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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2005 DEC -5 P 3:23

December 5, 2005

AGENDA ITEM
For Meeting of: 12-08-05

SUBMITTED LATE

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa
Acting Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Ron B. Katwan
Attorney

Amy L. Rothstein
Attorney

SUBJECT: Draft Notice of Proposed Rulemaking: Coordinated Communications (11 CFR 109.21).

Attached is a draft Notice of Proposed Rulemaking ("NPRM") revisiting the coordinated communication rules at 11 CFR 109.21, pursuant to the decisions of the District Court and the Court of Appeals in *Shays v. FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. July 15, 2005), *reh'g en banc denied* (Oct. 21, 2005) (No. 04-5352).

The Office of the General Counsel requests that this draft be placed on the agenda for the December 8, 2005 open meeting.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 109**

3 **[Notice 2005 –]**

4 **Coordinated Communications**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Notice of Proposed Rulemaking.

7 **SUMMARY:** The Federal Election Commission requests comment on proposed
8 revisions to its regulations regarding communications that have
9 been coordinated with Federal candidates and political party
10 committees. The Commission's current rules set out a three-prong
11 test for determining whether a communication is "coordinated"
12 with, and therefore an in-kind contribution to, a Federal candidate
13 or a political party committee. In Shays v. FEC, the Court of
14 Appeals invalidated one aspect of the so-called content prong of
15 the coordinated communications test, because the court believed
16 that the Commission had not provided adequate explanation and
17 justification for the current rules under the Administrative
18 Procedure Act. To comply with the decision of the Court of
19 Appeals, and to address other issues involving the coordinated
20 communication rules, the Commission is issuing this Notice of
21 Proposed Rulemaking. No final decision has been made by the
22 Commission on the issues presented in this rulemaking. Further

1 information is provided in the supplementary information that
2 follows.

3 **DATES:** Comments must be received on or before January 13, 2006. The
4 Commission will hold a hearing on the proposed rules on January
5 25 or 26, 2006, or both at 9:30 a.m. Anyone wishing to testify at
6 the hearing must file written comments by the due date and must
7 include a request to testify in the written comments.

8 **ADDRESSES:** All comments must be in writing, must be addressed to Mr. Brad
9 C. Deutsch, Assistant General Counsel, and must be submitted in
10 either e-mail, facsimile, or paper copy form. Commenters are
11 strongly encouraged to submit comments by e-mail or fax to
12 ensure timely receipt and consideration. E-mail comments must be
13 sent to either coordination@fec.gov or submitted through the
14 Federal eRegulations Portal at <www.regulations.gov>. If e-mail
15 comments include an attachment, the attachment must be in either
16 Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed
17 comments must be sent to (202) 219-3923, with paper copy
18 follow-up. Paper comments and paper copy follow-up of faxed
19 comments must be sent to the Federal Election Commission, 999 E
20 Street, NW, Washington, DC 20463. All comments must include
21 the full name and postal service address of the commenter or they
22 will not be considered. The Commission will post comments on its
23 website after the comment period ends. The hearing will be held

1 in the Commission's ninth-floor meeting room, 999 E Street, NW,

2 Washington, DC.

3 **FOR FURTHER**
4 **INFORMATION**
5 **CONTACT**: Mr. Brad C. Deutsch, Assistant General Counsel, Ms. Amy

6 Rothstein, or Mr. Ron B. Katwan, Attorneys, 999 E Street NW,

7 Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

8 **SUPPLEMENTARY**
9 **INFORMATION**: The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-

10 155, 116 Stat. 81 (2002) ("BCRA"), amended the Federal Election Campaign Act of

11 1971, as amended, 2 U.S.C. 431 et seq. (the "Act"), in a number of respects. In the

12 portion of BCRA relevant to this proceeding, Congress repealed the Commission's pre-

13 BCRA regulations regarding "coordinated general public political communications" and

14 directed the Commission to promulgate new regulations on "coordinated

15 communications" in their place. Pub. L. No. 107-155, sec. 214(b), (c) (2002). On

16 December 5, 2002, the Commission adopted regulations at 11 CFR 109.21 to implement

17 BCRA's provisions regarding payments for communications that are coordinated with a

18 candidate, a candidate's authorized committee, or a political party committee. See Final

19 Rules and Explanation and Justification on Coordinated and Independent Expenditures,

20 68 FR 421 (Jan. 3, 2003) ("2002 Coordination Final Rules").

21 Under the Act, as amended by BCRA, an expenditure "made by any person in

22 cooperation, consultation, or concert, with, or at the request or suggestion of" a Federal

23 candidate, a candidate's authorized committee, the national, State, or local committee of a

24 political party, or agents of any of the foregoing, is an in-kind contribution to the

25 candidate or political party committee with which it has been coordinated, and is thus

1 subject to the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C.
2 441a(a)(7)(B)(i) and (ii). An "expenditure" is any payment "made by any person for the
3 purpose of influencing any election for Federal office."[1] 2 U.S.C. 431(9)(A)(i).
4 Thus, under the Act, a payment for a communication constitutes an in-kind
5 contribution if two conditions are satisfied. First, the payment must qualify as an
6 "expenditure"; that is, it must be made for the purpose of influencing a Federal election.
7 Second, the payment must be made "in cooperation, consultation, or concert, with, or at
8 the request or suggestion of" a candidate or political party committee or agents thereof.
9 In addition, the Act provides that any disbursement for an "electioneering
10 communication"[2] that is coordinated with a candidate, a candidate's authorized
11 committee, a political party committee, or agents thereof, is an in-kind contribution to the
12 candidate or political party supported by the communication. 2 U.S.C. 441a(a)(7)(C).
13 To implement these provisions of the Act, 11 CFR 109.21 sets forth a three-prong
14 test for determining whether a communication is a coordinated communication, and
15 therefore an in-kind contribution to, a candidate, a candidate's authorized committee, or a
16 political party committee. See 11 CFR 109.21(a). First, the communication must be paid
17 for by someone other than a candidate, a candidate's authorized committee, a political
18 party committee, or their agents (the "payment prong"). See 11 CFR 109.21(a)(1).
19 Second, the communication must meet one of four content standards (the "content

[1] In addition, the Act specifically provides that the financing of the republication of campaign materials prepared by the candidate, the candidate's authorized committee, or agents thereof, is an expenditure. 2 U.S.C. 441a(a)(7)(B)(iii).

[2] The Act and Commission regulations define an electioneering communication as any broadcast, cable, or satellite communication that (1) refers to a clearly identified candidate for Federal office; (2) is publicly distributed within 60 days before a general election or 30 days before a primary election for the office sought by the candidate referenced in the communication; and (3) can be received by 50,000 or more persons within the geographic area that the candidate referenced in the communication seeks to represent. See 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29.

1 prong"). See 11 CFR 109.21(a)(2) and (c). Third, the communication must meet one of
2 five conduct standards (the "conduct prong"). See 11 CFR 109.21(a)(3) and (d). A
3 communication must satisfy all three prongs to be a "coordinated communication."

4 **I. The Content Prong**

5 This rulemaking is being initiated in response to court decisions that invalidated
6 one aspect of the "content prong" of the coordinated communication test. See Shays v.
7 FEC, 337 F. Supp. 2d 28 (D.D.C. 2004) ("Shays District"), aff'd, Shays v. FEC, 414 F.3d
8 76 (D.C. Cir. 2005) ("Shays Appeal") (pet. for reh'g en banc denied Oct. 21, 2005)(No.
9 04-5352). As described more fully below, the District Court held the content prong as a
10 whole to be invalid, while the Court of Appeals held the Commission's justification for
11 one aspect of the content prong (specifically, the 120-day time frame in the fourth content
12 standard) to be inadequate.

13 The purpose of the content prong is to "ensure that the coordination regulations
14 do not inadvertently encompass communications that are not made for the purpose of
15 influencing a Federal election." 2002 Coordination Final Rules at 426. Accordingly,
16 each of the four content standards that comprise the "content prong" identifies a category
17 of communications that satisfies the content prong because its "subject matter is
18 reasonably related to an election." Id. at 427.

19 The first content standard is satisfied if the communication is an electioneering
20 communication. See 11 CFR 109.21(c)(1). This content standard implements the
21 statutory directive, described above, that disbursements for coordinated electioneering
22 communications be treated as in-kind contributions to the candidate or political party
23 supported by the communication.

1 The second content standard is satisfied by a public communication[3] made at any
2 time that disseminates, distributes, or republishes campaign materials prepared by the
3 candidate, the candidate's authorized committee, or agents thereof. See 11 CFR
4 109.21(c)(2). This content standard implements the Congressional mandate that the
5 Commission's rules on coordinated communications address the "republication of
6 campaign materials." See Pub. L. 107-155, sec. 214(c)(1) (March 27, 2002).
7 The third content standard is satisfied if a public communication made at any time
8 expressly advocates the election or defeat of a clearly identified candidate for Federal
9 office. See 11 CFR 109.21(c)(3); see also 11 CFR 100.22. The Commission concluded
10 that express advocacy communications, no matter when such communications are made,
11 can be reasonably construed only as for the purpose of influencing an election.
12 The fourth content standard is satisfied if a public communication (1) refers to a
13 political party or a clearly identified Federal candidate; (2) is publicly distributed or
14 publicly disseminated 120 days or fewer before an election;[4] and (3) is directed to voters
15 in the jurisdiction of the clearly identified Federal candidate or to voters in a jurisdiction
16 in which one or more candidates of the political party appear on the ballot. See 11 CFR
17 109.21(c)(4).

