



MEMORANDUM

TO: NABPAC

FROM: Jan Witold Baran
D. Mark Renaud

DATE: March 26, 2007

RE: Revised Rules on Coordination and Independent Expenditures

On April 7, 2006, the Federal Election Commission (“FEC” or “Commission”) revised its rules on Coordinated Communications, effective July 10, 2006. 71 Fed. Reg. 33,190 (June 8, 2006) (Explanation and Justification on Coordinated Communications). These new rules, instigated by legal challenges to the old rules and promulgated under Section 214 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. No. 107-155 (Mar. 27, 2002), continue the two-part “content” and “conduct” standards for coordination, with revisions. A full description of the revised regulations follows below.

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Coordinated Communications

The definition of “coordinated communication” continues to form the heart of the Commission’s revised regulations. If a communication by an entity such as a corporation, PAC, or individual is a coordinated communication, then it cannot be an independent communication and is considered to be an in-kind contribution to the candidate, authorized committee, or political party committee with which it is coordinated. 11 C.F.R. §§ 100.16 & 109.20(b). This means that the communication is brought within the prohibitions and limitations of the Federal Election Campaign Act (“FECA”), which, among other things, prohibits corporate contributions and limits contributions by PACs to \$5,000 per election per candidate. In other words, coordinated corporate communications under these regulations are illegal corporate contributions.¹

A communication is a coordinated communication if it is paid for by a person other than a candidate, his or her authorized committee, a political party committee, or an agent of any of the foregoing persons and it satisfies one of the content standards and one of the conduct standards described below. *Id.* § 109.21.

A. Content Standards

There are four content standards in the Commission’s coordination regulations. If a communication is of a type not described by any one of these four content standards, then an entity (including a corporation) has not made a coordinated communication regardless of any interaction with federal candidates or political parties.² *See* 68 Fed. Reg. 421, 426-28 (Jan. 3, 2003) (Explanation and Justification on Coordinated and Independent Expenditures).

1. Electioneering Communications. The first type of communication covered by the coordination regulations involves electioneering communications, as defined in the electioneering communication rulemaking. 11 C.F.R. § 109.21(c)(1). An “electioneering communication” is a broadcast, cable, or satellite communication that refers to a clearly identified federal candidate and is broadcast within 30 days of a primary or 60 days of a general. *Id.* § 100.29. An electioneering communication also must be able to be received by 50,000 or more persons in the relevant Congressional District or state.
2. Republication of Campaign Materials. The coordination regulations also cover the redistribution, republication, or dissemination of campaign materials such as flyers, brochures, yard signs, etc. *Id.* § 109.21(c)(2).

¹ Please note that independent corporate and labor union communications that contain express advocacy are also illegal, but the same is not true for independent express advocacy paid for by non-corporate, non-union entities that have not received any corporate or union funds, although registration and reporting requirements may apply.

² Close interaction between entities and candidates may, however, give rise to an agency relationship, which would subject any resulting communications to the prohibitions and limitations of FECA.

3. Express Advocacy. A “public communication” that expressly advocates the election or defeat of a clearly identified federal candidate is subject to the coordination rules. *Id.* § 109.21(c)(3). There is no time-based limit applicable to this covered content category. Based upon pre-BCRA and some post-BCRA court decisions, express advocacy is limited, in most parts of the country, to communications that include such calls for action as “vote for,” “elect,” “Smith for Congress,” and the like. *See Buckley v. Valeo*, 424 U.S. 1, 42 n.52 (1976); *see also Center for Individual Freedom v. Carmouche*, 2006 U.S. App. LEXIS 11729, Nos. 04-30877, 05-30212 (5th Cir. May 11, 2006), *petition for rehearing en banc filed* (5th Cir. May 24, 2006); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004); *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Va. Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *but see FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987).

4. Communications Within a Certain Number of Days before an Election. Finally, the Commission’s coordination regulations also prohibit coordination with respect to “public communications” that refer to a political party or to a clearly identified candidate for federal office and that are distributed within a certain number of days before an election, convention, or caucus. 11 C.F.R. § 109.21(c)(4). In general, the period is 90 days for House and Senate candidates and 120 days before a primary through the general election for Presidential candidates. Attached at Appendix A is a chart of the specific rules, which are dependent upon the type of person or party identified in the communication, the person with which the communication is coordinated, and the location in which the communication is disseminated.

