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01/13/2006 05:02 PM

To <coordination@fec.gov>
cc
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Subject NPRM 2005-28

Please see attached rulemaking comments. Six attachments to follow by separate email.

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January 13, 2006

By Electronic Mail

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Notice 2005–28: Coordinated Communications

Dear Mr. Deutsch:

These comments are submitted jointly by the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics in response to the Commission's Notice of Proposed Rulemaking ("NPRM") 2005–28, published at 70 Fed. Reg. 73946 (December 14, 2005), seeking comment on proposed revisions to its regulations regarding communications that have been coordinated with federal candidates and political party committees under 11 C.F.R. § 109.21.

For the reasons set forth below, we oppose the alternative proposed revisions to the content standards of 11 C.F.R. § 109.21(c) set forth in NPRM 2005–28, and urge the Commission to instead adopt our proposed revisions detailed below.

The three commenters request the opportunity to testify at the hearing on this rulemaking, scheduled for January 25–26, 2006.

I. Coordination in the Pre-BCRA Era

The Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), distinguished for constitutional purposes between limitations on "contributions" to a candidate's campaign, and limitations on "expenditures" by a campaign. *Buckley* also recognized that, to be effective, any limitations on campaign contributions must apply to expenditures made in coordination with a candidate, so as to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47.

Buckley emphasized the difference between expenditures "made *totally independently* of the candidate and his campaign," *id.* at 47 (emphasis added), and "coordinated expenditures," construing the contribution limits in the Federal Election Campaign Act ("FECA") to include not only contributions made directly to a candidate, political party, or campaign committee, but also "all expenditures placed *in cooperation with or with the consent of* a candidate, his agents or an authorized committee of the candidate …." *Id*. at 46–

47 n.53 (emphasis added); *see also id.* at 78. The Court noted, "The 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." *Id.*[1]

The 1976 amendments to the FECA codified *Buckley*'s treatment of coordinated expenditures. FECA was amended to provide that an expenditure made "in cooperation, consultation, or in concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." Pub. L. No. 94–283, § 112, 90 Stat. 475 (codified at 2 U.S.C. § 441a(a)(7)(B)(i)). Conversely, the 1976 FECA amendments defined an "independent expenditure" as:

> an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made *without cooperation or consultation* with any candidate, or any authorized committee or agent of such candidate, *and which is not made in concert with, or at the request or*

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[1] The broad language of *Buckley* regarding coordination was echoed in subsequent Supreme Court decisions on the same topic. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), the Supreme Court held that a political party ad aired prior to a candidate's nomination would be not be treated as coordinated because the ad was developed "independently and *not pursuant to any general or particular understanding* with a candidate …." *Id.* at 614 (emphasis added). The Court stressed that "the constitutionally significant fact … is the lack of coordination between the candidate and the source of the expenditure." *Id.* at 617.

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"), the Court — again in the context of party spending — underscored "the good sense of recognizing the distinction between independence and coordination." *Id.* at 447. The Court recognized that there is a "*functional, not a formal*" definition of contributions, which includes expenditures made in coordination with a candidate. *Id.* at 443 (emphasis added). Of particular importance, the Court noted that independent expenditures are only those "without any candidate's approval (or wink or nod) …." *Id.* at 442. Justice Souter explained for the majority:

> There is *no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate*, and there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending. *Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits*.

Id. at 464 (emphasis added). The Court went on to hold that limitations on coordinated party spending are subject to "the same scrutiny we have applied to political actors, that is, scrutiny appropriate for a contribution limit …." Applying that scrutiny, the Court concluded that "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." *Id.* at 465.

> *suggestion of*, any candidate, or any authorized committee or agent of such candidate.

Pub. L. No. 94–283, § 102, 90 Stat. 475 (emphasis added) (codified at 2 U.S.C. § 431(17)).[2]

Under the interpretive rules promulgated by the FEC in 1980, an expenditure was not considered "independent" if made pursuant to:

> …any arrangement, coordination or direction by the candidate or his or her agent prior to the publication, distribution, display or broadcast of the communication. An expenditure will be presumed to be so made when it is –
>
> (A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or
>
> (B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agents.

11 C.F.R. § 109.1(b) (1980).

The standard for coordinated activity was narrowed by a district court in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). There, in the view of the court, the FEC took the position that "any consultation between a potential spender and a federal candidate's campaign organization about the candidate's plans, projects, or needs renders any subsequent expenditures made for the purpose of influencing the election 'coordinated,' i.e., contributions." *Id.* at 89. The district court found the FEC's treatment of such expenditures to be constitutionally overbroad because "the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate." *Id.* at 91.

Instead, the district court formulated its own, "narrowly tailored" definition of coordination, providing that coordination could be found where 1) an expenditure was "requested or suggested" by a candidate, or 2) where there had been "substantial discussion or negotiation between the campaign and the spender over" a communication's contents, timing, audience or the like, "such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure …." *Id*. at 92.

The court's analysis in the *Christian Coalition* case — the decision of a single federal judge — has serious flaws. The court formulated such a narrow definition of coordination conduct that it failed to encompass even the extensive discussions about strategic matters

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[2] The FECA definition of "independent expenditure" is limited to expenditures for "express advocacy," the courts have held that this limitation is not required by *Buckley. See, e.g., FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 87 n. 50 (D.D.C. 1999).

between campaign officials and Coalition leaders that took place in that case. Further, the court's standard would allow virtually unfettered communication between candidates and outside groups, so long as one side simply provides information to the other without eliciting a response. Yet that information could plainly be sufficient for an outside spender to craft an ad that would be of great value to the candidate.[3]

Aware that its decision would be controversial, the court invited the FEC to appeal, *id.* at 98 (finding that there are questions of law "as to which there is substantial ground for difference of opinion and … an immediate appeal … may materially advance the ultimate termination of the litigation"), and the Commission's counsel recommended it do so. Yet a majority of the Commission refused to appeal, leaving in place the district court decision. As Commissioners Thomas and McDonald pointed out in dissenting from this decision, "Not only is the district court's narrow and restrictive standard of coordination found nowhere in the [FECA] and Commission's regulations, but also it runs directly contrary to *Buckley* where the Supreme Court considered independent expenditures as those made 'totally independent of the candidate and his campaign.'"[4]

Not only did the Commission fail to appeal the district court's controversial decision, it embraced the decision by repealing its longstanding coordination regulations and codifying

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[3] It should be noted that the court in *Christian Coalition* did definitively reject the argument that the coordination rules should apply only to ads that contain express advocacy. Judge Green said such a limitation on the scope of coordination:

> …would misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions Were this standard adopted, it would open the door to unrestricted corporate or union underwriting of numerous campaign-related communications that do not expressly advocate a candidate's election or defeat.
>
> For example, expensive, gauzy candidate profiles prepared for television broadcast or use at a national political convention, which may then be broadcast, would be paid for from corporate or union treasury funds. Such payment would be every bit as beneficial to the candidate as a cash contribution of equal magnitude and would equally raise the potential for corruption. Even more pernicious would be the opportunity to launch coordinated attack advertisements, through which a candidate could spread a negative message about her opponent, at corporate or union expense, without being held accountable for negative campaigning….Allowing such coordinated expenditures would frustrate both the anti-corruption and disclosure goals of the Act.

52 F. Supp. 2d at 88 (citations omitted).

[4] *See* Statement for the Record of Commissioners Thomas and McDonald in *Federal Election Commission v. Christian Coalition* (Dec. 20, 1999), *available at*: http://www.fec.gov/members/thomas/thomasstatement04.htm.

a version of the court's standard into new rules. *See* 65 Fed. Reg. 76138 (Dec. 6, 2000); *see also* 66 Fed. Reg. 23537 (May 9, 2001) (final rule and effective date); 11 C.F.R. § 100.23.

The new rules, however, were even more restrictive than the district court's opinion. Although the court nowhere held that an actual "agreement or collaboration" was necessary to find coordination, the new regulations adopted this standard, permitting a finding of coordination only where there have been "substantial discussions or negotiations between the spender and the candidate … the result of which is collaboration or agreement." 11 C.F.R. 100.23(c)(2)(iii). The new rule, like the *Christian Coalition* decision, was itself controversial; Commissioners Thomas and McDonald said it was "far too narrowly drafted and will make evasion of the [FECA] commonplace."[5]

II. "Coordination" Under BCRA and *McConnell*

In the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress dealt with the *Christian Coalition* standard for coordination, and the Commission's regulation embracing it.

In BCRA, Congress amended FECA by extending the law's coordination provisions beyond candidates to include expenditures coordinated with party committees. *See* 2 U.S.C. § 441a(a)(7)(B)(ii). More importantly, section 214 of BCRA repealed the FEC's controversial 2000 coordination rule and directed the FEC to promulgate new coordination rules that do not require "agreement or formal collaboration" before the FEC can conclude that an expenditure is coordinated. Senator Feingold explained the intent behind this provision:

> The concept of "coordination" has been part of Federal campaign finance law since Buckley v. Valeo. It is a common-sense concept recognizing that when outside groups coordinate their spending on behalf of a candidate with a candidate or a party, such spending is indistinguishable from a direct contribution to that candidate or party …. An effective restriction on outside groups coordinating their campaign-related activities with federal candidates and their political parties is needed to prevent circumvention of the campaign finance laws ….
>
> Absent a meaningful standard for what constitutes coordination, the soft money ban in the bill would be seriously undermined. In the place of outside special interests donating six figure checks to the national parties to be spent on Federal elections, these entities could simply work in tandem with the parties and Federal candidates to spend their own treasury funds — soft money — on federal electioneering activities. This would fly in the face of

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[5] *See, e.g.*, Statement of Reasons of Commissioner Thomas and Chairman McDonald in *In re The Coalition, et al.*, MUR 4624 (FEC Sept. 7, 2001); *See also* Statement of Reasons of Commissioners Thomas and McDonald in *In re Republicans for Clean Air*, MUR 4982 (FEC Apr. 23, 2002); *see generally* Scott E. Thomas & Jeffrey H. Bowman, *Coordinated Expenditure Limits: Can They Be Saved?*, 49 Cath. U. L. Rev. 133 (1999); Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 Admin. L. Rev. 575 (2000).

> one of the main purposes of the bill to get national parties and Federal candidates out of the business of raising and spending soft money donations ….
>
> This current FEC regulation fails to cover a range of de facto and informal coordination between outside groups and candidates or parties that, if permitted, could frustrate the purposes of the bill. For example, if an individual involved in key strategic decision-making for a candidate's political advertising resigned from the candidate's campaign committee, immediately thereafter joined an outside organization, and then used inside strategic information from the campaign to develop the organization's imminent soft money-funded advertising in support of the candidate, a finding of coordination might very well be appropriate. The FEC regulation, however, would find coordination neither in this circumstance nor in various other situations where most reasonable people would recognize that the outside entities' activities were coordinated with candidates. This would leave a loophole that candidates and national parties could exploit to continue controlling and spending huge sums of soft money to influence federal elections …. To remedy this problem, the bill requires the FEC to reexamine the coordination issue and promulgate new coordination rules. *These rules need to make more sense in the light of real life campaign practices than do the current regulations.*

148 Cong. Rec. S2144–45 (daily ed. March 20, 2002) (emphasis added). Senator McCain elaborated on the intent of Section 214:

> It is important for the Commission's new regulations to ensure that actual "coordination" is captured by the new regulations. *Informal understandings and de facto arrangements can result in actual coordination as effectively as explicit agreement or formal collaboration.* In drafting new regulations to implement the existing statutory standard for coordination — an expenditure made "in cooperation, consultation or concert, with, or at the request of suggestion of" a candidate — *we expect the FEC to cover "coordination" whenever it occurs, not simply when there has been an agreement or formal collaboration ….*
>
> Section 214 represents a determination that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill. The FEC is required to issue a new regulation, and everyone who has an interest in the outcome of that rulemaking will be able to participate in it, and appeal the FEC's decision to the courts if they believe that is necessary.

