MEMORANDUM

TO: The Commission
    General Counsel
    Staff Director
    Office of the Commission Secretary

FROM: Vice Chairman Robert D. Lenhard
       Commissioner Steven T. Walther
       Commissioner Ellen L. Weintraub

DATE: April 7, 2006

RE: Final Rules for Coordinated Communications (11 CFR 109.21)

Attached please find a proposed draft of Final Rules for Coordinated Communications (11 CFR 109.21) we plan to offer at the Commission’s open session on April 7, 2006.
The Federal Election Commission is amending Subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) and (d), and Pub. L. 107-155 Sec. 214(c))

1. The authority citation for Part 109 continues to read as follows:

   Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L. 107-155, 116 Stat. 81.

2. Section 109.21 is being amended by:

   a. Revising paragraph (a)(1);
   b. Revising paragraph (c)(4);
   c. Revising paragraph (d)(3);
   d. Revising paragraph (d)(4);
   e. Revising paragraph (d)(5);
   f. Adding a new paragraph (g);
   g. Adding a new paragraph (h).

The additions and revisions would read as follows:

§ 109.21 What is a “coordinated communication”?

(a) * * *
(1) Is paid for, in whole or in part, by a person other than that candidate, authorized committee, political party committee, or agent of any of the foregoing:

* * * * *

(c) * * *

(4) A public communication, as defined in 11 CFR 100.26, that satisfies paragraph (i), (ii), or (iii): A communication that is a public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (e)(4)(i), (ii), and (iii) of this section are true:

(i) Political party committees. The public communication refers to a political party and is publicly distributed or otherwise publicly disseminated in a jurisdiction 120 days or fewer before a general, special, or runoff election in that jurisdiction, or primary or preference election in that jurisdiction, or nominating convention or caucus in that jurisdiction, in which one or more candidates of that political party will appear on the ballot.

(ii) House and Senate candidates. The public communication refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the identified candidate's jurisdiction 120 days or fewer before the identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus.
(iii) Presidential and Vice Presidential candidates. The public communication refers to a clearly identified Presidential or Vice Presidential candidate and is publicly distributed or otherwise publicly disseminated in a jurisdiction between 120 days before the identified candidate's primary or preference election in that jurisdiction, or nominating convention or caucus in that jurisdiction, and the day of the general election in that jurisdiction.

(i) The communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly-identified candidate, or to the voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

* * * * *

(d) * * *

(3) Substantial discussion. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the
employees or agents of the person paying for the communication, and the
candidate who is clearly identified in the communication, or his or her the
candidate’s authorized committee, or his or her the candidate’s opponent or
the opponent’s authorized committee, or a political party committee, or an
agent of any of the foregoing. A discussion is substantial within the
meaning of this paragraph 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. A communication does not satisfy this paragraph if the
information material to the creation, production, or distribution of the
communication was obtained from a publicly available source.

(4) Common vendor. All of the following statements in paragraphs (d)(4)(i)
through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such
person, contracts with or employs a commercial vendor, as defined
in 11 CFR 116.1(c), to create, produce, or distribute the
communication;

(ii) That commercial vendor, including any owner, officer, or
employee of the commercial vendor, has provided any of the
following services to the candidate who is clearly identified in the
communication, or his or her the candidate’s authorized committee,
or his or her the candidate’s opponent or the opponent’s authorized
committee, or a political party committee, or an agent of any of the 
foregoing, in the current two-year election cycle:

(A) Development of media strategy, including the selection or 
purchasing of advertising slots;

(B) Selection of audiences;

(C) Polling;

(D) Fundraising;

(E) Developing the content of a public communication;

(F) Producing a public communication;

(G) Identifying voters or developing voter lists, mailing lists, or 
donor lists;

(H) Selecting personnel, contractors, or subcontractors; or

(I) Consulting or otherwise providing political or media 
advice; and

(iii) That commercial vendor uses or conveys to the person paying for 
the communication:

(A) Information about the clearly identified candidate’s 
campaign plans, projects, activities, or needs of the clearly 
identified candidate, or his or her the candidate’s opponent’s 
campaign plans, projects, activities, or needs, or a political 
party committee’s campaign plans, projects, activities, or 
needs and that information is material to the creation, 
production, or distribution of the communication; or
(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or his or her the candidate's authorized committee, or his or her the candidate's opponent, or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, and that information is material to the creation, production, or distribution of the communication.

(C) This paragraph, (d)(4)(iii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source.

(5) Former employee or independent contractor. Both of the following statements in paragraph (d)(5)(i) and (d)(5)(ii) of this section are true:

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or his or her the candidate's authorized committee, or his or her the candidate's opponent, or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, during the current two-year election cycle; and

(ii) That former employee or independent contractor uses or conveys to the person paying for the communication:
(A) Information about the clearly identified candidate’s campaign plans, projects, activities, or needs of the clearly identified candidate, or his or her the candidate’s opponent’s campaign plans, projects, activities, or needs, or a political party committee’s campaign plans, projects, activities, or needs, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or his or her the candidate’s authorized committee, or his or her the candidate’s opponent or the opponent’s authorized committee, or a political party committee, or an agent of any of the foregoing, and that information is material to the creation, production, or distribution of the communication.

(C) This paragraph, (d)(5)(ii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the former employee or independent contractor was obtained from a publicly available source.
(g) Safe harbor for endorsements and solicitations by Federal candidates.

(1) A public communication in which a candidate for Federal office endorses another candidate for Federal or non-Federal office is not a coordinated communication with respect to the endorsing candidate if the public communication does not promote, support, attack, or oppose the endorsing candidate, the endorsing candidate’s opponent, or another candidate who seeks election to the same office as the endorsing candidate.

(2) A public communication in which a candidate for Federal office solicits funds for another candidate for Federal or non-Federal office, or a state or national political party committee, is not a coordinated communication with respect to the endorsing candidate if the public communication does not promote, support, attack, or oppose the endorsing candidate, the endorsing candidate’s opponent, or another candidate who seeks election to the same office as the endorsing candidate.

(h) Safe harbor for establishment and use of a firewall. The conduct standards in paragraph (d) of this section are not met if the commercial vendor, former employee, or political party committee has established and implemented a firewall that meets the following requirements. This safe harbor provision does not apply if specific information indicates that, despite the firewall, information about the candidate’s or political party committee’s campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used by or conveyed to the person paying for the communication.
(1) The 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, or the candidate’s opponent or the opponent’s authorized committee, or a political party committee, or an agent of any of the foregoing; and

(2) The “firewall” must be described in a written policy that is distributed at the time it is implemented to all relevant employees, consultants, and clients affected by the policy.