MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa
          Acting Staff Director

FROM: Lawrence H. Norton
       General Counsel

       Rosemary C. Smith
       Associate General Counsel

       Brad C. Deutsch
       Assistant General Counsel

       Ron B. Katwan
       Attorney

       Amy L. Rothstein
       Attorney


       The Office of the General Counsel requests that this draft be placed on the agenda for the December 8, 2005 open meeting.

Attachment
FEDERAL ELECTION COMMISSION

11 CFR Part 109

[Notice 2005 – ]

Coordinated Communications

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission requests comment on proposed revisions to its regulations regarding communications that have been coordinated with Federal candidates and political party committees. The Commission’s current rules set out a three-prong test for determining whether a communication is “coordinated” with, and therefore an in-kind contribution to, a Federal candidate or a political party committee. In Shays v. FEC, the Court of Appeals invalidated one aspect of the so-called content prong of the coordinated communications test, because the court believed that the Commission had not provided adequate explanation and justification for the current rules under the Administrative Procedure Act. To comply with the decision of the Court of Appeals, and to address other issues involving the coordinated communication rules, the Commission is issuing this Notice of Proposed Rulemaking. No final decision has been made by the Commission 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 January 13, 2006. The Commission will hold a hearing on the proposed rules on January 25 or 26, 2006, or both 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, must be addressed to Mr. Brad C. Deutsch, Assistant General Counsel, and must be submitted in either e-mail, facsimile, or paper copy form. Commenters are strongly encouraged to submit comments by e-mail or fax to ensure timely receipt and consideration. E-mail comments must be sent to either coordination@fec.gov or submitted through the Federal eRegulations Portal at <www.regulations.gov>. If e-mail comments include an attachment, the attachment must be in either Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219-3923, with paper copy follow-up. Paper comments and paper copy follow-up of faxed comments must 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 website 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: Mr. Brad C. Deutsch, Assistant General Counsel, Ms. Amy Rothstein, or Mr. Ron B. Katwan, Attorneys, 999 E Street NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.


Under the Act, as amended by BCRA, an expenditure "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of" a Federal candidate, a candidate's authorized committee, the national, State, or local committee of a political party, or agents of any of the foregoing, is an in-kind contribution to the candidate or political party committee with which it has been coordinated, and is thus

Thus, under the Act, a payment for a communication constitutes an in-kind contribution if two conditions are satisfied. First, the payment must qualify as an “expenditure”; that is, it must be made for the purpose of influencing a Federal election. Second, the payment must be made “in cooperation, consultation, or concert, with, or at the request or suggestion of” a candidate or political party committee or agents thereof. In addition, the Act provides that any disbursement for an “electioneering communication” 2 that is coordinated with a candidate, a candidate’s authorized committee, a political party committee, or agents thereof, is an in-kind contribution to the candidate or political party supported by the communication. 2 U.S.C. 441a(a)(7)(C).

To implement these provisions of the Act, 11 CFR 109.21 sets forth a three-prong test for determining whether a communication is a coordinated communication, and therefore an in-kind contribution to, 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 their agents (the “payment prong”). See 11 CFR 109.21(a)(1).

Second, the communication must meet one of four content standards (the “content

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1 In addition, the Act specifically provides that the financing of the republication of campaign materials prepared by the candidate, the candidate’s authorized committee, or agents thereof, is an expenditure. 2 U.S.C. 441a(a)(7)(B)(iii).

2 The Act and Commission regulations define an electioneering communication 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 or 30 days before a primary election for the office sought by the candidate referenced in the communication; and (3) can be received by 50,000 or more persons within the geographic area that the candidate referenced in the communication seeks to represent. See 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29.
prong”). See 11 CFR 109.21(a)(2) and (c). Third, the communication must meet one of
five conduct standards (the “conduct prong”). See 11 CFR 109.21(a)(3) and (d). A
communication must satisfy all three prongs to be a “coordinated communication.”

I. The Content Prong

This rulemaking is being initiated in response to court decisions that invalidated
one aspect of the “content prong” of the coordinated communication test. See Shays v.
04-5352). As described more fully below, the District Court held the content prong as a
whole to be invalid, while the Court of Appeals held the Commission’s justification for
one aspect of the content prong (specifically, the 120-day time frame in the fourth content
standard) to be inadequate.

The purpose of the content prong is to “ensure that the coordination regulations
do not inadvertently encompass communications that are not made for the purpose of
influencing a Federal election.” 2002 Coordination Final Rules at 426. Accordingly,
each of the four content standards that comprise the “content prong” identifies a category
of communications that satisfies the content prong because its “subject matter is
reasonably related to an election.” Id. at 427.

The first content standard is satisfied if the communication is an electioneering
communication. See 11 CFR 109.21(c)(1). This content standard implements the
statutory directive, described above, that disbursements for coordinated electioneering
communications be treated as in-kind contributions to the candidate or political party
supported by the communication.
The second content standard is satisfied by a public communication\(^3\) made at any
time that disseminates, distributes, or republishes campaign materials prepared by the
candidate, the candidate’s authorized committee, or agents thereof. **See 11 CFR**
109.21(c)(2). This content standard implements the Congressional mandate that the
Commission’s rules on coordinated communications address the “republication of
campaign materials.” **See** Pub. L. 107-155, sec. 214(c)(1) (March 27, 2002).

The third content standard is 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); **see also** 11 CFR 100.22. The Commission concluded
that express advocacy communications, no matter when such communications are made,
can be reasonably construed only as for the purpose of influencing an election.

The fourth content standard is 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;\(^4\) 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).

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\(^3\) 11 CFR 100.26 defines “public communication” as “a communication of any broadcast, cable or satellite
communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the
general public, or any other form of general public political advertising. The term public communication
shall not include communications over the Internet.” The District Court rejected the definition of “public
communication” in the Commission’s regulations because the definition categorically excludes all Internet
communications. *Shays District* at 70. To comply with the *Shays District* decision, the Commission issued
a Notice of Proposed Rulemaking that proposes to include certain Internet communications in the definition
of “public communication.” **See** Notice of Proposed Rulemaking on Internet Communications, 70 FR
16967 (April 4, 2005). The proposed revision to the definition of “public communication” would have the
effect of including certain Internet communications in the definition of “coordinated communication,” as
well. The Commission has not yet issued final rules in this rulemaking.

\(^4\) The term “election” includes general elections, primary elections, runoff elections, caucuses or
conventions, and special elections. **See** 11 CFR 100.2.
In adopting the 120-day time frame for public communications for the fourth content standard, the Commission sought to create a bright-line rule for public communications that fall short of express advocacy and do not republish campaign materials. The 120-day time frame "focuses the regulation on activity reasonably close to an election, but not so distant from the election as to implicate political discussion at other times." 2002 Coordination Final Rules at 430. The Commission noted that its intent was "to require as little characterization of the meaning or the content of the communication, or inquiry into the subjective effect of the communication on the reader, viewer, or listener as possible." 2002 Coordination Final Rules at 430 (citing Buckley v. Valeo, 424 U.S. 1, 42-44 (1976)). The Commission emphasized that the regulation "is applied by asking if certain things are true or false about the face of the public communication or with limited reference to external facts on the public record." Id.