For this rule to apply, a communication must be “publicly distributed or otherwise publicly disseminated in the clearly identified candidate’s jurisdiction” or, for communications that solely refer to a political party, “in a jurisdiction in which one or more candidates of a political party appear on the ballot.” 71 Fed. Reg. at 33,200. *See also* 11 C.F.R. § 109.21(c)(4). “The Commission has decided not to specify a minimum number of persons that must be able to receive a communication for the fourth content standard to apply.”^{3,4} 71 Fed. Reg. at 33,201.

³ “The Commission notes that [the candidate rules] also cover advertisements coordinated with a candidate and disseminated within the applicable time period before an election of that candidate’s opponent or potential opponent.” 71 Fed. Reg. at 33, 198 and n.37.

⁴ For the rule to apply to mailings or phone banks, there must be “more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period,” 11 C.F.R. § 100.27 (definition of “mass mailing”), or “more than 500 telephone calls of an identical or substantially similar nature within any 30-day

Important for the 120-day category and the express advocacy category, the restrictions only apply to “public communications.” Under regulations promulgated by the FEC in its soft money rulemaking and in a later Internet rulemaking, a public communication is “any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising.” 11 C.F.R. § 100.26. The definition specifically does not include communications made on the Internet or via electronic mail, “except for communications placed for a fee on another person’s website.” *Id.* See also 70 Fed. Reg. 18,589, 18,593-97 (April 12, 2006) (Explanation and Justification on Internet Communications); 68 Fed. Reg. at 430; 67 Fed. Reg. 49,064, 49,071-72 (July 29, 2002) (Explanation and Justification on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money). For the first content standard, the term “electioneering communication” does not include the Internet or email or any communication other than those broadcast on television, radio, cable, and satellite. See 11 C.F.R. § 100.29.

B. Conduct Standards

Only those communications that fit one of the content standards described above are subject to the FEC’s coordination restrictions. (These are referenced below as “covered communications.”) In order to establish “coordination” under the regulations, the conduct must fulfill one of the five conduct standards elucidated below. Unlike the pre-BCRA coordination rules, no agreement or formal collaboration need be present for the FEC to find coordination. 11 C.F.R. § 109.21(e). In addition, “[a] candidate’s or a political party committee’s response to an inquiry about the candidate’s or political party committee’s positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards.” *Id.* § 109.21(f).

Definition of Agent. For the conduct standards, the definition of agent becomes extremely important because coordination with the agent of a candidate or committee is considered to be the same as coordination with the candidate or party. *For a political party*, an agent is any person who has “actual authority, either express or implied” to request or suggest that a communication be created, produced, or distributed; to make or authorize a covered communication; to create, produce, or distribute any communication at the request or suggestion of a candidate; to make a direct communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication with a candidate; or to be materially involved in discussions regarding a communication’s content, intended audience, size, prominence, or duration, the means or mode of communication, the specific media outlet used for a communication, or the timing or frequency of a communication. *Id.* § 109.3(a). *A candidate’s agent* is any person who has “actual authority, either express or implied” to request or suggest that a communication be created, produced, or distributed; to make or authorize a covered communication; to request or suggest that any other person create, produce, or distribute any communication; to provide material or information to assist another person in the creation, production, or distribution of any communication; to make or direct a communication that is created, produced, or distributed with the use of material or

(Continued . . .)

period,” *id.* § 100.28 (definition of “telephone bank”). See also *id.* § 100.26 (definition of “public communication” includes terms “mass mailing” and “telephone bank”).

information derived from a substantial discussion about the communication with a different candidate; or to be materially involved in decisions regarding a communication's content or intended audience, the means or mode of communication, the specific media outlet used for a communication, the timing or frequency of a communication, or the size, prominence, or duration of a communication. *Id.* § 109.3(b).

According to the Commission, a principal would not assume liability for agents who act outside the scope of their actual authority, but merely acting contrary to the law does not mean that the action is outside the scope of the agent's actual authority. 68 Fed. Reg. at 424. Also, apparent authority is not enough. The authority must be actual, which includes both express and implied authority. *Id.* See also 71 Fed. Reg. 4,975 (Jan. 31, 2006) (Revised Explanation and Justification on Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures).

1. Request or Suggestion. A covered communication "created, produced, or distributed" at the request or suggestion of a candidate, authorized committee, political party committee, or an agent of any of the foregoing, is coordinated. Also, if the person paying for a covered communication suggests how it is to be created, produced, or distributed and the candidate, authorized committee, political party committee or agent of the foregoing assents to the suggestion, then the covered communication is coordinated. 11 C.F.R. § 109.21(d)(1). "Assent" is used by the Commission as a form of a request, meaning "an expression of a desire to some person for something to be granted or done." 68 Fed. Reg. at 432 (quoting the definition of "request" in *Black's Law Dict.* 1304 (6th ed. 1990)).

