of regulations for biocontainment facilities.

● Implement a comprehensive risk reduction program (more expansive regulations to address specific risk categories). This would be characterized as a broad risk mitigation strategy that could involve various options such as increased inspection, regulations specific to a certain organism or group of related organisms, or extensive biocontainment requirements. While not the preferred alternative at this time, the risk mitigation strategy considered within this alternative could provide the basis at some point for future Agency regulatory actions, either to establish a new and more appropriate regulatory framework for the movement of plant pests, biological control organisms, and associated articles, or to augment the existing regulations with more effective mitigation measures to address the risk of such movement.

We will examine the potential effects on the human environment of each alternative. We are also interested in comments that identify other issues that should be examined in the EIS. Potential issues include other new mitigation measures, logistical considerations, environmental regulations and constraints, and harmonization of regulatory efforts.

The EIS will be prepared in accordance with: (1) The National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500-1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Comments regarding the proposed scope of the EIS are welcome and will be considered fully. When APHIS has completed a draft EIS, a notice announcing its availability and an invitation to comment on it will be published in the **Federal Register**.

Done in Washington, DC, this 14th day of October, 2009.

Kevin Shea

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–25184 Filed 10–19–09: 8:45 am]

BILLING CODE: 3410–34–S

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2009–22]

Definition of Federal Election Activity

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission seeks comments on proposed changes to its rules regarding the definitions of ''voter registration activity'' and ''get-out-the-vote activity'' under the Federal Election Campaign Act of 1971, as amended. These proposed changes are in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays* v. *FEC*. The Commission has made no final decision on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.

DATES: Comments must be received on or before November 20, 2009. The Commission will hold a hearing on these proposed rules on Wednesday, December 16, 2009 at 9:30 a.m. and, if necessary, Thursday, December 17, 2009 at 9:30 a.m. Anyone wishing to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

ADDRESSES: All comments must be in writing, addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and submitted in either electronic, facsimile or hard copy form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to *FEAShays3@fec.gov*. If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219–3923, with hard copy follow-up. Hard copy comments and hard copy follow-up of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its web site after the comment period ends. The hearing will be held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, or Attorneys Mr. David C. Adkins or Mr. Neven F. Stipanovic, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002 [1] (''BCRA'') contained extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* (''the Act''). The Commission promulgated a number of rules to implement BCRA, including rules defining the terms ''voter registration activity'' and ''get-out-the-vote activity'' (''GOTV activity'') at 11 CFR 100.24(a). The Court of Appeals for the District of Columbia Circuit found aspects of these rules invalid in *Shays* v. *FEC*, 528 F.3d 914 (D.C. Cir. 2008) (''*Shays III Appeal*''). The Commission seeks comment on proposed changes to the rules at 11 CFR 100.24 to implement the *Shays III Appeal* decision.

I. Background

A. BCRA

The Act, as amended by BCRA, and Commission regulations provide that a State, district, or local committee of a political party must pay for certain ''Federal election activities'' with either entirely Federal funds [2] or, in other instances, a mix of Federal funds and ''Levin funds.'' [3] *See* 2 U.S.C. 441i(b); 11 CFR 300.32. The Act identifies four types of activity that are subject to these funding restrictions, including ''voter registration activity''—Type I Federal election activity—and GOTV activity—Type II Federal election activity. *See* 2 U.S.C. 431(20)(A)(i) and (ii); 441i(b); 11 CFR 100.24(a)(2) and (3).[4]

Application of BCRA's Federal election activity funding restrictions for Types I and II Federal election activity is conditioned upon the timing of the activity. Voter registration activity (Type

[1] Pub. L. 107–155, 116 Stat. 81 (2002).

[2] ''Federal funds'' are funds subject to the limitations, prohibitions, and reporting requirements of the Act. *See* 11 CFR 300.2(g).

[3] ''Levin funds'' are funds raised and disbursed by State, district, or local party committees pursuant to certain restrictions. *See* 2 U.S.C. 441i(b); *see also* 11 CFR 300.2(i).

[4] In addition to GOTV activity, Type II Federal election activity also includes ''voter identification'' and ''generic campaign activity.'' *See* 2 U.S.C. 431(20)(A)(ii); 11 CFR 100.24; 100.25. Types III and IV Federal election activity are outside the scope of this rulemaking and are not discussed. They pertain to public communications that refer to a clearly identified Federal candidate and promote, support, attack or oppose a candidate for Federal office (Type III), and services provided by an employee of a State, district, or local committee of a political party who spends more than 25 percent of his or her compensated time on activities in connection with a Federal election (Type IV). Types I and II Federal election activity may be funded with a combination of Federal and Levin funds; Types III and IV Federal election activity must be funded entirely with Federal funds.

I), for example, constitutes Federal election activity, and therefore is subject to BCRA's funding restrictions, only if it is conducted ''120 days before the date a regularly scheduled Federal election is held.'' 2 U.S.C. 431(20)(A)(i). Similarly, voter identification, GOTV activity, and generic campaign activity are Federal election activity only if they are conducted ''in connection with an election in which a candidate for Federal office appears on the ballot.'' 2 U.S.C. 431(20)(A)(ii).

