The Commission proposed that a communication that satisfies any one of the standards would satisfy the "content" requirement of 11 CFR 109.21.

Commenters expressed a wide range of views as to the appropriate content standard. One commenter attempted to craft a stand-alone unitary content standard through a combination of the electioneering communication and republication standards. Four commenters argued that an "express advocacy" content standard is necessary to provide clear guidance and to ensure that the regulation is not vague or overly broad. Most other commenters acknowledged

that the three standards of electioneering, republication, and express advocacy clearly comport with guidance from Congress and the courts, but three commenters argued that no additional content standards are warranted in the absence of any further directive from Congress. A joint comment by three commenters urged the Commission to focus the content standard on the content of the communication, rather than "external criteria" such as the timing or distribution of the communication. The same commenters also requested that the Commission adjust its content standard to ensure that communications between a political party committee and its "affiliates" are not covered.

Based generally on the approach taken by Congress with respect to electioneering communications, five commenters recommended a dual time-period approach to the content standard in which communications made 30 to 60 days before an election would be subject to lesser, if any, content restrictions than communications made outside of that time period. BCRA's principal sponsors agreed with this approach in their comments and observed that communications made within 30 days of a primary or 60 days of a general election are usually campaign related. A different commenter also recommended temporal limits, but suggested that any communications made outside the 30 or 60 days should be completely excluded from being treated as coordinated communications. BCRA's principal sponsors specifically rejected this approach in their comments.

After considering the concerns raised by the commenters about overbreadth, vagueness, underinclusiveness, and potential circumvention of the restrictions in the Act and the Commission's regulations, the Commission is

setting forth four content standards to implement the statutory requirements. These standards all provide bright-line tests and subject to regulation only those communications whose contents, in combination with the manner of its creation and distribution, indicate that the communication is made for the purpose of influencing the election of a candidate for Federal office.

A. 11 CFR 109.21(c)(1) Electioneering communications

Congress provided in BCRA that when "any person makes ... any disbursement for any electioneering communication ... and such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, state, or local political party committee thereof, or an agent or official of any such candidate, party or committee ... such disbursement shall be treated as a contribution to the candidate supported by the electioneering communication ... and as an expenditure by that candidate." 2 U.S.C. 441a(a)(7)(C). To implement that statutory directive, the Commission proposed in the NPRM that the first content standard paragraph (c)(1) simply focus on whether the communication is an "electioneering communication" under 11 CFR 100.29. See Final Rule on Electioneering Communications, 67 Fed. Register 51,131 (Oct. 23, 2002). Although the proposed rule in the NPRM described a communication "that would otherwise be an electioneering communication," this indirect reference has been removed and replaced with a direct reference to an electioneering communication.

Four commenters opined that the electioneering communication provisions in BCRA are unconstitutional, and opposed their inclusion as a content standard.

One of these commenters argued that the electioneering communication content standard should be limited to include only communications containing "express advocacy." The Commission concludes, however, that such an interpretation would undermine the scope of Congress's definition of an electioneering communication, 2 U.S.C. 434(f)(3)(A), especially in light of the Congressional mandate in 2 U.S.C. 441a(a)(7)(C). Another commenter argued that the Commission should nonetheless exclude the electioneering communications from the content standards because Congress did not specifically require its inclusion in that exact manner. In the Commission's judgment, however, including the electioneering communication standard specifically authorized by Congress as one of the content standards in the definition of "coordinated communication" is a simple and straightforward way to implement 2 U.S.C. 441a(a)(7)(C). As one commenter noted, the inclusion of electioneering communications as a content standard promotes consistency because the term is already defined by Congress at 2 U.S.C. 434(f)(3)(A) and in the Commission's new rules at 11 CFR 100.29.

The Commission considered and rejected constructing a separate definition of "coordination" that would have applied specifically to electioneering communications. A separate construction would be redundant because the relevant conduct under it would be identical to the conduct standards for other coordinated communication containing other types of content. Similarly, the Commission notes that Congress provided that an electioneering communication could be coordinated with an "official" of a candidate, party, or committee, in addition to the candidate, committees, and their agents. 2 U.S.C. 41a(a)(7)(C)(ii).

The Commission is not, however, separately addressing coordination with an official in the final rule because such an official is subsumed within the definition of "agent" in 11 CFR 109.3.

B. 11 CFR 109.21(c)(2) Dissemination, Distribution, or Republication of Campaign Material

The second content standard implements the Congressional mandate that the Commission's new rules on coordinated communications address the "republication of campaign materials." See Pub. L. 107-155, sec. 214(c)(1) (March 27, 2002). The Commission's former rule on republication of campaign materials, which has been moved from former 11 CFR 109.1(d) to new section 109.23 with minor changes explained below, sets out the required treatment of both the coordinated and uncoordinated dissemination, distribution, or republication of campaign material prepared by a candidate, an authorized committee, or an agent of either. Under section 109.23, discussed below, the reporting responsibilities of candidates, authorized committees, and political party committees vary depending on whether they "coordinate" with a person financing the dissemination, distribution, or republication of a candidate's campaign material.

In the final rules the "republication" content standard in paragraph (c)(2) of section 109.21 expressly links to paragraph (d)(6) of section 109.21. This link is important because paragraph (d)(6) of this section clarifies the application of the conduct standards of paragraph (d) of this section to the unique circumstances

of republication. This change from the NPRM is intended to emphasize the relationship between paragraphs (c)(2) and (d)(6) of section 109.21. In addition, section 11 CFR 109.21(c)(2) includes a cross-reference to 11 CFR 109.23 to ensure that certain uses of campaign material exempted by 11 CFR 109.23(b) from the definition of "contribution" will not satisfy the content standard in 11 CFR 109.21(c)(2).

The Commission is making one change to the republication content standard from the rule proposed in the NPRM. In the NPRM, a communication would have satisfied the content standard proposed in 11 CFR 109.21(c)(2) when "the communication" disseminated, distributed, or republished campaign materials prepared by a candidate. The Commission is changing the standard so that the content standard will only be satisfied when "the public communication" disseminates, distributes, or republishes campaign materials. Although the Commission did not receive specific comments on this point, the Commission is employing the term "public communication," as defined at 11 CFR 100.26, to conform the scope of this standard with the approach the Commission has consistently taken for the other content standards discussed below, with the exception of the "electioneering communication" standard.

C. 11 CFR 109.21(c)(3) Express Advocacy

The third content standard in paragraph (c)(3) of section 109.21 states that a communication also satisfies the content standard if it "expressly advocates" the election or defeat of a clearly identified candidate for Federal office. Although the

commenters expressed widely differing opinions about whether this "express advocacy" standard should be the sole content standard, none of the commenters opposed including "express advocacy" as a content standard in the regulations.

D. 11 CFR 109.21(c)(4) Additional Content Standard

In addition to electioneering communications described in 11 CFR 100.29, communications that republish campaign materials, and communications that "expressly advocate" the election or defeat of a clearly identified candidate, the Commission proposed three other possible content standards in the NPRM and requested comment on additional alternatives. Each of these alternatives was premised on the communication qualifying as a "public communication," with additional requirements. Alternative A required only that the communication qualify as a public communication and contain a reference to a clearly identified candidate for Federal office. Alternative B provided that the communication must also promote, support, attack, or oppose the clearly identified candidate. Alternative C required that the public communication refer to a clearly identified candidate, be made within 120 days of an election, be directed to voters within the jurisdiction of that candidate, and include an "express statement about the record or position or views on an issue, or the character, or the qualifications or fitness for office, or party affiliation," of the clearly identified candidate.

Several commenters criticized Alternative A as overly broad, asserting that a clearly identified candidate is the minimal standard necessary to distinguish "issue ads" from communications made for the purpose of influencing an election. In contrast, several different commenters argued that the requirement of a clearly identified candidate

was too restrictive because it would fail to encompass communications urging recipients to "vote Democrat" or "vote Republican." These commenters suggested that at a minimum the Commission expand the reference to include a reference to a "clearly identified political party." Furthermore, two commenters argued that the requirement of a clearly identified candidate also fails to encompass communications that "reflect and reinforce the themes and messages of the campaign."

Five commenters criticized Alternative B, arguing that the terms "promote, support, attack, or oppose" are overly broad. Two different commenters suggested that the proposed standard relied on subjective criteria and would discourage public speech and weaken the value of having a content standard.

Several commenters also criticized Alternative C as overly broad and containing subjective criteria. One commenter specifically objected to including communications containing statements about a candidate's positions on an issue. A different commenter cited a lack of a statutory basis or empirical support for the 120-day time limit and pointed out that the rule might be applied to cover communications made in a jurisdiction other than the jurisdiction of the clearly identified candidate.

In contrast, four commenters expressed general support for this standard, but with the removal of the 120 day limit, which they believed would exclude many coordinated communications made early in the election cycle. Two of these commenters also suggested that the Commission remove the word "express" from the requirement of an "express statement." In addition, a different commenter proposed an alternative standard to cover a communication that (1) "expressly refers to" a candidate in his capacity as a

candidate; (2) refers to the next election; and (3) is publicly disseminated and actually reaches 100 eligible voters.

The Commission is including a modified version of Alternative C in the final rules at 11 CFR 109.21(c)(4). Taking into consideration the suggestions of the commenters, this content standard is largely based on, but is somewhat broader than, Congress's definition of an electioneering communication. A communication meets this content requirement if (1) it is a public communication; (2) it refers to a clearly identified candidate or political party; (3) it is directed to voters in the jurisdiction of the clearly identified Federal candidate; and (4) it is publicly distributed or publicly disseminated 120 days or fewer before a primary or general election.

The term "publicly distributed" refers to communications distributed by radio or television (see 11 CFR 100.29(b)(3)) and the term "publicly disseminated" refers to communications that are made public via other media, e.g., newspaper, magazines, handbills. In this respect, paragraph (c)(4) reflects the fact that coordinated communications can occur through media other than television and radio. Moreover, for purposes of establishing a content standard in a coordination rule, there is no reason to exclude communications that meet the content requirements of an electioneering communication, but fail to constitute an electioneering communication only because of the media chosen for the communication.

Perhaps most importantly, paragraph (c)(4) creates parallel requirements for those whose communications do not technically qualify as electioneering communications. Because electioneering communications are by definition limited to broadcast, cable, or satellite communications (see 11 CFR 100.29), communications made through other

media, such as print communications, are not included under the electioneering communication-based content standard of paragraph (c)(1). Similarly, political committees such as separate segregated funds or non-connected committees do not make electioneering communications because their payments are treated as expenditures. Therefore, under new paragraph (c)(4), for example, where a candidate and the separate segregated fund paying for the communication satisfy the conduct requirements of new 11 CFR 109.21(d), the separate segregated fund makes a coordinated communication if it pays for a newspaper advertisement. Thus, to avoid an arbitrary distinction in the content standards, paragraph (c)(4) applies to all "public communications," a term defined and set forth in BCRA by Congress. 2 U.S.C. 431(22); 11 CFR 100.26. The use of the term "public communication" provides consistency within the regulations and distinguishes covered communications from, for example, private correspondence and internal communications between a corporation or labor organization and its restricted class. The three commenters who specifically addressed the proposed use of this term expressed support for its inclusion. One of these commenters pointed out that the use of "public communication" provides "helpful consistency within the regulations." In addition, a different commenter suggested that the Commission "completely exempt" e-mail and Internet communications from its coordination regulations. By framing the content standard in terms of a "public communication," the Commission addresses that comment. Although the term "public communication" covers a broad range of communications, it does not cover some forms of communications, such as those transmitted using the Internet and electronic mail. 11 CFR 100.26.

This new standard focuses as much as possible on the face of the public communication or on facts on the public record. This latter point is important. The intent is to require as little characterization of the meaning or the content of communication, or inquiry into the subjective effect of the communication on the reader, viewer, or listener as possible. See Buckley v. Valeo, 424 U.S. 1, 42-44 (1976). The new paragraph (c)(4) is applied by asking if certain things are true or false about the face of the public communication or with limited reference to external facts on the public record. This fourth content standard does not require a description of a candidate's views or positions, a requirement in the proposed rules that raised objections from commenters.

Paragraph (c)(4)(ii) of section 109.21 requires that the public communication must be publicly distributed or publicly disseminated 120 days or fewer before a primary election or a general election. The 120-day time frame is based on 2 U.S.C. 431(20)(A)(i) (see 11 CFR 100.24(b)(1)) and has several advantages. First, it provides a "bright-line" rule. Second, it focuses the regulation on activity reasonably close to an election, but not so distant from the election as to implicate political discussion at other times. As noted, Congress has, in part, defined "Federal election activity" in terms of a 120-day time frame, deeming that period of time before an election to be reasonably related to that election. See 2 U.S.C. 431(20)(A)(i). In contrast, the "express advocacy" content standard in paragraph (c)(3) of section 109.21 applies without time limitation. Similarly, this 120-day time frame is more conservative than the treatment of public communications in the definition of Federal election activity, which regulates public communications without regard to timeframe. 2 U.S.C. 431(20)(A)(iii); 11 CFR 100.24(b)(3).

The Commission has considered, but rejected, the use of a shorter time-frame, specifically, thirty days before a primary election and sixty days before a general election. This shorter time-frame would have been derived by analogy from the definition of "electioneering communication." See 2 U.S.C. 434(f)(3)(A). The shorter time-frames would have had the advantage of symmetry with the electioneering communication definition. There is, however, an important difference between the electioneering communication concept and the paradigm adopted here for regulating coordination. Although this content standard (i.e., paragraph (c)(4)(ii)) is obviously similar to the definition of "electioneering communication," this content standard is only one part of a three-part test (see discussion of paragraph (a) of section 109.21, above), whereas the definition of "electioneering communication" is complete in itself. Under this final rule, even if a political communication satisfies the content standard, the conduct standards must still be satisfied before the political communication is consider "coordinated." In this light, the content standard may be viewed as a "filter" or a "threshold" that screens outs certain communications from even being subjected to analysis under the conduct standards.[2] Thus it is appropriate to consider a broader time-frame when applying this content standard because it serves only to identify political communications that may be coordinated if other conditions (i.e., the conduct standards) are satisfied, and thus may be inappropriately underinclusive if too narrow.

[2] In effect, the content standard of paragraph (c)(4)(ii) operates as a "safe harbor" in that communications that are publicly disseminated or distributed more than 120 days before the primary or general election will not be deemed to "coordinated" under this particular content standard under any circumstances.

The new standard also encompasses communications that refer to political parties as well as those that identify candidates, as suggested by several commenters. This extension of the content standards implements 2 U.S.C. 441a(a)(7)(B)(ii), added by section 214(c) of BCRA, which provides that expenditures made by any person in coordination with a political party committee is considered to be a contribution to that party committee.

Several commenters said that there should be an exception to the content standards for communications that refer to the "popular name" of a bill or law that includes the name of a Federal candidate who was a sponsor of the bill or law. In addition to questions whether such an exception is necessary in light of the other restrictions explained above, the Commission believes that the "popular name" proposal would also open new avenues for the circumvention of the Act and the Commission's regulations. Because the "popular name" of a bill is not a defined term, and is not subject to specific restrictions by Congress, an exemption for the use of a candidate's name in the popular name of a bill might shield a communication that clearly attacks or supports a candidate by naming the bill in a way that associates the candidate with a popular or disfavored stance. The Commission concludes that if one or more of the conduct standards is met and the communication is directed to voters in that candidate's jurisdiction and made within 60 days of general election, Congress does not intend for such a communication to be exempted from the statutory requirements merely because the communication contains a reference to a crafted name for a piece of legislation in addition to the name of the clearly identified candidate.

The new standard also incorporates the concept of the "targeting" of the communication as an indication of whether it is election-related. BCRA's principal sponsors commented that a "key factor" in determining whether a communication should be covered under these rules is whether the communication is "targeted" to a specific voter audience. By requiring that the communication be "directed to voters in the jurisdiction of the clearly identified Federal candidate," the Commission is addressing this concern. In order to encompass communications that are coordinated with a political party committee and refer to a political party, but do not refer to a candidate, the Commission also provides that the content standard in paragraph (c)(4) would be satisfied when the communication is directed "to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot." The "directed to voters" requirement focuses on the intended audience of the communication, rather than a quantitative analysis of the number of possible recipients or the expected geographic limits of a particular media, that will be determined on a case-by-case basis from the content of the communication, its actual placement, and other objective indicators of the intended audience. For example, a public communication that otherwise makes express statements about promoting or attacking Representative X or Senator Y for their stance on the "X-Y Bill" does not satisfy this requirement if it is only broadcast in Washington, D.C., and not in either member's district or State. For purposes of new paragraph (c)(4), "jurisdiction" means a member of Congress' district, the State of a U.S. Senator, and the entire United States for the President and Vice President in the general election or before the national nominating convention.

4. 11 CFR 109.21(d) Conduct Standards

Paragraph (d) of section 109.21 lists five types of conduct that satisfy the "conduct standard" of the three-part coordination test. Under these rules, if one of these types of conduct is present, and the other requirements described in paragraphs (a) and (c) are satisfied, the communication is not made "totally independently" from the candidate, the candidate's authorized committee, or the political party committee, see Buckley, 424 U.S. at 47, and thus is coordinated. The introductory sentence of paragraph (d) implements the Congressional mandate in BCRA that the coordination regulation not require "agreement or formal collaboration." Pub. L. 107-155, sec. 214(c) (March 27, 2002); see more complete discussion below.

In the NPRM, the Commission proposed five categories of conduct that would each satisfy the conduct standard when material information is conveyed or used: 1) a request or suggestion; 2) material involvement in decisions; 3) a substantial discussion; 4) use of a common vendor; and 5) use of a former employee or independent contractor of a campaign committee or political party. Several commenters offered general observations regarding the Commission's approach to a conduct standard in the NPRM. One commenter applauded the Commission's decision to focus on specific transactions leading to a coordinated communication, rather than general contacts between an organization and a campaign. That same commenter, however, complained along with three other commenters that the standards still operated to establish a presumption of coordination and should be further narrowed to require a direct causal link between the sharing of information and its use in a particular communication. One other commenter expressed a concern that the proposed rules would operate to unduly restrict corporations

or labor organizations from preparing voter guides or "scorecards" to reflect the positions of candidates on specific legislation or issues.

BCRA's principal sponsors urged the Commission to ensure that lobbying activities would not result in a finding of coordination under the final rules. Similarly, a different commenter suggested that the conduct standards be limited to contacts with a candidate in his or her role as a candidate, rather than simply in the capacity of a legislator. That commenter indicated that without such a restriction the conduct rules would improperly restrict the ability of organizations to coordinate issue advocacy with elected officials. "An action alert from a nonprofit asking the public to call their Senators and urge them to pass McCain-Feingold," the commenter argued, "is more effective if the timing and content can be coordinated with Senator McCain."

A. 11 CFR 109.21(d)(1) Request or Suggestion

Under the Act, as amended by BCRA, an expenditure made by any person at the "request or suggestion" of a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing is a contribution to the candidate or political party committee. 2 U.S.C. 441a(a)(7)(B)(i), (ii). The first conduct standard, in 11 CFR 109.21(d)(1), implements this "request or suggestion" statutory provision. This standard has two prongs and satisfying either prong satisfies the conduct standard.

Three commenters requested in a joint comment that the term "suggest" be given additional definition or explanation, proposing that the definition should reflect a suggestion as a "a palpable communication intended to, and reasonably understood to, convey a request for some action." The Commission notes that the "request or suggest"

standard is derived from the Supreme Court's Buckley decision and has existed in the Commission's regulations without further definition for over two decades. See Buckley v. Valeo, 424 U.S. at 47 (finding that "the 'authorized or requested' standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions"); see also H.R. Doc. No. 95-44, at 55 (Jan. 12, 1977) (Explanation and Justification for 11 CFR 109.1, defining independent expenditure as an "expenditure ...which is not made ...at the request or suggestion of" a candidate, authorized committee, or their agents). A determination of whether a request or suggestion has occurred requires a fact-based inquiry that, even under the commenters' proffered explanation, can not be easily avoided through further definition.

A different commenter expressed concern that the proposed rule would have broadly affected communications made with respect to all candidates after the person paying for such communications has received a request or suggestion from any candidate. In this final rule, the Commission does not intend such an application. Neither of the two prongs of this conduct standard can be satisfied without some link between the request or suggestion and the candidate or political party who is, or that is, clearly identified in the communication. Where Candidate A requests or suggests that a third party pay for an ad expressly advocating the election of Candidate B, and that third party publishes such a communication with no reference to Candidate A, no coordination will result between Candidate B and the third party payor. However, a candidate is not removed from the provisions of the conduct standards merely by virtue of being a candidate. If Candidate A is an "agent" for Candidate B in the example above, then the communication would be

coordinated. Similarly, if Candidate A requests that Candidate B pay for a communication that expressly advocates the election of Candidate A, and Candidate B pays for such a communication, that communication is a coordinated communication and Candidate B makes an in-kind contribution to Candidate A.

