January 19, 2010

By Electronic Mail (CoordinationShays3@fec.gov)

Ms. Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Notice 2009-23: Coordinated Communications

Dear Ms. Rothstein:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Commission's Notice of Proposed Rulemaking (NPRM) 2009-23, published at 74 Fed. Reg. 53893 (October 21, 2009), seeking comment on proposed revisions to its regulations regarding communications that have been coordinated with federal candidates under 11 C.F.R. § 109.21.

The proposed coordination regulations noticed for comment are intended to implement the Bipartisan Campaign Finance Reform Act of 2002 (BCRA). They follow a continuing failure by the FEC to adopt lawful regulations to implement BCRA's coordination provisions—a failure that now extends for nearly eight years.

Previous BCRA coordination regulations adopted by the FEC have led to two lawsuits resulting in two federal district court decisions and two D.C. Circuit Court of Appeals decisions holding that the FEC coordination regulations are arbitrary, capricious, an abuse of discretion and contrary to law. *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III Appeal*") *aff'g in part* 508 F. Supp. 2d 10 (D.D.C. 2007) ("*Shays III District*"); *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays I Appeal*") *aff'g in part* 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays I District*").

Nonetheless, these illegal regulations remain in effect to this day.

After the D.C. Circuit first invalidated the Commission's coordination regulations in 2005 for (among other reasons) providing only an inadequate express advocacy content standard outside the pre-election windows set by the rule, the Commission waited a full year, and then readopted the same inadequate express advocacy standard—indeed it made matters worse by shortening the pre-election window from 120 days to 90 days in the case of congressional elections.

After the D.C. Circuit invalidated these rules for a second time in 2008, again because (among other reasons) it found the express advocacy test to be inadequate as the sole guard against coordination outside the windows, the Commission waited 16 months to even begin this rulemaking in response. And in this rulemaking, the Commission proposes (among its alternatives) to adopt two minor variations of the same express advocacy standard that the D.C. Circuit has already twice rejected.

This dilatory pace contrasts starkly with the Commission's expedited implementation of the D.C. Circuit's recent decision in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), a decision issued only four months ago. In that case, as soon as the government's time for appeal lapsed, the Commission immediately initiated a rulemaking to conform its regulations to the D.C. Circuit opinion, in order to ensure that compliant rules would be in place for this election cycle. *See* FEC NPRM 2009-31, 74 Fed. Reg. 68420 (Dec. 29, 2009). Indeed, because it believed it should not even wait to issue a compliant rule, the Commission on the same date announced an "interim final rule"—effective that very day (because the public needs "immediate guidance" and normal APA notice and comment procedures "may be contrary to the public interest," *id.*)—notifying the public that the existing allocation rules are invalid. FEC Notice 2009-30, 74 Fed. Reg. 68661 (Dec. 29, 2009). And if there still remained any doubt about the Commission's haste to implement that D.C. Circuit decision, the Commission also formally announced that in the meantime it will not enforce the allocation rules invalidated by the Court. *See* FEC Statement on the D.C. Circuit Court of Appeals Decision in *EMILY's List v. Federal Election Commission* (Jan. 12, 2009) (announcing various regulations that "will not be enforced" "until the Commission adopts a final rule regarding the removal" of the regulations).

But not so with the D.C. Circuit decisions in the *Shays* cases, where coordination rules declared illegal by the courts have languished on the books, literally for years. The Commission is not at liberty to pick and choose which federal court decisions it will comply with and which it will put on the back burner for election cycle after election cycle. In the face of two district court decisions and two D.C. Circuit opinions invalidating the coordination rules, we have gone through four election cycles since BCRA was adopted, and are now in the midst of a fifth cycle, without the FEC yet having provided the nation with lawful regulations to implement these critically important BCRA provisions.

This time the Commission must finally get it right.

It would be a dereliction of duty of the highest order for the Commission to yet again fail to adopt lawful regulations to implement the BCRA coordination provisions—eight years after the agency was mandated by Congress to do so—and thereby require a third lawsuit to be brought against the agency to obtain lawful coordination regulations.

