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To <CoordinationShays3@fec.gov>  
cc  
bcc  
Subject Coordination NPRM

Comments of Alliance for Justice, Sierra Club and AFL-CIO are attached.

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Coordination NPRM.pdf

January 19, 2010

**By Electronic Mail to CoordinationShays3@fec.gov**

Ms. Amy L. Rothstein  
Assistant General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking, “Coordinated Communications,” 74 Fed. Reg. 53893 (Oct. 21, 2009): Comments and Request to Testify

Dear Ms. Rothstein:

Alliance for Justice, AFL-CIO and Sierra Club submit these comments in response to the Notice of Proposed Rulemaking on Coordinated Communications published by the Federal Election Commission (“FEC” or “Commission”) on October 21, 2009 (“NPRM”) in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 528 F.3d 914 (DC Cir. 2008) (“*Shays III Appeal*”). See 74 Fed. Reg. 53893. Alliance for Justice and AFL-CIO request an opportunity to testify at the hearing on the NPRM.

The undersigned organizations submitted comments in the Commission’s 2002 coordination rulemaking following the adoption of the Bipartisan Campaign Reform Act (“BCRA”) and the 2005 coordination rulemaking following the decision in *Shays v. FEC*, 414 F.3d 76 (DC Cir. 2005) (“*Shays II*”). As these rulemakings and the litigations over them, both before and since BCRA, illustrate, the scope of the statutory prohibition on coordinated expenditures has long presented one of the most vexing issues facing the Commission. On the one hand, coordinated communications and other expenditures should not be a means by which groups or individuals may circumvent the contribution limitations imposed in connection with federal elections. See *Buckley v. Valeo*, 424 U.S. 1, 47 (1976). This concern may become even more relevant if the Supreme Court strikes down the ban on corporate independent expenditures. See *Citizen’s United v. FEC*, No. 08-205 (U.S.). On the other hand, however, the statutory prohibitions on coordinated expenditures should not be interpreted by the Commission in a manner which will deter, let alone prohibit, legitimate and important efforts by citizens to influence legislation and public policy. As set forth below, the Commission should continue to strike a balance between these values as it once again seeks to define coordinated communications.

Comments

I. THE COMMISSION SHOULD CONTINUE TO INCLUDE A CONTENT STANDARD FOR PUBLIC COMMUNICATIONS MADE OUTSIDE OF THE 90/120-DAY WINDOWS PRIOR TO ELECTIONS.

A. A Content Standard Is Permissible For Defining Coordinated Communications Outside the 90/120-day Periods Prior To Elections And That Standard Need Not Be As Strict As The Standard For Communications Made Within the 90/120-day Periods.

In *Shays II*, the court of appeals found that the plain language of FECA does *not* preclude a content-based standard for coordinated communications, *see* 414 F.3d at 98-99, and it explicitly disagreed with the lower court's suggestion that any coordination standard "looking beyond collaboration to content" would exceed the range of permissible readings of the statute. *See id.* at 99-100. Noting that FECA treats as a contribution any communication which both is an "expenditure" within the meaning of the statute and is coordinated with a candidate or a party, the court found that the time, place and content of a communication "may be critical indicia" of whether it has been undertaken for the purpose of influencing a federal election, as required under the statutory definition of "expenditure." *Id.* Moreover, the opinion concluded, the FEC could construe the statute's definition of coordinated expenditure "as leaving space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign," *id.*, and, as part of this construction, the agency could "develop an 'objective, bright-line test [that] does not unduly compromise the Act's purposes.'" *Id.*, quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986).

In *Shays III Appeal*, the court of appeals affirmed its earlier holding that a content standard for coordinated communications is not inconsistent with the statutory language. *See* 528 F.3d. at 924. In addition, the court also found that the Commission's decision in the 2005 rulemaking to regulate communications "more strictly" within the 90/120-day windows than it did outside of those windows was "perfectly reasonable" provided that the content standard "rationally separate[s] election-related advocacy from other speech." *Id.* at 926. Thus, while the court of appeals rejected as too narrow the express advocacy content standard adopted by the Commission for periods before the 90/120-day windows, the court confirmed the Commission's prerogative to adopt a content standard for those periods that is not as broad as the standard applicable within the 90/120-day periods.

