January 13, 2006

By Fax to (202) 219-3923

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking, "Coordinated Communications," 70 Fed. Reg. 73946 (Dec. 14, 2005): Comments and Request to Testify

Dear Mr. Deutsch:

The undersigned labor organizations submit these comments in response to the Notice of Proposed Rulemaking on Coordinated Communications published by the Federal Election Commission ("FEC" or "Commission") on December 14, 2005 ("NPRM"). *See* 70 Fed. Reg. 73946. Each of the undersigned organizations requests an opportunity to testify at the hearing on the NPRM to be held on January 25-26, 2006.

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 53 national and international unions representing nine million working men and women throughout the United States. The National Education Association ("NEA") is a labor organization comprised of more than 2.7 million members, the vast majority of whom are employees of public schools, colleges and universities throughout the United States. The Service Employees International Union ("SEIU") is a labor organization comprised of 1.8 million members in the healthcare, long-term care, property services and public services sectors in the United States, Canada and Puerto Rico. Each of these labor organizations engages in substantial legislative and policy advocacy on matters of concern to union members and working families, including matters pending before Congress and agencies of the federal government. Each of the signatory unions also maintains a connected federal political committee and participates actively in the political process on behalf of candidates at the federal, state and local levels.

The meaning and scope of the statutory prohibition on coordinated expenditures has long presented one of the most vexing issues facing unions and other organizations

which engage in both legislative and political activities. In an effort to clarify the scope of prohibited coordination, the AFL-CIO was a plaintiff in *McConnell v. FEC*, 540 U.S. 93 (2003), where it challenged BCRA §214(a)(2)'s provision on coordinated expenditures as unconstitutionally vague and overbroad. The AFL-CIO has also appeared as *amicus curiae* in a series of cases involving the meaning and scope of coordinated communications, including *Randall v. Sorrell*, No. 04-1528 (O.T. 2005), *Shays v. FEC*, 337 F.Supp. 2d 28 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C.Cir. 2005), and *FEC v. The Christian Coalition*, 52 F.Supp. 2d 45 (D.D.C. 1999). The positions taken in these cases reflect the concern of the signatory labor organizations that the statutory prohibitions on coordinated expenditures should not be interpreted in a manner which will deter lawful efforts by unions in particular and citizens in general to influence legislation and public policy. These comments reflect the same overriding concern.

Comments

I. THE COMMISSION SHOULD CONTINUE TO INCLUDE A CONTENT STANDARD IN THE REGULATIONS DEFINING COORDINATED COMMUNICATIONS IN ORDER TO EFFECTUATE CONGRESS'S MANDATE TO PROTECT LOBBYING AND SIMILAR ADVOCACY ACTIVITIES AND TO PROVIDE A MEANS OF AVOIDING INTRUSIVE INVESTIGATIONS INTO SENSITIVE ACTIVITIES PROTECTED BY THE FIRST AMENDMENT.

A. A Content Standard For Defining Coordinated Communications Is Permissible Under FECA.

Under the regulations adopted by the FEC following the Bipartisan Campaign Reform Act ("BCRA"), a communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication (1) is paid for by a person other than that candidate, authorized committee, political party committee or agent; (2) satisfies at least one of four *content* standards; and (3) satisfies at least one of several *conduct* standards. *See* 11 C.F.R. §109.21(a) (2003). In *Shays v. FEC*, two of the congressional sponsors of BCRA challenged the content standards in this regulation as contrary to the plain meaning of the statute. Although the district court disagreed with the plaintiffs' construction of the statute, finding that the statutory language is silent with respect to this point, *see* 337 F. Supp. 2d at 61, and it also found that the Commission's construction of the statute was a permissible one, *see id.* at 62, it nevertheless held that the regulation's content standards impermissibly undercut FECA's purposes by exempting certain types of communications which might still have some value to the candidate or political committee with which they were coordinated.[1] *See id.* at 64-65.

[1] In the district court the plaintiff challenged the content standard in two respects: first, a communication that occurs within 120 days of an election is covered only if it refers to a candidate or party by name; and, second, a communication that occurs outside of the 120-day period is covered only if it is targeted at the relevant electorate and if it contains official campaign materials or expressly advocates the election or defeat of a

The court of appeals in *Shays* agreed with the district court that the plain language of FECA does *not* preclude a content-based standard for coordinated communications, *see* 414 F. 3d at 98-99, but it disagreed with the lower court's suggestion that any coordination standard "looking beyond collaboration to content" would exceed the range of permissible readings of the statute. *See id.* at 99-100. Noting that FECA treats as a contribution any communication which is both an "expenditure" within the meaning of the statute and is coordinated with a candidate or a party, Judge Tatel found that the time, place and content of a communication "may be critical indicia" of whether it has been undertaken for the purpose of influencing a federal election, as required under the statutory definition of "expenditure." *Id.* Moreover, he concluded, the FEC could construe the statute's definition of coordinated expenditure "as leaving space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign," *id.*, and, as part of this construction, the agency could "develop an 'objective, bright-line test [that] does not unduly compromise the Act's purposes.'" *Id.*, quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986).

The decision of the court of appeals in *Shays*, which was not appealed by the plaintiffs, thus makes clear that a content-based standard for coordinated communications is permissible under FECA.

B. The Commission Should Include A Content-Based Standard In Its Definition of Coordinated Communications. Alternative 7 Set Forth In the NPRM Should Therefore Be Rejected.

Although the court of appeals' decision in *Shays* allows the Commission to continue to include a content standard in its definition of coordinated communications, Alternative 7 proposed in the NPRM would nevertheless eliminate the content standard entirely for all public communications. *See* 70 Fed. Reg. at 73952. Under this approach, any public communication that satisfies the conduct prong alone "would be deemed to have been made for the purpose of influencing a Federal election and thus be a 'coordinated communication,' regardless of whether it refers to a clearly identified Federal candidate or political party and regardless of when or to whom the communication is distributed." *Id.* This approach should be rejected because it ignores critical elements of the legislative history of BCRA as well as other important considerations which require that the Commission continue to include a content standard in its definition of coordinated communications.

1. A Content Standard Is Necessary To Protect Against Unnecessary Interference With Lobbying and Similar Contacts With Members of Congress, As Congress Intended When It Directed The Commission to Revise Its Pre-BCRA Coordination Regulation.

clearly identified candidate. *See* 337 F.Supp. 2d at 62 . In the court of appeals, the plaintiffs dropped their challenge to the first of these provisions. *See* 414 F.3d at 98.

One of the major issues that supporters of campaign finance reform sought to address when they proposed to amend FECA in the 107th Congress was what they regarded as the overly permissive definition of coordination which the Commission had adopted in 2000[2] in response to the decision in the *Christian Coalition* case.[3] As originally introduced in the Senate by Senators McCain, Feingold and others, the Bipartisan Campaign Reform Act of 2001 created a new statutory term, "coordinated activity," which was very broadly defined to mean "anything of value" provided in coordination with a candidate "regardless of whether the value being provided is in the form of a communication that expressly advocates a vote for or against a candidate." S. 27, 107th Cong., 1st Sess §214(a)(1)(B) (as introduced on January 22, 2001). From the outset of the debate on BCRA, however, concern was expressed about the broad scope of this provision and the impact it would have on legitimate lobbying and public education activities by citizens and organizations. *See, e.g.*, 147 Cong. Rec. S2446 (daily ed. March 19, 2001) (statement of Sen. Feingold acknowledging concern about the bill's coordination provisions and indicating that a corrective amendment would be offered).