[3] 11 CFR 100.26 defines "public communication" as "a communication 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. The term public communication shall not include communications over the Internet." The District Court rejected the definition of "public communication" in the Commission's regulations because the definition categorically excludes all Internet communications. Shays District at 70. To comply with the Shays District decision, the Commission issued a Notice of Proposed Rulemaking that proposes to include certain Internet communications in the definition of "public communication." See Notice of Proposed Rulemaking on Internet Communications, 70 FR 16967 (April 4, 2005). The proposed revision to the definition of "public communication" would have the effect of including certain Internet communications in the definition of "coordinated communication," as well. The Commission has not yet issued final rules in this rulemaking.
[4] The term "election" includes general elections, primary elections, runoff elections, caucuses or conventions, and special elections. See 11 CFR 100.2.

1 In adopting the 120-day time frame for public communications for the fourth
2 content standard, the Commission sought to create a bright-line rule for public
3 communications that fall short of express advocacy and do not republish campaign
4 materials. The 120-day time frame "focuses the regulation on activity reasonably close to
5 an election, but not so distant from the election as to implicate political discussion at
6 other times." 2002 Coordination Final Rules at 430. The Commission noted that its
7 intent was "to require as little characterization of the meaning or the content of the
8 communication, or inquiry into the subjective effect of the communication on the reader,
9 viewer, or listener as possible." 2002 Coordination Final Rules at 430 (citing Buckley v.
10 Valeo, 424 U.S. 1, 42-44 (1976)). The Commission emphasized that the regulation "is
11 applied by asking if certain things are true or false about the face of the public
12 communication or with limited reference to external facts on the public record." Id.
13 In adopting this time frame, the Commission relied on the fact that, in BCRA,
14 Congress defined "Federal election activity" ("FEA"), in part, as voter registration
15 activity "during the period that begins on the date that is 120 days" before a Federal
16 election. The Commission reasoned that, in doing so, Congress "deem[ed] that period of
17 time before an election to be reasonably related to that election." Id. (citing 2 U.S.C.
18 431(20)(A)(i)).
19

1 **II. Overview of Court Decisions in Shays v. FEC**

2 In Shays District, the District Court held that the Commission's coordinated
3 communication regulations did not survive the second step of Chevron review.[5] Shays
4 District at 61-62. Specifically, the court concluded that limiting the coordinated
5 communication definition to communications that satisfy the content standards at 11 CFR
6 109.21(c)(1) through (4) would "undercut[] [the Act's] statutory purpose of regulating
7 campaign finance and preventing circumvention of the campaign finance rules." Id. at
8 63. The District Court reasoned that communications that have been coordinated with a
9 candidate, a candidate's authorized committee, or a political party committee have value
10 for, and therefore are in-kind contributions to, that candidate or committee, regardless of
11 the content, timing, or geographic reach of the communications. See Shays District at
12 63-64.

13 The Court of Appeals, however, disagreed "with the district court's suggestion
14 that any standard looking beyond collaboration to content would necessarily 'create an
15 immense loophole,' thus exceeding the range of permissible readings under Chevron step
16 two." Shays Appeal at 99-100. The Court of Appeals noted that "we can hardly fault the
17 [Commission's] effort to develop an objective bright-line test [that] does not unduly
18 compromise the Act's purposes." Shays Appeal at 99 (internal quotations omitted).
19 Moreover, the Court of Appeals expressly "reject[ed] Shays and Meehan's argument that

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[5] The District Court described the first step of the Chevron analysis, which courts use to review an agency's regulations: "a court first asks 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" See Shays District, at 51 (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)). According to the District Court, in the second step of the Chevron analysis, the court determines if the agency's interpretation is a permissible construction of the statute that does not "unduly compromise" [the Act's] purposes by "creat[ing] the potential for gross abuse." See Shays District at 91, citing Orloski v. FEC, 795 F.2d 156, 164-65 (D.C. Cir. 1986) (internal citations omitted).

1 [the Act] precludes content-based standards under Chevron Step One." Id. As the Court
2 of Appeals emphasized, "time, place, and content may be critical indicia of
3 communicative purpose. While election-related intent is obvious, for example, in
4 statements urging voters to 'elect' or 'defeat' a specified candidate or party, the same
5 may not be true of [other types of] ads [.]" Id. Instead, the Court of Appeals found that
6 "the challenged regulation's fatal defect is not that the [Commission] drew distinctions
7 based on content, time, and place, but rather that, contrary to the [Administrative
8 Procedure Act], the Commission offered no persuasive justification for . . . the 120-day
9 time-frame and the weak restraints applying outside of it." Id. at 100. Specifically, the
10 Court of Appeals concluded that, by limiting "coordinated communications" made
11 outside of the 120-day window to communications containing express advocacy or the
12 republication of campaign materials, "the [Commission] has in effect allowed a
13 coordinated communication free-for-all for much of each election cycle." Id.
14 The Court of Appeals found that the Commission had not adequately explained
15 why "120 days reasonably defines the period before an election when non-express
16 advocacy likely relates to purposes other than 'influencing' a Federal election." Id. at
17 101. Regarding the Commission's reliance on Congress's use of a 120-day time frame in
18 BCRA's definition of FEA as voter registration activity, the Court observed that the
19 Commission had provided no evidence that voter registration activity occurs on cycles
20 similar to "coordinated communications." Id. at 100.
21 For these reasons, the Court of Appeals concluded that the Commission had not
22 provided adequate explanation under the Administrative Procedure Act ("APA") for the
23 Commission's decision to exclude communications distributed more than 120 days

1 before an election, unless a communication contains express advocacy or republishes
2 campaign materials. Therefore, the Court of Appeals affirmed the District Court's
3 invalidation of the Commission's coordinated communication rules. Id. at 101.

4 **III. Alternative Proposals for Revising the Content Prong in 11 CFR 109.21(c)**

5 The Commission is considering the seven alternatives described below to comply
6 with the Court of Appeals decision in Shays Appeal. The regulatory text for each
7 alternative, except one,[6] is set forth at the end of this NPRM. The Commission seeks
8 comment on each alternative, including responses to the following questions: Is the
9 alternative too broad or too narrow? Would the alternative potentially include public
10 communications that are not made for the purpose of influencing a Federal election and
11 that therefore should not be restricted and treated as in-kind contributions? Conversely,
12 would the alternative potentially exclude public communications that are made for the
13 purpose of influencing a Federal election and therefore should be treated as an in-kind
14 contribution, provided that the payment and conduct prongs are also satisfied? The
15 Commission invites commenters to provide examples of communications from previous
16 election cycles demonstrating that an alternative may be either underinclusive or
17 overinclusive. Would the alternative address the Court of Appeals' concerns regarding
18 the potential for circumvention of the Act and for corruption or the appearance of
19 corruption? Would the alternative properly effectuate congressional intent? Would the
20 alternative provide sufficient guidance to individuals and organizations seeking to be
21 actively involved in politics and to comply with the Commission's coordination rules?

22 The Commission notes that the alternatives presented in this NPRM are not
23 limited to the exact terms of the regulatory language set forth for each alternative at the

[6] See note 11 below.

1 end of the NPRM. Instead, as the narrative describing each alternative makes clear, the
2 final rules may be a variation of one of the alternatives or even a combination of
3 components from different alternatives. The Commission specifically invites comment
4 on whether a combination of components from several different alternatives would be
5 appropriate. The Commission also seeks comment on whether it should adopt a content
6 standard that is not presented as one of the alternatives in this NPRM.

7 In addition, given that the content prong and the conduct prong of the coordinated
8 communication test were intended to work together, the Commission seeks comment on
9 whether adopting a given alternative with respect to the content prong would necessitate
10 changing the conduct prong in 11 CFR 109.21(d) to ensure that only communications
11 made for the purpose of influencing a Federal election are covered. If so, what
12 amendments to the conduct prong should the Commission consider making?

13 <u>Alternative 1 – Retain current 11 CFR 109.21(c)(4) but revise the Explanation and</u>
14 <u>Justification</u>

15 Alternative 1 would retain the current coordinated communication test at 11 CFR
16 109.21, including the 120-day time frame in the fourth content standard at 11 CFR
17 109.21(c)(4)(ii), but would revise the Explanation and Justification for 11 CFR
18 109.21(c)(4)(ii) by providing further explanation supporting the 120-day time frame.[7]

19 The Court of Appeals emphasized that justifying the 120-day time frame, or
20 another time frame, requires the Commission to undertake a factual inquiry to determine
21 whether the temporal line that it draws "reasonably defines the period before an election

[7] Although this first alternative proposal to implement the appellate court's decision in <u>Shays Appeal</u> would not change 11 CFR 109.21(c)(4), the regulatory text of Alternative 1 as set forth at the end of this NPRM reflects proposed changes to 11 CFR 109.21(c)(4)(ii), to address situations in which multiple candidates for Federal office appear in a given public communication. <u>See</u> Section IV-3 below.