B. In Accordance With BCRA's Legislative History, The Commission Should Include A Content-Based Standard In Its Definition of Coordinated Communications That Protects Lobbying and Other Similar Policy Communications.

One of the major issues that supporters of stricter campaign finance regulation sought to address when they proposed to amend FECA in the 107<sup>th</sup> Congress was what they regarded as the overly permissive definition of coordination which the Commission had adopted in 2000<sup>1</sup> in response to the decision in the *Christian Coalition* case.<sup>2</sup> As originally introduced in the Senate by Senators McCain, Feingold and others, the Bipartisan Campaign Reform Act of 2001 created a new statutory term, “coordinated activity,” which was very broadly defined to mean “anything of value” provided in coordination with a candidate “regardless of whether the value being provided is in the form of a communication that expressly advocates a vote for or against a candidate.” See S. 27, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess §214(a)(1)(B) (as introduced on January 22, 2001). From the outset of the debate on BCRA, however, concern was expressed about the broad scope of this provision and the impact it would have on legitimate lobbying and public education activities by individuals and organizations. See, e.g., 147 Cong. Rec. S2446 (daily ed. March 19, 2001) (statement of Sen. Feingold acknowledging concern about the bill’s coordination provisions and indicating that a corrective amendment would be offered).

After extensive negotiations, the original broad coordination rule was dropped by the bill’s Senate sponsors and replaced by more limited coordination provisions which were intended to avoid interference with lobbying and similar policy activities.<sup>3</sup> See 147 Cong. Rec. S3184 (daily ed. March 30, 2001) (statement of Sen. McCain noting that “all agreed [the original provision] was not satisfactory to what we believe is a reasonable compromise”); *id.* (statement of Sen. Feingold that original version was overbroad

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<sup>1</sup> See Final Rule, “General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures,” 65 Fed. Reg. 76138 (December 6, 2000) (“FEC 2000 Coordination E & J”).

<sup>2</sup> In *Christian Coalition*, Judge Joyce Hems Green concluded that the agency had failed, in all but a few instances, to demonstrate that the organization’s conduct amounted to unlawful coordination, notwithstanding extensive evidence of the Christian Coalition’s contacts with federal officeholders and candidates over three election cycles. See 52 F. Supp. 2d, 45, 66-97 (D.D.C. 1999).

<sup>3</sup> Although the definition of “coordinated activity” was dropped in the version of S. 27 passed in the Senate, the bill continued to define “contribution” in 2 U.S.C. § 431(8) to include “any coordinated expenditure or other disbursement made by any person in connection with a candidate’s election, regardless of whether the expenditure or disbursement is for a communication that contains express advocacy.” S. 27, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. §214(a)(1)(C) (as passed by the Senate on April 2, 2001). This language was subsequently dropped in the House because it was still deemed to be overbroad, and it was not included in the final version of the bill.

because “it caught... legitimate conversations between Members of Congress and groups about legislation without touching on a campaign”).

The version of BCRA originally introduced in the House contained the same coordination provisions as were in the original bill introduced in the Senate. *See* H.R. 380, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. §§ 205, 206 (as introduced on January 31, 2001). After passage of the modified bill in the Senate, Reps. Shays and Meehan introduced a revised version of their bill, including coordination provisions which were virtually identical to the provisions in the Senate-passed bill. *See* H.R. 2356, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. §§ 202, 214 (introduced on June 28, 2001). However, this bill was adversely reported by the Committee on House Administration in part due to its “expansive definition” of coordination that “would discourage (if not eliminate) communications between citizens and their elected representatives....” H. R. Rep. No. 107-131, part 1, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. 4 (July 10, 2001) (referring to testimony of the AFL-CIO). In response to this criticism, the House sponsors of BCRA introduced an even narrower version of the coordination provision,<sup>4</sup> dropping the overbroad language in section 214(a) quoted in note 3, *supra*. *See* 148 Cong. Rec. H396 (daily ed. Feb. 13, 2002). When the House-passed bill was passed by the Senate, Senator McCain made clear that “nothing in section 214 should or can be read to suggest, as some have said, that lobbying meetings between a group and a candidate concerning legislative issues could alone lead to a conclusion that ads that the group runs subsequently concerning the legislation that was the subject of the meeting are coordinated with the candidate...” 148 Cong. Rec. S2145 (daily ed. March 20, 2002).

