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AGENDA ITEM

For Meeting of 9/26/10

SUBMITTED LATE

MEMORANDUM

TO: The Commission

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SUBJECT: Draft Final Rules and Explanation and Justification for Coordinated Communications

Attached are draft Final Rules and Explanation and Justification to implement the decision of the Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

We request that this draft be placed on the agenda for August 26, 2010.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 109

[Notice 2010 - XXXXX]

Coordinated Communications

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission is revising its regulations regarding coordinated communications. The Commission is issuing these rules and offering a more complete explanation and justification for parts of the existing rules to comply with the decision of the Court of Appeals for the District of Columbia Circuit in Shays v. FEC and to address other issues involving the coordinated communications rules.

DATES: These rules are effective on December 1, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, Ms. Jessica Selinkoff, Attorney, Ms. Joanna S. Waldstreicher, Attorney, or Ms. Esther D. Heiden, Attorney, 999 E Street N.W., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is revising its regulations regarding coordinated communications at 11 CFR 109.21. The Commission is: (1) adding a new content standard at 11 CFR 109.21(c)(5) for communications that are the functional equivalent of express advocacy; and (2) creating a safe harbor for certain business and commercial

communications. The Commission is retaining the conduct standards for common vendors and former employees at 11 CFR 109.21(d)(4) and (5) and is providing further explanation and justification for those rules. The Commission is not, at this time, adopting a safe harbor for certain public communications paid for by non-profit organizations described in 26 U.S.C. 501(c)(3) ("501(c)(3) organizations") or revising the rules concerning party coordinated communications at 11 CFR 109.37.

Transmission of Final Rules to Congress

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the Federal Register, at least thirty calendar days before they take effect. The final rules that follow were transmitted to Congress on _____.

Explanation and Justification

I. Background

The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. ("the Act"), and Commission regulations limit the amount a person may contribute to a candidate and that candidate's authorized committee with respect to any election for Federal office, and also limit the amount a person may contribute to other political committees in a given calendar year. See 2 U.S.C. 441a(a)(1); 11 CFR 110.1(b)(1), (c)(1), and (d); see also 2 U.S.C. 441b; 11 CFR 114.2 (prohibitions on corporate contributions). A "contribution" may take the form of money or "anything of value," including an in-kind contribution, provided to a candidate or political committee for the purpose of influencing a Federal election. See 2 U.S.C. 431(8)(A)(i) and (9)(A)(i);

11 CFR 100.52(a) and (d)(1), 100.111(a) and (e)(1). An expenditure made in coordination with a candidate, a candidate's authorized political committee, or political party committee constitutes an in-kind contribution to that candidate or party committee subject to contribution limits and prohibitions and must, subject to certain exceptions, be reported both as a contribution to and as an expenditure by that candidate or party committee. See 2 U.S.C. 441a(a)(7); 11 CFR 109.20 and 109.21(b).

A. The Rulemaking Record

These final rules for coordinated communications respond to the decision of the Court of Appeals for the District of Columbia Circuit in Shays v. FEC, 528 F.3d 914 (D.C. Cir. 2008) ("Shays III Appeal"), discussed below. The Commission published a Notice of Proposed Rulemaking ("NPRM") in the Federal Register on October 21, 2009. See Notice of Proposed Rulemaking on Coordinated Communications, 74 FR 53893 (Oct. 21, 2009). The NPRM comment period closed on January 19, 2010. The Commission received nine comments from 16 commenters on the NPRM. The NPRM comments are available at http://www.fec.gov/pdf/nprm/coord_commun/2009/shays3comments.shtml.

The Commission published a Supplemental Notice of Proposed Rulemaking ("SNPRM") in the Federal Register on February 10, 2010. See Supplemental Notice of Proposed Rulemaking on Coordinated Communications, 75 FR 6590 (Feb. 10, 2010). The SNPRM invited comments on the effect, if any, of the Supreme Court's decision in Citizens United v. FEC, 130 S.Ct. 876, 78 USLW 4078 (U.S. Jan. 21, 2010), on the rulemaking. The SNPRM comment period closed on February 24, 2010. The Commission received twelve comments from fifteen commenters on the SNPRM. The

SNPRM comments are available at http://www.fec.gov/pdf/nprm/coord_commun/2009/snprmcoordinatedcomments.shtml.

The Commission held a public hearing on March 2 and 3, 2010, at which eleven witnesses testified. Audio files of the hearing and a transcript of the proceeding are available at http://www.fec.gov/pages/hearings/coordinationshays3hearing.shtml.

The Commission kept the rulemaking record open until March 17, 2010. During this post-hearing period, the Commission received three additional comments from four commenters. These additional comments are available at http://www.fec.gov/law/law_rulemakings.shtml#coordinationshays3.[1]

B. Coordinated Communications Before the Bipartisan Campaign Reform Act of 2002

The Supreme Court first examined independent expenditures and coordination or cooperation between candidates and other persons in Buckley v. Valeo, 424 U.S. 1, 58 (1976), although coordination was not explicitly addressed in the Act at that time. See Pub. L. No. 93-443, 88 Stat. 1263 (1974); Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. 431 et seq.). In Buckley, the Court distinguished expenditures that were not truly independent – that is, expenditures made in coordination with a candidate or the candidate's authorized committee – from "independent expenditures." Buckley, 424 U.S. at 46-47. The Court noted that a third party's "prearrangement and coordination of an expenditure with the candidate or his agent" presents a "danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." Id. at 47. The Court further noted that the Act's contribution limits must not

[1] For purposes of this document, "comment" and "commenter" apply to both written comments and oral testimony at the public hearing.

be circumvented through "prearranged or coordinated expenditures amounting to disguised contributions." Id. The Court concluded that a "contribution" includes "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." Id. at 78; see also id. at 47 n.53.

After Buckley, Congress amended the Act to define an "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate" and "not made in concert with, or at the request or suggestion of" a candidate or the candidate's authorized committee or agent. 2 U.S.C. 431(p) (1976) (current version at 2 U.S.C. 431(17)). Congress also amended the Act to provide that an expenditure "shall be considered to be a contribution" when it is made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate, a candidate's authorized committees, or their agents. 2 U.S.C. 441a(a)(7)(B)(i) (1976). The Act separately addressed as contributions expenditures made for the dissemination, distribution, or republication of campaign materials prepared by a candidate, a candidate's authorized committees, or their agents. See 2 U.S.C. 441a(a)(7)(B)(ii) (1976) (now codified at 2 U.S.C. 441a(a)(7)(B)(iii)). Although Congress made some further adjustments to the Act in the decades following Buckley, the coordination provisions in the Act remained substantially unchanged until the Bipartisan Campaign Reform Act of 2002[2] ("BCRA"), as discussed below.

The Commission issued new regulations to implement these post-Buckley changes to the Act. See H.R. Doc. No. 95-1A (1977). The new rules defined an "independent expenditure" as an "expenditure by a person for a communication expressly

[2] Pub. L. No. 107-155, 116 Stat. 81 (2002).

advocating the election or defeat of a clearly identified candidate which is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of" a candidate or committee and set forth the "arrangements or conduct" constituting coordination. 11 CFR 109.1 (1977). In 2001, the Commission adopted new coordinated communications regulations in response to several court decisions.[3] See 11 CFR 100.23 (2001); Explanation and Justification for Final Rules on General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 FR 76138 (Dec. 6, 2000). Drawing on judicial guidance in Christian Coalition, the Commission defined a new term, "coordinated general public political communication" ("GPPC"), to address communications paid for by unauthorized committees, advocacy groups, and individuals that were coordinated with candidates or party committees. A GPPC that "included" a clearly identified candidate was coordinated if a third party paid for it and if it was created, produced, or distributed (1) at the candidate's or party committee's request or suggestion; (2) after the candidate or party committee exercised control or decision-making authority over certain factors; or (3) after "substantial discussion or negotiation" with the candidate or party committee regarding certain factors. 11 CFR 100.23(b), (c) (2001). The regulations explained that "substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election." 11 CFR 100.23(c)(2)(iii) (2001).

[3] See Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (concluding that political parties may make independent expenditures on behalf of their Federal candidates); FEC v. Christian Coalition, 52 F. Supp. 2d 45, 92 (D.D.C. 1999) ("Christian Coalition") (setting forth a test for concluding when an "expressive expenditure" becomes "coordinated" with a candidate).

C. Impact of BCRA on Coordinated Communications

In 2002, Congress revised the coordination provisions in the Act. See BCRA at secs. 202, 214, 116 Stat. at 90-91, 94-95. BCRA retained the statutory provision that an expenditure is a contribution to a candidate when it is made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" that candidate, the candidate's authorized committee, or the agents of either. See 2 U.S.C. 441a(a)(7)(B)(i). BCRA added a similar provision governing coordination with political party committees: expenditures made by any person, other than a candidate or the candidate's authorized committee, "in cooperation, consultation, or concert, with, or at the request or suggestion of" a national, State, or local party committee, are contributions to that political party committee. 2 U.S.C. 441a(a)(7)(B)(ii). BCRA also amended the Act to specify that a coordinated electioneering communication shall be a contribution to, and expenditure by, the candidate supported by that communication or that candidate's party. See 2 U.S.C. 441a(a)(7)(C); see also 2 U.S.C. 434(f)(3) (defining "electioneering communication").