1 when non-express advocacy likely relates to purposes other than 'influencing' a Federal
2 election" or whether it "will permit exactly what BCRA aims to prevent: evasion of
3 campaign finance restrictions through unregulated collaboration." Shays Appeal at 101-
4 02. Accordingly, the Commission seeks comment on the following questions raised by
5 the Court of Appeals in Shays Appeal regarding the 120-day time frame:
6 (1) Are a significant number of communications outside the 120-day period made
7 for the purpose of influencing Federal elections, or are communications to influence
8 Federal elections predominantly made within 120 days of an election? Are there specific
9 examples from the 2004 election cycle of communications that the current coordination
10 rules should have reached but did not or, conversely, examples of communications that
11 the current rules should not have reached but did? Id. at 102.
12 (2) Do communications made for the purpose of influencing House, Senate, and
13 Presidential races – all covered by this rule – occur during approximately the same
14 periods in relation to the general election or the primary, or should different time frames
15 apply to each? Id.
16 (3) If the Commission were to retain the 120-day time frame, would persons
17 aiming to influence elections shift spending outside of that period to avoid the rules'
18 restrictions? Would the same phenomenon potentially take place if the Commission
19 adopted a time frame longer or shorter than 120 days before a Federal election? In 2004,
20 was there any evidence that spending shifted outside the 120-day period to avoid the
21 rules' restrictions? Id.
22 The Commission specifically invites comments in the form of empirical data that
23 show the time periods before an election in which electoral communications generally

1 occur. Do outside persons make electoral communications during time frames that differ
2 from candidates or parties? Do early electoral communications, for example, that occur
3 more than 120 days before an election, have an effect on election results?

4 On its website, the Commission posts reports filed pursuant to the Act and
5 Commission regulations. Some of these reports include information on independent
6 expenditures by political committees filed under 11 CFR 104.4 and by persons other than
7 political committees under 11 CFR 109.10. Additionally, all political committees must
8 report coordinated expenditures along with all other in-kind contributions under 11 CFR
9 109.21(b)(3), while political party committees must report their coordinated party
10 expenditures separately under 11 CFR 109.37. See Form 3X, line 25 (summarizing
11 entries from Schedule F). For the convenience of commenters, the Commission has
12 extracted these data from the reports and posted them on its website.[8] Do the data
13 provide an empirical basis for retaining the 120-day time frame or establishing another
14 time frame? For example, the data appear to indicate that, during the 2004 election cycle,
15 (1) coordinated party expenditures made in connection with the general election were
16 made mostly after September 1, 2004 – roughly within 60 days of the general election,
17 and (2) independent expenditures were made mostly after July 27, 2004 – roughly within
18 90 days of the general election.[9] The Commission invites statistical analyses of these
19 data. Specifically, to what extent is it possible to extrapolate from any identified patterns
20 in party committee coordinated expenditures to expenditures for coordinated

[8] These data are available at www.fec.gov/press/coordruledata.shtml.

[9] A political party committee authorized to make coordinated expenditures may make such expenditures in connection with the general election before or after its candidate has been nominated. See 2 U.S.C. 441a(d), 11 CFR 109.34. See also 11 CFR 109.32(a). Generally, it is less likely that such expenditures would be made much before a candidate has been nominated. The Commission also notes that expenditures reported by political party committees as "coordinated expenditures" include not only expenditures for communications but also all other coordinated expenditures.

1 communications by outside groups? Do the data support the conclusion that

2 communications made for the purpose of influencing an election are almost always made,

3 or are generally made, within the last 60 to 90 days before an election?

4 The Commission also seeks comment on whether other existing analyses provide

5 a basis for choosing a particular time frame. See, e.g., Michael M. Franz et al., The

6 Election after Reform: Money, Politics and the Bipartisan Campaign Reform Act ch. 7

7 (Michael J. Malbin ed., Rowman and Littlefield, forthcoming Mar. 2006), available at

8 http://www.cfinst.org/studies/ElectionAfterReform/chapters.html; Ken Goldstein & Joel

9 Rivlin, Political Advertising in the 2002 Elections ch.3 (forthcoming), available at

10 http://polisci.wisc.edu/tvadvertising; Craig B. Holman, Buying Time 2000: Television

11 Advertising in the 2000 Federal Elections 52-59 (2001), available at

12 http://www.brennancenter.org/programs/buyingtime2000.html; Jonathan Krasno &

13 Kenneth Goldstein, The Facts About Television Advertising and the McCain-Feingold

14 Bill, 35(2) PS: Political Science and Politics 207 (2002), draft available at

15 http://www.cfinst.org/studies/papers/goldstein&krasno.pdf; Donald F. McGahn, Remarks

16 at Campaign Finance Reform Forum, Campaign Finance Institute (Jan. 14, 2005),[10]

17 available at www.cfinst.org/transcripts/pdf/1-14-05_Transcript_PanelThree.pdf.; see also

18 data compiled by the University of Wisconsin Advertising Project, available at

19 http://polisci.wisc.edu/tvadvertising.

20

[10] "The hotspot of the campaign didn't start until late September . . . . This cycle was very compressed when it came to the heavy spending. It eventually had in essence a four-week sprint as opposed to the eight- to ten-week sprint that we used to pay for."

1 Alternative 2 – Adopt a Different Time Frame

2 The Commission seeks comment on whether a time frame other than 120 days
3 would be more appropriate in bringing public communications that are made for the
4 purpose of influencing a Federal election within the coordination regulations, while
5 filtering out public communications that are not made for this purpose.[11] Does empirical
6 evidence support the adoption of a different time frame? Some States hold primary
7 elections early in the election year. Under the current rule, a public communication that
8 refers to a clearly identified candidate and is distributed within the 120-day period
9 preceding a primary election would satisfy the content standard at 11 CFR 109.21(c)(4),
10 but the same public communication distributed shortly after the primary but still more
11 than 120 days before the subsequent general election would not satisfy that standard.
12 Accordingly, rather than retain the current rule covering communications made within the
13 120-day period before an election, whether primary or general, should the Commission
14 adopt a time frame that covers an uninterrupted period of time starting 120 days (or some
15 other time period) before the primary election up to and including the day of the general
16 election?

17 The Commission also invites comment on whether to adopt a time frame covering
18 the period from January 1 of each election year through the day of the general election.
19 Would such an "election year" time frame begin too late for States that hold primaries
20 early in the year? Conversely, would an "election year" time frame begin too early for
21 States that hold primaries in September? Would such a time frame be appropriate for
22 Presidential elections?

[11] Because Alternative 2 does not propose a specific time frame, this NPRM does not set forth regulatory text for Alternative 2.

1 In addition, the Commission seeks comment on whether to adopt a tiered
2 approach, under which the range of communications that satisfy the fourth content
3 standard would depend on the communication's proximity to an election. For example,
4 for communications made within 120 days before an election, the fourth content standard
5 could be modified to capture any public communication that refers to a political party or
6 clearly identified Federal candidate and is directed to the voters in the relevant
7 geographical areas. For communications made between 120 and 240 days before an
8 election, the fourth content standard could capture only public communications that
9 promote, attack, support, or oppose ("PASO") a political party or a clearly identified
10 Federal candidate.[12] The Commission invites commenters to provide examples of
11 communications from previous election cycles to show whether a given time frame
12 would be either underinclusive or overinclusive.

13 Alternative 3 – Eliminate the time restriction from 11 CFR 109.21(c)(4)

14 Alternative 3 would revise 11 CFR 109.21(c)(4) by eliminating any time
15 restriction from the fourth content standard. Specifically, Alternative 3 would remove the
16 requirement that a public communication be publicly distributed or otherwise publicly
17 disseminated 120 days or fewer before an election. See 11 CFR 109.21(c)(4)(ii).
18 Alternative 3 would, however, retain the requirements that (1) the public communication
19 refer to a political party or clearly identified candidate and (2) be directed to voters in the
20 jurisdiction of the clearly identified candidate or to voters in the jurisdiction in which one
21 or more candidates of the political party appear on the ballot. See 11 CFR 109.21(c)(4)(i)
22 and (iii). Thus, under this alternative, any public communication that refers to a clearly
23 identified candidate or political party and is directed to voters in the relevant jurisdiction

[12] See Alternative 4 below for a more detailed discussion of the PASO standard.

would satisfy the content prong of the coordinated communication test, regardless of when it is distributed.

