

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 100 and 109**

3 **Notice 2010-01**

4 **Coordinated Communications**

5 **AGENCY:** Federal Election Commission.

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

7 **SUMMARY:** The Federal Election Commission is issuing a Supplemental
8 Notice of Proposed Rulemaking for the Notice of Proposed
9 Rulemaking on Coordinated Communications published on
10 October 21, 2009 in order to elicit comments addressing the impact
11 of the Supreme Court's decision in Citizens United v. FEC. The
12 Commission is also announcing a public hearing on the proposed
13 rules regarding coordinated communications. No final decision
14 has been made by the Commission on the issues presented in this
15 rulemaking.

16 **DATES:** Comments must be received on or before February 24, 2010. The
17 hearing will be held on Tuesday and Wednesday, March 2 and 3,
18 2010 and will begin at 10:00 a.m. Anyone wishing to testify at the
19 hearing must file written comments by the due date and must
20 include a request to testify in the written comments. Any person
21 who requested to testify in written comments received by the
22 Commission prior to the deadline for the initial comment period
23 need not request to testify again.

1 **ADDRESSES:** All comments must be in writing, addressed to Ms. Amy L.
2 Rothstein, Assistant General Counsel, and submitted in either
3 electronic, facsimile or paper form. Commenters are strongly
4 encouraged to submit comments electronically to ensure timely
5 receipt and consideration. Electronic comments should be sent to
6 CoordinationShays3@fec.gov. If the electronic comments include
7 an attachment, the attachment must be in Adobe Acrobat (.pdf) or
8 Microsoft Word (.doc) format. Faxed comments should be sent to
9 (202) 219-3923, with paper follow-up. Paper comments and paper
10 follow-up of faxed comments should be sent to the Federal
11 Election Commission, 999 E Street, NW., Washington, D.C.
12 20463. All comments must include the full name and postal
13 service address of the commenter or they will not be considered.
14 The Commission will post comments on its website after the
15 comment period ends. The hearing will be held in the
16 Commission’s ninth floor meeting room, 999 E Street, NW.,
17 Washington, D.C.

18 **FOR FURTHER**
19 **INFORMATION**
20 **CONTACT:**

 Ms. Amy L. Rothstein, Assistant General Counsel, Ms. Jessica
21 Selinkoff, or Ms. Joanna Waldstreicher, Attorneys, 999 E Street,
22 NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

23 **SUPPLEMENTARY**
24 **INFORMATION:**

1 On October 21, 2009, the Commission published a Notice of Proposed
2 Rulemaking (“NPRM”) proposing possible changes to the “coordinated communication”
3 regulations at 11 CFR 109.21 in response to the decision of the Court of Appeals for the
4 District of Columbia Circuit in Shays v. FEC, 528 F.3d 914 (D.C. Cir. 2008) (“Shays III
5 Appeal”). See Notice of Proposed Rulemaking on Coordinated Communications, 74 FR
6 53893 (Oct. 21, 2009). The deadline for comments on the NPRM was January 19, 2010.
7 In the NPRM, the Commission stated that it would announce the date of a hearing at a
8 later date.

9 I. Extension of Comment Period

10 Two days after the close of the NPRM’s comment period, on January 21, 2010,
11 the Supreme Court issued its decision in Citizens United v. FEC, No. 08-205 (U.S. Jan.
12 21, 2010), available at http://www.fec.gov/law/litigation/cu_sc08_opinion.pdf. Citizens
13 United may raise issues relevant to the coordinated communications rulemaking.
14 Therefore, the Commission is re-opening the comment period for this rulemaking. The
15 Commission seeks additional comment as to the effect of the Citizens United decision on
16 the proposed rules, issues, and questions raised in the NPRM and in this Supplemental
17 Notice of Proposed Rulemaking (“SNPRM”).¹ Comments are due on or before February
18 24, 2010.

19 a. General Considerations

20 In response to Shays III Appeal, the Commission’s NPRM proposed four
21 alternatives for revising the content prong of the coordinated communications test, three
22 alternatives for revising the conduct prong of the coordinated communications test, two

¹ The Commission is reevaluating a number of other regulations in light of the Citizens United decision and intends to begin a separate rulemaking to address these other regulations. Commenters will have an opportunity to address these other issues at that time.

1 alternative definitions of “promote, support, attack, or oppose” (“PASO”), and two safe
2 harbors.

