FEDERAL ELECTION COMMISSION
Washington, DC 20463

RULEMAKING ON
COORDINATED COMMUNICATIONS

DISSENTING STATEMENT OF
COMMISSIONER STEVEN T. WALTHER

I depart from my colleagues with respect to two important aspects of the regulations that the Commission is adopting today on coordinated communications.

First, I depart from the Commission's decision to adopt a content standard for communications disseminated outside the 90-day and 120-day coordinated communications windows based on the "functional equivalent of express advocacy" test set out in Chief Justice Roberts' opinion in the Supreme Court's decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*). As explained below, in Part I, in my view it would have been more appropriate for the Commission to instead adopt a standard based on the statutory "promote, support, attack, oppose" (PASO) test, a standard that the Commission today incorporates into another section of the regulations that are a part of this rulemaking.

Second, I depart from the Commission's decision to retain the 120-day temporal limit for the conduct standard applicable to the use of *material* information by common vendors and former employees. As discussed below, in Part II, because the Commission has not obtained the empirical data necessary to justify retention of the 120-day limit, I believe that the Circuit Court of the District of Columbia's decision in *Shays v. Federal*

Election Commission, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III Appeal*) mandates that the Commission extend the timeframe beyond 120 days.

As detailed below, in my view the regulations adopted today do not draw the line properly between when an expenditure for a communication is made independently of a candidate and when it has been coordinated with a candidate and therefore must be treated as a contribution under the Act.[1] As a consequence, I believe that the regulations adopted today will result in an excess of coordinated spending in circumvention of the Act's contribution limits.

I. PASO is the most appropriate standard for communications disseminated outside the coordinated communications windows

The Supreme Court first noted in *Buckley v. Valeo*, 424 U.S. 1, 47 (1976), that "prearrangement and coordination of an expenditure with [a] candidate or his agent" created the potential for circumvention of the contribution limits contained in the Act. Ever since then, Congress, the courts, and the Commission have continued to refine the legal test for when an expenditure should be treated as an in-kind contribution on the basis that the expenditure was made in coordination with a candidate.

Because "prearrangement and coordination of an expenditure with [a] candidate or his agent" presents a "danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate," *Buckley v. Valeo*, 424 U.S. at 47, the Commission's coordinated communications regulations have always been at the very core of the Commission's statutory mission to administer and enforce the limits and prohibitions of the Act.

[1] The Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* (the Act), mandates that whenever a political expenditure is made "in cooperation, consultation, or concert, with, or at the request or suggestion" of a candidate that the coordinated expenditure be treated as a contribution. 2 U.S.C. § 441a(a)(7)(B)(i).

At the same time, however, the Commission must tread lightly in determining the regulatory test that defines the line where spending for a communication is transformed, through coordinated activity, from a permissible independent expenditure – a communication that an independent speaker has an unqualified First Amendment right to make – into a regulated in-kind contribution.

Where and how this line – the line between *independent expenditures* and *coordinated communications* – is drawn is of even greater consequence as a result of the Supreme Court's *Citizens United* decision earlier this year. *Citizens United v. FEC*, 130 S.Ct. 876 (2010). In that landmark decision, the Supreme Court concluded that corporations have the same First Amendment right as natural persons to use their treasury funds to make independent expenditures. As a consequence, corporations now also run the risk of crossing over the line from constitutionally protected independent expenditures to prohibited corporate contributions. *See* 2 U.S.C. § 441b. Accordingly, in a post-*Citizens United* world, it is even more incumbent upon the Commission to keep a hawk's eye on ways in which corporate spending might erode the Act's constitutionally valid prohibition on corporate contributions. Before *Citizens United*, corporations could not use their treasury funds to make independent expenditures and, consequently, there was little practical concern regarding corporations crossing over the line into coordinated activity, resulting in impermissible corporate contributions. But now there is.