In BCRA, Congress chose to restrict the funds that State, district, and local party committees could use for Federal election activity because it determined that these activities influence Federal elections. *See* 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (noting, for example, that ''get-out-the-vote and voter registration drives * * * are designed to, and do have an unmistakable impact on both Federal and non-Federal elections'').

Restrictions on the funding of Federal election activity by State, district, and local party committees are critical because they prevent evasion of BCRA's restrictions on the raising and spending of non-Federal funds by national party committees and Federal candidates and officeholders. *See* Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064–65 (July 29, 2002) (''2002 Final Rule''). Indeed, in passing BCRA's Federal election activity provisions, Congress had in mind ''the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties, which then use those funds for Federal election activity.'' *See* 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

The Supreme Court upheld BCRA's Federal election activity provisions in *McConnell* v. *FEC,* 124 S. Ct. 619, 670–77 (2003). The Court found that non-Federal funds given to State, district, and local party committees could have the same corrupting influence as non-Federal funds given to the national parties and therefore held that BCRA's Federal election activity restrictions were justified by an important government interest. *Id.* at 672–73. Indeed, the Court held that BCRA's Federal election activity provisions were likely necessary to prevent ''corrupting activity from shifting wholesale to state committees and thereby eviscerating [the Act].'' *Id.* at 673.

In reaching its decision, the Court noted that BCRA regulated only ''those contributions to State and local parties that can be used to benefit federal candidates directly'' and therefore posed the greatest threat of corruption. *Id.* at 673–74. As such, the Court found BCRA's regulation of voter registration activities, which ''directly assist the party's candidates for federal office,'' and GOTV activities, from which Federal candidates ''reap substantial rewards,'' to be permissible methods of countering both corruption and the appearance of corruption. *Id.* at 674; *see also id.* at 675 (finding that voter registration activities and GOTV activities ''confer substantial benefits on federal candidates'' and ''the funding of such activities creates a significant risk of actual and apparent corruption,'' which BCRA aims to minimize).

B. Rulemakings

Although BCRA defines Federal election activity to include ''voter registration activity'' and ''GOTV activity,'' it did not specifically define those underlying terms. *See* 2 U.S.C. 431(20)(A)(ii)–(iii). Accordingly, the Commission promulgated definitions of these terms.

1. 2002 Rulemaking

The Commission first promulgated definitions of ''voter registration activity'' and ''GOTV activity'' on July 29, 2002. *See* 2002 Final Rule, 67 FR at 49067. The 2002 Final Rule defined ''voter registration activity'' as ''contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote.'' *Id.* at 49110. The Explanation and Justification (''E&J'') accompanying the rule noted that the definition was limited to ''individualized contact for the specific purpose of assisting individuals with the process of registering to vote.'' *Id.* at 49067. The Commission expressly rejected an approach whereby mere encouragement to register to vote would have constituted voter registration activity. The Commission was concerned that taking such an approach would result in ''thousands of political committees and grassroots organizations that merely encouraged voting as a civic duty, who have never been subject to Federal regulation for such conduct, [being] swept into the extensive reporting and filing requirements mandated under Federal law.'' *Id.*

The Commission similarly defined ''GOTV activity'' in 2002 as ''contacting registered voters by telephone, in person, or by other individualized means to assist them in engaging in the act of voting.'' *Id.* at 49111. In adopting this construction, the Commission sought to distinguish GOTV activity from ''ordinary or usual campaigning,'' to avoid ''federaliz[ing] a vast percentage'' of the campaign activity that a State, district, or local party committee may conduct on behalf of its candidates. *Id.* at 49067. The Commission's definition focused on actions directed toward registered voters that had the particular purpose of ''assisting registered voters to take any and all steps to get to the polls and cast their ballots, or to vote by absentee ballot or other means provided by law.'' *Id.* The definition was not intended to cover activity aimed at ''generally increasing public support for a candidate or decreasing public support for an opposing candidate.'' *Id.*

The Commission's 2002 definition of GOTV activity also expressly excluded ''any communication by an association or similar group of candidates for State and local office or of individuals holding State or local office if such communication refers only to one or more [S]tate or local candidates,'' in order to keep ''State and local candidates' grassroots and local political activity a question of State, not Federal, law.'' *Id.* The Commission declined to read BCRA as extending ''to purely State and local activity by State and local candidates'' and concluded that such ''a vast federalization of State and local activity'' required ''greater direction from Congress.'' *Id.*

The Commission's 2002 definitions of voter registration activity and GOTV activity were challenged in *Shays* v. *FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (''*Shays I District*''). The district court held that the definition of ''voter registration activity,'' which required actual assistance, was neither inconsistent with congressional intent nor an impermissible construction of BCRA. *See Shays I District*, 337 F. Supp. 2d at 100 (applying *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The court further held that the ''exact parameters'' of the regulatory definition were unclear and, therefore, it was unable to determine if the definition ''unduly compromised'' BCRA's purpose. *Id.* Nevertheless, the court found that the Commission's definition was promulgated without adequate notice and opportunity for comment, contrary to the Administrative Procedure Act; *see* 5 U.S.C. 553, and remanded the regulation to the Commission. *See Shays I District*, 337 F. Supp. 2d at 100.