After extensive negotiations, the original broad coordination rule was dropped by the bill's sponsors and replaced by more limited coordination provisions which were intended to avoid interference with lobbying and similar policy activities. *See* 147 Cong. Rec. S3184 (daily ed. March 30, 2001) (statement of Sen. McCain noting that "all agreed [the original provision] was not satisfactory to what we believe is a reasonable compromise"); *id.* (statement of Sen. Feingold that original version was overbroad because "it caught ... legitimate conversations between Members of Congress and groups about legislation without touching on a campaign.") For the same reasons, the Senate-

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[2] *See* Final Rule, "General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures," 65 Fed. Reg. 76138 (December 6, 2000). The district court in *Shays* stated erroneously that the FEC's pre-BCRA regulations had not included a content standard. *See* 337 F. Supp. 2d at 64. To the contrary, under the regulations adopted in 2000 the term "general public political communications" was defined to mean any expenditure that "includes a clearly identified candidate." *See* 11 C.F.R. §100.23(b) (2001). Thus, even before the post-BCRA regulations challenged in *Shays*, the Commission had recognized the need for some form of content based standard in defining prohibited coordinated communications. The Commission's former use of an "electioneering message" standard in some enforcement cases similarly attests to the need for a content standard to limit the scope of the prohibition on coordinated expenditures. *See infra* at 13.

[3] In *Christian Coalition*, Judge Joyce Herns Green concluded that the agency had failed, in all but a few instances, to demonstrate that the organization's conduct amounted to unlawful coordination, notwithstanding extensive evidence of the Christian Coalition's contacts with federal officeholders and candidates over three election cycles. *See* 52 F. Supp. 2d at 66-97.

passed version of the coordination provisions[4] was further amended by the House of Representatives[5] in order to limit their scope, and Congress ultimately enacted this narrowed version.[6]

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[4] Although the definition of "coordinated activity" was dropped in the version of S. 27 passed in the Senate, the bill continued to define "contribution" in 2 U.S.C. § 431(8) to include "any coordinated expenditure or other disbursement made by any person in connection with a candidate's election, regardless of whether the expenditure or disbursement is for a communication that contains express advocacy." S. 27, 107th Cong., 1st Sess. §214(a)(1)(C) (as passed by the Senate on April 2, 2001). As described in note 5, *infra*, this language was subsequently dropped in the House because it was still deemed to be overbroad, and it was not included in the final version of the bill.

[5] The version of BCRA introduced in the House contained the same coordination provisions as were in the bill introduced in the Senate. *See* H.R. 380, 107th Cong., 1st Sess. §§ 205, 206 (as introduced on January 31, 2001). After passage of the modified bill in the Senate, Reps. Shays and Meehan introduced a revised version of their bill, including coordination provisions which were virtually identical to the provisions in the Senate-passed bill. *See* H.R. 2356, 107th Cong., 1st Sess. §§ 202, 214 (introduced on June 28, 2001). This bill was adversely reported by the Committee on House Administration in part due to its "expansive definition" of coordination that "would discourage (if not eliminate) communications between citizens and their elected representatives...." H. Rep. No. 107-131, part 1, 107th Cong., 1st Sess. 4 (July 10, 2001) (referring to testimony of the AFL-CIO). In response to this criticism, the House sponsors of BCRA introduced an even narrower version of the coordination provision, dropping the overbroad language in section 214(a) quoted in note 4, *supra*. *See* 148 Cong. Rec. H396 (daily ed. Feb. 13, 2002). When the House-passed bill was passed by the Senate, Senator McCain made clear that "nothing in section 214 should or can be read to suggest, as some have said, that lobbying meetings between a group and a candidate concerning legislative issues could alone lead to a conclusion that ads that the group runs subsequently concerning the legislation that was the subject of the meeting are coordinated with the candidate..." 148 Cong. Rec. S2145 (daily ed. March 20, 2002).

[6] The final version of BCRA repealed the regulation on general public political communications adopted by the Commission in 2000 and directed the Commission to promulgate new regulations on "coordinated communications" which were not to "require agreement or formal collaboration to establish coordination." Pub. L. No. 107-155, § 214(b)-(c), 116 Stat. 94-95 (2003). Further, "[i]n addition to any subject determined by the Commission," the agency was directed to "address" four specific areas in the new regulations: (i) payments for the republication of campaign materials; (ii) payments for the use of a common vendor; (iii) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (iv) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party. *Id.* at §214(c)(1)-(4), 116 Stat. 95. BCRA also provided that any communication that falls within the newly-created category of "electioneering communications" and is

Thus, while some supporters of BCRA sought to overturn what they regarded as the overly permissive coordination regulation adopted by the FEC in 2000, other Members of Congress strenuously and successfully opposed a broad coordination provision because it would interfere with legitimate communications between citizens and officeholders and candidates. This history not only supports the *Shays* court's conclusion that FECA's coordination rules may be interpreted to include a content standard, it further demonstrates that Congress affirmatively intended that any coordination regulation issued by the Commission should protect against interference with lobbying and similar activities. As Senator McCain put it during debate on final passage of BCRA in the Senate, "we do not intend for the FEC to promulgate rules ... that would lead to a finding of coordination solely because the organization that runs such ads has previously had lobbying contacts with a candidate." 148 Cong. Rec. S2145 (daily ed. March 20, 2002). In order to fulfill Congress' intent, however, the Commission's coordination regulation must include a content-based standard which results in the exclusion of coordinated lobbying and similar activities from the definition of coordinated expenditures.[7] Alternative 7 proposed in the NPRM is inconsistent with this history because, by failing to include any content standard, it would make unlawful the very kinds of lobbying communications that Congress recognized are frequently coordinated with legislators who are also candidates for office.

2. A Content Standard Is Necessary to Filter Out Broadly Intrusive Investigations Into Constitutionally Protected Activities And To Allow The Commission To Use Its Law Enforcement Resources Effectively.

Enforcement of the statutory coordination rules "inevitably ... involves an intrusive and constitutionally troubling investigation of the inner workings of political [actors]." *Colorado Republican Federal Campaign Comm. v. FEC*, 533 U.S. 431, 471 n. 3 (2001) (Thomas, J. dissenting). The threat posed by such investigations into the inner workings of organizations can have a significant chilling effect not only on the right of citizens and organizations to speak on public issues, but also on "the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office...." *Clifton v. FEC*, 114 F. 3d 1309, 1314 (1st Cir. 1997). *Accord: AFL-CIO v. FEC*, 333 F. 3d 168, 178 (D.C. Cir. 2003) ("political

"coordinated" with a candidate or political party shall be treated as a contribution to the candidate supported by the communication. *Id.* at §202, 116 Stat. 90-91. Finally, BCRA codified the Commission's longstanding practice by expanding 2 U.S.C. §441a(a)(7) to include coordination with political parties as well as with candidates. *See id.* at §214(a), 116 Stat. 94, codified at 2 U.S.C. § 441a(a)(7)(B)(ii).

[7] Although it has sometimes been argued that the safe harbor in §109.21(f) of the current regulations adequately protects lobbying communications, this safeharbor only reaches responses by candidates or party committees to inquiries about their positions on legislative or policy issues, and therefore does not protect the full range of discussions that organizations and citizens routinely have with legislators about pending legislation and policy matters.

opponents ... file [coordination] charges against their competitors to serve the dual purposes of 'chilling' the expressive efforts of their competitor and learning their political strategy so that it can be exploited to the complainant's advantage.") Because of the "constitutionally troubling" nature of coordination investigations, it is incumbent upon the Commission to ensure that such cases only go forward where there is more than "a weak nexus to any electoral campaign," *Shays*, 414 F.3d at 99, a result which requires a clear content standard to be included in the definition of coordinated communications.