In adopting this time frame, the Commission relied on the fact that, in BCRA, Congress defined "Federal election activity" ("FEA"), in part, as voter registration activity "during the period that begins on the date that is 120 days" before a Federal election. The Commission reasoned that, in doing so, Congress "deem[ed] that period of time before an election to be reasonably related to that election." Id. (citing 2 U.S.C. 431(20)(A)(i)).
II. Overview of Court Decisions in *Shays v. FEC*

In *Shays District*, the District Court held that the Commission’s coordinated communication regulations did not survive the second step of *Chevron* review.\(^5\) *Shays District* at 61-62. Specifically, the court concluded that limiting the coordinated communication definition to communications that satisfy the content standards at 11 CFR 109.21(c)(1) through (4) would “undercut[] [the Act’s] statutory purpose of regulating campaign finance and preventing circumvention of the campaign finance rules.” *Id.* at 63. The District Court reasoned that communications that have been coordinated with a candidate, a candidate’s authorized committee, or a political party committee have value for, and therefore are in-kind contributions to, that candidate or committee, regardless of the content, timing, or geographic reach of the communications. *See Shays District* at 63-64.

The Court of Appeals, however, disagreed “with the district court’s suggestion that any standard looking beyond collaboration to content would necessarily ‘create an immense loophole,’ thus exceeding the range of permissible readings under *Chevron* step two.” *Shays Appeal* at 99-100. The Court of Appeals noted that “we can hardly fault the [Commission’s] effort to develop an objective bright-line test [that] does not unduly compromise the Act’s purposes.” *Shays Appeal* at 99 (internal quotations omitted). Moreover, the Court of Appeals expressly "reject[ed] Shays and Meehan’s argument that

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\(^5\) The District Court described the first step of the *Chevron* analysis, which courts use to review an agency’s regulations: “a court first asks ‘whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” *See Shays District*, at 51 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)). According to the District Court, in the second step of the *Chevron* analysis, the court determines if the agency’s interpretation is a permissible construction of the statute that does not “unduly compromise” [the Act’s] purposes by “create[ing] the potential for gross abuse.” *See Shays District* at 91, *citing Orlofski v. FEC*, 795 F.2d 156, 164-65 (D.C. Cir. 1986) (internal citations omitted).
[the Act] precludes content-based standards under Chevron Step One." Id. As the Court of Appeals emphasized, "time, place, and content may be critical indicia of communicative purpose. While election-related intent is obvious, for example, in statements urging voters to 'elect' or 'defeat' a specified candidate or party, the same may not be true of [other types of] ads [ ]." Id. Instead, the Court of Appeals found that "the challenged regulation's fatal defect is not that the [Commission] drew distinctions based on content, time, and place, but rather that, contrary to the [Administrative Procedure Act], the Commission offered no persuasive justification for . . . the 120-day time-frame and the weak restraints applying outside of it." Id. at 100. Specifically, the Court of Appeals concluded that, by limiting "coordinated communications" made outside of the 120-day 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.

The Court of Appeals found that the Commission had not adequately explained why "120 days reasonably defines the period before an election when non-express advocacy likely relates to purposes other than 'influencing' a Federal election." Id. at 101. Regarding the Commission’s reliance on Congress’s use of a 120-day time frame in BCRA’s definition of FEA as voter registration activity, the Court observed that the Commission had provided no evidence that voter registration activity occurs on cycles similar to "coordinated communications." Id. at 100.

For these reasons, the Court of Appeals concluded that the Commission had not provided adequate explanation under the Administrative Procedure Act ("APA") for the Commission’s decision to exclude communications distributed more than 120 days
before an election, unless a communication contains express advocacy or republishes campaign materials. Therefore, the Court of Appeals affirmed the District Court’s invalidation of the Commission’s coordinated communication rules. *Id.* at 101.

**III. Alternative Proposals for Revising the Content Prong in 11 CFR 109.21(c)**

The Commission is considering the seven alternatives described below to comply with the Court of Appeals decision in *Shays Appeal*. The regulatory text for each alternative, except one, is set forth at the end of this NPRM. The Commission seeks comment on each alternative, including responses to the following questions: Is the alternative too broad or too narrow? Would the alternative potentially include public communications that are not made for the purpose of influencing a Federal election and that therefore should not be restricted and treated as in-kind contributions? Conversely, would the alternative potentially exclude public communications that are made for the purpose of influencing a Federal election and therefore should be treated as an in-kind contribution, provided that the payment and conduct prongs are also satisfied? The Commission invites commenters to provide examples of communications from previous election cycles demonstrating that an alternative may be either underinclusive or overinclusive. Would the alternative address the Court of Appeals’ concerns regarding the potential for circumvention of the Act and for corruption or the appearance of corruption? Would the alternative properly effectuate congressional intent? Would the alternative provide sufficient guidance to individuals and organizations seeking to be actively involved in politics and to comply with the Commission’s coordination rules?

The Commission notes that the alternatives presented in this NPRM are not limited to the exact terms of the regulatory language set forth for each alternative at the

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6 See note 11 below.
end of the NPRM. Instead, as the narrative describing each alternative makes clear, the
final rules may be a variation of one of the alternatives or even a combination of
components from different alternatives. The Commission specifically invites comment
on whether a combination of components from several different alternatives would be
appropriate. The Commission also seeks comment on whether it should adopt a content
standard that is not presented as one of the alternatives in this NPRM.

In addition, given that the content prong and the conduct prong of the coordinated
communication test were intended to work together, the Commission seeks comment on
whether adopting a given alternative with respect to the content prong would necessitate
changing the conduct prong in 11 CFR 109.21(d) to ensure that only communications
made for the purpose of influencing a Federal election are covered. If so, what
amendments to the conduct prong should the Commission consider making?

Alternative 1 – Retain current 11 CFR 109.21(c)(4) but revise the Explanation and
Justification

Alternative 1 would retain the current coordinated communication test at 11 CFR
109.21, including the 120-day time frame in the fourth content standard at 11 CFR
109.21(c)(4)(ii), but would revise the Explanation and Justification for 11 CFR
109.21(c)(4)(ii) by providing further explanation supporting the 120-day time frame.7

The Court of Appeals emphasized that justifying the 120-day time frame, or
another time frame, requires the Commission to undertake a factual inquiry to determine
whether the temporal line that it draws "reasonably defines the period before an election

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7 Although this first alternative proposal to implement the appellate court's decision in Shays Appeal would not change 11 CFR 109.21(c)(4), the regulatory text of Alternative 1 as set forth at the end of this NPRM reflects proposed changes to 11 CFR 109.21(c)(4)(ii), to address situations in which multiple candidates for Federal office appear in a given public communication. See Section IV-3 below.
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.” Shays Appeal at 101-
02. Accordingly, the Commission seeks comment on the following questions raised by
the Court of Appeals in Shays Appeal regarding the 120-day time frame:

(1) Are a significant number of communications outside the 120-day period made
for the purpose of influencing Federal elections, or are communications to influence
Federal elections predominantly made within 120 days of an election? Are there specific
examples from the 2004 election cycle of communications that the current coordination
rules should have reached but did not or, conversely, examples of communications that
the current rules should not have reached but did? Id. at 102.

(2) Do communications made for the purpose of influencing House, Senate, and
Presidential races – all covered by this rule – occur during approximately the same
periods in relation to the general election or the primary, or should different time frames
apply to each? Id.

(3) If the Commission were to retain the 120-day time frame, would persons
aiming to influence elections shift spending outside of that period to avoid the rules’
restrictions? Would the same phenomenon potentially take place if the Commission
adopted a time frame longer or shorter than 120 days before a Federal election? In 2004,
was there any evidence that spending shifted outside the 120-day period to avoid the
rules’ restrictions? Id.