The court reached similar conclusions as to the definition of ''GOTV activity,'' holding that the definition of ''voter registration activity,'' which required actual assistance, was neither inconsistent with congressional intent nor an impermissible construction of

BCRA. *Id.* at 103, 105 (applying *Chevron*). The court also concluded that there was ''ambiguity as to what acts are encompassed by the regulation,'' which rendered the court unable to determine whether the definition of ''GOTV activity'' unduly compromised BCRA. *Id.* at 105. As it had with the definition of ''voter registration activity,'' however, the court found that the Commission's definition was promulgated without adequate notice and opportunity for comment and remanded the regulation to the Commission. *See id.* at 106.

The court also found that the exemption from the GOTV activity definition for communications made by associations or groups of State or local candidates or officeholders ran contrary to Congress's clearly expressed intent. *See id.* at 104. However, the court found that BCRA provided no support for such an exemption, and it rejected all federalism concerns raised by the Commission in defense of the exemption, holding that ''Congress was sensitive to federalism concerns in drafting BCRA'' and that the Supreme Court in *McConnell* had rejected the general federalism challenge brought against BCRA's Federal election activity provisions. *Id.*

2. 2005 Rulemaking

The Commission commenced a rulemaking in 2005 to address the court's concerns, rather than appeal these aspects of *Shays I District.* Following another notice and period for comment, the Commission promulgated definitions of ''voter registration activity'' and ''GOTV activity'' that were substantially similar to those promulgated in 2002. The final rules were accompanied by an E&J that sought to address many of the *Shays I District* court's concerns. *See* Final Rules on Definition of Federal Election Activity, 71 FR 8926, 8928 (Feb. 22, 2006) (''2006 Final Rule'').

The Commission's decision to leave unchanged the core aspects of the definitions of ''voter registration activity'' and ''GOTV activity'' was based on its continued concern that definitions which captured ''mere encouragement[s]'' would be ''overly broad,'' were unnecessary ''to effectively implement BCRA,'' and ''could have an adverse impact on grassroots political activity.'' [5] Accordingly, the 2006 definitions were designed to encompass activities that actually registered persons to vote and resulted in voters going to the polls. *Id.* at 8928–29. Thus, the Commission sought to ''regulate the funds used to influence Federal elections'' and not ''incidental speech.'' *Id.*

The Commission noted in its 2006 E&J that its regulations would not lead to the circumvention of the Act precisely because they captured ''the use of non-Federal funds for disbursements that State, district, and local parties make for those activities that actually register individuals to vote.'' *Id.* Moreover, ''many programs for widespread encouragement of voter registration to influence Federal elections would be captured as public communications under Type III [Federal election activity].'' *Id.* The 2006 E&J also provided a nonexclusive list of examples of activity that would—and would not—constitute voter registration activity. *Id.*

C. Shays III

The revised definitions of voter registration activity and GOTV activity were challenged again in *Shays* v. *FEC*, 508 F. Supp. 2d. 10, 63–70 (D.D.C. 2007) (''*Shays III District''*). Analyzing the definitions of ''voter registration activity'' and ''GOTV activity,'' the district court noted that the Commission's 2006 E&J addressed only the most obvious instances of what was—and was not—covered activity but not the ''vast gray area'' of activities that State and local parties may conduct and that may benefit Federal candidates. *Shays III District*, 508 F. Supp. 2d at 65, 69–70.

Regarding GOTV activities, in particular, the district court focused on Advisory Opinion 2006–19, issued to the Los Angeles County Democratic Party Central Committee, in which the Commission concluded that a local party committee's mass mailing and pre-recorded, electronically dialed telephone calls (''robocalls'') to the party's registered voters would not constitute get-out-the-vote activity. [6] The district court stated that Advisory Opinion 2006–19 had announced a much narrower interpretation of the scope of GOTV activity than ''might otherwise [have been] presumed on the face of the definition.'' *Id.* at 69.

The district court held that the Commission's failure to address these vast gray areas, and to explain whether activities falling within them would affect Federal elections, unduly compromised BCRA's purposes. *Id.* at 65–66, 69–70. Accordingly, the court remanded the definitions to the Commission. *Id.* at 70–71.

The court of appeals upheld the lower court's decision invalidating the Commission's definitions of ''voter registration activity'' and ''GOTV activity,'' although on slightly different grounds. *See Shays III Appeal*, 528 F.3d at 931. The court of appeals recognized that the Commission had discretion to promulgate definitions that left unaddressed large gray areas of activity and to fill them in later through enforcement actions and the advisory opinion process. *See id.*

Nevertheless, the court of appeals held that the Commission's definitions of ''voter registration activity'' and ''GOTV activity'' were deficient because they served to ''create 'two distinct loopholes.' '' *Id.* The flaws in both definitions were: (1) the ''assist'' requirements, which excluded efforts that ''actively encourage people to vote or register to vote;'' and (2) the ''individualized means'' requirements, which excluded ''mass communications targeted to many people,'' and had the effect of ''dramatically narrowing which activities [were] covered'' by the rules. *Id.* Accordingly, the court of appeals concluded that the definitions would ''allow the use of soft money for many efforts that influence federal elections,'' which is directly counter to BCRA's purpose. *Id.*

The court rejected the Commission's justifications for the definitions—to exclude mere exhortations from coverage and to give clear guidance as to the scope of the rules—because the Commission could craft definitions that exclude ''routine or speech-ending exhortations'' and that provided clear guidance to State, district, and local party committees in a way that is more consistent with BCRA. *Id.* at 932. Accordingly, the court of appeals remanded the regulations to the Commission.