A content standard also serves important administrative purposes for the Commission. One of the most difficult questions facing the agency over the years has been how to apply FECA's procedures for initiating investigations in the context of complaints alleging improper coordination of political activities with candidates and political parties. Complaining parties frequently rely on circumstantial evidence that a respondent has had the *opportunity* to coordinate with a candidate or party through a variety of means, such as attendance at the same meeting or political event. In order to avoid a full-blown investigation, respondents in such cases are then faced with proving a negative – that while they had the opportunity to coordinate, they did not in fact do so, an extremely difficult, if not impossible, task which effectively eliminates the statutorily mandated "reason-to-believe" investigative threshold in such cases and leads to burdensome and lengthy investigations in virtually every case of alleged coordination.[1] In contrast, an objective and clear content standard effectuates the "reason-to-believe"

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[1] One former Commissioner described the conundrum facing the Commission in cases of alleged coordination as follows:

> The evidentiary threshold for finding "reason-to-believe" that a violation of the Act has occurred may not demand a lot, but would here require some legally significant facts that distinguish these circumstances from every other independent situation. The trigger for a "reason-to-believe" finding must be something more than a well-meaning desire to *insure* no violation occurred. At the "RTB" stage, complaints certainly do not have to *prove* violations occurred, rendering investigation unnecessary, but the alleged facts must present something that is, in the broad sense, "incriminating" and not satisfactorily answered by the respondents ... The Commission must recognize the need to require some evidentiary threshold for making an inference of coordination and upon which to base a "reason-to-believe" finding of a violation – and recognize some limit to official curiosity .... Absent some legitimate basis for a challenge, however, the making of independent expenditures should not bring an automatic penalty from the FEC in the form of a finding of a violation and a full-scale inquiry.

Matter Under Review 2766, Supporting Memorandum of Commissioner Josefiak for the Statement of Reasons 3-6 (June 13,1990) (emphases in original), upheld in *Democratic Senatorial Campaign Committee v. FEC*, 745 F. Supp. 742, 745-46 (D.D.C. 1990). *See also* Matter Under Review 2272, upheld in *Stark v. FEC*, 683 F. Supp. 836, 846 (D.D.C. 1988); Matter Under Review 1624 (1984).

requirement in coordination cases and minimizes the administrative burden on the Commission by allowing some complaints to be resolved at an early stage of the enforcement process based solely on a communication's content. This also allows the Commission to focus its resources on the cases that are most likely to involve significant violations while at the same time avoiding unnecessary investigations in this most sensitive area of political regulation.

II. THE PROPOSALS IN THE NPRM TO RETAIN THE 120-DAY TIME PERIOD IN ITS CURRENT OR A MODIFIED FORM CANNOT BE SUPPORTED EMPIRICALLY AND SHOULD THEREFORE BE REJECTED.

Three of the proposals for a content standard set forth in the NPRM would retain the 120-day time period in the fourth prong of the content standard in its current or a modified form. Alternative 1 would retain the current test without change, but would revise the Explanation and Justification by providing a further explanation for allowing coordinated communications outside of the 120-day time frame unless they contain express advocacy or are electioneering communications. *See* 70 Fed. Reg. at 73949-50. In Alternative 2, the Commission seeks comment on whether a time frame other than 120 days would be more appropriate in bringing public communications that are made for the purpose of influencing a Federal election within the coordination regulations. *See id.* at 73950. Finally, Alternative 5 proposes to eliminate the 120-day time frame for political committees, while retaining it for all other speakers. *See id.* at 73951-52. Each of these proposals, however, may only be adopted if the Commission is able to provide the stringent empirical support required by the court of appeals in *Shays*. Since it is virtually impossible for the Commission to meet the court's mandate[9] and the proposals are defective in other respects, none of these proposals should be adopted.

Although the court of appeals recognized that a content-based standard for coordinated expenditures is permissible under FECA, it struck down the current regulations as lacking an adequate justification insofar as they permit coordinated communications to occur outside of the 120-day period if do not include express advocacy or are not electioneering communications. *See* 414 F. 3d at 100-101. In order to justify this rule, the court held, "the Commission must establish, consistent with APA standards, that its rule rationally separates election-related advocacy from other activity falling outside of FECA's expenditure definition." *Id.* at 102. And, it then described "the sort of inquiry the Commission should have undertaken," *id*, as follows:

> 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,

[9] In the AFL-CIO's comments in response to the 2002 coordination rulemaking, the organization similarly took the position that "[t]here is no empirical support for the premise of the first prong of the test that the timing of a communication during the period of 120 days before of (sic) a general or primary election marks a meaningful demarcation between election-related and other communications." Letter to John Vergelli dated October 11, 2002 at 9.

> 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.

We are not aware of any empirical evidence from which the Commission could reliably answer the questions the court posed with respect to the current 120-day period or any other time period that it might consider. Many of the studies cited by the Commission in the NPRM were conducted prior to the adoption of BCRA's far-reaching amendments, the effect of which cannot be determined on the basis of the single federal election held since they became effective. Moreover, these pre-BCRA studies were limited to broadcast advertisements that occurred within 60 days of a general election; none attempted to measure the volume of *non*-broadcast advertisements within *120* days or longer prior to an election.

Apart from the lack of empirical evidence on the questions identified by the court of appeals, it is also arguable that the decision identified the wrong questions for the Commission to address. The real issue presented by the current regulation is whether *coordinated* non-express advocacy communications are as likely to occur outside as inside of the 120-day period in the current regulation or any other period. The questions for which the court sought information may have no bearing on this issue because the prevalence of *coordinated* communications may or may not have any relationship to the prevalence of *non-coordinated* communications in the same or similar time periods. We are aware of no study that has addressed the prevalence over any period of time of *coordinated* political communications, or of the relationship in any period of coordinated and non-coordinated communications.

Finally, the empirical questions raised by the NPRM in response to the court of appeals' decision do not address equally important empirical questions that bear on an appropriate content standard. As noted earlier, one of the important purposes served by a content standard is to protect the right of organizations and groups to consult with Members of Congress regarding pending legislative and public policy issues. In this regard, while the current regulation imposes a more stringent definition for communications that occur within the 120-day period than outside of that period, the Commission never attempted to justify the more stringent standard by showing that lobbying and political activities are less likely to occur within the 120-day period than outside of it. If the Commission seeks to justify a more stringent definition of coordination during one period of time than in another, as it would in Alternatives 1, 2 and 5, it needs to determine how much lobbying and similar activity occurs within the periods under consideration and may therefore be impacted by the proposed regulation. Not only has the Commission failed to seek empirical information on this question in the NPRM,

we are aware of none that could be used to support the existing regulation.[10] The extent to which lobbying and similar activities may take place within any time period prior to an election depends entirely on the legislative calendar and may vary from year to year; in our experience, however, it is just as likely that significant lobbying communications will take place within 120 days, or any similar period, prior to an election as they will occur outside of that period. Under these circumstances, there is no basis for applying a different content standard depending upon when a communication occurs.

In sum, the Commission should not retain the 120-day period in the current regulations, or a similar time-based standard, both because there is no empirical evidence that could provide a justification for the more lenient standard in effect outside of the 120-day period, as required by the court of appeals in *Shays*, but also, and equally importantly, because there is no empirical evidence to support the more stringent standard imposed by the current regulation within the 120-day period, as distinct from some other period.

III. THE PROPOSED CONTENT STANDARDS THAT DO NOT RELY ON THE 120-DAY TIME PERIOD ARE INADEQUATE TO PROTECT LOBBYING COMMUNICATIONS. HOWEVER, THE SAFE HARBOR PROPOSED IN ALTERNATIVE 4, WITH CERTAIN MODIFICATIONS, PROVIDES A WORKABLE APPROACH.

