

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL ELECTION COMMISSION

### 11 CFR Parts 100 and 109

[Notice 2010–01]

#### Coordinated Communications

**AGENCY:** Federal Election Commission.

**ACTION:** Supplemental Notice of Proposed Rulemaking.

**SUMMARY:** The Federal Election Commission is issuing a Supplemental Notice of Proposed Rulemaking for the Notice of Proposed Rulemaking on Coordinated Communications published on October 21, 2009, in order to elicit comments addressing the impact of the Supreme Court's decision in *Citizens United v. FEC*. The Commission is also announcing a public hearing on the proposed rules regarding coordinated communications. No final decision has been made by the Commission on the issues presented in this rulemaking.

**DATES:** Comments must be received on or before February 24, 2010. The hearing will be held on Tuesday and Wednesday, March 2 and 3, 2010 and will begin at 10 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. Any person who requested to testify in written comments received by the Commission prior to the deadline for the initial comment period need not request to testify again.

**ADDRESSES:** All comments must be in writing, addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and submitted in either electronic, facsimile or paper form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to [CoordinationShays3@fec.gov](mailto:CoordinationShays3@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 paper follow-up. Paper comments and paper

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 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:** Ms. Amy L. Rothstein, Assistant General Counsel, Ms. Jessica Selinkoff, or Ms. Joanna Waldstreicher, Attorneys, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** On October 21, 2009, the Commission published a Notice of Proposed Rulemaking (“NPRM”) proposing possible changes to the “coordinated communication” regulations at 11 CFR 109.21 in response to the decision of the Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (“*Shays III Appeal*”). See Notice of Proposed Rulemaking on Coordinated Communications, 74 FR 53893 (Oct. 21, 2009). The deadline for comments on the NPRM was January 19, 2010. In the NPRM, the Commission stated that it would announce the date of a hearing at a later date.

#### I. Extension of Comment Period

Two days after the close of the NPRM's comment period, on January 21, 2010, the Supreme Court issued its decision in *Citizens United v. FEC*, No. 08–205 (U.S. Jan. 21, 2010), available at [http://www.fec.gov/law/litigation/cu\\_sc08\\_opinion.pdf](http://www.fec.gov/law/litigation/cu_sc08_opinion.pdf). *Citizens United* may raise issues relevant to the coordinated communications rulemaking. Therefore, the Commission is re-opening the comment period for this rulemaking. The Commission seeks additional comment as to the effect of the *Citizens United* decision on the proposed rules, issues, and questions raised in the NPRM and in this Supplemental Notice of Proposed Rulemaking (“SNPRM”).<sup>1</sup> Comments are due on or before February 24, 2010.

<sup>1</sup>The Commission is reevaluating a number of other regulations in light of the *Citizens United* decision and intends to begin a separate rulemaking to address these other regulations. Commenters will

#### a. General Considerations

In response to *Shays III Appeal*, the Commission's NPRM proposed four alternatives for revising the content prong of the coordinated communications test, three alternatives for revising the conduct prong of the coordinated communications test, two alternative definitions of “promote, support, attack, or oppose” (“PASO”), and two safe harbors.

The Commission seeks comments on the effect of the *Citizens United* decision on the Commission's proposals in the NPRM. The Commission asks broadly whether commenters believe *Citizens United* affects any aspect of the proposed rules and also asks specific questions regarding certain aspects of the proposed rules.

In concluding that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,” the Court explained that “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” *Citizens United*, slip op. at 41–42 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)). Does this statement suggest the need for a more robust coordination rule because the presence of prearrangement and coordination may result in, or provide the opportunity for, *quid pro quo* corruption?