BCRA expressly repealed the GPPC regulation at 11 CFR 100.23 and directed the Commission to promulgate new regulations on "coordinated communications" in their place. See BCRA at sec. 214, 116 Stat. at 94-95. Although Congress did not define the term "coordinated communications" in BCRA, the statute specified that the Commission's new regulations "shall not require agreement or formal collaboration to establish coordination."[4] BCRA at sec. 214(c), 116 Stat. at 95. BCRA also required that, "[i]n addition to any subject determined by the Commission, the regulations shall address

[4] The Court of Appeals for the District of Columbia has noted that "[a]part from this negative command – 'shall not require' – BCRA merely listed several topics the rules 'shall address,' providing no guidance as to how the FEC should address them." Shays v. Federal FEC, 414 F.3d 76, 97-98 (D.C. Cir. 2005).

(1) payments for the republication of campaign materials; (2) payments for the use of a common vendor; (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party." BCRA at sec. 214(c), 116 Stat. at 95; 2 U.S.C. 441a(7)(B)(ii) note.

D. Coordinated Communications After BCRA

As detailed below, the Commission promulgated revised coordinated communications regulations in 2002 as required by BCRA. Several aspects of those revised regulations were successfully challenged in Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004) ("Shays I District"), aff'd, Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) ("Shays I Appeal"), petition for reh'g en banc denied, No. 04–5352 (D.C. Cir. Oct. 21, 2005).

In 2006, the Commission further revised its coordination regulations in response to Shays I Appeal. These revised rules were themselves challenged in Shays v. FEC, 508 F. Supp. 2d 10 (D.D.C. 2007) ("Shays III District"), aff'd, Shays III Appeal, 528 F.3d 914.[5] The NPRM in this rulemaking was issued in response to Shays III Appeal.

1. 2002 Rulemaking

On December 17, 2002, the Commission promulgated regulations as required by BCRA. See 11 CFR 109.21 (2003); see also Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003) ("2002 E&J"). The Commission's 2002 coordinated communication regulations set forth a

[5] A third case filed by the same Plaintiff, referred to as "Shays II," addressed the Commission's approach to regulating section 527 organizations and is not relevant to the coordination rules at issue in this rulemaking. See Shays v. FEC, 511 F. Supp. 2d 19 (D.D.C. 2007).

three-prong test for determining whether a communication is a coordinated communication, and therefore an in-kind contribution to, and an expenditure by, a candidate, a candidate's authorized committee, or a political party committee. See 11 CFR 109.21(a). First, the communication must be paid for by someone other than a candidate, a candidate's authorized committee, a political party committee, or the agents of either (the "payment prong"). See 11 CFR 109.21(a)(1) (2003). Second, the communication must satisfy one of four content standards (the "content prong"). See 11 CFR 109.21(a)(2), (c) (2003). Third, the communication must satisfy one of five conduct standards (the "conduct prong").[6] See 11 CFR 109.21(a)(3), (d) (2003). A communication must satisfy all three prongs to be a "coordinated communication."

The Commission also adopted a safe harbor at 11 CFR 109.21(f) for responses to inquiries about legislative or policy issues. See 2002 E&J, 68 FR at 440-41.

a. Content Standards

The 2002 coordinated communication regulations contained four content standards identifying communications whose "subject matter is reasonably related to an election." 2002 E&J, 68 FR at 427. The first content standard was satisfied if the communication was an electioneering communication.[7] See 11 CFR 109.21(c)(1) (2003). The second content standard was satisfied by a public communication[8] made at any time

[6] A sixth conduct standard clarifies the application of the other five to the dissemination, distribution, or republication of campaign materials. See 11 CFR 109.21(d)(6) (2003).

[7] "Electioneering communication" is defined 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 for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and (3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives." 11 CFR 100.29; see also 2 U.S.C. 434(f)(3).

[8] "Public communication" is defined as "communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the

that disseminates, distributes, or republishes campaign materials prepared by a candidate, a candidate's authorized committee, or agents thereof. See 11 CFR 109.21(c)(2) (2003), 109.37(a)(2)(i) (2003). The third content standard was satisfied if a public communication made at any time expressly advocates the election or defeat of a clearly identified candidate for Federal office. See 11 CFR 109.21(c)(3) (2003), 109.37(a)(2)(ii) (2003). The 2002 version of the fourth content standard was satisfied if a public communication (1) refers to a political party or a clearly identified Federal candidate; (2) is publicly distributed or publicly disseminated 120 days or fewer before an election (the "120-day time window"); and (3) is directed to voters in the jurisdiction of the clearly identified Federal 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) (2003).

b. Conduct Standards

The 2002 coordinated communication regulations also contained five conduct standards. A communication created, produced, or distributed (1) at the request or suggestion of, (2) after material involvement by, or (3) after substantial discussion with, a candidate, a candidate's authorized committee, or a political party committee, would satisfy the first three conduct standards. See 11 CFR 109.21(d)(1)-(3) (2003). These three conduct standards were not at issue in Shays III Appeal, and are not addressed in this rulemaking.

The remaining two conduct standards, which are at issue in this rulemaking, are the (1) "common vendor" and (2) "former employee" standards. The 2002 version of the common vendor conduct standard was satisfied if (1) the person paying for the

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general public, or any other form of general public political advertising." 11 CFR 100.26; see also 2 U.S.C. 431(22).

communication contracts with, or employs, a "commercial vendor" to create, produce, or distribute the communication, (2) the commercial vendor has provided certain specified services to the political party committee or the clearly identified candidate referred to in the communication within the current election cycle, and (3) the commercial vendor uses or conveys information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or information used by the commercial vendor in serving the candidate or political party committee, and that information is material to the creation, production, or distribution of the communication. See 11 CFR 109.21(d)(4) (2003).

The 2002 version of the former employee conduct standard was satisfied if (1) the communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate or the political party committee clearly identified in the communication within the current election cycle, and (2) the former employee or independent contractor uses or conveys information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or information used by the former employee or independent contractor in serving the candidate or political party committee, and that information is material to the creation, distribution, or production of the communication. See 11 CFR 109.21(d)(5) (2003).

These two conduct standards covered only former employees, independent contractors, and vendors[9] who had provided services to a candidate or party committee

[9] See 11 CFR 109.21(d)(4)(ii) for the specific services that a vendor must provide in order to trigger the common vendor standard.

during the "current election cycle," as defined in 11 CFR 100.3. 2002 E&J, 68 FR at 436; 11 CFR 109.21(d)(4), (5) (2003).

2. Shays I Appeal

The Court of Appeals in Shays I Appeal held that the Act did not preclude content-based standards for coordinated communications. Shays I Appeal, 414 F.3d at 99-100 (applying Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). Nonetheless, the court found the 120-day time window in the fourth standard of the content prong of the coordinated communication regulations to be unsupported by adequate explanation and justification and, thus, arbitrary and capricious under the Administrative Procedure Act ("APA"). Shays I Appeal, 414 F.3d at 102. Although the Court of Appeals found the explanation for the particular time frame to be lacking, the Shays I Appeal court rejected the argument that the Commission is precluded from establishing a "bright line test." Id. at 99.

The Shays I Appeal court concluded that the regulation's "fatal defect" was in offering no persuasive justification for the 120-day time window and "the weak restraints applying outside of it." Id. at 100. The court concluded that, by limiting coordinated communications made outside of the 120-day time window to communications containing express advocacy or the republication of campaign materials, the Commission "has in effect allowed a coordinated communication free-for-all for much of each election cycle." Id. Indeed, the "most important" question the court asked was, "would candidates and collaborators aiming to influence elections simply shift coordinated spending outside that period to avoid the challenged rules' restrictions?" Id. at 102.

The Shays I Appeal decision required the Commission to undertake a factual inquiry to determine whether the temporal line that it drew "reasonably defines the period before an election when non-express advocacy likely relates to purposes other than 'influencing' a Federal election" or whether it "will permit exactly what BCRA aims to prevent: evasion of campaign finance restrictions through unregulated collaboration." Id. at 101–02.

3. 2005 Rulemaking

Following the Shays I Appeal decision, the Commission proposed seven alternatives for revising the content prong. See Notice of Proposed Rulemaking on Coordinated Communications, 70 FR 73946 (Dec. 14, 2005) ("2005 NPRM"). The Commission also used licensed data that provided empirical information regarding the timing, frequency, and cost of television advertising spots in the 2004 election cycle. See Supplemental Notice of Proposed Rulemaking on Coordinated Communications, 71 FR 13306 (Mar. 15, 2006).