The unanimous *Shays III Appeal* court rejected the Commission's use of "express advocacy" as a standard for separating election-related advocacy from other speech because the "express advocacy" standard failed to "'rationally separate[] election-related advocacy from other activity falling outside [the Act]'s expenditure definition.'" *Shays*

III Appeal, 528 F.3d at 926 (quoting *Shays I Appeal*, 414 F.3d 76, 102 (D.C. Cir. 2005)). In my view, there remains a substantive gap between communications that contain either "express advocacy" or the "functional equivalent of express advocacy" and those that fall within what the court identified as the larger universe of "election-related advocacy." PASO is the correct test to fill that gap,

The PASO standard is, in my view, the only recognized and commonly used standard for drawing the line between election-related advocacy and other speech that is unrelated to an election that would fully address the concerns raised by the *Shays III Appeal* panel regarding communications run outside the coordinated communications windows. *See* 11 CFR § 109.21(c)(4). I come to this conclusion because the PASO standard is more responsive to the *Shays III Appeal* court than the "functional equivalent of express advocacy" standard and because PASO is a well-established familiar statutory standard that has already withstood Supreme Court review.

A. A PASO standard is more responsive to the *Shays III* court than a "functional equivalent of express advocacy" standard

The Commission is engaged in this rulemaking for only one reason – to correct the legal infirmities in the Commission's rules that were identified by the *Shays III Appeal* court. Accordingly, the Commission's primary objective must be to fully respond to, and therefore to comply in all respects with, the decision issued by the unanimous DC Circuit *Shays III Appeal* panel.

Specifically, the *Shays III Appeal* court held that using the "functionally meaningless" express advocacy standard outside the 90/120-day coordinated communications windows "runs counter to [the Bipartisan Campaign Reform Act (BCRA)]'s purpose as well as the

[Administrative Procedure Act]." *Shays III Appeal*, 528 F.3d at 924-926.[2] The court explicitly found that express advocacy was too narrow a standard and that BCRA mandates that the Commission's regulations capture more content through a standard that "'rationally separates election-related advocacy from other activity falling outside [the Act]'s expenditure definition.'" *Shays III Appeal*, 528 F.3d at 926 (quoting *Shays v. FEC*, 414 F.3d 76, 102 (D.C. Cir. 2005) (*Shays I Appeal*)).

Accordingly, the Commission is required by the *Shays III Appeal* court to shift the regulatory line of demarcation by properly capturing communications that fall through the gap that currently exists between the narrow category of "express advocacy" and the much broader category of "election-related" advocacy. Effectively, the Commission must properly distinguish between election-related advocacy and other speech. Although the court clearly intended that the Commission revise its coordinated communication regulations by adopting a standard that would capture a broader spectrum of speech, the standard adopted by the Commission today remains tethered to express advocacy, the very standard that was rejected by the *Shays III Appeal* court.

It is not the phraseology of a communication, but rather the very *scope, or breadth,* of communications, made outside the 90/120-day coordinated communications windows, that were left unregulated and that were found by the court to be too limited. It does not seem likely the *Shays III Appeal* court would find the *WRTL* "functional equivalent of express advocacy" test to satisfy the court's judgment that the Commission must rationally separate election-related advocacy from other speech.

[2] Quoting *McConnell v. FEC*, 540 U.S. 93, 193 (2003) (concluding that *Buckley's* 'magic words' express advocacy requirement is "functionally meaningless"); *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 "functional equivalent standard" adopted by the Commission today, by its very definition, does not capture significant additional meaning. It simply captures additional words that serve only to convey essentially the same meaning. Granted, they are additional words beyond *Buckley's* "magic words," but they are nevertheless words that, in the Supreme Court's parlance, convey the same "functional" meaning. Accordingly, adopting the "functional equivalent standard" constitutes a distinction without a significant difference.[3] The *Shays III Appeal* court instructed the Commission that express advocacy was too narrow a standard for communications outside the 90/120-day coordinated communications windows – "in effect . . . a coordinated communication free-for-all for much of each election cycle." *Shays I Appeal*, 414 F.3d at 100. Accordingly, in my view, because the rule adopted today does not substantively expand the regulatory coverage outside the window, the "coordinated communication free-for-all" described by the court will likely continue unabated.

The *Shays III Appeal* decision requires the Commission to develop a test that captures more meaning, not just more words. The PASO standard does just that. The PASO standard captures all communications that either "promote," "attack," "support," or "oppose" a candidate. Because each of PASO's component terms is quintessentially election-related, the PASO standard fills the entire gap identified by the *Shays III Appeal* court of election-related speech that had not been captured by the Commission's use of an "express advocacy" standard.

