

argued that the proposed standard could lead to extensive and burdensome investigations that would place spenders at a disadvantage because it would be difficult for them to show that the vendor had not used certain information from a candidate's campaign committee or political party committee to create a communication. One commenter, who described himself as being in the business of "buying media spot time on behalf of various political clients," stated that he had spent a substantial sum of money responding to investigations, and opposed any rule in which "merely associating" with a common vendor might expose the person paying for a communication to the risk of enforcement proceedings. Four of these commenters, however, were generally supportive of the Commission's proposal to require that the common vendor "use or convey" material information to the person making the communication at issue, as opposed to simply providing services to both a candidate or party and the spender.

Similarly, three other commenters expressed concern about the "*per se* inclusion of vendors by class" and suggested that the inclusion of specific types of vendors should merely raise a "rebuttable presumption." These three commenters further noted that the proposed reference to "material information" would include information "used previously" in providing services to the candidate or party. These commenters questioned how a vendor might account for the "use" of material information.

After considering the wide range of comments, the Commission has decided to promulgate a final rule that is similar in many respects to the proposed rule, with certain modifications discussed below. It disagrees with those commenters who contended the proposed standard created any "prohibition" on the use of common vendors, and likewise disagrees with the commenters who suggested it established a presumption of coordination. Instead, the Commission notes that a different group of commenters urged the Commission to adopt such a presumption precisely because they believed the proposed standard did not already contain a presumption and would therefore be difficult to meet. The final rules in 11 CFR 109.21(d)(4) restrict the potential scope of the "common vendor" standard by limiting its application to vendors who provide specific services that, in the Commission's judgment, are conducive to coordination between a candidate or political party committee

and a third party spender. But under this final rule, even those vendors who provide one or more of the specified services are not in any way prohibited from providing services to both candidates or political party committees and third-party spenders. This regulation focuses on the sharing of information about plans, projects, activities, or needs of a candidate or political party through a common vendor to the spender who pays for a communication that could not then be considered to be made "totally independently" from the candidate or political party committee.

The only commenter who identified himself as providing vendor services indicated that it is not the common practice for vendors to make use of one client's media plans in executing the instructions of a different client, and sharing "any client information given by another" would "compromise the professional relationship" that is at the "core of any service business." That commenter observed that "[c]ommon vendors, at whatever tier, who avoid such conduct should never be at risk of being deemed an instrument of coordination." No other commenters offered conflicting information on these points. Thus, because the Commission addresses only the use or conveyance of information material to the communication, the final rules narrowly target the coordination activity without unduly intruding into existing business practices.

The common vendor rule is carefully tailored to ensure that all four of the following conditions must be met. First, under 11 CFR 109.21(d)(4)(i), the person paying for the communication, or the agent of such a person, must contract with, or employ, a "commercial vendor" to create, produce, or distribute the communication. The term "commercial vendor" is defined in the Commission's pre-BCRA regulations at 11 CFR 116.1(c) as "any person[] providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services." Thus, this standard only applies to a vendor whose usual and normal business includes the creation, production, or distribution of communications, and does not apply to the activities of persons who do not create, produce, or distribute communications as a commercial venture.

The second condition, in paragraph (d)(4)(ii), is that the commercial vendor must have provided certain services to the candidate or political party committee that puts the commercial

vendor in a position to acquire information about the campaign plans, projects, activities, or needs of the candidate or political party committee that is material to the creation, production or distribution of the communication. Nine specific services are enumerated in paragraphs (d)(4)(ii)(A) through (I). Providing these services places the "common vendor" in a position to convey information about the candidate's or party committee's campaign plans, projects, activities, or needs to the person paying for the communication where that information is material to the communication.

The third condition is that the new rule only applies to common vendors who provide the specified services during the current election cycle. "Election cycle" is defined in 11 CFR 100.3. The Commission sought comment on whether a different time period, such as a fixed two-year period, would more accurately align the rule with existing campaign practices. One commenter responded that a two-year period would be too long and suggested that the standard should pertain "only to vendors who were common during the election year," or possibly further limited to vendors who provide services during the 30-day period before a primary election or the 60-day period before an election. That commenter also suggested that a time limit be placed on the use or conveyance of information received from a candidate or political party in recognition that such information would eventually become stale and unworthy of restriction. A different commenter, however, suggested that a two-year time limit would be too short because it would not appropriately encompass election activity that takes place throughout the six-year Senate election cycle. Another commenter advised that the time limit for common vendor activities should be limited to the period "during the calendar year in which the candidate's name is on the ballot for election to Federal office." One commenter proposed an alternative in which a vendor's services would not be covered by the rule outside of the 30 days following the time the vendor ceased working for the candidate or political party committee.

The Commission is retaining "election cycle" as the temporal limit in the final rules. The election cycle provides a clearly defined period of time that is reasonably related to an election. The mixture of an election cycle with a calendar year cutoff would likely cause confusion.

The fourth condition, in paragraph (d)(4)(iii), requires that the commercial