The Commission specifically invites comments in the form of empirical data that
show the time periods before an election in which electoral communications generally
occur. Do outside persons make electoral communications during time frames that differ
from candidates or parties? Do early electoral communications, for example, that occur
more than 120 days before an election, have an effect on election results?

On its website, the Commission posts reports filed pursuant to the Act and
Commission regulations. Some of these reports include information on independent
expenditures by political committees filed under 11 CFR 104.4 and by persons other than
political committees under 11 CFR 109.10. Additionally, all political committees must
report coordinated expenditures along with all other in-kind contributions under 11 CFR
109.21(b)(3), while political party committees must report their coordinated party
expenditures separately under 11 CFR 109.37. See Form 3X, line 25 (summarizing
entries from Schedule F). For the convenience of commenters, the Commission has
extracted these data from the reports and posted them on its website.8 Do the data
provide an empirical basis for retaining the 120-day time frame or establishing another
time frame? For example, the data appear to indicate that, during the 2004 election cycle,
(1) coordinated party expenditures made in connection with the general election were
made mostly after September 1, 2004 – roughly within 60 days of the general election,
and (2) independent expenditures were made mostly after July 27, 2004 – roughly within
90 days of the general election.9 The Commission invites statistical analyses of these
data. Specifically, to what extent is it possible to extrapolate from any identified patterns
in party committee coordinated expenditures to expenditures for coordinated

8 These data are available at www.fec.gov/press/coordruledata.shtml.
9 A political party committee authorized to make coordinated expenditures may make such expenditures in
connection with the general election before or after its candidate has been nominated. See 2 U.S.C.
441a(d), 11 CFR 109.34. See also 11 CFR 109.32(a). Generally, it is less likely that such expenditures
would be made much before a candidate has been nominated. The Commission also notes that
expenditures reported by political party committees as "coordinated expenditures" include not only
expenditures for communications but also all other coordinated expenditures.
communications by outside groups? Do the data support the conclusion that communications made for the purpose of influencing an election are almost always made, or are generally made, within the last 60 to 90 days before an election?


\[^{10}\text{"The hotspot of the campaign didn't start until late September . . . . This cycle was very compressed when it came to the heavy spending. It eventually had in essence a four-week sprint as opposed to the eight- to ten-week sprint that we used to pay for."}\]
Alternative 2 – Adopt a Different Time Frame

The Commission seeks comment on whether a time frame other than 120 days would be more appropriate in bringing public communications that are made for the purpose of influencing a Federal election within the coordination regulations, while filtering out public communications that are not made for this purpose.11 Does empirical evidence support the adoption of a different time frame? Some States hold primary elections early in the election year. Under the current rule, a public communication that refers to a clearly identified candidate and is distributed within the 120-day period preceding a primary election would satisfy the content standard at 11 CFR 109.21(c)(4), but the same public communication distributed shortly after the primary but still more than 120 days before the subsequent general election would not satisfy that standard. Accordingly, rather than retain the current rule covering communications made within the 120-day period before an election, whether primary or general, should the Commission adopt a time frame that covers an uninterrupted period of time starting 120 days (or some other time period) before the primary election up to and including the day of the general election?

The Commission also invites comment on whether to adopt a time frame covering the period from January 1 of each election year through the day of the general election. Would such an “election year” time frame begin too late for States that hold primaries early in the year? Conversely, would an “election year” time frame begin too early for States that hold primaries in September? Would such a time frame be appropriate for Presidential elections?

11 Because Alternative 2 does not propose a specific time frame, this NPRM does not set forth regulatory text for Alternative 2.
In addition, the Commission seeks comment on whether to adopt a tiered
approach, under which the range of communications that satisfy the fourth content
standard would depend on the communication's proximity to an election. For example,
for communications made within 120 days before an election, the fourth content standard
could be modified to capture any public communication that refers to a political party or
clearly identified Federal candidate and is directed to the voters in the relevant
geographical areas. For communications made between 120 and 240 days before an
election, the fourth content standard could capture only public communications that
promote, attack, support, or oppose ("PASO") a political party or a clearly identified
Federal candidate. The Commission invites commenters to provide examples of
communications from previous election cycles to show whether a given time frame
would be either underinclusive or overinclusive.

Alternative 3 – Eliminate the time restriction from 11 CFR 109.21(c)(4)

Alternative 3 would revise 11 CFR 109.21(c)(4) by eliminating any time
restriction from the fourth content standard. Specifically, Alternative 3 would remove the
requirement that a public communication be publicly distributed or otherwise publicly
disseminated 120 days or fewer before an election. See 11 CFR 109.21(c)(4)(ii).

Alternative 3 would, however, retain the requirements that (1) the public communication
refer to a political party or clearly identified candidate and (2) be directed to voters in the
jurisdiction of the clearly identified candidate or to voters in the jurisdiction in which one
or more candidates of the political party appear on the ballot. See 11 CFR 109.21(c)(4)(i)
and (iii). Thus, under this alternative, any public communication that refers to a clearly
identified candidate or political party and is directed to voters in the relevant jurisdiction

12 See Alternative 4 below for a more detailed discussion of the PASO standard.
would satisfy the content prong of the coordinated communication test, regardless of
when it is distributed.

The Commission seeks comment on whether the fourth content standard without a
time frame would still be effective in distinguishing communications made for the
purpose of influencing a Federal election from communications made for other purposes,
such as communications made for the purpose of lobbying for or against certain
legislation. The Court of Appeals noted that “to qualify as ‘expenditure’ in the first
place, spending must be undertaken ‘for the purpose of influencing a federal election’ . . .
[T]ime, place, and content may be critical indicia of communicative purpose. While
election-related intent is obvious, for example, in statements urging voters to ‘elect’ or
‘defeat’ a specified candidate or party, the same may not be true of ads identifying a
federal politician but focusing on pending legislation[.]” Shays Appeal at 99. Does the
fact that a communication refers to a clearly identified candidate or a political party and
is directed to voters in the relevant geographical area by itself provide strong evidence
that the communication is made for the purpose of influencing a Federal election, even if
the communication is made a year or more before that election? Does the Commission
have the statutory authority to regulate “other categories of non-electioneering speech –
non-express advocacy, for example – outside the 120 days”? Id. at 101. How should the
Commission separate communications made for the purpose of influencing a Federal
election from those without such purpose?

The Commission also invites commenters to provide examples of
communications from previous election cycles to show whether Alternative 3 would be
either underinclusive or overinclusive.
Alternative 4 – Replace the content standard in 11 CFR 109.21(c)(4) with a “PASO” test

Alternative 4 would replace the content standard in 11 CFR 109.21(c)(4) with a new standard providing that a public communication would satisfy the content prong of the coordinated communication test if it refers to a political party or a clearly identified Federal candidate, is directed to voters in the jurisdiction of the clearly identified Federal candidate or to voters in a jurisdiction in which one or more Federal candidates of a political party are on the ballot, and the communication PASOs the political party or the clearly identified Federal candidate. 13 Would such a standard have the potential to be unconstitutionally vague in practical application? Or, conversely, would such a standard “provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited”? McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)).

Alternatively, the Commission invites comment on whether Alternative 4, instead of using a PASO standard, should create a safe harbor exemption from the coordinated communication rules for certain kinds of communications. To make use of the safe harbor, the person paying for the communication, or the candidate or party identified in the communication, would have to show that the communication meets certain criteria.