[3] I acknowledge, however, that in concluding that *Hillary: The Movie*, "qualifies as the functional equivalent to express advocacy" as a matter of law, and in applying the functional equivalent test based on what "most viewers" would understand as the message, the Supreme Court's decision in *Citizens United* arguably serves to broaden what was previously thought to be the scope of the *WRTL* "functional equivalent of express advocacy" test. *Citizens United*, 130 S. Ct. at 889-90.

B. PASO is a well-established familiar standard that stems from the Act and has withstood Supreme Court review

There appears to be virtually no confusion in the regulated community regarding the well-established PASO standard, which already serves as a common sense, effective, everyday tool to guide conduct in the campaign finance arena. Not only does PASO capture a broader spectrum of communications than express advocacy or its functional equivalent, it also has the benefit of being a statutory term that was introduced by Congress in BCRA[4] and that has withstood judicial scrutiny.

The Supreme Court upheld the constitutionality of the PASO standard in *McConnell v. FEC*, 540 U.S. 93 (2003), concluding that the component terms of the PASO standard – "promote," "attack," "support," or "oppose" – are understandable and clear enough to, in the Court's own words, "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *McConnell* at n.64. Consistent with the Supreme Court's conclusion that the PASO standard provides clear and adequate guidance, the Commission has not seen any significant activity in either enforcement regarding the scope of the PASO standard or in advisory opinion requests seeking to refine the PASO standard with more particularity than in the usual common sense meaning of its component terms.

[4] In BCRA, Congress created several new provisions that use the PASO standard. 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). Specifically, 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). 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 also included PASO as part of the backup definition of "electioneering communication," should that term's primary definition be found to be constitutionally impermissible. *See* 2 U.S.C. 434(f)(3)(A)(ii). Congress did not, however, include a definition for PASO or for any of its component terms for any of these provisions.

The Commission is clearly comfortable with the PASO standard; so much so that the Commission's existing coordinated communications regulations already contain a safe harbor provision that relies on the PASO standard as a limiting factor, without providing any definition of PASO's component terms.[5] Moreover, in this very rulemaking the Commission has adopted a new safe harbor provision for certain commercial and business communications that itself relies on the PASO standard, again without any definition of PASO's component terms.[6]

C. PASO is a constitutionally permissible standard for coordinated communications disseminated outside the 90/120-day windows

In *Citizens United*, the Supreme Court established that corporations have a First Amendment right to spend their treasury funds on independent expenditures (*i.e.*, communications containing express advocacy made independent of a federal candidate or party committee). The Court could find no compelling government interest in prohibiting corporate *independent* political speech. *Citizens United*, 130 S.Ct. at 913.

However, in *Citizens United*, the Court specifically contrasted the First Amendment right to make *independent* expenditures from the right to make political contributions to federal candidates. *See Citizens United*, 130 S.Ct. at 908-912. Precisely because political contributions could lead to either the reality of, or the appearance of, corruption, the

[5] The safe harbor at 11 CFR § 109.21(g) provides that a communication in which a Federal candidate endorses another candidate or solicits funds for another candidate, a political committee, or certain tax-exempt organizations, is not a treated as a coordinated communication so long as the communication does not PASO the endorsing/soliciting candidate or an opponent of that candidate.

[6] *See* new 11 CFR § 109.21(i) (new 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). I support the Commission's decision today to adopt this new safe harbor for business and commercial communications.

Court confirmed that the government has a compelling interest in prohibiting corporations from making contributions to candidates. *Id*.

Because spending that is coordinated with a candidate implicates the same risk of leading to either the reality of, or the appearance of, corruption as does a money contribution, the government has the same compelling interest in prohibiting corporations from coordinating their spending with candidates. However, just because corporations can now make independent expenditures, that does not mean that spending on express advocacy is the only type of spending that is capable of resulting, through coordination with a candidate, in an impermissible contribution.