[5] The Commission did change other aspects of the GOTV activity definition in response to the *Shays I District* court decision. The Commission removed from the definition of ''GOTV activity'' the exemption for communications by associations and groups of State or local candidates or officeholders. *See* 2006 Final Rule, 71 FR at 8931. The Commission also removed from the examples of GOTV activity the phrase ''within 72 hours of an election,'' to clarify that the definition covered activity conducted more than 72 hours before an election. *See id.* at 8930–31.

[6] The proposed communications would have been made four or more days before the election, would have informed recipients of the date of the election, would have urged them to vote for local, but not Federal, candidates, and would not have included additional information such as the hours and location of the individual voter's polling place. The Commission concluded that the communications would provide neither actual assistance nor sufficiently individualized assistance to constitute GOTV activity and that, as a result, the communications could be funded exclusively with non-Federal funds.

II. Proposed Revisions to 11 CFR 100.24(a)(2) and 100.24(a)(3)

To comply with the court's decision in *Shays III Appeal*, the Commission proposes revising the definitions of voter registration activity and GOTV activity at 11 CFR 100.24(a)(2)–(3). The Commission seeks comment on the proposal and is particularly interested in whether the proposed definitions would satisfy the court's decision in *Shays III Appeal*. The Commission has not made any final determinations regarding which aspects of the following proposal it will adopt in the final rule.

A. General Definitions

To comply with the *Shays III Appeal* decision, the Commission proposes revising the definitions of voter registration activity and GOTV activity at 11 CFR 100.24(a)(2) and (a)(3). Specifically, the Commission's proposal would define voter registration activity as ''encouraging or assisting potential voters in registering to vote'' and would define GOTV activity as ''encouraging or assisting potential voters to vote.'' The Commission has not made a final determination to adopt these general definitions and seeks comment on them.

These proposals are intended to close the ''two distinct loopholes'' in the current definitions that were identified by the *Shays III Appeal* court as allowing the use of non-Federal funds in connection with Federal elections. *See Shays III Appeal*, 528 F.3d at 931–32. The proposed definitions would eliminate the requirement that voter registration activity and GOTV activity must actually assist persons in registering to vote or in the act of voting. Instead, the proposed definitions cover both activities that encourage voting or voter registration, as well as activities that actually assist potential voters in voting or registering to vote.

Similarly, the proposed definitions would eliminate the requirement that voter registration activity and GOTV activity be conducted by ''individualized means.'' The proposed definitions cover both activities targeted towards individual persons and activities directed at groups of persons—for example, mass mailings, all electronically dialed telephone calls (or, as they are commonly known, ''robocalls''), or radio advertisements—so long as they encourage or assist voting or voter registration.

The Commission seeks comment on whether the proposed definitions adequately address the concerns articulated by the court in the *Shays III Appeal* decision. Do they provide sufficient guidance as to which activities are covered and which are not? Do the proposed definitions, in fact, close the ''two distinct loopholes'' identified by the *Shays III Appeal* court? Alternatively, do the proposed definitions cover activity that Congress did not intend to regulate in BCRA? If so, what specific activities would be covered by the proposed rules that would not have any effect on Federal elections?

More specifically, the proposed definition of ''voter registration activity'' is intended to cover, *inter alia*, the following activities: (1) Providing an individual with a flier that reads ''Register to Vote'' and that includes the URL and address of the appropriate State or local office handling voter registration; (2) providing an individual with a voter registration form and verbally encouraging the recipient to fill out the form and submit it to the appropriate State or local office handling voter registration; or (3) mailing voter registration forms to individuals and encouraging them, in a cover letter, to fill out and submit the forms in advance of the registration deadline. Should the definition cover such activities? What, if any, additional activities should it cover?

Similarly, the proposed definition of ''GOTV activity'' is intended to cover, *inter alia*, these activities: (1) Driving a sound truck through a neighborhood that plays a message urging listeners to ''Vote next Tuesday at the Main Street community center''; (2) mailing a flier to registered voters with the date of the election but not the location of polling places or their hours of operation; and (3) making telephone calls (including robocalls) reminding the recipient of the times during which the polls are open on election day. Should the proposed definition of GOTV activity cover such activities? What, if any, additional activities should it cover?

What, if any, enforcement difficulties might the proposed definitions present?