The first type of conduct, in paragraph (d)(1)(i), is satisfied if the person creating, producing, or distributing the communication does so at the request or suggestion of a candidate, authorized committee, political party committee, or agent of any of the foregoing. The Buckley court originally drew on the 1974 House and Senate Reports accompanying the 1974 amendments to the Act when it upheld the section in FECA that distinguished a communication made "at the request or suggestion" of the candidate or political party committee from those that are made "totally independently from the candidate and his campaign." Buckley, 424 U.S. at 47 (citing H.R. Rep. No. 93-1239, at 6 (1974) and S. Rep. No. 93-689, at 18 (1974)). A "request or suggestion" is therefore a form of coordination under the Act, as approved by Buckley. A request or suggestion encompasses the most direct form of coordination, given that the candidate or political party committee communicates desires to another person who effectuates them.

In the NPRM, the Commission noted that this provision, for example, would not apply to a speech at a campaign rally, but, in appropriate cases, would apply to requests or suggestions directed to specific individuals or small groups for the creation, production, or distribution of communications. One commenter agreed with this approach, requesting that the rule itself more clearly reflect this explanation. However, the Commission is not amending its rules because it could be potentially confusing to delineate in a rule every conceivable situation that could arise. Instead, the Commission offers the following

explanation of the new rule. The "request or suggestion" conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1). Similarly, a request in a public campaign speech or a newspaper advertisement is a request to the general public and is not covered, but a request during a speech to an audience at an invitation-only dinner or during a membership organization function is a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).

The second way to satisfy the "request or suggestion" conduct standard (paragraph (d)(1)(ii)) is for a person paying for a communication to suggest the creation, production, or distribution of the communication to the candidate, authorized committee, political party committee, or agent of any of the foregoing, and for the candidate, authorized committee, political party committee, or agent to assent to the suggestion. The NPRM explained that this second way of satisfying the conduct standard is intended to prevent circumvention of the statutory "request or suggestion" test (2 U.S.C. 441a(a)(7)(B)(i), (ii)) by, for example, the expedient of implicit understandings without a formal request or suggestion. Two commenters supported the addition of this new prong in order to prevent such circumvention of the Act. Two different commenters suggested that only affirmative assent should satisfy the conduct standard, although one of these commenters proposed that the rule should also cover situations where the parties have a prior

agreement that a certain response be taken as an affirmative answer. Three other commenters opposed an assent standard entirely as overly complex and dependent on subjective criteria. One of these commenters argued that such an approach would undermine the Commission's efforts to create bright lines with respect to conduct resulting in coordination, and joined with another of these commenters in expressing concern that such a standard would be too easily triggered in the context of lobbying or other discussions with elected representatives. Another of these commenters also questioned whether certain responses, such as silence or "when a Congressman's eyes light up at the mention of a certain communication," constitute assent. One commenter also questioned whether evidence of circumvention exists to justify this approach. This commenter warned that the assent standard could run afoul of the district court's decision in Christian Coalition, which, in the commenter's words, determined that "coordination does not exist where a union or corporation merely informs a candidate about its own political plans."

The Commission recognizes that the assent of a candidate may take many different forms, but it disagrees that a standard encompassing assent to a suggestion is overly complex. Assent to a suggestion is merely one form of a request; it is "an expression of a desire to some person for something to be granted or done." See Black's Law Dict. (6th ed. 1990) p. 1304 (definition of "request"). A determination of whether assent to a suggestion occurs is necessarily a fact-based determination, but no more so than a determination of whether other forms of a request or suggestion occur. The Commission therefore also disagrees with the commenter who suggested that the approach in the NPRM might not be permissible in light of the Christian Coalition

decision. The Commission did not, as that commenter suggested, propose that coordination could result where a payor "merely informs" a candidate or political party committee of its plans. Rather, under the proposed rule, a candidate or a political party committee will have accepted an in-kind contribution only if there is assent to the suggestion; by rejecting the suggestion, the candidate or political party committee may unilaterally avoid any coordination.

It is the Commission's judgment that the assent to a suggestion must be encompassed by this conduct standard to prevent the circumvention of the requirements of the Act in this area. Therefore, and in light of the reasons set forth in the NPRM and above, the Commission is promulgating the request or standard without change from its form in the NPRM.

One commenter suggested that the Commission should permit a person to rebut the "presumption" of coordination after a request or suggestion "by demonstrating that the organization had decided to make that communication prior to the contact with the candidate, campaign, or party." The Commission does not agree with the creation of such a "presumption." Instead, a request or suggestion must be based on specific facts, rather than presumed, to satisfy this conduct standard. Thus, the absence of a presumption obviates the need to establish a mechanism for rebuttal.

As discussed above, the Buckley Court expressly recognized a request or suggestion by a candidate as a direct form of coordination resulting in a contribution. Buckley, 424 U.S. at 47. In the NPRM, the Commission sought comment on whether the unique nature of requests or suggestions by candidates or political party committees indicates that such conduct should be handled differently under the coordination

regulations. Specifically, the Commission asked whether a request or suggestion for a communication by a candidate or political party committee should be viewed as a special case, and as sufficient, in and of itself, regardless of the contents of the communication, to establish coordination. Three commenters opposed any rule in which request or suggestion, without any content standard, could constitute a coordinated communication. One of these commenters argued that such an approach would permit a "false positive," such as when a group that has long planned a lobby effort meets with a legislator, and the legislator "expresses her hope" that the group will publicize a particular piece of legislation bearing her name. Similarly, another of these commenters asserted that there are "numerous communications that may be made at the request or suggestion of a candidate that have no relationship to any election." The Commission agrees with these commenters' concerns. Even supporters of this approach appeared to acknowledge in their testimony that a request to run an advertisement well before the next election might not be in an "electoral context" and therefore should not necessarily be treated as a coordinated communication under the Commission's regulations. Therefore, the final rules do not create any exception from the content standard for the "request or suggestion" conduct standard.

B. 11 CFR 109.21(d)(2) Material Involvement

The second conduct standard, 11 CFR 109.21(d)(2), addresses situations in which a candidate, authorized committee, or a political party committee is "materially involved in decisions" regarding specific aspects of a public communication paid for by someone else. Those specific aspects are listed in paragraphs (i) through (vi) of paragraph (d)(2):

(i) the content of the communication; (ii) the intended audience; (iii) the means or mode of the communication; (iv) the specific media outlet used; (v) the timing or frequency of the communication; or (vi) the size or prominence of a printed communication or duration of a communication by means of broadcast, cable, or satellite. Please note that "the specific media outlet used" includes those listed in the definition of "public communication" in 11 CFR 100.26, including the broadcast and print media, mass mailings, and telephone banks. The "content of the communication" would include the script of telephone calls.

One commenter argued that this conduct standard should be limited to situations in which a candidate or political party has "significant control or influence over decisions" regarding the communication. The Commission disagrees, as such a standard would do little to clarify the rule or its application. The same commenter expressed concern about the scope of the "material involvement" standard, arguing that one candidate's actions with respect to a third-party spender might "taint" all of that third-party's communications with respect to different candidates. For the same reasons discussed above in the context of the "request or suggestion" standard, the Commission is not tailoring its rules to address that perceived potential outcome.

Two other commenters characterized the material involvement standard as redundant in light of the "substantial discussion" conduct standard, and one also opposed its inclusion because of vagueness and because Congress did not mandate this specific approach in BCRA, nor was it mandated by Christian Coalition. In contrast, four commenters indicated general support for the inclusion of this standard in the final rules and urged the Commission to expand it to cover material involvement in "discussions," in

addition to decisions, regarding a communication. The Commission recognizes that there is a potential overlap between the "material involvement" standard and the "substantial discussion" standard explained below. Many activities that satisfy the "substantial discussion" conduct standard will also satisfy the "material involvement" standard, but the "material involvement" standard encompasses some activities that would not be encompassed by the "substantial discussion" standard or any of the other conduct standards. For example, a candidate is materially involved in a decision regarding the content of a communication paid for by another person if he or she has a staffer deliver to that person the results of a polling project recently commissioned by that candidate, and the polling results are material to the payor's decision regarding the intended audience for the communication. However, as explained below, the "substantial discussion" standard would not be satisfied by such delivery without some "discussion" or some form of interactive exchange between the candidate and the person paying for the communication. The Commission thus believes that the "material involvement" standard is necessary to address forms of "real world" coordination that would not be addressed in any of the other conduct standards.

One commenter advised against any interpretation of the rule that would define "material" to require a showing of direct causation. For the purposes of 11 CFR part 109, "material" has its ordinary legal meaning, which is "important; more or less necessary; having influence or effect; going to the merits." Black's Law Dict. (6th ed. 1990) p. 976. Thus, the term "materially involved in decisions" does not encompass all interactions, only those that are important to the communication. The term "material" is included to safeguard against the inclusion of incidental participation that is not important to, or does

not influence, decisions regarding a communication. The factual determination of whether a candidate's or authorized committee's involvement is "material" must be made on a case-by-case basis.

The "material involvement" standard does not provide a "bright-line" because its operation is necessarily fact-based. Nevertheless the inclusion of a "materiality" requirement serves to protect against overbreadth, consistent with Supreme Court jurisprudence. In construing the meaning of "material" in the context of Securities Exchange Commission regulations, the Supreme Court specifically rejected a "bright-line rule" for materiality:

> A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But ease of application alone is not an excuse for ignoring the purposes of the Securities Acts and Congress' policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.

Basic v. Levison, 485 U.S. 224, 236 (1988). Therefore, the "material involvement" standard does not impose a requirement of direct causation, but focuses instead on the nature of the information conveyed and its importance, degree of necessity, influence or the effect of involvement by the candidate, authorized committee, political party committee, or their agents in any of the communication decisions enumerated in 11 CFR 109.21(d)(2)(i) through (vi).

The Commission has considered and rejected the suggestion of the commenter who recommended that "material involvement" be narrowed to a "but-for" test, which would require proof that the communication would not have occurred but for the material involvement of a candidate, authorized committee, political party committee, or agent. The Commission is not adopting this approach or any similar requirement of direct causation in its final rules. Under such an analysis, information would only be "material" if all other potential influences on the content of the communication, its intended audience, its means or mode, the specific media outlet used, the timing or frequency of the communication, or the size, prominence, or duration of the communication could be eliminated. This would result in an extremely intrusive factual determination. For example, under the commenter's suggested approach, a candidate might propose a specific date for publication of a communication, but that candidate would not be materially involved in the decision regarding the timing of the communication unless the Commission could prove that no alternate factor could have led to the same timing decision. Such an approach is also unworkable because foreclosing all potential alternatives imposes an unnecessarily high burden of proof. The Commission also believes that such an approach would be unwarranted because the plain meaning of "material," as explained above, provides sufficient guidance for an inherently fact-based determination. For the same reasons, the Commission rejects any interpretation of "material involvement" that would require a showing that the communication is made "as a result of" the involvement of a candidate, an authorized committee, a political party committee, or an agent.

Instead, a candidate, authorized committee, or political party committee is considered "materially involved" in the decisions enumerated in paragraph (d)(2) after sharing information about plans, projects, activities, or needs with the person making the communication, but only if this information is found to be material to any of the above-enumerated decisions related to the communication. Similarly, a candidate or political party committee is "materially involved in decisions" if the candidate, political party committee, or agent conveys approval or disapproval of the other person's plans. The candidate or representatives of an authorized committee or political party committee need not be present or included during formal decisionmaking process but need only participate to the extent that he or she assists the ultimate decisionmaker, much like a lawyer who provides legal advice to a client is materially involved in a client's decision even when the client ultimately makes the decision.

The Commission notes that as with the "request or suggest" standard, the "material involvement" standard would not be satisfied, for example, by a speech to the general public, but is satisfied by remarks addressed specifically to a select audience, some of whom subsequently create, produce, or distribute public communications. However, it is not necessary that the involvement of the candidate or political party committee be traced directly to one specific communication. Rather, a candidate's or political party committee's involvement is material to a decision regarding a particular communication if that communication is one of a number of communications and the candidate or political party committee was materially involved in decisions regarding the strategy for those communications. For example, if a candidate is materially involved in a decision about the content or timing of a 10-part advertising campaign, then each of the

10 communications is coordinated without the need for further inquiry into the decisions regarding each individual ad on its own.

In order to respond to requests by several commenters for additional clarification about how the standard would operate, the Commission is providing the following hypothetical: Candidate A reads in the newspaper that the Payor Group is planning an advertising campaign urging voters to support Candidate A. Candidate A faxes over her own ad buying schedule to Payor Group, hoping that Payor Group will plan its own ad buying schedule around Candidate A's schedule to maximize the effect of both ad campaigns. The Payor Group subsequently runs ads that are all on NBC and ABC during the 6:00 news hour and during the most expensive weekday timeslot on NBC, whereas Candidate A's ads are run on CBS during the 6:00 news hour and during the most expensive time slot on CBS. When asked, Payor Group acknowledges that it received the fax from Candidate A, but says only that its plans for the timing of the campaign were in flux at the time they received the fax. The analysis under the "materially involved" conduct standard focuses on whether the fax constituted material involvement by the candidate in a decision regarding the timing of the Payor Group communications. Significant facts might include that the Payor Group changed its previously planned schedule, or that Payor Group had not yet made plans and had factored in the fax in its decision to choose CBS and the same time slot, or show in some other way that the fax was "important; more or less necessary, having influence or effect, [or] going to the merits" with respect to the Payor Group's decisions about the timing of its ads. The transmission and receipt of the fax in combination with the correlation of the two ad campaigns gives rise to a reasonable inference that Candidate A's involvement was

material to the Payor group's decision regarding the timing of its ad campaign. If, on the other hand, the example is changed so that the Payor Group's ads run on the same channel right after the candidate's ads in a way that lessens the effect of both ad campaigns, it may be appropriate to conclude that Candidate A's involvement was not material to the Payor group's decision regarding the timing of its ad campaign. In other words, the degree to which the communications overlapped or did not overlap is one indication of whether Candidate A's involvement was material to the timing of the Payor Group communications.

C. 11 CFR 109.21(d)(3) Substantial Discussion

In BCRA, Congress also directed the Commission to address "payments for communications made by a person after substantial discussion about the communication with a candidate or political party." Pub. L. 107-155, sec. 214(c)(4) (March 27, 2002). In the NPRM, the Commission proposed a third conduct standard that would apply when a communication satisfying one or more of the content standards "is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication" and a candidate, authorized committee, political party committee, or an agent of any of the foregoing. 67 Fed. Register at 60,065 (September 24, 2002). The proposed rule also specified that a discussion is substantial "if information about the plans, projects, or needs of the candidate or political party committee is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication." 67 Fed. Register at 60,066 (September 24, 2002).

Three commenters supported the inclusion of this standard exactly as proposed in the NPRM. Two different commenters, however, characterized this standard as redundant in light of the "material involvement" standard and suggested that they be combined into a single standard. One other commenter asserted that there was "insufficient quantification" as to the meaning of a "substantial" discussion and recommended that "substantial discussion" join "material involvement" as subjects for future rulemaking consideration. A different commenter advised that "material" should be further defined in the context of this standard. Two commenters advocated a return to the Christian Coalition test of whether or not the candidate and the spender emerge as "partners or joint venturers," while one of these commenters urged the Commission to specifically exclude discussions about policy and legislation in this context.

The Commission is including the "substantial discussion" standard in the final rules on coordinated communications because, as stated above, Congress required it to address this issue. Pub. L. 107-155, sec. 214(c)(4) (March 27, 2002). Under paragraph (d)(3) of 11 CFR 109.21, a communication meets the conduct standard if it is created, produced, or distributed after one or more substantial discussions between the person paying for the communication, or the person's agents, and the candidate clearly identified in the communication, his or her authorized committee, his or her opponent, or the opponent's authorized committee, a political party committee, or their agents. While the Commission recognizes the commenter's concerns that "substantial" and "material" are not set forth as bright-line tests, the Commission views an analysis of a "substantial discussion" as necessarily fact-specific and not naturally conducive to a meaningful bright-line analysis. Nevertheless, the Commission is providing an analytical framework

in which a finder of fact determines whether a discussion occurred, whether certain information was conveyed, and whether that information is material to the creation, production, or distribution of the communication. The Christian Coalition suggestion that a candidate and spender emerge as "joint venturers" would only serve to confuse readers. The "substantial discussion" conduct standard in this final rule addresses a direct form of coordination between a candidate, authorized committee, political party committee, or their agents and a third-party spender, and the Commission is narrowing the scope of this standard through the additional requirements that the discussion be "substantial" and the information conveyed be "material." Paragraph (d)(3) explains that a "discussion" is "substantial" if information about the plans, projects, activities, or needs of the candidate, authorized committee, or political party committee that is material to the creation, production or distribution of the communication is conveyed to a person paying for the communication. "Discuss" has its plain and ordinary meaning, which the Commission understands to mean an interactive exchange of views or information. "Material" has the meaning explained above in the context of the "materially involved" standard. In other words, the substantiality of the discussion is measured by the materiality of the information conveyed in the discussion.

D. 11 CFR 109.21(d)(4) Common Vendor

In BCRA, Congress required the Commission to address "the use of a common vendor" in the context of coordination. Pub. L. 107-155, sec. 214(c)(2) (March 27, 2002). In the NPRM, the Commission proposed the conduct standard in paragraph (d)(4) of section 109.21 to implement this Congressional mandate. Proposed paragraphs

(d)(4)(i) and (ii) provide that a common vendor is a commercial vendor who is contracted to create, produce, or distribute a communication by the person paying for that communication after that vendor has, during the same election cycle, provided any one of a number of listed services to a candidate who is clearly identified in that communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing. Under proposed paragraph (d)(4)(iii), the conduct standard would be satisfied if the common vendor conveys material information about the plans, projects, or needs of a candidate, authorized committee, or political party committee to the person paying for the communication, or if the vendor uses that material information in the creation, production, or distribution of a covered communication.

Many commenters addressed the "common vendor" standard proposed in the NPRM. One commenter asserted that this rule would not be enforceable because the term "common vendor" was "inadequately defined" to cover most vendors. This commenter warned that proposed standard would not reach many vendors who continuously re-organize personnel, merge, or dissolve and reorganize as different entities during or between election cycles. The same commenter believed it was important to include in the list of covered services media production vendors, pollsters, and media buying firms (for purchasing time slots) because they work closely together.

The Commission recognizes the possibility that commercial vendors may attempt to circumvent the new rules by re-organizing as different entities or replacing personnel. However, the Commission notes that the final rules focus on the use or conveyance of information used by a vendor, including its owner, officers, and employees, in providing

services to a candidate, authorized committee, or political party committee, rather than the particular structure of the vendor. The specific reference to a vendor's owners and officers was not included in the proposed rule, but is being added to the final rule to address the commenter's concern. Therefore, if an individual or entity qualifies as a commercial vendor at the time that individual or entity contracts with the person paying for a communication to provide any of the specified services, then the individual or entity qualifies as a common vendor to the extent that the same individual or entity, "or any owner, officer, or employee" of the commercial vendor, has provided any of the enumerated services to the candidate during the specified time period. Thus, a commercial vendor may qualify as a common vendor under 11 CFR 109.21(d)(4) even after reorganizing or shifting personnel.

Five commenters argued that the Commission should presume that the conduct standard is satisfied whenever a candidate and an outside spender use the same common vendor. According to these commenters, the rule proposed by the Commission in the NPRM would create an "impossibly high standard to meet" if it required a showing that the common vendor actually "uses" particular information.

In contrast, five different commenters asserted that any such presumption would be overly broad and "taint" the vendor, or submit the candidate, political party committee, vendor, or spender to unwarranted "liability" for communications presumed to be coordinated merely because of the use of the vendor. Several commenters in this latter group were concerned that an overly broad rule would chill speech and discourage vendors from providing services to candidates or political party committees, which the commenters warned would be particularly troublesome in areas where only a limited

number of vendors provide specific services. One commenter argued that the proposed standard could lead to extensive and burdensome investigations that would place spenders at a disadvantage because it would be difficult for them to show that the vendor had not used certain information from a candidate's campaign committee or political party committee to create a communication. One commenter, who described himself as being in the business of "buying media spot time on behalf of various political clients," stated that he had spent a substantial sum of money responding to investigations, and opposed any rule in which "merely associating" with a common vendor might expose the person paying for a communication to the risk of enforcement proceedings. Four of these commenters, however, were generally supportive of the Commission's proposal to require that the common vendor "use or convey" material information to the person making the communication at issue, as opposed to simply providing services to both a candidate or party and the spender.

Similarly, three other commenters expressed concern about the "per se inclusion of vendors by class" and suggested that the inclusion of specific types of vendors should merely raise a "rebuttable presumption." These three commenters further noted that the proposed reference to "material information" would include information "used previously" in providing services to the candidate or party. These commenters questioned how a vendor might account for the "use" of material information.