The Commission seeks comment on whether the fourth content standard without a time frame would still be effective in distinguishing communications made for the purpose of influencing a Federal election from communications made for other purposes, such as communications made for the purpose of lobbying for or against certain legislation. The Court of Appeals noted that "to qualify as 'expenditure' in the first place, spending must be undertaken 'for the purpose of influencing a federal election'. . . [T]ime, place, and content may be critical indicia of communicative purpose. While election-related intent is obvious, for example, in statements urging voters to 'elect' or 'defeat' a specified candidate or party, the same may not be true of ads identifying a federal politician but focusing on pending legislation[.]" Shays Appeal at 99. Does the fact that a communication refers to a clearly identified candidate or a political party and is directed to voters in the relevant geographical area by itself provide strong evidence that the communication is made for the purpose of influencing a Federal election, even if the communication is made a year or more before that election? Does the Commission have the statutory authority to regulate "other categories of non-electioneering speech – non-express advocacy, for example – outside the 120 days"? Id. at 101. How should the Commission separate communications made for the purpose of influencing a Federal election from those without such purpose?

The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 3 would be either underinclusive or overinclusive.

1 Alternative 4 – Replace the content standard in 11 CFR 109.21(c)(4) with a "PASO" test

2 Alternative 4 would replace the content standard in 11 CFR 109.21(c)(4) with a
3 new standard providing that a public communication would satisfy the content prong of
4 the coordinated communication test if it refers to a political party or a clearly identified
5 Federal candidate, is directed to voters in the jurisdiction of the clearly identified Federal
6 candidate or to voters in a jurisdiction in which one or more Federal candidates of a
7 political party are on the ballot, and the communication PASOs the political party or the
8 clearly identified Federal candidate.[13] Would such a standard have the potential to be
9 unconstitutionally vague in practical application? Or, conversely, would such a standard
10 "provide explicit standards for those who apply them and give the person of ordinary
11 intelligence a reasonable opportunity to know what is prohibited"? McConnell v. FEC,
12 540 U.S. 93, 170 n.64 (2003) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-
13 109 (1972)).

14 Alternatively, the Commission invites comment on whether Alternative 4, instead
15 of using a PASO standard, should create a safe harbor exemption from the coordinated
16 communication rules for certain kinds of communications. To make use of the safe
17 harbor, the person paying for the communication, or the candidate or party identified in
18 the communication, would have to show that the communication meets certain criteria.

[13] The PASO standard is found in BCRA and applies primarily to candidates and political party committees with respect to FEA. See 2 U.S.C. 431(20)(A)(iii). But Congress also applied the PASO standard to the activity of certain tax-exempt organizations. For example, BCRA prohibits party committees from soliciting funds for, or making or directing donations to, certain tax-exempt organizations that make expenditures or disbursements for FEA, which includes public communications that PASO a Federal candidate. See 2 U.S.C. 431(20)(A)(iii) and 441i(d)(1). BCRA also directed the Commission not to exempt any communications that PASO a clearly identified Federal candidate from the electioneering communication provisions. See 2 U.S.C. 434(f)(3)(B)(iv). The Commission provided examples of communications that PASO and communications that do not PASO in Advisory Opinion 2003-25.

A communication that satisfies these criteria would, as a matter of law, not be treated as a coordinated communication. For example, such criteria could include the following:

- The communication is devoted exclusively to a particular pending legislative or executive branch matter.
- The communication's reference to a clearly identified Federal candidate is limited to urging the public to contact that candidate to persuade the candidate to take a particular position on the pending legislative or executive branch matters.
- The communication does not refer to the political party affiliation or the political ideology (e.g., "liberal," "conservative," etc.) of a clearly identified Federal candidate.
- The communication does not refer to a clearly identified Federal candidate's record or position on any issue.
- The communication does not refer to a clearly identified Federal candidate's character, qualifications, or fitness for office.
- The communication does not refer to an election, voters or the voting public, or anyone's candidacy.

If this criteria-based approach is adopted, should any of the criteria be eliminated from, or added to, the list? If adopted, should the regulation provide that a communication must meet all of the criteria on the list to qualify for the safe harbor exemption or should the regulation follow a more flexible approach and provide that a communication may meet some but not necessarily all of the criteria on the list and still qualify for the exemption? Should satisfaction of one or more specific criteria on the list,

by itself, be sufficient to qualify for the exemption? By contrast, should any one or more criteria be critical to the analysis such that failure to meet these criteria would prohibit an organization from taking advantage of the safe harbor?

The Commission seeks comment as to whether Alternative 4 should incorporate a time period limitation, such as a specific number of days before an election. If so, should this time period be 120 days before an election or should a different time frame be adopted? The Commission invites commenters to submit supporting empirical data. The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 4 would be either underinclusive or overinclusive.

Alternative 5 – Eliminate the time restriction from 11 CFR 109.21(c)(4) for political committees only

Alternative 5 would adopt a bifurcated test under which application of the 120-day time frame would depend on the identity of the person paying for the public communication. If a registered political committee, or an organization that is required to register as a political committee, pays for a public communication that refers to a political party or a clearly identified Federal candidate and the public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more of the candidates of the political party appear on the ballot, then that public communication would be deemed as a matter of law to have been made for the purpose of influencing a Federal election. Such a public communication, when paid for by a political committee, would be deemed to have been made for the purpose of influencing a Federal election regardless of when it is distributed, because a political

1 committee is an organization whose major purpose is to influence elections.[14]
2 Alternatively, should the time frame be eliminated only for public communications that
3 are paid for by registered political committees or organizations that are required to
4 register as political committees if the communication PASOs a political party or a clearly
5 identified Federal candidate?

6 Under Alternative 5, if the person paying for the public communication is not a
7 registered political committee or an organization that is required to register as a political
8 committee, then the public communication would satisfy the content standard at 11 CFR
9 109.21(c)(4) only if it occurs 120 days or fewer before an election or during whatever
10 other time frame might be adopted. Are there data to justify the 120-day window? Do
11 the data support another time frame?

12 The Commission seeks comment on how such a bifurcated test would apply to
13 other entities, such as non-Federal candidates and their campaign organizations. The
14 Commission further seeks comment on how such a bifurcated test should apply to entities
15 organized under section 527 of the Internal Revenue Code that are not registered with the
16 Commission as political committees. The Commission also seeks comment on the effect
17 that this alternative approach would have on a candidate who has contacts that meet the
18 conduct standard with an organization that is not registered as a political committee. If
19 that organization is subsequently found to have inappropriately failed to register as a
20 political committee based on activity that was not known to the candidate, should the

[14] The Act defines a "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" aggregating in excess of $1,000 during a calendar year. 2 U.S.C. 431(4)(A). See also 11 CFR 100.5. In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court, in order to avoid vagueness, narrowed the Act's references to "political committee" to prevent their "reach [to] groups engaged purely in issue discussion." 424 U.S. at 79. The Court concluded that "[t]o fulfill the purpose of the Act [the words 'political committee'] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." Id.

1 Commission provide in the regulation that the candidate would not be deemed to have
2 accepted an in-kind contribution from the organization?
3 In addition, the Commission invites commenters to provide examples of
4 communications from previous election cycles to show whether Alternative 5 would be
5 either underinclusive or overinclusive.
6 Alternative 6 – Replace the fourth content standard in 11 CFR 109.21(c)(4) with a
7 standard covering public communications made for the purpose of influencing a Federal
8 election
9 Alternative 6 would replace the fourth content standard in 11 CFR 109.21(c)(4)
10 with a new standard that would closely track the statute and simply require a
11 communication to be a public communication made for the purpose of influencing a
12 Federal election. The effect of adopting Alternative 6 would be to restrict some public
13 communications that are not covered by current 11 CFR 109.21(c)(4), i.e.,
14 communications that are made for the purpose of influencing a Federal election but that
15 are either: (1) made more than 120 days before an election, or (2) made at any time and
16 do not refer to a political party or a clearly identified Federal candidate. In addition,
17 Alternative 6 would exclude from regulation some communications that are covered by
18 current 11 CFR 109.21(c)(4), i.e., communications that are made within 120 days of an
19 election and that do refer to a political party or a clearly identified Federal candidate but
20 that are not made for the purpose of influencing a Federal election.
21 Whether a given public communication is for the purpose of influencing a Federal
22 election would depend on the facts and would be decided on a case-by-case basis. This is
23 the approach some Commissioners used before 2002 when the Commission adopted a

1 content prong for its coordinated communication regulations. Under such a case-by-case
2 approach, some public communications would be treated as having been made for the
3 purpose of influencing a Federal election, even though no Federal candidate or political
4 party is referenced in the communication, and regardless of how far in advance of an
5 election such a communication is made. This approach would result in some public
6 communications being restricted as coordinated communications without having to meet
7 a content standard defined in the Commission's regulations. The Commission seeks
8 comment on whether such a case-by-case approach is appropriate and whether it would
9 provide sufficient guidance to candidates, their authorized committees, political party
10 committees, and outside organizations. Would such a standard have the potential to be
11 unconstitutionally vague in practical application? Or, conversely, would such a standard
12 "provide explicit standards for those who apply them and give the person of ordinary
13 intelligence a reasonable opportunity to know what is prohibited"? McConnell, 540 U.S.
14 at 170 n.64 (quoting Grayned, 408 U.S. at 108-109); compare Buckley v. Valeo, 424 U.S.
15 1, 24, n. 24, 46-47, n. 53, 78 (Payments for media advertisements "controlled by or
16 coordinated with the candidate" are treated as contributions, and "for the purpose of
17 influencing" phrase "presents fewer problems in connection with the definition of a
18 contribution because of the limiting connotation created by the general understanding of
19 what constitutes a political contribution."). The Commission also invites commenters to
20 provide examples of communications from previous election cycles to show whether
21 Alternative 6 would be either underinclusive or overinclusive.

