

comment on whether the unique nature of requests or suggestions by candidates or political party committees indicates that such conduct should be handled differently under the coordination regulations. Specifically, the Commission asked whether a request or suggestion for a communication by a candidate or political party committee should be viewed as a special case, and as sufficient, in and of itself, regardless of the contents of the communication, to establish coordination. Three commenters opposed any rule in which a request or suggestion, without any content standard, could constitute a coordinated communication. One of these commenters argued that such an approach would permit a “false positive,” such as when a group that has long planned a lobby effort meets with a legislator, and the legislator “expresses her hope” that the group will publicize a particular piece of legislation bearing her name. Similarly, another of these commenters asserted that there are “numerous communications that may be made at the request or suggestion of a candidate that have no relationship to any election.” The Commission agrees with these commenters’ concerns. Even supporters of this approach appeared to acknowledge in their testimony that a request to run an advertisement well before the next election might not be in an “electoral context” and therefore should not necessarily be treated as a coordinated communication under the Commission’s regulations. Therefore, the final rules do not create any exception from the content standard for the “request or suggestion” conduct standard.

B. 11 CFR 109.21(d)(2) Material Involvement

The second conduct standard, 11 CFR 109.21(d)(2), addresses situations in which a candidate, authorized committee, or a political party committee is “materially involved in decisions” regarding specific aspects of a public communication paid for by someone else. Those specific aspects are listed in paragraphs (i) through (vi) of paragraph (d)(2): (i) The content of the communication; (ii) the intended audience; (iii) the means or mode of the communication; (iv) the specific media outlet used; (v) the timing or frequency of the communication; or (vi) the size or prominence of a printed communication or duration of a communication by means of broadcast, cable, or satellite. Please note that “the specific media outlet used” includes those listed in the definition of “public communication” in 11 CFR 100.26, including the

broadcast and print media, mass mailings, and telephone banks. The “content of the communication” would include the script of telephone calls.

One commenter argued that this conduct standard should be limited to situations in which a candidate or political party has “significant control or influence over decisions” regarding the communication. The Commission disagrees, as such a standard would do little to clarify the rule or its application. The same commenter expressed concern about the scope of the “material involvement” standard, arguing that one candidate’s actions with respect to a third-party spender might “taint” all of that third-party’s communications with respect to different candidates. For the same reasons discussed above in the context of the “request or suggestion” standard, the Commission is not tailoring its rules to address that perceived potential outcome.

Two other commenters characterized the material involvement standard as redundant in light of the “substantial discussion” conduct standard, and one also opposed its inclusion because of vagueness and because Congress did not mandate this specific approach in BCRA, nor was it mandated by *Christian Coalition*. In contrast, four commenters indicated general support for the inclusion of this standard in the final rules and urged the Commission to expand it to cover material involvement in “discussions,” in addition to decisions, regarding a communication. The Commission recognizes that there is a potential overlap between the “material involvement” standard and the “substantial discussion” standard explained below. Many activities that satisfy the “substantial discussion” conduct standard will also satisfy the “material involvement” standard, but the “material involvement” standard encompasses some activities that would not be encompassed by the “substantial discussion” standard or any of the other conduct standards. For example, a candidate is materially involved in a decision regarding the content of a communication paid for by another person if he or she has a staffer deliver to that person the results of a polling project recently commissioned by that candidate, and the polling results are material to the payor’s decision regarding the intended audience for the communication. However, as explained below, the “substantial discussion” standard would not be satisfied by such delivery without some “discussion” or some form of interactive exchange between the candidate and the person paying for the communication. The

Commission thus believes that the “material involvement” standard is necessary to address forms of “real world” coordination that would not be addressed in any of the other conduct standards.

One commenter advised against any interpretation of the rule that would define “material” to require a showing of direct causation. For the purposes of 11 CFR part 109, “material” has its ordinary legal meaning, which is “important; more or less necessary; having influence or effect; going to the merits.” *Black’s Law Dict.* (6th ed. 1990) p. 976. Thus, the term “materially involved in decisions” does not encompass all interactions, only those that are important to the communication. The term “material” is included to safeguard against the inclusion of incidental participation that is not important to, or does not influence, decisions regarding a communication. The factual determination of whether a candidate’s or authorized committee’s involvement is “material” must be made on a case-by-case basis.

The “material involvement” standard does not provide a “bright-line” because its operation is necessarily fact-based. Nevertheless the inclusion of a “materiality” requirement serves to protect against overbreadth, consistent with Supreme Court jurisprudence. In construing the meaning of “material” in the context of Securities Exchange Commission regulations, the Supreme Court specifically rejected a “bright-line rule” for materiality:

A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But ease of application alone is not an excuse for ignoring the purposes of the Securities Acts and Congress’ policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.

Basic v. Levinson, 485 U.S. 224, 236 (1988). Therefore, the “material involvement” standard does not impose a requirement of direct causation, but focuses instead on the nature of the information conveyed and its importance, degree of necessity, influence or the effect of involvement by the candidate, authorized committee, political party committee, or their agents in any of the communication decisions enumerated in 11 CFR 109.21(d)(2)(i) through (vi).

The Commission has considered and rejected the suggestion of the commenter who recommended that “material involvement” be narrowed to