



AVOIDING COORDINATED COMMUNICATIONS*

February 23, 2010

Citizen's United allows corporations to advocate for the election or defeat of candidates, but these entities are still 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 concert or cooperation with a candidate or party committee or their agents ("coordinated communications").

Over the years, there has been a tug-of-war between the FEC and the courts in attempting to define coordinated communications in a way that accomplishes Congress's desire to prohibit contributions by corporations and unions without excessively trampling on their free speech rights. That game is still being played, with the FEC engaged in yet another rule-making just as the *Citizens United* decision was handed down. What follows is a summary of the rules as they currently stand, but please keep in mind that they will be revised yet again in the near future.

Current FEC regulations establish a three-prong test for determining whether there is a coordinated communication. All three prongs of the test—payment, content and conduct—must be met, but it's really the content and conduct prongs 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 Prong 11 CFR 109.21(c)

1. A public communication that **expressly advocates** the election or defeat of a clearly identified candidate;
2. 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);
3. 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
4. A public communication that is:
 - a. Made within 90 days 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 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

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or

- b. Made within 120 days 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 Prong 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;
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;
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);
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

1. **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.

2. **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.