1 Alternative 7 – Eliminate the content prong in 11 CFR 109.21(c) and replace it with the
2 requirement that the communication be a public communication as defined in 11 CFR
3 100.26

4 Alternative 7 would eliminate the entire content prong in 11 CFR 109.21(c), and
5 would replace it with the requirement that the communication be a public communication
6 as defined in 11 CFR 100.26.[15] Alternative 7 would also make some conforming
7 amendments. Alternative 7 would be based on the assumption that if an organization or
8 individual works with a candidate or a political party in making a public communication,
9 then the communication inherently has value to the political entity it is coordinated with,
10 regardless of timing or content. Accordingly, in Alternative 7, any public communication
11 that satisfies the conduct prong of the coordinated communication test at 11 CFR
12 109.21(d) would be deemed to have been made for the purpose of influencing a Federal
13 election and thus be a "coordinated communication," regardless of whether it refers to a
14 clearly identified Federal candidate or political party and regardless of when or to whom
15 the communication is distributed.

16 The Commission notes that, even though Alternative 7 would eliminate the entire
17 content prong, it would nonetheless comply with the statutory requirement that
18 disbursements for coordinated electioneering communications be in-kind contributions to
19 the candidate supported by them and with the congressional mandate that the
20 Commission's coordination rules address the "republication of campaign materials."
21 Specifically, under Alternative 7, all public communications (including electioneering
22 communications and communications that republish campaign materials) would be
23 coordinated communications as long as they satisfy the conduct prong.

[15] See note 3 above.

1 The Commission seeks comment on whether the conduct prong by itself, without
2 any content prong, would be effective in distinguishing between public communications
3 made for the purpose of influencing a Federal election and public communications made
4 for other purposes, such as public communications made for the purpose of lobbying for
5 or against certain legislation, or for supporting charitable or other non-political causes.
6 Assuming that it is true that a candidate or political party would not coordinate with an
7 outside organization or individual if the resulting communication did not have value for
8 the candidate or political party, does such value necessarily consist of influencing the
9 candidate's election or the election of a political party's candidates? Would the conduct
10 prong by itself, without any content prong, have the potential to be unconstitutionally
11 vague in practical application? Or, conversely, would such a regulation "provide explicit
12 standards for those who apply them and give the person of ordinary intelligence a
13 reasonable opportunity to know what is prohibited"? McConnell, 540 U.S. at 170 n.64
14 (quoting Grayned, 408 U.S. at 108-109). The Commission also invites commenters to
15 provide examples of communications from previous election cycles to show whether
16 Alternative 7 would be either underinclusive or overinclusive.

17 **IV. Other Issues Regarding the Content Prong**

18 The Commission also seeks comment on the following related issues.

19 1. The "directed to voters" requirement in 11 CFR 109.21(c)(4)(iii)

20 In the event that the Commission decides to retain a content prong, the
21 Commission seeks comment on modifying the requirement in the fourth content standard
22 that a public communication must be directed to voters in the jurisdiction of the clearly
23 identified candidate or to voters in a jurisdiction in which one or more candidates of the

political party appear on the ballot. See 11 CFR 109.21(c)(4)(iii). While the Act and Commission regulations defining "electioneering communications" require that 50,000 or more persons be able to receive the communication in the relevant geographic area, the fourth content standard does not specify how many persons must be able to receive a communication for it to be classified as a coordinated communication. See 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29(b)(3)(ii)(A) and (b)(5). Should 109.21(c)(4)(iii) be deemed satisfied if any person in the relevant geographic area can receive the communication? Should 11 CFR 109.21(c)(4)(iii) be changed to specify a minimum number of persons that must be able to receive the communication? If so, what should the required minimum number of persons be? Has the current regulation without a required minimum number presented any difficulties to, or created any confusion for, those seeking to comply with it?

The Commission notes that the fourth content standard applies to "public communications," and thus to communications made by means of newspapers, magazines, periodicals, billboards, mass mailing, and telephone banks. See 11 CFR 100.26. Is it appropriate to set a minimum for the "directed to voters" requirement that would exclude small and medium sized publications? If so, should the minimum number be based on the number of copies distributed or on estimates of the number of readers reached by the publications? Similarly, the definition of "public communication" includes limited communications, such as 501 pieces of mail or 501 telephone calls of an identical or substantially similar nature. See 2 U.S.C. 431(23) and (24); 11 CFR 100.26, 100.27, 100.29. Would it be appropriate to exclude such limited mass mailings or

1 telephone banks from the "directed to voters" requirement as de minimis even though
2 they come within the Commission's definition of "public communication"?
3 Under the current rules, the second and third content standards (i.e., the
4 republication of campaign material and the express advocacy standards) do not contain a
5 "directed to voters" requirement. Are communications that satisfy these standards so
6 clearly made for the purpose of influencing a Federal election that a "directed to voters"
7 requirement is unnecessary? In the alternative, should such a requirement be added to
8 these two content standards as well?
9 The Commission also seeks comment on whether to exempt from the
10 coordination regulations communications that are distributed in the jurisdiction of a
11 clearly identified congressional candidate when such distribution is part of, and incidental
12 to, a larger advertising campaign. For example, an advertisement distributed nationally
13 on cable television that refers to a U.S. Representative seeking reelection as one of
14 several sponsors of a piece of legislation will presumably reach voters in the U.S.
15 Representative's district. In such a case, the voters in the U.S. Representative's district
16 would be reached only incidentally as part of the larger lobbying campaign. Would an
17 exemption for communications that reach voters in the jurisdiction of the clearly
18 identified congressional candidate only incidentally provide a reliable way of
19 distinguishing communications that are made for the purpose of influencing a Federal
20 election from lobbying or issue advocacy communications? Would such a standard be
21 sufficiently clear to provide persons with prior notice of the types of communications that
22 are affected? For such a standard to provide effective prior notice, must the Commission
23 specify how many viewers are "incidental"? In the alternative, should the Commission

1 define "incidental" in terms of a certain ratio between the number of persons who can
2 receive the communication in the State or district of the clearly identified Senate or
3 House candidate and the number of persons who can receive the communication outside
4 that State or district? Should such an exemption be limited to public communications
5 that are distributed nationwide? The Commission also invites comment on whether the
6 regulations should provide that such an exemption would apply only if a communication
7 does not PASO the clearly identified candidate.

8 2. Federal candidate endorsements of, and solicitations of funds for, other Federal or non-
9 Federal candidates or State ballot initiatives

10 The Commission invites comment regarding the application of the coordinated
11 communication test to situations in which Federal candidates endorse, or solicit funds for,
12 other Federal and non-Federal candidates or State ballot initiatives. In Advisory Opinion
13 2004-01, the Commission considered a television advertisement that featured President
14 Bush endorsing a congressional candidate. The advertisement was publicly distributed
15 within 120 days of the Presidential primary in the State in which the advertisement aired.
16 The Commission concluded that the "material involvement" conduct standard in 11 CFR
17 109.21(d)(2) was satisfied because the President's agents "review[ed] the final script in
18 advance of the President's appearance in the advertisements for legal compliance, factual
19 accuracy, quality, consistency with the President's position and any content that distracts
20 from or distorts the 'endorsement' message that the President wishes to convey."[16]

[16] The Commission further determined that, for advertisements distributed within 120 days of the Presidential primary in the State in which the advertisement aired, the advertisements' production and distribution costs paid for by the congressional candidate's committee but attributable to the President's authorized committee were contributions to the President's committee by the congressional candidate's committee, but that no contribution would result if the President's committee reimbursed the congressional candidate's committee for its attributable share of the costs.

1 Advisory Opinion 2004-01. Similarly, in Advisory Opinion 2003-25, the Commission
2 considered an advertisement featuring a U.S. Senator's endorsement of a candidate for
3 mayor. In that opinion, the Commission determined that it was highly implausible that a
4 Federal candidate would appear in a communication endorsing a local candidate without
5 being materially involved in one or more of the decisions listed in the "material
6 involvement" conduct standard.

7 The Commission seeks comment on whether to exempt from the coordinated
8 communication rules a Federal candidate's appearance or use of a candidate's name in a
9 communication to endorse other Federal or non-Federal candidates. Do such
10 endorsements benefit the endorsing candidate? The Commission also invites comment
11 on whether any such exemption should be limited to communications that do not PASO
12 the endorsing candidate. Does the fact that the endorsing candidate appears in the
13 communication inevitably promote the endorsing candidate?

