

office" qualifies as either an "expenditure," a "contribution," or both, unless it is specifically excepted.

As explained above, the coordination provisions in the statute, 2 U.S.C. 441a(a)(7)(B)(i) and (ii), state that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate or a political party committee "shall be considered to be a contribution" to that candidate or political party committee. Several commenters argued that the Commission must first determine whether or not the payment for a communication constitutes an "expenditure" before proceeding to a coordination analysis. The Commission concludes that, when read as whole sentences, 2 U.S.C. 441a(a)(7)(B)(i) and (ii) require that for a contribution to exist, three requirements must be met: (1) There must be some conduct to differentiate the activity from an "independent expenditure," see 2 U.S.C. 431(17); (2) there must be some form of payment; and (3) that payment must be made for the purpose of influencing any election for Federal office. The Commission has determined that a payment that satisfies the content and conduct standards of 11 CFR 109.21 satisfies the statutory requirements for an expenditure in the specific context of coordinated communications, and thereby constitutes a contribution under 2 U.S.C. 441a(a)(7)(B)(i) and (ii).

#### A. 11 CFR 109.21(b)(1) General Rule

Paragraph (b)(1) of section 109.21 provides that a payment for a coordinated communication is made "for the purpose of influencing" an election for Federal office, the same phrase used by Congress in the definition of both "expenditure" and "contribution." 2 U.S.C. 431(8)(A) and (9)(A). Paragraph (b)(1) also states the general rule that a payment for a coordinated communication constitutes an in-kind contribution to the candidate, authorized committee, or political party committee with whom or with which it is coordinated, unless excepted under subpart C of 11 CFR part 100. Please note that this section encompasses electioneering communications under 11 CFR 100.29(a)(1), in addition to other communications. Congress expressly provided that when these communications are coordinated with a candidate, authorized committee, or political party committee, they must be treated like other coordinated communications in that disbursements for these communications are in-kind contributions to the candidate or party

committee with whom or which they were coordinated. See 2 U.S.C. 441a(a)(7)(C). Under BCRA, these coordinated electioneering communications, like other coordinated communications, must be treated as expenditures by the candidate, authorized committee, or political party committee with whom or with which they are coordinated. *Id.*

#### B. 11 CFR 109.21(b)(2) In-Kind Contributions Resulting From Conduct Described in Paragraphs (d)(4) or (d)(5) of This Section

Paragraph (b)(2) clarifies the application of the general rule of paragraph (b)(1) in a particular circumstance. Under the general rule in paragraph (b)(1), a candidate's authorized committee or a political party committee receives an in-kind contribution, subject to the contribution limits, prohibitions, and reporting requirements of the Act. As explained below, two of the conduct standards, found in paragraphs (d)(4) and (d)(5) of section 109.21, do not focus on the conduct of the candidate, the candidate's authorized committee or agents, but focus instead on the conduct of a common vendor or a former employee with respect to the person paying for the communication. To avoid the result where a candidate, authorized committee, or political party committee might be held responsible for receiving or accepting an in-kind contribution that did not result from its conduct or the conduct of its agents, the Commission explicitly provides that the candidate, the candidate's authorized committee, or political party committee does not receive or accept in-kind contributions that result from conduct described in the conduct standards of paragraphs (d)(4) and (d)(5) of this section. This treatment is generally analogous to the handling of republished campaign materials under new 11 CFR 109.23 and the Commission's pre-BCRA regulations. See former 11 CFR 109.1(d)(1). However, please note that the person paying for a communication that is coordinated because of conduct described in paragraphs (d)(4) or (d)(5) still makes an in-kind contribution for purposes of the contribution limitations, prohibitions, and reporting requirements of the Act.

One commenter suggested that the text of paragraph (b)(2) should be clarified to indicate that a candidate or political party committee receives and accepts an in-kind contribution resulting from a coordinated communication in which an agent of either engages in the conduct described

in paragraphs (d)(1) through (d)(3). The Commission agrees and is incorporating that suggested change into the final rules.

#### C. 11 CFR 109.21(b)(3) Reporting of Coordinated Communications

Paragraph (b)(3) of 11 CFR 109.21 provides that a political committee, other than a political party committee, must report payments for coordinated communications as in-kind contributions made to the candidate or political party committee with whom or which they are coordinated. Paragraph (b)(3) also clarifies that the recipient candidate, authorized committee, or political party committee with which a communication is coordinated must report the payor's payment for that communication as an in-kind contribution received under 11 CFR 104.13 and must also report making a corresponding expenditure in the same amount. 11 CFR 104.13.

#### 3. 11 CFR 109.21(c) Content Standards

The NPRM sought comments as to whether content standards should be included in the coordinated communications rules, and if so, what the appropriate standard should be. A number of alternative content standards were included in the NPRM. Two commenters opposed the inclusion of any content standard, arguing that to do so would inappropriately narrow the scope of the rules when the conduct of the person paying for the communication and the candidate or political party committee is sufficient, by itself, to eliminate the independence of the communication, thereby creating an in-kind contribution under 2 U.S.C. 441a(a)(7)(B)(i) and (ii). Several other commenters, however, generally supported the inclusion of a content standard, although they disagreed as to what that standard should be.

The Commission is including content standards in the final rules on coordinated communications to limit the new rules to communications whose subject matter is reasonably related to an election. In the NPRM, the Commission proposed three distinct content standards, in paragraph (c), along with three alternatives for a fourth standard. The three proposed standards were an "electioneering communication" standard, a standard encompassing the republication of candidate campaign materials, and a standard for communications that "expressly advocate" the election or defeat of a clearly identified candidate for Federal office. In addition, the three alternative content standards ranged