The "request or suggestion" conduct standard only covers requests or suggestions made to select audiences and does not cover those requests or suggestions offered to the public generally. As a result, requests posted on a public web page or contained in a newspaper ad would not be covered whereas those requests emailed to a discrete group of persons, made at an invitation-only dinner, or posted on an intranet site would be covered by the standard. See *id.*; see also 71 Fed. Reg. at 33, 205 (describing the safe harbor for the use of public information).

2. Material Involvement. A covered communication is coordinated if a candidate, authorized committee, political party committee, or agent of any of the foregoing is materially involved in decisions regarding any of the following:
 - The content of the communication;
 - The intended audience for the communication;
 - The means or mode of the communication;
 - The specific media outlet used for the communication;
 - The timing or frequency of the communication; or

- The size or prominence of a printed communication, or the duration of a communication by means of a broadcast, cable, or satellite.

11 C.F.R. § 109.21(d)(2).

3. Substantial Discussion. A covered communication is coordinated if it is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication (or its employees or agents) and the candidate who is clearly identified in the communication, his or her authorized committee, his or her opponent or the opponent's authorized committee, a political party committee, or an agent of any of the foregoing. "A discussion is substantial . . . if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication." *Id.* § 109.21(d)(3).

4. Common Vendor. The common vendor conduct standard requires several different factors to be present. Each factor is treated separately below.

First, the common vendor conduct standard applies to any commercial vendor, including any owner, officer, or employee of the commercial vendor, that has provided the following services to the candidate who is clearly identified in the covered communication or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing in the previous 120 days:

- Development of media strategy, including the selection or purchasing of advertising slots;
- Selection of audiences;
- Polling;
- Fundraising;
- Developing the content of a public communication;
- Producing a public communication;
- Identifying voters or developing voter lists, mailing lists, or donor lists;
- Selecting personnel, contractors, or subcontractors; or
- Consulting or otherwise providing political or media advice.

Id. §§ 109.21(d)(4)(i)-(ii). Media buyers that do not involve themselves in any of the above activities are not covered by the common vendor conduct standard. *See* 68 Fed. Reg. at 437.

Second, the common vendor must use or convey to the person paying for the covered communication: i) information about the clearly identified candidate's campaign⁵ plans, projects, activities, or needs or his or her opponent's campaign plans, projects, activities, or needs; or ii) information used previously by the common vendor in providing services to the candidate who is clearly identified in the covered communication or his or her authorized committee, opponent or opponent's authorized committee, a political party committee, or agent of any of the foregoing. 11 C.F.R. § 109.21(d)(4)(iii).

Finally, for both of the above types of information conveyed or used by the common vendor, "the information [must be] material to the creation, production, or distribution of the [covered] communication." *Id.* Because of this last requirement, the Commission does not consider the common vendor conduct standard to be a flat prohibition on the use of common vendors. *See* 68 Fed. Reg. at 436.

5. Former Employee or Independent Contractor. The conduct standard involving former employees also involves a multi-faceted analysis, which is described in detail below.

First, the former employee conduct standard only applies to covered communications paid for by a former employee or independent contractor or the employer of a former employee or independent contractor. 11 C.F.R. § 109.21(d)(5)(i).

Second, a former employee is one who, during the previous 120 days, was an employee or independent contractor of the candidate who is clearly identified in the covered communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing. *Id.*

Third, the former employee or independent contractor must use or convey to the person making the covered communication: i) information about the clearly identified candidate's campaign plans, projects, activities, or needs or his or her opponent's campaign plans, projects, activities, or needs; or ii) information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the covered communication or his or her authorized committee, or opponent, or opponent's authorized committee, political party committee, or agent of any of the foregoing. *Id.* § 109.21(d)(5)(ii).

Finally, for both of the above types of information conveyed or used by the former employee/independent contractor, "the information [must be]

⁵ According to the Commission, the term "campaign" is used in order that the conduct standard might not encompass lobbying activities or information that is not related to a campaign. *See* 68 Fed. Reg. at 437.

material to the creation, production, or distribution of the [covered] communication.” *Id.* Because of this last requirement, the Commission does not consider the former employee or independent contractor conduct standard to be a flat prohibition on the use of former employees or independent contractors. *See* 68 Fed. Reg. at 438.

