

AVOIDING COORDINATED COMMUNICATIONS*

July 2016

Corporations and unions are allowed to advocate for the election or defeat of candidates, but they remain prohibited from making contributions to federal candidates or party committees. A contribution may take the form of money or anything of value, including expenditures for communications that are made in cooperation with, or at the request or suggestion of, a candidate, party committee, or their agents (“coordinated communications”).

Over the years, the Federal Election Commission (FEC) and the courts have struggled to define coordinated communications in a way that accomplishes Congress’s desire to prohibit contributions by corporations and unions without excessively trampling on the organizations’ free speech rights. What follows is a summary of the rules as they currently stand.

Current FEC regulations establish a three-prong test for determining whether there is a coordinated communication. All three prongs (or standards) of the test—payment, content and conduct—must be met, but it’s really the content and conduct standards that matter because the payment prong simply requires some or all of a communication to be paid for by someone other than a candidate, a candidate’s authorized committee or a political party committee.

Content Standard 11 CFR 109.21(c)

1. An **electioneering communication** (a broadcast communication that refers to a federal candidate and is distributed to the relevant electorate 30 days before the primary election or 60 days before the general election); or
2. A public communication that republishes, disseminates or distributes in whole or in part **campaign materials** prepared by a candidate or a candidate’s campaign committee; or
3. A public communication that **expressly advocates** the election or defeat of a clearly identified candidate; or
4. A public communication that is the **functional equivalent of express advocacy** (i.e., susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate); or
5. A public communication that is:
 - a. Made within 90 days or fewer before an election and:
 - **Refers to a clearly identified House or Senate candidate and is publicly distributed in that candidate’s jurisdiction;** or
 - Refers to a political party, is coordinated with a House or Senate candidate, and is publicly

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- distributed in that candidate's jurisdiction; or
- Refers to a political party, is coordinated with a political party, and is publicly distributed during a midterm election cycle

or

- b. Made within 120 days or fewer before a Presidential primary election through the general election and:
 - **Refers to a clearly identified Presidential or Vice Presidential candidate and is publicly distributed in a jurisdiction before the clearly identified federal candidate's election in that jurisdiction;** or
 - Refers to a party, is coordinated with a Presidential or Vice Presidential candidate, and is publicly distributed in that candidate's jurisdiction; or
 - Refers to a political party, is coordinated with a political party, and is publicly distributed during the Presidential election cycle.

Note: Public communications do not include communications over the Internet unless placed for a fee on another person's website.

Conduct Standard 11 CFR 109.21(d)

1. The communication is created, produced or distributed at the **request or suggestion** of a candidate, a candidate's committee, a party committee or their agents, or one of these persons **assents** to the payer's suggestion that the communication be created, produced or distributed; or
2. A candidate, a candidate's authorized committee, a party committee or their agents is **materially involved** in decisions regarding the content, intended audience, means or mode of the communication, specific media outlet used, the timing or frequency or size or prominence of the communication; or
3. The communication is created, produced or distributed after the clearly identified candidate, the candidate's opponent or opponent's committee, a political party committee or their agents conveys information about the candidate or party committee's **plans, projects, activities, or needs** and that information is material to the creation, production, or distribution of the communication (known as the "**substantial discussion**" prong); or
4. The person paying for the communication **employs a commercial vendor** (aka "**common vendor**") to create, produce or distribute the communication, and that vendor:
 - **Has provided campaign-related services** within the previous 120 days **to the clearly identified candidate, his or her authorized committee, his or her opponent or opponent's authorized committee, or a political party committee,** and
 - **Uses or conveys information about the plans, projects, activities or needs** of these persons or **information previously used by the vendor in providing services** to these persons, and the information is material to the creation, production or distribution of the communication; or
5. The communication is paid for by a person or an employer of a person who has been an **employee or independent contractor** of a candidate's campaign committee or a party



committee during the previous 120 days and the person uses or conveys information about the **plans, projects, activities or needs** of the candidate, the candidate's opponent or opponent's committee, or a political party committee or **information previously used by the employee or independent contractor in providing services** to these persons, and that information is material to the creation, production or distribution of the communication.

Note: Information that comes from a publicly available source generally will not result in coordination.

Safe Harbors

Inquiries about legislative or policy issues. *11 CFR 109.21(f)*

Responses to candidate questionnaires or other requests for information on a candidate or political party committee's positions on legislative or policy issues will not satisfy any of the conduct standards as long as there is no discussion of campaign plans, projects, activities or needs.

Establishing and using an information "firewall." *11 CFR 109.21(h)*

The conduct standards will not be satisfied if there is a firewall policy in place that prohibits the flow of information about a candidate or party's plans, projects, activities or needs between those employees or consultants providing services to the person paying for the communication and those employees or consultants who are or have previously provided campaign-related services to the clearly identified candidate, the candidate's opponent, the opponent's committee or a political party committee. The policy must be in writing and distributed to all relevant persons.

Communications with restricted class. *11 CFR 114.3(a)*

Only public communications will satisfy the content standard. A corporation's communications to its "restricted class" concerning a federal candidate will not qualify as a contribution or expenditure even if the corporation satisfies one or more of the elements of the conduct prong. Generally, a nonprofit corporation's restricted class consists of its executive and administrative personnel (employees who are exempt from the Fair Labor Standards Act) and their families. If a corporation qualifies as a "membership organization" and has "members" (as defined at 11 CFR 114.1(e)), its members and their families are also part of the corporation's restricted class.

Commercial Transactions. *11 CFR 109.21(i)*

A public communication that identifies a federal candidate only in his or her capacity as the owner or operator of a business that existed before the candidacy will not qualify as coordinated as long as the communication is materially consistent with other public communications made prior to the candidacy and does not promote, support, attack, or oppose the candidate or another candidate who seeks the same office.