

reporting responsibilities of candidates, authorized committees, and political party committees vary depending on whether they “coordinate” with a person financing the dissemination, distribution, or republication of a candidate’s campaign material.

In the final rules the “republication” content standard in paragraph (c)(2) of section 109.21 expressly links to paragraph (d)(6) of section 109.21. This link is important because paragraph (d)(6) of this section clarifies the application of the conduct standards of paragraph (d) of this section to the unique circumstances of republication. This change from the NPRM is intended to emphasize the relationship between paragraphs (c)(2) and (d)(6) of section 109.21. In addition, section 11 CFR 109.21(c)(2) includes a cross-reference to 11 CFR 109.23 to ensure that certain uses of campaign material exempted by 11 CFR 109.23(b) from the definition of “contribution” will not satisfy the content standard in 11 CFR 109.21(c)(2).

The Commission is making one change to the republication content standard from the rule proposed in the NPRM. In the NPRM, a communication would have satisfied the content standard proposed in 11 CFR 109.21(c)(2) when “the communication” disseminated, distributed, or republished campaign materials prepared by a candidate. The Commission is changing the standard so that the content standard will only be satisfied when “the public communication” disseminates, distributes, or republishes campaign materials. Although the Commission did not receive specific comments on this point, the Commission is employing the term “public communication,” as defined at 11 CFR 100.26, to conform the scope of this standard with the approach the Commission has consistently taken for the other content standards discussed below, with the exception of the “electioneering communication” standard.

C. 11 CFR 109.21(c)(3) Express Advocacy

The third content standard in paragraph (c)(3) of section 109.21 states that a communication also satisfies the content standard if it “expressly advocates” the election or defeat of a clearly identified candidate for Federal office. Although the commenters expressed widely differing opinions about whether this “express advocacy” standard should be the sole content standard, none of the commenters opposed including “express advocacy” as a content standard in the regulations.

D. 11 CFR 109.21(c)(4) Additional Content Standard

In addition to electioneering communications described in 11 CFR 100.29, communications that republish campaign materials, and communications that “expressly advocate” the election or defeat of a clearly identified candidate, the Commission proposed three other possible content standards in the NPRM and requested comment on additional alternatives. Each of these alternatives was premised on the communication qualifying as a “public communication,” with additional requirements. Alternative A required only that the communication qualify as a public communication and contain a reference to a clearly identified candidate for Federal office. Alternative B provided that the communication must also promote, support, attack, or oppose the clearly identified candidate. Alternative C required that the public communication refer to a clearly identified candidate, be made within 120 days of an election, be directed to voters within the jurisdiction of that candidate, and include an “express statement about the record or position or views on an issue, or the character, or the qualifications or fitness for office, or party affiliation,” of the clearly identified candidate.

Several commenters criticized Alternative A as overly broad, asserting that a clearly identified candidate is the minimal standard necessary to distinguish “issue ads” from communications made for the purpose of influencing an election. In contrast, several different commenters argued that the requirement of a clearly identified candidate was too restrictive because it would fail to encompass communications urging recipients to “vote Democrat” or “vote Republican.” These commenters suggested that at a minimum the Commission expand the reference to include a reference to a “clearly identified political party.” Furthermore, two commenters argued that the requirement of a clearly identified candidate also fails to encompass communications that “reflect and reinforce the themes and messages of the campaign.”

Five commenters criticized Alternative B, arguing that the terms “promote, support, attack, or oppose” are overly broad. Two different commenters suggested that the proposed standard relied on subjective criteria and would discourage public speech and weaken the value of having a content standard.

Several commenters also criticized Alternative C as overly broad and containing subjective criteria. One commenter specifically objected to including communications containing statements about a candidate’s positions on an issue. A different commenter cited a lack of a statutory basis or empirical support for the 120-day time limit and pointed out that the rule might be applied to cover communications made in a jurisdiction other than the jurisdiction of the clearly identified candidate.

In contrast, four commenters expressed general support for this standard, but with the removal of the 120 day limit, which they believed would exclude many coordinated communications made early in the election cycle. Two of these commenters also suggested that the Commission remove the word “express” from the requirement of an “express statement.” In addition, a different commenter proposed an alternative standard to cover a communication that (1) “expressly refers to” a candidate in his capacity as a candidate; (2) refers to the next election; and (3) is publicly disseminated and actually reaches 100 eligible voters.

The Commission is including a modified version of Alternative C in the final rules at 11 CFR 109.21(c)(4). Taking into consideration the suggestions of the commenters, this content standard is largely based on, but is somewhat broader than, Congress’s definition of an electioneering communication. A communication meets this content requirement if (1) it is a public communication; (2) it refers to a clearly identified candidate or political party; (3) it is directed to voters in the jurisdiction of the clearly identified Federal candidate; and (4) it is publicly distributed or publicly disseminated 120 days or fewer before a primary or general election.

The term “publicly distributed” refers to communications distributed by radio or television (*see* 11 CFR 100.29(b)(3)) and the term “publicly disseminated” refers to communications that are made public via other media, *e.g.*, newspaper, magazines, handbills. In this respect, paragraph (c)(4) reflects the fact that coordinated communications can occur through media other than television and radio. Moreover, for purposes of establishing a content standard in a coordination rule, there is no reason to exclude communications that meet the content requirements of an electioneering communication, but fail to constitute an electioneering communication only because of the media chosen for the communication.