Id. at S2145 (daily ed. March 20, 2002) (emphasis added).

Section 214 of BCRA was challenged on First Amendment grounds in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 219–23 (2003). The Court began its analysis by noting:

> Ever since our decision in *Buckley*, it has been settled that expenditures by a noncandidate that are controlled by or coordinated with the candidate and his campaign may be treated as indirect contributions subject to FECA's source and amount limitations. Thus, FECA § 315(a)(7)(B)(i) long has provided that expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.

McConnell, 540 U.S. at 219 (internal citations and quotation marks omitted) (quoting *Buckley*, 424 U.S. at 46 and 2 U.S.C. § 441a(a)(7)(B)(i)).

The *McConnell* plaintiffs/appellants argued that BCRA Section 214 and the mandated new implementing regulations were "overbroad and unconstitutionally vague because they permit a finding of coordination even in the absence of an agreement." *McConnell*, 540 U.S. at 220. The Court was "not persuaded that the presence of an agreement marks the dividing line between expenditures that are coordinated — and therefore may be regulated as indirect contributions — and expenditures that truly are independent." *Id.* at 221. The Court explained:

> [T]he rationale for affording special protection to wholly independent expenditures has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures. Independent expenditures are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view. *By contrast, expenditures made after a "wink or nod" often will be as useful to the candidate as cash*. For that reason, Congress has always treated expenditures made "at the request or suggestion of" a candidate as coordinated.

McConnell, 540 U.S. at 221–22 (internal citations and quotation marks omitted) (quoting *Colorado II*, 533 U.S. at 446) (emphasis added). The Court thus continued to adopt a broad view — a "wink or nod" view — of what constitutes coordination, a position it had earlier set forth in both *Colorado I* ("general or particular understanding") and *Colorado II* ("wink or nod").

The Court rejected the claim that BCRA Section 214 is "overbroad because it permits a finding of coordination or cooperation notwithstanding the absence of a pre-existing agreement." *McConnell*, 540 U.S. at 222. The Court further held that "FECA's definition of coordination gives fair notice to those to whom [it] is directed and is not unconstitutionally

vague." *Id.* at 223 (internal citation and quotation marks omitted) (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950)).[6]

III. The Commission's First Rulemaking on "Coordinated and Independent Expenditures"

In September 2002, the Commission published NPRM 2002–16, seeking comment on proposed rules regarding "Coordinated and Independent Expenditures." 67 Fed. Reg. 60042 (Sept. 24, 2002).

For the first time, the Commission proposed *content* standards to define, in part, what constitutes a "coordinated communication." *See* 11 C.F.R. § 109.21(c). Prior to this, the Commission's regulations had set forth no separate "content" test for a coordinated communication; rather the regulatory language addressed only the "conduct" that constituted coordinated activity. Thus, prior to 2002, the Commission's regulations were silent as to what "content" a communication must contain in order to be treated as an in-kind contribution, if coordinated. The statutory provision on coordination, 2 U.S.C. § 441a(a)(7), of course, applies to "expenditures" made by a person in cooperation, consultation or concert with a person. The Commission generally implemented this statutory rule — and thus implicitly the "conduct" definition of coordination — by reference to whether the spending at issue was an "expenditure," *i.e.*, whether it was "for the purpose of influencing" an election. *See, e.g.*, Ad. Ops. 1982–56 (applying standard of whether communication has a "purpose to influence the candidate's election"); 1983–12 (applying standard of whether communications "are designed to influence the viewers' choices in an election"); 1988–22 (applying standard of whether communication is in "an election-related context").

In the 2002 NPRM, the Commission proposed four content standards for communication that would fall within the scope of the coordination regulation: (1) electioneering communication; (2) republished campaign materials; (3) express advocacy; and (4) "public communication," as defined in 11 C.F.R. § 100.26, made within 120 days of an election, targeted to the identified candidate's voters, and including express statements about the candidate's party affiliation, views on an issue, character, or qualifications for office. *See* 67 Fed. Reg. at 60065 (proposed alternative "C" for 11 C.F.R. § 109.21(c)(4)).

The Campaign Legal Center, Democracy 21 and the Center for Responsive Politics each submitted written comments on the notice, and opposed the content regulation proposed by the Commission, particularly the 120-day time frame.[7] The Center for Responsive

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[6] The *McConnell* plaintiffs/appellants also challenged the 2002 coordination regulations adopted by the FEC after passage of BCRA (discussed immediately below), but the Court affirmed the district court ruling that such a challenge was not ripe for consideration. *McConnell*, 540 U.S. at 223.

[7] *See* Comments of the Campaign and Media Legal Center on Notice 2002–16 (Oct. 11, 2002) at 3; Comments of Democracy 21 on Notice 2002–16 (Oct. 11, 2002) at 12; Comments of the Center for Responsive Politics on Notice 2002–16 (Oct. 11, 2002) at 4.

Politics stated succinctly: "Alternative C should be modified to eliminate the 120-day limitation so that it applies throughout the election cycle." Comments of the Center for Responsive Politics on Notice 2002–16 at 6. Democracy 21 elaborated:

> Alternative C adopts an approach that has merit to it, but should not be confined to a time frame, as proposed. Even outside a period of 120 days before an election, *coordinated* public communications can greatly benefit a candidate — and it is the fact of coordination itself which should raise suspicions that the communication is being made for campaign purposes. Alternative C would allow a large class of overtly coordinated expenditures to go unregulated simply because they fall outside of a time frame proximate to the election.

Comments of Democracy 21 on Notice 2002–16 at 13 (emphasis in original). Similarly, the Campaign Legal Center commented:

> Alternative C for paragraph (c)(4) presents a framework worth pursuing, in light of the Commission's approach here to developing coordination rules. We do suggest that the Commission broaden the time frame during which this test would apply. In light of the fact that the public communication in question would be "directed to voters in the jurisdiction of the clearly identified federal candidate," that it would characterize the candidate's stance on issues or qualifications, and that there would be coordination with that candidate, his or her opponent, or a political party …, the prospect that the advertisement is being made for campaign purposes is high even outside the 120-day period specified in the current draft.

Comments of the Campaign and Media Legal Center on Notice 2002–16 at 5.

At the meeting in December, 2002 to consider its final rule, Commissioner Thomas proposed an amendment that would have eliminated the 120-day period, stating in a memo to the Commission:

> As I indicated earlier, I am opposed to an approach in the coordination rulemaking whereby communications outside certain timeframes can fully escape any coordination analysis. In my view, the Commission would thereby be making coordinated communications legal that heretofore have been clearly illegal. This approach would sanction hard hitting 'issue ads' paid for by a person without any limit whatsoever, even if the benefiting candidate produced the ad, selected the media to be used, and picked the precise time and place for the ad to run! Imagine the storied Yellowtail ad … run nonstop at the behest of an opponent from the date of the primary in an early primary state through early July, or run nonstop from January through early May in a late primary state. This goes even beyond the misguided *Christian Coalition* analysis, and certainly runs counter to the intent behind the BCRA provisions that voided the Commission's regulations because they were too porous. It

> would allow the worst of the present 'issue ad' problems, and compound it by allowing full-scale coordination with the benefiting candidates.[8]

Ultimately, the Commission adopted the 120-day rule set forth in the NPRM. In the Explanation and Justification (E&J) for the final rule, it said:

> The 120-day time … has several advantages. First, it provides a "bright-line" rule. Second, it 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. As noted, Congress has, in part, defined "Federal election activity" in terms of a 120-day time frame, deeming that period of time before an election to be reasonably related to that election. See 2 U.S.C. 431(20)(A)(i). In contrast, the "express advocacy" content standard in paragraph (c)(3) of section 109.21 applies without time limitation. Similarly, this 120-day time frame is more conservative than the treatment of public communications in the definition of Federal election activity, which regulates public communications without regard to timeframe.

Final Rules and Explanation and Justification for Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 430 (Jan. 23, 2003).

Finally, with regard to the 120-day time frame, the Commission explained in a footnote: "In effect, the content standard of paragraph (c)(4)(ii) operates as a 'safe harbor' in that communications that are publicly disseminated or distributed more than 120 days before the primary or general election will not be deemed to be 'coordinated' under this particular content standard under any circumstances." *Id.* at 430 n.2.

IV. *Shays v. FEC* Decisions

In *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) (pet. for reh'g *en banc* denied Oct. 21, 2005), the principal House sponsors of BCRA challenged, *inter alia*, the Commission's "content" regulation in section 109.21, and particularly the 120-day rule.

A. The district court decision

As explained by the district court in *Shays*:

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[8] Commissioner Scott E. Thomas, FEC Agenda Document No. 02–90–A, 1 (Agenda Item for the Meeting of Dec. 5, 2002); *available at*: http://www.fec.gov/agenda/agendas2002/mtgdoc 02-90a.pdf. Commissioner Thomas' motion to amend the draft final rule and eliminate the 120-day period failed by a vote of 2–4. *See* Minutes of an Open Meeting of the Federal Election Commission December 5, 2002, 6 (approved Dec. 18, 2002); *available at*: http://www.fec.gov/agenda/agendas2002/approve02-96.pdf.

> Plaintiffs object[ed] to the fact that under this regulation, unless the communication constitutes "express advocacy" or is a republication of a candidate's own materials, the regulation only bars coordinated communications within 120 days of an election, primary or convention. They contend[ed] that under the plain language of the new rules, a candidate will now be able to help create an advertisement touting his virtues or attacking his opponent's, and then persuade a corporation or union to sponsor it using treasury funds, so long as the advertisement is run more than 120 days before any primary, convention, or general election and avoids any "express advocacy" or republication of campaign materials. Furthermore, Plaintiffs note[d] that under the regulations, if the coordinated communication does not refer to a candidate or political party by name then the communication may be broadcast at any time.

Shays, 337 F. Supp. 2d at 57–58 (footnotes and internal citations omitted). The court noted that the defendant FEC did not dispute this interpretation of the regulations and itself described the rule as a "safe harbor" for communications distributed more than 120 days before an election. *Id*. at 58.

The district court found, in applying the *Chevron* step-two analysis as to whether the challenged regulation "is based on a permissible construction of the statute," that it is:

> …readily apparent that … Congress left a large gap between the obviously impermissible and the obviously permissible. This gap creates the potential for a broad range of differing interpretations of the Act, the legitimacy of each being heavily dependent upon the degree to which it undercuts the statutory purposes …. If the FEC's interpretation unduly compromises the Act's purposes, it is not a reasonable accommodation under the Act, and it would therefore not be entitled to deference.