C. Safe Harbor for Publicly Available Information

Except with respect to communication made at the request or suggestion of a candidate, authorized committee, political party committee, or agent of the foregoing, there is a safe harbor for communications made where “information material to the creation, production, or distribution of the communication was obtained from a publicly available source.” 11 C.F.R. § 109.21(d)(2), (3) & (5). “To qualify for the safe harbor, the person paying for the communication bears the burden of showing that the information used in creating, producing, or distributing the communication was obtained from a publicly available source.” 71 Fed. Reg. at 33,205.

D. Safe Harbor for the Use of a Firewall

In its 2006 revisions, the FEC created a safe harbor from the coordination rules for the establishment of a firewall between coordinating and non-coordinating individuals or entities by a commercial vendor, former employee, or political committee.⁶ To apply, the firewall should be implemented before coordinated activities begin and must be described in a written policy that is distributed to all relevant and affected employees, consultants, and clients. 11 C.F.R. § 109.21(h)(2); 71 Fed. Reg. at 33,206-07. Most importantly,

[t]he firewall must be designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee.

11 C.F.R. § 109.21(h)(1). Note that the safe harbor provision “does not dictate the specific procedures required to prevent the flow of information . . . because a firewall is more effective if established and implemented in light of its specific organization, clients, and personnel.” 71 Fed. Reg. at 33,206.

E. Exceptions to Republication Content Standard

The Commission has also issued several exceptions to the content standard involving the dissemination, distribution, or republication of candidate campaign materials. The content standard does not apply if, among other things, either of the following is true:

⁶ This safe harbor codifies the Commission’s decision in Matter Under Review 5506 (EMILY’s List). 71 Fed. Reg. at 33,206.

- The campaign material is disseminated, distributed, or republished in a news story, commentary, or editorial; or
- The campaign material used by another person consists of a brief quote or portions of materials that demonstrate a candidate's position as part of the person's expression of its own view.

Id. § 109.23.

F. Other Exceptions

With the revisions made in 2006, the coordination regulations now contain exceptions for the following communications, regardless of timing, as long as the communications do not promote, support, oppose, or attack the endorsing or soliciting candidate or another candidate seeking the same office:

- A public communication in which a federal candidate endorses another federal candidate or a nonfederal candidate; and
- A public communication in which a federal candidate solicits funds for
 - Another federal candidate or nonfederal candidate;
 - A political committee; or
 - Certain 501(c) nonprofits (subject to the soft money regulations of 11 C.F.R. § 300.65).

11 C.F.R. § 109.21(g).

APPENDIX A: Public Communication Content Factor Chart

From 11 C.F.R. § 109.21(c)(4)

Number	Featured Person	Person with Whom Coordinated	Area of Distribution	Period during Which Coordination Rules Apply
(i)	Congressional Candidates only.	A Congressional Candidate, his or her authorized committee, a political party, or an agent of the foregoing.	The state or district of the featured Congressional Candidate(s).	Within 90 days of a primary, special, general, runoff, convention, or caucus.
(ii)	Presidential or Vice Presidential Candidates.	A Congressional Candidate, his or her authorized committee, a political party, or an agent of the foregoing.	As to a given state.	The <u>entire period</u> from 120 days before the primary, convention, or caucus in that state <u>through</u> the general election.

Number	Featured Person	Person with Whom Coordinated	Area of Distribution	Period during Which Coordination Rules Apply
(iii)(B) & (C)	A political party.	The political party committee or its agents.	As to a given state.	<p><u>In off-year election cycle</u> (e.g., 2005-06): within 90 days of a primary, special, general, runoff, convention, or caucus in that state</p> <p><u>In Presidential election cycle</u> (e.g., 2007-08), the <u>entire period</u> from 120 days before the primary, convention, or caucus in that state <u>through</u> the general election.</p>
(iii)(A)	A political party.	A candidate, his or her authorized committee, or an agent of the foregoing.	The state or district of the coordinating candidate(s).	Use appropriate candidate rule from Nos. (i) and (ii) above, depending on type of candidate.
(iv)(A)	A political party and a federal candidate.	A candidate, his or her authorized committee, or an agent of the foregoing.	The state or district of the featured candidate(s).	Use appropriate candidate rule from Nos. (i) and (ii) above, depending on type of candidate.

Number	Featured Person	Person with Whom Coordinated	Area of Distribution	Period during Which Coordination Rules Apply
(iv)(B)	A political party and a federal candidate.	The political party or its agents.	The state or district of the featured candidate(s).	Use appropriate candidate rule from Nos. (i) and (ii) above, depending on type of candidate.
(iv)(C)	A political party and a federal candidate.	The political party or its agents.	Outside the state or district of the featured candidate(s), but in a jurisdiction in which one or more candidates of the party appear on the ballot.	Use appropriate party rule as described in No. (iii)(B) & (C) above.