13 The PASO standard is found in BCRA and applies primarily to candidates and political party committees with respect to FEA. See 2 U.S.C. 431(20)(A)(iii). But Congress also applied the PASO standard to the activity of certain tax-exempt organizations. For example, BCRA prohibits party committees from soliciting funds for, or making or directing donations to, certain tax-exempt organizations that make expenditures or disbursements for FEA, which includes public communications that PASO a Federal candidate. See 2 U.S.C. 431(20)(A)(iii) and 441(d)(1). BCRA also directed the Commission not to exempt any communications that PASO a clearly identified Federal candidate from the electioneering communication provisions. See 2 U.S.C. 434(f)(3)(B)(iv). The Commission provided examples of communications that PASO and communications that do not PASO in Advisory Opinion 2003-25.
A communication that satisfies these criteria would, as a matter of law, not be treated as a coordinated communication. For example, such criteria could include the following:

- The communication is devoted exclusively to a particular pending legislative or executive branch matter.
- The communication’s reference to a clearly identified Federal candidate is limited to urging the public to contact that candidate to persuade the candidate to take a particular position on the pending legislative or executive branch matters.
- The communication does not refer to the political party affiliation or the political ideology (e.g., “liberal,” “conservative,” etc.) of a clearly identified Federal candidate.
- The communication does not refer to a clearly identified Federal candidate’s record or position on any issue.
- The communication does not refer to a clearly identified Federal candidate’s character, qualifications, or fitness for office.
- The communication does not refer to an election, voters or the voting public, or anyone’s candidacy.

If this criteria-based approach is adopted, should any of the criteria be eliminated from, or added to, the list? If adopted, should the regulation provide that a communication must meet all of the criteria on the list to qualify for the safe harbor exemption or should the regulation follow a more flexible approach and provide that a communication may meet some but not necessarily all of the criteria on the list and still qualify for the exemption? Should satisfaction of one or more specific criteria on the list,
by itself, be sufficient to qualify for the exemption? By contrast, should any one or more criteria be critical to the analysis such that failure to meet these criteria would prohibit an organization from taking advantage of the safe harbor?

The Commission seeks comment as to whether Alternative 4 should incorporate a time period limitation, such as a specific number of days before an election. If so, should this time period be 120 days before an election or should a different time frame be adopted? The Commission invites commenters to submit supporting empirical data. The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 4 would be either underinclusive or overinclusive.

Alternative 5 – Eliminate the time restriction from 11 CFR 109.21(c)(4) for political committees only

Alternative 5 would adopt a bifurcated test under which application of the 120-day time frame would depend on the identity of the person paying for the public communication. If a registered political committee, or an organization that is required to register as a political committee, pays for a public communication that refers to a political party or a clearly identified Federal candidate and the public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more of the candidates of the political party appear on the ballot, then that public communication would be deemed as a matter of law to have been made for the purpose of influencing a Federal election. Such a public communication, when paid for by a political committee, would be deemed to have been made for the purpose of influencing a Federal election regardless of when it is distributed, because a political
committee is an organization whose major purpose is to influence elections.\textsuperscript{14} Alternatively, should the time frame be eliminated only for public communications that are paid for by registered political committees or organizations that are required to register as political committees if the communication PASOs a political party or a clearly identified Federal candidate?

Under Alternative 5, if the person paying for the public communication is not a registered political committee or an organization that is required to register as a political committee, then the public communication would satisfy the content standard at 11 CFR 109.21(c)(4) only if it occurs 120 days or fewer before an election or during whatever other time frame might be adopted. Are there data to justify the 120-day window? Do the data support another time frame?

The Commission seeks comment on how such a bifurcated test would apply to other entities, such as non-Federal candidates and their campaign organizations. The Commission further seeks comment on how such a bifurcated test should apply to entities organized under section 527 of the Internal Revenue Code that are not registered with the Commission as political committees. The Commission also seeks comment on the effect that this alternative approach would have on a candidate who has contacts that meet the conduct standard with an organization that is not registered as a political committee. If that organization is subsequently found to have inappropriately failed to register as a political committee based on activity that was not known to the candidate, should the

\textsuperscript{14} The Act defines a “political committee” as any committee, club, association, or other group of persons that receives “contributions” or makes “expenditures” aggregating in excess of $1,000 during a calendar year. 2 U.S.C. 431(4)(A). See also 11 CFR 100.5. In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court, in order to avoid vagueness, narrowed the Act’s references to “political committee” to prevent their “reach [to] groups engaged purely in issue discussion.” 424 U.S. at 79. The Court concluded that “[t]o fulfill the purpose of the Act [the words ‘political committee’] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” Id.
Commission provide in the regulation that the candidate would not be deemed to have
accepted an in-kind contribution from the organization?

In addition, the Commission invites commenters to provide examples of
communications from previous election cycles to show whether Alternative 5 would be
either underinclusive or overinclusive.

Alternative 6 – Replace the fourth content standard in 11 CFR 109.21(c)(4) with a
standard covering public communications made for the purpose of influencing a Federal
election

Alternative 6 would replace the fourth content standard in 11 CFR 109.21(c)(4)
with a new standard that would closely track the statute and simply require a
communication to be a public communication made for the purpose of influencing a
Federal election. The effect of adopting Alternative 6 would be to restrict some public
communications that are not covered by current 11 CFR 109.21(c)(4), i.e.,
communications that are made for the purpose of influencing a Federal election but that
are either: (1) made more than 120 days before an election, or (2) made at any time and
do not refer to a political party or a clearly identified Federal candidate. In addition,
Alternative 6 would exclude from regulation some communications that are covered by
current 11 CFR 109.21(c)(4), i.e., communications that are made within 120 days of an
election and that do refer to a political party or a clearly identified Federal candidate but
that are not made for the purpose of influencing a Federal election.

Whether a given public communication is for the purpose of influencing a Federal
election would depend on the facts and would be decided on a case-by-case basis. This is
the approach some Commissioners used before 2002 when the Commission adopted a
content prong for its coordinated communication regulations. Under such a case-by-case approach, some public communications would be treated as having been made for the purpose of influencing a Federal election, even though no Federal candidate or political party is referenced in the communication, and regardless of how far in advance of an election such a communication is made. This approach would result in some public communications being restricted as coordinated communications without having to meet a content standard defined in the Commission’s regulations. The Commission seeks comment on whether such a case-by-case approach is appropriate and whether it would provide sufficient guidance to candidates, their authorized committees, political party committees, and outside organizations. Would such a standard have the potential to be unconstitutionally vague in practical application? Or, conversely, would such a standard “provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited”? McConnell, 540 U.S. at 170 n.64 (quoting Grayned, 408 U.S. at 108-109); compare Buckley v. Valeo, 424 U.S. 1, 24, n. 24, 46-47, n. 53, 78 (Payments for media advertisements “controlled by or coordinated with the candidate” are treated as contributions, and “for the purpose of influencing” phrase “presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution.”). The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 6 would be either underinclusive or overinclusive.
Alternative 7 – Eliminate the content prong in 11 CFR 109.21(c) and replace it with the requirement that the communication be a public communication as defined in 11 CFR 100.26.

