

because the communication contains a reference to a crafted name for a piece of legislation in addition to the name of the clearly identified candidate.

The new standard also incorporates the concept of the “targeting” of the communication as an indication of whether it is election-related. BCRA’s principal sponsors commented that a “key factor” in determining whether a communication should be covered under these rules is whether the communication is “targeted” to a specific voter audience. By requiring that the communication be “directed to voters in the jurisdiction of the clearly identified Federal candidate,” the Commission is addressing this concern. In order to encompass communications that are coordinated with a political party committee and refer to a political party, but do not refer to a candidate, the Commission also provides that the content standard in paragraph (c)(4) would be satisfied when the communication is directed “to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.” The “directed to voters” requirement focuses on the intended audience of the communication, rather than a quantitative analysis of the number of possible recipients or the expected geographic limits of a particular media, that will be determined on a case-by-case basis from the content of the communication, its actual placement, and other objective indicators of the intended audience. For example, a public communication that otherwise makes express statements about promoting or attacking Representative X or Senator Y for their stance on the “X–Y Bill” does not satisfy this requirement if it is only broadcast in Washington, DC, and not in either Member’s district or State. For purposes of new paragraph (c)(4), “jurisdiction” means a member of Congress’ district, the State of a U.S. Senator, and the entire United States for the President and Vice President in the general election or before the national nominating convention.

4. 11 CFR 109.21(d) Conduct Standards

Paragraph (d) of section 109.21 lists five types of conduct that satisfy the “conduct standard” of the three-part coordination test. Under these rules, if one of these types of conduct is present, and the other requirements described in paragraphs (a) and (c) are satisfied, the communication is not made “totally independently” from the candidate, the candidate’s authorized committee, or the political party committee, *see Buckley*, 424 U.S. at 47, and thus is

coordinated. The introductory sentence of paragraph (d) implements the Congressional mandate in BCRA that the coordination regulation not require “agreement or formal collaboration.” Pub. L. 107–155, sec. 214(c) (March 27, 2002); *see* more complete discussion below.

In the NPRM, the Commission proposed five categories of conduct that would each satisfy the conduct standard when material information is conveyed or used: (1) A request or suggestion; (2) material involvement in decisions; (3) a substantial discussion; (4) use of a common vendor; and (5) use of a former employee or independent contractor of a campaign committee or political party. Several commenters offered general observations regarding the Commission’s approach to a conduct standard in the NPRM. One commenter applauded the Commission’s decision to focus on specific transactions leading to a coordinated communication, rather than general contacts between an organization and a campaign. That same commenter, however, complained along with three other commenters that the standards still operated to establish a presumption of coordination and should be further narrowed to require a direct causal link between the sharing of information and its use in a particular communication. One other commenter expressed a concern that the proposed rules would operate to unduly restrict corporations or labor organizations from preparing voter guides or “scorecards” to reflect the positions of candidates on specific legislation or issues.

BCRA’s principal sponsors urged the Commission to ensure that lobbying activities would not result in a finding of coordination under the final rules. Similarly, a different commenter suggested that the conduct standards be limited to contacts with a candidate in his or her role as a candidate, rather than simply in the capacity of a legislator. That commenter indicated that without such a restriction the conduct rules would improperly restrict the ability of organizations to coordinate issue advocacy with elected officials. “An action alert from a nonprofit asking the public to call their Senators and urge them to pass McCain-Feingold,” the commenter argued, “is more effective if the timing and content can be coordinated with Senator McCain.”

A. 11 CFR 109.21(d)(1) Request or Suggestion

Under the Act, as amended by BCRA, an expenditure made by any person at the “request or suggestion” of a candidate, an authorized committee, a political party committee, or an agent of

any of the foregoing is a contribution to the candidate or political party committee. 2 U.S.C. 441a(a)(7)(B)(i), (ii). The first conduct standard, in 11 CFR 109.21(d)(1), implements this “request or suggestion” statutory provision. This standard has two prongs and satisfying either prong satisfies the conduct standard.

Three commenters requested in a joint comment that the term “suggest” be given additional definition or explanation, proposing that the definition should reflect a suggestion as a “a palpable communication intended to, and reasonably understood to, convey a request for some action.” The Commission notes that the “request or suggest” standard is derived from the Supreme Court’s *Buckley* decision and has existed in the Commission’s regulations without further definition for over two decades. *See Buckley v. Valeo*, 424 U.S. at 47 (finding that “the ‘authorized or requested’ standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions”); *see* also H.R. Doc. No. 95–44, at 55 (Jan. 12, 1977) (Explanation and Justification for 11 CFR 109.1, defining independent expenditure as an “expenditure . . . which is not made * * * at the request or suggestion of” a candidate, authorized committee, or their agents). A determination of whether a request or suggestion has occurred requires a fact-based inquiry that, even under the commenters’ proffered explanation, can not be easily avoided through further definition.

A different commenter expressed concern that the proposed rule would have broadly affected communications made with respect to all candidates after the person paying for such communications has received a request or suggestion from any candidate. In this final rule, the Commission does not intend such an application. Neither of the two prongs of this conduct standard can be satisfied without some link between the request or suggestion and the candidate or political party who is, or that is, clearly identified in the communication. Where Candidate A requests or suggests that a third party pay for an ad expressly advocating the election of Candidate B, and that third party publishes such a communication with no reference to Candidate A, no coordination will result between Candidate B and the third party payor. However, a candidate is not removed from the provisions of the conduct standards merely by virtue of being a candidate. If Candidate A is an “agent”