14 Similarly, the Commission seeks comment on whether to exempt from the
15 coordinated communication rules a Federal candidate's appearance in a communication
16 that solicits funds for other Federal or non-Federal candidates, party committees, political
17 action committees, or other political committees. Do such solicitations benefit the
18 candidate who makes them? The Commission also invites comment on whether any such
19 exemption should be limited to communications that do not PASO the soliciting
20 candidate, or, in the alternative, do not expressly advocate the election or defeat of the
21 soliciting candidate.

1 The Commission also seeks comment on whether a similar exemption from the
2 coordinated communication rules should also apply to a Federal candidate's appearance
3 in communications that endorse, or solicit funds for, State ballot initiatives.

4 3. Proposed clarification of application of 120-day time frame requirement in 11 CFR
5 109.21(c)(4)(ii)

6 Advisory Opinion 2004-01, discussed above, concerned President Bush's
7 appearance in a television advertisement paid for by a congressional candidate where
8 President Bush endorsed that congressional candidate. The Commission determined that
9 any airing of the advertisement that occurred more than 120 days before the Presidential
10 primary in the State in which the advertisement aired was not be an in-kind contribution
11 to President Bush because it did not satisfy the fourth content standard (i.e., 11 CFR
12 109.21(c)(4)). In making this determination, the Commission looked at whether the
13 communication was aired within 120 days before the non-paying candidate's (i.e.,
14 President Bush's) election rather than whether it was aired within 120 days before the
15 paying congressional candidate's election. The regulatory text for Alternative 1 reflects
16 the Commission's proposal to amend its coordinated communication rules to incorporate
17 the approach taken in Advisory Opinion 2004-01 and to make clear that the time frame
18 applies only to the election of a Federal candidate who is clearly identified and who has
19 not paid for the communication.

20 This alteration would clarify that no in-kind contribution is made under the
21 coordinated communications regulations to a candidate for Federal office who is referred
22 to in a public communication if the referenced candidate will not appear as a Federal
23 candidate on a ballot within 120 days of the distribution of the communication. See

1 Advisory Opinion 2005-18, Concurring Opinion of Chairman Thomas, Vice Chairman
2 Toner, Commissioners Mason, McDonald, and Weintraub.
3 For example, a Senator whose reelection is not until 2008 appears in an
4 advertisement with a 2006 House candidate. The advertisement is aired within 120 days
5 of the House candidate's election, is paid for by the House candidate's campaign
6 committee, and is aired in the State where the Senator will seek reelection in 2008. This
7 advertisement would not be an in-kind contribution to the Senator because the
8 advertisement was not aired within 120 days of the Senator's 2008 election.
9 The Commission seeks comment on whether the proposed language properly
10 effectuates this clarification.
11 **V. Issues Regarding the Conduct Prong**
12 The conduct prong of the Commission's coordinated communication regulations
13 was not challenged in Shays v. FEC. Nonetheless, the Commission is taking this
14 opportunity to evaluate how certain aspects of the conduct prong work in practice.
15 1. The "request or suggest" conduct standard in 11 CFR 109.21(d)(1)
16 The first conduct standard of the coordinated communications test is satisfied if a
17 communication is created, produced or distributed at the request or suggestion of a
18 candidate, a candidate's authorized committee, or a political party committee, or their
19 agents. See 11 CFR 109.21(d)(1). The Commission invites comment on whether, even if
20 the Commission decides to retain the content prong of the coordinated communication
21 test, it should provide that if the first conduct standard is satisfied, the communication
22 would automatically qualify as a coordinated communication without also having to
23 satisfy any of the standards contained in the content prong. If a public communication is

1 made at the request or suggestion of a candidate or a political party, then does that
2 communication presumptively have value to the political entity that it was coordinated
3 with, regardless of timing or content? Would such a proposal capture communications
4 that are not made for the purpose of influencing elections? Are there examples of public
5 communications, such as lobbying communications or communications supporting
6 charitable or other non-political causes, that are made at the "request or suggestion" of a
7 Federal candidate but that do not have value for the candidate's campaign?

8 2. The "common vendor" and "former employee" conduct standards in 11 CFR
9 109.21(d)(4) and (5)

10 The fourth standard of the conduct prong of the coordinated communication rules
11 involves common vendors, and the fifth standard involves former employees. See 11
12 CFR 109.21(d)(4) and (5). The Commission intended these standards to implement
13 Congress's requirement in BCRA that the Commission address "the use of a common
14 vendor" and "persons who previously served as an employee of a candidate or a political
15 party committee" in the context of coordination. BCRA, Pub. L. No. 107-55, sec.
16 214(c)(2) and (3) (2002).

17 The "common vendor" conduct standard is satisfied if (1) the person paying for
18 the communication contracts with, or employs, a "commercial vendor" to create,
19 produce, or distribute the communication, (2) the commercial vendor has a previous or
20 current relationship with the political party committee or the clearly identified candidate
21 referred to in the communication that puts the commercial vendor in a position to acquire
22 material information about the plans, projects, activities, or needs of the candidate or
23 political party committee, and (3) the commercial vendor uses or conveys material

1 information to the person paying for the communication about the plans, projects,
2 activities, or needs of the candidate or political party committee, or material information
3 used by the commercial vendor in serving the candidate or political party committee.
4 See 11 CFR 109.21(d)(4).

5 The "former employee" conduct standard is satisfied if (1) the person paying for
6 the communication was, or is employing a person who was an employee of the candidate
7 or the political party committee clearly identified in the communication, and (2) the
8 former employee uses or conveys material information to the person paying for the
9 communication about the plans, projects, activities, or needs of the candidate or political
10 party committee, or material information used by the former employee in serving the
11 candidate or political party committee. See 11 CFR 109.21(d)(5).

12 The first three conduct standards in 11 CFR 109.21(d)(1)-(3) are satisfied only if
13 either the principals themselves (i.e., candidates, their authorized committees, or political
14 party committees) or their agents coordinate with the person paying for the
15 communication.[17] However, because commercial vendors and former employees might
16 not be agents of a candidate or a political party committee at the time they use or convey
17 material information to a person paying for a communication, the "common vendor" and
18 the "former employee" conduct standards can be satisfied by persons other than the
19 principals themselves or their agents. The Commission seeks comment on whether it

[17] The first conduct standard addresses communications produced at the request or suggestion of a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing. See 11 CFR 109.21(d)(1). The second conduct standard addresses communications with which a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing has been materially involved. See 11 CFR 109.21(d)(2). The third conduct standard addresses communications produced after one or more substantial discussions between the person paying for the communication, or that person's employees or agents, and the candidate clearly identified in the communication, the candidate's authorized committee, the candidate's opponent, or the opponent's authorized committee, or an agent of any of the foregoing. See 11 CFR 109.21(d)(3).

1 should change the coordinated communication regulations to cover common vendors and
2 former employees only if these common vendors and former employees are agents under
3 the Commission's definition of agent in 11 CFR 109.3.[18] Does the Commission have
4 authority under the Act to make this change? If the Commission does make this change,
5 would such agents then be covered by the first three conduct standards in 11 CFR
6 109.21(d)(1)-(3) or would the "common vendor" and the "former employee" conduct
7 standards still cover some activities not captured by the first three conduct standards? If
8 the Commission revises the common vendor and former employee conduct standards to
9 cover only common vendors and former employees who are also agents, would that
10 render these two conduct standards superfluous? If so, should the Commission then
11 eliminate the conduct standards in 11 CFR 109.21(d)(4) and (5)? Given that BCRA
12 specifically required the Commission to promulgate regulations that addressed payments
13 for the use of common vendors and for communications directed or made by persons who
14 previously served as employees of a candidate or political party, does the Commission
15 have authority under the Act to eliminate 11 CFR 109.21(d)(4) and (5)?

16 In the rulemaking proceeding that resulted in the 2002 Coordination Final Rules,
17 the Commission received many comments on the common vendor conduct standard.
18 Some of the comments expressed concern about the potential liability that would attach

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[18] The definition of "agent" includes any person who has actual authority "to make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c)" on behalf of a political party committee or a Federal candidate or officeholder. See 11 CFR 109.3(a)(2) and (b)(2). For reasons unrelated to the issues addressed in this rulemaking, the Shays District court held that the Commission's definition of agent at 11 CFR 109.3 violated APA requirements and remanded the regulation to the Commission for action consistent with its decision. Shays District at 88. In order to comply with the Shays District decision, the Commission has issued an NPRM that sought comment on whether the Commission should retain the current definition of "agent" and on several alternatives for revising the definition. See Notice of Proposed Rulemaking on the Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 70 FR 5382 (Feb. 2, 2005). The Commission has not yet issued final rules in this rulemaking.

under the common vendor standard to candidates and party committees who employ the same vendors as other candidates and party committees because of the limited number of qualified vendors in a given geographic area.