B. Examples

Each proposed definition includes a non-exhaustive list of examples. Several activities that would either encourage or assist voter registration are provided at proposed paragraphs (a)(2)(i)(A–E). Some of the examples involve actual assistance (''assisting individuals in completing or filing [voter registration] forms'' and ''submitting on behalf of a potential voter a completed voter registration form''), while others involve encouragement of persons to register to vote (''urging individuals to register to vote * * * by any * * * means'').

Similarly, several activities that would either encourage or assist persons in voting are provided at proposed paragraph (a)(3)(i)(A)–(B). Some examples from the existing rule would be retained (such as ''offering to transport, or actually transporting, voters to the polls'') and new examples would be added to illustrate the new ''encourage'' component of the proposed definition. Informing voters of the date of an election or the times or locations of polling locations, for example, would constitute GOTV activity under the proposed definition.

The Commission has not settled on the proposed examples of voter registration activity and GOTV activity and seeks comments on them. By providing these examples, does the proposal make clear that the definitions of voter registration activity and GOTV activity would not require actual assistance? Would the examples help State, district, and local party committees distinguish activities that are covered under the proposed definitions from activities that are not covered? Do the examples clarify any potential ambiguities in the general definition? Are there other examples that should be added? Should any of the proposed examples be revised or deleted? Finally, is it clear that the lists of examples provided in the proposal are not exhaustive and that each example would, by itself, constitute voter registration activity or GOTV activity?

C. Exemption for ''Mere Exhortations''

Although the *Shays III Appeal* court required the Commission to promulgate definitions of voter registration activity and GOTV activity that included encouragements to vote and to register to vote, the court of appeals acknowledged that it would be permissible to exclude from the definitions ''routine or spontaneous speech-ending exhortations'' and ''mere exhortations * * * made at the end of a political event or speech.'' *Shays III Appeal,* 528 F.3d at 932. Accordingly, proposed 11 CFR 100.24(a)(2)(ii) and (a)(3)(ii) recognize that ''speeches'' or ''events'' that include exhortations to vote or to register to vote that are incidental to the speech or event are exempt from the regulatory definitions of GOTV activity and voter registration activity. The proposals provide examples of the types of incidental exhortations that would qualify under the exemption.

The exemption would be limited to exhortations made during a speech or at an event, such as a rally. It would not apply to exhortations made by any other means or in any other forum, such as robocalls, mailers, or television and

radio advertisements. Further, the proposed exemption would apply only if an exhortation to vote or to register to vote is incidental to the speech or event.

The Commission has not made a final determination to adopt this exemption and seeks comment on it. Does it provide clear guidance as to the activities exempted from the definitions of voter registration activity and GOTV activity? Do the examples make clear what types of statements qualify as ''mere exhortations''?

Has the Commission properly established the scope of the proposed exemption? Is it appropriate to limit the exemption to cover only those exhortations that are incidental to a speech or event? Does this requirement capture the type of ''speech-ending'' exhortations discussed by the court in the *Shays III Appeal* decision? Does the requirement that an exhortation be incidental to a speech or event create a workable and enforceable standard? How should the Commission determine whether an exhortation is incidental to a speech or event? Should the Commission consider the frequency with which a ''mere exhortation'' is offered? Is there a material difference between stating ''Vote next Tuesday'' once and stating it multiple times over the course of a speech or event?

Are there other factors that the Commission should consider in determining whether the exemption applies? For example, should the spontaneity of an exhortation play a role in making this determination, and how would the Commission determine the spontaneity of an exhortation? Does it matter at what point in a speech an exhortation is offered? Is an exhortation offered at the end of a speech different from one offered at the beginning or middle of a speech?

Further, is it proper to limit application of the exemption to incidental exhortations made at speeches and events, or should other communications be included as well? If so, what other types of activities and communications should be covered by the exemption? Should it cover direct mailings, robocalls, radio and television advertisements, and all other ''communications'' that contain incidental exhortations to vote or to register to vote? Should the exemption cover, for example, robocalls made a few days before a Federal election that detail Mayor Smith's record and exhorts listeners to ''Vote for Mayor Smith on Election Day''?[7] Would an exemption that included these types of communications be consistent with the court's opinion in *Shays III Appeal*?

Does the medium in which a statement is made affect whether it is a ''mere exhortation'' at all? Are scripted communications incapable of containing incidental exhortations? In other words, are scripted exhortations to vote or to register to vote the types of communications which the *Shays III Appeal* court was referring to in its opinion? If the exemption is expanded to cover exhortations made in other media, how could the Commission determine if they were incidental? Would such a determination be made by examining the proportion of space or time devoted to the exhortation in relation to the rest of the communication? *See, e.g.,* 11 CFR 106.1 (requiring that payments for communications discussing multiple Federal or non-Federal candidates be attributed to each candidate based on the time or space devoted to each one). Would the Commission have to establish threshold percentages that defined whether an exhortation was, in fact, incidental to a communication?

How would the proposed general definitions of ''voter registration activity'' and ''GOTV activity'' be affected by altering the scope of the exemption? Would the examples in proposed paragraphs (a)(2)(i)(A)–(E) and (a)(3)(i)(A)–(B) need to be revised if the Commission adopted a broader exemption? Would allowing a broader exemption potentially allow communications that affect Federal elections to be funded with non-Federal funds, contrary to BCRA's purpose?