Although not challenged in Shays I Appeal, the "election cycle" time frame of the common vendor and former employee conduct standards at 11 CFR 109.21(d)(4) and (5), among other aspects of that prong, was also reconsidered in the 2005 NPRM. The Commission sought comment on how the "election cycle" time limitation works in practice and whether the strategic value of information on a candidate's plans, products, and activities lasts throughout the election cycle. 2005 NPRM, 70 FR at 73955-56.

In 2006, the Commission promulgated revised rules that retained the content prong at 11 CFR 109.21(c), but revised the time periods in the fourth content standard. See Explanation and Justification for Final Rules on Coordinated Communications, 71

FR 33190 (June 8, 2006) ("2006 E&J"). Relying on the licensed empirical data, the Commission revised the coordinated communication regulation at 11 CFR 109.21(c)(4) and applied different time periods for communications coordinated with Presidential candidates (120 days before a state's primary through the general election), congressional candidates (separate 90-day time windows before a primary and before a general election), and political parties (tied to either the Presidential or congressional time periods, depending on the communication and election cycle). See id.

The 2006 coordinated communication regulations also reduced the period of time during which a common vendor's or former employee's relationship with the authorized committee or political party committee referred to in the communication could satisfy the conduct prong, from the entire election cycle to 120 days. 2006 E&J, 71 FR at 33204. The 2006 E&J noted that, especially in regard to the six-year Senate election cycles, the "election cycle" time limit was "overly broad and unnecessary to the effective implementation of the coordination provisions." Id. The 2006 E&J reasoned that 120 days was a "more appropriate" limit. Id.

The Commission also adopted new safe harbors at 11 CFR 109.21(d)(2)-(5) for use of publicly available information, 11 CFR 109.21(g) for endorsements and solicitations by Federal candidates, and 11 CFR 109.21(h) for the establishment and use of a firewall. See 2006 E&J, 71 FR at 33201-02, 33205-07.

4. Shays III Appeal

On June 13, 2008, the Court of Appeals issued its opinion in Shays III Appeal. The court addressed both the content and conduct prongs of the coordinated communication regulations.

a. Content Standards

The Shays III Appeal opinion held that the Commission's decision to apply "express advocacy" as the only content standard[10] outside the 90-day and 120-day windows "runs counter to BCRA's purpose as well as the APA." Shays III Appeal, 528 F.3d at 926. The court found that, although the administrative record demonstrated that the "vast majority" of advertisements were run in the more strictly regulated 90-day and 120-day windows, a "significant number" of advertisements ran before those windows and "very few ads contain magic words."[11] Id. at 924. The Shays III Appeal court held that "the FEC's decision to regulate ads more strictly within the 90/120-day windows was perfectly reasonable, but its decision to apply a 'functionally meaningless' standard outside those windows was not." Id. at 924 (quoting McConnell v. FEC, 540 U.S. 93, 193 (2003) (concluding that Buckley's 'magic words' requirement is "functionally meaningless"), overruled in part by Citizens United, 130 S. Ct. at 913); see also McConnell v. FEC, 251 F. Supp. 2d 176, 303-04 (D.D.C. 2003) (Henderson, J.); id. at 534 (Kollar-Kotelly, J.); id. at 875-79 (Leon, J.)) (discussing "magic words").

The court noted that "although the FEC . . . may choose a content standard less restrictive than the most restrictive it could impose, it must demonstrate that the standard it selects 'rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition.'"[12] Shays III Appeal, 528 F.3d at 926 (quoting Shays I Appeal, 414 F.3d at 102). The court stated that "the 'express advocacy' standard

[10] The court did not address the republication of campaign materials, see 11 CFR 109.21(c)(2), in its analysis of the period outside the time windows.

[11] "Magic words" are "examples of words of express advocacy, such as 'vote for,' 'elect,' 'support,' . . . 'defeat,' [and] 'reject.'" McConnell v. FEC, 540 U.S. 93, 191 (2003) (quoting Buckley, 424 U.S. at 44 n.52).

[12] An "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9); see also 11 CFR 100.111(a).

fails that test," but did not explicitly articulate a less restrictive standard that would meet the test. Id.

The court expressed particular concern about a possible scenario in which, "more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain magic words." Id. at 925. The court noted that the Commission "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." Id. The court held that such a rule not only frustrates Congress's purpose to prohibit funds in excess of the applicable contribution limits from being used in connection with Federal elections, but "provides a clear roadmap for doing so." Id.

b. Conduct Standards

The Shays III Appeal court also invalidated the 120-day period of time during which a common vendor's or former campaign employee's relationship with an authorized committee or political party committee could satisfy the conduct prong at 11 C.F.R. 109.21(d)(4) and (d)(5). Shays III Appeal, 528 F.3d at 928-29. The Shays III Appeal court found that with respect to the change in the 2006 coordinated communication regulations from the "current election cycle" to a 120-day period, "the Commission's generalization that material information may not remain material for long overlooks the possibility that some information . . . may very well remain material for at least the duration of a campaign." Id. at 928. The court therefore found that the Commission had failed to justify the change to a 120-day time window, and, as such, the change was arbitrary and capricious. Id. The court concluded that, while the

Commission may have discretion in drawing a bright line in this area, it had not provided an adequate explanation for the 120-day time period, and that the Commission must support its decision with reasoning and evidence. Id. at 929.

E. Current Rulemaking

On October 21, 2009, the Commission published the NPRM in this rulemaking in response to Shays III Appeal. See 74 FR 53893. The deadline for public comment on the NPRM was January 19, 2010. Two days after the close of the NPRM's comment period, on January 21, 2010, the Supreme Court issued its decision in Citizens United. Because Citizens United raised issues that were potentially relevant to this rulemaking, the Commission published the SNPRM. See 75 FR 6590. As discussed more fully below, the SNPRM re-opened the comment period and sought additional comment as to the effect of the Citizens United decision on the proposed rules, issues, and questions raised in the NPRM.

II. Coordinated Communications Content Prong Revisions (11 CFR 109.21(c)(3) and (c)(5))

The Commission is revising the content prong of the coordinated communication rules at 11 CFR 109.21(c) in response to Shays III Appeal. As explained further below, the Commission is adding a new standard to the content prong of the coordinated communication rules. New 11 CFR 109.21(c)(5) covers public communications that are the functional equivalent of express advocacy.

The new functional equivalent content standard was the second of four alternative approaches that the Commission proposed in the NPRM. The Commission also proposed adopting a content standard that would cover public communications that promote,

support, attack, or oppose a political party or a clearly identified candidate (the "PASO standard"). In addition, the Commission proposed clarifying the express advocacy content standard by including a cross-reference to 11 CFR 100.22. Finally, the Commission proposed covering all public communications made for the purpose of influencing an election that are the product of an explicit agreement between a candidate, authorized committee, or political party committee and the person paying for the communication (the "Explicit Agreement" standard). The proposed approaches that the Commission is not adopting are discussed in Part III, below.

A. 11 CFR 109.21(c)(5) – Functional Equivalent of Express Advocacy

The new content standard applies to any public communication that is the "functional equivalent of express advocacy." New 11 CFR 109.21(c)(5) specifies that a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate. The new content standard applies without regard to the timing of the communication or the targeted audience.

Shays III Appeal required the Commission to adopt a content standard that "'rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition.'" Shays III Appeal, 528 F.3d at 926 (quoting Shays I Appeal, 414 F.3d at 102). Specifically, the Court indicated that the Commission must choose a content standard that is more inclusive than "express advocacy" to apply outside the 90-day and 120-day time windows. Id. The Commission has determined that the functional equivalent of express advocacy content standard best meets these criteria. In this, the Commission agrees with the majority of the commenters that the concept of the

functional equivalent of express advocacy, which the Supreme Court first articulated in McConnell, then explained in FEC v. Wisconsin Right to Life, Inc. ("WRTL"), and later applied in Citizens United, is broader than express advocacy and provides a rational basis for separating electoral from non-electoral speech. See Citizens United, 130 S. Ct. at 889-90; WRTL, 551 U.S. 449, 469-70 (2007); McConnell, 540 U.S. at 204-06, overruled in part by Citizens United, 130 S. Ct. at 913.

1. Origin and application of the new standard

The functional equivalent of express advocacy standard has its origins in the Supreme Court's decision in McConnell. In that case, the Supreme Court rejected a facial challenge to BCRA's prohibition on the use of corporate and labor organization treasury funds to pay for electioneering communications, "to the extent that issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." McConnell, 540 U.S. at 206.

In WRTL, the Supreme Court explained the standard when it addressed BCRA's prohibitions on corporate and labor organization funding of electioneering communications, as they applied to three particular ads financed by a nonprofit corporation. As discussed below, the Court's controlling opinion set forth a test for determining when communications contain the "functional equivalent of express advocacy." 551 U.S. at 466-67, 469-70. Following the WRTL decision, the Commission promulgated rules that incorporated the functional equivalent of express advocacy test,

discussed below, in a provision governing the funding of electioneering communications by corporations and labor organizations.[13]

The Supreme Court applied the functional equivalent of express advocacy test a second time in Citizens United. In that decision, the Court found, among other things, that the provision in BCRA prohibiting corporations and labor organizations from using their general treasury funds to pay for electioneering communications was unconstitutional. See Citizens United, 130 S. Ct. at 889-90, 913.