The Commission addressed this and other concerns in the 2002 Coordination Final Rules by limiting the common vendor conduct standard to commercial vendors whose usual and normal business includes the creation, production, or distribution of communications; who have provided certain enumerated services to a candidate or party committee that put the vendor in a position to acquire information about the plans, projects, activities or needs of the candidate or party committee material to the creation, production, or distribution of the communication; who provide the specified services during the current election cycle; and who use or convey information about the candidate's or party committee's campaign plans, projects, activities or needs that is material to the creation, production, or distribution of the communication. See 68 FR 436-37. The Commission also excluded lobbying activities and information not related to a campaign from the scope of the rule.

The Commission stated that it did not anticipate that a person who hired a vendor and followed prudent business practices would be inconvenienced by the common vendor conduct standard. See id. at 437. The Commission now invites comments on whether this supposition has proven to be correct.

The Commission also seeks comment on whether it should create a rebuttable presumption that a common vendor or former employee has not engaged in coordinated conduct under 11 CFR 109.21(d)(4) and (5), if the common vendor or former employee has taken certain specified actions, such as the use of so-called "firewalls," to ensure that

1 no material information about the plans, projects, activities, or needs of a candidate or
2 political party committee is used or conveyed to a third party. The Commission
3 considered and rejected proposals to establish rebuttable presumptions and safe harbors
4 in the common vendor conduct standard in the 2002 Coordination Final Rules. See id.
5 More recently, however, the Commission recognized in the context of the first three
6 conduct standards (11 CFR 109.21(d)(1)-(3)) that the presence of a firewall between staff
7 assigned by a political committee to work directly with a candidate and staff assigned by
8 the political committee to work on advertisements supporting that candidate was
9 sufficient to refute certain allegations of coordination in a particular case. See Matter
10 Under Review ("MUR") 5506, First General Counsel's Report at 5-8 (Commission found
11 no reason to believe EMILY's List had violated section 441a of the Act based, in part, on
12 a representation by EMILY's List that it had created a firewall whereby employees,
13 volunteers, and consultants who handle advertising buys are "barred, as a matter of
14 policy, from interacting with Federal candidates, political party committees, or agents of
15 the foregoing. The employees, volunteers and consultants are also barred from
16 interacting with others within EMILY's List regarding specified candidates or
17 officeholders.").
18 If the Commission decides to establish a rebuttable presumption or safe harbor in
19 the common vendor and former employee conduct standards, what factors should the
20 Commission consider in determining whether an effective firewall exists? Is the role of a
21 firewall best addressed on a case-by-case basis through the enforcement process? Aside
22 from setting up firewalls, are there other actions by a common vendor, former employee,

1 or the political committees that engage them that the Commission should consider a safe

2 harbor?

3 The common vendor conduct standard and the former employee conduct standard

4 incorporate the current election cycle[19] as a temporal limit on their application. See 11

5 CFR 109.21(d)(4)(ii), (d)(5)(i). In the 2002 Coordination Final Rules, the Commission

6 explained that "[t]he election cycle provides a clearly defined period of time that is

7 reasonably related to an election." 2002 Coordination Final Rules at 436. The

8 Commission invites comments on how this temporal limit works in practice. Is

9 information about a candidate's campaign plans, products, activities, or needs of such an

10 ephemeral nature that its strategic significance dissipates shortly after the information is

11 communicated, which may be long before the end of the election cycle, or does the

12 information remain relevant throughout the election cycle? If the Commission concludes

13 that the strategic value of such information does not necessarily last throughout an entire

14 election cycle, should the Commission change the common vendor and former employee

15 conduct standards to cover a shorter time frame? If so, how long should such a time

16 frame be? Should the Commission adopt a 60-day time frame based on the

17 Commission's determination, underlying its longstanding rule with respect to polling

18 results, that such information outside of the 60-day time frame is of very little value?[20]

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[19] The term "election cycle" is defined in 11 CFR 100.3(b).

[20] The Commission's regulations on allocation of polling expenses at 11 CFR 106.4(g) provide that a candidate or political committee that receives poll results from a third party who commissioned and paid for the poll may report the value of the in-kind contribution as an allocated percentage of the original cost of the poll, so long as the candidate or political committee received the poll results more than 15 days after the initial recipient received such results. Section 106.4(g) of the Commission's rules provides three tiers of discounted allocation based on how long the gap is between the original receipt of poll results and their receipt by a candidate or political committee – poll results received by a candidate or political committee between 16 and 60 days following receipt by the initial recipient may be allocated at 50 percent of the original cost; between 61 and 180 days the allocation is at 5 percent of original cost; beyond 180 days, a candidate or political committee need not allocate any amount.

1 Alternatively, does the Commission's experience with the polling regulations provide
2 evidence that the Commission should adopt a 180-day window for its coordination
3 regulations? Alternatively, would retention of the election cycle time frame in the current
4 rule more accurately align the rule with existing campaign practices?
5 3. The use of publicly available information in "coordinated communications" – proposed
6 11 CFR 109.21(g)
7 The Commission seeks comment on whether to create a safe harbor that would
8 make clear as a matter of law that (1) the use of publicly available information in
9 connection with a public communication by any person paying for that public
10 communication does not satisfy any of the conduct standards, and (2) a candidate's or
11 political party committee's conveyance of publicly available information to any person
12 paying for a public communication does not satisfy any of the conduct standards. This
13 safe harbor in proposed 11 CFR 109.21(g) would cover situations in which a candidate,
14 authorized committee, or political party committee has conveyed information publicly,
15 such as, for example, at a campaign rally or on the candidate's or party's website or in a
16 press release, or where such information is otherwise publicly available, such as having
17 appeared in newspaper, television, or other press reports. Should such a safe harbor also
18 cover situations in which the person paying for the communication has received the
19 information both from the candidate, authorized committee, or political party committee,
20 in a non-public context and also from a public source? How should the rules treat a
21 situation in which the person paying for the communication did, in fact, receive the
22 information only from the candidate, authorized committee, or political party committee,
23 but could also have obtained the same information from a public source?

1 The Commission also seeks comment on whether, if it adopts this safe harbor for
2 the use of publicly available information, the burden of establishing whether the
3 information was publicly available should be on the Commission or on the party seeking
4 to make use of the safe harbor. If that burden were on the Commission, how would the
5 Commission be able to establish that the information was not publicly available at the
6 relevant time, given that some information, especially information available through the
7 Internet, may be in the public domain only for a limited time period?

8 4. Relationship Between Conduct and Content Standards

9 If the Commission broadens or eliminates the content standard for coordinated
10 communications, the Commission seeks comment on whether it would be appropriate to
11 narrow or otherwise modify any of the conduct standards. Are the conduct and content
12 standards properly understood as dynamic and working in conjunction with each other?

13 **VI. Party Coordinated Communications (11 CFR 109.37)**

14 The Commission notes that its "party coordinated communication" regulation at
15 11 CFR 109.37 also contains a three-prong test for determining whether a communication
16 is coordinated between a candidate and a political party committee. Although not
17 addressed in the Shays cases, the "party coordinated communication" test in 11 CFR
18 109.37 has a content prong that is substantially the same as the one for "coordinated
19 communications" in 11 CFR 109.21(c).[21] See 11 CFR 109.37(a)(2). If the Commission
20 decides to revise current 11 CFR 109.21 as described in the alternatives set forth above,

[21] 11 CFR 109.37(a)(2) differs from 11 CFR 109.21(c) in two ways: first, it does not contain a separate content standard for electioneering communications and, second, the content standard in section 109.37(a)(2)(iii), the equivalent of the fourth content standard in section 109.21(c)(4), can be satisfied only by reference to a clearly identified Federal candidate and not, as in section 109.21(c)(4), also by reference to a political party.

1 the Commission seeks comment on whether it should make conforming changes to the
2 party coordinated communication regulations in 11 CFR 109.37.
3 In addressing the conduct of national party officers under the national party soft
4 money ban at 2 U.S.C. 441i(a), the Supreme Court stated, "[n]othing on the face of
5 [section 441i(a)] prohibits national party officers, whether acting in their official or
6 individual capacities, from sitting down with state and local party committees or
7 candidates to plan and advise how to raise and spend soft money. As long as the national
8 party officer does not personally spend, receive, direct, or solicit soft money, [section
9 441i(a)] permits a wide range of joint planning and electioneering activity." McConnell,
10 540 U.S. at 160 (citing to Brief for Intervenor-Defendants Sen. John McCain et al. in No.
11 02-1674 et al., p. 22, which stated that "BCRA leaves parties and candidates free to
12 coordinate campaign plans and activities, political messages, and fund raising goals with
13 one another"); see also Advisory Opinion 2005-02 (incorporating such principles). The
14 Commission seeks comment on the relevance, if any, of this statement to the
15 Commission's coordinated communication regulations. Does McConnell render the
16 application of the conduct standards to coordination between a candidate and a political
17 party committee at 11 CFR 109.37(a)(3) obsolete? Does it preclude a finding of
18 coordination under the material involvement prong at 11 CFR 109.21(d)(2)? Does the
19 relationship between national party candidates and their parties justify adopting more
20 permissive conduct standards for "party coordinated communications" in 11 CFR 109.37
21 than for coordinated communications in 11 CFR 109.21? If so, how should the conduct
22 standards for "party coordinated communications" be amended?
23

1 **Certification of No Effect Pursuant to 5 U.S.C. § 605(b)**

2 **[Regulatory Flexibility Act]**

3

4 The Commission certifies that the attached proposed rules, if promulgated, would

5 not have a significant economic impact on a substantial number of small entities. The

6 basis for this certification is that any individuals and not-for-profit entities that would be

7 affected by these proposed rules would not be "small entities" under 5 U.S.C. 601. The

8 definition of "small entity" does not include individuals, but classifies a not-for-profit

9 enterprise as a "small organization" if it is independently owned and operated and not

10 dominant in its field. 5 U.S.C. 601(4).