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<sup>4</sup> The final version of BCRA repealed the regulation on general public political communications adopted by the Commission in 2000 and directed the Commission to promulgate new regulations on “coordinated communications” which were not to “require agreement or formal collaboration to establish coordination.” Pub. L. No. 107-155, § 214(b)-(c), 116 Stat. 94-95 (2003). Further, “[i]n addition to any subject determined by the Commission,” the agency was directed to “address” four specific areas in the new regulations: (i) payments for the republication of campaign materials; (ii) payments for the use of a common vendor; (iii) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (iv) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party. *Id.* at §214(c)(1)-(4), 116 Stat. 95. BCRA also provided that any communication that falls within the newly-created category of “electioneering communications” and is “coordinated” with a candidate or political party would be treated as a contribution to the candidate supported by the communication. *Id.* at §202, 116 Stat. 90-91. Finally, BCRA codified the Commission’s longstanding practice by expanding 2 U.S.C. §441a(a)(7) to include coordination with political parties as well as with candidates. *See id.* at §214(a), 116 Stat. 94, codified at 2 U.S.C. § 441a(a)(7)(B)(ii).

In sum, while some supporters of BCRA sought to overturn what they regarded as the overly permissive coordination regulation adopted by the FEC in 2000, both key supporters and other Members of Congress successfully opposed a broad coordination provision because it would interfere with legitimate communications by individuals and groups with officeholders and candidates. As Senator McCain put it during debate on final passage of BCRA in the Senate, “we do not intend for the FEC to promulgate rules ... that would lead to a finding of coordination solely because the organization that runs such ads has previously had lobbying contacts with a candidate.” *Id.* In order to fulfill Congress’ intent, therefore, any coordination regulation adopted by the Commission should include a content-based standard that strikes a sound balance between effectively preventing coordinated communications while at the same time protecting the First Amendment right to engage in coordinated lobbying, public advocacy and similar activities.

II. THE PASO TEST PROPOSED IN ALTERNATIVE 1 SHOULD BE REJECTED AS A STAND-ALONE TEST.

A. The PASO Test Is Precluded By The Legislative History of BCRA And It Raises Serious Constitutional Issues That Should Be Avoided.

Alternative 1 in the current NPRM would replace the express advocacy standard in the third content standard of the current regulation with a new standard which includes any public communication that “promotes, supports, attacks, or opposes a political party or a clearly identified candidate for Federal office.” Prop. Reg. 109.21(c)(3), 74 Fed. Reg. at 53912 (Alternative 1). The Commission rejected a similar proposal in its 2005 coordination rulemaking, and there are strong reasons why it should not be adopted now.

First, the legislative history of BCRA’s coordination provisions strongly suggests that the Commission does not have authority to use a PASO test to define coordinated communications. For a number of years prior to the enactment of BCRA, the Commission had wrestled with the question of whether coordinated expenditures under FECA were limited to communications containing express advocacy or whether, instead, the term should include a broader range of communications and, if so, how those communications should be defined.<sup>5</sup> Congressional proponents of BCRA sought to

