

The safe harbor in new 11 CFR 109.21(f) is more permissive than the regulations at issue in *Clifton* in several respects. First, the regulations in section 109.21 do not institute a general prohibition on any contact with the candidate or political party committee, so paragraph (f) functions as a safe harbor from less-restrictive regulations. For example, organizations whose activities are confined to producing voter guides may contact a candidate and discuss aspects of that candidate's campaign plans, projects, activities, or needs without making a coordinated communication so long as the voter guide does not contain express advocacy and it is not directed to voters in a specific jurisdiction and made available within the designated time period directly before an election, as provided in paragraphs 109.21(c)(1) and (4). In addition, whereas the regulations at issue in *Clifton* specifically required that both the inquiry and the response be written, paragraph (f) does not.

Three commenters urged the Commission to adapt its rules to exclude lobbying contacts with a candidate. Similarly, a different commenter proposed an exception for any legislative communication made prior to a vote, hearing, or other legislative consideration of the issue, and that "coincidentally" occurs prior to an election. Another commenter also urged the Commission to exempt grassroots communications that urge the people to contact state, local or national officials urging them to take action in their official capacity so long as they do not refer to the election or an official's status or qualifications as a federal candidate.

The Commission has considered these possible exceptions as well as the statements of BCRA's principal sponsors that the Commission's regulations should not interfere with lobbying activities. Therefore, these final rules are not intended to restrict communications or discussions regarding pending legislation or other issues of public policy. The Commission has determined, however, that sufficient safeguards exist in the final rules to ensure that lobbying and other activities that are not reasonably related to elections will not be unduly restricted. Additional exceptions are unnecessary and inappropriate because they could be exploited to circumvent the requirements of 11 CFR part 109.

One commenter proposed an exemption for a "legislative communication" made during legislative consideration of an issue when the communication "coincidentally" occurs just before an

election. This exemption is neither necessary nor workable, as it hinges on a complex analysis of several separate factors, as well as a determination of what qualifies as a "legislative communication." The potential number of communications that might satisfy the content standard, satisfy the conduct standard, and "coincidentally" occur just before an election is likely to be quite small in comparison to the potential number of communications that would actually be made for the purpose of influencing an election but carefully tailored to fit within the proposed exemption.

In addition, one commenter cautioned that exceptions are not appropriate to the extent that they apply to communications that meet the "electioneering communication" content standard. This commenter asserted that the plain language of the BCRA provides the Commission with little to no room to craft exceptions with respect to electioneering communications. The Commission disagrees that any such Congressional directive can be derived from plain language of BCRA in the context of coordinated electioneering communications.

11 CFR 109.22 Who Is Prohibited From Making Coordinated Communications?

The Commission requested comment on whether to include a separate section to clarify that any person who is otherwise prohibited under the Act from making a contribution or expenditure is also prohibited from making a coordinated communication. No comments addressed this provision. Section 109.22 is included in the final rules to avoid any potential misconception that 11 CFR 100.16, 11 CFR 109.23, or any portion of 11 CFR part 109 in any way permit a corporation, labor organization, foreign national, or other person to make a contribution or expenditure when that person is otherwise prohibited by any provision of the Act or the Commission's regulations from doing so.

11 CFR 109.23 How Are Payments for the Dissemination, Distribution, or Republication of Candidate Campaign Materials Treated and Reported?

The Commission has decided to implement only those regulatory changes that are necessary to implement section 214 of BCRA at this time. In the NPRM, the Commission proposed moving former 11 CFR 109.1(d) to proposed new section 11 CFR 100.57, along with several substantive changes. To whatever extent that proposed 11

CFR 100.57 would have elaborated on former 11 CFR 109.1(d), the Commission has reconsidered and instead is addressing the payments for the republication of campaign materials in new 11 CFR 109.23, which more closely follows former section 109.1(d). New section 109.23 implements post-BCRA 2 U.S.C. 441a(a)(7)(B)(iii), with several changes made to reflect new requirements in BCRA. Paragraph (a) of section 109.23 corresponds to former 11 CFR 109.1(d)(1), and paragraph (b) of section 109.23 addresses the exceptions in former 11 CFR 109.1(d)(2), in addition to several new exceptions.

1. 11 CFR 109.23(a) Financing of the Dissemination, Distribution, or Republication of Campaign Materials Prepared by a Candidate

Paragraph (a) of 11 CFR 109.23 addresses the financing of the dissemination, distribution, or republication of campaign materials prepared by the candidate, the candidate's authorized committee, or their agents and is the successor to former 11 CFR 109.1(d)(1). The only changes from the former rule are the replacement of one cross-reference to former 11 CFR 100.23 (repealed by Congress in BCRA), a clarification that a candidate does not receive or accept an in-kind contribution unless there is coordination, and minor grammatical changes. Paragraph (a) provides that the financing of the distribution, or republication of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either is considered a contribution for the purposes of the contribution limitations and reporting responsibilities by the person making the expenditure but is not considered an in-kind contribution received or an expenditure made by the candidate or the candidate's authorized committee unless the dissemination, distribution, or republication of campaign materials is coordinated.

Under former 11 CFR 109.1(d)(1), coordination was determined by whether the dissemination, distribution, or republication of the campaign material qualified as a "coordinated general public political communication" under former 11 CFR 100.23, which was repealed by Congress in BCRA. Therefore, under new 11 CFR 109.23, whether the dissemination, distribution, or republication is coordinated is determined by reference to the new coordinated communication rules in 11 CFR 109.21 and 109.37.

As discussed above in the Explanation and Justification for 11 CFR 109.21(c)(2) and 109.21(d)(6), a