The remaining three alternative standards proposed in the NPRM all contain a content standard that would be applied uniformly without regard to when a communication occurs. Alternative 3 would retain the current requirements that (1) the public communication refer to a political party or clearly identified candidate and (2) be directed to voters in the jurisdiction of the clearly identified candidate or to voters in the jurisdiction in which one or more candidates of the political party appear on the ballot. *See* 70 Fed. Reg. at 73950-51. Alternative 4 would replace the current content standard with a "promote, support, attack or oppose" ("PSAO") test or, alternatively, with a safeharbor exemption from the coordinated communication rules for certain kinds of communications. *See id.* at 73951. Alternative 6 would replace the fourth content standard with a standard covering public communications made for the purpose of influencing a federal election. *See id.* at 73952. For the following reasons, the tests set forth in these alternatives would not adequately distinguish between communications that

[10] In *McConnell v. FEC*, the plaintiffs contended that BCRA's definition of electioneering communications would have a significant negative impact on legislative- and policy-related broadcast communications that are run within the 60- and 30- day windows prior to general and primary elections. The Supreme Court noted that "the precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court, " 540 U.S. at 206, but it found nevertheless that the "vast majority" of ads run within 60 days before a general election had such a purpose. *Id.* The record in *McConnell*, however, did not include evidence regarding public communications other than broadcast ads and did not include evidence for any period other than the 60-day period prior to general elections.

are made for the purpose of influencing a federal election and those that are aimed at influencing legislation and similar policy matters, as required by the court of appeals in *Shays*. However, the safe- harbor approach proposed as an alternative to the PSAO test in Alternative 4, provides a workable standard and should be adopted with certain modifications.

A. The Current Test In the Fourth Content Standard Is Overbroad And Does Not Protect Permissible Lobbying Activities As Mandated By Congress. Alternative 3 Should Therefore Be Rejected.

Simply because a communication is targeted to a particular jurisdiction and refers to a candidate or political party does not by itself indicate that the communication is made for the purpose of influencing a federal election. As part of their lobbying and public policy programs, the undersigned organizations frequently sponsor public communications that refer to federal candidates and are targeted to the congressional districts represented by those candidates.[11] These ads are intended to and have the effect of influencing on-going legislative and policy debates, not to influence the outcome of any federal election. Yet they would be unlawful if coordinated with legislators who are also candidates.

Under BCRA §202 disbursements for electioneering communications that are coordinated with a candidate or party will be treated as contributions to, and expenditures by, that candidate or party. As set forth in detail above, this provision was the result of prolonged consideration by Congress and represented a careful compromise between legislators who wished to protect lobbying communications and supporters of BCRA who sought a much broader provision in order to avoid coordinated communications that will have an electoral impact. Under the maxim *expressio unius est exclusio alterius*, Congress's determination in §202 to include only coordinated electioneering

[11] The record in *McConnell v. FEC*, for example, contains both hard and electronic copies, as well as a detailed summary, of all of the broadcast communications sponsored by the AFL-CIO during the years 1995 through 2001. *See* Declaration of Denise Mitchell, Exhs 1-22. The summary is reproduced in volume II of the *McConnell* Joint Appendix at 461-581. The AFL-CIO's broadcast program set forth in these materials began in the wake of the 1994 national election, when the organization ran numerous radio and television ads to mobilize union households and the general public to oppose the new Republican-controlled Congress's attempts to enact the "Contract With America," including major cuts in federal funding for jobs, health and safety, housing, school lunches and the Medicare and Medicaid programs. The AFL-CIO's broadcast program continued throughout 1996 in an effort to shape the federal legislative agenda and to establish pro-worker public policies, including an increase in the federal minimum wage. Most of these ads also named individual Members of Congress and were targeted to their districts. As described in these materials, the AFL-CIO continued in subsequent years to run broadcast ads that referred to Members of Congress by name and were targeted to their districts on legislative issues such as tax fairness, Social Security and retirement, Medicare funding and prescription drug coverage, healthcare, minimum wage and overtime standards, workplace health and safety, international trade, and education.

communications within the definition of "expenditures" raises serious doubts about the validity of any content standard that includes more than express advocacy and electioneering communications.[12] At the very least, the legislative history makes clear that a standard as broad as the one proposed in Alternative 3, which would include numerous lobbying and policy communications merely because they refer to a federal candidate and are targeted to a particular jurisdiction, would be invalid as a matter of law.

B. The Commission's Proposal (Alternative 6) To Replace The Fourth Content Standard With a Standard Covering Public Communications Made "For The Purpose of Influencing a Federal Election" Should Be Rejected Because It Would Be Unconstitutionally Vague and Overbroad, Would Lead to Significant Confusion In The Regulated Community and Would Add to the Commission's Burden in Enforcing FECA.

In its discussion of Alternative 6, the NPRM states that "[w]hether a given public communication is for the purpose of influencing a Federal election would depend on the facts and would be decided on a case-by-case basis." 70 Fed. Reg. at 73952. The NPRM also indicates that this standard could be satisfied in some cases, which it does not define, "even though no Federal candidate or political party is referenced in the communication, and regardless of how far in advance of an election such a communication is made." *Id.* And it asserts that "some" communications could be restricted as coordinated communications "without having to meet a content standard defined in the Commission's regulations." *Id.* Apart from these cryptic and totally unhelpful comments, the NPRM provides no guidance whatever as to how the proposed language would be interpreted. There are numerous problems with this approach.

First, the Supreme Court's has consistently held that the phrase "for the purpose of influencing a federal election" is unconstitutionally vague and overbroad unless it is limited to communications that "in express terms advocate the election or defeat of a clearly identified federal candidate." *See McConnell v. FEC*, 540 U.S. at 191, citing *Buckley v. Valeo*, 424 U.S. 1, 77-80 (1976). *Accord: FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S.238, 248 (1986). In *McConnell*, the Court recognized that the express advocacy limitation on the phrase "for the purpose of influencing federal elections" is "firmly embedded in our law." 540 U.S. at 203.[13] If the Commission were to construe

[12] In *Shays*, the court of appeals stated that while electioneering communications are clearly one category of communications that may count as coordinated expenditures under BCRA, "nothing in the statute suggests they represent the only - or even the primary - such category." 414 F. 3d at 101. The court made this statement, however, without consideration of the detailed legislative history set forth in these comments. Moreover, Judge Tatel certainly did not approve of the overbroad content standard set forth in Alternative 3.

[13] The FEC recently confirmed that the express advocacy test remains in effect after BCRA with respect to communications that do not fall within the definition of electioneering communications. *See* Brief For The Appellee, *Wisconsin Right To Life, Inc. v. FEC*, No. 04-1581 (O.T. 2005) 6 n.1, 8 n.2.

the phrase "for the purpose of influencing a federal election" to cover communications that are not limited to express advocacy, it would adopt a standard which has previously been determined to be unconstitutionally vague and overbroad in the absence of a limiting and clarifying definition of the kind that the NPRM has refused to provide.

Second, even if the proposed standard is not unconstitutional, it can in no ways be regarded as providing clear guidance as to the kinds of communications that may be covered by the prohibition on coordinated expenditures. As one court put it in connection with a similar test utilized by the Internal Revenue Service, "[The 'facts and circumstances' standard] is no standard at all." *United Cancer Council, Inc. v. Comm'r*, 165 F. 3d 1173, 1179 (7th Cir. 1999). Alternative 6 would, therefore, provide none of the administrative benefits that a content standard is designed to provide, *see supra* 12-13, and it would result in the same kinds of arbitrary and inconsistent investigations which the Commission sought to avoid when it adopted the content standard in its 2002 regulations.

In this respect, the proposed standard is similar to the "electioneering message" standard unsuccessfully used by the Commission in the past to define the kinds of communications that may not be coordinated with candidates or party committees. *See, e.g.*, Advisory Opinion 1985-14. Recognizing that the "electioneering message" standard gave no advance notice to the regulated community or the Commission itself, four Commissioners ultimately announced that they would not vote to open any investigation involving alleged coordinated communications that relied on the "electioneering message" standard. *See* Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason and Karl J. Sandstrom on the Audits of "Dole for President Committee, Inc." (Primary), "Clinton/Gore '96 Primary Committee, Inc.," "Dole/Kemp '96, Inc." (General), "Dole/Kemp'96 Compliance Committee, Inc." (General), "Clinton/Gore '96 General Election Legal and Compliance Fund" at 6 (June 24, 1999). The standard proposed in Alternative 6 will almost certainly produce the same degree of administrative dysfunction.