Alternative 7 would eliminate the entire content prong in 11 CFR 109.21(c), and would replace it with the requirement that the communication be a public communication as defined in 11 CFR 100.26.\textsuperscript{15} Alternative 7 would also make some conforming amendments. Alternative 7 would be based on the assumption that if an organization or individual works with a candidate or a political party in making a public communication, then the communication inherently has value to the political entity it is coordinated with, regardless of timing or content. Accordingly, in Alternative 7, any public communication that satisfies the conduct prong of the coordinated communication test at 11 CFR 109.21(d) would be deemed to have been made for the purpose of influencing a Federal election and thus be a “coordinated communication,” regardless of whether it refers to a clearly identified Federal candidate or political party and regardless of when or to whom the communication is distributed.

The Commission notes that, even though Alternative 7 would eliminate the entire content prong, it would nonetheless comply with the statutory requirement that disbursements for coordinated electioneering communications be in-kind contributions to the candidate supported by them and with the congressional mandate that the Commission’s coordination rules address the “republication of campaign materials.” Specifically, under Alternative 7, all public communications (including electioneering communications and communications that republish campaign materials) would be coordinated communications as long as they satisfy the conduct prong.

\textsuperscript{15} See note 3 above.
The Commission seeks comment on whether the conduct prong by itself, without any content prong, would be effective in distinguishing between public communications made for the purpose of influencing a Federal election and public communications made for other purposes, such as public communications made for the purpose of lobbying for or against certain legislation, or for supporting charitable or other non-political causes. Assuming that it is true that a candidate or political party would not coordinate with an outside organization or individual if the resulting communication did not have value for the candidate or political party, does such value necessarily consist of influencing the candidate’s election or the election of a political party’s candidates? Would the conduct prong by itself, without any content prong, have the potential to be unconstitutionally vague in practical application? Or, conversely, would such a regulation “provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited”? *McConnell*, 540 U.S. at 170 n.64 (quoting *Grayned*, 408 U.S. at 108-109). The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 7 would be either underinclusive or overinclusive.

IV. Other Issues Regarding the Content Prong

The Commission also seeks comment on the following related issues.

1. The “directed to voters” requirement in 11 CFR 109.21(c)(4)(iii)

In the event that the Commission decides to retain a content prong, the Commission seeks comment on modifying the requirement in the fourth content standard that a public communication must be directed to voters in the jurisdiction of the clearly identified 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)(iii). While the Act and
Commission regulations defining “electioneering communications” require that 50,000 or
more persons be able to receive the communication in the relevant geographic area, the
fourth content standard does not specify how many persons must be able to receive a
communication for it to be classified as a coordinated communication. See 2 U.S.C.
434(f)(3)(C); 11 CFR 100.29(b)(3)(ii)(A) and (b)(5). Should 109.21(c)(4)(iii) be deemed
satisfied if any person in the relevant geographic area can receive the communication?
Should 11 CFR 109.21(c)(4)(iii) be changed to specify a minimum number of persons
that must be able to receive the communication? If so, what should the required
minimum number of persons be? Has the current regulation without a required minimum
number presented any difficulties to, or created any confusion for, those seeking to
comply with it?

The Commission notes that the fourth content standard applies to “public
communications,” and thus to communications made by means of newspapers,
magazines, periodicals, billboards, mass mailing, and telephone banks. See 11 CFR
100.26. Is it appropriate to set a minimum for the “directed to voters” requirement that
would exclude small and medium sized publications? If so, should the minimum number
be based on the number of copies distributed or on estimates of the number of readers
reached by the publications? Similarly, the definition of “public communication”
includes limited communications, such as 501 pieces of mail or 501 telephone calls of an
identical or substantially similar nature. See 2 U.S.C. 431(23) and (24); 11 CFR 100.26,
100.27, 100.29. Would it be appropriate to exclude such limited mass mailings or
telephone banks from the “directed to voters” requirement as de minimis even though
they come within the Commission’s definition of “public communication”?

Under the current rules, the second and third content standards (i.e., the
republication of campaign material and the express advocacy standards) do not contain a
“directed to voters” requirement. Are communications that satisfy these standards so
clearly made for the purpose of influencing a Federal election that a “directed to voters”
requirement is unnecessary? In the alternative, should such a requirement be added to
these two content standards as well?

The Commission also seeks comment on whether to exempt from the
coordination regulations communications that are distributed in the jurisdiction of a
clearly identified congressional candidate when such distribution is part of, and incidental
to, a larger advertising campaign. For example, an advertisement distributed nationally
on cable television that refers to a U.S. Representative seeking reelection as one of
several sponsors of a piece of legislation will presumably reach voters in the U.S.
Representative’s district. In such a case, the voters in the U.S. Representative’s district
would be reached only incidentally as part of the larger lobbying campaign. Would an
exemption for communications that reach voters in the jurisdiction of the clearly
identified congressional candidate only incidentally provide a reliable way of
distinguishing communications that are made for the purpose of influencing a Federal
election from lobbying or issue advocacy communications? Would such a standard be
sufficiently clear to provide persons with prior notice of the types of communications that
are affected? For such a standard to provide effective prior notice, must the Commission
specify how many viewers are “incidental”? In the alternative, should the Commission
define "incidental" in terms of a certain ratio between the number of persons who can
receive the communication in the State or district of the clearly identified Senate or
House candidate and the number of persons who can receive the communication outside
that State or district? Should such an exemption be limited to public communications
that are distributed nationwide? The Commission also invites comment on whether the
regulations should provide that such an exemption would apply only if a communication
does not PASO the clearly identified candidate.

2. Federal candidate endorsements of, and solicitations of funds for, other Federal or non-
Federal candidates or State ballot initiatives

The Commission invites comment regarding the application of the coordinated
communication test to situations in which Federal candidates endorse, or solicit funds for,
other Federal and non-Federal candidates or State ballot initiatives. In Advisory Opinion
2004-01, the Commission considered a television advertisement that featured President
Bush endorsing a congressional candidate. The advertisement was publicly distributed
within 120 days of the Presidential primary in the State in which the advertisement aired.
The Commission concluded that the "material involvement" conduct standard in 11 CFR
109.21(d)(2) was satisfied because the President’s agents "review[ed] the final script in
advance of the President’s appearance in the advertisements for legal compliance, factual
accuracy, quality, consistency with the President’s position and any content that distracts
from or distorts the ‘endorsement’ message that the President wishes to convey."\(^{16}\)

\(^{16}\) The Commission further determined that, for advertisements distributed within 120 days of the
Presidential primary in the State in which the advertisement aired, the advertisements’ production and
distribution costs paid for by the congressional candidate’s committee but attributable to the President’s
authorized committee were contributions to the President’s committee by the congressional candidate’s
committee, but that no contribution would result if the President’s committee reimbursed the congressional
candidate’s committee for its attributable share of the costs.
Advisory Opinion 2004-01. Similarly, in Advisory Opinion 2003-25, the Commission considered an advertisement featuring a U.S. Senator's endorsement of a candidate for mayor. In that opinion, the Commission determined that it was highly implausible that a Federal candidate would appear in a communication endorsing a local candidate without being materially involved in one or more of the decisions listed in the "material involvement" conduct standard.

The Commission seeks comment on whether to exempt from the coordinated communication rules a Federal candidate's appearance or use of a candidate's name in a communication to endorse other Federal or non-Federal candidates. Do such endorsements benefit the endorsing candidate? The Commission also invites comment on whether any such exemption should be limited to communications that do not PASO the endorsing candidate. Does the fact that the endorsing candidate appears in the communication inevitably promote the endorsing candidate?

