

a “but-for” test, which would require proof that the communication would not have occurred *but for* the material involvement of a candidate, authorized committee, political party committee, or agent. The Commission is not adopting this approach or any similar requirement of direct causation in its final rules. Under such an analysis, information would only be “material” if all other potential influences on the content of the communication, its intended audience, its means or mode, the specific media outlet used, the timing or frequency of the communication, or the size, prominence, or duration of the communication could be eliminated. This would result in an extremely intrusive factual determination. For example, under the commenter’s suggested approach, a candidate might propose a specific date for publication of a communication, but that candidate would not be materially involved in the decision regarding the timing of the communication unless the Commission could prove that no alternate factor could have led to the same timing decision. Such an approach is also unworkable because foreclosing all potential alternatives imposes an unnecessarily high burden of proof. The Commission also believes that such an approach would be unwarranted because the plain meaning of “material,” as explained above, provides sufficient guidance for an inherently fact-based determination. For the same reasons, the Commission rejects any interpretation of “material involvement” that would require a showing that the communication is made “as a result of” the involvement of a candidate, an authorized committee, a political party committee, or an agent.

Instead, a candidate, authorized committee, or political party committee is considered “materially involved” in the decisions enumerated in paragraph (d)(2) after sharing information about plans, projects, activities, or needs with the person making the communication, but only if this information is found to be material to any of the above-enumerated decisions related to the communication. Similarly, a candidate or political party committee is “materially involved in decisions” if the candidate, political party committee, or agent conveys approval or disapproval of the other person’s plans. The candidate or representatives of an authorized committee or political party committee need not be present or included during formal decisionmaking process but need only participate to the

extent that he or she assists the ultimate decisionmaker, much like a lawyer who provides legal advice to a client is materially involved in a client’s decision even when the client ultimately makes the decision.

The Commission notes that as with the “request or suggest” standard, the “material involvement” standard would not be satisfied, for example, by a speech to the general public, but is satisfied by remarks addressed specifically to a select audience, some of whom subsequently create, produce, or distribute public communications. However, it is not necessary that the involvement of the candidate or political party committee be traced directly to one specific communication. Rather, a candidate’s or political party committee’s involvement is material to a decision regarding a particular communication if that communication is one of a number of communications and the candidate or political party committee was materially involved in decisions regarding the strategy for those communications. For example, if a candidate is materially involved in a decision about the content or timing of a 10-part advertising campaign, then each of the 10 communications is coordinated without the need for further inquiry into the decisions regarding each individual ad on its own.

In order to respond to requests by several commenters for additional clarification about how the standard would operate, the Commission is providing the following hypothetical: Candidate A reads in the newspaper that the Payor Group is planning an advertising campaign urging voters to support Candidate A. Candidate A faxes over her own ad buying schedule to Payor Group, hoping that Payor Group will plan its own ad buying schedule around Candidate A’s schedule to maximize the effect of both ad campaigns. The Payor Group subsequently runs ads that are all on NBC and ABC during the 6:00 news hour and during the most expensive weekday timeslot on NBC, whereas Candidate A’s ads are run on CBS during the 6:00 news hour and during the most expensive time slot on CBS. When asked, Payor Group acknowledges that it received the fax from Candidate A, but says only that its plans for the timing of the campaign were in flux at the time they received the fax. The analysis under the “materially involved” conduct standard focuses on whether the fax constituted material involvement by the candidate in a decision regarding the timing of the Payor Group communications. Significant facts might include that the

Payor Group changed its previously planned schedule, or that Payor Group had not yet made plans and had factored in the fax in its decision to choose CBS and the same time slot, or show in some other way that the fax was “important; more or less necessary, having influence or effect, [or] going to the merits” with respect to the Payor Group’s decisions about the timing of its ads. The transmission and receipt of the fax in combination with the correlation of the two ad campaigns gives rise to a reasonable inference that Candidate A’s involvement was material to the Payor Group’s decision regarding the timing of its ad campaign. If, on the other hand, the example is changed so that the Payor Group’s ads run on the same channel right after the candidate’s ads in a way that lessens the effect of both ad campaigns, it may be appropriate to conclude that Candidate A’s involvement was *not* material to the Payor Group’s decision regarding the timing of its ad campaign. In other words, the degree to which the communications overlapped or did not overlap is one indication of whether Candidate A’s involvement was material to the timing of the Payor Group communications.

#### *C. 11 CFR 109.21(d)(3) Substantial Discussion*

In BCRA, Congress also directed the Commission to address “payments for communications made by a person after substantial discussion about the communication with a candidate or political party.” Public Law 107–155, sec. 214(c)(4) (March 27, 2002). In the NPRM, the Commission proposed a third conduct standard that would apply when a communication satisfying one or more of the content standards “is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication” and a candidate, authorized committee, political party committee, or an agent of any of the foregoing. 67 FR at 60,065 (September 24, 2002). The proposed rule also specified that a discussion is substantial “if information about the plans, projects, or needs of the candidate or political party committee is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.” 67 FR at 60,066 (September 24, 2002).

Three commenters supported the inclusion of this standard exactly as proposed in the NPRM. Two different commenters, however, characterized this standard as redundant in light of the “material involvement” standard