Shays, 337 F. Supp. 2d at 62 (quoting *Orloski v. Federal Election Comm'n*, 795 F.2d 156, 164 (D.C.Cir.1986)). The court did find that the regulation "compromises" the Act:

> [I]t has been a tenet of campaign finance law since *Buckley* that FECA, in an effort to prevent circumvention of campaign finance regulations, treats expenditures coordinated with candidates or political parties as contributions to those with whom the expenditures were coordinated. The basic premise of coordinated expenditure restrictions is that if political campaigns and outside entities are able to coordinate the outside entity's political expenditures, then the campaign finance contribution and expenditure regulations could be eviscerated.

Shays, 337 F. Supp. 2d at 62 (internal citation omitted). The court explained further that:

> FECA, in an effort to prevent circumvention, provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the

> request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i); *see also id.* § 441a(a)(7)(B)(ii) (same for political parties). BCRA Section 214 did nothing to change this requirement; it merely ordered the FEC to promulgate new regulations regarding coordinated communications, and provided some guidance. *Nor did Congress evince any intent to qualify the reach of this provision of FECA, or to exclude from its reach any particular type of "coordination." Such a move would run counter to the basic notion that a coordinated expenditure, by virtue of its coordination (not its content), is valuable to the political entity with which it is coordinated*.

Shays, 337 F. Supp. 2d at 62–63 (emphasis added).

Citing the legislative history of section 214 of BCRA, the court said: "Clearly, the statements by Senators McCain and Feingold make clear that the purpose of passing Section 214 of BCRA was not to exempt certain acts of coordination, but rather to enlarge the concept of what constitutes 'coordination' under campaign finance law." *Shays*, 337 F. Supp. 2d at 64.

The district court concluded that:

> …pursuant to step two of the *Chevron* analysis, the FEC's exclusion of coordinated communications made more than 120 days before a political convention, general or primary election, as well as any that do not refer to a candidate for federal office or a political party and any not aimed at a particular candidate's electorate or electorate where a named political party has a candidate in the race, undercuts FECA's statutory purposes and therefore these aspects of the regulations are entitled to no deference. A communication that is coordinated with a candidate or political party has value to the political actor. To exclude certain types of communications regardless of whether or not they are coordinated would create an immense loophole that would facilitate the circumvention of the Act's contribution limits, thereby creating "the potential for gross abuse." *Orloski*, 795 F.2d at 165. The FEC's regulation therefore is "not a reasonable accommodation under the Act," *Orloski*, 795 F.2d at 164 (internal quotation marks omitted), and fails *Chevron* step two.

Shays, 337 F. Supp. 2d at 64–65.

B. The D.C. Circuit decision.

The Commission appealed the district court's decision with regard to, *inter alia*, the 120-day coordination content rule to the D.C. Circuit Court of Appeals. *See Shays*, 414 F.3d 76, 97–102. Like the district court, the D.C. Circuit began its analysis by acknowledging that "FECA has long restricted coordination of election-related spending between campaigns and

outside groups." *Id.* at 97. The reason for such restrictions, according to the circuit court, "is obvious." *Id.* The court explained: "Without a coordination rule, politicians could evade contribution limits and other restrictions by having donors finance campaign activity directly — say, paying for a TV ad or printing and distributing posters." *Id.*

The court explained that, through passage of BCRA, Congress ordered the Commission to adopt new coordination regulations that do not require agreement of formal collaboration to establish coordination. In response, the Commission adopted a rule which, more than 120 days before an election, "covers only communications that either recycle official campaign materials or expressly advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 98 (internal quotation marks and citation omitted).

The court noted that plaintiffs/appellees Congressmen Shays and Meehan argued that "this limitation on the rule's coverage outside the 120-day window offers politicians and their supporters an unreasonably generous safe harbor." *Id.* at 98. The court offered several examples to illustrate the Congressmen's concerns:

> Under the new rules, more than 120 days before an election or primary, a candidate may sit down with a well-heeled supporter and say, "Why don't you run some ads about my record on tax cuts?" The two may even sign a formal written agreement providing for such ads. Yet so long as the supporter neither recycles campaign materials nor employs the "magic words" of express advocacy — "vote for," "vote against," "elect," and so forth — the ads won't qualify as contributions subject to FECA. Ads stating "Congressman X voted 85 times to lower your taxes" or "tell candidate Y your family can't pay the government more" are just fine. And even within 120 days of the election (though Shays and Meehan appear not to challenge this aspect of the rule), supporters need only avoid communications that identify candidates or parties by name. Ads regarding, say, economic effects of high taxes or tragic consequences of foreign wars are not contributions — again, even if formally coordinated with the official campaign.

Id. at 98. The circuit court noted that the district court had found that the coordination regulations "undercut FECA's statutory purposes and thus were entitled to no *Chevron* two deference." *Id.* at 98 (internal citation and quotation marks omitted).

The circuit court reached the same result — holding the coordination regulations to be invalid — but did so "for slightly different reasons." *Id.* at 98. Applying *Chevron* step-one analysis, the circuit court agreed with the district court that Congress had not spoken directly to the 120 day issue. But the circuit court found it "hard to imagine that Representatives and Senators voting for BCRA would have expected regulations like [those adopted by the Commission]." *Id.* at 98–99. The circuit court explained:

> Although Congress abrogated the FEC's old "collaboration or agreement" standard, the new rule permits significant categories of expression — e.g., non-express advocacy more than 120 days before an election — even where

> formal collaboration or agreement occurs. And while BCRA's "electioneering communication" provisions … disavow the "express advocacy" test — a standard *McConnell* describes as "functionally meaningless" — the FEC has resurrected that standard here, allowing unrestricted collaboration outside the 120 days so long as the communication's paymasters avoid magic words and redistribution.

Id. at 99 (internal citation omitted). Nevertheless, given the "lack of guidance" from Congress in the statute, the court declined to rule that "BCRA clearly forecloses the FEC's approach." *Id.* Instead, the court expressed its belief that the FEC could construe FECA "as leaving space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign." *Id.*

The circuit court reiterated that the Supreme Court in *McConnell* described the express advocacy test as "functionally meaningless." *Id*. (quoting *McConnell*, 540 U.S. at 193). The court found it obvious that Commission was required to find all express advocacy and republication of campaign materials to be subject to the coordination rules, but noted that "the Commission took the further step of deeming these two categories adequate by themselves to capture the universe of electorally oriented communication outside the 120-day window." This action, the court found, "requires some cogent explanation, not least because *by employing a 'functionally meaningless' standard outside that period, the FEC has in effect allowed a coordinated communication free-for-all for much of each election cycle*." *Id*. (emphasis added). The court explained at length:

> We see nothing in the FEC's official explanation that satisfies APA standards. The Commission's source for the 120-day period was an unrelated BCRA provision requiring hard money financing for state party voter registration drives within 120 days of an election. Drawing on this provision, the FEC explained that "Congress has, in part, defined 'Federal election activity' in terms of a 120-day time frame, deeming that period of time before an election to be reasonably related to that election." 68 Fed. Reg. at 430. Yet this observation has no bearing on the issue before us absent evidence that registration activity and electoral advocacy occur on similar cycles. For all we know from this record, registration efforts may significantly influence elections only in the immediate run-up to the vote, whereas candidate-centered advertisements may affect voters even when broadcast more than 120 days before the race closes. In fact, in a companion provision to the voter registration rule, BCRA imposes even stricter financing restrictions — without temporal limitation — on "public communication[s] that refer[ ] to a clearly identified candidate for Federal office … and that promote[ ] or support[ ] a candidate for that office, or attack[ ] or oppose[ ] a candidate for that office." 2 U.S.C. § 431(20)(A)(iii). Although the FEC acknowledged that its 120-day content standard was "more conservative" than this provision, *see* 68 Fed. Reg. at 430, it never explained why the time-frame for voter registration was more relevant than BCRA's rule for "public communications," seemingly a far more comparable subject-matter.

Id. at 100 (internal citation omitted) (emphasis added).

In addition to rejecting the Commission's "public communications" explanation for the 120-day period incorporated into the coordination rule, the court also rejected the FEC's other explanations for the coordination rule. Specifically, the court rejected the Commission's arguments that the rule's 120-period is reasonable:

- because it provides an easily understood "bright line";
- because it focuses on activity "reasonably close to an election, but not so distant from the election as to implicate political discussion at other times"; and
- because it is twice as long as BCRA's 60-day electioneering communication window.

See id. at 100–01. The court dismissed these rationales, explaining:

> The first of these bromides provides no independent basis for the rule: a bright line can be drawn in the wrong place. The second does not so much answer the question as ask it. *Why* is 120 days "reasonably close" but not "so distant"? Without further explanation, we have no assurance that 120 days reasonably defines the period before an election when non-express advocacy likely relates to purposes other than "influencing" a federal election — the line drawn by the statute's "expenditure" definition, 2 U.S.C. § 431(9)(A)….
>
> [T]he proposition that 120 days is twice 60 and four times 30, though arithmetically indisputable, is no reason to select that number over any other. Why not triple 60, or multiply 30 by one-and-a-half? … [N]othing should prevent the FEC from regulating other categories of non-electioneering speech — non-express advocacy, for example — outside the 120 days.

Id. at 101 (emphasis in original).

The court also rejected the Commission's argument that "limiting its standard to express advocacy and campaign redistribution outside the 120 days preserves space for political activities unrelated to elections." *Id.* at 101. The court explained that, though the Commission's regulation might achieve this goal, "so would regulating nothing at all, and that would hardly comport with the statute." *Id.* The court explained further:

> Notwithstanding its obligation to attempt to avoid unnecessarily infringing on First Amendment interests, the Commission must establish, consistent with APA standards, that its rule rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition. The record before us, however, provides no assurance that the FEC's standard does not permit substantial coordinated expenditure, thus tossing out the proverbial

> baby (spending qualifying as contributions) with the bath water (political advocacy).

Id. at 101–02 (internal citations and quotation marks omitted).

Finally, the court declined a request by plaintiffs/appellees Shays and Meehan that the court take judicial notice "that substantial election-oriented advertising occurred beyond the 120-day window in recent presidential races," but noted that such a fact, if true, "would undercut the Commission's view that it has drawn the line in the right place." *Id.* at 102. The court found that the Commission was in the best position to make such a factual inquiry. The court posed the following questions to the Commission for consideration in this court-ordered rulemaking:

> Do candidates in fact limit campaign-related advocacy to the four months surrounding elections, or does substantial election-related communication occur outside that window? Do congressional, senatorial, and presidential races — all covered by this rule — occur on the same cycle, or should different rules apply to each? And, perhaps most important, to the extent election-related advocacy now occurs primarily within 120 days, would candidates and collaborators aiming to influence elections simply shift coordinated spending outside that period to avoid the challenged rules' restrictions?

Id. at 102. The court advised that the Commission "carefully consider these questions, for if it draws the line in the wrong place, its action will permit exactly what BCRA aims to prevent: evasion of campaign finance restrictions through unregulated collaboration." *Id.*

The circuit court summarized its holding regarding the Commission's coordination rule as follows:

> [W]hile we accept the FEC's premise that time, place, and content may illuminate communicative purpose and thus distinguish FECA "expenditures" from other communications, we detect no support in the record for the specific content-based standard the Commission has promulgated. Accordingly, finding the rule arbitrary and capricious under the APA, we shall affirm the district court's invalidation.

