

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