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<sup>5</sup> See, e.g., Advisory Opinion 1985-14. In *FEC v. The Christian Coalition*, Judge Green ruled that coordinated communications by a corporation could be unlawful even if they do not contain express advocacy, see 52 F. Supp. 2d at 86-89; however, she provided virtually no guidance concerning the extent to which coordinated expenditures reached communications beyond those containing express advocacy except for suggesting that there must be some connection between the content of a communication and a federal election before it could be treated as a coordinated expenditure. See *id.* at 88 (referring to “campaign-related communications that do not expressly advocate a candidate’s election

resolve this issue once-and-for-all when they proposed the broad coordination provisions of BCRA in the 107<sup>th</sup> Congress. *See supra* at 3. But, as discussed above, these provisions were rejected and the compromise adopted by Congress, as set forth in BCRA §§ 202 and 214, provided that coordinated non-express advocacy communications would be treated as in-kind contributions only if they met the statutory definition of “electioneering communications.” *See McConnell v. FEC*, 540 U.S. at 202 (“BCRA §202 pre-empts a possible claim that ... coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions.”) Had Congress wished to apply the PASO test in defining the content of coordinated expenditures, it could simply have included this phrase in BCRA §202, as it had done in other provisions of the statute. The Commission should not adopt a standard which Congress itself failed to adopt when it considered the same issue. *See, e.g., Barnhart v. Sigmon Coal Co.*, 554 U.S. 438, 452 (2002) (“When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotation marks omitted); *U.S. Telecomm. Ass’n v. FCC*, 227 F. 3d 450, 458 (D.C. Cir. 2000).

Second, even if a PASO standard is not precluded by BCRA’s legislative history, the test raises serious constitutional questions which the Commission should avoid if it wishes to put an end to the long-standing uncertainty about the meaning of coordinated communications. In *McConnell*, the Supreme Court determined that the words “promote, support, attack or oppose” were not unconstitutionally vague as used in the definition of “federal election activity,” *see* 2 U.S.C. §431(20)(A)(iii), a statutory term added by BCRA and having application primarily to political parties. *See* 540 U.S. at 170 n. 64. In reaching this conclusion, however, the Court relied explicitly on the narrow context in which the phrase was used in the statute,<sup>6</sup> noting that, as the Court had previously

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or defeat.”) In the Commission’s subsequent coordination rulemaking, the agency similarly wrestled with the question of how far, if at all, it should extend the prohibition on coordinated expenditures beyond express advocacy, and again failed to resolve this thorny issue. *See* FEC 2000 Coordination E & J, 65 Fed. Reg. at 76141. *See also* Matter Under Review 4624, Statement for the Record of Commissioner Bradley A. Smith (Nov. 6, 2001), nn. 4 and 9 (noting that the Commission had not reached a final decision against requiring an express advocacy content standard).

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While the PASO standard is also used in a BCRA provision that prohibits political parties from soliciting funds for certain tax-exempt organizations, *see* 2 U.S.C. §441i(d)(1), the Supreme Court in *McConnell* did not address the constitutional validity of the standard in that context. The PASO test also appears in BCRA as a *limitation* on the Commission’s authority to promulgate regulatory exceptions to the prohibition on corporate and union disbursements for electioneering communications. *See* 2 U.S.C. §434(f)(3)(B)(iv). But *McConnell* did not address that usage either and, in any event, the

recognized in *Buckley*, “actions taken by political parties are presumed to be in connection with federal elections.” *Id.*

In contrast, the proposed PASO test in the NPRM would apply to individuals and non-political organizations whose communications *cannot* be presumed to be for federal electoral purposes in any case. Moreover, as Senator McCain himself implicitly acknowledged during the BCRA debate, the fact that a public communication is coordinated with a Member of Congress does not give rise to a presumption that it is for electoral purposes, since communications concerning legislation and policy matters are frequently coordinated with legislators. Such an inference is especially unwarranted in the time period in which the proposed regulation would be effective – namely, from three months to as long as six years before an election – when, as the Commission found in its 2005 rulemaking and *Shays III Appeal* confirmed, *see* 528 F.3d at 924, federal electoral activity is far less likely to take place. This is why the court of appeals agreed that there could be a content standard in the first place.

