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bcc
Subject U.S. Chamber Comments to the Coordinate Communications NPRM

Dear Ms. Rothstein,

Attached are the comments on behalf of the Chamber of Commerce of the United States of America to the Coordinated Communications Notice of Proposed Rulemaking (Notice 2009-23). Please let us know if you have any problems with the transmission.

Thank you.

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Chamber Coordination Comments.PDF

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January 19, 2010

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VIA E-MAIL COORDINATIONSHAYS3@FEC.GOV

Ms. Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on behalf of the Chamber of Commerce of the United States of America to the Coordinated Communications Notice of Proposed Rulemaking (Notice 2009-23)

Dear Ms. Rothstein:

The Chamber of Commerce of the United States of America ("Chamber") submits these comments in response to the Federal Election Commission ("FEC" or "Commission") Notice of Proposed Rulemaking ("NPRM") on Coordinated Communications. *See* 74 Fed. Reg. 53893 (Oct. 21, 2009).

The Chamber is responding to the NPRM's "Proposals To Address Coordinated Communications Content Standards." 74 Fed. Reg. at 53897-905. The Chamber supports the NPRM's "Alternative 2—The Modified *WRTL* Content Standard—Proposed 11 CFR 109.21(c)(5)" provided that it incorporates the safe harbor, rules of interpretation, and other limitations described at 11 C.F.R. § 114.15(b), (c), and (d).

I. The Chamber

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing more than 3,000,000 businesses and organizations of every size and in every sector of the Nation's economy. For almost a century, the Chamber has played a key role in advocating on behalf of its membership and the American business community. The Chamber's advocacy efforts include not only direct lobbying of government officials, but large-scale public advocacy to help shape the political debate.

For example, in 2008, the FEC's database of FEC Form 9 disclosures indicates that the Chamber reported more money spent on exempt grassroots lobbying activity

than any other entity.[1] In 2009, after a newly elected President and Congress took office, the Chamber engaged in a major public advertising effort focused on many of the new and important issues that these officeholders were debating including health care reform, financial services regulation, and union organizing.

As an incorporated entity, the Chamber is strictly prohibited from coordinating certain communications with federal candidates or political parties. *See* 11 C.F.R. § 109.22. Public communications are deemed coordinated if they (1) are paid for by someone other than a candidate or political party; (2) satisfy certain "content" standards;[2] and (3) satisfy certain "conduct" standards.[3] 11 C.F.R. § 109.21.

As demonstrated by the Chamber's 2008 Form 9 filings, the Chamber engages in a significant amount of public advocacy that satisfies the content standards of the coordination regulations. Publicly available lobbying reports also reflect that the Chamber, like other major associations, is in direct contact with federal officials – including officials who are simultaneously candidates for federal office. *See* Jonathan Allen, *U.S. Chamber: $34.7 Million in Lobbying*, Politico, Oct. 20, 2009. On occasion political opponents wrongly allege satisfaction of the content and conduct standards and, therefore, improper coordination. *See, e.g.,* FEC Matter

[1] Form 9 is used to disclose grassroots lobbying that also satisfies the definition of an "electioneering communication" which is a broadcast, satellite, or cable communication that refers to a clearly identified candidate and is directed to the candidate's electorate within 30 days of a primary election or nominating event or 60 days of a general election.

[2] The content standards include:

(1) Electioneering communications;
(2) Republished campaign materials;
(3) Express candidate advocacy; and
(4) Communications that refer to a House or Senate candidate/Presidential or Vice Presidential candidate that are directed to the candidate's electorate within 90/120 days of an election or nominating event.

[3] The conduct standards include when the communication is made:

(1) At the "request or suggestion" of a candidate or political party;
(2) With the "material involvement" of a candidate or political party;
(3) After a "substantial discussion" with a candidate or political party;
(4) With the assistance of "common vendor;" or
(5) With the assistance of a "former employee or independent contractor" of a candidate or political party.

Under Review 4624 (taking no further action against the Chamber and other members of "The Coalition" for alleged coordinated conduct during weekly lobbying meetings); FEC Matter Under Review 6077 (finding no reason to believe the Chamber coordinated its advertising).

Accordingly, the Chamber has an acute interest in the Commission's coordination regulations and in ensuring that they are written in a manner that prevents abuse and does not otherwise infringe on the Chamber's First Amendment rights to free speech, free association, and to petition the government for redress of grievances. The Chamber participated in the Commission's 2002 and 2005 coordination rulemaking proceedings and appreciates the opportunity to comment on this NPRM.