Finally, by failing to provide clear guidance to the regulated community, Alternative 6 would deter citizens and organizations from communicating with Members of Congress about pending legislation and other policy matters because they would have no idea whether their subsequent public communications would be covered by the prohibition on coordinated expenditures. Alternatively, citizens and organizations that have communicated with their legislators regarding legislative matters would be deterred from sponsoring public communications regarding that legislation out of fear of an investigation into their activities. In either case, the result would be exactly the kind of restrictions on lobbying activity that Congress itself sought to avoid when it enacted the coordination provisions of BCRA.

C. The "PSAQ" Test Proposed In Alternative 4 Should Be Rejected. However, The Safe Harbor Proposed As An Alternative To the PSAQ Test Provides A Workable Approach With Certain Modifications.

1. The "PSAO" Test Is Unconstitutionally Vague And Is Precluded By The Legislative History of BCRA.

The first proposal in Alternative 4 would replace the fourth content standard in the current regulation with a new standard which includes any public communication that refers to a political party or clearly identified federal candidate, is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more federal candidates of a political party are on the ballot, and the communication "promotes, attacks, supports or opposes" a candidate or political party. *See* 70 Fed. Reg. at 73951. This test is likely to be found to be unconstitutionally vague and overbroad and, in any event, it is so broad that it will interfere with legitimate lobbying communications, as the Commission itself has previously recognized.

In *McConnell*, the Supreme Court determined that the words "promote, support, attack or oppose" were not unconstitutionally vague as used in the definition of "federal election activity," *see* 2 U.S.C. §431(20)(A)(iii), a statutory term added by BCRA and having application primarily to political parties.[14] In reaching this conclusion, however, the Court relied explicitly on the narrow context in which the phrase was used in the statute, noting that, as the Court had previously recognized in *Buckley*, "actions taken by political parties are presumed to be in connection with federal elections." 540 U.S. at 170 n. 64. Since the proposed PSAO test would apply to non-political organizations whose communications cannot fairly be presumed to be for political purposes in all cases, the same reasoning does not apply here. Indeed, it is the absence of any basis for such a presumption that requires the adoption of a content standard in the first place.

The vagueness and overbreadth of the PSAO standard outside of the limited context addressed by the Supreme Court has been recognized by the Commission itself on two occasions.[15] First, the Commission acknowledged the difficulty of defining PSAO

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[14] While the PSAO standard is also used in BCRA in a provision that prohibits political parties from soliciting funds for certain tax-exempt organizations, *see* 2 U.S.C. §441i(d)(1), the Supreme Court in *McConnell* did not address the constitutional validity of the standard in this context. The PSAO test also appears in BCRA as a *limitation* on the Commission's authority to promulgate exceptions to the prohibition on corporate and union expenditures for electioneering communications. *See* 2 U.S.C. § 434(f)(3)(B)(iv). The PSAO test is not used in this provision to define unlawful conduct and in this context its inherent vagueness is irrelevant from a constitutional standpoint.

[15] There is no merit to the suggestion in the NPRM that the Commission has defined the PSAO standard in Advisory Opinion 2003-25. *See* 70 Fed. Reg. at 73951 n.13. In that opinion, the full Commission held only that the mere identification of an individual who is a federal candidate does not automatically promote, support, attack, or oppose that candidate. A concurring opinion by Commissioners Thomas and McDonald embraced the General Counsel's explanation of why the communication in issue did not fall within the PSAO test, and it further stated that these are all considerations which

with any degree of precision when it decided not to adopt clarifying language and merely repeated the statutory phrase in its regulations governing "federal election activity." *See* Final Rule, "Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money," 67 Fed. Reg. 49064, 49070, 49111 (July 29, 2002), adopting 11 C.F.R.§ 100.24(b)(3). Second, the Commission recognized the potential breadth of the PSAO test and, particularly, its potentially adverse impact on lobbying communications when it refused to adopt any of several suggested exceptions to the definition of "electioneering communication" for lobbying and other communications because it believed that communications exempted under any of the exceptions might reasonably be understood or perceived to "promote, support, attack or oppose" a federal candidate as prohibited in BCRA §434(f)(3)(B)(iv). *See* Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65201-202 (October 23, 2002) ("Although some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner.") Since the Commission has previously interpreted the PSAO test to encompass legitimate lobbying communications, it may not include that standard here since the mere existence of coordination does not change the nature of the communication.

Finally, the legislative history of BCRA's coordination provisions strongly suggests that the Commission does not have authority to use a PSAO test to define coordinated expenditures. For a number of years prior to the enactment of BCRA, the Commission had wrestled with the question of whether coordinated expenditures under FECA were limited to communications containing express advocacy or whether, instead, the term should include a broader range of communications.[16] Congressional proponents

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should be taken into account when deciding whether a particular communication contains PSAO material. Rather than helping to define PSAO, the fact that even this minimal effort could not garner the necessary four votes for adoption by the Commission demonstrates the impossibility of providing clear guidance regarding the meaning of the vague statutory term.

[16] *See, e.g.*, Advisory Opinion 1985-14. In *FEC v. The Christian Coalition*, Judge Green ruled that coordinated communications by a corporation could be unlawful even if they do not contain express advocacy, *see* 52 F. Supp. 2d at 86-89; however, she provided virtually no guidance concerning the extent to which coordinated expenditures reached communications beyond those containing express advocacy beyond suggesting that there must be some connection between the content of a communication and a federal election before it could be treated as a coordinated expenditure. *See id.* at 88 (referring to "campaign-related communications that do not expressly advocate a candidate's election or defeat.") In the Commission's subsequent coordination rulemaking, the agency similarly wrestled with the question of how far, if at all, it should extend the prohibition on coordinated expenditures beyond express advocacy, and again failed to resolve this thorny issue. *See* Final Rule, "General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures," 65 Fed. Reg.

of BCRA sought to resolve this issue once-and-for-all when they proposed the extremely broad coordination provisions of BCRA in the 107th Congress. *See supra* at 3. But, as discussed above, these provisions were rejected and the compromise adopted by Congress, as set forth in BCRA §202, provided that coordinated non-express advocacy communications would be treated as in-kind contributions only if they met the statutory definition of "electioneering communications." *See McConnell v. FEC*, 540 U.S. at 202 ("BCRA §202 pre-empts a possible claim that ... coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions.") Had Congress wished to apply the PSAO test in defining the content of coordinated expenditures, it could simply have included this phrase in BCRA §202, as it had done in two other provisions of the statute.

Similarly, Congress could easily have included a PSAO test when it directed the Commission to promulgate new regulations that do not require "agreement or formal collaboration" to establish coordination and to address certain other issues when adopting the new regulation. However, as the court of appeals put it in *Shays*, "in the BCRA provision most clearly on point – the directive calling for new regulations – *Congress studiously avoided prescribing any specific standard*, save abrogation of the 'collaboration or agreement' test." 414 F. 3d at 99 (emphasis added). The Commission cannot adopt a standard which Congress itself failed to adopt when it considered the same issue. *See, e.g., Barnhart v. Sigmon Coal Co.*, 554 U.S. 438, 452 (2002) ("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); *U.S. Telecomm. Ass'n v. FCC*, 227 F. 3d 450, 458 (D.C. Cir. 2000).

2. The Safe Harbor Proposed In Alternative 4 Provides A Workable Approach To Defining A Content Standard For Coordinated Public Communications.

The Commission has invited comment on whether, as an alternative to the PSAO test in Alternative 4, a safe harbor exemption should be created from the coordinated communication rules for certain kinds of communications, which the NPRM then describes as meeting six specific criteria. The safe harbor approach would be consistent with the court of appeals decision in *Shays*, would serve the purposes of a content standard discussed previously in these comments, and therefore is the most workable approach proposed in the NPRM.