With this background in mind, and for the reasons set forth below, we:

- Support maintaining the current content rule for communications within the 90-day and 120-day pre-election time frames;

- Support the adoption of the Alternative 1 PASO content standard for the period outside the pre-election windows;

- Oppose (as unnecessary) the promulgation of a regulatory definition of the component terms of the PASO standard;

- Oppose the Alternative B definition of PASO, but do not oppose the Alternative A definition of PASO (if, contrary to our views, the Commission decides to adopt a regulatory definition);

- Oppose the adoption of the Alternative 2 "modified *WRTL*" content standard;

- Oppose the adoption of the Alternative 3 express advocacy content standard;

- Do not oppose adoption of the Alternative 4 "Explicit Agreement" content/conduct standard, but only if it supplements (but does not supplant) the adoption of the Alternative 1 PASO standard, as well as the other, broader content and conduct standards;

- Oppose retention of the 120-day time period conduct standard for regulation of common vendors and former employees;

- Support the adoption of either a two year or election cycle time period conduct standard for regulation of common vendors and former employees;

- Oppose the creation of a safe harbor for 501(c)(3) organization communications; and

- Do not oppose the creation of a safe harbor for certain business and commercial communications.

Both the Campaign Legal Center and Democracy 21 request the opportunity to testify at the hearing to be held in this rulemaking.

I. "Coordination" in the Pre-BCRA Era

The Commission's history with its coordination regulation is, fair to say, tortured. It is important to review this history in some detail—and in particular the history of court decisions on this issue—because it sets the stage for the Commission's latest (and we hope last) attempt to finally get it right.

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 an independent outside spender in support of, or opposition to, a candidate's 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. Coordinated expenditures thus amount, in practical effect, to "disguised contributions" and should be viewed that way by the Commission.

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.*

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:

> [A]n 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 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)).

Under the rules promulgated by the FEC in 1980 to implement these statutory provisions, an expenditure was not considered "independent" if it was made pursuant to:

> [A]ny 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 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. The Court stated:

> 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).[1]

The standard for conduct that constitutes coordination 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,

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[1] 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.

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 that it failed to encompass even the extensive discussions about strategic matters between campaign officials and Christian 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.[2]

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.'"[3]

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[2] 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:

> [W]ould 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).

[3] *See* Statement for the Record of Commissioners Thomas and McDonald in *Federal Election Commission v. Christian Coalition* (Dec. 20, 1999).

Having failed to appeal the district court's controversial decision, the Commission then embraced it by repealing its longstanding coordination regulations and codifying 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).

II. "Coordination" Under BCRA and *McConnell*

In 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 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. <u>These rules need to make more sense in the light of real life campaign practices than do the current regulations</u>.

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. <u>Informal understandings and de facto arrangements can result in actual coordination as effectively as explicit agreement or formal collaboration</u>. 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—<u>we expect the FEC to cover "coordination" whenever it occurs, not simply when there has been an agreement or formal collaboration</u>….
>
> 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. FEC*, 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 argued that BCRA Section 214 and the mandate that the Commission issue new regulations on coordination 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 *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 412 (1950)).[4]

III. Post-BCRA/*McConnell* History of "Coordination" Regulation

A. The 2002 "Coordination" Rulemaking and *Shays I* Litigation

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

[4] The *McConnell* plaintiffs 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.

"content" a communication must contain in order to be treated (if coordinated) as an in-kind contribution.

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 candidate. The Commission generally implemented this statutory rule 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 sought to narrow the statutory definition of "expenditure," for purposes of the coordination rule, to four proposed content standards that would define which communications could potentially be regulated as coordinated expenditures. These were: (1) an "electioneering communication;" (2) republished campaign materials; (3) express advocacy; and (4) a "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)).

We (along with the Center for Responsive Politics) submitted written comments on the notice, and opposed the content regulation proposed by the Commission, particularly the 120-day time frame.[5] The Center for Responsive 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:

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[5] *See* Comments of the Campaign and Media Legal Center on Notice 2002-16, 3 (Oct. 11, 2002), *available* http://www.fec.gov/pdf/nprm/coor_and_ind_expenditures/campaign_and_media.pdf; Comments of Democracy 21 on Notice 2002-16, 12 (Oct. 11, 2002), *available at* http://www.fec.gov/pdf/nprm/coor_and_ind_expenditures/common_cause.pdf; Comments of the Center for Responsive Politics on Notice 2002-16, 4 (Oct. 11, 2002), *available at* http://www.fec.gov/pdf/nprm/coor_and_ind_expenditures/center_for_responsive_politics.pdf.

> 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 a 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.[6]

Ultimately, the Commission adopted the 120-day rule set forth in the NPRM.

1. *Shays I* District Court

In *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays I District*"), the principal House sponsors of BCRA challenged, *inter alia*, the Commission's "content" regulation in section 109.21, and particularly the 120-day rule.

As explained by the district court in *Shays I*:

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[6] 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/mtgdoc02-90a.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 I District, 337 F. Supp. 2d at 57-58 (footnotes and internal citations omitted). The court noted that the 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.