After considering the wide range of comments, the Commission has decided to promulgate a final rule that is similar in many respects to the proposed rule, with certain modifications discussed below. It disagrees with those commenters who contended the proposed standard created any "prohibition" on the use of common vendors, and likewise

disagrees with the commenters who suggested it established a presumption of coordination. Instead, the Commission notes that a different group of commenters urged the Commission to adopt such a presumption precisely because they believed the proposed standard did not already contain a presumption and would therefore be difficult to meet. The final rules in 11 CFR 109.21(d)(4) restrict the potential scope of the "common vendor" standard by limiting its application to vendors who provide specific services that, in the Commission's judgment, are conducive to coordination between a candidate or political party committee and a third party spender. But under this final rule, even those vendors who provide one or more of the specified services are not in any way prohibited from providing services to both candidates or political party committees and third-party spenders. This regulation focuses on the sharing of information about plans, projects, activities, or needs of a candidate or political party through a common vendor to the spender who pays for a communication that could not then be considered to be made "totally independently" from the candidate or political party committee.

The only commenter who identified himself as providing vendor services indicated that it is not the common practice for vendors to make use of one client's media plans in executing the instructions of a different client, and sharing "any client information given by another" would "compromise the professional relationship" that is at the "core of any service business." That commenter observed that "[c]ommon vendors, at whatever tier, who avoid such conduct should never be at risk of being deemed an instrument of coordination." No other commenters offered conflicting information on these points. Thus, because the Commission addresses only the use or conveyance of

information material to the communication, the final rules narrowly target the coordination activity without unduly intruding into existing business practices.

The common vendor rule is carefully tailored to ensure that all four of the following conditions must be met. First, under 11 CFR 109.21(d)(4)(i), the person paying for the communication, or the agent of such a person, must contract with, or employ, a "commercial vendor" to create, produce, or distribute the communication. The term "commercial vendor" is defined in the Commission's pre-BCRA regulations at 11 CFR 116.1(c) as "any person[] providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services." Thus, this standard only applies to a vendor whose usual and normal business includes the creation, production, or distribution of communications, and does not apply to the activities of persons who do not create, produce, or distribute communications as a commercial venture.

The second condition, in paragraph (d)(4)(ii), is that the commercial vendor must have provided certain services to the candidate or political party committee that puts the commercial vendor in a position to acquire information about the campaign plans, projects, activities, or needs of the candidate or political party committee that is material to the creation, production or distribution of the communication. Nine specific services are enumerated in paragraphs (d)(4)(ii)(A) through (I). Providing these services places the "common vendor" in a position to convey information about the candidate's or party committee's campaign plans, projects, activities, or needs to the person paying for the communication where that information is material to the communication.

The third condition is that the new rule only applies to common vendors who provide the specified services during the current election cycle. "Election cycle" is defined in 11 CFR 100.3. The Commission sought comment on whether a different time period, such as a fixed two-year period, would more accurately align the rule with existing campaign practices. One commenter responded that a two-year period would be too long and suggested that the standard should pertain "only to vendors who were common during the election year," or possibly further limited to vendors who provide services during the 30-day period before a primary election or the 60-day period before an election. That commenter also suggested that a time limit be placed on the use or conveyance of information received from a candidate or political party in recognition that such information would eventually become stale and unworthy of restriction. A different commenter, however, suggested that a two-year time limit would be too short because it would not appropriately encompass election activity that takes place throughout the six-year Senate election cycle. Another commenter advised that the time limit for common vendor activities should be limited to the period "during the calendar year in which the candidate's name is on the ballot for election to Federal office." One commenter proposed an alternative in which a vendor's services would not be covered by the rule outside of the 30 days following the time the vendor ceased working for the candidate or political party committee.

The Commission is retaining "election cycle" as the temporal limit in the final rules. The election cycle provides a clearly defined period of time that is reasonably related to an election. The mixture of an election cycle with a calendar year cutoff would likely cause confusion.

The fourth condition, in paragraph (d)(4)(iii), requires that the commercial vendor "uses or conveys information about the candidate's campaign plans, projects, activities, or needs" or the political party committee's campaign plans, projects, activities, or needs where that information is material to the creation, production, or distribution of the communication. This requirement encompasses situations in which the vendor assumes the role of a conduit of information between a candidate or political party committee and the person making or paying for the communication, as well as situations in which the vendor makes use of the information received from the candidate or political party committee without actually transferring that information to another person. By referring in the final rule to the candidate's "campaign" plans, projects, activities, or needs, the Commission clarifies that this conduct standard is not intended to encompass lobbying activities or information that is not related to a campaign. The Commission notes, however, that to the extent information relates to campaign plans, projects, activities, or needs, that information would be covered by this provision even if that information also related to non-campaign plans, projects, activities, or needs of the candidate.

Several commenters opposed the inclusion of the "use or convey" requirement as being exceedingly difficult to prove, while other commenters viewed it as necessary protection against an unduly burdensome rule. Two of the commenters who supported a general presumption of coordination suggested that a confidentiality agreement might be used to rebut the presumption, while three others opposed a general presumption suggested that the Commission establish a safe harbor for spenders who enter into a confidentiality agreement filed under seal with the Commission. A different commenter suggested that the "use or convey" provision would be "unworkable" unless it provided

for some form of exception for the use of an "ethical screen." Otherwise, according to that commenter, a single employee might "disqualify" an entire firm from providing services to both a candidate and a third-party spender.

The final rule does not require the use of any confidentiality agreement or ethical screen because it does not presume coordination from the mere presence of a common vendor. The final rule also does not dictate any specific changes to the business relationship between a vendor and its clients. The Commission does not anticipate that a person who hires a vendor and who, irrespective of BCRA's requirements, follows prudent business practices, will be inconvenienced by the final rule. Nevertheless, the Commission does not agree that the mere existence of a confidentiality agreement or ethical screen should provide a de facto bar to the enforcement of the limits on coordinated communication imposed by Congress. Without some mechanism to ensure enforcement, these private arrangements are unlikely to prevent the circumvention of the rules.

The Commission also sought comment on the list of common vendor services covered in paragraph (d)(4)(ii), and specifically whether purchasing advertising time slots for television, radio, or other media should be added to that list. Several commenters recommend excluding the following groups of vendor classes from those listed in the proposed rules on the principle that they lack adequate control as decisionmakers or they have little knowledge of communications: 1) "media time buyers and others where the technical nature of their services diminishes their role in controlling the content of strategically sensitive communications;" 2) fundraisers; 3) vendors involved in selecting personnel, contractors, or subcontractors; 4) vendors involved in consulting; and

5) vendors involved in identifying or developing voter lists, mailing lists, or donor lists. A media buyer urged the Commission not to include media buyers in the list of covered activities because they have little decisionmaking authority and act within "predetermined strategic parameters including timing, geographic and demographic target audiences, and budget," but do not "create, produce, or distribute" a communication by themselves.

The Commission is incorporating the list of covered common vendor services into the final rules without change from its form in proposed section 109.21(d)(4)(ii) of the NPRM. The Commission recognizes that media buyers might potentially serve a number of different roles at the direction of various clients. Therefore, the Commission is not including "purchasing advertising time slots for television, radio, or other media" as a distinct category in the list of common vendor services covered in paragraph (d)(4)(ii). However, media buyers and other similar service providers are included to the extent that their services fit within one of the other categories already listed in paragraph (d)(4)(ii).

E. 11 CFR 109.21(d)(5) Former Employee/Independent Contractor

In BCRA, Congress required the Commission to address in its revised coordination rules "persons who previously served as an employee of" a candidate or political party committee." Pub. L. 107-155, sec. 214(c)(3) (March 27, 2002). In the NPRM, the Commission proposed 11 CFR 109.21 (d)(5) to implement this Congressional requirement. Proposed paragraph (d)(5) would have applied to communications paid for by a person who was previously an employee or an independent contractor of a candidate, authorized committee, or political party committee, or by the employer of such a person. Under the rule proposed in the NPRM, the "former employee" conduct standard would be

satisfied if the former employee or independent contractor "makes use of or conveys" "material information" about the candidate's or political party committee's plans, projects, or needs to the person paying for the communication.

Commenters responding to the proposed rules made many of the same points about the "former employee" standard as they made with respect to the "common vendor" standard. One commenter opposed the proposal in the NPRM that covered the "use" of material information provided by a former employee. Such a standard, that commenter asserted, would be too broad and would amount to a "per se" rule that would lead to overly intrusive investigations. In contrast, four commenters argued that the proposed standard was not broad enough and suggested that the Commission establish a presumption of coordination when a former employee or an independent contractor of a campaign committee or political party committee pays for, or his or her current employer pays for, a communication that satisfies the content requirements of this section. These commenters argued that without such a presumption, it would be far too difficult to prove that an employee used material information or conveyed information to the new employer. In addition, however, three of these commenters suggested that the Commission limit the application of this presumption of coordination to a specified class of employees who are likely to "possess material political information." A different commenter indicated that it would be difficult to enforce this conduct standard because the definition of "independent contractor" in the NPRM was underinclusive in that it failed to account for the fact that an independent contractor might reorganize or change names, making it difficult to verify the identity of the independent contractor or former employee. As with the potential reorganization of common vendors discussed above, the

Commission does not believe that new requirements are necessary at this time to address the commenter's concerns. Employees and independent contractors are natural persons, rather than corporations or other entities or legal constructs, so the Commission anticipates that reorganization for the purpose of circumventing the new rules is even less likely than in the context of common vendors.

Three other commenters asserted that Congress had not mandated the proposed rule and expressed concern about the "increased risk of legal liability" for both party committees and former employees" that they believed would "stigmatize" the former employee and make it difficult for that person to find subsequent employment.

This proposed rule would have required that the employment or independent contractor relationship exist during the current election cycle. As discussed above with regard to paragraph (d)(4) on common vendors, the Commission requested comments on whether this time period should be a fixed two-year period, or the same election cycle, but not more than two years. Most comments on this provision were identical to the comments on the temporal requirements in paragraph (d)(4). One commenter believed the two-year time frame was "inappropriate and overly injurious both to corporations trying to communicate about legislative topics and to those former employees of candidates seeking employment with such corporations." In contrast, a different commenter suggested a six-year time period and asserted that the two-year period was too short to fully address the real-world practices in this area. Another commenter offered the same proposal the commenter had offered with respect to common vendors: the former employee should be covered during the calendar year in which the candidate's

name is on the ballot for election to Federal office. A fourth commenter suggested that the time frame be limited to the previous two years of the current election cycle.

The final rule in paragraph (d)(5) incorporates the temporal limit of the "election cycle," which is defined in 11 CFR 100.3. This time limit establishes a clear boundary based on an existing definition and ensures that there is a clear link between the conveyance or use of the material information and the time period in which that material might be relevant. In addition, the Commission disagrees with the single commenter who claimed that the two-year limit would harm the job prospects of former employees or inhibit discussions between corporations and candidates or political party committees. The Commission notes that the final rule focuses only on the use or conveyance of information that is material to a subsequent communication and does not in any way prohibit or discourage the subsequent employment of those who have previously worked for a candidate's campaign or a political party committee.

One commenter proposed a "cooling off period" for a former employee instead of a temporal limit based on a calendar year or an election cycle. Under that proposed approach, the former employee or independent contractor of a candidate or political party would have to wait for a certain time period, which the commenter proposed as 30-60 days, before providing services to a person paying for a communication covered by section 109.21(c). After that period, the former employee or independent contractor would not trigger the proposed conduct standard. The Commission is unwilling to impose a complete ban on an individual's employment opportunities, as a "cooling off period" requirement would function. Instead, the Commission views the narrowly

tailored approach proposed in the NPRM as preferable and is therefore not incorporating a "cooling off period" into the final rules.

This conduct standard expressly extends to an individual who had previously served as an "independent contractor" of a candidate's campaign committee or a political party committee. One commenter opposed the inclusion of independent contractors, arguing that an "independent contractor" is legally distinct from an "employee" and Congress, recognizing this distinction in other statutes, must have made an intentional decision to exclude independent contractors by using the term "employee" in section 214(c)(3). The Commission disagrees with this assumption and instead notes that the inclusion of independent contractors is entirely consistent with the use of "employee" because both groups receive some form of payment for services provided to the candidate, authorized committee or political party committee. Therefore, the Commission includes the term "independent contractor" in the final rule to preclude circumvention by the expedient of characterizing an "employee" as an "independent contractor" where the characterization makes no difference in the individual's relationship with the candidate or political party committee. This coordination standard also applies to the employer of an individual who was an employee or independent contractor of a candidate, authorized committee, or political party committee. The Commission interprets the Congressional intent behind section 214(c)(3) of BCRA to encompass situations in which former employees, who by virtue of their former employment have been in a position to acquire information about the plans, projects, activities, or needs of the candidate's campaign or the political party committee, may subsequently use that information or convey it to a person paying for a communication.

The Commission has added the requirement that the information must be material to the subsequent communication in order to ensure that the conduct standard is not overly broad.

One commenter argued that the proposed rule's incorporation of the phrase "material information used ... in providing services to the candidate" was vague and overly broad, and should be limited to material information about "campaign strategy and tactics," excluding policy views. This commenter also questioned whether the information must be material to the communication itself, or whether the information used to serve the candidate was material to those services. The Commission notes that in many cases the information may be material to both, but for the purposes of this final rule the Commission is only concerned with whether the information is material to the communication, not to the services previously provided to the candidate. As with the common vendor standard, this requirement encompasses both situations in which the former employee assumes the role of a conduit of information and situations in which the former employee makes use of the information but does not share it with the person who is paying for the communication.

The Commission is including this conduct standard to address what it understands to be Congress' primary concern, which is a situation in which a former employee of a candidate goes to work for a third party that pays for a communication that promotes or supports the former employer/candidate or attacks or opposes the former employer/candidate's opponent. One commenter proposed that the former employer (i.e., the candidate's campaign or a political party committee) must be shown to exercise ongoing control over its former employee. A different commenter, however, recognized

that the Commission's proposed rules would address such a concern by removing the reporting duties that might otherwise be triggered by the actions of the former employee who acted without the knowledge of his or her former employer. This reporting rule is included in the final rules in 11 CFR 109.21(b)(2). This commenter, however, raised a similar concern by suggesting that the final rule should be limited to cover only former employees when they are acting under the direction or control of their new employer, the third-party spender, to ensure that the former employee does not use or convey material information without the spender's knowledge. The Commission notes, however, that such a limitation is unnecessary and confusing in cases where the former employee or independent contractor pays for the communication by himself or herself.

The conduct standard in the final rule in 11 CFR 109.21(d)(5) does not require that the former employee act under the continuing direction or control of, at the behest of, or on behalf of, his or her former employer. This is because a former employee who acts under such circumstances is a present agent, and the revised rules covering agents apply to this individual. See 11 CFR 109.3. To give effect to the statutory language requiring that the Commission's coordination regulations address "former employees" (see Pub. L. 107-155, sec. 214(c)(3)) the Commission concluded that a "former employee," as that term is used in the statute, must be different from "agent." Furthermore, the Commission does not find in BCRA, the FECA, or the general legal principles of employer-employee law, a need or justification for such an exception that would, in essence, categorically free employers from responsibility for the actions of their employees. Instead, the Commission reiterates its observation offered above with respect to the "common vendor" standard. Irrespective of the Congressional requirements in BCRA, employers

may elect to clearly define the scope of employee responsibilities and to institute prudent policies or practices to ensure that the employee adheres to the scope of those expectations.

One commenter supported an exception to the "common vendor" and "former employee" conduct standards to permit persons in either of those classes to use or convey information if that vendor or former employee "makes use of information in a manner that is adverse to the candidate or political party committee without any coordination with the candidate benefiting from the communication." In the Commission's judgment, such an exception would obfuscate otherwise bright lines and provide a clear path for the circumvention of the Act and the Commission's regulations without offering a discernible benefit. Under the proposed exception, "use of information in a manner that is adverse to the candidate or political party committee" requires a subjective determination of both the interests of the candidate or political party and the effect that the "information" has on those interests.

The Commission also sought comment as to whether this conduct standard should be extended to volunteers, such as "fundraising partners," who by virtue of their relationship with a candidate or a political party committee, have been in a position to acquire material information about the plans, projects, activities, or needs of the candidate or political party committee. Three commenters opposed the inclusion of volunteers. One of these commenters argued that volunteers traditionally participate in more than one campaign at a time and "as a matter of practice, campaigns attempt to make volunteers feel more involved in the campaign by the intentional communication of 'insider' information." While the FECA exempts campaign volunteers from certain requirements,

this "practice" of sharing "insider" information is not adequate justification to exclude volunteers. Rather, the Commission recognizes that some, but not all, "volunteers" operate as highly placed consultants who might be given information about the plans, projects, activities, or needs of the candidate or political party committee with the expectation that the "volunteer" will use or convey that information to effectively coordinate a communication paid for by that "volunteer" or by a third-party spender. Nevertheless, the Commission is not extending the scope of the "former employee" standard in its final rules to encompass volunteers for a different reason. The Commission views the choice of the word "employee" in section 214(c)(3) as a significant indication of Congressional intent that the regulations be limited to individuals who were in some way employed by the candidate's campaign or political party committee, either directly or as an independent contractor. The Commission also notes that even though volunteers are not subject to the "former employee" conduct standard, their actions could nonetheless come within a different conduct standard in new 11 CFR 109.21(d). For example, if a candidate requests that a volunteer pay for a communication, and the volunteer does so, the communication is coordinated if the content of the communication satisfies one or more of the content standards in new 11 CFR 109.21(c). Also, in some cases a volunteer may qualify as an agent of a candidate or a political party under the definition in new 11 CFR 109.3.

F. 11 CFR 109.21(d)(6) Dissemination, Distribution, or Republication of Campaign Materials

Paragraph (d)(6) clarifies the application of the conduct standards to a candidate or authorized committee after the initial preparation of campaign materials when those materials are subsequently disseminated, distributed, or republished, in whole or in part, by another person. In light of the candidate's initial role in preparing the campaign material that is subsequently incorporated into a republished communication, it is possible that the candidate's involvement in the original preparation of part or all of that content might be construed as triggering per se one or more of the conduct standards in paragraph (d) of 11 CFR 109.21. To avoid this result, the Commission is including 11 CFR 109.21(d)(6) in the final rules to clarify that the candidate's actions in preparing the original campaign materials are not to be considered in the conduct analysis of paragraph (d)(1) through (d)(3) of section 109.21. (See above). Instead, 11 CFR 109.21(d)(6) explains that the focus is on the conduct of the candidate that occurs after the initial preparation the campaign materials. For example, if a candidate requests or suggests that a supporter pay for the republication of a campaign ad, the resulting communication paid for by the supporter satisfies both a content standard (republication) and conduct standard (request or suggestion), and is therefore a coordinated communication. However, without that request or suggestion, and assuming no other contacts with the candidate, the candidate's authorized committee, or their agents, the communication does not satisfy the "request or suggestion" conduct standard and is not a coordinated communication even though it contains campaign material prepared by the candidate.

The final rules are being changed from the proposed rules to explain more clearly the application of the conduct standards in paragraphs (d)(4) and (d)(5) to republished campaign materials, as well as to clarify the relationship between paragraph (c)(2) and (d)(6) of section 109.21.

5. 11 CFR 109.21(e) No Requirement of Agreement or Formal Collaboration

When Congress, in BCRA, required the Commission to promulgate new regulations on coordinated communications, it specifically barred any regulatory requirement of "agreement or formal collaboration" to establish coordination. Pub. L. 107-155, sec. 214(c) (March 27, 2002). In the NPRM, the Commission noted that although Congress did not define this phrase, earlier versions of BCRA stated that "collaboration or agreement" was not required to show coordination. See S. 27, 107th Cong., 1st Sess. (as passed by the Senate and transferred to the House, 478 Cong. Rec. H2547 (May 22, 2001)). The phrase "agreement or formal collaboration" reached its final form through a substitute amendment to H.R. 2356 offered by Representative Shays. See H. Amdt. 417, 478 Cong. Rec. H393 through H492 (February 13, 2002). New 11 CFR 109.21(d) provides that each of the five conduct standards can be satisfied "whether or not there is agreement or formal collaboration, which is defined in paragraph (e)," thereby implementing the Congressional prohibition against any requirement of agreement or formal collaboration in the coordination analysis. The final rule follows the proposed rule, with only a small grammatical change.

One commenter supported a distinction between "formal collaboration" and "collaboration." Two other commenters strongly supported this paragraph as proposed in

the NPRM. Another commenter recognized the Congressional prohibition on a requirement of agreement or formal collaboration, but urged the Commission to establish clear guidelines as to what is and is not permissible activity. The Commission attaches significance to the addition of the term "formal" as it modifies the term "collaboration." Thus, paragraph (e) states that the conduct standards in paragraph (d) of section 109.21 require some degree of collaboration, but not "formal" collaboration in the sense of being planned or systematically approved or executed.

New paragraph (e) also explains the term "agreement." Coordination under section 109.21 does not require a mutual understanding or meeting of the minds as to all, or even most, of the material aspects of a communication. Any agreement means the communication is not made "totally independently" from the candidate or party. See Buckley, 424 U.S. at 47. In the case of a request or suggestion under paragraph (d)(1) of section 109.21, agreement is not required at all.

