



FEDERAL ELECTION COMMISSION  
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**AGENDA ITEM**  
For Meeting of: 4-7-06

**MEMORANDUM**

**SUBMITTED LATE**

**TO:** The Commission  
General Counsel  
Staff Director  
Office of the Commission Secretary

**FROM:** Vice Chairman Robert D. Lenhard *RL*  
Commissioner Steven T. Walther *STW*  
Commissioner Ellen L. Weintraub *ELW*

**DATE:** April 7, 2006

**RE:** Final Rules for Coordinated Communications (11 CFR 109.21)

Attached please find a proposed draft of Final Rules for Coordinated Communications (11 CFR 109.21) we plan to offer at the Commission's open session on April 7, 2006.

1           The Federal Election Commission is amending Subchapter A of Chapter I of Title  
2 11 of the Code of Federal Regulations as follows:

3

4 **PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C.**  
5 **431(17), 441a(a) and (d), and Pub. L. 107-155 Sec. 214(c))**

6 1.     The authority citation for Part 109 continues to read as follows:

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

9 2.     Section 109.21 is being amended by:

- 10       a. Revising paragraph (a)(1);
- 11       b. Revising paragraph (c)(4);
- 12       c. Revising paragraph (d)(3);
- 13       d. Revising paragraph (d)(4);
- 14       e. Revising paragraph (d)(5);
- 15       f. Adding a new paragraph (g);
- 16       g. Adding a new paragraph (h).

17

18 The additions and revisions would read as follows:

19

20 § 109.21 What is a “coordinated communication”?

21 (a)   \*       \*       \*

1 (1) Is paid for, in whole or in part, by a person other than that candidate,  
2 authorized committee, political party committee, or agent of any of the  
3 foregoing:

4 \* \* \* \* \*

5 (c) \* \* \*

6 (4) A public communication, as defined in 11 CFR 100.26, that satisfies  
7 paragraph (i), (ii), or (iii): A communication that is a public communication, as defined  
8 in 11 CFR 100.26, and about which each of the following statements in paragraphs  
9 (e)(4)(i), (ii), and (iii) of this section are true.

10 (i) Political party committees. The public communication refers to a  
11 political party and is publicly distributed or otherwise publicly  
12 disseminated in a jurisdiction 120 days or fewer before a general,  
13 special, or runoff election in that jurisdiction, or primary or preference  
14 election in that jurisdiction, or nominating convention or caucus in that  
15 jurisdiction, in which one or more candidates of that political party will  
16 appear on the ballot.

17 (ii) House and Senate candidates. The public communication refers to a  
18 clearly identified House or Senate candidate and is publicly distributed  
19 or otherwise publicly disseminated in the identified candidate's  
20 jurisdiction 120 days or fewer before the identified candidate's general,  
21 special, or runoff election, or primary or preference election, or  
22 nominating convention or caucus.

1 (iii) Presidential and Vice Presidential candidates. The public  
2 communication refers to a clearly identified Presidential or Vice  
3 Presidential candidate and is publicly distributed or otherwise publicly  
4 disseminated in a jurisdiction between 120 days before the identified  
5 candidate's primary or preference election in that jurisdiction, or  
6 nominating convention or caucus in that jurisdiction, and the day of the  
7 general election in that jurisdiction.

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

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

15 ~~(iii) — The public communication is directed to voters in the jurisdiction~~  
16 ~~of the clearly identified candidate, or to the voters in a jurisdiction~~  
17 ~~in which one or more candidates of the political party appear on~~  
18 ~~the ballot.~~

19 \* \* \* \* \*

20 (d) \* \* \*

21 (3) Substantial discussion. The communication is created, produced, or  
22 distributed after one or more substantial discussions about the  
23 communication between the person paying for the communication, or the

1 employees or agents of the person paying for the communication, and the  
2 candidate who is clearly identified in the communication, or ~~his or her~~the  
3 candidate's authorized committee, or ~~his or her~~the candidate's opponent or  
4 the opponent's authorized committee, or a political party committee, or an  
5 agent of any of the foregoing. A discussion is substantial within the  
6 meaning of this paragraph if information about the candidate's or political  
7 party committee's campaign plans, projects, activities, or needs is  
8 conveyed to a person paying for the communication, and that information  
9 is material to the creation, production, or distribution of the  
10 communication. A communication does not satisfy this paragraph if the  
11 information material to the creation, production, or distribution of the  
12 communication was obtained from a publicly available source.