II. *Shays III*

This NPRM was issued in response to the decision by the United States Court of Appeals for the D.C. Circuit in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"), which struck down portions of the Commission's coordination regulations. The *Shays III* court was primarily concerned that the content standards did not capture enough election-related speech because, outside the 90/120 day pre-election periods, only republished candidate materials and express candidate advocacy could qualify as regulated content.[4] 528 F.3d at 920-28. The court reviewed the record before it to conclude that the FEC was justified in regulating communications more strictly during the 90/120 periods, but had unreasonably limited its regulation beyond those periods. *Id.* at 924-25 (citing *McConnell v. FEC*, 540 U.S. 93, 193 (2003), that the express advocacy standard is "functionally meaningless" and stating that the FEC was, therefore, "regulating nothing at all" outside the 90/120 periods).

Shays III concluded from the record that third parties were disseminating communications that were election-related, but could not be captured by the coordination content standards. *Id.* at 924. This, according to the court, frustrated Congress's goal of regulating coordinated communications "in connection with federal elections." *Id.* at 925. The challenge presented by *Shays III* to the Commission is to develop a content standard to the coordination "rule that rationally separates election-related advocacy from other activity" beyond the 90/120 day period. *Id.*

[4] *See* note 2 *supra.*

Both the court – in *Shays III* and in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays II*") – and the Supreme Court in *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), have provided useful guidance on what the Commission should consider when crafting such a rule.

A. Content

The content of a communication may be a "critical indicia" of whether it is election-related. *Shays II*, 414 F.3d at 99-100; *see also Shays III*, 528 F.3d at 924. A content-based standard provides an "objective, bright-line test" that "leav[es] space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign." *Shays II*, 414 F.3d at 208. This "space" is necessary because Congress did not intend to regulate communications, the content of which "relate[s] to political or legislative goals independent from any electoral race – goals like influencing legislators' votes or increasing public awareness." *Id.*

The Supreme Court in *WRTL* went a step further to proclaim the primacy of content as the measure of whether a communication is election-related and, therefore, can be regulated. *WRTL* explained that permissible restrictions on political speech "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." 551 U.S. at 469.

B. First Amendment Interests

"[W]hen it comes to drawing difficult lines in an area of pure political speech – between what is protected and what the Government may ban – it is worth recalling" that "Congress shall make no law … abridging the freedom of speech." *WRTL*, 551 at 482 (quoting the First Amendment). The *Shays III* court "applaud[ed] the Commission's sensitivity to First Amendment values" when it drew these lines in its previous coordination rulemakings and provided the Commission considerable leeway to incorporate First Amendment values in this proceeding stating that "[t]he FEC, properly motivated by First Amendment concerns, may choose a content standard less restrictive than the most restrictive it could impose." 528 F.3d at 925, 926.

This guidance from the *Shays III* decision is consistent with the Supreme Court's time-honored maxim that "First Amendment freedoms need breathing space to survive." *WRTL*, 551 U.S. at 468-69 (citing authority). *Shays III* incorporated this

concept into its directive to the FEC in this rulemaking to develop a standard that "*rationally* separates election-related advocacy from other activity." 528 F.3d at 926 (quoting *Shays II*, 414 F.3d at 102) (emphasis added).

* * *

In sum, the instructions from the *Shays III* court to the FEC are to develop a "rational" distinction between election-related and other speech disseminated outside the 90/120 day periods. Out of respect for long-standing First Amendment interests, the standard may be content-based – which provides objective, bright-line guidance – and need not be the most restrictive standard available.

III. The NPRM

The NPRM suggests four possible alternatives to define election-related speech outside the 90/120 day period. Brief summaries of the four alternatives follow:

1. The PASO Standard.

PASO stands for "promote, attack, support, and oppose." 74 Fed. Reg. at 53897. Any communication that PASOs a federal candidate or party would satisfy the content standard of the coordination regulations. *Id.* The NPRM proposes two different definitions of PASO based on the dictionary definitions of its underlying words. The first definition of PASO defines "promote" as "to help, encourage, further, or advance," "support" as "to uphold, aid, or advocate," "attack" as "to argue with, blame, or criticize," and "oppose" as "to act against, hinder, obstruct, or be hostile or adverse to." *Id.* at 53910. The second proposed definition of PASO includes a similar language, i.e., "[u]nambiguously helps, encourages, advocates for, praises, furthers, argues with, sets as an adversary, is hostile or adverse to, or criticizes," but also requires that the communication contain "a clear nexus between the clearly identified candidate for Federal office or political party and an upcoming Federal election or a candidacy for such election." *Id.* at 53911.

