

Coordination and Common Vendors: Two Terms You Need to Know Right Now If You Plan to Run Ads in 2014

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Although the 2014 midterm elections are more than a year away, now is the time for an organization interested in sponsoring independent advertising to begin developing the necessary compliance framework so that the organization's advertising does not run afoul of the Federal Election Commission's (FEC) coordination regulations. The FEC's coordination regulations apply not only to organizations paying for independent expenditures (communications expressly advocating the election or defeat of a clearly identified federal candidate), but also to organizations paying for public communications that reference a clearly identified federal candidate or political party within 90 days of an election. One particular aspect of the FEC's coordination regulations—the common vendor standard—requires an organization to carefully select its advertising vendors months in advance and possibly require its vendors to implement a firewall.

In general, an organization may spend an unlimited amount of money on communications that are created and produced independently of any federal candidate or political party. If a communication is coordinated with a federal candidate or political party, however, then it is deemed an in-kind contribution subject to federal contribution limits and prohibitions. The FEC has developed a three-pronged test for determining whether a communication is coordinated, but the conduct prong draws the most attention and is typically the deciding factor. The conduct prong utilizes five conduct tests to examine the interaction between the organization paying for the communication and the benefitting federal candidate or political party.

Authors

Caleb P. Burns
Partner
202.719.7451
cburns@wiley.law

Under one of the conduct prong's tests, known as the common vendor standard, a communication may be coordinated if the organization paying for the communication employs or contracts with a commercial vendor to create, produce or distribute the communication, and the commercial vendor:

- Is currently providing services or has provided services within the previous 120 days to the referenced federal candidate, the candidate's opponent or a political party that exposes the vendor to information about the campaign plans, projects, activities or needs of the federal candidate or political party; and
- Uses or conveys information about the campaign plans, projects, activities or needs of the federal candidate or political party, or information used previously by the vendor in providing services to the candidate or political party, and that information is material to the creation, production or distribution of the communication.

According to the FEC's coordination regulations, vendors that provide any of the following services to a federal candidate or political party are considered to have access to information about the campaign plans, projects, activities or needs of the federal candidate or political party: development of media strategy, including the selection or purchasing of advertising slots; selection of audiences; polling; fundraising; developing the content of a public communication; producing a public communication; identifying voters or developing voter lists, mailing lists or donor lists; selecting personnel, contractors, or subcontractors; or consulting or otherwise providing political or media advice.

Recognizing that it may be difficult to select a vendor that does not have any federal candidate or political party clients, the FEC's coordination regulations also provide a safe harbor for establishing and adhering to a firewall. For the safe harbor to apply, the common vendor must design and implement a firewall to prohibit the flow of information between employees or consultants providing services for the organization paying for the communication and those employees or consultants currently or previously providing services to the referenced federal candidate, the candidate's opponent or a political party. The firewall must be documented in a written policy and distributed to all relevant employees, consultants and clients affected by the firewall. (Note that the safe harbor does not apply if, despite the firewall, information about the federal candidate or political party's campaign plans, projects, activities or needs that is material to the creation, production or distribution of the communication was, in fact, used or conveyed.)

In order to avoid triggering coordination through a common vendor, an organization sponsoring independent advertising must consider the following when selecting a vendor:

- Which federal candidates and/or political parties will the organization's communications reference?
- Is the potential vendor currently providing, or has the potential vendor provided within the past 120 days, services to any of these federal candidates, their opponents or a political party?
- If so, are the vendor's services of the nature that the vendor has or had access to information about the campaign plans, projects, activities or needs of the federal candidates or political parties?
- Does the vendor screen all potential clients for possible common vendor conflicts?

- Does the vendor have a sufficiently large staff to implement a firewall while providing services to all clients?
- Does the vendor ensure that any subcontractors or consultants also adhere to its firewall?
- Does the vendor have a written firewall policy that satisfies the FEC's safe harbor requirements?

Depending on the scope and scale of an organization's independent advertising program, screening for common vendors and establishing an effective firewall may become complicated. Wiley Rein is available to assist any organization with navigating the FEC's coordination regulations, including common vendor screening and firewall implementation.