Id.

V. Revising the Content Standards of 11 C.F.R. § 109.21(c)

We start this discussion with a contemporary illustration of the problem. Senator Rick Santorum (R-PA) is a candidate for reelection in the 2006 Pennsylvania Senate election. (The primary election in Pennsylvania is to be held on May 16, 2006; the general election is on November 7, 2006). According to the *National Journal*, Americans for Job Security (AJS) — a section 501(c)(6) corporation — made a $500,000 ad buy on November 18, 2005

— *178 days before the primary election* — to run the following ad statewide in Pennsylvania:

> **ANNOUNCER [v/o]:** Most Saturdays they get together in the park, 8 a.m. sharp.
>
> Pennsylvania families relax a little more these days because Rick Santorum is getting things done everyday.
>
> Over $300 billion in tax relief, eliminating the marriage penalty, increasing the per child tax credit – all done.
>
> And now Rick Santorum is fighting to eliminate unfair taxes on family businesses.
>
> Call and say thanks because Rick Santorum is the one getting it done.
>
> (*Text on screen: Senator Rick Santorum; (717)231-7540; Paid for by Americans for Job Security.*[9]

We have no information to indicate that this ad was coordinated by AJS with the Santorum campaign — *i.e.*, whether the campaign suggested the themes or content for the ad, indeed, whether Senator Santorum personally wrote the ad and suggested to AJS the timing and markets to air it. But under the Commission's existing coordination regulation, he could have.

The ad does not meet any "content" standard of the existing rule: it is not an "electioneering communication" (because it is being run outside the applicable 30/60 day time periods), 11 C.F.R. § 109.21(c)(1); it does not republish or disseminate campaign material prepared by the candidate, *id.* at § 109.21(c)(2); it does not contain express advocacy, *id.* at § 109.21(c)(3) — and, although it refers to a candidate and was directed to voters in that candidate's jurisdiction, it was not "disseminated 120 days or fewer before a general, special or runoff election …," *id.* at § 109.21(c)(4).

Thus, no matter how closely coordinated in fact this ad was — indeed, even if it was written by Senator Santorum — AJS can continue to use an unlimited amount of corporate funds to pay for running this ad, or similar ads, throughout Pennsylvania until January 15, 2006, the beginning of the 120-day pre-primary period. And then AJS can spend more corporate funds in coordination with Senator Santorum to again run this ad, or similar ads, from May 17, 2006 until July 9, 2006, when the 120-day pre-general election period begins.

The American for Job Security ad promoting Senator Santorum is far from the only example of an ad that is plainly intended to influence a campaign and that is being run outside the 120-day window — and thus not captured by the Commission's existing rule.

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[9] A copy of the ad script from the *National Journal* is attached as an exhibit in APPENDIX VI–14.

Although the D.C. Circuit did not facially invalidate the existing 120-day rule, it expressed deep skepticism of it, and required a substantial showing to be made, based on a factual record, that the rule reasonably separates election-influencing ads from others. As the Commission states in the NPRM:

> 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 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."

70 Fed. Reg. at 73949 (quoting *Shays*, 414 F.3d at 101–02).

Before commenting on any of the Commission's proposed revisions to the content standards, we submit, for the record, evidence of election-influencing advertising broadcast more than 120 days prior to the election the ad was intended to influence. After presenting this evidence, we propose an alternative approach to a content standard that includes elements from several of the proposals contained in the NPRM. For reasons we discuss below, none of the alternatives proposed by the Commission, in itself, adequately or effectively implements the coordination provision in the statute. Finally, we comment briefly on other questions raised in the NPRM.

A. Substantial Election-Related Communication Occurs Outside the 120-day Time Frame Established by 11 C.F.R. § 109.21(c)

The D.C. Circuit Court of Appeals in *Shays* asked whether "substantial election-related communication occur[s] outside" the 120-day regulatory time frame." *Shays*, 414 F.3d at 102. Our review of political advertising data compiled by the *National Journal* reveals overwhelming evidence that substantial election-related advertising does, in fact, occur outside the 120-day regulatory time frame.

We have divided the advertising data into two groups: (1) presidential election advertising preceding the election by more than 120 days; and (2) congressional election advertising preceding the election by more than 120 days. Within these two groups, we have organized the information according to election year, and also according to whether the ad was intended to influence a primary or general election. We have compiled data on advertising in the 2004 and 2006 congressional elections, as well as the 1996, 2000 and 2004 presidential elections. This data is summarized below, with scripts of **more than 200 advertisements** included in **APPENDICES I** through **VI**. We include data on advertising by independent organizations, political party committees and candidates. Advertising by any and all of these groups more than 120 days before an election establishes the simple fact that substantial election-related communication does occur outside the 120-day regulatory time

frame — creating the potential for circumvention of contribution limits through coordinated efforts.

1. Presidential Election Advertising Preceding the Election By More Than 120 Days

The presidential election campaign of 1995–96 not only marked the birth of widespread soft money candidate-specific issue advertising, but also the unprecedented launch of broadcast campaign advertising during the summer preceding the presidential primary elections. As two election scholars explained at length:

> The Clinton campaign aired some advertising in 1995, praising Clinton's position on gun control. But the campaign hit on a more innovative strategy — to use party soft money to run "issue advertisements" that did not specifically call for the reelection of Clinton but that would serve to bolster his image. At the urging of consultant Dick Morris, Clinton raised enough soft money to fund an $18 million advertising campaign during the summer and fall of 1995. One such ad charged that the "Dole-Gingrich" budget tried to cut Medicare, but Clinton cut taxes for working families. Eventually, this kind of spending topped $44 million. An FEC preliminary audit of the Clinton campaign held that this party spending was really campaign spending and asked for a repayment of $7 million. Nevertheless, the Commission itself voted 6–0 that the spending was issue advocacy and that no repayment was needed.

WESLEY JOE & CLYDE WILCOX, FINANCING THE 1996 ELECTION 50–51 (John C. Green ed., 1999) (citations omitted).

According to the Commission's audit of the Clinton/Gore '96 Primary Committee, Inc., the committee began broadcasting campaign ads in June 1995 — *more than eight months before the first 1996 presidential primary*. *See* FEC, *Report of the Audit Division on Clinton/Gore '96 Primary Committee, Inc.*, Agenda Doc. No. 98–85, 12 (Nov. 19, 1998; for the meeting of Dec. 3, 1998). The committee spent $2.3 million on advertising between June 27 and July 24, 1995. *Id.* at 15. Advertising paid for by the Democratic National Committee (DNC), coordinated with the Clinton/Gore '96 primary committee, began airing in August, 1995. *Id.* Between August 16, 1995 and August 28, 1996, the DNC spent more than $42 million on advertising coordinated with the Clinton/Gore campaign. *Id*. This coordinated advertising campaign is detailed in the audit report, *id.* at 9-43, wherein the Commission's audit staff recommended that the Commission find the cost of producing and broadcasting the ads to be an in-kind contribution from the DNC to the Clinton/Gore committee. *Id.* at 43.

The success of the Clinton-DNC early advertising strategy encouraged candidates, party committees and independent organizations to repeat the strategy prior to the 2000 presidential election. According to the *National Journal*: "In 1995 President Clinton and the Democratic National Committee took early advertising to new levels. And in 1998, an FEC ruling on 'issue ads' threw open the doors for others to follow suit. As a result, 1999 saw

more ads airing earlier than ever before." *The Ads of 1999*, NATIONAL JOURNAL (Dec. 23, 1999); APPENDIX I–2. **APPENDIX I** contains this *National Journal* article, as well as nine others describing more than eighteen television and radio ads intended to influence the 2000 presidential primaries, but broadcast in at least one state more than 120 days before that state's primary election.[10]

The National Abortion and Reproductive Rights Action League (NARAL), for example, began broadcasting two ads attacking "Republican hopefuls" George W. Bush and Elizabeth Dole in Iowa and New Hampshire in March 1999 — ten months before Iowa's January 24, 2000 caucus and New Hampshire's February 1, 2000 primary. *NARAL Ads Target Bush, Dole*, NATIONAL JOURNAL (Mar. 24, 1999); APPENDIX I–23.

In April 1999, the Republican Leadership Council began airing ads targeting Al Gore in California and nationally on CNN, poking fun at Gore's statement that he invented the Internet. *RLC Targets Gore's Internet Statement*, NATIONAL JOURNAL (Apr. 6, 1999); APPENDIX I–19.

In June 1999, candidates began running campaign ads. On June 2, 1999, presidential candidate Steve Forbes launched a national $10 million television ad campaign. *Forbes Launches National Ad Blitz*, NATIONAL JOURNAL (June 2, 1999); APPENDIX I–16. Similarly, presidential candidate John McCain began airing campaign ads June 28, 1999. *McCain Campaign Unveils Its First Ad*, NATIONAL JOURNAL (June 29, 1999); APPENDIX I–12.

These ads, along with the others detailed in **APPENDIX I**, make clear that candidates and independent organizations spent millions of dollars on broadcast advertising more than 120 days prior to the 2000 presidential primaries.

In addition to not encompassing the non-candidate ads run more than 120 before primary elections, the current regulation does not cover ads run after the primaries but more than 120 days before the general election. **APPENDIX II** contains thirteen *National Journal* articles describing television and radio ads broadcast by candidates, parties and independent groups in at least one state after that state's primary, but before July 10, 2000 — the 120th day preceding the November 7, 2000 presidential general election.

The Democratic National Committee (DNC) and the Republican National Committee (RNC) were clearly among the most active advertisers during the summer of 2000. The first seven articles in **APPENDIX II** describe soft-money candidate-specific issue ads by both national committees. All of the ads avoid the use of magic words and, thus, would not be covered by the Commission's current coordination content standards. The script of the DNC's ad launched June 8, 2000, after all state primaries had ended, read:

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[10] The 2000 presidential primaries and caucuses began January 24 in Iowa and concluded June 6 in New Jersey, Alabama, Montana, South Dakota and New Mexico. *See* Ian Christopher McCaleb, *Compressed Primary Schedule Yields More Than 70 Events in Five Months*, CNN.COM (Jan. 7, 2000); *available at*: http://archives.cnn.com/2000/ALLPOLITICS/stories/01/07/other.wrap.

> **ANNOUNCER** [v/o]: Every week, Bob Darthez has to afford his groceries and prescription drugs. He's worked a lifetime, but now he's at the mercy of the big drug companies. They're using money and lobbyists to stop progress in Washington.
>
> Al Gore is taking them on. Fighting for a Medicare prescription drug benefit for seniors like Bob Darthez.
>
> **AL GORE**: People can't afford these ridiculously high prices for prescription medicines. When their doctors prescribe medicine for their health and their well-being, they ought to be able to take it.
>
> *(On screen: The Gore Plan; www.1-877-leadnow.com; Paid for by the Democratic National Committee)*

Dems Fire First With Health Care Spot, NATIONAL JOURNAL (June 8, 2000); APPENDIX II–14.