The Commission itself has at least twice recognized the vagueness and overbreadth of the PASO standard outside of the limited context addressed by the Supreme Court in *McConnell*. The Commission acknowledged the difficulty of defining PASO with any degree of precision when it decided not to adopt clarifying language and merely repeated the statutory phrase in its regulations governing “federal election activity.” *See* Final Rule, “Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money,” 67 Fed. Reg. 49064, 49070, 49111 (July 29, 2002), adopting 11 C.F.R. §100.24(b)(3). And, the Commission also recognized the potential breadth of the PASO test and, particularly, its potentially adverse impact on lobbying communications when it refused to adopt any of several suggested exceptions to the definition of “electioneering communication” for lobbying and other communications because it believed that communications exempted under any of the exceptions might reasonably be understood or perceived to “promote, support, attack or oppose” a federal candidate as prohibited in BCRA §434(f)(3)(B)(iv). *See* Final Rule, “Electioneering Communications,” 67 Fed. Reg. 65190, 65201-202 (October 23, 2002) (“Although some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner”). Before adopting a PASO test here, the Commission would therefore have to carry the heavy burden of explaining why it has changed its view about the inherent overbreadth and vagueness of the PASO test.

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PASO test is not used there to prohibit conduct or speech, unlike its proposed use in Alternative 1.



Finally, the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), also casts doubt on whether a PASO standard would be constitutionally sound. While, as noted in the NPRM, *WRTL* involved *independent* corporate expenditures, nothing in the opinion suggests that the Court meant to exclude coordinated communications from its holding. Moreover, as discussed in point II, the Court's reasoning applies with equal force to coordinated communications concerning legislation and policy matters. While further litigation would be necessary to finally resolve these issues, the Commission would do well to avoid further uncertainty in this area by not adopting a stand-alone PASO standard as proposed in the NPRM.

B. The Alternative Definitions Proposed In The NPRM Are Not Sufficient To Cure The Vagueness and Overbreadth of the PASO Standard.

The alternative definitions of PASO proposed in the NPRM will not cure the vagueness problems associated with the test. Alternative A, which attempts to craft a definition of each of the four component words that would apply whenever one of the terms is used with any other of the words, is confusing at best and underscores why the PASO test itself should be avoided. Most importantly, Alternative A would include numerous legislative and policy communications that are not-election related, as is made clear in the examples set forth in the proposed definition. Indeed, by providing that a communication may promote, support, attack, or oppose a candidate in whole or part "even if it does not refer to any election, candidacy, political party, or voting," Alternative A would be far broader even than the standard now applicable *within* the 90/120-day windows, a result which is not required by the decision in *Shays III Appeal* and is totally inconsistent with the legislative history of BCRA.

The definition of PASO in Alternative B avoids some of the problems with Alternative A because it would require an "explicit" reference to a candidate or political party and a clear nexus between the candidate/party and an upcoming election or candidacy. *See* 74 Fed. Reg. at 53900. However, even though the NPRM states that Alternative B is "intended to exclude communications directed only at legislation or some other cause," *id.*, the term "clear nexus" is inherently imprecise, and will not always provide clear guidance as to the kinds of coordinated communications that fall within the definition. While some of the examples in Alternative B are useful, if this approach is ultimately adopted, the regulation should spell out in more detail the criteria on which the examples are based. Even so, no such regulation could do so as clearly and appropriately as does the current definition of "functional equivalence" in 11 C.F.R. §114.15, the proposed content standard to which we now turn.

III. THE FUNCTIONAL EQUIVALENCE STANDARD PROPOSED IN ALTERNATIVE 2 PROVIDES A WORKABLE APPROACH BUT SHOULD BE MODIFIED TO INCLUDE THE OTHER ELEMENTS OF THE FEC'S REGULATION, INCLUDING THE SAFE HARBOR.

Alternative 2 in the NPRM would add as a fifth content standard to the current regulation any public communication that is the “functional equivalent of express advocacy.” The “functional equivalence” test derives from the Supreme Court’s decisions in *McConnell* and *WRTL*. In *McConnell*, 540 U.S. at 206, the Court held that BCRA § 203’s prohibition on corporate and union electioneering communications is not facially unconstitutional insofar as it reaches only express advocacy or its functional equivalent. And, in *WRTL* the Court held that BCRA § 203 is unconstitutional as applied to corporate advertisements that did not amount to the functional equivalent of express advocacy.