A fourth commenter suggested that there should be no finding of coordination where "the organization was not seeking the candidate's agreement and would have run the ad anyway." This commenter recommended that the Commission further refine the requirement so that a communication is considered coordinated only if the request, agreement or collaboration of the candidate or political party is shown to lead the organization to change some aspect of the communication.

The Commission is not adopting either of these suggestions as they require a subjective determination of the intent of the spender and are therefore inconsistent with the Commission's approach of establishing clear guidance through objective determinations where possible. Paragraph (e) therefore does not require any particular

form of investigation or finding, but simply implements the judgment of Congress by clarifying the two criteria that are not required.

6. 11 CFR 109.21(f) Safe Harbor for Responses to Inquiries About Legislative or Policy Issues

In the NPRM, the Commission requested comment on whether any specific "safe harbor" provisions or exceptions to the conduct or content standards should be included in the final rules. Commenters recommended a number of possible exceptions and safe harbors. As explained below, the Commission is including one of the proposed exceptions in its final rules in 11 CFR 109.21(f).

Several commenters urged the Commission to adopt an exception to the conduct standards for a candidate's response to an inquiry, whether in writing or other form, regarding his or her position on legislative or policy issues. These responses are helpful in preparing voter guides, voting records, in debates or other communications. One commenter cited constitutional considerations and argued that such an exception is required by Clifton v. FEC, 114 F.3d 1309 (1st Cir. 1997). Another advised that this exception would provide notice that the regulation is not intended to deter certain activities that groups or individuals "might otherwise avoid out of an abundance of caution." A different commenter advocated an exemption for any public communications, including republication of materials from candidates, their committees or political parties, that meet the criteria of 11 CFR 110.13 regarding candidate debates and forums, and 11 CFR 114.4(c) regarding voter registration drives and voter education.

In new section 109.21(f) the Commission is providing a "safe harbor" to address the commenters' concerns that the preparation of a voter guide or other inquiries about the views of a candidate or political party committee might satisfy one of the conduct standards in section 109.21(d). This safe harbor applies to inquiries regarding views on legislation or other policy issues, but does not include a response that conveys information about the candidate's or political party's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of a subsequent communication.

This exception satisfies the requirements of Clifton v. FEC, 114 F.3d 1309. See also new 11 CFR 114.4(c)(5), explained below. In Clifton, the Court examined the Commission's then-new regulations at 11 CFR 114.4(c)(4) and (5). The Commission's old regulations permitted corporations and labor organizations to prepare and produce "voter guides" to the general public, subject to the following prohibition:

> [T]he corporation or labor organization shall not contact or in any other way act in cooperation, coordination, or consultation with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, except that questions may be directed in writing to the candidates included in the voter guide and the candidates may respond in writing;

11 CFR 114.4(c)(5)(ii)(A) (1996). While Clifton invalidated that regulation as unauthorized by the Act, 927 F. Supp. at 500, the Court nevertheless suggested that a safe harbor might have survived. The safe harbor in new 11 CFR 109.21(f) is more permissive than the regulations at issue in Clifton in several respects. First, the

regulations in section 109.21 do not institute a general prohibition on any contact with the candidate or political party committee, so paragraph (f) functions as a safe harbor from less-restrictive regulations. For example, organizations whose activities are confined to producing voter guides may contact a candidate and discuss aspects of that candidate's campaign plans, projects, activities, or needs without making a coordinated communication so long as the voter guide does not contain express advocacy and it is not directed to voters in a specific jurisdiction and made available within the designated time period directly before an election, as provided in paragraphs 109.21(c)(1) and (4). In addition, whereas the regulations at issue in Clifton specifically required that both the inquiry and the response be written, paragraph (f) does not.

Three commenters urged the Commission to adapt its rules to exclude lobbying contacts with a candidate. Similarly, a different commenter proposed an exception for any legislative communication made prior to a vote, hearing, or other legislative consideration of the issue, and that "coincidentally" occurs prior to an election. Another commenter also urged the Commission to exempt grassroots communications that urge the people to contact state, local or national officials urging them to take action in their official capacity so long as they do not refer to the election or an official's status or qualifications as a federal candidate.

The Commission has considered these possible exceptions as well as the statements of BCRA's principal sponsors that the Commission's regulations should not interfere with lobbying activities. Therefore, these final rules are not intended to restrict communications or discussions regarding pending legislation or other issues of public policy. The Commission has determined, however, that sufficient safeguards exist in the

final rules to ensure that lobbying and other activities that are not reasonably related to elections will not be unduly restricted. Additional exceptions are unnecessary and inappropriate because they could be exploited to circumvent the requirements of 11 CFR part 109.

One commenter proposed an exemption for a "legislative communication" made during legislative consideration of an issue when the communication "coincidentally" occurs just before an election. This exemption is neither necessary nor workable, as it hinges on a complex analysis of several separate factors, as well as a determination of what qualifies as a "legislative communication." The potential number of communications that might satisfy the content standard, satisfy the conduct standard, and "coincidentally" occur just before an election is likely to be quite small in comparison to the potential number of communications that would actually be made for the purpose of influencing an election but carefully tailored to fit within the proposed exemption.

In addition, one commenter cautioned that exceptions are not appropriate to the extent that they apply to communications that meet the "electioneering communication" content standard. This commenter asserted that the plain language of the BCRA provides the Commission with little to no room to craft exceptions with respect to electioneering communications. The Commission disagrees that any such Congressional directive can be derived from plain language of BCRA in the context of coordinated electioneering communications.

11 CFR 109.22 Who is Prohibited from Making Coordinated Communications?

The Commission requested comment on whether to include a separate section to clarify that any person who is otherwise prohibited under the Act from making a contribution or expenditure is also prohibited from making a coordinated communication. No comments addressed this provision. Section 109.22 is included in the final rules to avoid any potential misconception that 11 CFR 100.16, 11 CFR 109.23, or any portion of 11 CFR part 109 in any way permit a corporation, labor organization, foreign national, or other person to make a contribution or expenditure when that person is otherwise prohibited by any provision of the Act or the Commission's regulations from doing so.

11 CFR 109.23 How are Payments for the Dissemination, Distribution, or Republication of Candidate Campaign Materials Treated and Reported?

The Commission has decided to implement only those regulatory changes that are necessary to implement section 214 of BCRA at this time. In the NPRM, the Commission proposed moving former 11 CFR 109.1(d) to proposed new section 11 CFR 100.57, along with several substantive changes. To whatever extent that proposed 11 CFR 100.57 would have elaborated on former 11 CFR 109.1(d), the Commission has reconsidered and instead is addressing the payments for the republication of campaign materials in new 11 CFR 109.23, which more closely follows former section 109.1(d). New section 109.23 implements post-BCRA 2 U.S.C. 441a(a)(7)(B)(iii), with several changes made to reflect new requirements in BCRA. Paragraph (a) of section 109.23 corresponds to former 11 CFR 109.1(d)(1), and paragraph (b) of section 109.23 addresses the exceptions in former 11 CFR 109.1(d)(2), in addition to several new exceptions.

1. 11 CFR 109.23(a) Financing of the Dissemination, Distribution, or Republication of Campaign Materials Prepared by a Candidate

Paragraph (a) of 11 CFR 109.23 addresses the financing of the dissemination, distribution, or republication of campaign materials prepared by the candidate, the candidate's authorized committee, or their agents and is the successor to former 11 CFR 109.1(d)(1). The only changes from the former rule are the replacement of one cross-reference to former 11 CFR 100.23 (repealed by Congress in BCRA) and minor grammatical changes. Paragraph (a) provides that the financing of the distribution, or republication of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either is considered a contribution for the purposes of the contribution limitations and reporting responsibilities by the person making the expenditure but is not considered an expenditure by the candidate or the candidate's authorized committee unless the dissemination, distribution, or republication of campaign materials is coordinated.

Under former 11 CFR 109.1(d)(1), coordination was determined by whether the dissemination, distribution, or republication of the campaign material qualified as a "coordinated general public political communication" under former 11 CFR 100.23, which was repealed by Congress in BCRA. Therefore, under new 11 CFR 109.23, whether the dissemination, distribution, or republication is coordinated is determined by reference to the new coordinated communication rule in 11 CFR 109.21.

As discussed above in the Explanation and Justification for 11 CFR 109.21(c)(2) and 109.21(d)(6), a communication that disseminates, distributes, or republishes

campaign material prepared by a candidate, the candidate's authorized committee, or an agent of either, and that satisfies one of the conduct standards in section 109.21(d), is a coordinated communication. Under 11 CFR 109.21(b), and by implication from paragraph (a) of section 109.23, the financing of such a "coordinated communication" is an in-kind contribution received by the candidate, authorized committee, or political party committee with whom or with which it was coordinated. In other words, the person financing the dissemination, distribution, or republication of candidate campaign material has provided something of value to the candidate, authorized committee, or political party committee. See 2 U.S.C. 431(8)(A)(i). Note that this is the same result under former section 109.1(d)(1). Even though the candidate, authorized committee, or political party committee does not receive cash-in-hand, the practical effect of this constructive receipt is that the candidate, authorized committee, or political party committee must report the in-kind contribution in accordance with 11 CFR 104.13, meaning that it must report the amount of the payment as a receipt under 11 CFR 104.3(a) and also as an expenditure under 11 CFR 104.3(b).

To the extent that the financing of the dissemination, distribution, or republication of campaign materials finances does not qualify as a coordinated communication, the candidate or authorized committee that originally prepared the campaign materials has no reporting responsibilities. However, whether or not the dissemination, distribution, or republication qualifies as a coordinated communication under 11 CFR 109.21, paragraph (a) of section 109.23, like former section 109.1(d)(1), requires the person financing such dissemination, distribution, or republication always to treat that financing, for the purposes of that person's contribution limits and reporting requirements, as an in-kind

contribution made to the candidate who initially prepared the campaign material. In other words, the person financing the communication must report the payment for that communication if that person is a political committee or is otherwise required to report contributions. Furthermore, that person must count the amount of the payment towards that person's contribution limits with respect to that candidate under 11 CFR 110.1 (persons other than political committees) or 11 CFR 110.2 (multicandidate political committees), and with respect to the aggregate bi-annual contribution limitations for individuals set forth in 11 CFR 110.5.

Although paragraph (a) of 11 CFR 109.23 is nearly otherwise unchanged from former 11 CFR 109.1(d)(1), the new reference to 11 CFR 109.21 has an important impact because new section 109.21 reflects Congress's decision in post-BCRA 2 U.S.C. 441a(a)(7)(B)(ii) that expenditures may be coordinated with a political party committee. Therefore, the republication of campaign material may be coordinated with a political party committee. As explained above, the financing "by any person of the dissemination, distribution, or republication of campaign material prepared by a candidate qualifies as an expenditure for the purposes of 2 U.S.C. 441a(a)(7)(B)(ii)." See 2 U.S.C. 441a(a)(7)(B)(iii) (emphasis added.) Under 2 U.S.C. 441a(a)(7)(B)(ii), "expenditures" that are coordinated with a political party committee "shall be considered to be contributions made to such party committee." Thus, reading 2 U.S.C. 441a(a)(7)(B)(ii) and (iii) together, the Commission concludes that when a person coordinates with a political party committee to finance the dissemination, distribution, or republication of a candidate's campaign material, that financing constitutes a contribution to the political party committee. Therefore, under paragraph (a) of section 109.23, the financing of the

dissemination, distribution, or republication of campaign material prepared by a candidate constitutes an in-kind contribution to a political party committee with which it was coordinated, and the amount of that financing must be reported by that political party committee as both an in-kind contribution received and an expenditure made. See 11 CFR 104.13. The Commission notes that section 109.23 does not encompass in this respect the dissemination, distribution, or republication of campaign material prepared by the political party committee, but only campaign material prepared by a candidate.

2. 11 CFR 109.23(b) Exceptions

In the NPRM, the Commission proposed several exceptions to the general "republication" rule proposed 11 CFR 100.57. Proposed 11 CFR 100.57(b) would have clarified that five listed uses of campaign material prepared by a candidate would not qualify as a contribution under proposed 11 CFR 100.57(a). The exceptions were largely drawn from uses already permitted by other rules.

Several commenters focused on the proposed exceptions or proposed additional exemptions. One commenter proposed that republication should not be considered a contribution unless there is coordination. The Commission does not discern any instruction from Congress, nor any other basis, that justifies such a departure from the Commission's longstanding interpretation of the underlying republication provision in the Act, now set forth at 2 U.S.C. 441a(a)(7)(B)(iii). The same commenter also inquired as to whether a corporation or labor organization may pay for the republication of campaign materials for use outside its restricted class, so long as that republication is not coordinated with a candidate under the applicable conduct standards set forth in 11 CFR

109.21(d) (see below). The Commission normally addresses specific inquiries about the application of particular provisions through its Advisory Opinion process, rather than in the rulemaking context, but the Commission takes this opportunity to emphasize that this rulemaking is not intended to change existing law with respect to the practices of corporations or labor organizations. See 11 CFR 109.22. Both the pre- and post-BCRA regulations provide that the financing of the dissemination, distribution, or republication of a candidate's campaign material constitutes a contribution to that candidate. Furthermore, such financing for activities outside the restricted class of a corporation or labor organization would also constitute an expenditure by the labor organization or corporation made in connection with an election for Federal office that would therefore be prohibited by 2 U.S.C. 441b(a). Therefore, a corporation or labor organization may not disseminate, distribute, or republish campaign materials except as provided in 11 CFR 114.3(c)(1).

The same commenter also proposed additional exceptions for paragraph (b) to cover republication and distribution of original campaign material that already exists in the public domain, such as presentations made by candidates, biographies, positions on issues or voting records. The Commission declines to promulgate a "public domain" exception because such an exception could "swallow the rule," given that virtually all campaign material that could be republished could be considered to be "in the public domain." In the event that a campaign retains the copyright to its campaign materials, and the campaign materials are thus not in the public domain as a matter of law, this means that the republisher would presumably have to obtain permission from the

campaign to republish the campaign materials, raising issues of authorization or coordination. See 11 CFR 110.11.

Similarly, a commenter suggested an exception to permit the "fair use" of campaign materials, which would presumably permit the republication of campaign slogans and other limited portions of campaign materials for analysis and other uses provided under the legal tests developed with respect to intellectual property law. This commenter also argued that the "fair use" exception should be available to supporters of the candidate who originally produced the materials, as well as that candidate's opponents.

The Commission, however, believes that a "fair use" exception could swallow the rule, particularly to the extent that it directly contradicts the statutory language addressing the dissemination, distribution, or republication of campaign material "in whole or in part." 2 U.S.C. 441a(a)(7)(B)(iii) (emphasis added). Furthermore, the Commission notes that "fair use" is an exception in the intellectual property arena intended to protect literary, scholastic, and journalistic uses of material without infringing upon the intellectual property rights of those who created the material. The Commission declines to import this concept into the political arena where it would not serve to promote the same important purposes, and where the exceptions to the definitions of "contribution" and "expenditure" already address these concerns. See, e.g., 11 CFR 100.73 and 100.132 (exceptions to the definition of "contribution" and "expenditure," respectively, for news stories, commentary, and editorials.) In the context of intellectual property law, the republication of another person's work is generally viewed as undesirable by the original author, thus the "fair use" exception provides a limited exception to the general

limitations on such republication. In contrast, Congress has addressed republication of campaign materials through 2 U.S.C. 441a(a)(7)(B)(iii) in a context where the candidate/author generally views the republication of his or her campaign materials, even in part, as a benefit. Given the different purpose served by intellectual property law and campaign finance law, a "fair use" exception would be inappropriate and unworkable in the campaign arena.

The Commission is including the exceptions proposed in 100.57(b) in its final rules at CFR 109.23(b). Under 11 CFR 109.23(b)(1), a candidate or political party committee is permitted to disseminate, distribute, or republish its own materials without making a contribution. Paragraph (b)(2) exempts the use of material in a communication advocating the defeat of the candidate or party who prepared the material. For example, Person A does not make a contribution to Candidate B if Person A incorporates part of Candidate B's campaign material into its own public communication that advocates the defeat of Candidate B. However, if the same public communication also urged the election of Candidate B's opponent, Candidate C, and incorporated a picture or quote that had been prepared by Candidate C's campaign, then the result does constitute a contribution to Candidate C.

A third exception, in paragraph (b)(3), makes it clear that campaign material may be republished as part of a bona fide news story as provided in 11 CFR 100.73 or 11 CFR 100.132. In paragraph (b)(4), the Commission continues to allow a corporation or labor organization to make limited use of candidate materials in communications to its restricted class, as provided in 11 CFR 114.3(c)(1).

Finally, in paragraph (b)(5), the Commission recognizes that a national, State, or subordinate committee of a political party makes a coordinated party expenditure rather than an in-kind contribution when it uses its coordinated party expenditure authority under 11 CFR 109.32 to pay for the dissemination, distribution, or republication of campaign material. This rule is based on former 11 CFR 109.1(d)(2), which provided that a State or subordinate party committee could engage in such dissemination, distribution, or republication as an agent designated by a national committee pursuant to former 11 CFR 110.7(a)(4), but is somewhat broader than former 11 CFR 109.1(d)(2).

11 CFR Part 109, Subpart D -- Special Provisions for Political Party Committees

11 CFR 109.30 How are Political Party Committees Treated for Purposes of Coordinated and Independent Expenditures?

A national, State, or subordinate committee of a political party may make expenditures up to prescribed limits in connection with the general election campaign of a Federal candidate that do not count against the committees' contribution limits. See 2 U.S.C. 441a(d). These expenditures are commonly referred to as "coordinated party expenditures." Political party committees, however, need not demonstrate actual coordination with their candidates to avail themselves of this additional spending authority. Nor are political party committees restricted as to the nature of the expenditures they may make on behalf of a candidate that are treated as coordinated party expenditures. Political party committees may also make independent expenditures. See

Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604 (1996) ("Colorado I").

In BCRA, Congress set certain new restrictions on these "coordinated party expenditures" and related restrictions on political party committee independent expenditures. There are also certain new restrictions on transfers and assignments of coordinated party expenditure authorizations between party committees. 2 U.S.C. 441a(d)(4)(A) through (C).

Section 109.30 provides an introduction to subpart D of part 109 that states how political party committees are treated for purposes of coordinated and independent expenditures. This new section first clarifies that political party committees may make independent expenditures subject to the provisions of sections 109.35 and 109.36. (See discussion below.) Second, section 109.30 explains that political party committees may support candidates with coordinated party expenditures and states that these coordinated party expenditures are subject to limits that are separate from and in addition to the contribution limits at 11 CFR 110.1 and 110.2.

No comments were received on this section, and the final rule is unchanged from the proposed rule in the NPRM except that the reference to other 11 CFR part 109, subpart D provisions has been revised to exclude section 109.31.

11 CFR 109.31 [Added and reserved]

The Commission in the NPRM proposed rules at 11 CFR 109.30 to 109.37 regarding political party committees. The Commission is issuing final rules at 11 CFR 109.30 and 109.32 to 109.36, but not at 11 CFR 109.31 and 109.37. The reasons

regarding proposed section 109.31 are set forth below, and proposed section 109.37 is discussed further below.

Under FECA, certain political party committees have long been authorized to make what have come to be known as "coordinated party expenditures." 2 U.S.C. 441a(d). Although this term is used extensively (see, e.g., the Commission's Campaign Guides), it is not formally defined in the Commission's regulations.

The Commission in the NPRM proposed a rule which would have defined "coordinated party expenditure" at 11 CFR 109.31. That proposed definition included payments made by a national committee of a political party, including a national Congressional campaign committee, or a State committee of a political party, including any subordinate committee of a State committee, under 2 U.S.C. 441a(d) for anything of value in connection with the general election campaign of a candidate, including party coordinated communications defined at 11 CFR 109.37.

The Commission received two comments on section 109.31 in support of the proposed rule. One witness at the hearing criticized this provision, asserting that in conjunction with 11 CFR 109.20 this provision would subject everything political parties do to the coordinated party expenditure limits.

In light of the concern raised, the Commission's recognition that this rule is not required by BCRA, and in order to devote the Commission's resources to the rules that are most directly required by BCRA to be completed this calendar year, the Commission is not issuing a final rule at 11 CFR 109.31. Instead, the Commission is adding and reserving this section and may revisit the "coordinated party expenditures" definition in the future.

The Commission notes, however, that the term "coordinated party expenditures" does appear in the final rules at 11 CFR 109.23(b), 109.20(b), 109.30, 109.32, 109.33, 109.34, and 109.35. To prevent any confusion, the Commission clarifies in the absence of a definition at section 109.31 that the term "coordinated party expenditure" refers to an expenditure made by a political party committee pursuant to 2 U.S.C. 441a(d). The Commission stresses that it is not restricting the traditional flexibility political parties have had in making coordinated expenditures in support of their candidate.

11 CFR 109.32 What are the Coordinated Party Expenditure Limits?

The Commission's restructuring of 11 CFR part 109 includes moving the coordinated party expenditure limits found at former 11 CFR 110.7(a) and (b) to 11 CFR 109.32. This new section retains the basic organizational structure of paragraphs (a) and (b) of former section 110.7, while making the revisions explained below. The final rule is unchanged from the proposed rule in the NPRM except where noted below.