In fact, the Act contains distinct statutory definitions for (1) *expenditure* (2 U.S.C. § 431(9))[7] and (2) *independent expenditure* (2 U.S.C. § 431(17)).[8] Any spending at all that is "for the purpose of influencing an election" is an *expenditure*, whether or not the spending is made to fund a communication. However, when funds are used specifically for a *communication* and the communication is made *independently* of a candidate, the more specific statutory definition of *independent expenditure*, which is limited to communications that "expressly advocate[e] the election or defeat of a clearly identified candidate," applies.[9]

[7] "The term 'expenditure' includes (i) 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; and (ii) a written contract, promise, or agreement to make an expenditure." 2 U.S.C. § 431(9)(A).
[8] "The term 'independent expenditure' means an expenditure by a person (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17).
[9] *See H.R. Doc. No. 95-1A, Federal Election Regulations, Explanation and Justification for Part 100 Independent Expenditures* at 54 (1977), available at www.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf#page=17 ("This definition parallels 2 U.S.C. § 431(p) [original definition of "independent expenditures in the Act] with additional language from *Buckley v. Valeo* requiring that the expenditure be communicative in nature.").

In contrast, whenever an *expenditure* is not made independently – irrespective of whether the expenditure is for a communication or for some other election-related purpose – and instead is made "in cooperation, consultation, or concert, with, or at the request or suggestion of a candidate" there is no express advocacy requirement and the Act mandates that the coordinated *expenditure* be treated as a contribution. 2 U.S.C. § 441a(a)(7)(B)(i),

Because a coordinated expenditure need not first qualify as an *independent expenditure*, the Commission is not statutorily or constitutionally constrained from adopting a PASO standard for coordinated communications disseminated outside the 90/120-day windows. In fact, this is necessarily the case given that the regulatory standard already in place for communications *within* (*i.e.*, inside) the 90/120-day windows (and which was not challenged in *Shays III*) is a "refers to" standard, which is far short of the express advocacy standard required for *independent expenditures*.

II. Retaining the 120-day temporal limit for common vendors and former campaign employees is not adequately supported by the record

I also depart from my colleagues in the Commission's decision to retain the 120-day temporal limit for the conduct standard applicable to common vendors and former employees. Except for opinion from some commenters, which does not constitute empirical evidence, there is nothing new in the rulemaking record to overcome the *Shays III Appeal* court's finding that there is at least some *material* campaign information that retains value for longer than 120 days.

As directed by Congress in BCRA, 2 U.S.C. § 411a(a)(7)(B)(ii) Note, the Commission first adopted a coordinated communications conduct standard for payments to common vendors and payments for communications directed or made by former

campaign employees in 2003. The temporal limit in the Commission's 2003 regulation covered the use of *material* information throughout the "current election cycle." 11 CFR § 109.21(d)(4)-(5) (2003).

Although several of the Commission's 2003 BCRA regulations were challenged in court, the "current election cycle" timeframe for the use of material information by common vendors and former campaign employees was not among them. *See Shays I Appeal*. Nevertheless, when the Commission revised its post-BCRA coordinated communications regulations in 2006 in response to the *Shays I Appeal* decision, the Commission, on its own, decided to reduce, to 120 days, the time period during which a common vendor's or former employee's relationship with the candidate referred to in a communication could satisfy the conduct prong of the coordinated communications regulation.[10] In doing so, the Commission explained that the "current election cycle" timeframe had been "overly broad and unnecessary to the effective implementation of the coordination provisions" because "material information regarding candidate and political party committee campaigns, strategy, plans, needs and activities . . . does not remain 'material' for long periods of time during an election cycle." Explanation and Justification for Final Rules on Coordinated Communications, 71 FR 33190, 33204 (June 8, 2006).

A. The Commission's "reasoning and evidence" for retaining the 120-day timeframe remains insufficient

The *Shays III Appeal* court found two flaws in the Commission's rationale for reducing the timeframe to 120 days. *Shays III Appeal* at 929. First, citing to 11

[10] The conduct standard applicable to common vendors and former employees does not regulate the use of campaign information that is *not material* to creation, production or distribution of a communication. Moreover, even if material information is shared, if the information was obtained from a publicly available source, the conduct standard is also not satisfied. 11 CFR 109.21(d)(4)(iii).

CFR § 106.4(g), the court indicated that although "the Commission's regulations [regarding polling data] recognize that some types of information retain value for longer than 120 days"[11] the "Commission inexplicably asserts that other types of campaign information – including far more durable information [than polling data] such as donor lists and lists of supportive voters – will have lost value within 120 days." *Id*. Second, the Court concluded that although the Commission has "some discretion in choosing exactly where to draw a bright line such as this one, it must support its decision with reasoning and evidence, for 'a bright line can be drawn in the wrong place.'" *Id. (citing Shays I Appeal* at 101).