2. The Modified *WRTL* Content Standard

WRTL explained that government may regulate the "functional equivalent of express advocacy" which includes any communication that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate." 551 U.S. at 469-70. Under the Modified *WRTL* Content Standard, a communication

that qualifies as the "functional equivalent of express advocacy" would satisfy the content standard of the coordination regulations. 74 Fed. Reg. at 53902.

The FEC has already implemented "the functional equivalent of express advocacy" standard in its regulations to ensure that its prohibition on corporate electioneering communications applies only to communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate." *See* 11 C.F.R. § 114.15. Those regulations include the above-quoted language as well as a safe harbor, rules of interpretation for applying the language, and limitations on other information that may be considered when applying the language. *Id.* at § 114.15(b), (c), and (d). The Modified *WRTL* Content Standard would not include the safe harbor, rules of interpretation, or other limitations. 74 Fed. Reg. at 53902.

3. Clarification of the Express Advocacy Standard

Current FEC regulations include an alternative definition of express advocacy that reaches beyond the so-called "magic words" definition that has been criticized by the courts as "functionally meaningless." *See Shays III*, 528 F.3d at 924. This alternative definition includes communications that:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b). Under the Clarification of the Express Advocacy Standard, any communication that satisfies this definition of express advocacy would also satisfy the content standard of the coordination regulations. 74 Fed. Reg. at 53904.

4. The "Explicit Agreement" Standard

Unlike the previous three alternatives just summarized, the "Explicit Agreement" Standard would substitute a content-based analysis with one based on conduct. Under the "Explicit Agreement" Standard, content would be irrelevant. Rather, a communication would be considered coordinated if it is based on an "explicit agreement" with a candidate or political party "to create, produce, or distribute the communication ... for the purpose of influencing a Federal election." *Id.* at 53904-05, 53912.[5]

IV. Comments

Given the mandate of the *Shays III* court, a *WRTL* Content Standard is the most appropriate alternative. Specifically, the Commission should include all the components of 11 C.F.R. § 114.15 that originally implemented *WRTL*'s "functional equivalent of express advocacy" language, i.e., the safe harbor, rules of interpretation, and other limitations.

1. The PASO Standard

The PASO Standard should be rejected. It injects too much vagueness for third-party speakers to apply with any degree of consistency or confidence. The NPRM tacitly acknowledges this fact by attempting to further define the words "promote," "attack," "support," and "oppose" in its alternative definitions of PASO. Unfortunately, the definitions suggested by the NPRM are no less vague than the constituent PASO terms. *See, e.g.,* 74 Fed. Reg. at 53910, 53911 ("help," "argue," "aid," and "hinder"). This demonstrates the fundamental flaw with the PASO standard. The words "promote," "attack," "support," and "oppose" have very

[5] The NPRM proposed the "Explicit Agreement" Standard in response to following from *Shays III*:

> [T]he regulation still permits exactly what we worried about in *Shays II*, i.e., more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads contain no magic words. 414 F.3d at 98. Indeed, pressed at oral argument, counsel admitted that the FEC would do nothing about such coordination, even if a contract formalizing the coordination and specifying that it was "for the purpose of influencing a federal election" appeared on the front page of the New York Times.

528 F.3d at 925; *see* 74 Fed. Reg. at 53904 (referring to this as the "NY Times hypothetical").

general meanings. Though such words are useful in some contexts, they are antithetical to drawing lines of First Amendment significance. *See WRTL*, 551 U.S. at 474 n.7.

The vagueness of the PASO Standard results in impermissible overbreadth. As explained in *Shays II*, the standard adopted by the Commission must avoid regulation of coordinated communications that "relate to political or legislative goals independent from any electoral race – goals like influencing legislators' votes or increasing public awareness." 414 F.3d at 208. However, the PASO standard would sweep communications such as these into its regulatory grasp.

One of the NPRM's proposed examples of a communication that would satisfy the first alternative definition of PASO follows:

> Senator X is working hard to lower your taxes.
> Senator X is the one getting it done. Call Senator X
> and tell him "thanks."

74 Fed. Reg. at 53911 (providing the additional context that Senator X is running for reelection). But this communication is "increasing public awareness" and "relate[s] to … legislative goals," i.e., lowering taxes, and, therefore, should be protected issue speech under *Shays II*. The fact that in this example the Senator is running for reelection is immaterial. Members of Congress are perpetually running for reelection. Accordingly, if a Senator's simultaneous status as a candidate could convert issue speech into regulated election-related speech, then none of the issue speech protected by *Shays II* could, in fact, be protected.