This exemption is not intended to inoculate speeches or events that otherwise would meet the proposed definitions of ''voter registration activity'' or ''GOTV activity.'' For example, a speech given 60 days before an election that provides listeners with information on how to register to vote would constitute Federal election activity even if it also contains an exhortation to register to vote (such as ''Register and make your voice heard!''). Should the Commission make this limitation explicit in the rule itself? Without an explicit limitation, could the general exemption be interpreted as applying to voter registration activity or GOTV activity for reasons other than their inclusion of an exhortation? Would adding an explicit limitation be helpful or would it be redundant and therefore unnecessary?

[7] A similar communication that urged a vote for a Federal candidate would be Type III Federal election activity, *see* 11 CFR 100.24(b)(3), and would be subject to BCRA's funding restrictions for that reason, regardless of whether the activity was also deemed to be GOTV activity.

D. Exclusion of Public Communications Relating to State and Local Elections

Finally, proposed 11 CFR 100.24(a)(3)(iii) excludes from the definition of ''GOTV activity'' a ''public communication that refers solely to one or more clearly identified candidates for State or local office and notes the date of the election.'' The proposal under consideration, if adopted, would ensure that the expansion of the GOTV activity definition, which is required by the *Shays III Appeal* court, does not, in effect, render meaningless the statutory definition of ''Federal election activity,'' which specifically does not include amounts disbursed or expended for ''a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii).'' 2 U.S.C. 431(20)(B)(i); 11 CFR 100.24(c)(1).

The Commission has not made a final determination to adopt the proposed exclusion and seeks comment on it. Does the proposed exclusion correctly implement the statutory definition? Is the proposed exclusion necessary to ensure that the expansion of the definition of ''GOTV activity'' does not render meaningless the exclusion for communications that refer solely to non-Federal candidates? Is it necessary to ensure that the Commission does not federalize purely State and local campaign activity?

Conversely, would the proposed provision exclude from regulation the types of activities from which ''federal candidates reap substantial rewards''? *See McConnell,* 124 S. Ct. at 168. Similarly, is the proposed exclusion materially different from the exception for associations of State and local candidates that was included in the Commission's first definition of GOTV activities and that was invalidated by the district court in the *Shays I District* decision? *See Shays I District,* 337 F. Supp. 2d at 102–03; *see also* discussion above in part I.B–C.

E. Other Issues

In *Shays III Appeal,* the court of appeals cited Advisory Opinion 2006–19 (Los Angeles County Democratic Party Central), in which the Commission concluded that letters and pre-recorded telephone calls encouraging certain Democrats to vote in an upcoming local election did not count as GOTV activity, in part, because the communications did not provide individualized assistance to voters. *See Shays III Appeal,* 528 F.3d at 932. The court held that this overly restrictive

definition of GOTV activity was contrary to the statute. See *id.* The court did not address, however, whether communications made solely in connection with a non-Federal election may be excluded from the definition of GOTV activity or Federal election activity.

In light of the *Shays III Appeal* decision and the definitions proposed above, must the Commission explicitly supersede, in whole or in part, Advisory Opinion 2006–19? If so, should the Commission, either in its E&J or in the regulation explicitly address the circumstances involved with that advisory opinion? For example, should the E&J or final regulation acknowledge explicitly that communications made four or more days before an election are ''GOTV activity'' if they encourage or assist individuals in voting, provided that neither of the proposed exclusions at 11 CFR 100.24(a)(3)(iii) (State and local elections) or 11 CFR 100.24(c)(5) (voter identification or GOTV activity solely in connection with a non-Federal election; *see above*)—if adopted—is met? What other aspects of that advisory opinion should be addressed in a similarly explicit manner?

III. Voter Identification and GOTV Activity in Connection With a Non-Federal Election

A. Background

BCRA limits regulation of Type II FEA to activities that are conducted ''in connection with an election in which a candidate for Federal office appears on the ballot.'' *See* 2 U.S.C. 441i(b)(1); 431(20)(A)(ii). In 2002, the Commission defined ''in connection with an election in which a candidate for Federal office appears on the ballot'' generally to mean the period of time beginning on the earliest filing deadline for access to the primary election ballot for Federal candidates in each particular State, and ending on the date of the general election, up to and including any runoff date. *See* 11 CFR 100.24(a)(1)(i). For States not holding a primary election, the covered period began on January 1 of each even-numbered year. *Id.* For special elections in which Federal candidates were on the ballot, the period was deemed to begin when the date of the special election was set and to end on the date of the special election. *See* 11 CFR 100.24(a)(1)(ii).

This definition did not, however, account for municipalities, counties, and States that conducted separate, non-Federal elections within the ''in connection with an election'' time windows. As such, Type II Federal election activities conducted in connection with these non-Federal elections were subject to BCRA's restrictions. Therefore, in 2006, the Commission adopted an Interim Final Rule that revised the definition of ''in connection with an election in which a candidate for Federal office appears on the ballot'' to exclude purely non-Federal voter identification and GOTV activity. *See* Interim Final Rule on Definition of Federal Election Activity, 71 FR 14357 (Mar. 22, 2006) (''Interim Final Rule'').