The RNC responded several days later with its own soft-money ad praising George W. Bush's Social Security plan. Like the DNC, the RNC avoided express advocacy and, as a result, its ad would not have been covered by the Commission's current content standards. The script read:

> **ANNOUNCER** [v/o]: With our nation at peace and more prosperous than ever, now is the time to find real solutions to America's problems.
>
> George Bush knows that to keep our commitment to seniors we must strengthen and improve Social Security now -- or the retirement of the Baby Boom generation will push it near bankruptcy. He's proposing a bipartisan plan to strengthen and improve Social Security.
>
> The Bush plan guarantees everyone at or near retirement every dollar of their benefits. No cuts in Social Security. You paid into it; it's your money, and it will be there for you. And the Bush plan gives younger workers a choice to invest a small part of their Social Security in sound investments they control for higher returns.
>
> Learn more about George Bush's voluntary plan for personal Social Security retirement accounts. The Bush blueprint: Better for seniors today, better for all of us tomorrow.
>
> *(On screen: www.SocialSecurityBlueprint.com; Paid for by the Republican National Committee)*

GOP's Turn At Soft-Money Game, NATIONAL JOURNAL (June 13, 2000); APPENDIX II–12.

In addition to political party committees, independent organizations were also active with presidential advertising campaigns in the spring and summer of 2000. The Coalition to Protect Americans Now broadcast television ads alleging that Al Gore "would give the Kremlin a veto over American missile defenses." *Bring Back The Cold War?*, NATIONAL JOURNAL (June 1, 2000); APPENDIX II–18. *See also New Group Blasts Admin's Defense System*, NATIONAL JOURNAL (May 24, 2000); APPENDIX II–20. A group named Shape the Debate aired televisions ads in March 2000 attacking Al Gore's character — repeatedly calling him a hypocrite. *See Shaping the Debate About Gore*, NATIONAL JOURNAL (March 30, 2000); APPENDIX II–24.

In short, the *National Journal* articles in **APPENDIX II** make clear that candidates, parties and independent organizations spent millions of dollars on broadcast advertisements in the months following state primaries, but more than 120 days before the general election in 2000.

The trend of early campaign advertising continued in the 2003–04 presidential election cycle. **APPENDIX III** contains twenty-two *National Journal* articles describing more than twenty-five ads intended to influence the 2004 primary elections, but broadcast in at least one state more than 120 days prior to that state's primary.[11]

The Reform Voter Project, for example, began airing television ads in Iowa and New Hampshire criticizing President Bush's environmental record on February 18, 2003 — *eleven months* prior to the 2004 Iowa caucus and *a year before* the New Hampshire primary. It is this targeting of the ads to Iowa and New Hampshire, combined with the ad's direct attack on President Bush's character, that makes clear the advertiser's intent to influence the 2004 elections. The script of the ad read:

> *(On screen: Group of kids singing, holding hands and dancing in a circle on a green field under blue skies.)*
>
> **KIDS**: Ring around the rosey...
>
> **ANNOUNCER** [v/o]: As air pollution increases, more kids get asthma attacks.
>
> **KIDS**: ... a pocket full of posies...
>
> **ANNOUNCER** [v/o]: Pollution that comes from big corporations who gave millions of dollars to elect President Bush.
>
> *(On screen: www.whatdiditbuy.com)*

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[11] The 2004 presidential primary elections and caucuses began January 13 in Washington, D.C. and concluded June 8 in Montana and New Jersey. A comprehensive list of 2004 presidential primary dates can be found on the Commission's Web site. *See* FEC, 2004 Presidential Primary Dates and Candidate Filing Deadlines For Ballot Access (May 26, 2004); *available at*: http://www.fec.gov/pubrec/fe2004/2004pdates.pdf.

KIDS: ... ashes, ashes...

ANNOUNCER [v/o]: Now President Bush is letting those special interests pollute the air even more.

KIDS: ... we all fall down.

(On screen: Child breathes from an asthma inhaler while standing in front of smokestacks.)

ANNOUNCER [v/o]: Don't you wish we had a president who stood up for us, not his special interest contributors?

(On screen: Paid for by Reform Voter Project)

Group Says Bush Enviro Policy Tied To Cash, NATIONAL JOURNAL (Feb. 19, 2003); APPENDIX III–49.

In May 2003, MoveOn.org began airing television ads in 21 media markets criticizing President Bush's "tax cuts for the rich." *Group Makes Bloody Case Against Tax Cut*, NATIONAL JOURNAL (May 14, 2003); APPENDIX III–47. The League of Conservation Voters, MoveOn.org, and Win Without War all ran television advertisements during the summer of 2003 criticizing President Bush, as described in detail by *National Journal* articles in **APPENDIX III**.

Howard Dean was the first presidential candidate to begin broadcast advertising when he hit the Iowa airwaves in mid-June, 2003. *See* Mark H. Rodeffer, *In First Ad, Dean Hits Bush And Democrats*, NATIONAL JOURNAL (June 17, 2003); APPENDIX III–45. Dean was joined in July by Rep. Dennis Kucinich, who launched a radio ad campaign in Iowa. *See* Mark H. Rodeffer, *Willie Nelson Plugs Kucinich On Iowa Radio*, NATIONAL JOURNAL (July 31, 2003); APPENDIX III–36. John Edwards became the third presidential hopeful to engage in broadcast advertising when he debuted three television ads in Iowa and New Hampshire during the first week of August. *See* Mark H. Rodeffer, *Edwards Highlights Working-Class Roots*, NATIONAL JOURNAL (Aug. 7, 2003); APPENDIX III–29. Rep. Richard Gephardt joined the air wars on September 2, when he went on the air in Iowa and New Hampshire. *See* Meg Kinnard, *Gephardt Debut Plugs Blue-Collar Roots*, NATIONAL JOURNAL (Sept. 2, 2003); APPENDIX III–20. And Senator John Kerry converted his September 2 announcement speech into two television ads that debuted in Iowa a day later. *See* Meg Kinnard, *Kerry's First Ads Use Announcement Speech*, NATIONAL JOURNAL (Sept. 4, 2003); APPENDIX III–17.

As evidenced by the articles in **APPENDIX III**, candidates and independent groups spent millions of dollars on television advertising throughout 2003 to influence the 2004 presidential primaries — advertising which did not meet the content standard of the existing coordination regulation.

Finally, with regard to presidential election advertising, **APPENDIX IV** contains sixty-one *National Journal* articles describing more than seventy television and radio advertisements intended to influence — but broadcast more than 120 days prior to — the November 2, 2004 presidential general election. All articles in **APPENDIX IV** note the states in which the ads ran. Every ad contained in **APPENDIX IV** was broadcast in at least one state after that state's primary election,[12] but before July 5, the 120th day preceding the November general election.

The number of advertisements detailed in **APPENDIX IV** clearly indicates that candidates and independent organizations engage in extensive political advertising more than 120 days before presidential general elections. President Bush launched his general election television ad campaign during the first week of March 2004, airing four ads nationwide on cable television and targeting the ads to eighteen battleground states via broadcast television. *See* Jennifer Koons, *Bush Debut Lauds Steady Leadership*, NATIONAL JOURNAL (Mar. 4, 2004); APPENDIX IV–147. MoveOn.org responded immediately to the President's ads with an ad buy of its own in seventeen battleground states. The script of the MoveOn.org ad read:

> *(On screen: Worker leaves factory at night, drives home, picks up stack of bills, sees sleeping family)*
>
> **ANNOUNCER** [v/o]: Times are tough. So you work overtime to make ends meet. Then you find out George Bush wants to eliminate overtime pay for eight million workers. Two million jobs lost. Jobs going overseas. And now, no overtime pay.
>
> When it comes to choosing between corporate values and family values, face it, George Bush is not on our side.
>
> *(On screen: Paid for by MoveOn.org Voter Fund)*

Meg Kinnard, *MoveOn.org: Bush Not In Sync With Workers*, NATIONAL JOURNAL (March 4, 2004); APPENDIX IV–145.

The conservative independent group Citizens United then responded to the MoveOn.org ads with a television ad of its own aiming to undercut John Kerry's populist message. The script of the Citizens United ad read:

> *(On screen: Photographs of the candidate, boats in a harbor and various pieces of real estate; John Kerry)*
>
> **ANNOUNCER** [v/o]: Massachusetts Senator John Kerry.

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[12] A comprehensive list of 2004 presidential primary dates can be found on the Commission's Web site. *See* FEC, 2004 Presidential Primary Dates and Candidate Filing Deadlines For Ballot Access (May 26, 2004); *available at*: http://www.fec.gov/pubrec/fe2004/2004pdates.pdf.

> Hairstyle by Christophe's: $75.
>
> Designer shirts: $250.
>
> Forty-two-foot luxury yacht: $1 million.
>
> Four lavish mansions and beachfront estate: Over $30 million.
>
> *(On screen: Kerry with his Massachusetts Sen. Edward Kennedy)*
>
> Another rich, liberal elitist from Massachusetts who claims he's a man of the people. Priceless.
>
> *(On screen: John Kerry; www.citizensunited.org; 866-458-2004; Paid For By Citizens United)*

Jennifer Koons, *Group Slams Kerry's 'Lavish' Lifestyle*, NATIONAL JOURNAL (Mar. 9, 2003); APPENDIX IV–143.

Finally, with the Democratic Party nomination locked up, John Kerry launched his general election television ad campaign in sixteen general election battleground states on March 13, 2004. *See* Jennifer Koons, *Kerry Counters Bush Claims On Taxes*, NATIONAL JOURNAL (Mar. 15, 2003); APPENDIX IV–134. From this point onward, the battleground state airwaves were flooded with advertisements by both candidates and their supporters — leaving no doubt that "substantial election-related communication occur[s] outside" the 120-day regulatory time frame. *Shays*, 414 F.3d at 102.

The advertising campaigns described by the articles in **APPENDICES I** through **IV** make clear that extensive advertising took place more than 120 days prior to the 2000 and 2004 presidential primary elections, as well as between the presidential primary elections and the start of the 120-day period preceding the presidential general elections in both 2000 and 2004. Whether these public communications were, in fact, coordinated with federal candidates or national party committees is unimportant. The important facts are that candidates, parties and independent organizations do attempt to influence federal elections outside the 120-day timeframe established by 11 C.F.R. § 109.21(c) and that the content standards established by section 109.21(c), therefore, permit substantial coordinated spending for the purpose of influencing federal elections. In other words, the current coordination rule's content standards "permit exactly what BCRA aims to prevent: evasion of campaign finance restrictions through unregulated collaboration." *Shays*, 414 F.3d at 102. No explanation or justification of the current rule will change these simple facts.

2. Congressional Election Advertising Preceding the Election By More Than 120 Days

The 120-day time frame of 11 C.F.R. § 109.21(c) not only permits evasion of contribution limits through unregulated coordination in presidential elections, but also in

congressional elections. **APPENDIX V** contains 55 *National Journal* articles describing more than sixty-five television and radio ads broadcast more than 120 days prior to the 2004 primary and general congressional elections. Some noteworthy differences exist between the advertising patterns in presidential and congressional elections.[13]

APPENDIX V contains ads by candidates, parties and independent organizations. In Alaska, for example, the U.S. Chamber of Commerce began running classic sham issue ads in support of Senator Lisa Murkowski in November 2003 — *nine months* before Alaska's August 24, 2004 primary election. The script of a Chamber of Commerce ad entitled "Fighting" read:

> **ANNOUNCER** [v/o]: Alaskans are hurting. Unemployment, taxes. But in Washington, we have a fresh, experienced face fighting for jobs, a better economy, lower taxes and the individual liberty we love. Senator Lisa Murkowski.
>
> Some are trying to stop progress and stop ANWR, but Lisa Murkowski brings her knowledge of Alaska to Washington, so she can fight those who want to impose their agenda on our land. Call Lisa Murkowski. Thank her for fighting for Alaska jobs.
>
> *(On screen: Call Lisa Murkowski; 907-271-3735; Paid For By The U.S. Chamber Of Commerce)*

Meg Kinnard, *Chamber Praises Murkowski's Efforts*, NATIONAL JOURNAL (Nov. 25, 2003); APPENDIX V–10.

Candidates likewise began airing campaign ads long before the current coordination regulation's 120-day time period had begun. Colorado Senate candidate Mike Miles began airing television ads in early October 2003 — *more than ten months* prior to Colorado's August 10, 2004 primary election. *See* Meg Kinnard, *Miles Promotes Roles As Soldier, Teacher*, NATIONAL JOURNAL (Oct. 25, 2003); APPENDIX V–12.

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[13] Congressional primary elections are typically held in closer proximity to general elections — with the gap between the two elections in 2004 being less than 120 days in half of the states. (A comprehensive list of 2004 congressional primary election dates can be found on the Commission's Web site. *See* FEC, *2004 Congressional Pre-Election Reporting Dates*; *available at*: http://www.fec.gov/info/charts_primary_dates.htm.) **APPENDIX V**, therefore, contains a smaller percentage of ads run between the primary and general elections than do the appendices pertaining to presidential elections. However, the large number of ads described in **APPENDIX V** is testament to the fact that extensive congressional election advertising occurs more than 120 days before primaries. For this reason, the Commission's proposal to merely eliminate the gap in coverage of 11 C.F.R. § 109.21(c) between primary and general elections is an insufficient means of preventing circumvention of federal contribution limits through unregulated coordination.

One other noteworthy difference is that congressional candidates also rely more heavily on radio advertising than do presidential candidates. **APPENDIX V**, therefore, contains a higher percentage of radio ad descriptions than do the appendices pertaining to presidential elections.

Illinois was among the most active states for early congressional campaign advertising in 2003–04. Senate hopeful Blair Hull became the first Illinois congressional candidate to air television and radio advertisements when he launched his broadcast advertising campaign in June 2003 — *more than eight months* before the state's March 13, 2004 primary. *See* Meg Kinnard, *Hull Gets an Early Start For Illinois Senate*, NATIONAL JOURNAL (June 24, 2003); APPENDIX V–57. As detailed in articles found in **APPENDIX V**, Hull was joined by candidates John Cox, Jack Ryan, Gery Chico, Andy McKenna, and Dan Haynes in running ads more than 120 days prior to the primary election. In all, **APPENDIX V** contains fourteen articles describing nineteen ads run by these candidate more than 120 days prior to the primary.

Candidate for the U.S. House of Representatives also got in on the early advertising action during the 2003–04 election cycle. A competitive race in North Carolina's 5th District prompted two candidates to begin broadcast advertising more than 120 days prior to the state's July 20, 2004 primary election. Candidate Jim Snyder launched a television ad campaign in early August 2003 — *nearly one year* prior to the primary election. *See* Meg Kinnard, *N.C.-05's Snyder Praises Bush, Scorns Gore*, NATIONAL JOURNAL (Aug. 22, 2003); APPENDIX V–126. Candidate Jay Helvey joined Snyder on the air later in 2003. *See* Meg Kinnard, *Helvey Laments Job Losses For N.C.-05*, NATIONAL JOURNAL (Dec. 10, 2003); APPENDIX V–123.

As was the case in the 2004 congressional elections, candidates running in 2006, as well as the parties and independent groups that support them, have gotten off to an early start with campaign advertising. **APPENDIX VI** contains the scripts of fourteen television and radio ads running more than 120 days prior to the 2006 congressional primary elections.[14] The National Republican Senatorial Committee in July 2005 launched its first salvo in the party's attempt to unseat Democratic Senator Robert Byrd — *more than nine months* before West Virginia's May 9, 2006 primary election. *See National Republican Senatorial Committee: "Change,"* NATIONAL JOURNAL (July 29, 2005); APPENDIX VI–24. Similarly, the Montana Democratic Party in August 2005 launched a television attack on long-time Republican Senator Conrad Burns — *ten months* before Montana's June 6, 2006 primary election. *See Montana Democratic Party: "Smell Test,"* NATIONAL JOURNAL (Aug. 10, 2005); APPENDIX VI–4.

As detailed in **APPENDIX VI**, Senate candidates in New York, North Dakota, Rhode Island and Wisconsin launched ad campaigns in September 2005. *See, e.g., John Spencer For Senate: "Pirro,"* NATIONAL JOURNAL (Sept. 6, 2005); APPENDIX VI–9; *Steve Laffey For Senate: "Mess,"* NATIONAL JOURNAL (Sept. 14, 2005); APPENDIX VI–20; *Kent Conrad For Senate: "45 Days,"* NATIONAL JOURNAL (Sept. 19, 2005); APPENDIX VI–11. Finally, as noted in the introductory remarks to this section of our comments, independent organizations such as Americans For Job Security have already run ads in 2006

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[14] A comprehensive list of 2006 congressional primary election dates can be found on the Commission's Web site. *See 2006 Congressional Pre-Election Reporting Dates*; *available at*: http://www.fec.gov/info/charts_primary_dates.shtml.

congressional races. *See Americans For Job Security: "Record,"* NATIONAL JOURNAL (Nov. 22, 2005); APPENDIX VI–14.

Like the advertising campaigns described by the articles in **APPENDICES I** through **IV**, the advertisements detailed in **APPENDICES V** and **VI** make clear that extensive political advertising took place more than 120 days before the 2004 and 2006 congressional elections. As stated above with regard presidential election advertising, the question of whether these public communications were, in fact, coordinated with federal candidates or national party committees is unimportant. The important fact is that candidates, parties and independent organizations do attempt to influence congressional elections more than 120 days before the elections — and the Commission's existing coordination rules present the opportunity for such ads to be coordinated without regulation. The content standards established by 11 C.F.R. § 109.21(c), therefore, "permit exactly what BCRA aims to prevent: evasion of campaign finance restrictions through unregulated collaboration." *Shays*, 414 F.3d at 102. No explanation or justification of the current rule will change this simple fact.

B. Proposed Revision of 11 C.F.R. § 109.21(c)

The Commission invites comment on "whether it should adopt a content standard that is not presented as one of the alternatives in this NPRM." 70 Fed. Reg. at 73949. Finding that none of the alternatives presented in NPRM 2005–28 adequately and effectively implements the law, we propose the following regulatory approach — which includes elements from several of the alternatives presented in the NPRM.

This approach would address the problems with the Commission's existing rule, by replacing current subsection (4) — the existing 120-day rule — with the following proposed subsections (4), (5) and (6):

(4) A public communication, as defined in 11 C.F.R. § 100.26, made by a political committee, which is an expenditure directed to voters in the jurisdiction of the candidate with whom the communication is coordinated, or if coordinated with a political party, is an expenditure directed to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

(5) A public communication, as defined in 11 C.F.R. § 100.26, made by an organization described in section 527 of the Internal Revenue Code and not registered as a political committee, which:

(i) (A) is distributed or disseminated during the period beginning 30 days prior to the primary election or 60 days prior to the general election of the federal candidate with whom the communication is coordinated, or, if coordinated with a political party, during the period beginning 30 days prior to the primary election or 60 days prior to the general election in which one or more candidates of the political party appear on the ballot, and (B) is directed to voters in the jurisdiction of that

candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot, regardless of whether the communication refers to a clearly identified candidate for federal office, or party; or

(ii) (A) is distributed or disseminated during the period beginning 120 days prior to the primary election and ending on the day of the general election, (B) refers to a clearly identified candidate for federal office or to a political party, and (C) 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; or

(iii) (A) is distributed or disseminated more than 120 days prior to the primary election, (B) promotes, attacks, supports or opposes a clearly identified candidate for federal office, or if the ad is coordinated with a political party, promotes, attacks, supports or opposes the party or its candidates, and (C) 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.

(6) A public communication, as defined in 11 C.F.R. § 100.26, made by any person other than a political committee or other organization described in section 527 of the Internal Revenue Code which:

(i) (A) is distributed or disseminated during the period beginning 30 days prior to the primary election or 60 days prior to the general election of the federal candidate with whom the communication is coordinated, or, if coordinated with a political party, during the period beginning 30 days prior to the primary election or 60 days prior to the general election in which one or more candidates of the political party appear on the ballot, and (B) is directed to voters in that candidate's jurisdiction, regardless of whether the communication refers to a clearly identified candidate for federal office, or party; or

(ii) (A) is distributed or disseminated during the period beginning 120 days prior to the primary election and ending on the day of the general election, (B) refers to a clearly identified candidate for federal office or to a political party, and (C) 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; or

(iii) (A) is distributed or disseminated more than 120 days prior to the primary election, (B) refers to the character or the qualifications or fitness for office of a clearly identified candidate for federal office, or if the ad is coordinated with a political party, refers to the character or the qualifications or fitness for office of the party generically or of

> candidates of that party, and (C) 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.

The effect of this regulatory language would be as follows for a public communication that is the product of coordinated activity between the spender and a candidate or political party (*i.e.*, activity that meets the "conduct" standards of 11 C.F.R. § 109.21(d)), and that is disseminated to the electorate of that candidate or that party if it has candidates on the ballot:

? If the ad is sponsored by a federal *political committee*, and is an "expenditure" (*i.e.*, for the purpose of influencing the election of the candidate with whom it is coordinated), it meets the "content" test and is therefore a "coordinated communication," regardless of when it is run.

? If the ad is sponsored by *any person other than a federal political committee* (*e.g.*, a 527 group not registered as a political committee, an individual, corporation, labor union or other non-profit group) and is distributed *in the immediate pre-election period* (*i.e.*, 30 days before a primary election or 60 days before a general election), the ad meets the "content" test if it is coordinated with a candidate or party, whether or not the ad refers to a candidate or party. In other words, in this immediate pre-election period, any ad by an outside spender that is coordinated with a candidate or party is a "coordinated communication."[15]

? If the ad is sponsored by *any person other than a federal political committee* and is distributed *during the period beginning 120 days prior to the primary election and ending on the day of the general election*, and the ad refers to a clearly identified candidate or political party, it meets the "content" test and is therefore a "coordinated communication." (This is similar to the Commission's 2002 rule).

? If the ad is sponsored by a *527 group* that is not registered as a political committee, is distributed *more than 120 days prior to the primary election*, and the ad promotes, attacks,

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[15] This point is to address a flaw in the 2002 rule that the plaintiffs in the *Shays* litigation brought to the court's attention. Plaintiffs argued that the 2002 rule permitted coordination right up to the day of the election on "thematic" ads — ads that echo a candidate's positions on key issues but do not mention the name of the candidate (or party). Such ads, the plaintiffs argued, could be of significant benefit to the candidate, particularly if coordinated. The D.C. Circuit noted this problem as well. In describing the 2002 rule, the court said:

> And even within 120 days of the election …, supporters need only avoid communications that identify candidates or parties by name. Ads regarding, say, economic effects of high taxes or tragic consequences of foreign wars are not contributions — again, even if formally coordinated with the official campaign.