1. 11 CFR 109.32(a) Coordinated Party Expenditure Limits for Presidential Elections

The Commission sets forth in paragraph (a) of section 109.32, in amended fashion, the coordinated party expenditure limit for the national committee of a political party for Presidential elections that appeared at former section 110.7(a). Because political party committees may also make independent expenditures, Colorado I, 518 U.S. at 618, the heading of paragraph (a) clarifies that the "expenditures" referred to in section 109.32 are "coordinated party expenditures." See 2 U.S.C. 441a(d). This clarification also appears in paragraphs (a)(1), (2), (3), and (4) of section 109.32.

Paragraph (a)(1) authorizes the national committee of a political party to make coordinated party expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party. The final rule deletes the words "the party's" as surplusage that was inadvertently added into the proposed rule. Paragraph (a)(1) is the successor to former 11 CFR 110.7(a)(1) and is unchanged from that rule except for the clarification noted above.

Paragraph (a)(2) sets out the coordinated party expenditure limit, which is two cents multiplied by the voting age population of the United States, following former 11 CFR 110.7(a)(2). Paragraph (a)(2) of section 109.32 also states that this spending limit shall be increased in accordance with 11 CFR 110.17, which the Commission is adding to clarify that this spending limit is subject to increase. Section 110.17 is the successor to former 11 CFR 110.9(c). See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 Fed. Register 69,928 (November 19, 2002). Paragraph (a)(2) of section 109.32 also refers to 11 CFR 110.18, the definition of the term "voting age population," which is discussed below.

Paragraph (a)(3) provides that any coordinated party expenditure under paragraph (a) of this section is in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States, as well as any contribution by the national committee to the candidate permissible under 11 CFR 110.1 or 110.2. Paragraph (a)(3) is the successor to former 11 CFR 110.7(a)(3) and is substantively unchanged from that rule.

Paragraph (a)(4) provides that any coordinated party expenditures made by the national committee of a political party pursuant to paragraph (a) of this section, or made

by any other party committee under authority assigned by a national committee of a political party under 11 CFR 109.33, on behalf of that party's Presidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8. The only change to paragraph (a)(4) from the proposed rule is that the term "designated" has been changed to "assigned" in order to be consistent with the terminology applied in section 109.33.

Paragraph (a)(4) is the successor to former 11 CFR 110.7(a)(6), and is revised to clarify that only the national party committee has coordinated party expenditure authority for Presidential general elections and that any other political party committee making a coordinated party expenditure in such an election must be so assigned by the national committee.

2. 11 CFR 109.32(b) Coordinated Party Expenditure Limits for Other Federal Elections

Paragraph (b) of section 109.32 addresses coordinated party expenditures in other Federal elections, and is the successor to former 11 CFR 110.7(b). Paragraph (b) applies to the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, for Federal elections other than Presidential elections. As in paragraph (a) above, paragraph (b) clarifies that the "expenditures" referred to in paragraphs (b)(1), (2), and (4) are coordinated party expenditures.

Paragraph (b)(1) authorizes the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, to make coordinated party expenditures in connection with the general election campaign

of a candidate for Federal office in that State who is affiliated with the party. The phrase "a candidate for Federal office in that State who is affiliated with the party" is changed from the phrase "the party's candidate for Federal office in that State" that was inadvertently included in the proposed rule. Paragraph (b)(1) is the successor to former 11 CFR 110.7(b)(1) and is unchanged from the previous rule except for the clarification noted above.

Paragraph (b)(2)(i) sets out the coordinated party expenditure limit for Senate candidates and for House candidates from a State that is entitled to only one Representative at the greater of two cents multiplied by the voting age population of the State or $20,000. Paragraph (b)(2)(ii) sets out the coordinated party expenditure limit for House candidates from any other State at $10,000. Paragraph (b)(2) follows former 11 CFR 110.7(a)(2). Paragraph (b)(2) of section 109.32 also refers to 11 CFR 110.18, the definition of the term "voting age population," which is discussed below.

Paragraph (b)(3) provides that the spending limitations in paragraph (b)(2) shall be increased in accordance with 11 CFR 110.17, which is the successor to former 11 CFR 110.9(c). See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 Fed. Register 69,928 (November 19, 2002). The Commission is adding paragraph (b)(3) to the rule in order to clarify that this limit is subject to increase. The Commission is changing the citation to 11 CFR 110.17(c), as proposed in the NPRM, to a citation to 11 CFR 110.17, to make it consistent with the reference to section 110.17 in paragraph (a)(2) described above.

Paragraph (b)(4) provides that any coordinated party expenditure under paragraph (b) of this section shall be in addition to any contribution by a political party committee to

the candidate permissible under 11 CFR 110.1 or 110.2. Paragraph (b)(4) of 11 CFR 109.32 is the successor to former 11 CFR 110.7(b)(3), and is unchanged apart from the clarification noted above and a clarification that the contributions referenced are those made by a political party committee.

The Commission received two comments on this section, one which supported the rule proposed in the NPRM and another which stated the commenter's agreement with the statement of the coordinated party expenditure limits set forth in 2 U.S.C. 441a(d).

11 CFR 109.33 May a Political Party Committee Assign its Coordinated Party Expenditure Authority to Another Political Party Committee?

Section 109.33 restates and clarifies the pre-BCRA rule permitting assignment of coordinated party expenditure authority between political party committees. Section 109.33 replaces the authorizing provisions found in the pre-BCRA regulations at 11 CFR 110.7(a)(4) and (c); further changes to section 110.7 are addressed below.

In light of the new statutory restrictions on coordination and independent expenditures in BCRA, such assignments of coordinated party expenditure authority are prohibited under certain circumstances in which the assigning political party committee has made coordinated party expenditures (using part of the spending authority) and the intended assignee political party committee has made or intends to make independent expenditures with respect to the same candidate during an election cycle. See 2 U.S.C. 441a(d)(4)(C) and 11 CFR 109.35(c). Therefore, paragraph (a) of section 109.33 begins with a cross-reference to 11 CFR 109.35(c), which implements the statutory restrictions on assignments and transfers.

Paragraph (a) of section 109.33 restates the Commission's longstanding policy that a political party committee with authority to make coordinated party expenditures may assign all or part of that authority to other political party committees, and that this interpretation extends to both national and State committees of political parties. See Campaign Guide for Political Party Committees at p.16 (1996). Paragraph (a) of section 109.33 provides that coordinated party expenditure authority may be assigned only to other political party committees. See 2 U.S.C. 441a(d). Pre-BCRA 11 CFR 110.7(a)(4) indicated that coordinated expenditures may be made "through any designated agent, including State and subordinate party committees." [Emphasis added.] This limitation of assignment to other political party committees precludes possible circumvention of the new restrictions on transfers and assignments between political party committees found in BCRA. 2 U.S.C. 441a(d)(4)(B), (C). It is the Commission's understanding that, historically, political party committees have not assigned coordinated spending authority to entities that are not party committees, and thus this prophylactic measure should not adversely affect party committees.

Paragraph (a) provides that whenever a political party committee authorized to make coordinated party expenditures assigns another political party committee to use part or all of its spending authority, the assignment must be in writing, must specify a dollar amount, and must be made before the party committee receiving the assignment actually makes the coordinated party expenditure. In this respect, the rule codifies longstanding Commission interpretation. See Campaign Guide for Political Party Committees at p.16 (1996). This provision applies to both national and State party committees wishing to assign their 2 U.S.C. 441a(d) authority.

Paragraph (b) of section 109.33 is the successor to pre-BCRA 11 CFR 110.7(c). It provides that, for purposes of the coordinated spending limits, a State committee includes subordinate committees of the State committee. Unlike its predecessor, pre-BCRA section 110.7(c), paragraph (b) of section 109.33 covers district and local political party committees (see 11 CFR 100.14(b)) to the extent that a State committee assigns to them its coordinated spending authority, given that these district or local committees may not qualify as "subordinate State committees."

Paragraphs (b)(1) and (2) of section 109.33 restate with only minor non-substantive revision the pre-BCRA rule in 11 CFR 110.7(c)(1) and (2) setting out the State committees' methods of administering the coordinated party expenditure authority.

Paragraph (c) of section 109.33 sets forth recordkeeping requirements. This new paragraph (c) provides that a political party committee that assigns its authority to make coordinated party expenditures under this section, or that receives an assignment of coordinated expenditure authority, must maintain the written assignment for at least three years in accordance with 11 CFR 104.14. This three-year requirement is consistent with other recordkeeping requirements in the Act and in the Commission's regulations. See 2 U.S.C. 432(d); 11 CFR 102.9(c).

Although the Commission did not include this precise recordkeeping requirement in proposed section 109.33 in the NPRM, it sought comment more generally on whether to require political party committees to attach copies of written assignments to reports they file with the Commission, or to fax or e-mail them if they are electronic filers. The comments received regarding section 109.33, as described below, did not address the reporting issue.

The Commission has decided to require recordkeeping rather than reporting in section 109.33. Recordkeeping is less burdensome for political party committees and should provide sufficient documentation of assignments of coordinated party expenditure authority should questions subsequently arise. Indeed, the required maintenance of such documentation may serve a political party committee's own interest. See MUR 5246.

The Commission received two comments on this section as proposed in the NPRM. The commenters, while supporting the rule proposed in the NPRM, asserted that it should be made clear that nothing in the rule supersedes the prohibition on political party committees making both coordinated and independent expenditures with respect to a candidate after nomination. See 2 U.S.C. 441a(d)(4)(A); 11 CFR 109.35(b). The Commission does not intend for section 109.33 to supersede that prohibition, which is in the final rules at section 109.35(b) and is discussed below. As explained more thoroughly below, the Commission believes that section 109.35(b), in its final rule formulation, and section 109.35(c) referenced within section 109.33, serve to maintain the prohibition against circumvention through assignments of coordination party expenditure authority under section 109.33.

Finally, the Commission is making a non-substantive change from the NPRM in the title of section 109.33 in the final rule. The Commission is changing the word "limit" to "authority" in order to match the text of the rule. The only other changes to the NPRM aside from the addition of paragraph (c) are non-substantive changes to paragraphs (a) and (b).

11 CFR 109.34 When May a Political Party Committee Make Coordinated Party Expenditures?

Section 109.34 restates without substantive revision the pre-BCRA rule in 11 CFR 110.7(d) permitting a political party committee to make coordinated party expenditures in connection with the general election campaign before or after its candidate has been nominated. All pre-nomination coordinated expenditures continue to be subject to the coordinated party expenditure limitations, whether or not the candidate on whose behalf they are made receives the party's nomination. The Commission received one comment on this section, which supported the proposed rule.

11 CFR 109.35 What are the Restrictions on a Political Party Committee Making Both Independent Expenditures and Coordinated Party Expenditures in Connection with the General Election of a Candidate?

In BCRA, Congress prohibits political party committees, under certain conditions, from making both coordinated party expenditures and independent expenditures with respect to the same candidate, and from making transfers and assignments to other political party committees. 2 U.S.C. 441a(d)(4). A critical threshold issue is identifying the political party committees to which these prohibitions apply. Congress provided that for the purposes of these new prohibitions, "all political committees established and maintained by a national political party (including all Congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee." 2 U.S.C. 441a(d)(4)(B). Congress plainly intended to

combine certain political party committees into a collective entity or entities for purposes of these prohibitions. 2 U.S.C. 441a(d)(4)(B).

1. 11 CFR 109.35(a) Applicability

In the NPRM, the Commission proposed a rule that divided a political party into a national group of political committees and various State and local groups of political committees for the purposes of implementing the BCRA provisions governing independent and coordinated expenditures by a political party. See 2 U.S.C. 441a(d)(4). The NPRM acknowledged the legislative history supporting a "single committee" interpretation that combined the national, State and local party committees, but proposed the "dual groups" interpretation in order to give the fullest possible effect to the transfer and assignment provision of the same statute. 67 Fed. Register at 60,054 (September 24, 2002). Under the transfer and assignment provision, a "committee of a political party" that makes coordinated party expenditures under 2 U.S.C. 441a(d) in connection with the general election campaign of a candidate must not, during that election cycle, transfer any funds to, assign authority to make coordinated party expenditures to, or receive a transfer from, "a committee of the political party" that has made or intends to make an independent expenditure with respect to that candidate. 2 U.S.C. 441a(d)(4)(C). The NPRM questioned whether, without more than one group or aggregation of political party committees, transfers or assignments between political party committees could occur as contemplated in section 441a(d)(4)(C).

Several commenters, including BCRA's principal sponsors, urged that the Commission adopt the "single committee" approach, asserting that it followed from the statutory language as well as the legislative history.

The Commission concludes that the wording of the statute is amenable to different interpretations. It also agrees that the legislative history, in the form of Senate floor speeches by the bill's sponsors, leaves no doubt as to the sponsors' intention. Senator McCain stated:

> Section 213 of the bill allows the political parties to choose to make either coordinated expenditures or independent expenditures on behalf of each of their candidates, but not both. This choice is to be made after the party nominates its candidate, when the party makes its first post-nomination expenditure – either coordinated or independent – on behalf of the candidate.
>
> ...
>
> This provision fully recognizes the right of the parties to make unlimited independent expenditures. But it helps to ensure that the expenditure will be truly independent, as required by Colorado Republican I, by prohibiting a party from making coordinated expenditures for a candidate at the same time it is making independent expenditures for the same candidate. We believe that once a candidate has been nominated a party cannot coordinate with a candidate and be independent in the same election campaign. After the date of nomination, the party is free to choose to coordinate with a candidate, or to operate independently of that candidate.

...

> Section 213 provides, for this purpose only, that all the political committees of a party at both the state and national levels are considered to be one committee for the purpose of making this choice. This will prevent one arm of the party from coordinating with a candidate while another arm of the same party purports to operate independently of such candidate. This provision is intended to ensure that a party committee which chooses to engage in unlimited spending for a candidate is in fact independent of the candidate.

148 Cong. Rec. S2144 (daily ed. March 20, 2002). Another BCRA sponsor, Senator Feingold, stated:

> For the purposes of [section 213], all national and state party committees are considered to be one entity so a national party cannot make an independent expenditure if a state party has made a coordinated expenditure with respect to a particular candidate.

148 Cong. Rec. S1993 (daily ed. March 18, 2002) (section-by-section analysis included by Sen. Feingold in the Record).

An opponent of BCRA in the Senate, Senator McConnell, also recognized BCRA's "single committee" approach. Among various proposed technical changes to the Senate bill, Senator McConnell recommended:

> 4. Permit Party Coordinated and Independent Expenditures. Shays-Meehan [the bill passed by the House and under consideration in the Senate] treats all party committees (from national to local parties) as a

single committee. Prohibits all committees from doing both coordinated expenditures and independent expenditures after nomination by party (contrary to S. Ct. ruling in Colorado I).

Solution: Do not treat all party committees as a single committee and do not prohibit them from doing both independent and coordinated party expenditures.

148 Cong. Rec. S1529 (daily ed. March 5, 2002) (analysis included by Sen. McConnell in the Record). Senator McCain responded to Senator McConnell's proposed change:

This is a proposed substantive change to the pending CFR [Campaign Finance Reform] legislation. The proposal would allow parties to make both independent and coordinated expenditures in individual races.

The requirement that the parties choose between these expenditures was contained in both the Senate and House-passed bills and is not inconsistent with the Colorado I decision. For purposes of this provision only, national and state committees are treated as a single entity.

...

148 Cong. Rec. S1530 (daily ed. March 5, 2002) (analysis included by Sen. McCain in the Record). Finally, the Commission notes that there is no legislative history supporting a different interpretation of 2 U.S.C. 441a(d)(4).

One commenter criticized the "single committee" approach as contrary to Colorado I, asserting that this Supreme Court decision permitted political party committees to make both coordinated and independent expenditures. The Commission acknowledges that there are competing interpretations of Colorado I, but concludes that

this Supreme Court opinion does not preclude the "single committee" approach: Colorado I merely invalidated the Commission's conclusive presumption that political party committees are not capable of ever making independent expenditures. In any event, Congress has determined to regulate a political party that would otherwise make both independent and coordinated expenditures with respect to a particular candidate.

Several witnesses testifying at the hearing argued that treating all party committees as a single entity is impractical because party committees at the national or State level do not control party committees at lower levels in their organizations. These commenters complained that a local party committee under the "single committee" approach, by making an independent expenditure with respect to a candidate, could preclude the State or national party committee from making coordinated party expenditures with respect to that candidate. The Commission notes that since the inception of FECA's coordinated party expenditure authority in 1976, party committees at different levels have been required to work together regarding coordinated party expenditures and also work together in the sharing of contribution limits by affiliated State and local committees. See pre-BCRA 11 CFR 110.7(c) (prescribing methods whereby State party committees administer the coordinated spending limits applicable to entire political party organizations); 2 U.S.C. 441a(a)(5). In the same vein, two commenters at the hearing described Republican Party "victory plans" and Democratic Party "coordinated campaign plans" as necessitating substantial cooperation between the different levels of a political party.

Congress clearly intended to establish some combination of political party committees. See 2 U.S.C. 441a(d)(4)(B). The final rules in 11 CFR 109.35, unlike the

proposed rules, adopt a "single committee" approach in implementing BCRA. As explained below, the final rules construe the scope of the "single committee" contemplated in section 441a(d)(4)(B) as conservatively as the statute allows.

No comments were received that supported the NPRM's "dual groups" approach, although two witnesses testified at the hearing that the dual approach would be preferable to the "single committee" approach (one of these commenters, however, also testified that the BCRA sponsors intended the "single committee" approach).

Commenters favoring the "single committee" approach suggested examples of how the transfer and assignment provision could be given meaningful effect. One commenter proposed that the transfer and assignment provision may apply prior to nomination, unlike the prohibition on making both coordinated and independent expenditures with respect to a candidate, which applies only after nomination. While the Commission agrees with this statement, see the discussion below regarding the timing of the application of 11 CFR 109.35(b) and (c), the statement does not specify precisely how the transfer and assignment provision would operate in the "single committee" context. Two commenters suggested that the transfer and assignment provision could be read to prohibit a national party from making coordinated party expenditures with respect to a candidate prior to nomination and then transferring funds to a State party committee that would then try to make supposedly independent expenditures with respect to that candidate. The Commission does not agree that this scenario would necessitate the operation of the transfer and assignment provision. Under the "single committee" approach, the national committee of a political party and a State committee of the party would both be included in the "single committee," whereas the transfer and assignment

provision only applies to a transfer between a political party committee within the "single committee" and a party committee outside the "single committee."

The Commission concludes that the transfer and assignment provision has effect because the "single committee" approach excludes political party organizations that are not "political committees" under the Act (see 2 U.S.C. 431(4)(A) and (C) and 11 CFR 100.5(a) and (c)), as well as political party committees that are not "established and maintained by a State political party (including any subordinate committee of a State committee)." See 2 U.S.C. 441a(d)(4)(B). Transfers and assignments could take place between these political party committees excluded from the "single committee" and political party committees within the "single committee," and thus the restrictions in section 441a(d)(4)(C) would apply to these transactions. (The restrictions in section 441a(d)(4)(C) may also apply to transfers and assignments between political party committees excluded from the "single committee. See the discussion below.) This interpretation has the advantages of narrowing the scope of the transfer and assignment provision in 2 U.S.C. 441a(d)(4)(C) from the "dual groups" approach proposed in the NPRM without rendering any provision of BCRA inoperative, providing a more natural reading of the language of 2 U.S.C. 441a(d)(4)(B), and being supported by clear legislative history. It is, therefore, the approach the Commission adopts in the final rules in 11 CFR 109.35.

Accordingly, the Commission believes that a better interpretation of the "single committee" does not combine literally all national, State and local committees of a political party. Rather, the statute contemplates a "single committee" of a political party

that is limited to party organizations that are "political committees" under the Act, and that are "established and maintained" by a national or State party committee. See 2 U.S.C. 441a(d)(4)(B).

Thus, the "single committee" is defined at 11 CFR 109.35(a) as the national committee of a given political party, all Congressional campaign committees of that political party, and all political committees established, financed, maintained, or controlled by any of the foregoing, all State committees of that political party and all political committees established, financed, maintained, or controlled by these State party committees, including all subordinate committees, of any of these State committees. The term "single committee" is used throughout section 109.35 to refer to the political party committees grouped as required in 2 U.S.C. 441a(d)(4)(B).

The Commission has concluded that the phrase, "established, financed, maintained, or controlled" in paragraph (a) of the final rules is a permissible and useful regulatory clarification of the statutory phrase, "established and maintained." See 2 U.S.C. 441a(d)(4)(B). Congress appears to have chosen a broad standard with anti-proliferation aspects by combining national and State party committees into the "single committee." The legislative history indicates that this broad standard includes political committees of a party at both the state and national level. See 148 Cong. Rec. S2144 (daily ed. March 20, 2002) (statement of Sen. McCain). In this respect, section 441a(d)(4)(B) serves the same purposes in the specific context of party committees as the analogous anti-proliferation provision of FECA applicable generally to political committees. 2 U.S.C. 441a(a)(5) (for the purposes of the contribution limitations, all contributions made by political committees established or financed or maintained or

controlled by the same person or entity shall be considered to have been made by a single political committee). One commenter testified in support of using affiliation as the standard by which to combine political party committees for the purposes of section 109.35.

