

section 109.21 as well as between 11 CFR 109.37(a)(2)(i) and paragraph (d)(6) of section 109.21. The conduct standards in paragraph (d)(4) and (d)(5) would not be affected by (d)(6). Whereas a candidate's or authorized committee's original preparation of campaign materials might have possibly been misconstrued as satisfying the conduct standards in (d)(1) through (d)(3) without the addition of (d)(6), there is no such danger that the (d)(4) "common vendor" standard or the (d)(5) "former employee" standard would be satisfied by the candidate's or authorized committee's original preparation of campaign materials. However, to avoid any potential confusion, the second sentence in paragraph (d)(6) clarifies that a communication that satisfies the conduct standards in (d)(4) or (d)(5) is still a coordinated communication even if the communication only satisfies the content standard in paragraph (c)(2).

5. 11 CFR 109.21(e) No Requirement of Agreement or Formal Collaboration

When Congress, in BCRA, required the Commission to promulgate new regulations on coordinated communications, it specifically barred any regulatory requirement of "agreement or formal collaboration" to establish coordination. Public Law 107-155, sec. 214(c) (March 27, 2002). In the NPRM, the Commission noted that although Congress did not define this phrase, earlier versions of BCRA stated that "collaboration or agreement" was not required to show coordination. See S. 27, 107th Cong., 1st Sess. (as passed by the Senate and transferred to the House, 478 Cong. Rec. H2547 (May 22, 2001)). The phrase "agreement or formal collaboration" reached its final form through a substitute amendment to H.R. 2356 offered by Representative Shays. See H. Amdt. 417, 478 Cong. Rec. H393 through H492 (February 13, 2002). New 11 CFR 109.21(d) provides that each of the five conduct standards can be satisfied "whether or not there is agreement or formal collaboration, which is defined in paragraph (e)," thereby implementing the Congressional prohibition against any requirement of agreement or formal collaboration in the coordination analysis. The final rule follows the proposed rule, with only a small grammatical change.

One commenter supported a distinction between "formal collaboration" and "collaboration." Two other commenters strongly supported this paragraph as proposed in the NPRM. Another commenter recognized the Congressional prohibition on a requirement of agreement or formal collaboration, but urged the

Commission to establish clear guidelines as to what is and is not permissible activity. The Commission attaches significance to the addition of the term "formal" as it modifies the term "collaboration." Thus, paragraph (e) states that the conduct standards in paragraph (d) of section 109.21 require some degree of collaboration, but not "formal" collaboration in the sense of being planned or systematically approved or executed.

New paragraph (e) also explains the term "agreement." Coordination under section 109.21 does not require a mutual understanding or meeting of the minds as to all, or even most, of the material aspects of a communication. Any agreement means the communication is not made "totally independently" from the candidate or party. See *Buckley*, 424 U.S. at 47. In the case of a request or suggestion under paragraph (d)(1) of section 109.21, agreement is not required at all.

A fourth commenter suggested that there should be no finding of coordination where "the organization was not seeking the candidate's agreement and would have run the ad anyway." This commenter recommended that the Commission further refine the requirement so that a communication is considered coordinated only if the request, agreement or collaboration of the candidate or political party is shown to lead the organization to change some aspect of the communication.

The Commission is not adopting either of these suggestions as they require a subjective determination of the intent of the spender and are therefore inconsistent with the Commission's approach of establishing clear guidance through objective determinations where possible. Paragraph (e) therefore does not require any particular form of investigation or finding, but simply implements the judgment of Congress by clarifying the two criteria that are not required.

6. 11 CFR 109.21(f) Safe Harbor for Responses to Inquiries About Legislative or Policy Issues

In the NPRM, the Commission requested comment on whether any specific "safe harbor" provisions or exceptions to the conduct or content standards should be included in the final rules. Commenters recommended a number of possible exceptions and safe harbors. As explained below, the Commission is including one of the proposed exceptions in its final rules in 11 CFR 109.21(f).

Several commenters urged the Commission to adopt an exception to

the conduct standards for a candidate's response to an inquiry, whether in writing or other form, regarding his or her position on legislative or policy issues. These responses are helpful in preparing voter guides, voting records, in debates or other communications. One commenter cited constitutional considerations and argued that such an exception is required by *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997). Another advised that this exception would provide notice that the regulation is not intended to deter certain activities that groups or individuals "might otherwise avoid out of an abundance of caution." A different commenter advocated an exemption for any public communications, including republication of materials from candidates, their committees or political parties, that meet the criteria of 11 CFR 110.13 regarding candidate debates and forums, and 11 CFR 114.4(c) regarding voter registration drives and voter education.

In new section 109.21(f) the Commission is providing a "safe harbor" to address the commenters' concerns that the preparation of a voter guide or other inquiries about the views of a candidate or political party committee might satisfy one of the conduct standards in section 109.21(d). This safe harbor applies to inquiries regarding views on legislation or other policy issues, but does not include a response that conveys information about the candidate's or political party's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of a subsequent communication.

This exception satisfies the requirements of *Clifton v. FEC*, 114 F.3d 1309. See also new 11 CFR 114.4(c)(5), explained below. In *Clifton*, the Court examined the Commission's then-new regulations at 11 CFR 114.4(c)(4) and (5). The Commission's old regulations permitted corporations and labor organizations to prepare and produce "voter guides" to the general public, subject to the following prohibition:

[T]he corporation or labor organization shall not contact or in any other way act in cooperation, coordination, or consultation with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, except that questions may be directed in writing to the candidates included in the voter guide and the candidates may respond in writing; 11 CFR 114.4(c)(5)(ii)(A) (1996). While *Clifton* invalidated that regulation as unauthorized by the Act, 927 F. Supp. at 500, the Court nevertheless suggested that a safe harbor might have survived.