The Interim Final Rule added new paragraph (a)(1)(iii) to 11 CFR 100.24 to exclude voter identification or GOTV activities that were ''in connection with a non-Federal election that is held on a date separate from a date of any Federal election'' and that refers exclusively to: (1) Non-Federal candidates participating in the non-Federal election, provided the non-Federal candidates are not also Federal candidates; (2) ballot referenda or initiatives scheduled for the date of the non-Federal election; or (3) the date, polling hours and locations of the non-Federal election. *See* 11 CFR 100.24(a)(1)(iii)(A)(1)–(3); Interim Final Rule, 71 FR at 14359–60. By its own terms, the provision expired on September 1, 2007. *See* 11 CFR 100.24(a)(1)(iii)(B); Interim Final Rule at 14358.

B. Proposal

The Commission is considering adding 11 CFR 100.24(c)(5), which would exclude from the definition of ''Federal election activity'' any voter identification activities or GOTV activities that are ''solely in connection with a non-Federal election held on a date separate from any Federal election.'' For example, a GOTV program offering to transport voters to the polls on the day of an exclusively non-Federal election would be eligible for the proposed exclusion. However, a voter identification program collecting information about voters' preferences in both a non-Federal election in March and a Federal primary in April would not qualify, since such a program would not be ''solely in connection with a non-Federal election.'' This proposal largely tracks the Interim Final Rule, although, as proposed here, it would be located in a different paragraph within 11 CFR 100.24.

The proposed rule under consideration is based on the premise that voter identification and GOTV activity for non-Federal elections held on a different date from any Federal election will have no effect on subsequent Federal elections. The Commission seeks comments, especially in the form of empirical data, on whether voter identification and GOTV efforts in connection with a non-Federal election have any meaningful effect on voter turnout in a subsequent Federal election, or otherwise confer benefits on Federal candidates. For example, if a GOTV communication provides the date of a non-Federal election and offers transportation to voters for such a non-Federal election, what effect, if any, would such activity have on a Federal election held on a separate date, that is weeks or months later?

The proposed exclusion would be narrowly drawn and not apply to activities that are also in connection with a Federal election. To that end, the Commission seeks comment on whether the exclusion should take into account the proximity of the next Federal election. For example, should the rule distinguish between situations where the next Federal election is only six days later, as opposed to six months? How much time should pass between a Federal and State or local election to ensure activities associated with the State or local election have no affect on the Federal one? Should the time required to pass be different for voter identification activity than it is for GOTV activity?

Additionally, many states currently allow voters to cast a ballot, either in person or by mail, prior to Election Day—a process known generally as ''early voting.'' *See U.S. Election Assistance Comm'n, A Voter's Guide to Federal Elections 5 (2008), available at http://www.eac.gov/voter/voter/a-voters-guide-to-federal-elections/attachment_download/file.* However, the exclusion in proposed section 100.24(c)(5) distinguishes excluded local activity, in part, based on whether the dates of Federal and non-Federal elections coincide. The Commission seeks comment on whether early voting affects the relevance of the dates on which elections are held. Do the early voting periods for Federal elections overlap with the dates of State and local elections or State and local early voting periods? Can early voters cast ballots at the same time for both Federal and State or local elections when the actual date of those elections do not coincide? How does GOTV activity for early voting in non-Federal elections affect turnout and voting patterns for early voting in Federal elections? The Commission particularly welcomes comments in the form of empirical data.

The proposed exclusion further requires that voter identification or GOTV activity refer exclusively to non-Federal candidates participating in the non-Federal election (provided that the non-Federal candidates are not also

Federal candidates); ballot referenda or initiatives scheduled for the date of the non-Federal election; or the date, polling hours, and locations of the non-Federal election. These limitations are intended to ensure that the only activity excluded from the definition of ''Federal election activity'' is solely in connection with a non-Federal election.

To effectuate this intention better, the Commission invites comments on any changes that it should make to proposed 11 CFR 100.24(c)(5). Do the proposal's limitations ensure that the exclusion covers only non-Federal activity? The Commission seeks comment on whether proposed 11 CFR 100.24(c)(5) excludes ''purely non-Federal'' activities. Is the proposed exclusion consistent with congressional intent?

Finally, the current proposal is different from previous Commission approaches to this issue. In the Interim Final Rule, and subsequently in a Notice of Proposed Rulemaking,[8] the Commission had proposed excluding non-Federal voter identification and GOTV activity from regulation by amending the definition of ''in connection with an election in which a candidate for Federal office appears on the ballot.'' The current proposal would instead address non-Federal elections by adding a new exclusion to the definition of ''Federal election activity'' at 11 CFR 100.24(c)(5). Would this approach have a different effect from the approach in the Interim Final Rule and the NPRM, and if so, should the Commission adopt the prior approach or the proposed approach? Does the Commission have the authority to add this provision, even though it is not expressly provided for in the statutory text? Alternatively, does the statute's definition of Federal election activity at 2 U.S.C. 431(20)(A), which does not include the type of activities described under proposed 11 CFR 100.24(c)(5), permit this provision?