The final rule at 11 CFR 109.21(c)(5) adopts the Supreme Court's functional equivalent of express advocacy test. "As explained by The Chief Justice's controlling opinion in WRTL, the functional-equivalent test is objective: 'a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.'" Citizens United, 130 S. Ct. at 889-90 (quoting WRTL, 551 U.S. at 469-470).

In applying the test, the Commission will follow the Supreme Court's reasoning and application of the test to the communications at issue in WRTL and Citizens United.

In WRTL, the Court found that the particular ads in question were not the functional equivalent of express advocacy. WRTL ran three similar radio advertisements. The transcript of "Wedding" reads as follows:

PASTOR: And who gives this woman to be married to this man?

[13] See 11 CFR 114.15. The Commission intends to issue a separate NPRM to address the regulations at 11 CFR 114.15 in light of the Supreme Court's decision in Citizens United.

BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .

VOICE-OVER: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple yes or no vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: BeFair.org. Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's Committee.

WRTL aired a similar radio advertisement entitled "Loan," which only differs from "Wedding" in its introduction. The "Loan" radio script begins:

LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well . . . . .

COUPLE: Yes, yes . . . we're listening.

OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca . . .

VOICE-OVER: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. . . .

The remainder of the script is identical to "Wedding."

The third WRTL communication is a television advertisement, "Waiting," where "the images on the television ad depict a middle-aged man being as productive as possible while his professional life is in limbo. The man reads the morning paper, polishes his shoes, scans through his Rolodex, and does other similar activities." WRTL, 551 U.S. at 459 n.5. The television script reads:

> VOICE-OVER: There are a lot of judicial nominees out there who can't go to work. Their careers are put on hold because a group of Senators is filibustering --- blocking qualified nominees from a simple yes or no vote. It's politics at work and it's causing gridlock.

The Supreme Court stated that "the remainder of the script is virtually identical to 'Wedding.'" Id.

In finding that the advertisements were not the functional equivalent of express advocacy and explaining its rationale, the Supreme Court stated:

> Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

WRTL, 551 U.S. at 470.

In Citizens United, the Court applied the same "functional-equivalent test" to a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the

Democratic Party's 2008 Presidential primary elections. Citizens United, 130 S. Ct. at 887. The Court found:

> Under this test, Hillary is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency. The narrative may contain more suggestions and arguments than facts, but there is little doubt that the thesis of the film is that she is unfit for the Presidency. The movie concentrates on alleged wrongdoing during the Clinton administration, Senator Clinton's qualifications and fitness for office, and policies the commentators predict she would pursue if elected President. It calls Senator Clinton 'Machiavellian' and asks whether she is 'the most qualified to hit the ground running if elected President.' The narrator reminds viewers that 'Americans have never been keen on dynasties' and that 'a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House.'
>
> Citizens United argues that Hillary is just 'a documentary film that examines certain historical events.' We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President. The narrator begins by asking 'could [Senator Clinton] become the first female President in the history of the United States?' And the narrator reiterates the

> movie's message in his closing line: 'Finally, before America decides on our next president, voters should need no reminders of . . . what's at stake—the well being and prosperity of our nation.'
>
> As the District Court found, there is no reasonable interpretation of Hillary other than as an appeal to vote against Senator Clinton. Under the standard stated in McConnell and further elaborated in WRTL, the film qualifies as the functional equivalent of express advocacy.

Id. at 889-90 (internal citations to record omitted).

As stated above, in its application of the functional equivalent of express advocacy test, the Commission will be guided by the Supreme Court's reasoning and application of the test. A communication will be considered the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

2. Proposed rule and comments received

The new functional equivalent content standard at 11 CFR 109.21(c)(5) is identical to the one proposed in the NPRM. Sixteen commenters provided comments on the proposed content standard. Of the sixteen, eleven commenters supported the proposal and five opposed it.

Three commenters argued that the functional equivalent of express advocacy standard does not apply to coordinated communications. They noted that the court cases in which the standard was developed did not address coordinated speech. In their view, the functional equivalent of express advocacy standard, like the express advocacy

standard, was developed as a constitutional limitation for independent speech by persons other than candidates and political committees and was never intended to apply to candidates, political parties, or those who coordinate with them.

Eight commenters disagreed and argued that the functional equivalent of express advocacy test could be appropriately used in the coordinated communication context. In particular, several commenters asserted that nothing in the test is expressly or impliedly limited to independent speech; rather, the functional equivalent test, which focuses on the communication's content, incorporates general principles of campaign finance law that are equally applicable to coordinated speech.

A number of the commenters supporting the functional equivalent standard noted that the standard "both has the imprimatur of the Supreme Court and the virtue of using language with which the regulated community is now familiar." As one commenter stated:

> [A]lthough it is not perfect, the Wisconsin Right to Life standard is something that people are familiar with, it is already in [Commission] regulations, and in fact, the regulated community has had experience under that standard in the 2008 election, and . . . both corporate and union and other types of organizations seem to have effectively used that standard just two days before the Citizens United opinion in a special election in Massachusetts.

The Commission received eight comments on whether the proposed functional equivalent content standard would satisfy the concerns of the Shays III Appeal court. A majority of those commenters who addressed the topic concluded that the test would satisfy the Court. In particular, several commenters asserted that a functional equivalent

content standard would rationally separate election-related speech from non-electoral speech. Two of these commenters observed that the proposed functional equivalent standard would accomplish this goal because it is an objective standard that was designed by the Supreme Court as a means of identifying election-related advocacy. One commenter noted that the Supreme Court had developed the functional equivalent of express advocacy test to "address exactly what Shays III criticized – regulation based solely on a 'functionally meaningless' express advocacy standard."

By contrast, three commenters maintained that a functional equivalent content standard would be overly similar to the express advocacy content standard, which was rejected by the Shays III Appeal court. These commenters argued that the proposed standard, like the express advocacy standard, is under-inclusive, and would fail to rationally separate election-related speech from other communications as required by Shays III Appeal.

Several commenters urged the Commission to adopt a standard that would protect lobbying and similar policy communications, and that would neither deter nor prohibit the legitimate efforts of groups to influence legislation and policy. These commenters observed that groups often work closely with officeholders who are also Federal candidates on public communications involving legislative efforts, grassroots lobbying, issue advocacy, and educational messages that are completely unrelated to elections. They noted that groups often coordinate with these officeholders on the timing and content of communications in order to generate public support for legislation.

The Commission received thirteen comments on whether a functional equivalent content standard should incorporate any elements of the regulations at 11 CFR 114.15

implementing the Supreme Court's decision in WRTL, or whether the Commission should use criteria other than those set forth in WRTL and Citizens United for determining when a communication is the functional equivalent of express advocacy.

The commenters were divided in their approach. Six commenters opposed adding additional criteria to the proposed functional equivalent content standard; they argued that there was no need, after Citizens United, for any regulatory elaboration of the test. Conversely, one commenter argued that the functional equivalent test as developed by the Supreme Court was neither objective nor clear, and urged the Commission to enumerate specific words that would indicate that a communication was unambiguously related to an election because of a reference to a candidacy, voting, or election. Another commenter supported incorporating all the elements of 11 CFR 114.15 into a functional equivalent content standard, while a different commenter argued that the rules at 11 CFR 114.15 are too vague. Five commenters argued in favor of a bright line rule. Two commenters urged the Commission to adopt language from the WRTL decision stating that, in considering whether a communication is the functional equivalent of express advocacy, "the tie goes to the speaker."[14] WRTL, 551 U.S. at 474 & n.7.

The new content standard applies to all speakers subject to the revised 11 CFR 109.21[15] – including individuals and advocacy organizations – without regard to when a communication is made or its intended audience. The functional equivalent of express advocacy test has been applied by the Supreme Court as a stand-alone test for separating election-related speech that is not express advocacy from non-election related speech.

[14] The NPRM also sought comment on the application of the functional equivalent of express advocacy test to a number of examples. The Commission received no comments on those examples. As noted above, the Commission will follow the Supreme Court's reasoning and application of the test.
[15] Party coordinated communications are addressed in 11 CFR 109.37.

Additionally, the Supreme Court developed the functional equivalent of express advocacy test for communications by the full range of speakers covered by the coordinated communication rules. As noted by the commenters, groups often work closely with officeholders on public communications involving legislation, grassroots lobbying, issue advocacy, and educational messages that are completely unrelated to elections. In recognition of these interests, the Commission has decided to use an objective, well-established standard that has been sanctioned by the Supreme Court and that is familiar to those subject to it. As the court noted in Shays III Appeal, "the 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 926.