Similarly, the Commission seeks comment on whether to exempt from the coordinated communication rules a Federal candidate's appearance in a communication that solicits funds for other Federal or non-Federal candidates, party committees, political action committees, or other political committees. Do such solicitations benefit the candidate who makes them? The Commission also invites comment on whether any such exemption should be limited to communications that do not PASO the soliciting candidate, or, in the alternative, do not expressly advocate the election or defeat of the soliciting candidate.
The Commission also seeks comment on whether a similar exemption from the coordinated communication rules should also apply to a Federal candidate’s appearance in communications that endorse, or solicit funds for, State ballot initiatives.

3. Proposed clarification of application of 120-day time frame requirement in 11 CFR 109.21(c)(4)(ii)

Advisory Opinion 2004-01, discussed above, concerned President Bush’s appearance in a television advertisement paid for by a congressional candidate where President Bush endorsed that congressional candidate. The Commission determined that any airing of the advertisement that occurred more than 120 days before the Presidential primary in the State in which the advertisement aired was not be an in-kind contribution to President Bush because it did not satisfy the fourth content standard (i.e., 11 CFR 109.21(c)(4)). In making this determination, the Commission looked at whether the communication was aired within 120 days before the non-paying candidate’s (i.e., President Bush’s) election rather than whether it was aired within 120 days before the paying congressional candidate’s election. The regulatory text for Alternative 1 reflects the Commission’s proposal to amend its coordinated communication rules to incorporate the approach taken in Advisory Opinion 2004-01 and to make clear that the time frame applies only to the election of a Federal candidate who is clearly identified and who has not paid for the communication.

This alteration would clarify that no in-kind contribution is made under the coordinated communications regulations to a candidate for Federal office who is referred to in a public communication if the referenced candidate will not appear as a Federal candidate on a ballot within 120 days of the distribution of the communication. See
Advisory Opinion 2005-18, Concurring Opinion of Chairman Thomas, Vice Chairman
Toner, Commissioners Mason, McDonald, and Weintraub.

For example, a Senator whose reelection is not until 2008 appears in an
advertisement with a 2006 House candidate. The advertisement is aired within 120 days
of the House candidate’s election, is paid for by the House candidate’s campaign
committee, and is aired in the State where the Senator will seek reelection in 2008. This
advertisement would not be an in-kind contribution to the Senator because the
advertisement was not aired within 120 days of the Senator’s 2008 election.

The Commission seeks comment on whether the proposed language properly
effectuates this clarification.

V. Issues Regarding the Conduct Prong

The conduct prong of the Commission’s coordinated communication regulations
was not challenged in Shays v. FEC. Nonetheless, the Commission is taking this
opportunity to evaluate how certain aspects of the conduct prong work in practice.

1. The “request or suggest” conduct standard in 11 CFR 109.21(d)(1)

The first conduct standard of the coordinated communications test is satisfied if a
communication is created, produced or distributed at the request or suggestion of a
candidate, a candidate’s authorized committee, or a political party committee, or their
agents. See 11 CFR 109.21(d)(1). The Commission invites comment on whether, even if
the Commission decides to retain the content prong of the coordinated communication
test, it should provide that if the first conduct standard is satisfied, the communication
would automatically qualify as a coordinated communication without also having to
satisfy any of the standards contained in the content prong. If a public communication is
made at the request or suggestion of a candidate or a political party, then does that
communication presumptively have value to the political entity that it was coordinated
with, regardless of timing or content? Would such a proposal capture communications
that are not made for the purpose of influencing elections? Are there examples of public
communications, such as lobbying communications or communications supporting
charitable or other non-political causes, that are made at the “request or suggestion” of a
Federal candidate but that do not have value for the candidate’s campaign?

2. The “common vendor” and “former employee” conduct standards in 11 CFR
109.21(d)(4) and (5)

The fourth standard of the conduct prong of the coordinated communication rules
involves common vendors, and the fifth standard involves former employees. See 11
CFR 109.21(d)(4) and (5). The Commission intended these standards to implement
Congress’s requirement in BCRA that the Commission address “the use of a common
vendor” and “persons who previously served as an employee of a candidate or a political
214(c)(2) and (3) (2002).

The “common vendor” conduct standard is satisfied if (1) the person paying for
the communication contracts with, or employs, a “commercial vendor” to create,
produce, or distribute the communication, (2) the commercial vendor has a previous or
current relationship with the political party committee or the clearly identified candidate
referred to in the communication that puts the commercial vendor in a position to acquire
material information about the plans, projects, activities, or needs of the candidate or
political party committee, and (3) the commercial vendor uses or conveys material
information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or material information used by the commercial vendor in serving the candidate or political party committee. See 11 CFR 109.21(d)(4).

The “former employee” conduct standard is satisfied if (1) the person paying for the communication was, or is employing a person who was an employee of the candidate or the political party committee clearly identified in the communication, and (2) the former employee uses or conveys material information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or material information used by the former employee in serving the candidate or political party committee. See 11 CFR 109.21(d)(5).

The first three conduct standards in 11 CFR 109.21(d)(1)-(3) are satisfied only if either the principals themselves (i.e., candidates, their authorized committees, or political party committees) or their agents coordinate with the person paying for the communication. However, because commercial vendors and former employees might not be agents of a candidate or a political party committee at the time they use or convey material information to a person paying for a communication, the “common vendor” and the “former employee” conduct standards can be satisfied by persons other than the principals themselves or their agents. The Commission seeks comment on whether it

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17 The first conduct standard addresses communications produced at the request or suggestion of a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing. See 11 CFR 109.21(d)(1). The second conduct standard addresses communications with which a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing has been materially involved. See 11 CFR 109.21(d)(2). The third conduct standard addresses communications produced after one or more substantial discussions between the person paying for the communication, or that person’s employees or agents, and the candidate clearly identified in the communication, the candidate’s authorized committee, the candidate’s opponent, or the opponent’s authorized committee, or an agent of any of the foregoing. See 11 CFR 109.21(d)(3).
should change the coordinated communication regulations to cover common vendors and
former employees only if these common vendors and former employees are agents under
the Commission’s definition of agent in 11 CFR 109.3.\footnote{The definition of “agent” includes any person who has actual authority “to make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c)” on behalf of a political party committee or a Federal candidate or officeholder. See 11 CFR 109.3(a)(2) and (b)(2). For reasons unrelated to the issues addressed in this rulemaking, the Shays District court held that the Commission’s definition of agent at 11 CFR 109.3 violated APA requirements and remanded the regulation to the Commission for action consistent with its decision. Shays District at 88. In order to comply with the Shays District decision, the Commission has issued an NPRM that sought comment on whether the Commission should retain the current definition of “agent” and on several alternatives for revising the definition. See Notice of Proposed Rulemaking on the Definition of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 70 FR 5382 (Feb. 2, 2005). The Commission has not yet issued final rules in this rulemaking.} Does the Commission have
authority under the Act to make this change? If the Commission does make this change,
would such agents then be covered by the first three conduct standards in 11 CFR
109.21(d)(1)-(3) or would the “common vendor” and the “former employee” conduct
standards still cover some activities not captured by the first three conduct standards? If
the Commission revises the common vendor and former employee conduct standards to
cover only common vendors and former employees who are also agents, would that
render these two conduct standards superfluous? If so, should the Commission then
eliminate the conduct standards in 11 CFR 109.21(d)(4) and (5)? Given that BCRA
specifically required the Commission to promulgate regulations that addressed payments
for the use of common vendors and for communications directed or made by persons who
previously served as employees of a candidate or political party, does the Commission
have authority under the Act to eliminate 11 CFR 109.21(d)(4) and (5)?