The Court further held that the governmental interest in “[l]aws that burden political speech” is “limited to *quid pro quo* corruption,” and that “[i]ngratiation and access, in any event, are not corruption.” *Citizens United*, slip op. at 43, 45. In light of these statements in *Citizens United*, is one of the governmental interests asserted in *Shays III-Appeal* for a stricter coordinated communications rule—*i.e.*, to prevent third-party sponsors of communications from ingratiating themselves with Federal candidates (528 F.3d at 925)—still valid after *Citizens United*? Or, was the Court's holding limited to the independent expenditures that were at

have an opportunity to address these other issues at that time.

issue in *Citizens United*? Given that coordination was not at issue in *Citizens United*, did the Court's mention of coordination suggest, in any way, that a different governmental interest would justify regulating non-party speech that may be coordinated?

Now that *Citizens United* permits additional entities, such as public corporations and labor organizations, to make independent expenditures, does the proposed rule on coordinated communications adequately address those organizations?

#### b. Content Standards

The Commission seeks comment on the effect, if any, of the *Citizens United* decision on the proposed content standards. What effect does the decision have on the proposed Modified *WRTL* content standard, including the proposal's "functional equivalent of express advocacy" test? See, e.g., *NPRM*, 74 FR at 53902. Should any parts of 11 CFR 114.15 be included in such a test, or is Section 114.15 simply inapplicable after *Citizens United*? Does the "functional equivalent of express advocacy" standard still provide a potentially useful coordinated communications content standard to address the *Shays III-Appeal* court's concerns? Should the Commission devise alternative criteria for the Modified *WRTL* content standard, or does the Court's discussion of the Commission's "two part, 11-factor balancing test to implement *WRTL*'s ruling" indicate a general disapproval of such an approach? *Citizens United*, slip op. at 18 (referring to *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*")). Are any additional criteria necessary at all, or should the Commission simply rely on the Modified *WRTL* standard as articulated in the proposed rule text? Did the Court's application of the test to *Hillary: The Movie* demonstrate that the Court's "functional equivalent of express advocacy" standard is sufficiently workable without further explanation?

Additionally, the Commission seeks further comment on the examples given in the *NPRM*—both those in the proposed PASO definitions and those to which the proposed PASO and Modified *WRTL* content standards may or may not apply—in light of *Citizens United*. See *Citizens United*, slip op. at 3, 20–21, and 52–54; see also *NPRM*, 74 FR at 53903–04 and 53911–12. The Commission also seeks comment on the application of the proposed content standard alternatives to the communications at issue in *Citizens United*. See *Citizens United*, slip op. at 3, 52–54. What impact, if any, does the

Court's conclusion that *Hillary: The Movie* is "the functional equivalent of express advocacy" have on the Commission's coordinated communications rules and in particular to the application of the "express advocacy" content standard outside the 90/120-day windows? Does the analysis change when the "functional equivalent of express advocacy" is not being applied to a communication in order to strike down a speech prohibition, as in *Citizens United*, but rather to restrict certain speech, as in the proposed coordination rules? See, e.g., *Citizens United*, slip op. at 10 ("First Amendment standards, however, 'must give the benefit of any doubt to protecting rather than stifling speech'") (quoting *WRTL*, 551 U.S. at 469). Is there anything in the opinion to suggest that the Court intended its conclusion, that *Hillary: The Movie* is "the functional equivalent of express advocacy" to apply only in limited contexts?

Are the proposed PASO definitions sufficiently clear and unambiguous so as not to require "intricate case-by-case determinations" or to require prospective speakers to seek guidance from the Commission as to whether their proposed speech would be coordinated? *Id.* at 12. Do *Citizens United* and *WRTL* provide a constitutional limit on the reach of the proposed PASO standard? Are any content standards broader than express advocacy or its functional equivalent permissible after *Citizens United*, or are these the only standards that the Court has concluded are sufficiently clear? In light of the Supreme Court's statements that the PASO components "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), and that any rule must "eschew the open-ended rough-and-tumble of factors," *Citizens United*, slip op. at 19 (quoting *WRTL*, 551 U.S. at 469), should the Commission adopt a PASO content standard without a definition? In the absence of a definition, would the rule provide specific enough guidance to prospective speakers? Would such a rule be enforceable by the Commission?