In *Shays*, the court of appeals held that FECA does not preclude a content-based standard so long as the rule "rationally separates election-related advocacy from other activity falling outside of FECA's expenditure definition." 414 F. 3d at 102. By focusing

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76138, 76141 (December 6, 2000). *See also* Matter Under Review 4624, Statement for the Record of Commissioner Bradley A. Smith (Nov. 6, 2001), nn. 4 and 9 (noting that the Commission had not reached a final decision against requiring an express advocacy content standard.)

on the content of the communication, rather than on its timing, the safe harbor proposed in the NPRM makes this separation in an even more direct manner than the 120-day test rejected by the court, which could only serve as a crude proxy for determining whether a communication is an expenditure under the statute. Moreover, while it is theoretically possible that a communication which satisfies the safe harbor criteria might still constitute "election-related advocacy," the criteria selected make this extremely unlikely. The court of appeals did not require that a bright-line test be 100% accurate in separating election and non-election advocacy, only that the test "'not unduly compromise the Act's purposes,'"414 F.3d at 99, quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986). Although there are flaws in the proposed criteria, as a general matter the safe harbor proposed in the NPRM, which requires that a communication have a demonstrable legislative purpose, surely does not "unduly" compromise the statute's purposes, if it does so at all.

A safe harbor of the kind proposed in the NPRM will serve as a "'filter' or a 'threshold' that screens out certain communications from even being subjected to analysis under the conduct standards," just as the 120-day test in the current regulation. *See* Final Rules, "Bipartisan Campaign Reform Act of 2002 Reporting; Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 430 (January 3, 2003). The safe harbor will, therefore, protect citizens and organizations from unnecessary and intrusive investigations into the most sensitive forms of political speech and association, while also allowing the Commission to focus its limited law enforcement resources on those cases involving communications that have the greatest likelihood of influencing federal elections.

The safe harbor approach proposed in the NPRM is also similar to the current regulation in that it "focuses as much as possible on the face of the public communication or on facts on the public record ... [in order] 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." *Id.*, citing *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976). The safe harbor can therefore be applied with relative ease at the reason-to-believe stage of the enforcement process, a goal which, as discussed above, has long eluded the Commission. *See supra* at 7. And, more importantly, such a standard allows citizens and organizations to know with reasonable certainty what steps they must take in order to limit their public communications in a lawful manner.

Because the proposal would create a safe harbor under which "[a] communication that satisfies [the regulatory] criteria would, as a matter of law, not be treated as a coordinated communication," 70 Fed. Reg. at 73951, it would *protect* speech and association, rather than *prohibit* it, thereby avoiding the difficult constitutional and statutory issues raised by all of the other proposals in the NPRM, including the PSAO test proposed in Alternative 4. Since a citizen or organization whose communications do not fall within the safe-harbor criteria would still be free to defend a communication on content as well as conduct grounds,[17] the safe harbor would be both the most supportive

[17] Although the NPRM is unclear on this point, we assume that a communication that does not fall within the safe harbor might still be excluded from the definition of

of political speech and the most consistent with the legislative history of BCRA's coordination provisions in which Congress made clear its intention to protect lobbying and similar activities.

Finally, the safe harbor proposed in the NPRM is similar to the approach taken by the Internal Revenue Service in Rev. Rul. 2004-06, which sets forth criteria for determining whether communications by nonprofit organizations are taxable as "exempt function" activities under section 527(f) of the Internal Revenue Code. Although the criteria in Rev. Rul. 2004-06 are not identical to the criteria proposed in the FEC's NPRM, they are "mutually consistent" in many respects, thereby facilitating compliance by nonprofit organizations with both sets of rules, a goal directed by Congress in FECA. *See* 2 U.S.C. § 438(f).

3. The Safe Harbor Criteria Proposed In the NPRM Should Be Modified To Insure That They Do Not Impinge On Lobbying and Other Legitimate Communications.

While the foregoing comments apply to the safe-harbor approach in general and to most of the specific criteria proposed in the NPRM, several of the criteria included in the proposal warrant further comment.

(a) The first criterion in the safe harbor should be expanded to include a public communication that is devoted exclusively to a legislative or executive branch matter whether or not such matter is "currently pending." Labor unions and other citizens organizations frequently run advertisements relating to legislative matters that are a topic of current public discussion and debate but are not yet scheduled for an imminent vote. President Bush's proposal to privatize the Social Security program, for example, became a hotly debated topic in the media long before it was introduced as specific legislation and it has never been scheduled for a vote. It should be sufficient to satisfy this criterion that the issue addressed in a public communication is subject to action by Congress or the executive branch, whether or not it has been reduced to a specific legislative or executive branch proposal at the time of the communication.

(b) The first criterion should also be expanded to include a public communication made in response to a public statement by a candidate attacking the organization (or its members *qua* members) that pays for the communication. The NEA, for example, has found itself the target of outlandish and gratuitous statements by public officials. Such attacks, whether made by an administration official or a federal candidate cannot and should go unanswered. Yet, if the union has previously coordinated its membership activities with the opposing candidate, it will risk provoking a complaint of coordinated communications if it does in fact respond to its attacker by name. The right to respond in these circumstances is so fundamental that the union should not have to risk a burdensome FEC investigation in order to defend itself.

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coordinated communications if it does not refer to a federal candidate or a political party or if it is not targeted to an appropriate jurisdiction. The Commission should make this clear in the final regulation or its Explanation and Justification.

(c) The second criterion should be clarified so that a communication with a grassroots lobbying message would still be exempt even if it also refers readers, viewers or listeners to a website or 800-line which includes electoral messages relating to the issue in the communication. Grassroots lobbying communications that urge the public to contact named legislators or other public officials regarding the legislative or policy matter addressed in the communication may also urge readers or viewers to go to the organization's website or an 800-line for more information. The content of these secondary sources should not preclude the original communication from falling within the safe harbor.

(d) The fourth criterion for the safe harbor, under which an exempt communication could "not refer to a clearly identified Federal candidate's record or position on any issue," is overbroad and should not be included at all. This criterion would preclude a grassroots lobbying communication from indicating that a federal officeholder had previously voted for or against a particular piece of pending legislation that is the subject of the communication. While it might be argued that such references have been used in the past where the prior votes had taken place months or even years before the communication was distributed, thereby demonstrating an election-influencing, rather than lobbying, purpose for the ad, this concern is adequately addressed by the first and second criteria in the NPRM, which require that the communication be devoted exclusively to a legitimate legislative or executive branch matter and the reference is limited to urging the public to contact the officeholder/candidate to persuade him or her to take a particular position on the pending matter. As long as these criteria are satisfied, an ad's reference to an officeholder's previous record or stated position on the pending issue should not be deemed to demonstrate an election-influencing purpose for the ad. Grassroots lobbying ads frequently name specific officeholder/candidates precisely because they have either voted against a bill in the past or have not taken a position on the bill, and it is important to inform the public of this fact in order to explain why they should be contacting the officeholder/candidate in connection with the pending matter. Such communications should not be excluded from the safe harbor for this reason alone.

(e) Finally, the Commission should not adopt the suggestion in the NPRM under which communications made within a certain number of days before an election would be excluded from the safe harbor. As noted earlier, communications dealing with legislation and other matters of public policy frequently occur in close proximity to elections. Indeed, these are the kind of communications which Congress intended to protect and for which a safe harbor is necessary. Moreover, the possibility that the proposed safe harbor could be abused if it does not include a time period limitation is greatly reduced by the fact that broadcast communications disseminated within 60/30 days elections would be excluded from the safe harbor under the content standard for electioneering communications. *See* 11 C.F.R. §109.21(c)(1).

