

hands of a third party. Therefore, in the Commission's judgment, apparent authority is not 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

11 CFR 109.10 How Do Political Committees and Other Persons Report 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. The Commission has subsequently promulgated 11 CFR 109.10 as part of a separate rulemaking. See Final Rules and Explanation and Justification for Bipartisan Campaign Reform Act of 2002 Reporting, published elsewhere in this issue of the **Federal Register**. There are no changes to 11 CFR 109.10 in this rulemaking.

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 FR 76,962 (Dec. 13, 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. Public Law 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. 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.

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 Public Law 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