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AGENDA ITEM

For Meeting of: 12-5-02 →

MEMORANDUM

TO: The Commission
FROM: Vice Chairman Karl J. Sandstrom *KJS*
DATE: 12/05/2002
SUBJECT: Proposed Amendment to Agenda Document No. 02-90

SUBMITTED LATE

Page 126, lines 5-12: Delete and replace with the following:

11 CFR 109.37 What is a “Party Coordinated Communication”?

In BCRA, Congress required the Commission to promulgate new regulations on “coordinated communications” that are paid for by persons other than candidates, authorized committees of candidates, and party committees. Pub. L. 107-155, sec. 214(b), (c); see 11 CFR 109.21 above. Although Congress did not specifically direct the Commission to address coordinated communications paid for by political party committees, the Commission is doing so to give clear guidance to those affected by BCRA. Should party-specific issues arise in the future, the Commission will address them in a new rulemaking.

Page 127, line 20 through page 128, line 9: Delete and replace with the following:

While the Commission recognizes that Congress in BCRA did not specifically direct the Commission to address coordinated communications paid for by political party committees, the Commission is doing so to give clear guidance to those affected by BCRA.

Congress determined to regulate political party committees' independent expenditures and coordinated party expenditures, and thus it is appropriate and useful for the Commission to promulgate rules at this time detailing standards for party coordinated communications. See 2 U.S.C. 441a(d)(4) and 11 CFR 109.35, discussed above.

The Commission is promulgating final rules similar to those in proposed section 109.37, generally applying the same regulatory analysis to communications paid for by the political party committees that is applied to communications paid for by other persons. See 11 CFR 109.21(a) through (f). This analysis determines when communications paid for by a political party committee are considered to be coordinated with a candidate, a candidate's authorized committee, or their agents.

Following 11 CFR 109.21(a), section 109.37(a) defines the circumstances in which communications paid for by political party committees are considered to be coordinated with a candidate, a candidate's authorized committee, or agents of any of the foregoing. Under 11 CFR 109.37(a)(1) through (3), such communications are deemed to be "party coordinated communications" when they were paid for by a political party committee or its agent, satisfy at least one of the content standards in section 109.37(a)(2)(i) through (iii), and satisfy at least one of the conduct standards in 11 CFR 109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR 109.21(e) and (f).

The party coordinated communication content standards in section 109.37(a)(2)(i) through (iii) are adopted from 11 CFR 109.21(c)(2) through (c)(4). The first content standard, at paragraph (a)(2)(i) of section 109.37, is 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 109.23(b). The Commission also provides in this content standard that for a communication that satisfies this standard, see the conduct standard in 11 CFR 109.21(d)(6), under which the communication is evaluated. See the discussion above of 11 CFR 109.21(c)(2). This content standard at 11 CFR 109.37(a)(2)(i) for party coordinated communications is the same as the standard set forth for coordinated communications by other persons in 11 CFR 109.21(c)(2).

The second content standard, at paragraph (a)(2)(ii) of section 109.37, is a public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office. This content standard for party coordinated communications is identical to the standard set forth for coordinated communications by other persons in 11 CFR 109.21(c)(3).

The third content standard, at paragraph (a)(2)(iii) of section 109.37, is a public communication that 1) refers to a clearly identified candidate for Federal office; 2) is 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 3) is directed to voters in the jurisdiction of the clearly identified candidate. 11 CFR 109.37(a)(2)(iii)(A)-(C). See the discussion above of 11 CFR 109.21(c)(4). This content standard at section 109.37(a)(2)(iii) is based on the content standard at section 109.21(c)(4) but limits its coverage to communications that refer to a clearly identified candidate for Federal office.

Finally, the Commission notes that the content standard at 11 CFR 109.21(c)(1), coordinated electioneering communications, is not applied to party coordinated communications because electioneering communications, as defined, exclude communications which constitute expenditures under the Act, which includes political party committee expenditures. See 2 U.S.C. 434(f)(3)(B)(ii); 11 CFR 100.29(c)(3).

For the conduct standards for party coordinated communications, in paragraph (a)(3) of section 109.37, the Commission refers to the conduct standards set forth in 11 CFR 109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR 109.21(e) and (f). As in 11 CFR 109.21(d), agreement or formal collaboration is not necessary for a finding that a communication is coordinated. See the discussion above of 11 CFR 109.21(d) and (e). Further, paragraph (a)(3) of section 109.37 provides that a candidate's response to an inquiry about that candidate'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 11 CFR 109.21(d)(1) through (d)(6). This safe harbor parallels the safe harbor at 11 CFR 109.21(f). See the discussion above of 11 CFR 109.21(f).

The Commission also addresses in paragraph (a)(3) of section 109.37 circumstances in which the in-kind contribution results solely from conduct in 11 CFR 109.21(d)(4) or (d)(5). Under these circumstances, the candidate does not receive or accept an in-kind contribution and is not required to report an expenditure. See the discussion above regarding 11 CFR 109.21(b)(2).

Paragraph (b) of section 109.37 explains the treatment of party coordinated communications. This paragraph provides that political party committees must treat

payments for communications coordinated with candidates as either in-kind contributions or coordinated party expenditures.

The Commission excepts from 11 CFR 109.37(b) such payments that are otherwise excepted from the definitions of "contribution" and "expenditure" found at 11 CFR part 100 subparts C and E. For example, the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card, sample ballot, palm card, or other printed listing(s) of three or more candidates for any public office for which an election is held in the State in which the committee is organized is not a contribution or an expenditure. 11 CFR 100.80 and 100.140. Thus, if such communications were coordinated with candidates, the payments for such communications would not be treated as either in-kind contributions or as coordinated party expenditures.

For such a payment that a political party committee treats as an in-kind contribution, paragraph (b)(1) of section 109.37 states that it is made for the purpose of influencing a Federal election. See the discussion above regarding 11 CFR 109.21(b).

For such a payment that a political party committee treats as a coordinated party expenditure, paragraph (b)(2) of section 109.37 states that such expenditure is made 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.

Finally, paragraphs (b)(1) and (b)(2) of section 109.37 each refer to the reporting obligations flowing from party coordinated communications under 11 CFR part 104.

Page 163, line 21, add the following:

§ 109.37 What is a “party coordinated communication”?

(a) Definition. A political party communication is coordinated with a candidate, a candidate’s authorized committee, or their agents of any of the foregoing, 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(e). For a communication that satisfies the content standard in 11 CFR 109.21(e)(2), the conduct standard in 11 CFR 109.21(d)(6) must be satisfied before the communication shall be deemed coordinated.~~

The communication satisfies at least one of the content standards described in paragraphs (a)(2)(i) through (a)(2)(iii) of this section.

(i) 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 109.23(b). For a communication that satisfies this content standard, see 11 CFR 109.21(d)(6).

(ii) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(iii) A communication that is a public communication, as defined in

11 CFR 100.26, and about which each of the following statements in paragraphs (a)(2)(iii)(A) through (a)(2)(iii)(C) of this section are true.

(A) The communication refers to a clearly identified candidate for Federal office;

(B) The public communication is 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

(C) The public communication is directed to voters in the jurisdiction of the clearly identified candidate.

- (3) The communication satisfies at least one of the conduct standards in 11 CFR 109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR 109.21(e). A candidate's response to an inquiry about that candidate'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 11 CFR 109.21(d)(1) through (d)(6). 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, and is not required to report an expenditure, that results from conduct described in 11 CFR 109.21(d)(4) or (d)(5), unless the candidate, ~~or~~ authorized committee, or an agent of any of the foregoing, 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.

The following are related conforming and technical changes:

- page 7, line 4: after "109.21" insert "and a 'party coordinated communication' from 11 CFR 109.37"
- page 20, line 2: after "committee." insert "Similarly, the regulations in 11 CFR 109.37, explained further 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 political party committee."
- page 77, line 4: after "109.21" insert "as well as between 11 CFR 109.37(a)(2)(i) and paragraph (d)(6) of section 109.21"
- page 92, line 23 through page 93, line 2: delete; in its place, insert "109.30 and 109.32 to 109.37, but not at 11 CFR 109.31. The reasons regarding proposed section 109.31 are set forth below."
- page 135, table: for "New section" 109.37, change "New--Reserved" to "New" in the "Old section" column.
- page 137, lines 17: after "109.21" insert "or a party coordinated communication under 11 CFR 109.37." [remove the strike-through of this material]
- page 141, line 17: delete; in its place, insert "§ 109.37 What is a 'party coordinated communication'?"
- page 145, line 5: after "109.21" insert "or a party coordinated communication under 11 CFR 109.37" [remove the strike-through of this material]
- page 153, line 22: after "section" insert "or 11 CFR 109.37(a)(2)(i)"