

commenter, however, recognized that the Commission's proposed rules would address such a concern by removing the reporting duties that might otherwise be triggered by the actions of the former employee who acted without the knowledge of his or her former employer. This reporting rule is included in the final rules in 11 CFR 109.21(b)(2). This commenter, however, raised a similar concern by suggesting that the final rule should be limited to cover only former employees when they are acting under the direction or control of their new employer, the third-party spender, to ensure that the former employee does not use or convey material information without the spender's knowledge. The Commission notes, however, that such a limitation is unnecessary and confusing in cases where the former employee or independent contractor pays for the communication by himself or herself.

The conduct standard in the final rule in 11 CFR 109.21(d)(5) does not require that the former employee act under the continuing direction or control of, at the behest of, or on behalf of, his or her former employer. This is because a former employee who acts under such circumstances is a present agent, and the revised rules covering agents apply to this individual. See 11 CFR 109.3. To give effect to the statutory language requiring that the Commission's coordination regulations address "former employees" (see Pub. L. 107-155, sec. 214(c)(3)) the Commission concluded that a "former employee," as that term is used in the statute, must be different from "agent." Furthermore, the Commission does not find in BCRA, the FECA, or the general legal principles of employer-employee law, a need or justification for such an exception that would, in essence, categorically free employers from responsibility for the actions of their employees. Instead, the Commission reiterates its observation offered above with respect to the "common vendor" standard. Irrespective of the Congressional requirements in BCRA, employers may elect to clearly define the scope of employee responsibilities and to institute prudent policies or practices to ensure that the employee adheres to the scope of those expectations.

One commenter supported an exception to the "common vendor" and "former employee" conduct standards to permit persons in either of those classes to use or convey information if that vendor or former employee "makes use of information in a manner that is adverse to the candidate or political party committee without any coordination with the candidate

benefiting from the communication." In the Commission's judgment, such an exception would obfuscate otherwise bright lines and provide a clear path for the circumvention of the Act and the Commission's regulations without offering a discernible benefit. Under the proposed exception, "use of information in a manner that is adverse to the candidate or political party committee" requires a subjective determination of both the interests of the candidate or political party and the effect that the "information" has on those interests.

The Commission also sought comment as to whether this conduct standard should be extended to volunteers, such as "fundraising partners," who by virtue of their relationship with a candidate or a political party committee, have been in a position to acquire material information about the plans, projects, activities, or needs of the candidate or political party committee. Three commenters opposed the inclusion of volunteers. One of these commenters argued that volunteers traditionally participate in more than one campaign at a time and "as a matter of practice, campaigns attempt to make volunteers feel more involved in the campaign by the intentional communication of 'insider' information." While the FECA exempts campaign volunteers from certain requirements, this "practice" of sharing "insider" information is not adequate justification to exclude volunteers. Rather, the Commission recognizes that some, but not all, "volunteers" operate as highly placed consultants who might be given information about the plans, projects, activities, or needs of the candidate or political party committee with the expectation that the "volunteer" will use or convey that information to effectively coordinate a communication paid for by that "volunteer" or by a third-party spender. Nevertheless, the Commission is not extending the scope of the "former employee" standard in its final rules to encompass volunteers for a different reason. The Commission views the choice of the word "employee" in section 214(c)(3) as a significant indication of Congressional intent that the regulations be limited to individuals who were in some way employed by the candidate's campaign or political party committee, either directly or as an independent contractor. The Commission also notes that even though volunteers are not subject to the "former employee" conduct standard, their actions could nonetheless come within a different conduct standard in new 11 CFR

109.21(d). For example, if a candidate requests that a volunteer pay for a communication, and the volunteer does so, the communication is coordinated if the content of the communication satisfies one or more of the content standards in new 11 CFR 109.21(c). Also, in some cases a volunteer may qualify as an agent of a candidate or a political party under the definition in new 11 CFR 109.3.

F. 11 CFR 109.21(d)(6) Dissemination, Distribution, or Republication of Campaign Materials

Paragraph (d)(6) clarifies the application of the conduct standards to a candidate or authorized committee after the initial preparation of campaign materials when those materials are subsequently disseminated, distributed, or republished, in whole or in part, by another person. In light of the candidate's initial role in preparing the campaign material that is subsequently incorporated into a republished communication, it is possible that the candidate's involvement in the original preparation of part or all of that content might be construed as triggering *per se* one or more of the conduct standards in paragraph (d) of 11 CFR 109.21. To avoid this result, the Commission is including 11 CFR 109.21(d)(6) in the final rules to clarify that the candidate's actions in preparing the original campaign materials are not to be considered in the conduct analysis of paragraph (d)(1) through (d)(3) of section 109.21. (See above). Instead, 11 CFR 109.21(d)(6) explains that the focus is on the conduct of the candidate that occurs after the initial preparation of the campaign materials. For example, if a candidate requests or suggests that a supporter pay for the republication of a campaign ad, the resulting communication paid for by the supporter satisfies both a content standard (republication) and conduct standard (request or suggestion), and is therefore a coordinated communication. However, without that request or suggestion, and assuming no other contacts with the candidate, the candidate's authorized committee, or their agents, the communication does not satisfy the "request or suggestion" conduct standard and is not a coordinated communication even though it contains campaign material prepared by the candidate.

The final rules are being changed from the proposed rules to explain more clearly the application of the conduct standards in paragraphs (d)(4) and (d)(5) to republished campaign materials, as well as to clarify the relationship between paragraph (c)(2) and (d)(6) of