3 The Commission seeks comments on the effect of the Citizens United decision on
4 the Commission’s proposals in the NPRM. The Commission asks broadly whether
5 commenters believe Citizens United affects any aspect of the proposed rules and also
6 asks specific questions regarding certain aspects of the proposed rules.

7 In concluding that “independent expenditures, including those made by
8 corporations, do not give rise to corruption or the appearance of corruption,” the Court
9 explained that “[t]he absence of prearrangement and coordination of an expenditure with
10 the candidate or his agent not only undermines the value of the expenditure to the
11 candidate, but also alleviates the danger that expenditures will be given as a quid pro quo
12 for improper commitments from the candidate.” Citizens United, slip op. at 41-42
13 (quoting Buckley v. Valeo, 424 U.S. 1, 47 (1976)). Does this statement suggest the need
14 for a more robust coordination rule because the presence of prearrangement and
15 coordination may result in, or provide the opportunity for, quid pro quo corruption?

16 The Court further held that the governmental interest in “[l]aws that burden
17 political speech” is “limited to quid pro quo corruption,” and that “[i]ngratiation and
18 access, in any event, are not corruption.” Citizens United, slip op. at 43, 45. In light of
19 these statements in Citizens United, is one of the governmental interests asserted in Shays
20 III-Appeal for a stricter coordinated communications rule – *i.e.*, to prevent third-party
21 sponsors of communications from ingratiating themselves with Federal candidates (528
22 F.3d at 925) – still valid after Citizens United? Or, was the Court’s holding limited to the
23 independent expenditures that were at issue in Citizens United? Given that coordination

1 was not at issue in Citizens United, did the Court’s mention of coordination suggest, in
2 any way, that a different governmental interest would justify regulating non-party speech
3 that may be coordinated?

4 Now that Citizens United permits additional entities, such as public corporations
5 and labor organizations, to make independent expenditures, does the proposed rule on
6 coordinated communications adequately address those organizations?

7 b. Content Standards

8 The Commission seeks comment on the effect, if any, of the Citizens United
9 decision on the proposed content standards. What effect does the decision have on the
10 proposed Modified WRTL content standard, including the proposal’s “functional
11 equivalent of express advocacy” test? See, e.g., NPRM, 74 FR at 53902. Should any
12 parts of 11 CFR 114.15 be included in such a test, or is Section 114.15 simply
13 inapplicable after Citizens United? Does the “functional equivalent of express advocacy”
14 standard still provide a potentially useful coordinated communications content standard
15 to address the Shays III-Appeal court’s concerns? Should the Commission devise
16 alternative criteria for the Modified WRTL content standard, or does the Court’s
17 discussion of the Commission’s “two part, 11-factor balancing test to implement
18 WRTL’s ruling” indicate a general disapproval of such an approach? Citizens United,
19 slip op. at 18 (referring to FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007)
20 (“WRTL”). Are any additional criteria necessary at all, or should the Commission
21 simply rely on the Modified WRTL standard as articulated in the proposed rule text? Did
22 the Court’s application of the test to Hillary: The Movie demonstrate that the Court’s

1 “functional equivalent of express advocacy” standard is sufficiently workable without
2 further explanation?

3 Additionally, the Commission seeks further comment on the examples given in
4 the NPRM – both those in the proposed PASO definitions and those to which the
5 proposed PASO and Modified WRTL content standards may or may not apply – in light
6 of Citizens United. See Citizens United, slip op. at 3, 20-21, and 52-54; see also NPRM,
7 74 FR at 53903-04 and 53911-12. The Commission also seeks comment on the
8 application of the proposed content standard alternatives to the communications at issue
9 in Citizens United. See Citizens United, slip op. at 3, 52-54. What impact, if any, does
10 the Court’s conclusion that Hillary: The Movie is “the functional equivalent of express
11 advocacy” have on the Commission’s coordinated communications rules and in particular
12 to the application of the “express advocacy” content standard outside the 90/120-day
13 windows? Does the analysis change when the “functional equivalent of express
14 advocacy” is not being applied to a communication in order to strike down a speech
15 prohibition, as in Citizens United, but rather to restrict certain speech, as in the proposed
16 coordination rules? See, e.g., Citizens United, slip op. at 10 (“First Amendment
17 standards, however, ‘must give the benefit of any doubt to protecting rather than stifling
18 speech.’”) (quoting WRTL, 551 U.S. at 469). Is there anything in the opinion to suggest
19 that the Court intended its conclusion, that Hillary: The Movie is “the functional
20 equivalent of express advocacy” to apply only in limited contexts?