414 F.3d at 98.

supports or opposes a clearly identified candidate or party, the ad meets the "content" test and is a "coordinated communication."

? Finally, if the ad is sponsored by a *person other than a political committee or 527 group*, is distributed more than 120 days prior to the primary election, and refers to the character or the qualifications or fitness for office of a clearly identified candidate for federal office or party, the ad meets the "content" test and is a "coordinated communication."

The rationales for this approach are as follows:

i. Political committee/527 test. First, this approach takes account of a fundamental distinction between political committees and section 527 groups, on the one hand, and all other spenders, on the other. It is based on a principle of campaign finance law, first set forth in *Buckley*, that groups whose "major purpose" is to influence elections are subject to broader regulatory standards than individuals or groups without such a major purpose. 424 U.S. at 79. Thus, for instance, the Court stated in *Buckley* that its First Amendment concerns about potential vagueness in regulatory standards — a concern that gave rise to the "express advocacy" test — was applicable only to non-major purpose groups, and not to political committees and other entities, like 527 groups, in the business of influencing elections.[16]

For political committees, the "content" test is an easy one — and is provided by the statute itself. As noted above, section 441a(a)(7)(B)(i) — which is the statutory basis for the coordination rule — states that "*expenditures*" made "in cooperation, consultation or concert with, or at the request or suggestion of" a candidate "shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added). The term "expenditures"

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[16] In discussing the statutory definition of "expenditure" as money spent "for the purpose of influencing" a federal election, the Court said:

> To fulfill the purposes of the Act, [political committees] 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. Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.
>
> But when the maker of the expenditure is not within these categories — when it is an individual other than a candidate or a group other than a "political committee" — the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of [the disclosure provision] is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of [the spending limit] — to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 80 (emphasis added).

is defined by statute to mean payments "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i).[17]

For political committees — groups registered with Commission as entities whose major purpose is to influence federal elections — no further regulatory definition is required. The Commission's regulations already include obligations imposed on political committees with regard to their "expenditures." *See, e.g.*, 11 C.F.R. § 104.3(b)(1) (requirement to report "expenditures"); *id.* at § 104.3(b)(3) (requirement to itemize "expenditures" in excess of $200); *id.* at § 104.9 (uniform reporting requirements for "expenditures"); *id.* at § 106.1 (requiring allocation of "expenditures" by political committees). None of these regulations has, or needs, any further limitation on the definition of "expenditure" for purpose of applying that term to political committees — there is no time frame limit or further content limit. If the spending by a committee is "for the purpose of influencing" a federal election, it is an "expenditure" by the committee and subject to regulation as such. The same should be true for purposes of applying the coordination rule of section 441a(a)(7)(B)(i) to "expenditures" by a political committee: if such "expenditures" for public communications are coordinated under the "conduct" standard and targeted to voters of the candidate with whom they were coordinated, they should be treated as "coordinated communications."

With regard to section 527 groups not registered as political committees — groups that have self-identified to the Internal Revenue Service as "political organizations" — similar principles apply because such groups, like political committees, have a principal purpose to influence elections as a matter of their tax status, and thus are groups whose activities "are, by definition, campaign related." For such groups, we believe the Commission should apply a PASO test outside the 120-day pre-primary period as a means to determine if they are making an "expenditure" within the meaning of section 441a(a)(7)(B)(i).[18] If a 527 political organization coordinates with a candidate on a public communication that promotes or supports that candidate (or attacks or opposes his opponent), it is appropriate to treat that spending as an in-kind contribution to the candidate. There is no constitutional bar to applying the PASO test to 527 groups. In *McConnell*, the Court approved a PASO test for party committees as constitutionally sufficient, 540 U.S. at 170 n. 64, and in so doing reaffirmed its *Buckley* analysis that vagueness concerns do not apply to such "major purpose" spenders.[19]

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[17] The term "expenditure" is further defined in the Commission's regulations. 11 C.F.R. § 100.110 – 100.154.

[18] During the period beginning 120 days before a primary and ending on the day of the general election, 527 groups and other non-committee entities should be subject to the same test.

[19] These commenters have taken the position in a prior rulemaking that the Commission should issue a regulation to require section 527 "political organizations," subject to certain specified exceptions, to register as political committees under FECA if they make expenditures that PASO a federal candidate. *See* Comments of Democracy 21, the Campaign Legal Center and the Center for Responsive Politics on Notice 2004-6 (April 5, 2004), at 20-23.

In the case of non-major purpose spenders — *e.g.*, individuals, corporations, unions, certain tax-exempt organizations — the proposed rule primarily relies on a bright-line time-frame test, similar to that which the Commission adopted in the 2002 coordination rulemaking, but also includes an important provision covering coordinated activity outside the 120-day time period. This preserves the advantages previously recognized by the Commission in having a time frame test to govern the election activities of non-major purpose groups.

ii. Time frame test. Our proposed rule incorporates the advantages of the time frame test of the 2002 rule for any person other than a federal political committee, in that it establishes a bright line for purposes of applying a *per se* rule for coordinated communications that are disseminated within the 30/60 day period and meet the conduct test, and a *per se* rule for coordinated communications that refer to a candidate or party and are disseminated during the period beginning 120 days prior to the primary. We think the use of a time frame test in this fashion has advantages that the Commission previously discussed in its E&J on the 2002 rule. 68 Fed. Reg. at 430. Yet the proposed rule also addresses the three ways in which the Commission's 2002 time frame-based rule was impermissibly under-inclusive.

First, as discussed above, the proposed rule addresses the problem of "thematic" ads that are coordinated with a candidate and run right before the election to augment the candidate's own ads. The rule thus applies a narrow time frame test — a 30/60 day standard — for communications coordinated with a candidate and that are disseminated to the candidate's electorate right before an election. Such ads, run at the suggestion of the candidate, or after substantial discussion with the candidate, or with the material involvement of the candidate, can provide important support for the candidate whether or not the ads refer to the candidate by name. As noted above, the D.C. Circuit in *Shays* recognized this problem. 414 F.3d at 98. In the immediate pre-election period, the fact of coordination alone is evidence that the spending is for the purpose of influencing the election.

Second, the proposed rule eliminates the "gap" between the date of the primary election and the beginning of the 120-day pre-general election period. No time frame test will be sufficient if it fails to cover ads run in this period — a period *during the election year itself* when candidates, parties and outside groups are plainly engaged in campaign spending. It is both an intuitive proposition, and one supported by the material discussed above and submitted here for the record, that post-primary spending in the election year that refers to a candidate and is targeted to the electorate of that candidate is overwhelming likely to be for the purpose of influencing the candidate's election, even if it is more than 120 days before the general election. If that spending is also coordinated with the candidate, it should be treated under the coordination rules as an in-kind contribution.

Third, the rule incorporates two different tests for coordinated spending *outside*, (*i.e.*, prior to) the period 120 days before the primary election — one for 527 "major purpose" groups not registered as federal political committees; and another for non-major purpose entities. As the factual material discussed above clearly establishes, campaign ads are run more than 120 days before primary elections. To allow an outside spender to run *any kind of*

ad, no matter how obviously oriented to a candidate's campaign it is, in coordination with a candidate, in this time frame prior to the 120-day period, was a fatal flaw in the 2002 rule. If such ads are coordinated and refer to a candidate, are targeted to the electorate of the candidate, and make certain kinds of claims about that candidate that are indicia of campaign ads (*i.e.*, in the case of 527 organizations, promoting or attacking candidates; in the case of other non-committee entities, references to qualifications or fitness for office) as opposed to discussing a legislative issue, then the ad similarly would be treated as a campaign ad and, if coordinated, subject to the campaign finance laws. In discussing a similar test proposed in the 2002 NPRM (but then rejected), the Commission said:

> This possible content standard would attempt to focus as much as possible on the face of the public communication or on facts on the public record. This latter point is important. The intent would be to require as little characterization of the meaning or the content of communication, or inquiry into the subjective effect of the communication on the reader, viewer or listener as possible…. [This Alternative] would be 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.

67 Fed. Reg. at 60049.

Ultimately, the Commission decided against this approach, and instead to cover only communications within the 120-day pre-election period. We think the Commission must re-examine this alternative for communications *outside* that same time period.

iii. Targeting test. Each of the "content" standards applies only to ads directed to the voters in the jurisdiction of the candidate referred to in the ad. This targeting restriction is in itself a significant limitation on the scope of the "content" standard. Even if a group ran a lobbying ad that was coordinated with Senator A and touted Senator A's support of legislation, the ad would fall outside the content standard for the purposes of a Senate race, unless it ran in Senator A's state. Yet there would be no reason for the group to run a lobbying ad in Senator A's state since, by definition, he already supports the legislation at issue. If the ad does run in Senator A's state, touting his support of the legislation, it is a reasonable inference that the purpose of the ad is thus not to increase support for the legislation, but rather to increase support for Senator A (*i.e.*, to influence his campaign). As such, the ad can reasonably be treated as related to the election, and if coordinated with Senator A, as subject to the campaign finance laws.

iv. Conduct test. Finally, it is an obvious point — but one worth emphasizing — that none of the "content" tests, alone, impose any restrictions on the communications described by those content tests. Rather, such ads are subject to the campaign finance laws *only if, in addition, they are in fact coordinated with a candidate.* The "conduct" tests for coordination impose a wholly separate, and significant, set of tests to determine whether ads that meet the content test are treated as "coordinated communications" and are accordingly subject to the campaign finance laws.

Thus, even if a spender's ads meet the content tests by, *e.g.*, referring to a candidate within the applicable time frame, they are not covered by the coordination provisions of the campaign finance laws *unless* the spender runs the ads "at the request or suggestion" of that candidate, 11 C.F.R. § 109.21(d)(1); or after "material involvement" of that candidate in determining the content, intended audience, media, timing, etc., of the ad, *id.* at § 109.21.(d)(2); or if the ads are based on "substantial discussion" with that candidate about the creation, production or distribution of the ad, where "material information" relating to the ads is conveyed in the course of such discussions, *id.* at § 109.21(d)(3).[20]

These *conduct* tests themselves thus pose a substantial independent barrier to the treatment of any ads as coordinated under the campaign finance laws. As the Commission correctly noted in the 2002 E&J:

> Under this final rule [setting forth a 120-day period as a content test], even if a political communication satisfies the content standard, the conduct standards must still be satisfied before the political communication is considered "coordinated." In this light, the content standard may be viewed as a "filter" or a "threshold" that screens out certain communications from even being subjected to analysis under the conduct standards. Thus it is appropriate to consider a broader time frame when applying this content standard because it serves only to identify political communications that may be coordinated if other conditions (*i.e.*, the conduct standards) are satisfied, and thus may be inappropriately underinclusive if too narrow.

68 Fed. Reg. at 430.

And to an important extent, the conduct tests themselves are a significant indicator that the ads may well be intended to influence the candidate's election. The Commission correctly notes in the NPRM that "if an organization or individual works with a candidate or political party in making a public communication, then the communication inherently has value to the political entity it is coordinated with…." 70 Fed. Reg. at 73952. Where a candidate "requests" an ad, or has "material" involvement in the content of the ad, or engages in "substantial" discussion about the ad — and where the ad then mentions that candidate and is broadcast to the electorate of that candidate — it is a fair inference that the ad is related to the candidate's election.