11 Moreover, any State, district, and local party committees that would be affected

12 by these proposed rules would be not-for-profit committees that do not meet the

13 definition of "small organization." State political party committees are not independently

14 owned and operated because they are not financed and controlled by a small identifiable

15 group of individuals, and they are affiliated with the larger national political party

16 organizations. In addition, the State political party committees representing the

17 Democratic and Republican parties have a major controlling influence within the political

18 arena of their State and are thus dominant in their field. District and local party

19 committees are generally considered affiliated with the State committees and need not be

20 considered separately.

21 Furthermore, any separate segregated funds that would be affected by these

22 proposed rules would be not-for-profit political committees that do not meet the

23 definition of "small organization" because they are financed by a combination of

24 individual contributions and financial support for certain expenses from corporations,

1 labor organizations, membership organizations, or trade associations, and therefore are
2 not independently owned and operated.

3 Most of the other political committees that would be affected by these proposed
4 rules would be not-for-profit committees that do not meet the definition of "small
5 organization." Most political committees are not independently owned and operated
6 because they are not financed by a small identifiable group of individuals. In addition,
7 most political committees rely on contributions from a large number of individuals to
8 fund the committees' operations and activities.

9 To the extent that any State party committees representing minor political parties
10 or any other political committees might be considered "small organizations," the number
11 that would be affected by this proposed rule would not be substantial, particularly the
12 number that would coordinate expenditures with candidates or political party committees
13 in connection with a Federal election. Accordingly, to the extent that any other entities
14 may fall within the definition of "small entities," any economic impact of complying with
15 these rules would not be significant.

16 With respect to commercial vendors whose clients include political party
17 committees or other political committees, the proposed rules consider ways to reduce the
18 existing regulatory restrictions. Thus, rather than adding an economic burden, the
19 proposed rules would potentially have a beneficial economic impact on such commercial
20 vendors.

21 **List of Subjects**

22 <u>11 CFR Part 109</u>

23 Elections, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend 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. 107-55 Sec. 214(c))

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

Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L. 107-55, 116 Stat. 81.

ALTERNATIVE 1

2. Section 109.21(c) would be amended by revising paragraphs (1) and (4) to read as follows:

§ 109.21 What is a "coordinated communication"?

* * * * *

(c) Content standards. Each of the types of content described in paragraphs (c)(1) through (c)(4) satisfies the content standard of this section.

(1) A~~ communication that is a~~n electioneering communication under 11 CFR 100.29.

(2) A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.

(3) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(4) A ~~communication that is a~~ public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section is~~are~~ true. Payment for a public communication that otherwise satisfies paragraphs (c)(4)(i), (ii), and (iii) of this section is not an in-kind contribution to a candidate if the public communication is not publicly distributed or otherwise publicly disseminated 120 days or fewer before that candidate's own election.

(i) The public 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 voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

* * * * *

ALTERNATIVE 3

3. Section 109.21 would be amended by revising paragraphs (c)(4) to read as follows:

§ 109.21 What is a "coordinated communication"?

*   *   *   *   *

(c)   *   *   *

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

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

~~(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~~

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

*   *   *   *   *

ALTERNATIVE 4

4. Section 109.21 would be amended by revising paragraph (c)(4) to read as follows:

§ 109.21 What is a "coordinated communication"?

* * * * *

(c) * * *

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

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

(ii) The public communication promotes, supports, attacks, or opposes or the political party or clearly identified candidate for Federal office; and~~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 voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

* * * * *

1 ALTERNATIVE 5

2 5. Section 109.21 would be amended revising the introductory language for

3 paragraph (c) and by adding a new paragraph (c)(5) to read as follows:

4 **§ 109.21 What is a "coordinated communication"?**

5 * * * * *

6 (c) Content standards. Each of the types of content described in paragraphs (c)(1)

7 through (c)(45) satisfies the content standard of this section.

8 * * *

9 (5) A public communication, as defined in 11 CFR 100.26, and about which

10 each of the following statements in paragraphs (c)(5)(i), (ii), and (iii) of

11 this section is true.

12 (i) The public communication is made by a political committee, as

13 defined in 11 CFR 100.5;

14 (ii) The public communication refers to a political party or to a clearly

15 identified candidate for Federal office; and

16 (iii) The public communication is directed to voters in the jurisdiction

17 of the clearly identified candidate or to voters in a jurisdiction in

18 which one or more candidates of the political party appear on the

19 ballot.

20 * * * * *

21

<u>ALTERNATIVE 6</u>

6. Section 109.21 would be amended by revising paragraph (c)(4) to read as follows:

§ 109.21 What is a "coordinated communication"?

* * * * *

(c) * * *

(4) A ~~communication that is a~~ public communication, as defined in 11 CFR 100.26, <u>that is made for the purpose of influencing an election for Federal office</u>~~and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true.~~

~~(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 voters in a jurisdiction in which one or more candidates of the political party appear on the ballot~~.

* * * * *

ALTERNATIVE 7

7. Section 109.3 would be amended by revising paragraphs (a)(2) and (b)(2) to read as follows:

§ 109.3 Definitions.

*   *   *   *   *

(a)   *   *   *

(2) To make or authorize an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26~~that meets one or more of the content standards set forth in 11 CFR 109.21(c)~~.

*   *   *   *   *

(b)   *   *   *

(2) To make or authorize an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26~~that meets one or more of the content standards set forth in 11 CFR 109.21(c)~~.

*   *   *   *   *

8. Section 109.21 would be amended by revising paragraph (a)(2), by removing and reserving paragraph (c), and by revising the first sentence of paragraph (d)(6) to read as follows:

§ 109.21 What is a "coordinated communication"?

*   *   *   *   *

(a)   *   *   *

(2) Is an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26~~Satisfies at least one of the content standards in paragraph (c) of this section~~; and

* * * * *

(c) [Removed and reserved.]~~Content standards~~. ~~Each of the types of content described in paragraphs (c)(1) through (c)(4) satisfies the content standard of this section.~~

~~(1) A communication that is an electioneering communication under 11 CFR 100.29.~~

~~(2) A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.~~

~~(3) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.~~

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

~~(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,~~

1 ~~or runoff election, or 120 days or fewer before a primary or~~
2 ~~preference election, or a convention or caucus of a political party~~
3 ~~that has authority to nominate a candidate; and~~
4 ~~(iii) The public communication is directed to voters in the jurisdiction~~
5 ~~of the clearly identified candidate or to voters in a jurisdiction in which~~
6 ~~one or more candidates of the political party appear on the ballot.~~
7 (d) * * *
8 (6) Dissemination, distribution, or republication of campaign material. A
9 communication that disseminates, distributes, or republishes, in whole or
10 in part, campaign materials prepared by a candidate, the candidate's
11 authorized committee, or an agent of any of the foregoing, ~~satisfies the~~
12 ~~content standard of paragraph (c)(2) of this section or 11 CFR~~
13 ~~109.37(a)(2)(i)~~ shall ~~only~~ satisfy the conduct standards of paragraphs
14 (d)(1) through (d)(3) of this section only on the basis of conduct by the
15 candidate, the candidate's authorized committee, or the agents of any of
16 the foregoing, that occurs after the original preparation of the campaign
17 materials that are disseminated, distributed, or republished. * * *
18 * * * * *
19 9. Section 109.21 would be amended by adding a new paragraph (g) to read as
20 follows:
21 **§ 109.21 What is a "coordinated communication"?**
22 * * * * *
23 (g) Safe harbor for use of publicly available information.

1 (1) The use of publicly available information by any person paying for a

2 public communication in connection with a public communication does not

3 satisfy any of the conduct standards in paragraph (d) of this section.

4 (2) A candidate's or political party committee's conveyance of publicly

5 available information to any person paying for a public communication does not

6 satisfy any of the conduct standards in paragraph (d) of this section.

7

8

9 ____________________

10 Scott E. Thomas

11 Chairman

12 Federal Election Commission

13 DATED ____________

14 BILLING CODE: 6715-01-U