In the rulemaking proceeding that resulted in the \textit{2002 Coordination Final Rules},
the Commission received many comments on the common vendor conduct standard.
Some of the comments expressed concern about the potential liability that would attach
under the common vendor standard to candidates and party committees who employ the
same vendors as other candidates and party committees because of the limited number of
qualified vendors in a given geographic area.

The Commission addressed this and other concerns in the 2002 Coordination
Final Rules by limiting the common vendor conduct standard to commercial vendors
whose usual and normal business includes the creation, production, or distribution of
communications; who have provided certain enumerated services to a candidate or party
committee that put the vendor in a position to acquire information about the plans,
projects, activities or needs of the candidate or party committee material to the creation,
production, or distribution of the communication; who provide the specified services
during the current election cycle; and who use or convey information about the
candidate’s or party committee’s campaign plans, projects, activities or needs that is
material to the creation, production, or distribution of the communication. See 68 FR
436-37. The Commission also excluded lobbying activities and information not related
to a campaign from the scope of the rule.

The Commission stated that it did not anticipate that a person who hired a vendor
and followed prudent business practices would be inconvenienced by the common vendor
conduct standard. See id. at 437. The Commission now invites comments on whether
this supposition has proven to be correct.

The Commission also seeks comment on whether it should create a rebuttable
presumption that a common vendor or former employee has not engaged in coordinated
conduct under 11 CFR 109.21(d)(4) and (5), if the common vendor or former employee
has taken certain specified actions, such as the use of so-called “firewalls,” to ensure that
no material information about the plans, projects, activities, or needs of a candidate or political party committee is used or conveyed to a third party. The Commission considered and rejected proposals to establish rebuttable presumptions and safe harbors in the common vendor conduct standard in the 2002 Coordination Final Rules. See id.

More recently, however, the Commission recognized in the context of the first three conduct standards (11 CFR 109.21(d)(1)-(3)) that the presence of a firewall between staff assigned by a political committee to work directly with a candidate and staff assigned by the political committee to work on advertisements supporting that candidate was sufficient to refute certain allegations of coordination in a particular case. See Matter Under Review ("MUR") 5506, First General Counsel’s Report at 5-8 (Commission found no reason to believe EMILY’s List had violated section 441a of the Act based, in part, on a representation by EMILY’s List that it had created a firewall whereby employees, volunteers, and consultants who handle advertising buys are “barred, as a matter of policy, from interacting with Federal candidates, political party committees, or agents of the foregoing. The employees, volunteers and consultants are also barred from interacting with others within EMILY’s List regarding specified candidates or officeholders.")

If the Commission decides to establish a rebuttable presumption or safe harbor in the common vendor and former employee conduct standards, what factors should the Commission consider in determining whether an effective firewall exists? Is the role of a firewall best addressed on a case-by-case basis through the enforcement process? Aside from setting up firewalls, are there other actions by a common vendor, former employee,
or the political committees that engage them that the Commission should consider a safe
harbor?

The common vendor conduct standard and the former employee conduct standard
incorporate the current election cycle as a temporal limit on their application. See 11
CFR 109.21(d)(4)(ii), (d)(5)(i). In the 2002 Coordination Final Rules, the Commission
explained that "[t]he election cycle provides a clearly defined period of time that is
reasonably related to an election." 2002 Coordination Final Rules at 436. The
Commission invites comments on how this temporal limit works in practice. Is
information about a candidate's campaign plans, products, activities, or needs of such an
ephemeral nature that its strategic significance dissipates shortly after the information is
communicated, which may be long before the end of the election cycle, or does the
information remain relevant throughout the election cycle? If the Commission concludes
that the strategic value of such information does not necessarily last throughout an entire
election cycle, should the Commission change the common vendor and former employee
conduct standards to cover a shorter time frame? If so, how long should such a time
frame be? Should the Commission adopt a 60-day time frame based on the
Commission's determination, underlying its longstanding rule with respect to polling
results, that such information outside of the 60-day time frame is of very little value?20

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19 The term "election cycle" is defined in 11 CFR 100.3(b).
20 The Commission's regulations on allocation of polling expenses at 11 CFR 106.4(g) provide that a
candidate or political committee that receives poll results from a third party who commissioned and paid
for the poll may report the value of the in-kind contribution as an allocated percentage of the original cost
of the poll, so long as the candidate or political committee received the poll results more than 15 days after
the initial recipient received such results. Section 106.4(g) of the Commission's rules provides three tiers
of discounted allocation based on how long the gap is between the original receipt of poll results and their
receipt by a candidate or political committee -- poll results received by a candidate or political committee
between 16 and 60 days following receipt by the initial recipient may be allocated at 50 percent of the
original cost; between 61 and 180 days the allocation is at 5 percent of original cost; beyond 180 days, a
candidate or political committee need not allocate any amount.
Alternatively, does the Commission’s experience with the polling regulations provide
evidence that the Commission should adopt a 180-day window for its coordination
regulations? Alternatively, would retention of the election cycle time frame in the current
rule more accurately align the rule with existing campaign practices?

3. The use of publicly available information in “coordinated communications” – proposed

11 CFR 109.21(g)

The Commission seeks comment on whether to create a safe harbor that would
make clear as a matter of law that (1) the use of publicly available information in
connection with a public communication by any person paying for that public
communication does not satisfy any of the conduct standards, and (2) a candidate’s or
political party committee’s conveyance of publicly available information to any person
paying for a public communication does not satisfy any of the conduct standards. This
safe harbor in proposed 11 CFR 109.21(g) would cover situations in which a candidate,
authorized committee, or political party committee has conveyed information publicly,
such as, for example, at a campaign rally or on the candidate’s or party’s website or in a
press release, or where such information is otherwise publicly available, such as having
appeared in newspaper, television, or other press reports. Should such a safe harbor also
cover situations in which the person paying for the communication has received the
information both from the candidate, authorized committee, or political party committee,
in a non-public context and also from a public source? How should the rules treat a
situation in which the person paying for the communication did, in fact, receive the
information only from the candidate, authorized committee, or political party committee,
but could also have obtained the same information from a public source?
The Commission also seeks comment on whether, if it adopts this safe harbor for
the use of publicly available information, the burden of establishing whether the
information was publicly available should be on the Commission or on the party seeking
to make use of the safe harbor. If that burden were on the Commission, how would the
Commission be able to establish that the information was not publicly available at the
relevant time, given that some information, especially information available through the
Internet, may be in the public domain only for a limited time period?

4. Relationship Between Conduct and Content Standards

If the Commission broadens or eliminates the content standard for coordinated
communications, the Commission seeks comment on whether it would be appropriate to
narrow or otherwise modify any of the conduct standards. Are the conduct and content
standards properly understood as dynamic and working in conjunction with each other?

VI. Party Coordinated Communications (11 CFR 109.37)

The Commission notes that its “party coordinated communication” regulation at
11 CFR 109.37 also contains a three-prong test for determining whether a communication
is coordinated between a candidate and a political party committee. Although not
addressed in the Shays cases, the “party coordinated communication” test in 11 CFR
109.37 has a content prong that is substantially the same as the one for “coordinated
communications” in 11 CFR 109.21(c). See 11 CFR 109.37(a)(2). If the Commission
decides to revise current 11 CFR 109.21 as described in the alternatives set forth above,

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21 11 CFR 109.37(a)(2) differs from 11 CFR 109.21(c) in two ways: first, it does not contain a separate
content standard for electioneering communications and, second, the content standard in section
109.37(a)(2)(iii), the equivalent of the fourth content standard in section 109.21(c)(4), can be satisfied only
by reference to a clearly identified Federal candidate and not, as in section 109.21(c)(4), also by reference
to a political party.
the Commission seeks comment on whether it should make conforming changes to the
party coordinated communication regulations in 11 CFR 109.37.