While *WRTL* considered BCRA § 203’s prohibition on independent corporate spending for electioneering communications, the constitutional considerations on which it relied are equally relevant in determining whether certain coordinated communications may be regulated since in each situation an overbroad standard will unduly chill the right to speak on legislation and similar matters of policy. Thus, the Court’s controlling opinion by Chief Justice Roberts emphatically rejected any standard which conditioned permissible political speech on its election-influencing “intent” or “effect” because that approach “would afford ‘no security for free discussion.’” 540 U.S. at 467, quoting *Buckley v. Valeo*, 424 U.S. at 43, in turn quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945). Moreover, in order to avoid chilling a substantial amount of legislative and other issue speech, the Court held that the proper standard must be “objective” and avoid burdensome litigation.<sup>7</sup>

Under Alternative 2, a public communication would fit within the functional equivalence standard only “if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate.” This language also derives from *WRTL* and was incorporated by the Commission into its regulation implementing that decision. See 11 C.F.R. §114.5(a). Thus, this test both has the imprimatur of the Supreme Court and the virtue of using language with which the regulated community is now familiar. While it remains possible that a communication which satisfies the proposed standard might still constitute “election-related advocacy,” the criteria selected make this far less likely. Moreover, unlike the prohibition on corporate and union electioneering communications, which applies only to communications made within 30/60 days of an election, the test would apply here only to

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<sup>7</sup> The point here is not that the First Amendment bars Congress or the Commission from regulating coordinated communications that do not include express advocacy or its functional equivalent. That issue was not presented in *WRTL* or in the *Shays* litigation. Rather, the point here is that the court of appeals has already recognized that the Commission need not apply the same strict standard outside of the 90/120-day windows as it applies inside of the windows, and the approach taken in *WRTL*, albeit in a different context, provides a readily available and reasonable standard that meets the criteria announced by the court of appeals.

communications made outside of the 90/120-day windows, thereby reducing the likelihood that coordinated election-related advocacy would avoid regulation.

Again, the court of appeals did not require that a bright-line test be 100% accurate in separating election and non-election advocacy, only that the test “not unduly compromise the Act’s purposes.” *Shays III Appeal*, 528 F.3d at 926-927, quoting *Orloski v. FEC*, 795 F.2d at 165; *Shays II*, 414 F.3d at 99 (same). And the court’s direction that a content standard must “rationally separate[] election-related advocacy from other speech,” *Shays III Appeal*, 528 F.3d at 926 (emphasis added), further clarifies that the line between the two need not be perfect, only “rational.” As the controlling opinion in *WRTL* stated:

“[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.” [*Buckley*] 424 U.S. at 42. Under the [susceptible of no reasonable interpretation] test ..., that is not enough to establish that the ads can only reasonably be viewed as advocating or opposing a candidate in a federal election. “Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the *First Amendment* is implicated, the tie goes to the speaker, not the censor.

551 U.S. at 474 (emphasis in original). *Shays III Appeal* did not refer to *WRTL* for reasons that it did not explain. But the Commission, on remand, should craft rules that harmonize the standards for regulable speech that both decisions impose on it, and we submit that the functional equivalence standard most appropriately does so.<sup>8</sup>

Alternative 2 as proposed, however, does not go far enough in protecting legitimate legislative and policy discussions with Members of Congress because it does not include the safe harbor for lobbying communications set forth in 11 C.F.R. §114.15(b), the rules of interpretation in 11 C.F.R. §114.15(c), and the limitations on relevant information in 11 C.F.R. §114.15(d).<sup>9</sup> Inclusion of these provisions is essential to

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<sup>8</sup> To be clear, express advocacy and the republication of candidate or party materials should continue to be part of the content standard for the pre-windows period.