More broadly, the term "established, financed, maintained, or controlled" is a well-defined term of art with a long history in the FECA, the Commission's regulations and advisory opinions, and court cases. See, e.g., Pub. L. 94-283, sec. 112 (May 11, 1976) (anti-proliferation provision added to the FECA); Advisory Opinion 1990-16 (two committees controlled by the same candidate are affiliated committees); Common Cause v. FEC, 906 F.2d 705 (D.C. Cir. 1990) (Commission required to apply 2 U.S.C. 441a(a)(5) and 11 CFR 100.5(g) criteria in considering whether two committees were affiliated). It would be needlessly confusing for political party committees to be subject in this context to a different standard than the one applicable to their contribution limits and 2 U.S.C. 441a(a)(5).

Section 109.35(a), as proposed in the NPRM, included those political committees "established, financed, maintained, or controlled" by the national committee or by a Congressional campaign committee of a political party, and the final rule includes those committees in the single committee. As to the State and local political party committees, the NPRM included, in part, district or local committees of that political party within that State that meet the definition of political committee under 11 CFR 100.5. The final rule has changed this formulation to include all political committees "established, financed, maintained, or controlled" by the State committees of the political party. This language more closely tracks the statute, see 2 U.S.C. 441a(d)(4)(B), and will more appropriately

combine certain local political party committees into the "single committee," while excluding others. The Commission notes that whether a political party committee is "established, financed, maintained, or controlled" by a State committee (or by a national committee) is a factual determination that is made on a case-by-case basis. Cf. Common Cause v. FEC, 489 F. Supp. 738, 743 (D.D.C. 1980) (the determination whether political action committees are established, financed, maintained or controlled by the same entity is a factual one).

2. 11 CFR 109.35(b) Restrictions on Certain Coordinated and Independent Expenditures

Congress provided in BCRA that on or after the date on which a political party nominates a candidate, no "committee of the political party" may make: 1) any coordinated expenditure under 2 U.S.C. 441a(d) with respect to the candidate during the election cycle at any time after it makes any independent expenditure with respect to the candidate during the election cycle; or 2) any independent expenditure with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under 2 U.S.C. 441a(d) with respect to the candidate during the election cycle. 2 U.S.C. 441a(d)(4)(A). The Commission interprets these prohibitions as applying to a political party committee, such as the "single committee" defined in paragraph (a), as well as to a political party committee excluded from the "single committee."

Section 109.35(b) generally tracks the statute, but employs new terms in places to clarify its application. Paragraph (b)(1) prohibits a political party committee from making any post-nomination coordinated party expenditure under section 109.32 in connection with the general election campaign of a candidate at any time after that

political party committee makes any post-nomination independent expenditure with respect to that candidate. Similarly, paragraph (b)(2) prohibits a political party committee from making any post-nomination independent expenditure with respect to a candidate at any time after that political party committee makes a post-nomination coordinated expenditure under section 109.32 in connection with the general election campaign of that candidate. For the "single committee" defined in paragraph (a), as soon as a political party committee within the "single committee" makes an independent expenditure or a coordinated party expenditure with respect to a candidate after nomination, all political party committees within that "single committee" are bound during the remainder of the election cycle to whichever type of expenditure is made first. For example, if the first independent or coordinated party expenditure with respect to a nominee made by a committee within the "single committee" is a coordinated party expenditure made by the State committee, the national committee cannot thereafter make an independent expenditure with respect to that candidate during the remainder of the election cycle.

The restrictions in paragraph (b) also apply to a political party committee other than the single committee. Such a political party committee may not make both independent and coordinated party expenditures with respect to a nominee. The Commission recognizes that this application of the prohibition only arises where a national committee or a State or subordinate committee had assigned its coordinated party expenditure authority to that political party committee outside the "single committee" structure. Only in these circumstances could a political party committee other than the "single committee" have the ability in the first place to make both coordinated party expenditures and independent expenditures.

As noted above, the result that any political party committee within the "single committee" could bind all the political party committees within the "single committee" was criticized by several commenters at the hearing. These commenters asserted that this result would preclude a national or State committee of a political party from making a coordinated party expenditure with respect to a nominee if a local party committee first made an independent expenditure with respect to that same nominee, even of small size and without the State or national committee's prior knowledge or consent. In response, the Commission notes that this result occurs only if the local party committee is a political committee under the Act, and is within the "single committee" as defined in paragraph (a). Otherwise, the local party committee's independent expenditure does not affect the coordinated party expenditure authority of party committees within the "single committee," such as the national committee and a State committee. Beyond this, the Commission notes the commenters' concerns, but points out that just that result is the apparent aim of the statute. 2 U.S.C. 441a(d)(4)(A).

The restrictions in paragraphs (b)(1) and (b)(2) apply "during the remainder of the election cycle." See 2 U.S.C. 441a(d)(4)(A). This clarifies that paragraph (b) applies exclusively to post-nomination expenditures through the end of the election cycle. The prohibitions apply to a political party committee upon the first post-nomination independent or coordinated expenditure by that political party committee and run until the end of the election cycle. In the case of the "single committee," the prohibitions apply to political party committees within that "single committee" upon the first post-nomination independent or coordinated expenditure by a committee within that "single committee" and run until the end of the election cycle.

Two commenters asserted that it should be made clear that the prohibitions set forth at section 109.35(b) are not superseded by the coordinated party expenditure assignment provision at section 109.33. As stated above in the discussion of that section, the Commission does not intend that result. Several considerations buttress the Commission's intention here. First, the "single committee" approach in section 109.35(a) combines the national and State committees and some local committees into one committee for the purposes of the restrictions at section 109.35(b), and thus all such committees are bound to the same type of post-nomination expenditure (i.e., either independent or coordinated) with respect to a candidate. Thus, the assignment of coordinated spending authority between political party committees within the "single committee" would not permit a circumvention of section 109.35(b). Further, even if a political party committee within the "single committee" assigned its coordinated party expenditure authority to a political party committee that is ostensibly outside of the "single committee" and the assigned committee then attempts to make coordinated party expenditures with respect to a nominee that the "single committee" is supporting with independent expenditures, the act of such assignment and subsequent coordinated party expenditures might be evidence that the expending committee is financed and controlled by the assigning committee, see section 109.35(a), thereby bringing the expending committee into the "single committee" and prohibiting the making of coordinated party expenditures if the "single committee" was supporting the nominee with independent expenditures. Finally, in some circumstances the restriction on assignments set forth in section 109.35(c), discussed below, prevents the assignment of coordinated party expenditure authority in the first place.

3. 11 CFR 109.35(c) Restrictions on Certain Transfers and Assignments

Congress provided in BCRA that a "committee of a political party" that makes coordinated party expenditures with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated party expenditures under 2 U.S.C. 441a(d) to, or receive a transfer of funds from, a "committee of the political party" that has made or intends to make an independent expenditure with respect to the candidate. 2 U.S.C. 441a(d)(4)(C). Congress apparently intended to prevent a circumvention of the prohibition against making both coordinated and independent expenditures by means of transfers or assignments. On its face, this prohibition applies only to a "committee of a political party" that makes coordinated party expenditures with respect to a candidate. Although Congress prohibits transfers in either direction between a political party committee making coordinated party expenditures and a political party committee making or intending to make independent expenditures with respect to the same candidate, Congress prohibits assignments of coordinated party expenditure spending authority only from the political party committee making coordinated expenditures to a political party committee making or intending to make independent expenditures, and not in the other direction.

In the final rules, paragraph (c) of 11 CFR 109.35 generally tracks the statutory language in 2 U.S.C. 441a(d)(4)(C), employing terms defined in section 109.35(d), as described below. Paragraph (c) prohibits transfers of any funds and some assignments of authority to make coordinated party expenditures between political party committees after

the occurrence of two events: 1) a political party committee makes a coordinated party expenditure in connection with the general election campaign of a candidate, and 2) another political party committee makes an independent expenditure or declares its intention to do so with respect to the same candidate. After these two events take place, the political party committee electing to make coordinated party expenditures may not transfer funds to, or receive any transfer of funds from, the political party committee electing to make independent expenditures during the remainder of the election cycle. 11 CFR 109.35(c)(1). Also, after these two events take place, the political party committee electing to make coordinated party expenditures must not assign authority to make coordinated party expenditures in connection with the general election campaign of a candidate to the political party committee electing to make independent expenditures during the remainder of the election cycle. 11 CFR 109.35(c)(2).

For the "single committee" as defined in paragraph (a) of section 109.35, the transfer and assignment prohibitions apply only to the extent that party committees within the "single committee" make transfers or assignments to, or receive transfers from, political party committees that are not within the "single committee." This provision does not prohibit transfers and assignments between party committees within the "single committee." For example, paragraph (c) prevents a national Senatorial campaign committee making coordinated party expenditures with respect to a Senate candidate from transferring funds to a local party committee outside the "single committee" that had made independent expenditures with respect to that Senate candidate. Paragraph (c) also prevents a transfer between these committees if their positions are reversed: a local party committee outside the "single committee" making coordinated party expenditures with

respect to a Senate candidate may not transfer funds to a national Senatorial campaign committee that had made independent expenditures with respect to that Senate candidate. The Commission recognizes that this application of the prohibition only arises where the political party committee outside the "single committee" had been assigned coordinated party expenditure authority by a national committee or a State or subordinate committee. Only in these circumstances could a political party committee excluded from the "single committee" have the ability in the first place to make coordinated party expenditures.

On the other hand, paragraph (c) of section 109.35 does not prevent transactions between political party committees within the "single committee." For example, paragraph (c) does not prohibit a national party committee from transferring funds or assigning its 2 U.S.C. 441a(d) spending authority to the national Senatorial campaign committee, because both are within the "single committee." The Commission emphasizes, however, that the restrictions in 11 CFR 109.35(b), discussed above, apply to expenditures of political party committees within the "single committee."

The restrictions in paragraph (c) also apply to transfers and assignments between political party committees where both committees are outside the "single committee." For example, if local party committee A is outside the "single committee," and if it has been assigned authority to make coordinated party expenditures with respect to Candidate Q, then local party committee A may not transfer funds to local party committee B that is also outside the "single committee" if local party committee B has made or intends to make independent expenditures with respect to Candidate Q. Similarly, local party committee B must not transfer funds to local party committee A. The result is the same if the positions of A and B are reversed. As noted above, it may be less likely that

committees outside of the "single committee" will make coordinated party expenditures. The Commission notes, however, that the statutory restrictions apply to these political party committees nonetheless. See 2 U.S.C. 441a(d)(4)(A) and (C). The prohibitions apply to all political party committees, of which the "single committee" is, in effect, a specially defined example. See 2 U.S.C. 441a(d)(4)(B).

In 11 CFR 109.35(c), the Commission replaces the statutory phrase "during the election cycle" with "during the remainder of the election cycle." See 2 U.S.C. 441a(d)(4)(C). As noted above, the transfer and assignments prohibitions only go into effect after the occurrence of the two specific events involving the political party committees that are involved in the transfer or assignment. Thus, the period during which the prohibitions apply starts after the occurrence of both events and runs until the end of the election cycle, as defined in paragraph (d)(2) of section 109.35. The Commission noted in the NPRM that, in contrast to the prohibition on a party committee making both independent and coordinated expenditures with respect to a candidate, which is expressly limited to the post-nomination period, the transfers and assignments provision does not include the same timing restriction and thus could apply prior to nomination as well as after nomination. See 2 U.S.C. 441a(d)(4)(A) and (C); see also 11 CFR 109.34, which is renumbered from 11 CFR 110.7(d) (party committees may make coordinated expenditures in connection with the general election campaign before their candidates have been nominated); Colorado I (involved pre-nomination independent expenditures by a State party committee). Indeed, under 11 CFR 109.35(d)(2), the prohibitions in 11 CFR 109.35(c) could take effect prior to nomination. As discussed below, "election cycle" begins on the first day following the date of the previous general election, and may span a

two, four, or six year period depending on the office sought. In practice it would be unusual for the prohibitions of 11 CFR 109.35(c) to go into effect far before the date of nomination because political parties are unlikely to make coordinated party expenditures so early in the election cycle. In addition, such restrictions only take effect after a political party committee makes a coordinated party expenditure with respect to the candidate and another political party committee makes or intends to make an independent expenditure with respect to the same candidate. See 11 CFR 109.35(c). The Commission received no comments regarding this aspect of the timing of the application of the prohibitions in section 109.35.

Finally, the Commission noted in the NPRM that it was not proposing specific rules to implement the statutory language in the transfer and assignment provision that a political party committee "intends to make" an independent expenditure with respect to a candidate. 2 U.S.C. 441a(d)(4)(C). The Commission received no comments on this issue and incorporates no specific language into section 109.35.

4. 11 CFR 109.35(d) Definitions

In paragraph (d)(1) of section 109.35, the Commission defines when independent expenditures that are made by a political party committee are "with respect to" a candidate, for purposes of section 109.35. Independent expenditures made "with respect to" a candidate include not only those expressly advocating the election of the party's candidate, but also any independent expenditures expressly advocating the defeat of any other candidate seeking nomination for election, or election, to the Federal office sought by that party's candidate. This definition facilitates the appropriate coverage, and helps

avoid circumvention, of the prohibitions at paragraphs (b) and (c) of section 109.35 discussed above. See 11 CFR 100.16 (definition of "express advocacy" that includes communications expressly advocating the "election or defeat" of a clearly identified candidate).

Under paragraph (d)(2) of section 109.35, the term "election cycle" has the meaning in 11 CFR 100.3(b), except that the election cycle ends on the date of the general election runoff, if one is held. For purposes of 11 CFR 109.35, "election cycle" thus begins on the first day following the date of the previous general election for the office or seat which the candidate seeks and ends on the date on which the general election for the office or seat that the individual seeks is held, or on the date any general election runoff is held. Since paragraph (b) of section 109.35 only applies after nomination, see 2 U.S.C. 441a(d)(4), the "election cycle" period for this provision effectively extends from nomination through the general election or general election runoff. Finally, the Commission notes that the political party of a candidate running in a general election runoff is not permitted an additional coordinated party expenditure authority with respect to that candidate for the runoff. See Democratic Senatorial Campaign Committee v. FEC, 918 F. Supp. 1 (D.D.C. 1994).

There were no comments on the proposed definitions, which remain unchanged from the NPRM.

Finally, the Commission notes that the term "State" as used in these rules is defined in 11 CFR 100.11.

5. Impact of Political Party Committee Activity Carried Out Pursuant to Contribution Limits and Coordinated Party Expenditure Authority

2 U.S.C. 441a(d)(4) applies to coordinated party expenditures and to political party committee independent expenditures. Congress did not directly address political party committees' monetary and in-kind contributions to candidates that are subject to the contribution limits under 2 U.S.C. 441a(a) and 441a(h). See 2 U.S.C. 441a(d)(1) ("Notwithstanding any other provision of law with respect to . . . limitations on contributions, [political party committees] may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained [in this subsection]" [emphasis added]); 2 U.S.C. 441a(d)(4)(A) (addresses coordinated party expenditures made under section 441a(d) and does not directly address contributions). See also 11 CFR 109.30, 109.32.

Political party committees may make in-kind contributions to a candidate in the form of coordinated activity. See 2 U.S.C. 441a(a)(7)(B)(i) and 11 CFR 109.20, discussed above. The Commission notes that such coordination between a political party committee and a candidate may compromise the actual independence of any simultaneous or subsequent independent expenditures the political party committee may attempt with respect to that candidate. Similarly, coordinated party expenditures made by a political party committee with respect to a candidate prior to nomination, see 11 CFR 109.34, may be considered evidence that could compromise the actual independence of any simultaneous or subsequent independent expenditures the political party committee may attempt with respect to that candidate. See 11 CFR 109.35; Buckley v. Valeo, 424 U.S. at 47 (in striking down limits on independent expenditures, the Court described such

expenditures as made "totally independently of the candidate and his campaign" [emphasis added]).

Finally, the title of section 109.35 in this Explanation and Justification has been altered from the NPRM to match the title in the rule.

11 CFR 109.36 Are There Additional Circumstances Under Which a Political Party Committee is Prohibited from Making Independent Expenditures?

Prior to the enactment of BCRA, the Commission's rules prohibited a national committee of a political party from making independent expenditures in connection with the general election campaign of a candidate for President. See former 11 CFR 110.7(a)(5). In the NPRM, the proposed rule at 11 CFR 109.36 would have largely deleted this prohibition. The NPRM limited the remaining application of the prohibition to certain circumstances in which the national committee of a political party serves as the principal campaign committee or authorized committee of its Presidential candidate, as permitted under 2 U.S.C. 432(e)(3)(A)(i) and 441a(d)(2). See 11 CFR 102.12(c)(1) and 9002.1(c). Such a prohibition is consistent with 11 CFR 100.16(b) (redesignated from former section 109.1(e)) providing that no expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

The Commission received several comments on this section, each of which urged the Commission to retain the prohibition at former 11 CFR 110.7(a)(5) regarding national party committee independent expenditures with respect to Presidential nominees. One commenter asserted that neither Colorado I nor BCRA require the deletion of the prohibition, and that in light of the significance of this issue, Congress would have

expressly addressed it if Congress desired a change in the current regulation. The commenter noted that such a change in the rule is based upon a misinterpretation of BCRA, which should not be read as affirmatively authorizing political party committees to engage in any particular activity. Another commenter claimed that to allow in a broad fashion national party committees to make independent expenditures on behalf of their Presidential candidates is to invite abuse. The commenter stated that Presidential candidates and their parties are so inextricably intertwined as to preclude any meaningful possibility that one can operate "independently" of the other, and that the degree of coordination that exists between a national party committee and its Presidential candidate typically far exceeds even the level of coordination between a party committee and its congressional candidates.

The Commission acknowledges the concerns expressed in the comments but for the following reasons is including 11 CFR 109.36 in the final rules. First, the Commission does not believe it appropriate to retain in its rules a conclusive presumption of coordination after Colorado I. Even though Colorado I expressly involved only Congressional races, and arguably the likelihood of coordination may be greater between a national party committee and its Presidential nominee, the rule at section 109.36 is consistent with the Supreme Court's decision.

Second, the Commission concludes that Congress in BCRA effectively repealed the prohibition at 11 CFR 110.7(a)(5). See 2 U.S.C. 441a(d)(4). Under a new statutory provision, Congress prohibits political party committees from making both post-nomination independent expenditures and post-nomination coordinated expenditures in support of a candidate. See 2 U.S.C. 441a(d)(4)(A). A national party committee could

thus make independent expenditures with respect to a candidate after nomination unless the committee or another political party committee within the "single committee," see 11 CFR 109.35(a), had already made post-nomination coordinated expenditures with respect to that candidate. Because this provision appears to apply equally to party committee expenditures on behalf of either Presidential or Congressional candidates, a national party committee may be able to make independent expenditures with respect to a Presidential candidate under certain circumstances. Thus, while Congress did not specifically require the deletion of the prohibition at former 11 CFR 110.7(a)(5), the Commission has concluded that a provision within BCRA is consistent with that result. To the extent that BCRA, and Colorado I as discussed above, do not require the Commission to promulgate the rule at section 109.36, the Commission nonetheless exercises its discretion to do so as a permissible interpretation of BCRA and Colorado I.

Finally, the Commission notes that if coordination occurs between a national party committee and its Presidential nominee, it would negate the actual independence of independent expenditures the national party committee attempted with respect to that candidate. See Buckley v. Valeo, 424 U.S. at 47 (in striking down limits on independent expenditures, the Court described such expenditures as made "totally independently of the candidate and his campaign" [emphasis added]). The Commission recognizes that the ability of a national party committee to make such independent expenditures may be unlikely in practice, but the Commission's rules must allow for such a possibility, and as noted above, must reject a conclusive presumption that such expenditures are always coordinated.

Finally, section 109.36 contains one non-substantive change from the NPRM, and the title of section 109.36 in this Explanation and Justification has been slightly altered from the NPRM to match the title in the rule.

11 CFR 109.37 [Added and reserved]

The Commission in the NPRM proposed rules at 11 CFR 109.30 to 109.37 regarding political party committees. As noted above, the Commission is not issuing a final rule at 11 CFR 109.31 or 109.37, the latter for the reasons set forth below.

The Commission in the NPRM proposed a rule which would have been at 11 CFR 109.37, political party coordinated communications, using the same content and conduct standards as proposed in section 109.21 for coordinated communications by other persons.

The Commission received a number of comments on this proposal. The comments fall into two general categories. One group of commenters urged the Commission to defer this party coordinated communication rulemaking, arguing (1) that it is not strictly required by BCRA, (2) that the Commission should be focusing its resources at this time on the rulemaking most directly required by BCRA, and (3) that the comment period was a difficult time for the political parties to focus on the rulemaking because it was shortly before the 2002 general election. These commenters also asserted that party coordinated communications is a complicated subject area, citing the many questions posed in the NPRM in their claim that the Commission should defer this rulemaking.

