

Presidential candidate under certain circumstances. Thus, while Congress did not specifically require the deletion of the prohibition at former 11 CFR 110.7(a)(5), the Commission has concluded that a provision within BCRA is consistent with that result. To the extent that BCRA, and *Colorado I* as discussed above, do not require the Commission to promulgate the rule at section 109.36, the Commission nonetheless exercises its discretion to do so as a permissible interpretation of BCRA and *Colorado I*.

Finally, the Commission notes that if coordination occurs between a national party committee and its Presidential nominee, it would negate the actual independence of independent expenditures the national party committee attempted with respect to that candidate. See *Buckley v. Valeo*, 424 U.S. at 47 (in striking down limits on independent expenditures, the Court described such expenditures as made “totally independently of the candidate and his campaign” [emphasis added]). The Commission recognizes that the ability of a national party committee to make such independent expenditures may be unlikely in practice, but the Commission’s rules must allow for such a possibility, and as noted above, must reject a conclusive presumption that such expenditures are always coordinated.

Finally, section 109.36 contains one non-substantive change from the NPRM, and the title of section 109.36 in this Explanation and Justification has been slightly altered from the NPRM to match the title in the rule.

11 CFR 109.37 What Is a “Party Coordinated Communication”?

In BCRA, Congress required the Commission to promulgate new regulations on “coordinated communications” that are paid for by persons other than candidates, authorized committees of candidates, and party committees. Public Law 107–155, sec. 214(b), (c); see 11 CFR 109.21 above. Although Congress did not specifically direct the Commission to address coordinated communications paid for by political party committees, the Commission is doing so to give clear guidance to those affected by BCRA.

The Commission in the NPRM proposed a rule which would have been at 11 CFR 109.37, political party coordinated communications, using the same content and conduct standards as proposed in section 109.21 for coordinated communications by other persons.

The Commission received a number of comments on this proposal. The

comments fall into two general categories. One group of commenters urged the Commission to defer this party coordinated communication rulemaking, arguing (1) that it is not strictly required by BCRA, (2) that the Commission should be focusing its resources at this time on the rulemaking most directly required by BCRA, and (3) that the comment period was a difficult time for the political parties to focus on the rulemaking because it was shortly before the 2002 general election. These commenters also asserted that party coordinated communications is a complicated subject area, citing the many questions posed in the NPRM in their claim that the Commission should defer this rulemaking.

On the substance of the proposed rule, this group of commenters testified at the hearing that the proposed content and conduct standards were both overbroad. (See the discussion above regarding 11 CFR 109.21). These commenters noted that any coordination standard for political party committees must allow for the regular contacts between a political party committee and its candidates. Another commenter raised an equal protection argument, asserting that a regulation that on its face appears to treat political party committees the same as other persons may as a practical matter have an unequal impact on the political parties.

The other group of commenters relied on the relationship between a political party committee and its candidates for the assertion that the Commission should promulgate a party coordinated communication rule using a rebuttable presumption that the communications are coordinated with candidates. These commenters stated that this presumption could be rebutted by a showing of actual independence. One commenter believed that the Commission’s rule should describe ways in which a political party committee could establish its independence from a candidate. Another commenter noted that *Colorado I*, which struck down a conclusive presumption of coordination, does not prevent the use of a rebuttable presumption, and that such a rule is necessary to ensure that political party committee independent expenditures are in fact “totally independent” from candidates as required by the Supreme Court in *Buckley*.

While the Commission recognizes that Congress in BCRA did not specifically direct the Commission to address coordinated communications paid for by political party committees, the Commission is doing so to give clear guidance to those affected by BCRA.

Congress determined to regulate political party committees’ independent expenditures and coordinated party expenditures, and thus it is appropriate and useful for the Commission to promulgate rules at this time detailing standards for party coordinated communications. See 2 U.S.C. 441a(d)(4) and 11 CFR 109.35, discussed above.

The Commission is promulgating final rules similar to those in proposed section 109.37, generally applying the same regulatory analysis to communications paid for by the political party committees that is applied to communications paid for by other persons. See 11 CFR 109.21(a) through (f). This analysis determines when communications paid for by a political party committee are considered to be coordinated with a candidate, a candidate’s authorized committee, or their agents.

Following 11 CFR 109.21(a), section 109.37(a) defines the circumstances in which communications paid for by political party committees are considered to be coordinated with a candidate, a candidate’s authorized committee, or agents of any of the foregoing. Under 11 CFR 109.37(a)(1) through (3), such communications are deemed to be “party coordinated communications” when they were paid for by a political party committee or its agent, satisfy at least one of the content standards in section 109.37(a)(2)(i) through (iii), and satisfy at least one of the conduct standards in 11 CFR 109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR 109.21(e) and other conditions.

The party coordinated communication content standards in section 109.37(a)(2)(i) through (iii) are adopted from 11 CFR 109.21(c)(2) through (c)(4). The first content standard, at paragraph (a)(2)(i) of section 109.37, is a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate’s authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). The Commission also provides in this content standard that for a communication that satisfies this standard, see the conduct standard in 11 CFR 109.21(d)(6), under which the communication is evaluated. See the discussion above of 11 CFR 109.21(c)(2). This content standard at 11 CFR 109.37(a)(2)(i) for party coordinated communications is the same as the standard set forth for coordinated