More generally, how should the Commission conduct investigations in enforcement actions arising from allegations of coordination? Does the Court's holding in *Citizens United* that corporations have a First Amendment right to make independent expenditures raise concerns about investigating potentially coordinated communications that do not exist in other contexts? Would investigations to

determine whether a communication is independent or coordinated (and thus a contribution), chill protected speech? To avoid such a risk, should the Commission require a heightened standard (e.g., requiring more particularity or specificity) in any complaint alleging coordination before opening an enforcement proceeding? Should such a heightened complaint standard be adopted with, or regardless of, any revised content standard? Would such a heightened complaint standard impair the Commission's ability to investigate allegations of contributions via coordination? Does anything in the Act (particularly 2 U.S.C. 437g(a)) authorize or preclude the Commission from adopting a heightened complaint standard for coordination allegations? If the Commission may not require a heightened complaint standard for coordination allegations, would that then preclude the application of a broader content standard? Why?

#### c. Safe Harbors

Additionally, the *NPRM* proposes safe harbors that would exempt certain communications sponsored by 501(c)(3) organizations or candidates' businesses from being treated as coordinated. *NPRM*, 74 FR at 53907–53910. Are these proposed safe harbors consistent with the *Citizens United* decision? See, e.g., slip op. at 24 ("Prohibited too, are restrictions distinguishing among different speakers, allowing speech by some but not others."). Should the proposed safe harbors apply broadly regardless of the types of entities involved? For example, should there be a safe harbor from the coordination rules for any public communication in which a candidate for Federal office expresses or seeks support for any type of organization, or for a position on a public policy or legislative proposal espoused (or opposed) by that organization? Similarly, should the safe harbor for commercial transactions include any public communication in which a candidate for Federal office proposes any type of commercial transaction, regardless of whether it is for a business that the candidate owns or operates, or whether the business existed prior to the candidacy? Would such safe harbors be overbroad or undermine the efficacy of the rule?

#### d. Consequences of Court's Media Exemption Analysis

In *Citizens United*, the Court stated, "There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not," and "[t]his differential

treatment [between corporations with and without media outlets] cannot be squared with the First Amendment.” Slip op. at 37. Does the Court’s analysis of the media exemption affect the proposed rule changes, or the coordination rules generally? If so, how?

## II. Notice of Hearing

The Commission announces that a hearing will be held on Tuesday, March 2, 2010 and Wednesday, March 3, 2010 (see **DATES** and **ADDRESSES**, above). The witnesses will be those individuals who indicated in their timely comments, whether to the NPRM published on October 21, 2009 or to this notice, that they wish to testify at the hearing. Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary’s office at (202) 694-1040, at least 72 hours prior to the hearing date.

Dated: February 5, 2010.

On behalf of the Commission,

**Matthew S. Petersen,**

*Chairman, Federal Election Commission.*

[FR Doc. 2010-2973 Filed 2-9-10; 8:45 am]

**BILLING CODE 6715-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2009-1153; Airspace Docket No. 09-ACE-13]

#### Proposed Amendment of Class E Airspace; Emmetsburg, IA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend Class E airspace at Emmetsburg, IA. Additional controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAPs) at Emmetsburg Municipal Airport, Emmetsburg, IA. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) operations for SIAPs at the airport.

**DATES:** 0901 UTC. Comments must be received on or before March 29, 2010.

**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-2009-1153/Airspace Docket No. 09-ACE-13, 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-2009-1153/Airspace Docket No. 09-ACE-13.” 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/](http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/).

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see “**ADDRESSES**” section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except

Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd, Fort Worth, TX 76137.

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 E airspace extending upward from 700 feet above the surface for SIAPs operations at Emmetsburg Municipal Airport, Emmetsburg, IA. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9T, dated August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E 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