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

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

19 (ii) That commercial vendor, including any owner, officer, or  
20 employee of the commercial vendor, has provided any of the  
21 following services to the candidate who is clearly identified in the  
22 communication, or ~~his or her~~the candidate's authorized committee,  
23 or ~~his or her~~the candidate's opponent or the opponent's authorized

1 committee, or a political party committee, or an agent of any of the  
2 foregoing, in the current two-year election cycle:

- 3 (A) Development of media strategy, including the selection or  
4 purchasing of advertising slots;
- 5 (B) Selection of audiences;
- 6 (C) Polling;
- 7 (D) Fundraising;
- 8 (E) Developing the content of a public communication;
- 9 (F) Producing a public communication;
- 10 (G) Identifying voters or developing voter lists, mailing lists, or  
11 donor lists;
- 12 (H) Selecting personnel, contractors, or subcontractors; or
- 13 (I) Consulting or otherwise providing political or media  
14 advice; and

15 (iii) That commercial vendor uses or conveys to the person paying for  
16 the communication:

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

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

9 (C) This paragraph, (d)(4)(iii), is not satisfied if the information  
10 material to the creation, production, or distribution of the  
11 communication used or conveyed by the commercial vendor  
12 was obtained from a publicly available source.

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

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

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

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

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

18 (C) This paragraph, (d)(5)(ii), is not satisfied if the  
19 information material to the creation, production, or  
20 distribution of the communication used or conveyed by  
21 the former employee or independent contractor was  
22 obtained from a publicly available source.

23 \* \* \* \* \*



1 (g) Safe harbor for endorsements and solicitations by Federal candidates.

2 (1) A public communication in which a candidate for Federal office endorses  
3 another candidate for Federal or non-Federal office is not a coordinated  
4 communication with respect to the endorsing candidate if the public  
5 communication does not promote, support, attack, or oppose the endorsing  
6 candidate, the endorsing candidate's opponent, or another candidate who  
7 seeks election to the same office as the endorsing candidate.

8 (2) A public communication in which a candidate for Federal office solicits  
9 funds for another candidate for Federal or non-Federal office, or a state or  
10 national political party committee, is not a coordinated communication  
11 with respect to the endorsing candidate if the public communication does  
12 not promote, support, attack, or oppose the endorsing candidate, the  
13 endorsing candidate's opponent, or another candidate who seeks election  
14 to the same office as the endorsing candidate.

15 (h) Safe harbor for establishment and use of a firewall. The conduct standards in  
16 paragraph (d) of this section are not met if the commercial vendor, former  
17 employee, or political party committee has established and implemented a  
18 firewall that meets the following requirements. This safe harbor provision does  
19 not apply if specific information indicates that, despite the firewall, information  
20 about the candidate's or political party committee's campaign plans, projects,  
21 activities, or needs that is material to the creation, production, or distribution of  
22 the communication was used by or conveyed to the person paying for the  
23 communication.

1           (1) The firewall must be designed and implemented to prohibit the flow of  
2           information between employees or consultants providing services for the  
3           person paying for the communication and those employees or consultants  
4           currently or previously providing services to the candidate who is clearly  
5           identified in the communication, or the candidate’s authorized committee,  
6           or the candidate’s opponent or the opponent’s authorized committee, or a  
7           political party committee, or an agent of any of the foregoing; and

8           (2) The “firewall” must be described in a written policy that is distributed at  
9           the time it is implemented to all relevant employees, consultants, and  
10          clients affected by the policy.

11

12       \*       \*       \*       \*       \*