

for Candidate B in the example above, then the communication would be coordinated. Similarly, if Candidate A requests that Candidate B pay for a communication that expressly advocates the election of Candidate A, and Candidate B pays for such a communication, that communication is a coordinated communication and Candidate B makes an in-kind contribution to Candidate A.

The first type of conduct, in paragraph (d)(1)(i), is satisfied if the person creating, producing, or distributing the communication does so at the request or suggestion of a candidate, authorized committee, political party committee, or agent of any of the foregoing. The *Buckley* court originally drew on the 1974 House and Senate Reports accompanying the 1974 amendments to the Act when it upheld the section in FECA that distinguished a communication made "at the request or suggestion" of the candidate or political party committee from those that are made "totally independently from the candidate and his campaign." *Buckley*, 424 U.S. at 47 (citing H.R. Rep. No. 93-1239, at 6 (1974) and S. Rep. No. 93-689, at 18 (1974)). A "request or suggestion" is therefore a form of coordination under the Act, as approved by *Buckley*. A request or suggestion encompasses the most direct form of coordination, given that the candidate or political party committee communicates desires to another person who effectuates them.

In the NPRM, the Commission noted that this provision, for example, would not apply to a speech at a campaign rally, but, in appropriate cases, would apply to requests or suggestions directed to specific individuals or small groups for the creation, production, or distribution of communications. One commenter agreed with this approach, requesting that the rule itself more clearly reflect this explanation. However, the Commission is not amending its rules because it could be potentially confusing to delineate in a rule every conceivable situation that could arise. Instead, the Commission offers the following explanation of the new rule. The "request or suggestion" conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients

constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1). Similarly, a request in a public campaign speech or a newspaper advertisement is a request to the general public and is not covered, but a request during a speech to an audience at an invitation-only dinner or during a membership organization function is a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).

The second way to satisfy the "request or suggestion" conduct standard (paragraph (d)(1)(ii)) is for a person paying for a communication to suggest the creation, production, or distribution of the communication to the candidate, authorized committee, political party committee, or agent of any of the foregoing, and for the candidate, authorized committee, political party committee, or agent to assent to the suggestion. The NPRM explained that this second way of satisfying the conduct standard is intended to prevent circumvention of the statutory "request or suggestion" test (2 U.S.C. 441a(a)(7)(B)(i), (ii)) by, for example, the expedient of implicit understandings without a formal request or suggestion. Two commenters supported the addition of this new prong in order to prevent such circumvention of the Act. Two different commenters suggested that only affirmative assent should satisfy the conduct standard, although one of these commenters proposed that the rule should also cover situations where the parties have a prior agreement that a certain response be taken as an affirmative answer. Three other commenters opposed an assent standard entirely as overly complex and dependent on subjective criteria. One of these commenters argued that such an approach would undermine the Commission's efforts to create bright lines with respect to conduct resulting in coordination, and joined with another of these commenters in expressing concern that such a standard would be too easily triggered in the context of lobbying or other discussions with elected representatives. Another of these commenters also questioned whether certain responses, such as silence or "when a Congressman's eyes light up at the mention of a certain communication," constitute assent. One commenter also questioned whether evidence of circumvention exists to justify this approach. This commenter warned that the assent standard could run afoul of the district court's decision in *Christian Coalition*, which, in the commenter's words, determined that

"coordination does not exist where a union or corporation merely informs a candidate about its own political plans."

The Commission recognizes that the assent of a candidate may take many different forms, but it disagrees that a standard encompassing assent to a suggestion is overly complex. Assent to a suggestion is merely one form of a request; it is "an expression of a desire to some person for something to be granted or done." See *Black's Law Dict.* (6th ed. 1990) p. 1304 (definition of "request"). A determination of whether assent to a suggestion occurs is necessarily a fact-based determination, but no more so than a determination of whether other forms of a request or suggestion occur. The Commission therefore also disagrees with the commenter who suggested that the approach in the NPRM might not be permissible in light of the *Christian Coalition* decision. The Commission did not, as that commenter suggested, propose that coordination could result where a payor "merely informs" a candidate or political party committee of its plans. Rather, under the proposed rule, a candidate or a political party committee will have accepted an in-kind contribution only if there is assent to the suggestion; by rejecting the suggestion, the candidate or political party committee may unilaterally avoid any coordination.

It is the Commission's judgment that the assent to a suggestion must be encompassed by this conduct standard to prevent the circumvention of the requirements of the Act in this area. Therefore, and in light of the reasons set forth in the NPRM and above, the Commission is promulgating the request or suggestion standard without change from its form in the NPRM.

One commenter suggested that the Commission should permit a person to rebut the "presumption" of coordination after a request or suggestion "by demonstrating that the organization had decided to make that communication prior to the contact with the candidate, campaign, or party." The Commission does not agree with the creation of such a "presumption." Instead, a request or suggestion must be based on specific facts, rather than presumed, to satisfy this conduct standard. Thus, the absence of a presumption obviates the need to establish a mechanism for rebuttal.

As discussed above, the *Buckley* Court expressly recognized a request or suggestion by a candidate as a direct form of coordination resulting in a contribution. *Buckley*, 424 U.S. at 47. In the NPRM, the Commission sought