



## **Coordinated Communications: Politically Unregulated Speech Versus Campaign Regulated Speech**

The Federal Election Commission (FEC) recently released its [revised regulations](#) regarding coordinated communications with federal candidates and political party committees. According to federal election law, coordinated communications by corporations, including 501(c) corporations, result in prohibited campaign contributions. Organizations that violate this prohibition may face a number of FEC penalties, including, but not limited to, a substantial fine or even criminal penalties. The following is a summary of the new coordination rules.

### **Coordination and Independent Activities**

Expenditures made in concert or cooperation with a candidate or political party are treated as in-kind contributions subject to the prohibitions and limitation of federal election law. FEC regulations set out a three-part test to determine if a particular communication is “coordinated.” Satisfaction of *all three* of the specific elements of the test “justifies the conclusion that payments for the coordinated communication are for the purpose of influencing a federal election.”

**Payment.** The communication is paid for, in whole or in part, by someone other than a candidate, a candidate’s authorized committee, or their agents, or a political party or its agents. The definition of “agent” includes any person who has actual authority, express or implied, to engage in specific activities (listed in the rules) on behalf of a principal.

**Content Standard.** In order to limit the rules to communication whose subject is reasonably related to an election, the communication must be one of the following:

- A “public communication” that expressly advocates the election or defeat of a clearly identified candidate; *or*

A “public communication” is a communication by means of 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.” “Public communications” do not cover Internet and other electronic communications (including e-mail), other than ads placed for a fee on another person’s website; private correspondence; and internal communications between a corporation or labor organization and its restricted class.

- A communication that satisfies the definition of an “electioneering communication” as defined by the statute;
- A “public communication” that includes, in whole or in party, campaign materials prepared by a candidate, the candidate’s authorized committee, or any agent of either the candidate or his authorized committee. The rules clarify that a candidate’s actions in

preparing the *original* campaign materials will not be considered in the conduct analysis; the focus analysis will be the conduct *after* the initial preparation;

A public communication that is distributed within 90 days of a primary, special, or general election:

- References a House or Senate candidate (not a political party)
- Coordinated with a political party or the referenced candidate or his/her opponent
- Distributed in the identified candidate's jurisdiction
  
- References a political party and a House or Senate candidate
- Coordinated with a House or Senate candidate
- Distributed in the coordinating candidate's jurisdiction and where one or more of the party's candidates is on the ballot
  
- References a political party (not a federal candidate)
- Coordinated with House or Senate candidate
- Distributed in the coordinating candidate's jurisdiction and where one or more of the party's candidates is on the ballot
  
- References a political party (not a federal candidate) *or* a political party and a House or Senate candidate
- Coordinated with a political party
- Distributed anywhere during a non-Presidential election cycle where one or more of the party's federal candidates is on the ballot

A public communication that is distributed from 120 days before the date of a Presidential primary, caucus or convention until the general election

- References a Presidential or Vice Presidential candidate (not a political party)
- Coordinated with a political party or the references candidate or his/her opponent
- Distributed in the jurisdiction of the Presidential or Vice Presidential candidate's primary, caucus or convention
  
- References a political party and a Presidential or Vice Presidential candidate
- Coordinated with a candidate
- Distributed within the coordinating candidate's jurisdiction where one or more of the party's candidate's is on the ballot
  
- References a political party (not a federal candidate)
- Coordinated with a Presidential or Vice Presidential candidate
- Distributed in a jurisdiction of the Presidential or Vice Presidential candidate's primary, caucus or convention, where one or more of the party's candidates is on the ballot
  
- References a political party (not a federal candidate) *or* a political party and a Presidential or Vice Presidential candidate

- Coordinated with a political party
- Distributed anywhere during a Presidential election cycle where one or more of the party's candidates is on the ballot

Conduct Standard. The rules enumerate different types of conduct, any of which may satisfy this test, *whether or not there is agreement or formal collaboration:*

- *Request or Suggestion.* A communication is created, produced, or distributed at the request or suggestion of a candidate or authorized committee or political party or agent of any of these entities. This standard also covers the situation where the entity paying for the communication makes the suggestion and the candidate, authorized committee, or political party committee assents to the suggestion.
- *Material Involvement.* A candidate, authorized committee, political party, or agent is materially involved in the decisions regarding the content, intended audience, the means and mode of the communication, specific media outlet use for, timing and frequency or size and prominence of a printed communication, or duration of a broadcast, cable, or satellite communication.
- *Substantial Discussion.* A communication is produced, created, or distributed after substantial discussion about the communication between the person paying for the communication (or their employees or agents) and the candidate identified in the communication, his or her authorized committee, his or her opponent's authorized committee, a political party, or agents of any of these individuals or entities. The discussion is "substantial" if the information conveyed to the person paying for the communication is material to the created, production, or distribution of the communication. In addition, this rule does not apply if the "material" information was obtained from a publicly available source.
- *Common Vender.* The communication is created or distributed by an organization with the assistance of a vendor who has provided certain types of services to a candidate, his authorized committee, his opponents committee, a political party, or an agent of any of these entities within the previous 120 days. The former employee or contractor must use or convey to the entity making the communication information about the identified candidate's (or his opponent's) plans, projects, activities, or needs, and that information must be material to the creation, production or distribution of the communication.

Safe Harbors.

- *Legislative and Policy Discussions.* A candidate's or political party committee's response to an inquiry about a candidate's or party's positions on legislative or policy issues that does not include a discussion of campaign plans, project, or needs, does not satisfy the conduct standards. This provision is intended to permit organizations to make

inquiries about a candidate's views on policy issues or legislation in the context, for example, of preparing a voter guide or a lobbying campaign.

- *Firewall*. The regulations expressly provide that the conduct standards above are not met if the commercial vendor, former employee, or organizations establishes and implements a “firewall” that prohibits candidate and political party information, material to a communication, from passing to individuals who are creating, producing, or distributing a communication subject to the coordination rules. The firewall must be described in a written policy that is distributed at the time of implementation to all relevant employees, consultants, and clients that are affected by the policy. If, however, there is specific information that is material to the creation, production, or distribution of the communication used by or conveyed to the person pay for the communication, the “firewall” will not provide a defense.
  
- *Publicly Available Information*. A communication created with publicly available information, for example, obtained from a candidate's political party's website or learned from a public campaign speech, is not coordinated.

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For additional information, please feel free to contact the Alliance for Justice. The Alliance for Justice publishes plain-language guides on nonprofit advocacy topics, offers educational workshops on the laws governing the advocacy of nonprofits, and provides technical assistance for nonprofits engaging in advocacy.

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ALLIANCE<sup>FOR</sup>JUSTICE

11 Dupont Circle, N.W., 2<sup>nd</sup> Floor • Washington, DC 20036  
Phone: 202-822-6070 • Email: [advocacy@afj.org](mailto:advocacy@afj.org) • [www.allianceforjustice.org](http://www.allianceforjustice.org)