

communications can constitute coordination, and urged the Commission to provide explicitly that non-communication expenditures will *not* be considered to be coordination. The Commission disagrees with the commenter's assertion because Congress has not so limited the statutory provisions relating to coordination. See 2 U.S.C. 431(17) and 441a(a)(7)(B)(i) and (ii). Therefore, the Commission is moving pre-BCRA 11 CFR 109.1(c), to section 109.20(b) with revisions to make it clear that these other expenditures, when coordinated, are also in-kind contributions (or coordinated party expenditures, if a political party committee so elects) to the candidate or political party committee with whom or with which they are coordinated. The exceptions contained in 11 CFR part 100, subpart C (exceptions to the definition of "contribution") and subpart E (exceptions to the definition of "expenditure") continue to apply.

11 CFR 109.21 What Is a "Coordinated Communication"?

In BCRA, Congress expressly repealed 11 CFR 100.23, Public Law 107-155, sec. 214(b) (March 27, 2002), and instructed the Commission to promulgate new regulations on "coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees." Public Law 107-155, sec. 214(c) (March 27, 2002). Congress also mandated that the new regulations address four specific aspects of coordinated communications: (1) Republication of campaign materials; (2) the use of a common vendor; (3) communications directed or made by a former employee of a candidate or political party; and (4) communications made after substantial discussion about the communication with a candidate or political party. See Public Law 107-155, sec. 214(c)(1) through (4) (March 27, 2002).

The Commission is promulgating new 11 CFR 109.21 to comply with this Congressional mandate. This rule applies to communications coordinated with candidates, their authorized committees, political party committees, or the agents of any of the foregoing. Paragraph (a) of this section begins by defining "coordinated communication." Paragraph (b) spells out the treatment of "coordinated communications" as in-kind contributions, which must be reported. Next, paragraph (c) sets out the content standard for coordinated communications. Paragraph (d) establishes conduct standards for the coordination analysis. Paragraph (e) addresses the Congressional guidance

that an agreement or formal collaboration is not required for a communication to be considered "coordinated." Paragraph (f) provides a safe harbor for certain inquiries as to legislative and policy issues.

The Commission notes that Congress has provided that candidates and any entity "acting on behalf of 1 or more candidates" must not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act. * * * 2 U.S.C. 441i(e)(1)(A). The Commission has addressed this restriction in a separate rulemaking (see Final Rules and Explanation and Justification on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49,081 (July 29, 2002)), and does not necessarily equate activity resulting in a coordinated communication under 11 CFR 109.21 with "acting on behalf of 1 or more candidates" in 2 U.S.C. 441i(e)(1). Therefore, a determination of whether a coordinated communication exists must be made separately from, and without reference to, a determination of whether an entity is "acting on behalf of 1 or more candidates" under 2 U.S.C. 441i(e)(1)(A).

1. 11 CFR 109.21(a) Definition

Paragraph (a) of new section 109.21 sets forth the required elements of a "coordinated communication," which comprise a three-pronged test. For a communication to be "coordinated," all three prongs of the test must be satisfied. While no one of these elements standing alone fully answers the question of whether a communication is for the purpose of influencing a Federal election, see 11 CFR 100.52(a), 100.111(a), the satisfaction of all three prongs of the test set out in new 11 CFR 109.21 justifies the conclusion that payments for the coordinated communication are made for the purpose of influencing a Federal election, and therefore constitute in-kind contributions. Nevertheless, the Commission notes that the inclusion of one prong of its test, the content standard, could function efficiently as an initial threshold for the coordination analysis.

Under the first prong, in paragraph (a)(1), the communication must be paid for by someone other than a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing. However, a person's status as a candidate does not exempt

him or her from this section with respect to payments he or she makes for communications on behalf of a different candidate. Under paragraph (a)(2), the second prong of the three-pronged test is a "content standard" regarding the subject matter of the communication. Under paragraph (a)(3), the third prong of the test is a "conduct standard" regarding the interactions between the person paying for the communication and the candidate or political party committee. A sentence proposed in the NPRM regarding republication of campaign materials is being moved from proposed paragraph (a)(3) in the NPRM to paragraph (c)(2) in the final rules.

Of the seven commenters who specifically commented on this three-part structure for the regulations, two expressed general support for the approach. The other five, including BCRA's principal sponsors, urged the Commission to emphasize the actual conduct and minimize the importance of any content standard. The final rules, however, maintain the same structure as the proposed rules for the reasons described below. The Commission recognizes that a content requirement may serve to exclude some communications that are made with the subjective intent of influencing a Federal election, thereby potentially narrowing the reach of 2 U.S.C. 441a(a)(7)(B)(i) and (ii), but the Commission believes that a content standard provides a clear and useful component of a coordination definition in that it helps ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a federal election.

2. 11 CFR 109.21(b) Treatment as an In-Kind Contribution; Reporting

Under the Act and the Commission's regulations, a "contribution" is defined as "a gift, subscription, loan ... advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office," subject to a number of specific exceptions. See 11 CFR 100.52(a), *et seq.*; see also 2 U.S.C. 431(8)(A), *et seq.* An "expenditure" is similarly defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office," and is also subject to a list of specific exceptions. See 11 CFR 100.111(a), *et seq.*; see also 2 U.S.C. 431(9)(A), *et seq.* Thus, a "payment" that is "made for the purpose of influencing any election for Federal