

vendor “uses or conveys information about the candidate’s campaign plans, projects, activities, or needs” or the political party committee’s campaign plans, projects, activities, or needs where that information is material to the creation, production, or distribution of the communication. This requirement encompasses situations in which the vendor assumes the role of a conduit of information between a candidate or political party committee and the person making or paying for the communication, as well as situations in which the vendor makes use of the information received from the candidate or political party committee without actually transferring that information to another person. By referring in the final rule to the candidate’s “campaign” plans, projects, activities, or needs, the Commission clarifies that this conduct standard is not intended to encompass lobbying activities or information that is not related to a campaign. The Commission notes, however, that to the extent information relates to campaign plans, projects, activities, or needs, that information would be covered by this provision even if that information also related to non-campaign plans, projects, activities, or needs of the candidate.

Several commenters opposed the inclusion of the “use or convey” requirement as being exceedingly difficult to prove, while other commenters viewed it as necessary protection against an unduly burdensome rule. Two of the commenters who supported a general presumption of coordination suggested that a confidentiality agreement might be used to rebut the presumption, while three others opposed a general presumption suggested that the Commission establish a safe harbor for spenders who enter into a confidentiality agreement filed under seal with the Commission. A different commenter suggested that the “use or convey” provision would be “unworkable” unless it provided for some form of exception for the use of an “ethical screen.” Otherwise, according to that commenter, a single employee might “disqualify” an entire firm from providing services to both a candidate and a third-party spender.

The final rule does not require the use of any confidentiality agreement or ethical screen because it does not presume coordination from the mere presence of a common vendor. The final rule also does not dictate any specific changes to the business relationship between a vendor and its clients. The Commission does not anticipate that a person who hires a vendor and who, irrespective of BCRA’s requirements,

follows prudent business practices, will be inconvenienced by the final rule. Nevertheless, the Commission does not agree that the mere existence of a confidentiality agreement or ethical screen should provide a *de facto* bar to the enforcement of the limits on coordinated communication imposed by Congress. Without some mechanism to ensure enforcement, these private arrangements are unlikely to prevent the circumvention of the rules.

The Commission also sought comment on the list of common vendor services covered in paragraph (d)(4)(ii), and specifically whether purchasing advertising time slots for television, radio, or other media should be added to that list. Several commenters recommend excluding the following groups of vendor classes from those listed in the proposed rules on the principle that they lack adequate control as decisionmakers or they have little knowledge of communications: (1) “Media time buyers and others where the technical nature of their services diminishes their role in controlling the content of strategically sensitive communications;” (2) fundraisers; (3) vendors involved in selecting personnel, contractors, or subcontractors; (4) vendors involved in consulting; and (5) vendors involved in identifying or developing voter lists, mailing lists, or donor lists. A media buyer urged the Commission not to include media buyers in the list of covered activities because they have little decisionmaking authority and act within “predetermined strategic parameters including timing, geographic and demographic target audiences, and budget,” but do not “create, produce, or distribute” a communication by themselves.

The Commission is incorporating the list of covered common vendor services into the final rules without change from its form in proposed section 109.21(d)(4)(ii) of the NPRM. The Commission recognizes that media buyers might potentially serve a number of different roles at the direction of various clients. Therefore, the Commission is not including “purchasing advertising time slots for television, radio, or other media” as a distinct category in the list of common vendor services covered in paragraph (d)(4)(ii). However, media buyers and other similar service providers are included to the extent that their services fit within one of the other categories already listed in paragraph (d)(4)(ii).

#### *E. 11 CFR 109.21(d)(5) Former Employee/Independent Contractor*

In BCRA, Congress required the Commission to address in its revised coordination rules “persons who previously served as an employee of” a candidate or political party committee.” Public Law 107–155, sec. 214(c)(3) (March 27, 2002). In the NPRM, the Commission proposed 11 CFR 109.21(d)(5) to implement this Congressional requirement. Proposed paragraph (d)(5) would have applied to communications paid for by a person who was previously an employee or an independent contractor of a candidate, authorized committee, or political party committee, or by the employer of such a person. Under the rule proposed in the NPRM, the “former employee” conduct standard would be satisfied if the former employee or independent contractor “makes use of or conveys” “material information” about the candidate’s or political party committee’s plans, projects, or needs to the person paying for the communication.

Commenters responding to the proposed rules made many of the same points about the “former employee” standard as they made with respect to the “common vendor” standard. One commenter opposed the proposal in the NPRM that covered the “use” of material information provided by a former employee. Such a standard, that commenter asserted, would be too broad and would amount to a “*per se*” rule that would lead to overly intrusive investigations. In contrast, four commenters argued that the proposed standard was not broad enough and suggested that the Commission establish a presumption of coordination when a former employee or an independent contractor of a campaign committee or political party committee pays for, or his or her current employer pays for, a communication that satisfies the content requirements of this section. These commenters argued that without such a presumption, it would be far too difficult to prove that an employee used material information or conveyed information to the new employer. In addition, however, three of these commenters suggested that the Commission limit the application of this presumption of coordination to a specified class of employees who are likely to “possess material political information.” A different commenter indicated that it would be difficult to enforce this conduct standard because the definition of “independent contractor” in the NPRM was underinclusive in that it failed to account for the fact that an independent