21 Are the proposed PASO definitions sufficiently clear and unambiguous so as not
22 to require “intricate case-by-case determinations” or to require prospective speakers to
23 seek guidance from the Commission as to whether their proposed speech would be

1 coordinated? Id. at 12. Do Citizens United and WRTL provide a constitutional limit on
2 the reach of the proposed PASO standard? Are any content standards broader than
3 express advocacy or its functional equivalent permissible after Citizens United, or are
4 these the only standards that the Court has concluded are sufficiently clear? In light of
5 the Supreme Court’s statements that the PASO components “give the person of ordinary
6 intelligence a reasonable opportunity to know what is prohibited,” McConnell v. FEC,
7 540 U.S. 93, 170 n.64 (2003), and that any rule must “eschew the open-ended rough-and-
8 tumble of factors,” Citizens United, slip op. at 19 (quoting WRTL, 551 U.S. at 469),
9 should the Commission adopt a PASO content standard without a definition? In the
10 absence of a definition, would the rule provide specific enough guidance to prospective
11 speakers? Would such a rule be enforceable by the Commission?

12 More generally, how should the Commission conduct investigations in
13 enforcement actions arising from allegations of coordination? Does the Court’s holding
14 in Citizens United that corporations have a First Amendment right to make independent
15 expenditures raise concerns about investigating potentially coordinated communications
16 that do not exist in other contexts? Would investigations to determine whether a
17 communication is independent or coordinated (and thus a contribution), chill protected
18 speech? To avoid such a risk, should the Commission require a heightened standard
19 (e.g., requiring more particularity or specificity) in any complaint alleging coordination
20 before opening an enforcement proceeding? Should such a heightened complaint
21 standard be adopted with, or regardless of, any revised content standard? Would such a
22 heightened complaint standard impair the Commission’s ability to investigate allegations
23 of contributions via coordination? Does anything in the Act (particularly 2 U.S.C.

1 437g(a)) authorize or preclude the Commission from adopting a heightened complaint
2 standard for coordination allegations? If the Commission may not require a heightened
3 complaint standard for coordination allegations, would that then preclude the application
4 of a broader content standard? Why?

5 c. Safe Harbors

6 Additionally, the NPRM proposes safe harbors that would exempt certain
7 communications sponsored by 501(c)(3) organizations or candidates' businesses from
8 being treated as coordinated. NPRM, 74 FR at 53907-53910. Are these proposed safe
9 harbors consistent with the Citizens United decision? See, e.g., slip op. at 24
10 (“Prohibited too, are restrictions distinguishing among different speakers, allowing
11 speech by some but not others.”). Should the proposed safe harbors apply broadly
12 regardless of the types of entities involved? For example, should there be a safe harbor
13 from the coordination rules for any public communication in which a candidate for
14 Federal office expresses or seeks support for any type of organization, or for a position on
15 a public policy or legislative proposal espoused (or opposed) by that organization?
16 Similarly, should the safe harbor for commercial transactions include any public
17 communication in which a candidate for Federal office proposes any type of commercial
18 transaction, regardless of whether it is for a business that the candidate owns or operates,
19 or whether the business existed prior to the candidacy? Would such safe harbors be
20 overbroad or undermine the efficacy of the rule?

21 d. Consequences of Court’s Media Exemption Analysis

22 In Citizens United, the Court stated, “There is no precedent supporting laws that
23 attempt to distinguish between corporations which are deemed to be exempt as media

1 corporations and those which are not,” and “[t]his differential treatment [between
2 corporations with and without media outlets] cannot be squared with the First
3 Amendment.” Slip op. at 37. Does the Court’s analysis of the media exemption affect
4 the proposed rule changes, or the coordination rules generally? If so, how?
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1 II. Notice of Hearing

2 The Commission announces that a hearing will be held on Tuesday, March 2,
3 2010 and Wednesday, March 3, 2010 (see Dates and Addresses, above). The witnesses
4 will be those individuals who indicated in their timely comments, whether to the NPRM
5 published on October 21, 2009 or to this notice, that they wish to testify at the hearing.
6 Individuals who plan to attend and require special assistance, such as sign language
7 interpretation or other reasonable accommodations, should contact the Commission
8 Secretary's office at (202) 694-1040, at least 72 hours prior to the hearing date.

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On behalf of the Commission,

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Matthew S. Petersen
Chairman
Federal Election Commission

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DATED: _____

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BILLING CODE: 6715-01-P