The same overbreadth problem occurs under the second alternative definition of PASO which includes the additional limitation that the communication contain "a clear nexus between the clearly identified candidate for Federal office or political party and an upcoming Federal election or a candidacy for such election." Suppose the communication in the example above ended with the line: "Call Senator X and tell him 'thanks' and that if he keeps up the good work, you will remember it on election day." The ad now includes a "clear nexus" to an election, but that nexus operates as a prod to legislative – not electoral – action and, therefore, clearly "relate[s] to political or legislative goals" and is protected by *Shays II*.

The NPRM notes that the Supreme Court in a footnote has suggested that PASO is not vague. 74 Fed. Reg. at 53898 (quoting *McConnell*, 540 U.S. at 170 n.64).

However, the NPRM also recognizes that the Supreme Court was addressing a situation in which the phrase PASO was applied to political parties whose activities are "presumed to be in connection with election campaigns." *Id.* Because political parties are fully regulated by the campaign finance laws, they are not subject to the same First Amendment harm that a third-party speaker faces when confronting regulatory vagueness. Regardless of how a political party resolves regulatory vagueness, the political party is still subject to regulation. This stands in stark contrast with vagueness that might subject a third-party speaker to regulation in the first instance and may prevent the third-party from speaking.

Regardless, the Commission need not wade into this difficult issue in this rulemaking. *Shays III* does not require the Commission to develop a coordination standard that captures all election-related speech. Rather, the Commission can respect the First Amendment interests implicated by the vagueness and overbreadth of the PASO standard by adopting a different standard that is simply "rational" in its application to election-related advocacy. 528 F.3d at 925 (quoting *Shays II*, 414 F.3d at 102). Though the PASO Standard may reach a significant amount of election-related speech, it also captures speech that the First Amendment shields from regulation. For these reasons, the Commission should not adopt the PASO Standard.

2. A *WRTL* Content Standard

Instead, the Chamber endorses the adoption of a *WRTL* Content Standard. In contrast to the PASO Standard, a *WRTL* Content Standard that includes the safe harbor, rules of interpretation, and other limitations of 11 C.F.R. § 114.15 captures only election-related speech. Furthermore, the Supreme Court has ruled that it is a "rational" means of identifying election-related advocacy.

The Modified *WRTL* Content Standard proposed in the NPRM would apply to content that "is the functional equivalent of express advocacy" because it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 74 Fed. Reg. at 53912. However, the inclusion of a reasonableness standard – which introduces a degree of subjectivity and, therefore, vagueness and overbreadth – makes this language, without more, difficult to apply. *Id.* at 53902 (noting the vagueness and overbreadth potential of this language). The Commission recognized as much when it

implemented the exact same language from *WRTL* in 11 C.F.R. § 114.15 to include the following safe harbor, rules of interpretation, and other limitations:

> (b) *Safe harbor.* A … communication is permissible … if it:
>
> (1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;
>
> (2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and
>
> (3) Either:
>
> (i) Focuses on a legislative, executive or judicial matter or issue; and
> (A) Urges a candidate to take a particular position or action with respect to the matter or issue, or
> (B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or
> (ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.
>
> (c) *Rules of interpretation.* If a … communication does not qualify for the safe harbor in paragraph (b) of this section, the Commission will consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(1) A communication includes indicia of express advocacy if it:

(i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or
(ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.

(2) Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes content that:

(i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or
(ii) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or
(iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.

(3) In interpreting a communication …, any doubt will be resolved in favor of permitting the communication.

(d) *Information permissibly considered.* In evaluating a … communication under this section, the Commission may consider only the communication itself and basic background information that may be necessary to put the communication in context and which can be established with minimal, if any, discovery. Such information may include, for

> example, whether a named individual is a candidate for office or whether a communication describes a public policy issue.

The concerns that motivated the Commission to include these provisions when it first implemented *WRTL*'s "functional equivalent of express advocacy" language are equally applicable in this context. That is, these additional provisions provide a level of clarity that allows third-party speakers to understand, in advance, whether their communications will be subject to regulation. For example, the Chamber – and presumably others – were able to engage in advertising as reported on 2008 Form 9 filings by relying on these provisions.

Accordingly, a coordination regulation that incorporates the *WRTL* "functional equivalent of express advocacy" language must include the additional provisions of 11 C.F.R. § 114.15 to provide clarity and to ensure that the regulation does not chill otherwise protected speech. Without the safe harbor, rules of interpretation, and other limitations contained in 11 C.F.R. § 114.15, a *WRTL* Content Standard is hopelessly difficult to apply.