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

> [I]t 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 I District, 337 F. Supp. 2d at 62 (quoting *Orloski v. FEC,* 795 F.2d 156, 164 (D.C. Cir.1986)). The court did find that the regulation "unduly 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 I District, 337 F. Supp. 2d at 62 (internal citation omitted). The court explained further:

> 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 I District, 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 I District*, 337 F. Supp. 2d at 64.

The *Shays I* district court concluded:

> [P]ursuant 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 I District, 337 F. Supp. 2d at 64-65.

2. *Shays I* Appeal

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 I Appeal*, 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 *Shays I* circuit court explained that, through passage of BCRA, Congress ordered the Commission to adopt new coordination regulations that do not require agreement or 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 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 plaintiffs' 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 *Shays I* 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 *Shays I* 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).

In addition to rejecting the Commission's "voter registration" explanation for the 120-day period incorporated into the coordination rule, the *Shays I* circuit court also rejected the FEC's

other explanations as well. 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 *Shays I* circuit 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 *Shays I* circuit court declined a request by plaintiffs Shays and Meehan that it 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 subsequent 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 the Commission that it "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 court summarized its holding 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.

B. The 2005 Coordination Rulemaking and *Shays III* Litigation

In December 2005, "[t]o comply with the [*Shays I*] decision of the Court of Appeals, and to address other issues involving the coordinated communication rules," the Commission commenced another "coordination" rulemaking. NPRM 2005-28, 70 Fed. Reg. 73946 (Dec. 14, 2005). This was over 14 months after the district court's *Shays I* decision and five months after the D.C. Circuit's decision.

"Specifically," the Commission explained in NPRM 2005-28, "the Court of Appeals concluded that, by limiting 'coordinated communications' made outside of the 120-day window to communications containing express advocacy or the republication of campaign materials, 'the [Commission] has in effect allowed a coordinated communication free-for-all for much of each election cycle.'" *Id.* at 73948 (quoting *Shays I Appeal*, 414 F.3d at 100).

Although the *Shays I* circuit court 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 separated election-influencing ads from others. As the Commission stated in NPRM 2005-28:

> 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 I Appeal*, 414 F.3d at 101–02).

We, together with the Center for Responsive Politics, submitted joint written comments on NPRM 2005-28, opposing the proposed revisions to the "coordination" regulation.[7] We also submitted, for the rulemaking record, extensive evidence of election-influencing advertising that was broadcast more than 120 days prior to the election the ad was intended to influence. *See* Comments on Notice 2005-28 at 16-28, APPENDICES I-VI.

This evidence was submitted in response to the question raised by the *Shays I* circuit court: whether "substantial election-related communication occur[s] outside" the 120-day regulatory time frame." *Shays I Appeal*, 414 F.3d at 102. Our review of political advertising data compiled by the *National Journal* revealed overwhelming evidence that substantial election-related advertising does, in fact, occur outside the 120-day regulatory time frame.

In our submission, we divided 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 organized the information according to election year, and also according to whether the ad was intended to influence a primary or general election. We compiled data on advertising in the 2004 and 2006 congressional elections, as well as the 1996, 2000 and 2004 presidential elections. This data was summarized in our comments and we included scripts of more than 200 advertisements as six appendices to the comments we filed. We included 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 established 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. 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 federal elections more than 120 days before the elections—and the Commission's coordination rules presented the opportunity for such ads to be coordinated without restriction or regulation.

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[7] *See* Comments of the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics on Notice 2005-28 (January 13, 2006), a*vailable at* http://www.fec.gov/pdf/nprm/cood_comm/comm13.pdf.

In the 2005 rulemaking, the Commission proposed seven alternative revisions to the 120-day time frame—all of which we opposed. *See* Comments on Notice 2005-28 at 35-38. In addition to addressing the 120-day time frame issue, the Commission also proposed to address a variety of issues not raised in the *Shays I* litigation.

The Commission, for example, sought 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 or solicit funds for other federal or non-federal candidates. 70 Fed. Reg. at 73953-54. We opposed the creation of such exemptions as neither justified nor appropriate. *See* Comments on Notice 2005-28 at 38.

Regarding the "common vendor" and "former employee" conduct standards of 11 C.F.R. § 109.21(d)(4)-(5), the Commission in NPRM 2005-28 asked 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 opposed 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, we argued, would fundamentally compromise the purposes and intent of BCRA § 214(c)(2)–(3) and, consequently, would constitute an impermissible construction of the statute. *See* Comments on Notice 2005-28 at 39.