IV. THE "DIRECTED TO VOTERS" REQUIREMENT SHOULD BE RETAINED, BUT THE CURRENT STANDARD SHOULD BE CLARIFIED.

The Commission seeks comment on modifying the requirement in the fourth content standard that a public communication must be directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot, assuming that a content prong is retained in the regulation. *See* 70 Fed. Reg. at 73953. As noted earlier, the targeting requirement is not *sufficient* to demonstrate that a communication has a close nexus to a federal election. The record in the original BCRA coordination rulemaking makes clear that grassroots lobbying communications also are frequently targeted to the voters in the jurisdiction of the candidate who is identified in the communication.[18] Any content standard adopted by the Commission should, therefore, go beyond the targeting requirement.

Nevertheless, the targeting requirement should be retained in any content standard because it is *necessary* to demonstrate a nexus between a public communication and a federal election. As the Commission stated in the Explanation and Justification for the current coordination regulation, the fourth content standard "incorporates the concept of the 'targeting' of the communication as an indication of whether it is election-related." 68 Fed. Reg. at 431. There are few, if any, circumstances under which an organization or private citizen would coordinate with a federal candidate about an election-influencing public communication that would not be targeted to the voters in that candidate's jurisdiction.[19] For this reason, BCRA's definition of electioneering communication includes a targeting requirement, and neither the district court nor the court of appeals in *Shays* expressed any doubt about including a targeting requirement in the coordination content standard.

The NPRM correctly points out, however, that the extremely broad language of the current targeting requirement, in contrast to BCRA's more specific requirement, could have unwarranted consequences in at least two important respects. First, a public communication which is part of a larger advertising campaign that includes, but is not limited to, voters in the identified candidate's jurisdiction, cannot be said to have the

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[18] *See, e.g.*, comments submitted by the following organizations: American Taxpayers Alliance at 14, Chamber of Commerce of the United States at 11, Independent Sector at 2; transcript of October 24, 2002 hearing, testimony of Center for Responsive Politics at 47-50, Alliance for Justice at 205-06, and American Taxpayers Alliance at 224-25.

[19] In theory, a sponsor of fundraising activity in another jurisdiction might coordinate with the candidate, but such fundraising activities rarely occur through public communications due to their relatively high cost and the lower expectations of significant support outside of the jurisdiction in which the candidate is on the ballot.

nexus to that candidate's election which the targeting requirement is intended to show.[20] This would be true whenever the number of persons in the targeted district were less than a majority of the total number of persons at whom the communication is directed,[21] a standard which would give more concrete guidance than the "incidental" standard suggested in the NPRM. Furthermore, this revised targeting standard should apply regardless of whether a communication includes material that promotes, supports, attacks or opposes the candidate, although it is highly unlikely that such material, if properly defined, would ever appear in a communication that is distributed primarily outside of the candidate's jurisdiction.[22]

Second, because of the extreme breadth of the current definition of "public communication," the targeting requirement can result in coverage of some communications that should be regarded as *de minimis* in the context of alleged coordination. In defining electioneering communications, Congress required that a broadcast communication must be able to reach at least 50,000 persons in the relevant district or state, *see* 2 U.S.C. §434(f)(3)(C), apparently because the relatively small cost of broadcast communications that reach fewer persons was deemed to present a minimal risk of political corruption. Congress retained the 50,000 threshold when it provided in BCRA §202 that *coordinated* electioneering communications are to be treated as contributions under FECA. *See* 2 U.S.C. §441a(a)(7)(C). In adopting the current content standard, the Commission gave no reason for applying a lesser test than Congress had adopted, and we recommend that the 50,000 threshold, or a similar proxy for relatively inexpensive public communications,[23] be incorporated into the targeting requirement as a means of avoiding

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[20] A related issue arises when an organization sponsors ads in more than one jurisdiction that are identical in content except for the name of the federal officeholder/candidate who is identified. If such "cookie-cutter" ads are distributed in more than an insubstantial number of jurisdictions where the officeholder named is not running for election, then the same ad should not be regarded as being "directed" to the voters in the jurisdiction where the officeholder named is a candidate.

[21] For example, a popular Member of Congress from New York City whose re-election is virtually guaranteed might appear in a GOTV communication distributed throughout the City. If the number of persons in the Member's own district is less than the total number of persons in the other districts in which the communication is distributed, the targeting element of the fourth content standard would not be satisfied.

[22] Our objection to use of the PSAO test in this context is thus based more on the inherent vagueness of that test, which could result in the inclusion of communications that have no electoral purpose, than on the risk that, if properly applied, the test would result in the inclusion of a significant number of public communications.

[23] The cost of making many of the public communications covered in the current regulation is certainly less than the cost of a broadcast communication even in the small markets excluded by BCRA's 50,000-person threshold. The current cost of sending 501 pieces of mail, for example, can be as little as $250. The cost of making telephone calls through a robo-call system can be as little as 4 cents per call, which means that the cost

burdensome and constitutionally troubling investigations where the risk of possible corruption is so small.

V. THE "COMMON VENDOR" AND "FORMER EMPLOYEE" CONDUCT STANDARDS SHOULD NOT BE RETAINED.

The Commission seeks comment on a number of issues pertaining to the "common vendor" and "former employee" conduct standards in the current regulation, including whether the Commission should eliminate these standards entirely and whether the regulation should include a rebuttable presumption or safe harbor where a vendor or former employee has taken certain specified actions, such as the use of a "firewall." *See* 70 Fed. Reg. at 73954-56. The Commission has not developed a sufficient factual basis for continuing to retain the common vendor and former employee requirements in the conduct standard. Rather, coordination that is effectuated through a common vendor or former employee should only be addressed by addressing the other conduct standards if the vendor or employee is acting as an "agent" of the candidate or political party within the Commission's rules concerning agency. In Point VI, we propose that the Commission establish a safe harbor from *all* of the conduct standards in cases where a firewall has been established, including, but not limited to, the common vendor and former employee requirements if they are retained in some form.

The NPRM states that the common vendor and former employee conduct standards were intended by the Commission to implement Congress's requirement in BCRA that it address these issues in developing a revised coordination regulation. *See id.* at 73954. In its 2002 rulemaking, the Commission similarly suggested that Congress had mandated that common vendor and former employee restrictions be included in the revised regulation. *See, e.g.*, 68 Fed. Reg. at 435, 437. This is an erroneous reading of BCRA's legislative history, which makes clear that Congress did not mandate that the Commission include restrictions on common vendors and former employees, but only that it consider these issues in formulating new coordination regulations. *See, e.g.*, 148 Cong. Rec. S2145 (daily ed. March 20, 2002) (statement of Sen. Feingold) (section 214 of BCRA lists four subjects the FEC must address, but it "does not dictate how the Commission is to resolve those subjects.") Any doubt about this question was resolved by the court of appeals in *Shays* when it stated that "BCRA merely listed several topics the rules 'shall address,' providing no guidance as to how the FEC should address them."[24] 414 F. 3d at 98.

Given Congress's "open-ended directive," *id.*, in order to include any form of restriction on common vendors and former employees, the Commission must be able to

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of calling 49,000 persons would be under $2000. The cost of an advertisement in a magazine with circulation of less than 50,000 persons is also extremely small.

[24] Thus, the Commission could "address" the common vendor and former employee issues by providing in its regulations that the existence of a common vendor or former employee will *not* constitute evidence of coordination, a result which is not precluded by BCRA or its legislative history.

show initially that common vendors and former employees present a significant source of unlawful coordinated communications beyond those circumstances in which they would be acting as agents of a candidate or party. However, because of the Commission's erroneous interpretation of BCRA's mandate, neither in the 2002 rulemaking nor in this NPRM has the Commission put forward any empirical basis for the common vendor and former employee restrictions nor has it even requested evidence on this fundamental question. Without such an evidentiary basis, the regulation is plainly unlawful under the Administrative Procedure Act.

The present NPRM does seek comment on the extent to which the current common vendor and former employee requirements have interfered with political activity. Although this inquiry puts the cart before the horse -- there is no reason to determine whether the common vendor and former employee requirements interfere with political activity until it has been demonstrated that such requirements are needed in the first place -- in the experience of the undersigned organizations the rigid requirements in the current regulation have created significant burdens.

