

CHAPTER 9

Communications

In addition to contributions and other financial assistance, party committees may also distribute communications which support candidates. This chapter discusses the varied types of communications, how they must be paid for and the disclaimer requirements that apply.

I. Party Coordinated Communications

When a party committee pays for a communication that is coordinated with a candidate, the communication is either an in-kind contribution or a coordinated party expenditure. (On the other hand, when a non-party committee pays for a communication that is coordinated with a political party committee, the communication is an in-kind contribution to the party committee.)

Coordination Defined

Coordinated means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.¹ 109.20.

Determining Coordination²

There is a three-pronged test to determine whether a communication is coordinated. A communication must satisfy all three prongs of the test to be considered a coordinated communication. 109.37(a). Political party committees are subject to a coordination test similar to that which would be applied to communications paid for by other persons. See 109.21(a) and 109.37(a).

The three prongs of the test consider:

- The source of payment (payment prong);
- The subject matter of the communication (content prong); and
- The interaction between the person paying for the communication and the candidate or political party committee (conduct prong).

Payment Prong

A coordinated communication is paid for, in whole or in part, by a political party committee or its agent. 109.37(a)(1).

Content Prong

A communication that meets any one of these three standards meets the content prong:

- A public communication that republishes, disseminates or distributes candidate campaign materials, unless the activity meets one of the exceptions at 109.23(b);
- A public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; or
- A public communication that:
 - Refers to a clearly identified House or Senate candidate and is publicly distributed in the identified candidate's jurisdiction within 90 days of the candidate's primary or general election;
 - Refers to a clearly identified Presidential or Vice Presidential candidate and is publicly distributed in a jurisdiction during the period starting 120 days before the primary election in that jurisdiction and ending on the date of the general election.

109.37(a)(2).

Conduct Prong

The purpose of the conduct prong is to determine when interaction between the campaign and the person paying for the communication might constitute coordination. When the conduct prong, the content prong and the payment prong are all satisfied, then the communication is a coordinated communication and results in an in-kind contribution or a party coordinated expenditure. A com-

¹ For the purposes of 11 CFR part 109 only, "agent" is defined at 109.3.

² Note: At the time of this Guide's publication, the rules governing coordination were subject to further rulemaking by the FEC. Pending further action, these standards remain in effect. See *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007), *aff'd* in part, *rev'd* in part, 528 F.3d 914 (D.C. Cir. 2008).

munication that satisfies any one of the conduct standards described below satisfies the conduct prong.

1) Request or Suggestion

This conduct standard has two parts, and satisfying either satisfies the standard. The first part is satisfied if the person creating, producing or distributing the communication does so at the request or suggestion of a candidate, authorized committee or agent of any of these. A communication satisfies the second part of the “request or suggestion” conduct standard if the person paying for the communication suggests the creation, production or distribution of the communication to the candidate, authorized committee or agent of any of the above, and the candidate or political party committee assents to the suggestion. 109.21(d)(1).

2) Material Involvement

This conduct standard is satisfied if a candidate, candidate committee, or an agent of any of these was “materially involved in decisions” regarding any of the following aspects of a public communication paid for by someone else:

- Content of the communication;
- Intended audience;
- Means or mode of the communication;
- Specific media outlet used;
- Timing or frequency of the communication; or
- Size or prominence of a printed communication or duration of a communication by means of broadcast, cable or satellite. 109.21(d)(2).

3) Substantial Discussion

A communication meets this conduct standard if it is created, produced or distributed after one or more substantial discussions between the person paying for the communication, or the person’s agents, and the candidate clearly identified in the communication or that candidate’s committee, that candidate’s opponent or opponent’s committee, or an agent of the above. A discussion would be “substantial” if information about the plans, projects, activities or needs of the candidate that is material to the creation, production or distribution of the communication is conveyed to the person paying for the communication. 109.21(d)(3).

4) Employment of Common Vendor

The conduct standard provides that the use of a common vendor in the creation, production or dis-

tribution of a communication satisfies the conduct standard if:

- The person paying for the communication contracts with, or employs, a “commercial vendor” to create, produce or distribute the communication;³ and
- The commercial vendor, including any officer, owner or employee of the vendor, has a previous or current relationship with the candidate that puts the commercial vendor in a position to acquire information about the campaign plans, projects, activities or needs of the candidate. This previous relationship is defined in terms of nine specific services related to campaigning and campaign communications. Note that these services would have to have been rendered during the previous 120 days before the production of the communication; and
- The commercial vendor uses or conveys information about the campaign plans, projects, activities or needs of the candidate, or information previously used by the commercial vendor in serving the candidate, to the person paying for the communication, and that information is material to the creation, production or distribution of the communication. 109.21(d)(4).

5) Former Employee/Independent Contractor

This conduct standard applies to communications paid for by a person (or the employer of a person) who has previously been an employee or an independent contractor of a candidate’s campaign committee during the 120 days before the production of the communication.

This standard requires that the former employee use or convey information about the plans, projects, activities or needs of the candidate, or information used by the former employee in serving the candidate, to the person paying for the communication, and the information is material to the creation, production or distribution of the communication. 109.21(d)(5).⁴

³ The term “commercial vendor” is defined at 116.1(c).

⁴ Under the rules, a candidate with whom a party coordinated communication is coordinated would not receive or accept an in-kind contribution that resulted only from conduct described in the “Employment of Common Vendor” and “Former Employee/Independent Contractor” sections. 109.37(a)(3) and 109.21(b)(2).