<sup>9</sup> The NPRM suggests that the safe harbor in 11 CFR § 114.15(b) is not needed because the Commission is also proposing two new safe harbors at 11 CFR §§ 109.21(I) and (j). See 74 Fed. Reg. at 53902 n. 25. But the two proposed safe harbors do not go nearly as far as the safe harbor in 11 CFR § 114.15(b) to protect lobbying and similar

providing the explicit guidance that is necessary in order to avoid chilling legitimate legislative and policy communications. These provisions would also serve the important screening function which the content standards as a whole are intended to serve. As the Commission itself has recognized, an objective and clear content standard best enables the Commission to administer the “reason-to-believe” requirement in coordination cases and minimizes the administrative burden on the Commission by allowing it to resolve some complaints at an early stage of the enforcement process based solely on a communication’s content. *See* Final Rules, “Bipartisan Campaign Reform Act of 2002 Reporting; Coordinated and Independent Expenditures,” 68 Fed. Reg. 421, 430 (January 3, 2003). Alternative 2, however, will not be sufficiently useful in this regard unless it also includes these provisions.

IV. THE PROPOSED “EXPLICIT AGREEMENT” STANDARD SHOULD NOT BE ADOPTED AS A STAND-ALONE RULE BUT MIGHT BE APPROPRIATE IN CONJUNCTION WITH AN APPROPRIATE CONTENT STANDARD.

Alternative 4 in the current NPRM proposes that certain public communications would be treated as coordinated *without regard to their content* if there is a formal or informal agreement between a candidate, authorized committee, or political party committee and a person paying for the communication to create, produce, or distribute the communication if either the communication or the agreement is made “for the purpose of influencing a Federal election.” Prop. Reg. §§ 109.21(c)(5) and (d)(7), 74 Fed. Reg at 53912. This proposal should be rejected for a number of reasons.

The NPRM states that the explicit agreement standard is being proposed in response to the suggestion of the court of appeals which found it difficult to accept the proposition that non-express advocacy communications run by an individual or group could be proper if they were distributed at the request of a candidate and both parties agreed that the purpose of running the ads was to influence the outcome of the election. The court’s concern, however, was raised in the context of a regulation which barred only coordinated express advocacy outside of the 90/120-day windows. Adoption of a new content standard in addition to express advocacy, as required by the court and proposed in the NPRM, will largely address this concern, since it would expand the types of communications that could be regulated to include the kinds of ads that are most likely to be the subject of such an explicit agreement.

The court of appeals hypothetical and Alternative 4, moreover, beg the question of how to determine whether a public communication is “intended to influence an election.” While the NPRM states that this is “a fact-specific determination,” the NPRM provides no guidance as to how this phrase would be interpreted. The proposed standard

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communications, and doing so is necessary to strike the right balance here.

would in effect replace the objective content and conduct standards in the current regulation with a subjective test that has no bounds. Such an intent-based standard was rejected by the Supreme Court in *Buckley* because it would afford “no security for free discussion,” 424 U.S. at 43; and, the controlling opinion in *WRTL* reaffirmed this position when it “decline[d] to adopt a test for as-applied challenges turning on the speaker’s intent to affect an election.” 551 U.S. at 467. As the Court stated, “[f]ar from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad ... on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue”. *Id.* at 467-468. These concerns are just as relevant here.

If the Commission considers adopting an “explicit agreement” conduct standard, it must be crafted in conjunction with, rather than in lieu of, a content standard such as the “functional equivalence” test discussed above.

#### V. THE “COMMON VENDOR” AND “FORMER EMPLOYEE” CONDUCT STANDARDS SHOULD NOT BE RETAINED.

The Commission also seeks comment on three alternative proposals intended to comply with the decision in *Shays III Appeal* striking down the Commission’s 2005 decision to apply the “common vendor” and “former employee” conduct standards only within a 120-day period.

The Commission has stated that the original and revised common vendor and former employee conduct standards were intended to implement Congress’s requirement in BCRA § 214 that the Commission “address” these issues in developing a revised coordination regulation. *See* 70 Fed. Reg. at 73954; 68 Fed. Reg. at 435, 437. But that is an erroneous reading of BCRA’s legislative history. Congress did not mandate that the Commission adopt separate and specific restrictions concerning common vendors and former employees, but only that it consider their roles when the Commission formulated new coordination regulations. *See, e.g.*, 148 Cong. Rec. S2145 (daily ed. March 20, 2002) (statement of Sen. Feingold) (section 214 of BCRA lists four subjects the FEC must address, but it “does not dictate how the Commission is to resolve those subjects.”) Any doubt about this question was resolved by the court of appeals in *Shays II* when it stated that “BCRA merely listed several topics the rules ‘shall address,’ providing no guidance as to how the FEC should address them.” 414 F. 3d at 98.