On the substance of the proposed rule, this group of commenters testified at the hearing that the proposed content and conduct standards were both overbroad. (See the discussion above regarding 11 CFR 109.21). These commenters noted that any coordination standard for political party committees must allow for the regular contacts between a political party committee and its candidates. Another commenter raised an equal protection argument, asserting that a regulation that on its face appears to treat political party committees the same as other persons may as a practical matter have an unequal impact on the political parties.

The other group of commenters relied on the relationship between a political party committee and its candidates for the assertion that the Commission should promulgate a party coordinated communication rule using a rebuttable presumption that the communications are coordinated with candidates. These commenters stated that this presumption could be rebutted by a showing of actual independence. One commenter believed that the Commission's rule should describe ways in which a political party committee could establish its independence from a candidate. Another commenter noted that Colorado I, which struck down a conclusive presumption of coordination, does not prevent the use of a rebuttable presumption, and that such a rule is necessary to ensure that political party committee independent expenditures are in fact "totally independent" from candidates as required by the Supreme Court in Buckley.

In the NPRM, the Commission acknowledged that Congress did not specifically direct the Commission to address party coordinated communications, but the Commission proposed to do so to give clear guidance to those affected by BCRA. However, in light of the significant scope and complexity of this issue, the time needed to give full

consideration to the comments, and in order to devote the Commission's resources to the rules that are most directly required by BCRA to be completed this calendar year, the Commission is at this time not issuing a final rule regarding party coordinated communications. The Commission will promulgate this rule on party coordinated communications in 2003. Pending that rulemaking, the status quo with regard to coordinated communications paid for by party committees continues; although no new regulation specifically addresses party coordinated communications as such, they are fully subject to the Act.

11 CFR 110.1 Contributions by Persons Other Than Multicandidate Political Committees

The Commission clarifies that the section 110.1 limitations on contributions to political committees making independent expenditures apply to contributions made by persons other than multicandidate committees to political party committees that make independent expenditures. See 11 CFR 110.1(n). Paragraph 110.1(n) replaces pre-BCRA paragraph (d)(2) of section 110.1 regarding the application of the contribution limits to contributions to committees that make independent expenditures.

This section is being updated because under pre-BCRA paragraph (d)(2) of section 110.1, the Commission recognized that political committees other than party committees may make independent expenditures, but did not contemplate party committees doing so. See Colorado I, 518 U.S. at 618. For example, national party committees may receive contributions aggregating $20,000 per year from individuals, a contribution limit that Congress increased to $25,000 for contributions made on or after

January 1, 2003. See 2 U.S.C. 441a(a)(1)(B). Consequently, under BCRA, the $20,000 ($25,000) contribution limit continues to apply when the recipient national party committee uses the contribution to make independent expenditures. The Commission notes that 11 CFR 110.1(h) regarding contributions to political committees supporting the same candidate, remains unchanged except to state that the support to candidates by political party committees may include independent expenditures. The Commission received no comments on this section.

Additional changes to 11 CFR 110.1 are addressed in a separate rulemaking on BCRA's increased contribution limits. See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 Fed. Register 69,928 (November 19, 2002).

11 CFR 110.2 Contributions by Multicandidate Political Committees

The Commission clarifies that the section 110.2 limitations on contributions to political committees making independent expenditures apply to contributions made by multicandidate committees to political party committees that make independent expenditures. See 11 CFR 110.2(k). Paragraph 110.2(k) replaces pre-BCRA paragraph (d)(2) of section 110.2 regarding the application of the contribution limits to contributions to committees that make independent expenditures.

This section is being updated for the reasons set forth above in the discussion regarding 11 CFR 110.1. The Commission received no comments on this section.

Additional changes to 11 CFR 110.2 were addressed in a separate rulemaking on BCRA's increased contribution limits. See Final Rules and Explanation and Justification

for Contribution Limitations and Prohibitions, 67 Fed. Register 69,928 (November 19, 2002).

11 CFR 110.7 Removed and Reserved

The pre-BCRA regulations at 11 CFR 110.7 contained the coordinated party expenditure limits and related provisions. As explained above, the Commission is moving section 110.7, in amended form, to 11 CFR part 109, subpart D. Specifically, the provisions in section 110.7 are revised and redesignated as follows: 11 CFR 110.7(a) and (b) to 11 CFR 109.32(a) and (b) and 109.36; 11 CFR 110.7(c) to 11 CFR 109.33; and 11 CFR 110.7(d) to 11 CFR 109.34.

11 CFR 110.8 Presidential Candidate Expenditure Limitations

As in 11 CFR 109.32(a) and (b) discussed above, the Commission clarifies that the expenditure limits for publicly funded Presidential candidates are increased in accordance with 11 CFR 110.17. See 11 CFR 110.8(a)(2). To accommodate this new section 110.8(a)(2), the Commission is re-designating pre-BCRA paragraphs (a)(1) and (a)(2) as (a)(1)(i) and (a)(1)(ii), respectively.

In 11 CFR 110.8(a)(3), the Commission references the definition of "voting age population" at 11 CFR 110.18. The voting age population is a factor in the calculation of expenditure limitations in 11 CFR 110.8(a). No commenters addressed this section.

The Commission also made additional changes to 11 CFR 110.9(c) in a separate rulemaking, including moving it to 11 CFR 110.17. See Final Rules and Explanation and

Justification for Contribution Limitations and Prohibitions, 67 Fed. Register 69,928 (November 19, 2002).

11 CFR 110.14 Contributions to and Expenditures by Delegates and Delegate Committees

In light of the Congressional repeal of former 11 CFR 100.23, the removal of the separate definition of "independent expenditure" under 11 CFR 109.1, and the removal of 11 CFR 109.2, as discussed above, the Commission is making several necessary technical revisions to 11 CFR 110.14. These technical revisions were not originally proposed in the NPRM. Within 11 CFR 110.14, the Commission is replacing all references to a "coordinated general public political communication under 11 CFR 100.23" with references to "coordinated communication under 11 CFR 109.21." In addition, the Commission is replacing all citations to former 11 CFR 109.2 with citations to 11 CFR 109.10. Finally, the Commission is replacing all references to independent expenditures under 11 CFR part 109 with references to independent expenditures under 11 CFR 100.16 to reflect the removal of the definition of "independent expenditure" in former 11 CFR 109.1.

11 CFR 110.18 Voting Age Population

The Commission is moving pre-BCRA section 110.9(d) regarding voting age population ("VAP") to 11 CFR 110.18 as part of a reorganization of section 110.9. This provision is referenced in sections 109.32(a) and (b) (coordinated party expenditure limits) and 110.8(a)(3) (Presidential candidate expenditure limits) where the VAP is used

as a factor in calculating the limits. Section 110.18 is revised from pre-BCRA section 110.9(d) to clarify that the Secretary of Commerce each year certifies to the Commission and publishes in the Federal Register an estimate of the VAP pursuant to 2 U.S.C. 441a(e). No comments addressed this provision.

Changes to the other provisions of section 110.9, including paragraph (c) of this section, are addressed in a separate rulemaking. See Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 Fed. Register 69,928 (November 19, 2002).

11 CFR 114.4 Disbursements for Communications Beyond the Restricted Class in Connection with a Federal Election

Paragraph (c)(5) of section 114.4 pertains to voter guides paid for by corporations and labor organizations. The Commission makes several changes to this paragraph to conform with other regulatory changes in response to BCRA.

The pre-BCRA version of paragraphs (c)(5)(i) and (ii) of section 114.4 provided that a corporation or labor organization must not, among other things, "contact" a candidate in the preparation of a voter guide, except in writing. In this rulemaking, the Commission is promulgating a safe harbor in the coordination rules that allows a person, such as a corporation or labor union, to contact a candidate to inquire about the candidate's positions on legislative or policy issues without a subsequent communication paid for by that person being deemed coordinated with the candidate (assuming there are no other actions resulting in coordination). See 11 CFR 109.21(f) and the above discussion relating to this provision.

Accordingly, paragraph (c)(5)(i) of section 114.4 is being amended to delete the prohibition against any contact with a candidate in the preparation of a voter guide.

Paragraph (c)(5)(ii) of section 114.4 is being amended to delete the requirement that contact with the candidate be in writing.

The Commission is also making several non-substantive changes to paragraphs (c)(5)(i) and (ii) of section 114.4 to conform these provisions to the statutory provisions on which they are based. Compare 2 U.S.C. 441a(a)(7)(B) with 11 CFR 114.5(c)(5)(i) and (ii).

The Commission received three comments on this section, all of which urged the Commission to include an exception to the coordination standard at 11 CFR 109.21 for inquiries to candidates in connection with voter guides. The Commission is including the described safe harbor at 11 CFR 109.21(f) to address this concern.

The Commission notes that an appeals court in one circuit invalidated portions of pre-BCRA 11 CFR 114.4(c)(5). See Clifton v. Federal Election Commission, 927 F. Supp. 493 (D. Me. 1996), modified in part and remanded in part, 114 F.3d 1309 (1st Cir. 1997), cert. denied, 522 U.S. 1108 (1998). Subsequently a Petition for Rulemaking asked the Commission to repeal its voter guide regulation. See Notice of Availability, 64 Fed. Register 46,319 (Aug. 25, 1999). The Commission's present rulemaking consists of changes necessitated by BCRA, although any additional changes to the voter guide regulations could be addressed in a future rulemaking.

Certification of No Effect Pursuant to 5 U.S.C. 605(b)

[Regulatory Flexibility Act]

The Commission certifies that the attached rules will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that the national, State, and local party committees of the two major political parties, and other political committees are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental jurisdictions. Further, individual citizens operating under these rules are not small entities.

To the extent that any political committee may fall within the definition of "small entities," their numbers are not substantial, particularly the number that would coordinate expenditures with candidates or political party committees in connection with a Federal election.

In addition, the small entities to which the rules apply will not be unduly burdened by the proposed rules because there is no significant extra cost involved, as any new potential recordkeeping responsibilities would be minimal and optional. Any commercial vendors whose clients include campaign committees or political party committees were previously subject to different rules regarding coordination, and will not experience a significant economic impact as a result of the new rules because the requirements of these new rules are no more than what is necessary to comply with the new statute enacted by Congress.

Derivation Table

The following derivation table identifies the new sections in parts 100, 109, and 110 and the corresponding pre-BCRA rules that addressed those subject areas.

New section	Old section
100.16(b)	109.1(e)
109.1	New
109.3	109.1(b)(5)
109.11	109.3
109.20	109.1(c)
109.21	New
109.22	New
109.23	109.1(d)
109.30	New
109.31	New--Reserved
109.32(a)	110.7(a) (except para. (a)(4) and para. (a)(5))
109.32(b)	110.7(b)
109.33	110.7(a)(4) and (c)
109.34	110.7(d)
109.35	New
109.36	110.7(a)(5)
109.37	New--Reserved
110.1(n)	New
110.2(k)	New
110.8(a)(2)	New
110.8(a)(3)	New
110.18	110.9(d)

List of Subjects

11 CFR Part 100

Elections

11 CFR Part 102

Political committees and parties, reporting and recordkeeping requirements.

~~11 CFR Part 104~~

~~Campaign funds, political committees and parties, reporting and recordkeeping requirements.~~

~~11 CFR Part 105~~

~~Document filing.~~

11 CFR Part 109

Elections, reporting and recordkeeping requirements.

11 CFR Part 110

Campaign funds, political committees and parties.

11 CFR Part 114

Business and industry, elections, labor.

For the reasons set out in the preamble, ~~the Federal Election Commission proposes to amend~~ subchapter A of chapter 1 of title 11 of the Code of Federal Regulations is amended as follows:

PART 100 – SCOPE AND DEFINITIONS

1. The authority citation for part 100 is~~would be~~ revised to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

2. Section 100.16 is~~would be~~ revised to read as follows:

§ 100.16 Independent expenditure (2 U.S.C. 431(17)).

(a) The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. A communication is "made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents" if it is a coordinated communication under 11 CFR 109.21. ~~or a party coordinated communication under 11 CFR 109.37~~

(b) No expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

~~3. Part 100 would be revised by removing and reserving section 100.23 to read as follows:~~

§ 100.23 [Removed and reserved.]

3. Remove and reserve § 100.23.

~~4. Part 100, subpart B would be revised by adding section 100.57 to read as follows:~~

~~**§ 100.57 Dissemination, distribution, or republication of candidate campaign materials (2 U.S.C. 441a(a)(7)(B)(iii).**~~

~~(a) Except as provided in paragraph (b) of this section, a payment for the dissemination, distribution, or republication, in whole or in part, of any broadcast or of any written, graphic, or other form of campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing is a contribution to the candidate or political party committee if the dissemination, distribution, or republication or campaign materials satisfies any of the conduct standards set forth in 11 CFR 109.21(d)(6) with respect to any conduct other than the original preparation of campaign materials. If the dissemination, distribution, or republication of campaign materials is not coordinated with a candidate or political party committee, then the payment for such dissemination, distribution, or republication is a contribution by the person making the payment for the purposes of that person's contribution limits and reporting requirements. The candidate who prepared the campaign material does not receive or accept an in-kind contribution that results solely from the dissemination, distribution, or republication of campaign material originally prepared by that candidate, unless the dissemination, distribution, or republication of the campaign materials is coordinated with that candidate or a political party committee as a result of conduct other than the original preparation of campaign materials.~~

~~(b) The following uses of campaign materials do not constitute a contribution to the candidate who originally prepared the materials:~~

~~(1) The campaign material is disseminated, distributed, or republished by the candidate, the candidate's authorized committee, or an agent of either of the foregoing who prepared that material;~~

~~(2) The campaign material is incorporated into a communication that advocates the defeat of the candidate or party that prepared the material;~~

~~(3) The campaign material is disseminated, distributed, or republished in a news story, commentary, or editorial exempted under 11 CFR 100.73 or 11 CFR 100.132;~~

~~(4) The campaign material used consists of a brief quote or portions of materials that demonstrate a candidate's position as part of a corporation's or labor organization's expression of its own views to its restricted class under 11 CFR 114.3(c)(1); or~~

~~(5) A national political party committee or a State or subordinate political party committee pays for such dissemination, distribution, or republication of campaign materials using coordinated party expenditure authority under 11 CFR 109.32.~~

PART 102 – REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)

4. The authority citation for Part 102 ~~would~~ continues to read as follows:

Authority: 2 U.S.C. 432, 433 434(a)(11), 438(a)(8), and 441d.

5. Section 102.6(a)(1)(ii) is~~would be~~ revised to read as follows:

§ 102.6 Transfers of funds; collecting agents.

(a) * * *

(1) * * *

(ii) Subject to the restrictions set forth at 11 CFR 109.35(c), 300.10(a), 300.31, and 300.34(a) and (b), transfers of funds may be made without limit on amount between or among a national party committee, a State party committee and/or any subordinate party committee whether or not they are political committees under 11 CFR 100.5 and whether or not such committees are affiliated.

* * * * *

6. Part 109 ~~would be~~is revised to read as follows:

PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) and (d), and Pub. L. 107-155 sec. 214(c))~~(March 27, 2002)~~

Sec.

§ 109.23 How are payments for the dissemination, distribution, or republication of candidate campaign materials treated and reported?

Subpart D – Special Provisions for Political Party Committees

§ 109.30 How are political party committees treated for purposes of coordinated and independent expenditures ~~and coordination~~?

§ 109.31 ~~What is a "coordinated party expenditure"?~~ [Added and reserved]

§ 109.32 What are the coordinated party expenditure limits?

§ 109.33 May a political party committee assign its coordinated party expenditure authority ~~limit~~ to another political party committee?

§ 109.34 When may ~~can~~ a political party committee make coordinated party expenditures?

§ 109.35 What are the restrictions on a political party making both independent expenditures and coordinated party expenditures in connection with the general election of a candidate?

§ 109.36 Are there additional circumstances under which a political party committee is prohibited from making independent expenditures?

§ 109.37 ~~What is a "party coordinated communication"?~~ [Added and reserved]

Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Pub. L. ~~155-107~~107-155, 116 Stat. 81 § 214(c).

Subpart A – Scope and Definitions

§ 109.1 When will this part apply?

This part applies to expenditures that are made independently from a candidate, an authorized committee, a political party committee, or their agents, and to those payments

that are made in coordination with a candidate, an authorized committee, a political party committee, or their agents. The ~~regulations~~ rules in this part explain how ~~the differences between the two kinds of payments and state how each~~ these types of payments must be reported and ~~who~~ how they must be treated by candidates, authorized committees, and political party committees.~~report it.~~ In addition, subpart D of part 109 describes procedures and limits that apply only to payments, transfers, and assignments made by political party committees.

§ 109.2 [Removed and reserved]

§ 109.3 Definitions.

For the purposes of 11 CFR part 109 only, agent means any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of the specified persons:

(a) In the case of a national, State, district, or local committee of a political party, any one or more of the activities listed in paragraphs (a)(1) through (a)(5) of this section:

(1) To request or suggest that a communication be created, produced, or distributed.

(2) To make or authorize ~~any~~ communication that meets one or more of the content standards ~~described in 11 CFR 100.29(a)(1), or to make or authorize a public communication that meets the content standard~~ set forth in 11 CFR 109.21(c).

(3) To create, produce, or distribute any communication at the request or suggestion of a candidate.

(4) To be materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(iv) The timing or frequency of the communication; or,

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite. ~~on a television, radio, or cable station or by telephone; or.~~

~~(vi) The script of a telephone message.~~

(5) To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication with a candidate.

(b) In the case of an individual who is a Federal candidate or an individual holding Federal office, any one or more of the activities listed in paragraphs (b)(1) through (b)(6~~5~~) of this section:

(1) To request or suggest that a communication be created, produced, or distributed.

(2) To make or authorize ~~any~~ communication that meets one or more of the content standards ~~described in 11 CFR 100.29(a)(1), or to make or authorize a public communication that meets the content criteria~~ set forth in 11 CFR 109.21(c).

(3) To request or suggest that any other person create, produce, or distribute any communication.

(4) To be materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

~~(iv)~~ The timing or frequency of the communication;

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite. ~~on a television, radio, or cable station or by telephone; or,~~

~~(vi) The script of a telephone message.~~

(5) To provide material or information to assist another person in the creation, production, or distribution of any communication.

(6) To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication with a different candidate.

Subpart B – Independent Expenditures

§ 109.11 When is a "non-authorization notice" (disclaimer) required?

Whenever any person makes an independent expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such person shall comply with the requirements of 11 CFR 110.11.

Subpart C – Coordination

§ 109.20 What does "coordinated" mean?

(a) Coordinated means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.

(b) Any expenditure that is coordinated within the meaning of paragraph (a) of this section, but that is not made for a coordinated communication under 11 CFR 109.21 ~~or a party coordinated communication under 11 CFR 109.37~~, is either an in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated and must be reported as an expenditure made by that candidate or political party committee, unless otherwise exempted under 11 CFR part 100, subparts C or E.

§ 109.21 What is a "coordinated communication"?

(a) Definition. A communication is coordinated with a candidate, an authorized committee, ~~or their agents, or~~ a political party committee, or ~~its~~ an agents of any of the foregoing when the communication:

(1) Is paid for by a person other than that candidate, ~~or an~~ authorized committee, ~~a~~ political party committee, or agent of any of the foregoing;

(2) Satisfies at least one of the content standards in paragraph (c) of this section; and

(3) Satisfies at least one of the conduct standards in paragraph (d) of this section. ~~For a communication that satisfies the content standard in paragraph (c)(2) of this section, the conduct standard in paragraph (d)(6) of this section must be satisfied for the communication to be deemed coordinated.~~

(b) Treatment as an in-kind contribution and expenditure; Reporting.

(1) General rule. A payment for a coordinated communication ~~that is coordinated with a candidate or political party committee~~ is made for the purpose of influencing a Federal election, and is an in-kind contribution under 11 CFR 100.52(d) to the candidate, authorized committee, or political party committee with whom or which it ~~was~~ is coordinated, unless excepted under 11 CFR part 100, subpart C, and must be reported as an expenditure made by that candidate, authorized committee, or political party committee under 11 CFR 104.13, unless excepted under 11 CFR part 100, subpart E~~C~~.

(2) In-kind contributions resulting from conduct described in paragraphs (d)(4) or (d)(5) of this section. Notwithstanding paragraph (b)(1) of this section, the candidate, authorized committee, or political party committee with whom or which a communication is coordinated does not receive or accept an in-kind contribution, and is not required to report an expenditure, that results from conduct described in paragraphs (d)(4) or (d)(5) of this section, unless the candidate, authorized committee, or political party committee, or an agent of any of the foregoing, engages in conduct described in paragraphs (d)(1) through (d)(3) of this section.

