

from a minimal threshold that would have encompassed any “public communication” that refers to a “clearly identified candidate” (Alternative A), a public communication that “promoted, supported, attacked, or opposed” a candidate for Federal office (Alternative B), and a public communication that was made during a specific time period shortly before an election, was directed to a specific group of voters, and discussed the views or record of a candidate (Alternative C). The Commission proposed that a communication that satisfies any one of the standards would satisfy the “content” requirement of 11 CFR 109.21.

Commenters expressed a wide range of views as to the appropriate content standard. One commenter attempted to craft a stand-alone unitary content standard through a combination of the electioneering communication and republication standards. Four commenters argued that an “express advocacy” content standard is necessary to provide clear guidance and to ensure that the regulation is not vague or overly broad. Most other commenters acknowledged that the three standards of electioneering, republication, and express advocacy clearly comport with guidance from Congress and the courts, but three commenters argued that no additional content standards are warranted in the absence of any further directive from Congress. A joint comment by three commenters urged the Commission to focus the content standard on the content of the communication, rather than “external criteria” such as the timing or distribution of the communication. The same commenters also requested that the Commission adjust its content standard to ensure that communications between a political party committee and its “affiliates” are not covered.

Based generally on the approach taken by Congress with respect to electioneering communications, five commenters recommended a dual time-period approach to the content standard in which communications made 30 to 60 days before an election would be subject to lesser, if any, content restrictions than communications made outside of that time period. BCRA’s principal sponsors agreed with this approach in their comments and observed that communications made within 30 days of a primary or 60 days of a general election are usually campaign related. A different commenter also recommended temporal limits, but suggested that any communications made outside the 30 or 60 days should be completely excluded

from being treated as coordinated communications. BCRA’s principal sponsors specifically rejected this approach in their comments.

After considering the concerns raised by the commenters about overbreadth, vagueness, underinclusiveness, and potential circumvention of the restrictions in the Act and the Commission’s regulations, the Commission is setting forth four content standards to implement the statutory requirements. These standards all provide bright-line tests and subject to regulation only those communications whose contents, in combination with the manner of its creation and distribution, indicate that the communication is made for the purpose of influencing the election of a candidate for Federal office.

A. 11 CFR 109.21(c)(1) Electioneering Communications

Congress provided in BCRA that when “any person makes * * * any disbursement for any electioneering communication * * * and such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, state, or local political party committee thereof, or an agent or official of any such candidate, party or committee * * * such disbursement shall be treated as a contribution to the candidate supported by the electioneering communication * * * and as an expenditure by that candidate.” 2 U.S.C. 441a(a)(7)(C). To implement that statutory directive, the Commission proposed in the NPRM that the first content standard paragraph (c)(1) simply focus on whether the communication is an “electioneering communication” under 11 CFR 100.29. See Final Rule on Electioneering Communications, 67 FR 51,131 (Oct. 23, 2002). Although the proposed rule in the NPRM described a communication “that would otherwise be an electioneering communication,” this indirect reference has been removed and replaced with a direct reference to an electioneering communication.

Four commenters opined that the electioneering communication provisions in BCRA are unconstitutional, and opposed their inclusion as a content standard. One of these commenters argued that the electioneering communication content standard should be limited to include only communications containing “express advocacy.” The Commission concludes, however, that such an interpretation would undermine the scope of Congress’s definition of an electioneering communication, 2 U.S.C. 434(f)(3)(A), especially in light of the

Congressional mandate in 2 U.S.C. 441a(a)(7)(C). Another commenter argued that the Commission should nonetheless exclude the electioneering communications from the content standards because Congress did not specifically require its inclusion in that exact manner. In the Commission’s judgment, however, including the electioneering communication standard specifically authorized by Congress as one of the content standards in the definition of “coordinated communication” is a simple and straightforward way to implement 2 U.S.C. 441a(a)(7)(C). As one commenter noted, the inclusion of electioneering communications as a content standard promotes consistency because the term is already defined by Congress at 2 U.S.C. 434(f)(3)(A) and in the Commission’s new rules at 11 CFR 100.29.

The Commission considered and rejected constructing a separate definition of “coordination” that would have applied specifically to electioneering communications. A separate construction would be redundant because the relevant conduct under it would be identical to the conduct standards for other coordinated communication containing other types of content. Similarly, the Commission notes that Congress provided that an electioneering communication could be coordinated with an “official” of a candidate, party, or committee, in addition to the candidate, committees, and their agents. 2 U.S.C. 441a(a)(7)(C)(ii). The Commission is not, however, separately addressing coordination with an official in the final rule because such an official is subsumed within the definition of “agent” in 11 CFR 109.3.

B. 11 CFR 109.21(c)(2) Dissemination, Distribution, or Republication of Campaign Material

The second content standard implements the Congressional mandate that the Commission’s new rules on coordinated communications address the “republication of campaign materials.” See Public Law 107–155, sec. 214(c)(1) (March 27, 2002). The Commission’s former rule on republication of campaign materials, which has been moved from former 11 CFR 109.1(d) to new section 109.23 with minor changes explained below, sets out the required treatment of both the coordinated and uncoordinated dissemination, distribution, or republication of campaign material prepared by a candidate, an authorized committee, or an agent of either. Under section 109.23, discussed below, the