A *WRTL* Content Standard will also satisfy the *Shays III* requirement that it "rationally separates election-related advocacy from other activity." 528 F.3d at 925 (quoting *Shays II*, 414 F.3d at 102). There can be no doubt that a regulation grounded in *WRTL*'s "functional equivalent of express advocacy" formulation provides a "rational" means of identifying election-related speech. The Supreme Court in *WRTL* used it to do precisely that. 551 U.S. at 456-57.[6] Although the safe harbor, rules of interpretation, and other limitations of 11 C.F.R. § 114.15 may result in less regulation of some election-related content, they are necessary to avoid countervailing First Amendment concerns. This balance is entirely consistent with what *Shays III* has authorized. 528 F.3d at 926 ("the FEC, properly motivated by First Amendment concerns, may choose a content standard less restrictive than the most restrictive it could impose").

[6] In fact, the "functional equivalent of express advocacy" formulation was developed by the Supreme Court to address exactly what *Shays III* criticized – regulation based solely on a "functionally meaningless" express advocacy standard. 528 F.3d at 924 (quoting *McConnell v. FEC*, 540 U.S. 93, 193 (2003)).

3. Clarification of the Express Advocacy Standard

The FEC's alternative regulatory definition of express advocacy contained at 11 C.F.R. § 100.22(b) is no stranger to controversy. It has been held unconstitutional by federal courts that have addressed it on the merits. *See Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Maine Right to Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998). More recently, this Commission has recognized the "checkered history" of 11 C.F.R. § 100.22(b) and appears loath to apply it. *See* FEC Matters Under Review 5694 and 5910 (Americans for Job Security) Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn (Apr. 27, 2009).

The vagueness and overbreadth of the alternative definition of express advocacy is well documented in the above-cited materials and need not be rehashed here. Suffice it to say, the alternative definition of express advocacy suffers from the same vagueness and overbreadth problems as the PASO Standard. Accordingly, the alternative definition of express advocacy should not be adopted for purposes of this rulemaking.

4. The "Explicit Agreement" Standard

The "Explicit Agreement" Standard is not a content standard. Rather, it is a conduct standard that requires an examination of intent which, for the reasons articulated in *WRTL*, 551 U.S. at 467-69, has very serious First Amendment consequences and, therefore, should be rejected.

The "Explicit Agreement" Standard would regulate a communication as coordinated if it is made pursuant to an "explicit agreement" with a candidate or political party "to create, produce, or distribute the communication ... *for the purpose of influencing* a Federal election." *Id.* at 53904-05, 53912 (emphasis added). This standard begs the question of a speaker's intent. *See WRTL*, 557 U.S. at 467-69 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976), which explained, at 79 and n.104, that the meaning of "for the purpose of ... influencing" requires an examination of a speaker's intent).

This is precisely what the Supreme Court in *WRTL* worried would occur when intent is used to divine an election-related purpose:

> Far 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. No reasonable speaker would choose to run an ad ... if its only defense to a criminal prosecution would be that its motives were pure.

551 U.S. at 468. The FEC's briefs in *WRTL* confirmed that a "constitutional standard that turned on the subjective sincerity of a speaker's message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation." *Id.*

The Commission would be well within its authority, as described in *Shays II*, 414 F.3d at 99-100, and *Shays III*, 528 F.3d at 924, if it rejects the "Explicit Agreement" Standard for a content-based standard. As explained by the Supreme Court, a content-based standard better safeguards First Amendment interests. *WRTL*, 551 U.S. at 467-69. *Shays III* applauded the FEC's previous efforts to respect First Amendment interests in its coordination regulations and has afforded the FEC flexibility to do so again here by allowing it, as previously stated, to "choose a content standard less restrictive than the most restrictive it could impose" provided that the standard "rationally separates election-related advocacy from other activity." 528 F.3d at 925, 926.[7] Because of the serious First Amendment concerns raised by the "Explicit Agreement" Standard, it should be rejected.

[7] Applying a content-based standard instead of the "Explicit Agreement" Standard does not mean that "the FEC would do nothing" in the NY Times hypothetical discussed in *Shays III*. *See* note 5 *supra*. To the contrary, regulation of the advertisement in the NY Times hypothetical would be based on the content of the advertising.

V. Conclusion

For the foregoing reasons, the Chamber respectfully requests that the Commission adopt a *WRTL* Content Standard with the safe harbor, rules of interpretation, and other limitations of 11 C.F.R. § 114.15 intact. Counsel also request to testify at the Commission's hearing on this NPRM.

Sincerely,

Jan Witold Baran
Caleb P. Burns

Counsel to the Chamber of Commerce of the United States of America