In addressing the conduct of national party officers under the national party soft
money ban at 2 U.S.C. 441i(a), the Supreme Court stated, “[n]othing on the face of
[section 441i(a)] prohibits national party officers, whether acting in their official or
individual capacities, from sitting down with state and local party committees or
candidates to plan and advise how to raise and spend soft money. As long as the national
party officer does not personally spend, receive, direct, or solicit soft money, [section
441i(a)] permits a wide range of joint planning and electioneering activity.” McConnell,
540 U.S. at 160 (citing to Brief for Intervenor-Defendants Sen. John McCain et al. in No.
02-1674 et al., p. 22, which stated that “BCRA leaves parties and candidates free to
coordinate campaign plans and activities, political messages, and fund raising goals with
one another”); see also Advisory Opinion 2005-02 (incorporating such principles). The
Commission seeks comment on the relevance, if any, of this statement to the
Commission’s coordinated communication regulations. Does McConnell render the
application of the conduct standards to coordination between a candidate and a political
party committee at 11 CFR 109.37(a)(3) obsolete? Does it preclude a finding of
coordination under the material involvement prong at 11 CFR 109.21(d)(2)? Does the
relationship between national party candidates and their parties justify adopting more
permissive conduct standards for “party coordinated communications” in 11 CFR 109.37
than for coordinated communications in 11 CFR 109.21? If so, how should the conduct
standards for “party coordinated communications” be amended?
Certification of No Effect Pursuant to 5 U.S.C. § 605(b)

[Regulatory Flexibility Act]

The Commission certifies that the attached proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities. The basis for this certification is that any individuals and not-for-profit entities that would be affected by these proposed rules would not be “small entities” under 5 U.S.C. 601. The definition of “small entity” does not include individuals, but classifies a not-for-profit enterprise as a “small organization” if it is independently owned and operated and not dominant in its field. 5 U.S.C. 601(4).

Moreover, any State, district, and local party committees that would be affected by these proposed rules would be not-for-profit committees that do not meet the definition of “small organization.” 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 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.

Furthermore, any separate segregated funds that would be affected by these proposed rules would be 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 financial support for certain expenses from corporations,
labor organizations, membership organizations, or trade associations, and therefore are
not independently owned and operated.

Most of the other political committees that would be affected by these proposed
rules would be 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. In addition,
most political committees rely on contributions from a large number of individuals to
fund the committees’ operations and activities.

To the extent that any State party committees representing minor political parties
or any other political committees might be considered “small organizations,” the number
that would be affected by this proposed rule would not be substantial, particularly the
number that would coordinate expenditures with candidates or political party committees
in connection with a Federal election. Accordingly, to the extent that any other entities
may fall within the definition of “small entities,” any economic impact of complying with
these rules would not be significant.

With respect to commercial vendors whose clients include political party
committees or other political committees, the proposed rules consider ways to reduce the
existing regulatory restrictions. Thus, rather than adding an economic burden, the
proposed rules would potentially have a beneficial economic impact on such commercial
vendors.

List of Subjects

11 CFR Part 109

Elections, Reporting and recordkeeping requirements.
For the reasons set out in the preamble, the Federal Election Commission proposes to amend Subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) and (d), and Pub. L. 107-55 Sec. 214(c))

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

   Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L. 107-55, 116 Stat. 81.

ALTERNATIVE I

2. Section 109.21(c) would be amended by revising paragraphs (1) and (4) 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)(4) satisfies the content standard of this section.

(1) A communication that is an electioneering communication under 11 CFR 100.29.

(2) A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate’s authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.
(3) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(4) A communication that is a public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section is true. Payment for a public communication that otherwise satisfies paragraphs (c)(4)(i), (ii), and (iii) of this section is not an in-kind contribution to a candidate if the public communication is not publicly distributed or otherwise publicly disseminated 120 days or fewer before that candidate's own election.

(i) The public communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.
Section 109.21 would be amended by revising paragraphs (c)(4) to read as follows:

§ 109.21 What is a “coordinated communication”?

(c) * * * *

(4) A communication that is a public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii) and (iii) of this section are true.

(i) The public communication refers to a political party or to a clearly identified candidate for Federal office; and

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

* * * * *
ALTERNATIVE 4

4. Section 109.21 would be amended by revising paragraph (c)(4) to read as follows:

§ 109.21 What is a “coordinated communication”?

(c) * * * *

(4) A communication that is a public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are is true.

(i) The public communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication promotes, supports, attacks, or opposes or the political party or clearly identified candidate for Federal office; and The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

* * * *
ALTERNATIVE 5

5. Section 109.21 would be amended revising the introductory language for paragraph (c) and by adding a 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)(45) satisfies the content standard of this section.

(5) A public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(5)(i), (ii), and (iii) of this section is true.

(i) The public communication is made by a political committee, as defined in 11 CFR 100.5;

(ii) The public communication refers to a political party or to a clearly identified candidate for Federal office; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

* * * * *
ALTERNATIVE 6

Section 109.21 would be amended by revising paragraph (c)(4) to read as follows:

§ 109.21 What is a “coordinated communication”?

* * * * *

(c) * * *

(4) A communication that is a public communication, as defined in 11 CFR 100.26, that is made for the purpose of influencing an election for Federal office and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true.

(i) The communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

* * * * *
7. Section 109.3 would be amended by revising paragraphs (a)(2) and (b)(2) to read as follows:

§ 109.3 Definitions.

(a) *

(2) To make or authorize an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26 that meets one or more of the content standards set forth in 11 CFR 109.21(e).

(b) *

(2) To make or authorize an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26 that meets one or more of the content standards set forth in 11 CFR 109.21(e).

8. Section 109.21 would be amended by revising paragraph (a)(2), by removing and reserving paragraph (c), and by revising the first sentence of paragraph (d)(6) to read as follows:

§ 109.21 What is a “coordinated communication”?
(2) Is an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26 satisfies at least one of the content standards in paragraph (e) of this section; and

(3) A communication that is an electioneering communication under 11 CFR 100.29.

(2) A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.

(3) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(4) A communication that is a public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true:

(i) The communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special,
or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

(d) * * *

(6) Dissemination, distribution, or republication of campaign material. A communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, satisfies the content standard of paragraph (c)(2) of this section or 11 CFR 109.37(a)(2)(i) shall only satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section only on the basis of conduct by the candidate, the candidate's authorized committee, or the agents of any of the foregoing, that occurs after the original preparation of the campaign materials that are disseminated, distributed, or republished. * * *

* * * * *

9. Section 109.21 would be amended by adding a new paragraph (g) to read as follows:

§ 109.21 What is a “coordinated communication”?

* * * * *

(g) Safe harbor for use of publicly available information.
(1) The use of publicly available information by any person paying for a public communication in connection with a public communication does not satisfy any of the conduct standards in paragraph (d) of this section.

(2) A candidate's or political party committee's conveyance of publicly available information to any person paying for a public communication does not satisfy any of the conduct standards in paragraph (d) of this section.

Scott E. Thomas
Chairman
Federal Election Commission

DATED
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