VI. Comments on the Commission's Proposed Alternative Revisions to 11 C.F.R. § 109.21(c)

The discussion above in explanation of our proposed regulation anticipates the comments we would make about each of the seven alternatives proposed in the NPRM. Below, we briefly set forth separate comments on each of the alternatives.

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[20] In addition, the conduct tests are met if the ads result, under tightly limited circumstances, from the use of "common vendors" by the spender and the candidate, *id.* at § 109.21(d)(4), or are based on information from a "former employee" of the candidate, *id.* at § 109.21(d)(5).

A. Alternative 1 — Retain the current rule. We oppose this alternative, for reasons set forth above. The current rule is plainly under-inclusive in that it permits unlimited coordination between a candidate and spender on ads run in the period after the date of the primary and before the beginning of the 120-day pre-election period, and on ads in the period prior to 120 days before the primary. As the attached exhibits show, candidates, parties and outside groups run ads in both of these periods that are clearly for the purpose of influencing federal elections. To maintain the current rule would mean, in effect, that a candidate could sit down with a spender, draft such ads, and direct the spender where and when to place the ads. The spender — *e.g.*, a corporation or labor union — could then use an unlimited amount of its treasury funds — *i.e.*, soft money — to pay for such ads. This rule, in effect, reinstates a version of the old soft money system. As the D.C. Circuit aptly noted, this rule "has in effect allowed a coordinated communication free-for-all for much of each election cycle." *Shays*, 414 F.3d at 100. We believe this approach is contrary to law, and cannot be adequately explained or justified by the Commission.

B. Alternative 2 — Adopt a different time frame. As noted in our comments above, we believe the Commission can use a time frame approach for its basic rule for spending by non-major purpose groups and 527 groups not registered as federal political committees, so long as there is a supplemental test for the period outside the time frame. As the NPRM suggests, and as is reflected in our proposed rule, the "gap" between the date of the primary election and the beginning of the 120-day pre-general election period should be filled, so the time frame test should simply start at the point 120 days prior to the primary election. For the period within this time frame, reference to a candidate and targeting to the candidate's electorate (for ads by entities other than federal political committees) would satisfy the content test. Prior to the time frame, the Commission should use the test set forth and described above.

C. Alternative 3 — Eliminate the time frame. This alternative proposes that any ad which refers to a candidate and is directed to voters in the candidate's jurisdiction satisfies the content test, no matter when the ad is run. For spenders other than political committees, we believe this approach is not preferable because it fails to include a sufficient nexus to the statutory requirement that a coordinated "expenditure" be "for the purpose of influencing" a federal election. Such a nexus is provided in our proposed approach, outside the time frame, by the PASO and "character, qualifications, or fitness for office" tests for 527 groups and other non-committee entities, respectively. By contrast, as we discuss above, we do not believe that a time frame test is necessary or appropriate for public communications by political committees. Rather, a more direct test — "for the purpose of influencing" — can be used to determine if spending by a political committee constitutes an "expenditure."

D. Alternative 4 — a PASO test. As set forth above, we recommend the Commission use an "expenditure" test for political committees, and a PASO test for other 527 groups which are not registered as political committees. When such groups, which are in the business of influencing elections, spend funds for public communications, those expenditures "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Buckley*, 424 U.S. at 80. Thus, it is appropriate, and constitutional, to apply the basic statutory "expenditure" test to political

committees, and the PASO test to other 527 groups, without the need for bright line narrowing to address vagueness concerns. By contrast, for non-"major purpose" spenders, we do not recommend that the Commission use a PASO test, for the reasons set forth above. Our approach does, however, incorporate one element of Alternative 4, by using a "character-qualifications-fitness" test for ads run outside the 120 day time frame period. This test sets forth reasonably ascertainable criteria to judge ads that have the typical characteristics of campaign ads in the period prior to the applicable time frame.

E. Alternative 5 — Eliminate the time frame for political committees. We agree with a bifurcated approach set forth in this Alternative that treats political committees (and other 527 groups) differently than non-major purpose spenders. As this Alternative correctly suggests, an "expenditure" by a political committee should satisfy the "content" test of the coordination rule, without regard to a time frame. For political committees, the statutory definition of "expenditure" — spending "for the purpose of influencing" a federal election — provides sufficient guidance for application of this rule, without any additional regulatory definition, as it does for application of other FECA rules applicable to political committee "expenditures," such as the reporting requirements of section 434. For similar reasons, explained above, we think that public communications by other 527 groups that are coordinated with candidates or parties should be subject to the coordination rules — regardless of how proximate the communication is to an election.

F. Alternative 6 — a "for the purpose of influencing" standard. This approach effectively would re-impose the longstanding implied "content" rule — a determination of whether the spending at issue is an "expenditure" — that the Commission used prior to the 2002 post-BCRA regulation.[21] As we noted above, the pre-2002 rule did not set forth any separate "content" standard at all, but only a "conduct" test. As a practical matter under that rule, the Commission implicitly applied a statutory "content" standard, in that the coordinated speech had to constitute an "expenditure," 2 U.S.C. § 441a(a)(7)(B)(i) — that is, it had to be "for the purpose of influencing" an election. If the Commission now made this the explicit "content" test in the regulation, it would effectively be returning to, and codifying, its pre-2002 practice.

We support this approach for political committees, as discussed above. We also support a very similar approach for other 527 groups, by using the closely related PASO test instead of a "for the purpose of influencing" test. Further, we think it is within the Commission's authority to adopt this approach for non-major purpose groups. The Commission used an implied "for the purpose of influencing" test for over 25 years following *Buckley*, without either court challenge on vagueness grounds, or any apparent inability in the regulated community to understand and apply the standard, at least as to coordinated spending. But greater clarity and simplicity, and hence greater guidance to the regulated community, can be provided by the rule we suggest — relying on a time frame test

[21] As the NPRM notes, "This is the approach some Commissioners used before 2002 when the Commission adopted a content prong for its coordinated communications regulations." 70 Fed. Reg. 73952. Yet as we discuss above, advisory opinions in the 1980's routinely used a bare "for the purpose of influencing" test to determine if coordinated spending constituted an "expenditure." *See* p.8, *supra*.

for any spending proximate to an election, supplemented by the additional criteria we propose to identify campaign ads, and hence "expenditures," outside the time frame.

G. Alternative 7 — Eliminate the content test. Under this approach, any "public communication" at any time by any spender that is coordinated with a candidate would be treated as a coordinated expenditure. This is similar to Alternative 3, which proposes to eliminate the time frame, but goes beyond it in also eliminating the need to refer to a candidate at all, no matter how remote in time to the election the communication is made. Indeed, this Alternative seems to go beyond Alternative 6 by eliminating even a bare "for the purpose of influencing" test. We think this approach is overbroad in that it is not based on capturing only "expenditures" — *i.e.*, money spent "for the purpose of influencing" a federal election. But "expenditure" is the statutory touchstone of the coordination rule set forth in section 441a(a)(7)(B)(i), and any content standard to implement this statutory provision must relate to capturing such "expenditures," apart from the conduct standard.

VII. Comments on Proposed Coordination Regulation Revisions Not Required By the *Shays* Decisions

In addition to addressing the current coordination regulation's 120-day time frame issue, as required by the *Shays* decisions, the Commission also proposes in NPRM 2005–28 to address a variety of issues not raised in the *Shays* litigation.

The Commission, for example, "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." 70 Fed. Reg. at 73953. The Commission likewise "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." *Id*. at 73953–54. The Commission further solicits comment on whether such an exemption should be created for federal candidate appearances in communications that endorse or solicit funds for state ballot initiatives. We oppose the creation of such exemptions as neither justified not appropriate.

The Commission also asks, with regard to the conduct standards of 11 C.F.R. § 109.21(d), whether the Commission should provide by regulation that if the first conduct standard is satisfied (*i.e.*, the 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), then "the communication would automatically qualify as a coordinated communication without also having to satisfy any of the standards contained in the *content* prong." 70 Fed. Reg. at 73954. A public communication made at the request or suggestion of a candidate or a political party does presumptively have value to the candidate or party which requested it, regardless of timing or content. We support the Commission's proposed *per se* rule providing that when the first conduct standard is satisfied, the communication automatically qualifies as a coordinated communication.

Regarding the "common vendor" and "former employee" conduct standards of 11 C.F.R. § 109.21(d)(4)–(5), the Commission asks whether it should amend these provisions "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." 70 Fed. Reg. 73955. We strongly oppose this proposal to limit the applicability of 11 C.F.R. § 109.21(d)(4)–(5) to "agents," as defined in 11 C.F.R. § 109.3. Doing so would fundamentally compromise the purposes and intent of BCRA § 214(c)(2)–(3) and, consequently, would constitute an impermissible construction of the statute.

With further regard to the "common vendor" and "former employee" conduct standards of 11 C.F.R. § 109.21(d)(4)–(5), the Commission asks:

> [W]hether 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.

70 Fed. Reg. at 73955. We oppose the creation of such a presumption as a fiction that is in direct conflict with the statute. The "firewall" concept has no basis in statutory federal campaign finance law, and the creation of an exemption from the coordination rules based on the "firewall" concept, or any similar concept, would fundamentally compromise the purposes and intent of BCRA § 214(c)(2)–(3) and would constitute an impermissible construction of the statute.

In addition to proposing changes to the "common vendor" and "former employee" aspects of the conduct standards in 11 C.F.R. § 109.21(d), the Commission proposes amending the conduct standards with regard to use of publicly available information. Specifically, the Commission proposes:

> 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.

70 Fed. Reg. at 73956. We oppose such a broadly-written regulatory exemption. The Commission may reasonably create a safe harbor for the use of publicly available information so long as the information was *actually obtained from a public medium* (*e.g.*, newspaper, Web site, campaign rally, etc.), with *no direct or individualized contact* between the candidate or party committee disseminating the information and person paying for the public communication. Such a safe harbor, however, cannot legally include any instance in which "the person paying for the communication has received the information . . . from the

candidate, authorized committee, or political party committee, in a nonpublic context" — even when such information is also available from a public source. *Id.*

Finally, the Commission notes in NPRM 2005–28 that the Supreme Court in *McConnell* 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.

70 Fed. Reg. at 73956 (quoting *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)) (emphasis added).

The Commission asks whether this passage from *McConnell* "render[s] the application of the conduct standards to coordination between a candidate and a political party committee at 11 CFR 109.37(a)(3) obsolete?" 70 Fed. Reg. at 73957. The answer to this question is no. This passage from the *McConnell* decision by no means renders obsolete the application of conduct standards to coordination between a candidate and a political party. The *McConnell* passage makes clear that BCRA leaves room for national party officers to discuss with state and local party committees and candidates how to raise and spend soft money *for the purpose of influencing state and local elections* and for *limited* electioneering activity that may impact both state and federal elections (*e.g.*, Levin Fund activity). The overwhelming majority of expenditures for the purpose of influencing federal elections, however, must be made with federally permissible funds. The party coordinated communication provisions of 11 C.F.R. § 109.37 apply with full force to all such expenditures.

We appreciate the opportunity to submit these comments.

Sincerely,

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