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

The Commission certifies that the attached proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The basis for this certification is that this proposed rule would affect State, district, and local party committees, which are not ''small entities'' as defined in 5 U.S.C. 601. The term ''small entities'' includes not-for-profit enterprises that are ''small organizations'' under 5 U.S.C. 601(4) and 601(6). State, district, and local party committees are not-for-profit enterprises, but they are not ''small organizations'' under 5 U.S.C. 601(4) because they are not independently owned and operated and are not dominant in their field. 5 U.S.C. 601(4). State political 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 States 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. To the extent that any State party committees representing minor political parties might be considered ''small organizations,'' the number affected by this proposed rule is not substantial.

List of Subjects in 11 CFR Part 100

Elections.

For the reasons set out in the preamble, subchapter A of chapter 1 of title 11 of the *Code of Federal Regulations* is proposed to be amended as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for 11 CFR part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

2. Section 100.24 is amended by removing paragraph (a)(1)(iii), by revising paragraphs (a)(2) and (a)(3), and by adding paragraph (c)(5) to read as follows:

§ 100.24 Federal election activity (2 U.S.C. 431(20)).

(a) * * *

(2) *Voter registration activity* means encouraging or assisting potential voters in registering to vote.

(i) Except as provided in paragraph (a)(2)(ii) of this section, voter registration activity includes, but is not limited to, any of the following:

(A) Urging, whether by mail (including direct mail), in person, by telephone (including robocalls), or by any other means, potential voters to register to vote;

(B) Preparing and distributing information about registration and voting;

(C) Distributing voter registration forms or instructions to potential voters;

(D) Answering questions about how to complete or file a voter registration form, or assisting potential voters in completing or filing such forms; or

(E) Submitting a completed voter registration form on behalf of a potential voter.

(ii) A speech or event is not voter registration activity solely because it includes an exhortation to register to vote that is incidental to the speech or event, such as:

(A) ''Register and make your voice heard'';

(B) ''Don't forget to register to vote'';

(C) ''Register by September 5th''; or

(D) ''Don't forget to register to vote by next Wednesday.''

(3) *Get-out-the-vote activity* means encouraging or assisting potential voters to vote.

(i) Except as provided in paragraph (a)(3)(ii) of this section, get-out-the-vote activity includes, but is not limited to, any of the following:

(A) Informing potential voters, whether by mail (including direct mail), in person, by telephone (including robocalls), or by any other means, about:

(*1*) The date of an election;

(*2*) Times when polling places are open;

(*3*) The location of particular polling places;

(*4*) Early voting or voting by absentee ballot; or

(B) Offering to transport, or actually transporting, potential voters to the polls.

(ii) A speech or event is not get-out-the-vote activity solely because it includes an exhortation to vote that is incidental to the speech or event, such as:

(A) ''Your vote is very important'';

(B) ''Don't forget to vote'';

(C) ''Don't forget to vote on November 4th''; or

(D) ''Your vote is very important next Tuesday.''

(iii) Get-out-the-vote activity does not include a public communication that refers solely to one or more clearly identified candidates for State or local office, but does not refer to a clearly identified Federal candidate, and notes the date of the election, such as:

(A) A broadcast advertisement stating ''Vote Smith for mayor on November 4th''; or

(B) A mailer sent to at least 500 persons stating ''Get out and show your support for State Delegate Jones next Tuesday.''

* * * * *

(c) * * *

[8] *See* Notice of Proposed Rulemaking on Federal Election Activity and Non-Federal Elections, 72 FR 31473 (June 7, 2007).

(5) Voter identification or get-out-the-vote activity that is solely in connection with a non-Federal election that is held on a date on which no Federal election is held and that refers exclusively to:

(i) Non-Federal candidates participating in the non-Federal election, provided the non-Federal candidates are not also Federal candidates;

(ii) Ballot referenda or initiatives scheduled for the date of the non-Federal election; or

(iii) The date, polling hours and locations of the non-Federal election.

Dated: October 14, 2009.

On behalf of the Commission.

Steven T. Walther,

Chairman, Federal Election Commission.

[FR Doc. E9–25107 Filed 10–19–09; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0543; Airspace Docket No. 09–ACE–9]

Proposed Amendment of Class D Airspace; St Louis, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class D airspace at St Louis, MO. Additional controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAPs) at Spirit of St Louis Airport, St Louis, MO. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) operations for SIAPs at Spirit of St Louis Airport.

DATES: 0901 UTC. Comments must be received on or before December 4, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2009–0543/Airspace Docket No. 09–ACE–9, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: (817) 321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2009–0543/Airspace Docket No. 09–ACE–9.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), part 71 by adding additional Class D airspace extending upward from the surface to and including 3000 feet MSL for SIAPs operations at Spirit of St Louis Airport, St Louis, MO. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class D airspace areas are published in Paragraph 5000 of FAA Order 7400.9T, signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class D airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would add additional controlled airspace at Spirit of St Louis Airport, St Louis, MO.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration