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OFFICE OF THE CHAIRMAN

**AGENDA ITEM**

For Meeting of: 4-7-06

**SUBMITTED LATE**

MEMORANDUM

**DATE:** April 7, 2005  
**TO:** The Commission  
**FROM:** Chairman Michael E. Toner *MT*  
**RE:** Draft Final Rules for Coordinated Communications (11 CFR 109.21)

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Attached please find proposed amendments to 11 CFR 109.21 that I plan to offer at today's meeting.

## 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.~~ For purposes of this subpart, a candidate, candidate’s authorized committee, or political party committee shall include an agent thereof.

(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, a political party committee, ~~or an agent of any of the foregoing~~ when the communication:

- (1) Is paid for, in whole or in part, by a person other than that candidate, authorized committee, 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.

(b) *Treatment as an in-kind contribution and expenditure; Reporting—(1) General rule.* A payment for a coordinated communication 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 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.

(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) *No in-kind contribution.* No in-kind contribution results from conduct described in paragraph (d) of this section when a federal candidate referenced in a communication will not appear as a federal candidate on a ballot:

- (i) For the House of Representatives or Senate within 60 days of when the communication is publicly distributed, or

(ii) For President within 120 days of when the communication is publicly distributed.

(4~~3~~) *Reporting of coordinated communications.* A political committee, other than a political party committee, that makes a coordinated communication must report the payment 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 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).

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(4) satisfies the content standard of this section.

(1) A communication that is an electioneering communication under 11 CFR 100.29.

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

(3) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office and is directed to voters in the jurisdiction of the clearly identified federal candidate.

(4) 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 publicly distributed or otherwise publicly disseminated

(a) 60 days or fewer before a general, special, or runoff election, or 60 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 in the case of candidates for the House of Representatives or Senate; and/or

(b) 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 in the case of candidates for President; and

(iii) The public communication is directed to voters in the jurisdiction in which of

**the clearly identified candidate for federal office is on the ballot or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.**

(5) A communication that can be received nationwide is not directed to the jurisdiction where any clearly identified House or Senate candidate is on the ballot.

(6) The content standards of this section are not satisfied where a federal candidate referenced in a communication will not appear as a federal candidate on the ballot within 60 days of when the communication is publicly distributed, in the case of candidates for the House of Representatives and Senate, and within 120 days of when the communication is publicly distributed in the case of candidates for President.

**(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, ~~or 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, ~~or political party committee, or agent of any of the foregoing,~~ assents to the suggestion.**

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

**(i) The ~~e~~C~~o~~n~~t~~e~~n~~t~~;~~ of the communication;**

**(ii) The ~~i~~I~~n~~t~~e~~n~~d~~e~~d~~ audience~~;~~ for the communication;**

**(iii) The ~~m~~M~~e~~a~~n~~s or mode~~;~~ of the communication;**

**(iv) The ~~s~~S~~p~~e~~c~~i~~f~~i~~c~~ media outlet used~~;~~ for the communication;**

**(v) The ~~t~~T~~i~~m~~i~~n~~g~~ or frequency~~;~~ of the communication; or**

**(vi) The ~~s~~S~~i~~z~~e~~ 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 ~~the candidate's~~ authorized committee, or ~~the candidate's 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 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~~ the candidate's authorized committee, or ~~his or her~~ the candidate's opponent or the opponent's authorized committee, or a political party committee, ~~or an agent of any of the foregoing,~~ during the previous 60 days 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 uses or conveys to the person paying for the communication:

- (A) Information about the ~~clearly identified candidate's~~ campaign plans, projects, activities, or needs of the clearly identified candidate, or his or her the candidate's opponent's campaign plans, projects, activities, or needs, or a political party committee's campaign plans, projects, activities, or needs and that information is material to the creation, production, or distribution of the communication; or
- (B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or ~~his or her~~ the candidate's authorized committee, or ~~his or her~~ the candidate's 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~~ the candidate's authorized committee, or ~~his or her~~ the candidate's opponent or the opponent's authorized committee, or a political party committee, ~~or an~~

agent of any of the foregoing, during the previous 60 days ~~current election~~ cycle; and

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

(A) Information about the ~~clearly identified candidate's~~ campaign plans, projects, activities, or needs ~~of the clearly identified candidate, or his or her~~ the candidate's **opponent's** ~~campaign plans, projects, activities, or needs, or a political party committee's~~ campaign plans, projects, activities, or needs, and that information is material to the creation, production, or distribution of the communication; or

(B) 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~~ the candidate's authorized committee, or ~~his or her~~ the candidate's 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) *Dissemination, distribution, or republication of campaign material.* A communication that satisfies the content standard of paragraph (c)(2) of this section or 11 CFR 109.37(a)(2)(i) shall only satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section on the basis of conduct by the candidate, ~~or 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.

(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~~ the candidate's authorized committee, ~~his or her~~ the candidate's opponent, or the opponent's authorized committee, ~~or a political party committee, or an agent of any of the foregoing~~,

is not required for a communication to be 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 response by 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.

(g) *Safe Harbor for establishment and use of a firewall or other screening policy.* The conduct standards in paragraph (d) of this section are not met so long as a commercial vendor, former employee, or any other person as defined in 11 CFR 100.10 has

established and implemented a firewall or other screening policy that meets the following requirements:

- (A) The firewall is designed and implemented to prohibit the flow of information between employees or consultants of the person paying for the communication and those employees or consultants who, in the previous 60 days, provided services to, or were employed by, the candidate who is clearly identified in the communication, or the candidate's authorized committee, or the candidate's opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing;
- (B) The firewall is in place at the time the commercial vendor, former employee, or any other person contracts with, or is employed by, the person paying for the communication; and
- (C) There is no specific information indicating that, despite the firewall, information about the candidate's, political party committee's, or opponent's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication has been used or conveyed to the person paying for the communication.

(h) *Safe Harbor for endorsements and solicitations by Federal candidates.*

- (1) A public communication in which a candidate for Federal office endorses another candidate for Federal or non-Federal office does not satisfy the standards in paragraphs (c) or (d) of this section with respect to the endorsing Federal candidate unless the public communication promotes, supports, attacks, or opposes the endorsing candidate or the endorsing candidate's opponent.
- (2) A public communication in which a candidate for Federal office solicits funds for another candidate for Federal or non-Federal office, for a political committee, or for any other person as defined in 11 CFR 100.10 does not satisfy the standards in paragraphs (c) or (d) of this section with respect to the soliciting Federal candidate unless the public communication promotes, supports, attacks, or opposes the soliciting candidate or the soliciting candidate's opponent.

(i) *Safe harbor for use of publicly available information.* A public communication will not satisfy any of the conduct standards in paragraph (d) of this section if the person paying for the public communication uses publicly available information about the campaign plans, projects, activities, or needs of the candidate, or the candidate's opponent, or the political party committee, in connection with the communication, provided that the information:

- (1) Is publicly available at the time the communication is created, and
- (2) Has been obtained only through a publicly available source, including, but not limited to, a candidate's or political party's website, a press release, a news story, broadcast station records, published polling results, or an event attended by the general public, such as a campaign rally.

## **§ 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, ~~or 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. The candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.

(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, ~~or 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 of materials that demonstrate a candidate's position as part of a person's expression of its own views; 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.