

contractor might reorganize or change names, making it difficult to verify the identity of the independent contractor or former employee. As with the potential reorganization of common vendors discussed above, the Commission does not believe that new requirements are necessary at this time to address the commenter's concerns. Employees and independent contractors are natural persons, rather than corporations or other entities or legal constructs, so the Commission anticipates that reorganization for the purpose of circumventing the new rules is even less likely than in the context of common vendors.

Three other commenters asserted that Congress had not mandated the proposed rule and expressed concern about the "increased risk of legal liability" for both party committees and former employees" that they believed would "stigmatize" the former employee and make it difficult for that person to find subsequent employment.

This proposed rule would have required that the employment or independent contractor relationship exist during the current election cycle. As discussed above with regard to paragraph (d)(4) on common vendors, the Commission requested comments on whether this time period should be a fixed two-year period, or the same election cycle, but not more than two years. Most comments on this provision were identical to the comments on the temporal requirements in paragraph (d)(4). One commenter believed the two-year time frame was "inappropriate and overly injurious both to corporations trying to communicate about legislative topics and to those former employees of candidates seeking employment with such corporations." In contrast, a different commenter suggested a six-year time period and asserted that the two-year period was too short to fully address the real-world practices in this area. Another commenter offered the same proposal the commenter had offered with respect to common vendors: the former employee should be covered during the calendar year in which the candidate's name is on the ballot for election to Federal office. A fourth commenter suggested that the time frame be limited to the previous two years of the current election cycle.

The final rule in paragraph (d)(5) incorporates the temporal limit of the "election cycle," which is defined in 11 CFR 100.3. This time limit establishes a clear boundary based on an existing definition and ensures that there is a clear link between the conveyance or use of the material information and the time period in which that material

might be relevant. In addition, the Commission disagrees with the single commenter who claimed that the two-year limit would harm the job prospects of former employees or inhibit discussions between corporations and candidates or political party committees. The Commission notes that the final rule focuses only on the use or conveyance of information that is material to a subsequent communication and does not in any way prohibit or discourage the subsequent employment of those who have previously worked for a candidate's campaign or a political party committee.

One commenter proposed a "cooling off period" for a former employee instead of a temporal limit based on a calendar year or an election cycle. Under that proposed approach, the former employee or independent contractor of a candidate or political party would have to wait for a certain time period, which the commenter proposed as 30–60 days, before providing services to a person paying for a communication covered by section 109.21(c). After that period, the former employee or independent contractor would not trigger the proposed conduct standard. The Commission is unwilling to impose a complete ban on an individual's employment opportunities, as a "cooling off period" requirement would function. Instead, the Commission views the narrowly tailored approach proposed in the NPRM as preferable and is therefore not incorporating a "cooling off period" into the final rules.

This conduct standard expressly extends to an individual who had previously served as an "independent contractor" of a candidate's campaign committee or a political party committee. One commenter opposed the inclusion of independent contractors, arguing that an "independent contractor" is legally distinct from an "employee" and Congress, recognizing this distinction in other statutes, must have made an intentional decision to exclude independent contractors by using the term "employee" in section 214(c)(3). The Commission disagrees with this assumption and instead notes that the inclusion of independent contractors is entirely consistent with the use of "employee" because both groups receive some form of payment for services provided to the candidate, authorized committee or political party committee. Therefore, the Commission includes the term "independent contractor" in the final rule to preclude circumvention by the expedient of characterizing an "employee" as an "independent contractor" where the

characterization makes no difference in the individual's relationship with the candidate or political party committee. This coordination standard also applies to the employer of an individual who was an employee or independent contractor of a candidate, authorized committee, or political party committee. The Commission interprets the Congressional intent behind section 214(c)(3) of BCRA to encompass situations in which former employees, who by virtue of their former employment have been in a position to acquire information about the plans, projects, activities, or needs of the candidate's campaign or the political party committee, may subsequently use that information or convey it to a person paying for a communication. The Commission has added the requirement that the information must be material to the subsequent communication in order to ensure that the conduct standard is not overly broad.

One commenter argued that the proposed rule's incorporation of the phrase "material information used \* \* \* in providing services to the candidate" was vague and overly broad, and should be limited to material information about "campaign strategy and tactics," excluding policy views. This commenter also questioned whether the information must be material to the communication itself, or whether the information used to serve the candidate was material to those services. The Commission notes that in many cases the information may be material to both, but for the purposes of this final rule the Commission is only concerned with whether the information is material to the communication, not to the services previously provided to the candidate. As with the common vendor standard, this requirement encompasses both situations in which the former employee assumes the role of a conduit of information and situations in which the former employee makes use of the information but does not share it with the person who is paying for the communication.

The Commission is including this conduct standard to address what it understands to be Congress' primary concern, which is a situation in which a former employee of a candidate goes to work for a third party that pays for a communication that promotes or supports the former employer/candidate or attacks or opposes the former employer/candidate's opponent. One commenter proposed that the former employer (*i.e.*, the candidate's campaign or a political party committee) must be shown to exercise ongoing control over its former employee. A different