Special rules regarding dissemination, distribution or republication of campaign material

A communication that republishes, disseminates or distributes campaign material only satisfies the first three conduct standards on the basis of the candidate's conduct—or that of his or her committee or agents—that occurs after the original preparation of the campaign materials that are disseminated, distributed or republished. 109.21(d)(6).⁵

The following uses of campaign materials do not constitute a contribution to the candidate who prepared the materials pursuant to the exceptions at 109.23(b):

- The campaign material is disseminated, distributed or republished by the candidate or authorized committee of the candidate who prepared the material;
- The campaign material is distributed in a communication that advocates the defeat of the candidate who prepared it;
- The campaign materials is disseminated, distributed or republished in a news story, commentary or editorial that is described in 100.73 and 100.132;
- The campaign material used consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views; or
- A national, state or local political party pays for the communication using coordinated expenditure authority. 109.23(b).

Agreement or formal collaboration.

Neither agreement (defined as a mutual understanding on any part of the material aspect of the communication or its dissemination) nor formal collaboration (defined as planned or systematically organized work) is necessary for a communication to be a coordinated communication. 109.21(e).

⁵ Please note that the financing of the distribution or republication of campaign materials, while considered an in-kind contribution by the person making the expenditure, is not considered an expenditure (or an accepted contribution) by the candidate's authorized committee unless the dissemination, distribution or republication of campaign materials is a coordinated communication. 109.23(a).

Safe Harbor Provisions to the Conduct Prong

Safe harbor for responses to inquires about legislative or policy issues

A candidate's response to an inquiry about that candidate's positions on legislative or policy issues, which does not include discussion of campaign plans, projects, activities or needs, will not satisfy any of the conduct standards. 109.37(a)(3).

Safe harbor for publicly available information

Using information that was obtained from a publicly available source to create, produce or distribute a communication would not, in and of itself, satisfy the conduct standard unless the public communication itself was a request or suggestion by the candidate's committee. 109.21(d)(2), (d)(3), (d)(4)(iii) and (d)(5)(ii).

Safe harbor for the establishment and use of a firewall

The conduct standard for coordination is not met if a commercial vendor, former employee or political committee establishes a "firewall" to prohibit the flow of information between employees or consultants of the person paying for the communication and employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication or an opponent of the candidate mentioned in the communication. The firewall must be described in a written policy that is distributed to all relevant employees, consultants and clients affected by the policy. 109.21(h)(1) and (2).

Safe harbor for candidate endorsements and solicitations

A federal candidate may endorse or solicit funds for a candidate for federal or nonfederal office in a public communication without the communication being considered a "coordinated communication" with respect to the endorsing or soliciting candidate, so long as the communication does not promote or support the candidate making the endorsement or solicitation and does not attack or oppose his/her opponent. The safe harbor described in this paragraph also covers candidate solicitations for other political committees (including party committees) and candidate solicitations for certain tax-exempt organizations. For permissible

tax-exempt organizations, see 300.65. 109.21(g)(1) and (2).

In-kind Contribution vs. Party Coordinated Expenditure

Party coordinated communications must be treated by the party committee as either an in-kind contribution to the candidate or as a coordinated party expenditure to the general election campaign of the candidate. 109.37(b). See page 44.

2. Communications Coordinated with a Party Committee

In addition to the rules regarding “party coordinated communications” discussed above, there are also rules governing communications that are paid for by an outside group or individual and are coordinated with a party committee. If these communications meet the three-pronged test for coordination, then the payment for the communication is an in-kind contribution to the party committee. 109.21(a).

Determining Coordination

Communications that are coordinated with a party committee satisfy a similar three-pronged test for coordination. However, there are three important differences. First, the communication is paid for in whole or in part by a person other than the political party committee. 109.21(a)(1). Second, electioneering communications satisfy the content prong. 109.21(c)(1). Third, the content prong includes a standard that addresses references to political parties. If the public communication refers to a political party, does not refer to a clearly identified federal candidate and is publicly distributed or otherwise publicly disseminated in a jurisdiction where one or more candidates of that political party will appear on the ballot, then the content standard for a communication that is coordinated with a party committee will be met. 109.21(c)(4)(iii).

3. Independent Expenditures

Party committees may support (or oppose) candidates by making independent expenditures. Independent expenditures are not contributions and are not subject to contribution limits. (However, contributions made to a committee or to another person making independent expenditures are subject to limits, as explained at the end of this section.)

Independent expenditures must be paid for with federally permissible funds.

Defined

An independent expenditure is an expenditure for a communication, such as a website, newspaper, TV or direct mail advertisement, that:

- Expressly advocates the election or defeat of a clearly identified federal candidate; and
- Is not coordinated with a candidate, candidate’s committee, party committee or their agents. (See above.) 100.16(a).

Clearly Identified Candidate

A candidate is “clearly identified” if the candidate’s name, nickname or image appears, or the identity of the candidate is otherwise apparent. Examples include: “the President,” “your Congressman,” “the Democratic Presidential nominee,” “the Republican candidate for Senate in the State of Georgia.” 100.17.

Express Advocacy

“Express advocacy” means that the communication includes a message that unmistakably urges election or defeat of one or more clearly identified candidate(s). There are two ways that a communication can be considered express advocacy: by use of certain explicit words of advocacy of election or defeat and by the “only reasonable interpretation” test. 100.22.

Explicit words of advocacy of election or defeat

The following words are examples of those that convey a message of express advocacy (see 100.22(a) for more examples):

- “Vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for the U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in ‘08”;