

Perhaps most importantly, paragraph (c)(4) creates parallel requirements for those whose communications do not technically qualify as electioneering communications. Because electioneering communications are by definition limited to broadcast, cable, or satellite communications (see 11 CFR 100.29), communications made through other media, such as print communications, are not included under the electioneering communication-based content standard of paragraph (c)(1). Similarly, political committees such as separate segregated funds or non-connected committees do not make electioneering communications because their payments are treated as expenditures. Therefore, under new paragraph (c)(4), for example, where a candidate and the separate segregated fund paying for the communication satisfy the conduct requirements of new 11 CFR 109.21(d), the separate segregated fund makes a coordinated communication if it pays for a newspaper advertisement. Thus, to avoid an arbitrary distinction in the content standards, paragraph (c)(4) applies to all "public communications," a term defined and set forth in BCRA by Congress. 2 U.S.C. 431(22); 11 CFR 100.26. The use of the term "public communication" provides consistency within the regulations and distinguishes covered communications from, for example, private correspondence and internal communications between a corporation or labor organization and its restricted class. The three commenters who specifically addressed the proposed use of this term expressed support for its inclusion. One of these commenters pointed out that the use of "public communication" provides "helpful consistency within the regulations." In addition, a different commenter suggested that the Commission "completely exempt" e-mail and Internet communications from its coordination regulations. By framing the content standard in terms of a "public communication," the Commission addresses that comment. Although the term "public communication" covers a broad range of communications, it does not cover some forms of communications, such as those transmitted using the Internet and electronic mail. 11 CFR 100.26.

This new standard focuses as much as possible on the face of the public communication or on facts on the public record. This latter point is important. The intent is to require as little characterization of the meaning or the content of communication, or inquiry into the subjective effect of the

communication on the reader, viewer, or listener as possible. See *Buckley v. Valeo*, 424 U.S. 1, 42–44 (1976). The new paragraph (c)(4) is applied by asking if certain things are true or false about the face of the public communication or with limited reference to external facts on the public record. This fourth content standard does not require a description of a candidate's views or positions, a requirement in the proposed rules that raised objections from commenters.

Paragraph (c)(4)(ii) of section 109.21 requires that the public communication must be publicly distributed or publicly disseminated 120 days or fewer before a primary election or a general election. The 120-day time frame is based on 2 U.S.C. 431(20)(A)(i) (see 11 CFR 100.24(b)(1)) and has several advantages. First, it provides a "bright-line" rule. Second, it focuses the regulation on activity reasonably close to an election, but not so distant from the election as to implicate political discussion at other times. As noted, Congress has, in part, defined "Federal election activity" in terms of a 120-day time frame, deeming that period of time before an election to be reasonably related to that election. See 2 U.S.C. 431(20)(A)(i). In contrast, the "express advocacy" content standard in paragraph (c)(3) of section 109.21 applies without time limitation. Similarly, this 120-day time frame is more conservative than the treatment of public communications in the definition of Federal election activity, which regulates public communications without regard to timeframe. 2 U.S.C. 431(20)(A)(iii); 11 CFR 100.24(b)(3).

The Commission has considered, but rejected, the use of a shorter time-frame, specifically, thirty days before a primary election and sixty days before a general election. This shorter time-frame would have been derived by analogy from the definition of "electioneering communication." See 2 U.S.C. 434(f)(3)(A). The shorter time-frames would have had the advantage of symmetry with the electioneering communication definition. There is, however, an important difference between the electioneering communication concept and the paradigm adopted here for regulating coordination. Although this content standard (*i.e.*, paragraph (c)(4)(ii)) is obviously similar to the definition of "electioneering communication," this content standard is only one part of a three-part test (see discussion of paragraph (a) of section 109.21, above), whereas the definition of "electioneering communication" is complete in itself. Under this final rule,

even if a political communication satisfies the content standard, the conduct standards must still be satisfied before the political communication is considered "coordinated." In this light, the content standard may be viewed as a "filter" or a "threshold" that screens out certain communications from even being subjected to analysis under the conduct standards.<sup>2</sup> Thus it is appropriate to consider a broader time-frame when applying this content standard because it serves only to identify political communications that may be coordinated if other conditions (*i.e.*, the conduct standards) are satisfied, and thus may be inappropriately underinclusive if too narrow.

The new standard also encompasses communications that refer to political parties as well as those that identify candidates, as suggested by several commenters. This extension of the content standards implements 2 U.S.C. 441a(a)(7)(B)(ii), added by section 214(c) of BCRA, which provides that expenditures made by any person in coordination with a political party committee is considered to be a contribution to that party committee.

Several commenters said that there should be an exception to the content standards for communications that refer to the "popular name" of a bill or law that includes the name of a Federal candidate who was a sponsor of the bill or law. In addition to questions whether such an exception is necessary in light of the other restrictions explained above, the Commission believes that the "popular name" proposal would also open new avenues for the circumvention of the Act and the Commission's regulations. Because the "popular name" of a bill is not a defined term, and is not subject to specific restrictions by Congress, an exemption for the use of a candidate's name in the popular name of a bill might shield a communication that clearly attacks or supports a candidate by naming the bill in a way that associates the candidate with a popular or disfavored stance. The Commission concludes that if one or more of the conduct standards is met and the communication is directed to voters in that candidate's jurisdiction and made within 60 days of general election, Congress does not intend for such a communication to be exempted from the statutory requirements merely

<sup>2</sup> In effect, the content standard of paragraph (c)(4)(ii) operates as a "safe harbor" in that communications that are publicly disseminated or distributed more than 120 days before the primary or general election will not be deemed to be "coordinated" under this particular content standard under any circumstances.