First, the current regulation has had a considerable chilling effect on the retention of consultants, deterring the engagement of any consultant who has previously worked for a federal candidate or political party at any time during the current election cycle, even if the consultant's work for the candidate or party has long ended . Since an election cycle for Senator is six years and for President is four years, the period of disqualification may include work which has no possible relevance to the pending election, and even in races for the House of Representatives, the two-year cycle covers an unreasonably long period of time. Similarly, the current regulation has made it difficult for unions and other organizations to continue working with consultants with whom they have long-standing relationships once those consultants are engaged to work for campaigns or a party. Even if the union is able to find another consultant, it is deprived of the expertise which its original consultant gained from the previous work. It is simply the fact, confirmed by our own experience, that there are not enough qualified national political consultants compatible with unions and other progressive organizations to compensate for the impairment of professional relationships caused by the current regulation.

Second, the chilling effect of the current common vendor and former employee requirements is exacerbated by the fact that these rules apply whenever the vendor or employee "uses or conveys" information obtained from the candidate or political party. *See* 11 C.F.R. §§109.21(d)(4)(iii) and 109.21(d)(5)(ii). As a result of this language, a public communication may be found to be coordinated without a union or a candidate's having any intention to coordinate or even knowing that coordination has occurred. This has proven to be both the most unfair aspect of the current rule and the most difficult for organizations to understand, accept and seek to comply with absent the most draconian restrictions and restraints on employment and association. For the same reasons, coordination alleged to have occurred solely through the "use" of information by a vendor or employee invites the most intrusive investigations into the processes and strategies of creating public communications.

Third, the unknowing and unintentional coordination covered by the current rule is the least worthy of legal sanction precisely because of the lack of awareness on the part of the union or other organization. Notably, the Commission itself has recognized that coordination under the current common vendor and former employee rules involves circumstances beyond the scope of the other content standards when it provided that a candidate or party need not treat or report as an in-kind contribution any communication that is deemed to be coordinated under these rules. *See* 11 C.F.R. §109.21(b)(2). It makes little sense to absolve the candidate or party from responsibility for a communication that has been coordinated under these circumstances while continuing to hold responsible the sponsor of the communication who has equally little knowledge about the use of prohibited information.

In view of these concerns, the Commission should not retain the common vendor and former employee conduct standards and should instead treat all such cases under the other conduct standards. If the Commission still continues to believe that some restrictions on common vendors and former employees might be necessary, above and beyond what may already apply to them as agents, it could then initiate a separate rulemaking to determine whether there is adequate empirical support for such additional restrictions and what form they should take.

VI. THE COMMISSION SHOULD ADOPT A FIREWALL SAFE HARBOR THAT WOULD BE APPLICABLE TO ALL OF THE CONDUCT STANDARDS.

The Commission also seeks comment on whether it should create a safe harbor from the common vendor and former employee requirements where the vendor or employee has taken certain specified actions, such as the use of a firewall, to ensure that no material information about the plans, projects activities, or needs of a candidate or party committee is used or conveyed to a third party. *See* 70 Fed. Reg. at 73955. If, contrary to our suggestion in point V, the Commission retains the common vendor and former employee standards in their current or a modified form, then a safe harbor is absolutely essential to minimize the kinds of problems we have detailed. However, such a safe harbor should not be limited to the common vendor and former employee standards, but, as recently implicitly recognized by the Commission, available with respect to all of the conduct standards. *See* MUR 5506, First General Counsel's Report 5-8 (Emily's List).

As discussed earlier, in order to effectuate Congress's purposes in BCRA and to avoid infringing on constitutionally protected activities, the Commission should create a safe harbor which would remove lobbying communications from the *content* prong of the coordination regulation. Albeit a critical improvement from the current regulation, the proposed content safe harbor would still only provide limited protection for unions and other organizations that engage in both lobbying and election-influencing communications. This is because the proposed content safe harbor would only protect organizations that coordinate with Members of Congress and later make lobbying communications, but not when they, or their related entities, later engage in independent expenditures, electioneering communications or other political communications that would still be covered by the content standard. In such cases, it still could be alleged that

the lobbying-related meetings provided, at least in theory, an "opportunity" for coordination of the organization's political communications as well as an opportunity to discuss its lobbying communications, thereby putting the organization in the position of having to prove that the initial meetings were limited to lobbying issues only, a burden which it can rarely satisfy to the Commission's satisfaction at the reason-to-believe stage of an enforcement proceeding. In actuality, therefore, a union which wishes to avoid protracted litigation before the FEC must either forego meeting with Members of Congress about its lobbying communications or it must forego engaging in political communications after those meetings have taken place, a Hobson's choice of constitutional dimension that the Commission must not impose.

This dilemma can be minimized, however, if unions and other politically active organizations are able to avoid coordination investigations by showing at the RTB stage of enforcement proceedings that a firewall existed which separated the persons responsible for meeting with candidates about legislation (and other permissible purposes) from the persons responsible for the organization's political communications Such a conduct safe harbor would reduce significantly the chilling effect of the coordination rules by making it possible for unions and other politically active organizations to dispose of unfounded allegations quickly and with minimal effort and expense. At the same time, such a safe harbor would allow the Commission to avoid protracted, fact-intensive coordination investigations where there is little or no likelihood that prohibited coordination occurred.

The conduct safe harbor we propose would apply only in cases where the complaint relies on circumstantial evidence of coordination, such as the mere existence of a meeting or telephone call, and not where the complaint includes credible evidence that actual coordination occurred. Furthermore, in order to rely on the safe harbor, a union or other organization should have to demonstrate, first, that the firewall was established in a written policy which was distributed to all relevant staff and consultants and, second, that the policy was implemented at least 60 days prior to the date of the public communication alleged in the complaint to have been coordinated.[25] A union or other respondent which can make this showing should, consistent with the RTB requirement itself, be able to avoid a full-scale investigation.

VII. THE COMMISSION SHOULD CREATE A SAFE HARBOR FOR PUBLICLY AVAILABLE INFORMATION.

Under the conduct standards in the current coordination regulation, a communication is coordinated if a candidate or political party committee is "materially involved" in certain aspects of the communication. *See* 11 C.F.R. §109.21(d)(2). The Explanation and Justification for this provision makes clear that it will be satisfied when an organization receives information from a candidate which is important to the communication. *See* 68 F.R. at 433. The Commission recognized one of the difficulties

[25] A 60-day test is reasonable in view of the short shelf-life of information in political campaigns, where plans, strategies, and needs change by the day, if not the hour. *Cf.* 11 C.F.R. §106.4(g)(2) (treating poll results as having only minimal value after 60 days.)

with this provision when it noted in the E & J that the material involvement standard would not be violated if the sponsor of a communication receives information by a candidate's speech to the general public, although the Commission did not attempt to square this conclusion with the language of the regulation nor did it explain how this exception would apply, if at all, in other similar contexts. *See* 68 Fed. Reg. at 434. A safe harbor for acting on publicly available information as proposed in the NPRM would rectify this omission and avoid an otherwise unwarranted interpretation of the regulation.

Under the literal language of the current regulation, a union which receives information regarding a candidate's speaking schedule from a press release or other public announcement from the campaign could be found to have coordinated a communication which it distributes to coincide with the candidate's appearance at a particular event. Similarly, a union which receives information about a candidate's position on an issue from the candidate's website, from a campaign press conference, or from a widely available distribution by the campaign could be found to have coordinated a communication in which it expressly advocates the candidate's election because of his or her position on this issue. In both instances, and in many other similar cases, the union will have received material information from a publicly available source even though there has been no coordination with the candidate in any real-world sense. As the E & J makes clear, this was not the Commission's original intent and it should adopt the safe harbor proposed in the NPRM to make this clear.

Respectfully submitted,

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