In addition, the functional equivalent of express advocacy content standard best serves to separate election-related advocacy from other speech in the periods outside the 90- and 120-day pre-election time windows, where the content standard likely will have its greatest impact. See 11 C.F.R. § 109.21(c)(4) (public communications satisfy content standard within the pre-election windows with references to clearly identified candidates or political parties). Like the express advocacy and republication content standards at 11 CFR 109.21(c)(2) and (c)(3), the new content standard applies both inside and outside of the 90- and 120-day time windows in the fourth content standard at 11 CFR 109.21(c)(4). Outside of those time windows, a significantly lower percentage of ads have the purpose and effect of influencing federal elections. See 2006 Final Rule at 33193-97; Citizens United, 130 S. Ct. at 895 ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence.").

As required by Shays III Appeal, the new content standard also captures more communications than the express advocacy content standard outside of the 90-day and 120-day time windows. As one commenter noted, the functional equivalent of express advocacy necessarily encompasses more than express advocacy. As discussed above, the functional equivalent of express advocacy content standard would apply to all communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." For each of these reasons, the Commission concludes that the functional equivalent test satisfies the concerns of the Shays III Appeal court. Accordingly, the Commission has decided to adopt the functional equivalent of express advocacy test as a new content prong for determining whether a communication is coordinated.

B. Technical amendment – 11 CFR 109.21(c)(3)

The Commission is making a technical change to the express advocacy content standard at 11 CFR 109.21(c)(3) by adding a cross-reference to the definition of express advocacy at 11 CFR 100.22.

This change is identical to the one proposed as part of Alternative 2 in the NPRM. The Commission received no comments on this aspect of proposed Alternative 2.[16]

III. Proposed Content Standards Not Adopted

The Commission is not adopting any of the other proposals from the NPRM for revising the content prong of the coordinated communications rule. In addition to the functional equivalent of express advocacy content standard discussed above, the NPRM

[16] See Part III(B) below, regarding the proposal in the NPRM to address the Shays III Appeal court's concerns solely by adding a cross reference to the express advocacy definition in the express advocacy content standard.

contained three alternative proposals: (1) adopting a content standard to cover public communications that promote, support, attack, or oppose a political party or a clearly identified Federal candidate (the "PASO standard"); (2) clarifying the express advocacy content standard by adding a reference to the definition of express advocacy in 11 CFR 100.22; and (3) adopting a new content standard and a new conduct standard to address public communications for which there is explicit agreement (the "Explicit Agreement" standard).

A. Proposed Alternative 1 – Promote, Support, Attack or Oppose ("PASO")

The Commission is not adopting proposed Alternative 1, which would have amended 11 CFR 109.21(c) by replacing the express advocacy standard with a PASO standard. Under the proposed PASO standard, any public communication that promoted, supported, attacked, or opposed a political party or a clearly identified Federal candidate would have met the content prong of the coordinated communications test, without regard to when the communication was made or the targeted audience. The Commission is also not adopting a definition of PASO as proposed in the NPRM.

1. Background

In BCRA, Congress created a number of new campaign finance provisions that apply to communications that PASO Federal candidates. For example, Congress included public communications that refer to a candidate for Federal office and that PASO a candidate for that office as one type of Federal election activity ("Type III" Federal election activity). BCRA requires that State, district, and local party committees, Federal candidates, and State candidates pay for PASO communications entirely with Federal funds. See 2 U.S.C. 431(20)(A)(iii); 441i(b), (e), (f); see also 2 U.S.C. 441i(d)

(prohibiting national, State, district, and local party committees from soliciting donations for tax-exempt organizations that make expenditures or disbursements for Federal election activity).

Congress also included PASO as part of the backup definition of "electioneering communication," should that term's primary definition be found to be constitutionally insufficient. See 2 U.S.C. 434(f)(3)(A)(ii). In addition, Congress incorporated by reference Type III Federal election activity as a limit on the exemptions that the Commission may make from the definition of "electioneering communication." See 2 U.S.C. 434(f)(3)(B)(iv); see also 2 U.S.C. 431(20)(A)(iii). Congress did not define PASO or any of its component terms.

Accordingly, the Commission incorporated PASO in its regulations defining "Federal election activity," and in the soft money rules governing State and local party committee communications and the allocation of funds for these communications. See 11 CFR 100.24(b)(3) and (c)(1); 11 CFR 300.33(c), 300.71, 300.72. The Commission also incorporated PASO as a limit to the exemption for State and local candidates from the definition of "electioneering communication," and as a limit to the safe harbors from the coordinated communications rules for endorsements and solicitations. See 11 CFR 100.29(c)(5) and 109.21(g). To date, the Commission has not adopted a regulatory definition of either PASO or any of its component terms.

The Supreme Court in McConnell upheld the statutory PASO standard in the context of BCRA's provisions limiting party committees' Federal election activities to Federal funds, noting that "any public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating."

McConnell, 540 U.S. at 170. The Court further found that Type III Federal election activity was not unconstitutionally vague because the "words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision." Id. at 170 n.64. The Court stated that the PASO words "'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" Id. (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)). The Court stated that this is "particularly the case" with regard to Federal election activity, "since actions taken by political parties are presumed to be in connection with election campaigns." Id.

2. Comments Received

The commenters were divided on the proposed PASO content standard. Some commenters asserted that PASO would be most consistent with BCRA's purpose; that it would be a "fair proxy" for determining when a communication is for the purpose of influencing a Federal election; and that it would be most responsive to the Shays III Appeal court's requirement that the Commission adopt a content standard that rationally separates election-related advocacy from other activity falling outside of the Act's expenditure definition. Other commenters, however, argued that the PASO standard would reach non-electoral speech and, thus, would not rationally separate election-related advocacy from activity falling outside of the Act's expenditure definition as required by Shays III Appeal. Additionally, some of these commenters argued that the PASO standard should not be extended to contexts other than those defined in BCRA and

approved by the Supreme Court in McConnell – that is, to the Federal election activities of political parties. See McConnell, 540 U.S. at 170.

The Commission notes that it has used PASO in both the coordinated communications safe harbor for endorsements and solicitations, and in the new coordination safe harbor for commercial communications discussed in Part V below, even though such uses were not required by BCRA. See 11 CFR 109.21(g) and (i). Nonetheless, the Commission is not adopting the PASO standard because it has decided that the Shays III Appeal court's mandate is best addressed by adopting a content standard based on the functional equivalent of express advocacy, for the reasons given in Part II above.

Nor is the Commission adopting any definition of PASO, as proposed in the NPRM. In the NPRM, the Commission stated that it was considering possible definitions of PASO "[a]s part of its consideration of a PASO content standard." Because the Commission is not adopting a PASO content standard, it is also not adopting a definition of that standard.

B. Proposed Alternative 3 – Clarification of the Express Advocacy Content Standard

The Commission is not adopting proposed Alternative 3, which would have addressed Shays III Appeal solely by incorporating a cross-reference to the express advocacy definition at 11 CFR 100.22 in the express advocacy content standard at 11 CFR 109.21(c)(3).

As discussed above, Shays III Appeal interpreted the existing express advocacy content standard as follows: "more than 90/120 days before an election, candidates may

ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain magic words." Shays III Appeal, 528 F.3d at 925 (emphasis added). However, "magic words" are only one part of the Commission's express advocacy regulation. See 11 CFR 100.22.

The Commission proposed adding an explicit reference to 11 CFR 100.22 to the express advocacy content standard at 11 CFR 109.21(c)(3) to clarify that, outside of the 90- and 120-day windows, communications containing more than just "magic words" are coordinated communications, provided that the conduct and payment prongs of the coordinated communication test are also met. The Commission sought comment on whether, by itself, the clarification of 11 CFR 109.21(c)(3) as encompassing not only "magic words," but also the entirety of the express advocacy definition at 11 CFR 100.22, would fully address the Shays III Appeal court's concern about the current limitations of the content prong.

Ten commenters addressed this proposal, all of whom opposed it. Eight commenters challenged the definition of "express advocacy" at 11 CFR 100.22, which is beyond the scope of this rulemaking. Two commenters asserted that the proposal "is still an express advocacy test and, for that reason . . . would be radically under-inclusive and would not comply with the [Shays III Appeal] remand."

The Commission agrees that merely clarifying the express advocacy content standard at 11 CFR 109.21(c)(3) by adding a cross-reference to the definition of the term at 11 CFR 100.22 would not, by itself, satisfy the direction of the court in Shays III Appeal. The Commission therefore is not adopting the proposal in Alternative 3 of the NPRM.

Although the Commission is not adopting proposed alternative 3 as a response to the Shays III Appeal court decision, it is adding a cross reference to the definition of express advocacy as described in Part II above.

C. Proposed Alternative 4 – The "Explicit Agreement" Standard

The Commission is not adopting proposed Alternative 4, which would have revised 11 CFR 109.21(c)(5), (d)(7), and (e), to provide that both the content and conduct prongs of the coordinated communication test would be satisfied by a formal or informal agreement between a candidate, candidate's committee or political party committee, and a person paying for a "public communication," as defined in 11 CFR 100.26. Under the proposal, either the agreement or the communication would have had to be made for the purpose of influencing a Federal election. Like the other proposed content standards, the proposed "Explicit Agreement" alternative would have applied without regard to when the communication was made or the targeted audience. The Commission sought comment on whether the Explicit Agreement alternative should be adopted in conjunction with another content proposal.

The proposed Explicit Agreement Alternative was an attempt to address a concern that appears to have motivated the courts in both Shays I Appeal and Shays III Appeal: communications plainly intended to influence a Federal election could be explicitly coordinated outside the 90 and 120 day windows, so long as such communications did not contain the "magic words" of express advocacy. See Shays III Appeal, 528 F.3d at 925-26; Shays I Appeal, 414 F.3d 98. In concluding that the current coordinated communication regulations "frustrate Congress's goal of 'prohibiting soft money from being used in connection with Federal elections,'" the Shays III Appeal court stated that,

"[o]utside the 90/120-day windows, the regulation allows candidates to evade – almost completely – BCRA's restrictions on the use of soft money." Id. (quoting McConnell, 540 U.S. at 177 n. 69).

The Shays III Appeal court presented an example (the "NY Times hypothetical") to illustrate that "the regulation still permits exactly what we worried about" in Shays I Appeal: "more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain magic words," and the Commission would do nothing about this, "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." Id. The Shays III Appeal court's discussion referenced the identical concern raised in Shays I Appeal, where the court noted that:

> [M]ore than 120 days before an election or primary, a candidate may sit down with a well-heeled supporter and say, "Why don't you run some ads about my record on tax cuts?" The two may even sign a formal written agreement providing for such ads. Yet so long as the supporter neither recycles campaign materials nor employs the "magic words" of express advocacy – "vote for," "vote against," "elect," and so forth – the ads won't qualify as contributions subject to FECA.

Shays III Appeal, 528 F.3d at 921 (quoting Shays I Appeal, 414 F.3d 98).

Comments Received

Of the twelve commenters who addressed the Explicit Agreement proposal, none supported the proposal on its own. Five commenters did, however, support the proposal if it were adopted in addition to another content standard. Two commenters supported the Explicit Agreement standard only if it were adopted in addition to the PASO content standard, and three commenters supported the proposal only if it were adopted in addition to a functional equivalent of express advocacy content standard

Seven commenters expressed concern that the "fact specific" determination of whether a communication or agreement was made for the purpose of influencing a Federal election would require broad and intrusive investigations to determine the speaker's intent. Eight commenters noted that the Supreme Court has rejected intent-based standards requiring broad discovery, most explicitly and recently in WRTL: "an intent-based test would chill core political speech by opening the door to a trial on every ad." WRTL, 551 U.S. at 467.

Six commenters asserted that the adoption of a revised content standard that rationally separates election-related advocacy from other communications would satisfy the Shays III Appeal court's concerns. These commenters argued that the NY Times hypothetical was intended to show the weakness of the existing content standard. As one commenter stated, "The court's point here was about how bad the express advocacy content standard is, not an endorsement of an 'explicit agreement' conduct standard."

The Commission agrees with the majority of commenters that the Explicit Agreement proposal is not necessary and would not be the best way to carry out the Shays III Appeal court's mandate. The court required the Commission to adopt a content standard that "'rationally separates election-related advocacy from other activity falling

outside FECA's expenditure definition.'" Shays III Appeal, 528 F.3d at 926. The revised content prong of the coordinated communication test does so. It "rationally separates" election-related advocacy from other communications about which a candidate may coordinate with an outside group, such as issue advertisements, by filtering out non-electoral communications.[17] See 2002 E&J at 430.

The Commission agrees with the commenters who stated that the NY Times hypothetical served to demonstrate the Shays III Appeal court's concerns about the sufficiency of the express advocacy standard outside the 90- and 120-day windows. The revised content standard addresses this concern. Thus, the Commission is not required to adopt the Explicit Agreement proposal, which would have significantly altered the structure of the current rules.

Furthermore, the Explicit Agreement proposal would require the Commission to determine whether the agreement or communication in question was made for the purpose of influencing an election. This inquiry could require the Commission to examine the subjective intent of the parties to an agreement. Although it is possible, as Shays III Appeal suggested, that a candidate's supporter would explicitly state that communications are being coordinated for the purpose of influencing an election, in most cases meeting the Explicit Agreement standard would require other proof demonstrating that the agreement or communication was made for the purpose of influencing an election. In such cases, the Commission would need to investigate and evaluate the parties' subjective intent, a task that the Supreme Court has cautioned against. See, e.g.,

[17] The court has twice upheld the Commission's determination to promulgate coordinated communications rules that "drew distinctions based on content." Shays I Appeal, 414 F.3d at 100; see also Shays III Appeal, 528 F.3d at 924.

WRTL, 551 U.S. at 467 ("[A]n intent-based test would chill core political speech by opening the door to a trial on every ad[.]").

The Commission also recognizes commenters' concerns regarding the practical difficulty of investigating the purpose of agreements or communications. Although the presence of the conduct standard inevitably requires investigation into parties' actions, the content standard serves to limit those inquiries to election-related activity. This screening function is particularly important when considering communications made at any time, without regard to their proximity to a Federal election.

For these reasons, the Commission has decided not to adopt the Explicit Agreement proposal.

IV. Coordinated Communications Conduct Prong -- Common Vendor and Former Employee Standards (11 CFR 109.21(d)(4) and (d)(5))

The Commission is not adopting any changes to the common vendor or former employee conduct standards at this time. In order to comply with the Shays III Appeal decision, the Commission has decided to retain the current 120-day time period in the common vendor and former employee conduct standards, while providing a more detailed explanation and justification about why this time frame is sufficient to prevent circumvention of the Act.

BCRA required the Commission to promulgate new coordinated communications rules that address "payments for the use of a common vendor" and "payments for communications directed or made by persons who previously served as an employee of a candidate or a political party." BCRA at sec. 214(c), 116 Stat. at 95; 2 U.S.C.

441a(7)(B)(ii) note. In response to these requirements, the Commission adopted two conduct standards in the 2002 coordinated communications rulemaking, at 11 CFR 109.21(d)(4) and (d)(5), that directly addressed common vendors and former employees of candidates and party committees. See Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003).

The 2002 regulation provided that the fourth standard of the conduct prong (the "common vendor" standard) was satisfied if three conditions were met. First, the person paying for the communication must contract with or employ a "commercial vendor" to create, produce, or distribute the communication. 11 CFR 109.21(d)(4)(i). Second, the commercial vendor must have provided certain specified services to the candidate clearly identified in the communication, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee during the same election cycle . 11 CFR 109.21(d)(4)(ii) (2002). Third, the commercial vendor must use or convey to the person paying for the communication information about the plans, projects, activities, or needs of the candidate, candidate's opponent, or political party committee, and that information must be material to the creation, production, or distribution of the communication. 11 CFR 109.21(d)(4)(iii)(A). Alternatively, the commercial vendor must use or convey to the person paying for the communication information used previously by the commercial vendor in providing services to the candidate, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or the political party committee, and that information must be material to the creation, production, or distribution of the communication.

11 CFR 109.21(d)(4)(iii)(B). Material information that was obtained from a publicly available source does not meet this conduct standard. 11 CFR 109.21(d)(4)(iii).

Similarly, the fifth conduct standard (the "former employee" standard) was satisfied if two conditions were met. First, the communication must be paid for by a person or by the employer of a person who was an employee or independent contractor of the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee during the same election cycle. 11 CFR 109.21(d)(5)(i) (2002). Second, the former employee or independent contractor must use, or convey to the person paying for the communication, information about the plans, projects, activities, or needs of the candidate or political party committee that is material to the creation, production, or distribution of the communication. 11 CFR 109.21(d)(5)(ii)(A). Alternatively, the former employee or independent contractor must use, or convey to the person paying for the communication, information used previously by the former employee or independent contractor in providing services to the candidate, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or the political party committee that is material to the creation, production, or distribution of the communication. 11 CFR 109.21(d)(5)(ii)(B). Material information that was obtained from a publicly available source does not meet this conduct standard. 11 CFR 109.21(d)(5)(ii).

In the 2002 rulemaking, the Commission adopted the election cycle as the time period during which a common vendor or former employee must have provided services to an authorized committee or political party committee to come within these conduct

standards. The time period effectively operates as a screening mechanism: it provides a bright line to limit potentially difficult investigations into whether particular information is material to a communication, by recognizing that information loses its strategic value as it ages. In 2006, the Commission reduced the time period from the entire election cycle to the previous 120 days. See 11 CFR 109.21(d)(4)(ii), (d)(5)(i); Final Rules and Explanation and Justification: Electioneering Communications, 71 FR at 33204 (June 8, 2006).

The 120-day time period was challenged in Shays III Appeal. While the court did not disagree with the time period on its merits, it found that "the FEC has provided no explanation for why it believes 120 days is a sufficient time period to prevent circumvention of the Act." Shays III Appeal, 528 F.3d at 929. The court recognized that the Commission has discretion in determining where to draw a bright line, but concluded that "it must support its decision with reasoning and evidence, for 'a bright line can be drawn in the wrong place.'" Id. (quoting Shays I Appeal, 414 F.3d at 101). Thus, although the Shays III Appeal court held that the Commission had failed to justify sufficiently the 120-day period applicable to both common vendors and former employees, it did not hold that the 120-day period was inherently improper.

In the NPRM, the Commission proposed three alternatives for the common vendor and former employee conduct standards: retain the 120-day period with a more thorough explanation and justification; replace the 120-day period with a two-year period ending on the date of the general election; and resume using the former current election cycle period. The Commission sought comment on whether each proposed alternative would comply with the court's holding in Shays III Appeal. The Commission also

sought comment on whether it should adopt a different time period than the proposed alternatives. In trying to determine the most appropriate period of time, the Commission asked a number of questions, including questions about the factors that may affect the period of time that campaign information remains relevant, and whether particular types of information remain useful to a campaign for shorter or longer periods of time. The Commission also asked whether the shelf life of campaign information depends on the particular election, or the specific type of vendor or media involved.

At the hearing, Commissioners specifically requested empirical or statistical data to be submitted to help determine which alternative would best implement the court's holding. The consensus at the hearing and in written comments appeared to be that no such data exist: several commenters stated that they doubted whether such data existed, and none of the commenters provided any. The Commission also conducted its own research of the existing political science and social science literature, and this research also failed to uncover any data of this kind. Indeed, given the variables involved, such as the different types of campaign information and the dynamics of different campaigns, the Commission is doubtful that it could fashion an empirical or statistical study that would produce meaningful results.

Two commenters opposed retaining the 120-day period. One commenter suggested that a 120-day period does not accurately reflect the period during which a vendor or former employee is likely to possess and convey timely campaign information. The other advocated for a "strong presumption of coordination standard." Neither provided empirical or statistical data to support adoption of a time-period longer than 120 days.

The bulk of the commenters who addressed this issue, however, asserted that virtually no information that would be material to the creation, production, or distribution of a public communication made for the purpose of influencing an election would retain its relevance for longer than 120 days. Several commenters explained that the shelf life of campaign information has been shortened because the Internet and cable news outlets continue to reduce the duration of the news cycle. They agreed that information such as overall campaign strategy or campaign "master plans," purchases of television ad time, donor lists and mailing lists, polling results, and monetary resources and spending loses relevance or becomes public within the 120-day period.

Although the Shays III Appeal court stated that a "detailed state-by-state master plan prepared by a chief strategist may very well remain material for at least the duration of a campaign," several commenters stated that, based on their personal campaign experience, this is not the case. Shays III Appeal at 928 (quoting Shays III District at 51). The commenters testified that overall campaign strategies and master plans grow stale as a campaign progresses, and generally become outdated well within 120 days. They stated that strategies and master plans developed at the outset of a campaign often change in response to the give and take of political campaigns. They stated that what may be a battle plan at one point in time changes, and could change drastically, as events overtake that plan and as participants "react[] to the environment on the ground in the election." One commenter said she felt that "if I miss one particular meeting one week, the plan has completely changed . . . the next."

The commenters also noted that in many cases, a campaign's overall strategy becomes a matter of public knowledge through its advertisements, interactions with the

press, and other public avenues. In fact, several commenters noted that often "the entire press and political world knows what the master plan is" because "master plans are drawn up to be presented to the press to show the road map to victory."

Commenters also addressed the purchase of television advertising time, noting that the information is publicly available from television stations. Through this publicly available information, candidates and political committees can determine when and where their allies and opponents are devoting resources, and make decisions about their own television communications accordingly. Information obtained from a publicly available source is the antithesis of the valuable proprietary information known only to campaign insiders that is the focus of the coordinated communications rules. For this reason, such information is exempted from the common vendor and former employee conduct standards. See 11 CFR 109.21(d)(4)(iii) and (d)(5)(ii).

Likewise, some commenters pointed out that potentially the most valuable type of information to a campaign – information about a campaign's contributors, available funds, and expenditures – is also publicly available, through the campaign finance reports filed with the Commission. Candidates' authorized committees and political party committees must file reports with the Commission at least every calendar quarter and in many instances more often, detailing all receipts and disbursements. See 11 CFR 104.3 and 104.5. This information will thus necessarily become publicly available within the 120-day window. As noted above, information obtained from a publicly available source does not satisfy the common vendor and former employee conduct standards in 11 CFR 109.21(d)(4) and (d)(5), an exemption that was not challenged in Shays III Appeal.

Several commenters also pointed to the Commission's own regulations concerning the allocation of polling costs, which provide that after sixty days polls lose 95 percent of their value, and argued that the regulation demonstrates how quickly polling information becomes stale. See 11 CFR 106.4(g). The Shays III Appeal court also took note of this regulation, pointing out that the regulation indicates that polling data retains some value for 180 days. One commenter stated that this regulation no longer reflects the realities of political campaigns, however, and that "two-month-old polls are not worth five percent" of their original value. Another commenter pointed out that the Commission's regulation concerning polling data was written "decades ago," and observed that polling practices have changed dramatically in the intervening years, shortening the lifespan of polling results significantly.

Several commenters addressed the shelf life and materiality of contributor lists and mailing lists. Most agreed that campaign contributor lists do not provide information that is not also publicly available through reports submitted to the Commission. They also indicated that these lists are of little use to third parties wishing to create or distribute public communications in support of a campaign, because the contributors on the list already presumably support the candidate, and there is thus little incentive for a third party to target its communications to those supporters.

The Commission has decided to retain the 120-day period in the common vendor and former employee provisions at 11 CFR 109.21(d)(4) and (d)(5) because, based on the record, 120 days has been shown to be a sufficient time period to prevent circumvention of the Act. The clear thrust of the comments was that campaign information must be both current and proprietary (that is, non-public) to be subject to the coordinated

communications regulation. The information in the rulemaking record shows the widespread public availability of certain types of campaign information that used to remain confidential for much longer in years past, as well as the rapidity with which campaign strategy changes in response to the give-and-take of the campaign process. The record also indicates that changes in technology have significantly reduced the duration of the news cycle, further decreasing the time that campaign information remains relevant. Moreover, there is no information in the rulemaking record showing that the use or conveyance by common vendors and former employees of information material to public communications outside of the 120-day period has become problematic in the four years that the 120-day period has been in effect. Therefore, the Commission concludes that it is extremely unlikely that a common vendor or former employee may possess information that remains material when it is more than four months old.

The Commission is maintaining the 120-day time period because of the weight of comments and testimony stating that information is not valuable beyond 120 days. Accordingly, adopting either of the alternatives extending the common vendor and former employee conduct standards beyond 120 days would be unsupported by the rulemaking record.

V. Safe Harbor for Certain Business and Commercial Communications (11 CFR 109.21(i))

The Commission is adopting a new coordinated communications safe harbor at 11 CFR 109.21(i) to address certain commercial and business communications, as proposed in the NPRM. The safe harbor excludes from the definition of a coordinated

communication any public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy, so long as the public communication does not PASO that candidate or another candidate who seeks the same office, and so long as the communication is consistent with other public communications made by the business prior to the candidacy in terms of the medium, timing, content, and geographic distribution.

The new safe harbor is intended to encompass the types of commercial and business communications that were the subjects of several recent enforcement actions. Matter Under Review ("MUR") 6013 (Teahen), MUR 5517 (Stork), and MUR 5410 (Oberweis) concerned advertisements paid for by businesses owned by Federal candidates that had been operating prior to the respective candidacies. Each advertisement included the name, image, and voice of the candidate associated with the business that paid for the advertisement.

Although each of these advertisements served an apparent business purpose and lacked any explicit electoral content, the advertisements were nonetheless coordinated communications under 11 CFR 109.21. See also MUR 4999 (Bernstein). The advertisements met the payment prong because the candidates' businesses paid for them. They met the content prong because they referred to the candidates by name and picture and were distributed in the candidate's district within the relevant time windows before the election. They met the conduct prong through the candidates' participation in the production of the advertisements.

To avoid capturing such advertising in the future in the coordinated communications rules, the Commission proposed a new safe harbor for bona fide business communications. In the NPRM, the Commission asked a series of questions about the proposed safe harbor. The Commission sought comment on whether to exclude these kinds of commercial and business communications from regulation as coordinated communications, and whether the proposed safe harbor would accomplish this goal. The Commission also sought comment on whether the proposed safe harbor could be used to circumvent the Act's contribution limitations and prohibitions; what changes to the proposed safe harbor might better capture only bona fide business communications without also encompassing election-related communications; and whether the rationale for adopting a similar safe harbor in the 2007 electioneering communications rulemaking would apply in the coordinated communications context.

None of the commenters expressed opposition to the proposed safe harbor, and only one commenter explicitly discussed it. Although that commenter did not oppose the safe harbor as proposed, the commenter indicated that it would also support limiting the safe harbor to communications on behalf of businesses whose names include candidates' names.

The Commission has decided not to impose the additional limitation suggested by the commenter in the final rule. The new safe harbor is already limited to public communications in which a candidate is referred to solely in his or her capacity as owner or operator of the business, thus limiting its reach to businesses with a bona fide business or commercial reason to use the candidate's name or likeness in their communications. The public communication must also be consistent with previous public communications

with respect to its medium (e.g., television, newspaper, etc.), timing (e.g., frequency, time of year, and for television or radio communications, duration and time of day), content, and geographic distribution. Finally, as is the case with the existing safe harbors for endorsements and solicitations, only public communications that do not PASO either the candidate referred to in the communication or any other candidate seeking the same office can qualify for the new safe harbor. Taken together, these multiple safeguards make the additional limitation suggested by the commenter unnecessary.

The Commission considered a similar safe harbor in the 2002 electioneering communications rulemaking, but declined to adopt it then because some public communications might be considered to serve electoral purposes "even if they also serve a business purpose unrelated to the election." Explanation and Justification for Final Rules on Electioneering Communications, 67 FR 65190, 65202 (Oct. 23, 2002). More recently, however, the Commission recognized that many electioneering communications "could reasonably be interpreted as having a non-electoral, business or commercial purpose" (Explanation and Justification for Final Rules on Electioneering Communications, 72 FR 72899, 72904 (Dec. 26, 2007)), and adopted a safe harbor for communications that propose a commercial transaction. 11 CFR 114.15(b). Similarly, here, the Commission recognizes that commercial advertisements that meet the criteria in the new safe harbor serve non-electoral business and commercial purposes. The new safe harbor at 11 CFR 109.21(i) is an appropriate means of excluding bona fide business and commercial communications from regulation as coordinated communications.

VI. Safe Harbor for Public Communications in Support of Certain Tax-Exempt Nonprofit Organizations

The Commission is not adopting the safe harbor proposed in the NPRM to address certain communications paid for by certain tax-exempt nonprofit organizations and in which Federal candidates and officeholders appear. The safe harbor would have excluded from the definition of a coordinated communication any public communication paid for by a non-profit organization described in 26 U.S.C. 501(c)(3) ("501(c)(3) organizations"), in which a candidate expresses or seeks support for the payor organization, or for a public policy or legislative initiative espoused by the payor organization, unless the public communication PASOs the candidate or another candidate who seeks the same office.

The proposed safe harbor was intended to address communications like the one that was the subject of a recent enforcement action. See MUR 6020 (Alliance/Pelosi). The enforcement action involved a television advertisement paid for by a 501(c)(3) organization. In the advertisement, a Federal candidate appeared, discussed environmental issues, and asked viewers to visit a website sponsored by the organization paying for the advertisement. The advertisement was a public communication that was distributed nationwide, including in the candidate's congressional district, within ninety days before the candidate's primary election, and therefore satisfied the fourth coordinated communications content standard at 11 CFR 109.21(c)(4). The advertisement solicited general support for the organization's website and cause, but did

not "solicit[] funds . . . for [an] organization[]" under the existing solicitation safe harbor at 11 CFR 109.21(g)(2).[18]

The NPRM sought comment on whether the Commission should adopt such a safe harbor. The Commission asked whether the proposed safe harbor was necessary and permissible, and what restrictions or conditions should apply to the safe harbor if it were adopted.

The seven commenters who addressed the proposed safe harbor were divided. Two commenters opposed the proposed safe harbor, arguing that it would be subject to abuse. These commenters noted that the proposed safe harbor "does not distinguish between ads primarily about the charity from those primarily about the candidate." The commenters expressed concern that candidates could take advantage of the proposed safe harbor to coordinate with 501(c)(3) organizations to create and distribute ads "to promote [the candidates'] campaign agenda, to set forth their policy views, or to associate themselves with a public-spirited endeavor, all for the purpose of influencing that candidate's election."Other commenters supported the proposed safe harbor. One commenter argued that worthy charitable causes should not be limited in the means of expression available to them by campaign finance regulations. Another commenter argued that not all joint efforts between public officials and 501(c)(3) organizations are necessarily campaign-related, and asserted that some communications by 501(c)(3) organizations are more effective if their timing and content can be coordinated with lawmakers.

[18] The safe harbor at 11 CFR 109.21(g)(2) provides that a public communication in which a Federal candidate solicits funds for another Federal or non-Federal candidate, a political committee, or certain tax-exempt organizations as permitted by 11 CFR 300.65, is not a coordinated communication with respect to the soliciting candidate unless the public communication PASOs the soliciting candidate or an opponent of that candidate.

But even some of the commenters that supported the proposed safe harbor indicated that it may not be necessary at this time. These commenters acknowledged that 501(c)(3) organizations "risk the loss of their tax-exempt status if they engage in any form of partisan political activity" and are, thus, "very wary" about engaging in any activity that would possibly bring their activities within the coordinated communications rules. The commenters stated that the Internal Revenue Service regulations governing 501(c)(3) organizations prohibit a broader range of political activity than Commission regulations, and that few of those 501(c)(3) organizations would therefore benefit from the proposed safe harbor.

The Commission is not adopting the proposed safe harbor for public communications in support of 501(c)(3) organizations. The enforcement action that prompted the proposed safe harbor, MUR 6120 (Alliance/Pelosi), is the only Commission enforcement action in which a 501(c)(3) organization paid for a public communication that satisfied all three prongs of the coordinated communications rule. The lack of any additional complaints against 501(c)(3) organizations under the coordinated communication rules indicates that there is no significant need for the proposed safe harbor at this time. Even without a safe harbor for communications in support of 501(c)(3) organizations, the Commission retains its prosecutorial discretion to dismiss enforcement matters involving such communications.

Certification of No Effect Pursuant to 5 U.S.C. § 605(b) [Regulatory Flexibility Act]

The Commission certifies that the attached rules will not have a significant economic impact on a substantial number of small entities.

The primary basis for this certification is as follows. First, any individuals and not-for-profit enterprises that will be affected by these rules are not "small entities" under 5 U.S.C. 601. The definition of "small entity" does not include individuals. A not-for-profit enterprise is included in the definition as a "small organization" only if it is independently owned and operated and not dominant in its field. 5 U.S.C. 601(4). The National party committees are dominant in their field and do not meet the definition of "small organization." Most State, district, and local party committees also do not meet the definition of "small organization." State, district, and local party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their State and are thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately.

Second, any separate segregated funds that will be affected by these rules are not-for-profit political committees that do not meet the definition of "small organization" because they are financed by a combination of individual contributions and receive financial support from corporations, labor organizations, membership organizations, or trade associations, and therefore are not independently owned and operated.

Third, most of the other political committees that will be affected by these rules are also not-for-profit committees that do not meet the definition of "small organization." Most political committees are not independently owned and operated because they are

not financed by a small identifiable group of individuals. Most political committees rely on contributions from a large number of individuals to fund the committees' operations and activities.

Fourth, the number of State party committees representing minor political parties or any other political committees that might be considered "small organizations" that might be affected by these rules would not be substantial. These rules affect political committees only if they coordinate expenditures with candidates or political party committees in connection with a Federal election.

Fifth, to the extent that any other entities affected by these rules may fall within the definition of "small entities," any economic impact of complying with these rules will not be significant because any economic impact will not affect the revenue stream of such entities. These rules do not impose any new requirements on commercial vendors. Any indirect economic effects that the rules might have on commercial vendors result from the decisions of their clients rather than Commission requirements.

Finally, to the extent that some small entities may be significantly affected by the attached rules, these rules are promulgated pursuant to a court order. Thus, any economic impact of these rules would be caused by the court mandate, rather than agency decisions contained in these rules.

List of Subjects

11 CFR Part 109

Coordinated and independent expenditures.

For the reasons set out in the preamble, Subchapter A of Chapter 1 of Title 11 of the Code of Federal Regulations is amended as follows:

PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) AND (d), AND PUB. L. 107-155 SEC. 214(c))

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

Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L. 107-155, 116 Stat. 81.

2. Section 109.21 is amended by revising the introductory text of paragraph (c), revising paragraph (c)(3), and adding new paragraph (c)(5) 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)(5) of this section satisfies the content standard of this section.

* * * * *

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates, as defined in 11 CFR 100.22, the election or defeat of a clearly identified candidate for Federal office.

* * * * *

(5) A public communication, as defined in 11 CFR 100.26, that is the functional equivalent of express advocacy. For purposes of this section, a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

* * * * *

3. Section 109.21 paragraphs (d)(4)(ii) and (d)(5)(i) are republished to read as follows:

§ 109.21 What is a "coordinated communication"?

* * * * *

(d) * * *

(4) * * *

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days:

* * * * *

(5) * * *

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days; and

* * * * *

4. Section 109.21 is amended by adding new paragraph (i) to read as follows:

§ 109.21 What is a "coordinated communication"?

* * * * *

(i) Safe harbor for commercial transactions. A public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy is not a coordinated communication with respect to the clearly identified candidate if

(1) The medium, timing, content, and geographic distribution of the public communication are consistent with public communications made prior to the candidacy; and

(2) The public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office as that candidate.

On behalf of the Commission,

_____

Matthew S. Petersen
Chairman
Federal Election Commission

DATED: _____

BILLING CODE: 6715-01-P