Given Congress’s “open-ended directive,” *id.*, the Commission in order to include any form of restriction on common vendors and former employees, even one based on an election-cycle, must be able to show that common vendors and former employees present a significant source of unlawful coordinated communications distinct from the circumstances in which they would be acting as agents of a candidate or party. However, neither in the 2002 rulemaking nor in this NPRM has the Commission put forward any

empirical basis for the separate common vendor and former employee restrictions nor has the Commission even requested evidence on this fundamental question, as it did for the temporal aspects of the content standards. While the court of appeals in *Shays III Appeal* found that the Commission had failed to support the 120-day period for common vendors and common employees with reasoning and evidence, it is insufficient to return to an election-cycle standard for which the Commission similarly lacks an empirical basis. Alternative 3 in the current NPRM - a return to the full election-cycle period - should therefore be rejected.

The NPRM's two other alternatives are equally unsatisfactory. It is difficult to imagine how the Commission can obtain the kind of information required by the court of appeals to justify either the current 120-day rule or a longer period, since this would require empirical evidence of the shelf-life of various types of campaign information that might be available to various types of vendors and former employees. Any effort to determine the typical period during which candidates for federal office actively campaign also seems doomed to failure.

Given these difficulties, the Commission should simply drop the common vendor and former employee standards altogether. Under this approach, the general conduct standards would apply regardless of when a vendor or employee worked in a campaign. And, their roles would be examined and restricted on the basis of their activities, just like any other person that deals with a candidate or party.

VI. THE COMMISSION SHOULD ADOPT THE PROPOSED SAFE HARBOR FOR COMMUNICATIONS IN SUPPORT OF NONPROFIT ORGANIZATIONS.

The Commission seeks comment on a proposed safe harbor for public communications paid for by organizations exempt under section 501(c)(3) of the Internal Revenue Code in which a federal candidate expresses or seeks support for that organization, or for a position on a public policy or legislative proposal espoused by that organization unless the communications promotes, supports, attacks, or opposes the candidate or another candidate for the same office. Prop. Reg. § 109.21(i), 74 Fed. Reg. at 53913. We generally support this proposal because, unlike any other kind of group, 501(c)(3) organizations risk the loss of their tax-exempt status if they engage in any form of partisan political activity. Maintaining their tax-exempt status is almost always essential to the survival of 501(c)(3) organizations, and there is therefore little risk that the safe harbor would be abused.

We do suggest several clarifications of the proposed safe harbor. First, while the safe harbor is intended to go beyond the current safe harbor for certain candidate solicitations in 11 C.F.R. §109.21(g)(2), we assume that the current provision would remain in effect. This is important since 11 C.F.R. §109.21(g)(2) allows solicitations for

groups other than 501(c)(3) organizations if the solicitations are permissible under 11 C.F.R. §301.65.

Second, the proposed safe harbor appears to be preferable to expanding the existing safe harbor in 11 C.F.R. §109.21(g)(1) to include “endorsements” of 501(c)(3) entities, since this suggestion could be interpreted to exclude support for positions or legislation supported by the organization.

Third, we assume that the organization’s “position” which may be supported by a candidate would include the organization’s *opposition* to certain legislation or policy initiatives, not just its support of legislation or policy initiatives. The E & J issued with the new safe harbor should make this clear.

Fourth, in response to the specific questions raised in the NPRM, there is no reason why such a safe harbor should be restricted to public communications that are distributed nationwide or limited to legislation that is before Congress. The point of the safe harbor is to permit coordination with candidates with respect to communications that are not election-related, and neither of these restrictions is necessary to this goal.

Fifth, the proposed safe harbor should not be inapplicable if the communication is found to promote, support, attack or oppose a candidate. This introduces all of the difficulties of interpretation associated with the PASO language and would thereby undercut the salutary effects of the safe harbor.

Thank you for your consideration of these comments.

Respectfully submitted,



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