(3) Reporting of coordinated communications. A political committee, other than a political party committee, that makes a coordinated communication must report the payments for the communication as a contribution made to the candidate or political party committee with whom or which it was

coordinated and as an expenditure in accordance with 11 CFR 104.3(b)(1)(v). A candidate, authorized committee, or political party committee with whom or which a communication paid for by another person is coordinated must report the usual and normal value of the communication as an in-kind contribution ~~received~~ in accordance with 11 CFR 104.13, meaning that it must report the amount of the payment as a receipt under 11 CFR 104.3(a) and as an expenditure under 11 CFR 104.3(b), ~~in accordance with 11 CFR 104.13~~.

(c) Content standards. ~~Any one~~Each of the ~~following~~ types of content described in paragraphs (c)(1) through (c)(4) satisfies the content standard of this section.~~:~~

(1) ~~The~~ A communication ~~would otherwise be considered~~ that is an electioneering communication under 11 CFR 100.29~~; or~~,

(2) ~~The~~ A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR ~~100.57(b)~~109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.~~; or~~

(3) ~~The~~ A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office~~; or~~,

~~Alternative A:~~

~~(4) The communication is a public communication, as defined in~~

~~11 CFR 100.26, that refers to a clearly identified candidate for Federal office.~~

~~Alternative B:~~

~~(4) The communication is a public communication, as defined in 11 CFR 100.26, that promotes or supports or attacks or opposes a clearly identified candidate for Federal office.~~

~~Alternative C:~~

(4) ~~The~~ A communication that is a public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true.

(i) The communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is ~~made~~publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.; ~~and~~

~~(iii) The public communication makes express statements about the record or position or views on an issue, or the character, or the~~

~~qualifications or fitness for office, or party affiliation, of a clearly identified Federal candidate.~~

(d) Conduct standards. Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section:

(1) Request or suggestion.

(i) The communication is created, produced, or distributed at the request or suggestion of a candidate or an authorized committee, political party committee, or agent of any of the foregoing; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, political party committee, or agent of any of the foregoing, assents to the suggestion.

(2) Material involvement. A candidate, an authorized committee, a political party committee, or an agent of any of the foregoing, is materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) Substantial discussion. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs~~, of the candidate or the political party committee'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.

(4) Common vendor. All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor, as defined in 11 CFR 116.1(c), to create, produce, or distribute the communication;

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the

communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, in the current election cycle:

(A) Development of media strategy, including the selection or purchasing of advertising slots;

(B) Selection of audiences;

(C) Polling;

(D) Fundraising;

(E) Developing the content of a public communication;

(F) Producing a public communication;

(G) Identifying voters or developing voter lists, mailing lists, or donor lists;

(H) Selecting personnel, contractors, or subcontractors; or

(I) Consulting or otherwise providing political or media advice; and

(iii) That commercial vendor ~~makes~~ uses ~~of~~ or conveys to the person paying for the communication:

(A) ~~Material i~~Information about the clearly identified candidate's campaign plans, projects, activities, or needs ~~of the candidate who is clearly identified in the communication, or his or her authorized committee~~, or his or her opponent's ~~or the opponent's authorized~~

~~committee~~campaign plans, projects, activities, or needs, or a political party committee's campaign plans, projects, activities, or needs ~~, or an agent of any of the foregoing,~~ and that information is material to the creation, production, or distribution of the communication; or

(B) ~~Material i~~Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, and that information is material to the creation, production, or distribution of the communication.

(5) Former employee or independent contractor. Both of the following statements in paragraph (d)(5)(i) and (d)(5)(ii) of this section are true:

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, during the current election cycle; and;

(ii) That former employee or independent contractor ~~makes~~ uses ~~of~~ or conveys to the person paying for the communication:

(A) ~~Material i~~Information about the clearly identified candidate's campaign plans, projects, activities, or needs ~~of the candidate who is clearly identified in the communication, or his or her authorized committee,~~ , or his or her opponent's campaign plans, projects, activities, or needs, ~~or the opponent's authorized committee,~~ or a political party committee's campaign plans, projects, activities, or needs, ~~or an agent of any of the foregoing,~~ and that information is material to the creation, production, or distribution of the communication; or

(B) ~~Material i~~Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, and that information is material to the creation, production, or distribution of the communication.

(6) ~~Conduct pertaining to communications that d~~Disseminatione, distributione, or republicationsh of campaign material ~~prepared by a candidate.~~ A communication that satisfies the content standard of paragraph (c)(2) of this section shall only satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section on the basis of conduct by

the candidate, the candidate's authorized committee, or the agents of any of the foregoing, that occurs after the original preparation of the campaign materials that are disseminated, distributed, or republished. The conduct standards of paragraphs (d)(4) and (d)(5) of this section may also apply to such communications as provided in those paragraphs. ~~With respect to conduct by a candidate or candidate's authorized that initially prepared the campaign material committee~~A ~~communication that satisfies the content requirement of paragraph (e)(2) of this section shall only be considered to satisfy one or more of the conduct standards of this section if that~~e candidate ~~or authorized committee that initially prepared the campaign material engages in any of the conduct described in paragraphs (d)(1) through (d)(3) of this section with respect to the subsequent dissemination, distribution, or republication of the campaign materials.~~

(e) Agreement or formal collaboration. Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, his or her authorized committee, his or her opponent, or the opponent's authorized committee, a political party committee, or an agent of any of the foregoing, is not required for a communication to be ~~considered~~ a coordinated communication. Agreement means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination. Formal collaboration means planned, or systematically organized, work on the communication.

(f) Safe harbor for responses to inquiries about legislative or policy issues. A candidate's or a political party committee's response to an inquiry about that candidate's

or political party committee's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards in paragraph (d) of this section.

§ 109.22 Who is prohibited from making coordinated communications?

Any person who is otherwise prohibited from making contributions or expenditures under any part of the Act or Commission regulations is prohibited from paying for a coordinated communication.

§ 109.23 Dissemination, distribution, or republication of candidate campaign materials

(a) General rule. The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either of the foregoing shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure but need not be reported as an expenditure by the candidate or the candidate's authorized committee unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21.

(b) Exceptions. The following uses of campaign materials do not constitute a contribution to the candidate who originally prepared the materials:

(1) The campaign material is disseminated, distributed, or republished by the candidate, the candidate's authorized committee, or an agent of either of the foregoing who prepared that material;

(2) The campaign material is incorporated into a communication that advocates the defeat of the candidate or party that prepared the material;

(3) The campaign material is disseminated, distributed, or republished in a news story, commentary, or editorial exempted under 11 CFR 100.73 or 11 CFR 100.132;

(4) The campaign material used consists of a brief quote or portions of materials that demonstrate a candidate's position as part of a corporation's or labor organization's expression of its own views to its restricted class under 11 CFR 114.3(c)(1); or

(5) A national political party committee or a State or subordinate political party committee pays for such dissemination, distribution, or republication of campaign materials using coordinated party expenditure authority under 11 CFR 109.32.

Subpart D – Special Provisions for Political Party Committees

§ 109.30 How are political party committees treated for purposes of coordinated and independent expenditures?

Political party committees may make independent expenditures subject to the provisions in this subpart. See 11 CFR 109.35 and 109.36. Political party committees may also make coordinated party expenditures in connection with the general election campaign of a candidate, subject to the limits and other provisions in this subpart. See 11 CFR 109.32~~1~~ through 11 CFR 109.35.

§ 109.31 ~~What is a "coordinated party expenditure"?~~ [Added and reserved]

~~Coordinated party expenditures include payments made by a national committee of a political party, including a national Congressional campaign committee, or a State committee of a political party, including any subordinate committee of a State committee, under 2 U.S.C. 441a(d) for anything of value in connection with the general election campaign of a candidate, including party coordinated communications defined at 11 CFR 109.37.~~

§ 109.32 What are the coordinated party expenditure limits?

(a) Coordinated party expenditures in Ppresidential elections.

(1) The national committee of a political party may make coordinated party expenditures in connection with the general election campaign of any ~~the party's~~ candidate for President of the United States affiliated with the party.

(2) The coordinated party expenditures shall not exceed an amount equal to two cents multiplied by the voting age population of the United States. See 11 CFR 110.18. This limitation shall be increased in accordance with 11 CFR 110.17.

(3) Any coordinated party expenditure under paragraph (a) of this section shall be in addition to--

(i) Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and

(ii) Any contribution by the national committee to the candidate permissible under 11 CFR 110.1 or 110.2.

(4) Any coordinated party expenditures made by the national committee of a political party pursuant to paragraph (a) of this section, or made by any other party committee under authority assigned ~~designated~~ by a national committee of a political party under 11 CFR 109.33, on behalf of that party's Ppresidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8.

(b) Coordinated party expenditures in other Federal elections.

(1) The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make coordinated party expenditures in connection with the general election campaign of a ~~the party's~~ candidate for Federal office in that State who is affiliated with the party.

(2) The coordinated party expenditures shall not exceed:

(i) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of--

(A) Two cents multiplied by the voting age population of the State (see 11 CFR 110.18); or

(B) Twenty thousand dollars.

(ii) In the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(3) The limitations in paragraph (b)(2) of this section shall be increased in accordance with 11 CFR 110.17~~(c)~~.

(4) Any coordinated party expenditure under paragraph (b) of this section shall be in addition to any contribution by a political party committee to the candidate permissible under 11 CFR 110.1 or 110.2.

§ 109.33 May a political party committee assign its coordinated party expenditure ~~limit~~ authority to another political party committee?

(a) Assignment. Except as provided in 11 CFR 109.35(c), the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may assign its authority to make coordinated party expenditures authorized by~~in~~ 11 CFR 109.32 to another political party committee~~;~~. Such an assignment must be made in writing, must state the amount of the authority assigned, and must be received by the assignee committee before any coordinated party expenditure is made pursuant to the assignment. ~~provided that before the coordinated party expenditure is made, the national or State committee specifies in writing to the assigned political party committee the amount the assigned political party committee may spend.~~

(b) Compliance. For purposes of the coordinated party expenditure limits, State committee includes a subordinate committee of a State committee and includes a district or local committee to which coordinated party expenditure authority has been assigned. State committees and subordinate State committees and such district or local committees combined shall not exceed the coordinated party expenditure limits set forth in 11 CFR 109.32. The State committee shall administer the limitation in one of the following ways:

(1) The State committee shall be responsible for insuring that the

coordinated party expenditures of the entire party organization are within the coordinated party expenditure limits, including receiving reports from any subordinate committee of a State committee or district or local committee making coordinated party expenditures under 11 CFR 109.32, and filing consolidated reports showing all coordinated party expenditures in the State with the Commission; or

(2) Any other method, submitted in advance and approved by the Commission, that permits control over coordinated party expenditures.

(c) Recordkeeping.

(1) A political party committee that assigns its authority to make coordinated party expenditures under this section must maintain the written assignment for at least three years in accordance with 11 CFR 104.14.

(2) A political party committee that is assigned authority to make coordinated party expenditures under this section must maintain the written assignment for at least three years in accordance with 11 CFR 104.14.

§ 109.34 When may a political party committee make coordinated party expenditures?

A political party committee authorized to make coordinated party expenditures may make such expenditures in connection with the general election campaign before or after its candidate has been nominated. All pre-nomination coordinated party expenditures shall be subject to the coordinated party expenditure limitations of this subpart, whether or not the candidate on whose behalf they are made receives the party's nomination.

§ 109.35 What are the restrictions on a political party committee making both independent expenditures and coordinated party expenditures in connection with the general election of a candidate?

~~(a) Applicability. For the purposes of this subpart:~~

~~(1) The national committee of a given political party, all Congressional campaign committees of that political party, and all political committees established, financed, maintained, or controlled by any of the foregoing, together comprise a political party group.~~

~~(2) The State committee of a given political party in a given State, all subordinate committees of that State committee, and all district or local committees of that political party within that State that meet the definition of political committee under 11 CFR 100.5, together comprise a political party group. See 11 CFR 100.14.~~

(a) Applicability. For the purposes of this section, the national committee of a given political party, all Congressional campaign committees of that political party, all political committees established, financed, maintained, or controlled by any of the foregoing, all State committees of that political party and all political committees established, financed, maintained, or controlled by any of those State committees including all subordinate committees of any of those State committees, together comprise a single committee of that political party. See 11 CFR 100.5(g) and 100.14.

(b) Restrictions on certain coordinated and independent expenditures. On or after the date on which a political party nominates a candidate for election to Federal office, a ~~no~~

committee within that ~~political committee within a given~~ political party ~~group may~~ must not do any of the following during the remainder of the election cycle:

(1) Make any coordinated party expenditure under 11 CFR 109.32 in connection with the general election campaign of that candidate at any time after that ~~any political~~ committee within that political party ~~group~~ makes ~~any~~ independent expenditure with respect to that candidate; or

(2) Make any independent expenditure with respect to that candidate at any time after ~~any political~~ that committee within that political party ~~group~~ makes ~~any~~ coordinated party expenditure under 11 CFR 109.32 in connection with the general election campaign of that candidate.

(c) Restrictions on certain transfers and assignments. On or after the date that a ~~political~~ committee ~~within~~ within a political party ~~group~~ makes any coordinated party expenditure under 11 CFR 109.32 in connection with the general election campaign of a candidate, ~~no political~~ that committee ~~within that same political party group~~ must~~ay~~ not do any of the following during the remainder of the election cycle:

(1) Transfer any funds to, or receive a transfer of any funds from, any ~~political~~ other political committee ~~within another~~ within that political party ~~group~~ if ~~any political~~ that other political committee ~~within that other political party group~~ has made or intends to make an independent expenditure with respect to that candidate; or

(2) Assign all or any portion of its authority to make coordinated party expenditures under 11 CFR 109.32 in connection with the general election campaign of that candidate to any ~~political~~ other political committee

~~within another~~ within that political party ~~group~~ if ~~any political committee within~~ that other ~~political party group~~ political committee has made or intends to make an independent expenditure with respect to that candidate. See 11 CFR 109.33.

(d) Definitions. For the purposes of this section:

(1) An independent expenditure made by a political party committee with respect to a candidate includes independent expenditures expressly advocating the election of that party's candidate, as well as independent expenditures expressly advocating the defeat of any other candidate seeking nomination for election, or election, to the Federal office sought by that party's candidate.

(2) Election cycle has the meaning in 11 CFR 100.3(b), except that the election cycle ends on the date of the general election runoff, if any.

§ 109.36 Are there additional circumstances under which a political party committee is prohibited from making independent expenditures?

The national committee of a political party must not make independent expenditures in connection with the general election campaign of a candidate for President of the United States if the national committee of thata political party is designated as the authorized committee of its Ppresidential candidate pursuant to 11 CFR 9002.1(c).

§ 109.37 ~~What is a "party coordinated communication"?~~ [Added and reserved]

~~(a) Definition. A political party communication is coordinated with a candidate, a candidate's authorized committee, or their agents, when the communication satisfies the conditions set forth in paragraphs (a)(1), (a)(2), and (a)(3) of this section.~~

~~(1) The communication is paid for by a political party committee or its agent.~~

~~(2) The communication satisfies at least one of the content standards in 11 CFR 109.21(c). For a communication that satisfies the content standard in 11 CFR 109.21(c)(2), the conduct standard in 11 CFR 109.21(d)(6) must be satisfied before the communication shall be deemed coordinated.~~

~~(3) The communication satisfies at least one of the conduct standards in 11 CFR 109.21(d). Notwithstanding paragraph (b)(1) of this section, the candidate with whom a party coordinated communication is coordinated does not receive or accept an in-kind contribution that results from conduct described in 11 CFR 109.21(d)(4) or (d)(5), unless the candidate or authorized committee engages in conduct described in 11 CFR 109.21 d)(1) through (d)(3).~~

~~(b) Treatment of a party coordinated communication. A payment by a political party committee for a communication that is coordinated with a candidate, and that is not otherwise exempted under 11 CFR part 100, subpart C or E, must be treated by the political party committee making the payment as either:~~

~~(1) An in-kind contribution for the purpose of influencing a Federal election under 11 CFR 100.52(d) to the candidate with whom it was coordinated, which must be reported under 11 CFR part 104; or~~

~~(2) A coordinated party expenditure pursuant to coordinated party expenditure authority under 11 CFR 109.32 in connection with the general election campaign of the candidate with whom it was coordinated, which must be reported under 11 CFR part 104.~~

PART 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

7. The authority citation for part 110 continues ~~would be revised~~ to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d~~(a)(8)~~, 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h, and 441k.

8. In section 110.1, paragraph (d) is ~~would be~~ revised and paragraph (n) is ~~would be~~ added to read as follows:

§ 110.1 Contributions by persons other than multicandidate political committees.

* * * * *

(d) Contributions to other political committees. No person shall make contributions to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

* * * * *

(n) Contributions to committees making independent expenditures. The limitations on contributions of this section also apply to contributions made to political committees making independent expenditures under 11 CFR Part 109.

9. In section 110.2, paragraph (d) is ~~would be~~ revised and paragraph (k) is ~~would be~~ added to read as follows:

§ 110.2 Contributions by multicandidate political committees.

* * * * *

(d) Contributions to other political committees. No multicandidate political committee shall make contributions to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

* * * * *

(k) Contributions to multicandidate political committees making independent expenditures. The limitations on contributions of this section also apply to contributions made to multicandidate political committees making independent expenditures under 11 CFR Part 109.

~~10. Section 110.7 would be removed and reserved.~~

§ 110.7 [Removed and reserved].

10. Remove and reserve § 110.7.

11. In section 110.8, paragraph (a) is ~~would be~~ amended as follows:

(a) The introductory text is ~~would be~~ redesignated as paragraph (a)(1);

(b) Paragraph (a)(1) is ~~would be~~ redesignated as paragraph (a)(1)(i);

(c) Paragraph (a)(2) is ~~would be~~ redesignated as paragraph (a)(1)(ii);

(d) Paragraph (a)(2) is ~~would be~~ revised to read as follows; and

(e) A paragraph (a)(3) is ~~would be~~ added to read as follows:

§ 110.8 Presidential candidate expenditure limitations.

(a) * * *

(2) The expenditure limitations in paragraph (a)(1) of this section shall be increased in accordance with 11 CFR 110.179(e).

(3) Voting age population is defined at 11 CFR 110.18.

* * * * *

12. Section 110.14 is revised to read as follows:

§ 110.14 Contributions to and expenditures by delegates and delegate committees.

(f) * * *

(2) * * *

(i) Such expenditures are independent expenditures under 11 CFR 100.16 if they are made for a communication expressly advocating the election or defeat of a clearly identified Federal candidate that is not a coordinated communication under 11 CFR 109.21.

* * * * *

(ii) Such expenditures are independent expenditures under 11 CFR 100.16 if they are made for a communication expressly advocating the election or defeat of a clearly identified Federal candidate that is not a coordinated communication under 11 CFR 109.21.**

* * *

(B) The delegate shall report the portion of the expenditure allocable to the Federal candidate as an independent expenditure in accordance with 11 CFR 109.10.

(3) * * *

* * * * *

(iii) Such expenditures are not chargeable to the presidential candidate's expenditure limitation under 11 CFR 110.8 unless they were coordinated communications under 11 CFR 109.21.

* * * * *

(i) Expenditures by a delegate committee referring to a candidate for public office --

(2) * * *

(i) Such expenditures are in-kind contributions to a Federal candidate if they are coordinated communications under 11 CFR 109.21.

(A) Such independent expenditures must be made in accordance with the requirements of 11 CFR 100.16.

* * *

(ii) Such expenditures are independent expenditures under 11 CFR 100.16 if they are made for a communication expressly advocating the election or defeat of a clearly identified Federal candidate that is not a coordinated communication under 11 CFR 109.21.

(A) Such independent expenditures must be made in accordance with the requirements of 11 CFR part 100.16.

(B) The delegate committee shall report the portion of the expenditure allocable to the Federal candidate as an independent expenditure in accordance with 11 CFR 109.10.

(3) * * *

* * * * *

(iii) Such expenditures are not chargeable to the presidential candidate's expenditure limitation under 11 CFR 110.8 unless they were coordinated communications under 11 CFR 109.21.

13. ~~In part 110~~ Section 110.18 is ~~would be~~ added to read as follows:

§ 110.18 Voting Age Population.

There is annually published by the Department of Commerce in the Federal Register an estimate of the voting age population based on an estimate of the voting age population of the United States, of each State, and of each Congressional district. The term voting age population means resident population, 18 years of age or older.

PART 114 – CORPORATE AND LABOR ORGANIZATION ACTIVITY

14. The authority citation for part 114 ~~would~~ continues to read as follows:

Authority: 2 U.S.C. 431(8)(B), 431(9)(B), 432, 434(a)(11), 437d(a)(8), 438(a)(8), and 441b.

15. In section 114.4, paragraphs (c)(5)(i) and (c)(5)(ii)(A) is~~would be~~ revised to read as follows:

§ 114.4 Disbursements for communications beyond the restricted class in connection with a Federal election.

* * *

(c) Communications by a corporation or labor organization to the general public.

* * *

(5) Voter guides.

* * *

(i) The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, and no portion of the voter guide may expressly advocate the election or defeat of one or more clearly identified candidate(s) or candidates of any clearly identified political party.

(ii) (A) The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide;

* * * * *