

and suggested that they be combined into a single standard. One other commenter asserted that there was “insufficient quantification” as to the meaning of a “substantial” discussion and recommended that “substantial discussion” join “material involvement” as subjects for future rulemaking consideration. A different commenter advised that “material” should be further defined in the context of this standard. Two commenters advocated a return to the *Christian Coalition* test of whether or not the candidate and the spender emerge as “partners or joint venturers,” while one of these commenters urged the Commission to specifically exclude discussions about policy and legislation in this context.

The Commission is including the “substantial discussion” standard in the final rules on coordinated communications because, as stated above, Congress required it to address this issue. Public Law 107–155, sec. 214(c)(4) (March 27, 2002). Under paragraph (d)(3) of 11 CFR 109.21, a communication meets the conduct standard if it is created, produced, or distributed after one or more substantial discussions between the person paying for the communication, or the person’s agents, and the candidate clearly identified in the communication, his or her authorized committee, his or her opponent, or the opponent’s authorized committee, a political party committee, or their agents. While the Commission recognizes the commenter’s concerns that “substantial” and “material” are not set forth as bright-line tests, the Commission views an analysis of a “substantial discussion” as necessarily fact-specific and not naturally conducive to a meaningful bright-line analysis. Nevertheless, the Commission is providing an analytical framework in which a finder of fact determines whether a discussion occurred, whether certain information was conveyed, and whether that information is material to the creation, production, or distribution of the communication. The *Christian Coalition* suggestion that a candidate and spender emerge as “joint venturers” would only serve to confuse readers. The “substantial discussion” conduct standard in this final rule addresses a direct form of coordination between a candidate, authorized committee, political party committee, or their agents and a third-party spender, and the Commission is narrowing the scope of this standard through the additional requirements that the discussion be “substantial” and the information conveyed be “material.” Paragraph

(d)(3) explains that a “discussion” is “substantial” if information about the plans, projects, activities, or needs of the candidate, authorized committee, or political party committee that is material to the creation, production or distribution of the communication is conveyed to a person paying for the communication. “Discuss” has its plain and ordinary meaning, which the Commission understands to mean an interactive exchange of views or information. “Material” has the meaning explained above in the context of the “materially involved” standard. In other words, the substantiality of the discussion is measured by the materiality of the information conveyed in the discussion.

D. 11 CFR 109.21(d)(4) Common Vendor

In BCRA, Congress required the Commission to address “the use of a common vendor” in the context of coordination. Public Law 107–155, sec. 214(c)(2) (March 27, 2002). In the NPRM, the Commission proposed the conduct standard in paragraph (d)(4) of section 109.21 to implement this Congressional mandate. Proposed paragraphs (d)(4)(i) and (ii) provide that a common vendor is a commercial vendor who is contracted to create, produce, or distribute a communication by the person paying for that communication after that vendor has, during the same election cycle, provided any one of a number of listed services to a candidate who is clearly identified in that communication, or his or her authorized committee, or his or her opponent or the opponent’s authorized committee, or a political party committee, or an agent of any of the foregoing. Under proposed paragraph (d)(4)(iii), the conduct standard would be satisfied if the common vendor conveys material information about the plans, projects, or needs of a candidate, authorized committee, or political party committee to the person paying for the communication, or if the vendor uses that material information in the creation, production, or distribution of a covered communication.

Many commenters addressed the “common vendor” standard proposed in the NPRM. One commenter asserted that this rule would not be enforceable because the term “common vendor” was “inadequately defined” to cover most vendors. This commenter warned that proposed standard would not reach many vendors who continuously reorganize personnel, merge, or dissolve and reorganize as different entities during or between election cycles. The

same commenter believed it was important to include in the list of covered services media production vendors, pollsters, and media buying firms (for purchasing time slots) because they work closely together.

The Commission recognizes the possibility that commercial vendors may attempt to circumvent the new rules by re-organizing as different entities or replacing personnel. However, the Commission notes that the final rules focus on the use or conveyance of information used by a vendor, including its owner, officers, and employees, in providing services to a candidate, authorized committee, or political party committee, rather than the particular structure of the vendor. The specific reference to a vendor’s owners and officers was not included in the proposed rule, but is being added to the final rule to address the commenter’s concern. Therefore, if an individual or entity qualifies as a commercial vendor at the time that individual or entity contracts with the person paying for a communication to provide any of the specified services, then the individual or entity qualifies as a common vendor to the extent that the same individual or entity, “or any owner, officer, or employee” of the commercial vendor, has provided any of the enumerated services to the candidate during the specified time period. Thus, a commercial vendor may qualify as a common vendor under 11 CFR 109.21(d)(4) even after reorganizing or shifting personnel.

Five commenters argued that the Commission should presume that the conduct standard is satisfied whenever a candidate and an outside spender use the same common vendor. According to these commenters, the rule proposed by the Commission in the NPRM would create an “impossibly high standard to meet” if it required a showing that the common vendor actually “uses” particular information.

In contrast, five different commenters asserted that any such presumption would be overly broad and “taint” the vendor, or submit the candidate, political party committee, vendor, or spender to unwarranted “liability” for communications presumed to be coordinated merely because of the use of the vendor. Several commenters in this latter group were concerned that an overly broad rule would chill speech and discourage vendors from providing services to candidates or political party committees, which the commenters warned would be particularly troublesome in areas where only a limited number of vendors provide specific services. One commenter