In the Notice of Proposed Rulemaking (NPRM),[12] the Commission sought comment on three proposed alternatives for the common vendor and former employee conduct standards: (1) retain the 120-day period with a more thorough explanation and justification; (2) replace the 120-day period with a two-year period; and (3) resume using the former election cycle period.

In response to the NPRM, some commenters indicated that based on their own campaign experience, there was little material information that retains relevance for longer than 120 days and that recent changes in information technology have reduced the duration of the news cycle thereby further decreasing the time that campaign information remains relevant. No commenter provided any empirical or statistical data showing the length of time for which confidential campaign information retains its usefulness.

In my view, however, the number of commenters providing anecdotal opinion evidence on one side of this issue, or the other, should not be determinative as to where

[11] *See* 11 CFR § 106.4(g) (Commission regulation regarding allocation of polling costs provides that polls lose 95 percent of their value after 60 days and then lose their value entirely after 180 days).
[12] Notice of Proposed Rulemaking on Coordinated Communications, 74 FR 53893 (Oct. 21, 2009).

the Commission should draw the temporal line for common vendors and former employees. Even if, assuming *arguendo*, everyone agreed that *most* information becomes stale within 120 days, the *Shays III Appeal* court requires the Commission to address the fact that *some material* information does not become stale, even if that information does not make up the bulk of a campaign's information. Simply put, the Commission has decided to retain a regulation that continues to permit some material information to be shared by common vendors and former employees outside the 120-day timeframe and the Commission has yet to articulate how that decision will not lead to circumvention of the Act.[13]

Effectively, the 120-day timeframe provides a free pass for the flow of any and all information, no matter how "material," how strategic, how important, how proprietary, simply so long as the information flows outside the 120-day timeframe. Based on this regulation, one simply cannot file a complaint with the Commission, even if a person has dispositive proof that a common vendor or a former employee has shared material proprietary information, so long as it is outside the 120–day timeframe.

For the foregoing reasons, the current record in this rulemaking does not establish that 120 days is a sufficient time period to prevent circumvention of the Act, as required by the *Shays III Appeal* court. *Shays III Appeal* at 929.

B. A two-year election cycle would have been a more appropriate timeframe

The *Shays III Appeal* decision requires that the Commission "support its decision with reasoning and evidence." I do not believe that this requirement has been sufficiently satisfied. At best, some commenters have anecdotally indicated that in today's Internet-

[13] See *Shays III Appeal* at 929 ("[T]he FEC has provided no explanation for why it believes 120 days is a sufficient time period to prevent circumvention of the Act.").

age much political information either quickly becomes stale or is made public. Again, that may very well be true – and, in fact, I think that to some extent it is true; however, the fact that the value of some, or even much, information will evaporate within 120 days, in the words of the *Shays III* district court "overlooks the possibility that *some* information—for instance, 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." *Shays III Appeal* at 929 (citing lower court *Shays III* decision, 508 F. Supp. 2d 10, 51 (D.D.C. 2007)).

From the moment a candidate launches a campaign, campaign staff and the vendors that work with the campaign will have access to a wide range of confidential information, including, for example, sensitive information about a political opponent, and strategic decisions that may well retain value for far more than 120 days. Accordingly, I support revising the regulation to encompass a timeframe that focuses on the election cycle rather than on a 120–day timeframe.

Although the Commission has not obtained any more empirical evidence than it had in 2006 to justify a 120 day timeframe, rather than return to the "entire election cycle," I would have supported adoption of the second alternative proposed in the NPRM – replacing the 120-day period with a period that would end with each two-year Federal election cycle because the vast majority of Federal elections are for House seats[14] which are subject to a two-year election cycle. The reality of Federal elections is that there is invariably a paradigmatic shift in political strategy going forward after each even-year Federal election, as a consequence of the results in each election. Therefore a two-year

[14] All 435 House seats are subject to election each even-numbered November. By contrast, there are elections for 33 or 34 Senate seats and, at most, one President in each even-numbered November.

election cycle, ending in November of each even-numbered year, is a timeframe for the common vendor and former employee conduct standards that I could support.

III. Conclusion

For the foregoing reasons, I respectfully dissent from my colleagues in those two aspects of the rulemaking.

August 26, 2010

Steven T. Walther
Commissioner