With further regard to the "common vendor" and "former employee" conduct standards of 11 C.F.R. § 109.21(d)(4)-(5), the Commission in NPRM 2005-28 asked:

> [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 opposed the creation of such a presumption as a fiction that is in direct conflict with the statute. *See* Comments on Notice 2005-28 at 39.

In March 2006, the Commission issued a Supplemental Notice of Proposed Rulemaking ("SNPRM") 2006-5, published at 71 Fed. Reg. 13306 (March 15, 2006), and invited comment on political advertising data licensed from CMAG, providing information regarding television advertising spots run by Presidential, Senate, and House candidates during the 2004 election cycle.

Together with the Center for Responsive Politics, we again jointly submitted written comments in the rulemaking proceeding.[8] We argued that the CMAG data entered into the record by the Commission proves only the obvious: that candidates run more campaign ads close

[8] *See* Comments of the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics on Notice 2006-5 (March 22, 2006), *available at* http://www.fec.gov/pdf/nprm/coord_commun/comm32.pdf

in time to election day than temporally distant from it, and that the number of campaign ads run by candidates increases as election day approaches. *See* Comments on Notice 2006-5 at 1. It is unquestionably true that most campaign ads are run within 120 days of an election. But the *Shays I* circuit court ordered the Commission to consider whether substantial election-related communication occurs outside the 120-day window. 414 F.3d at 102. Just because most ads are run within 120 days of an election does not mean that the ads running outside of the 120-day period are insubstantial, either in the number of such ads or in dollar value.

We provided the Commission detailed analysis as to how its CMAG data itself shows that substantial campaign advertising does take place outside the 120-day window, and that candidates spend significant sums on such ads. We pointed out, for example, that according to the CMAG data, 8.44% of all ads run prior to the 2004 presidential primaries/caucuses in media markets contained within a single battleground state were aired more than 120 days before the primaries/caucuses—and that this amounted to more than 3,800 ads valued at more than $802,544. *See* Comments on Notice 2006-5 at 5. We further argued that, not only is this is a substantial amount of spending outside the 120-day window, but also that the CMAG data almost surely understated the spending by presenting data only for media markets contained fully within a single battleground state—thereby excluding data from large media markets in battleground states that happen to include portions of another state. For example, although the Commission identified Pennsylvania as a battleground state, the Commission excluded from its analysis ad data from the Philadelphia media market, Pennsylvania's largest media market and the fourth largest media market in the nation, and from the Pittsburgh media market, the state's second-largest media market. Neither media market meets the criterion of being contained with a single battleground state. *See id.* at 5-6.

Further, we explained that the data was not dispositive of the central issue before the Commission. The key problem with the "coordination" regulation was neither that it uses a time-frame test for coordination, nor that it uses the 120-day period as the time frame. Rather, the problem with the regulation is that, outside the 120 day pre-election window, the only test for coordination is whether an ad contains express advocacy.[9] Yet as the *Shays I* circuit court noted, that test is "functionally meaningless." 414 F.3d at 99 (quoting *McConnell,* 540 U.S. at 193). The court said that using the express advocacy test as the standard outside the 120-day window "in effect allow[s] a coordinated communication free-for-all for much of each election cycle." 414 F.3d at 100.[10]

Thus, as we explained, the question before the Commission was not whether to keep the 120-day rule or replace it with a different time frame, but whether to supplement that standard with some test—but one more robust than the "meaningless" test of express advocacy—that

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[9] Republication of campaign material also meets the "content" test outside the window. 11 C.F.R. § 109.21(c)(2). For purposes of this discussion, however, we assume that, as a practical matter, express advocacy is the only test outside the 120-day window.

[10] In the *Christian Coalition* case, Judge Green called the argument that express advocacy should be the content test for the coordination rules to be "untenable," "fanciful," "unpersuasive," "pernicious," and designed to "frustrate both the anti-corruption and disclosure goals of the Act." *See Christian Coalition*, 52 F. Supp. 2d at 87-88 & n.50; *see also supra* n.2.

would apply to those non-express advocacy campaign ads that do run outside the 120-day time frame. *See* Comments on Notice 2006-5 at 2.

Nevertheless, the Commission in June 2006 published its revised rules on "coordinated communications," which, *inter alia*:

- revised the fourth content standard at 11 C.F.R. § 109.21(c)(4) to establish separate time frames for communications referring to political parties, Congressional and Presidential candidates—shortening the time frames for Congressional candidates from 120 days to 90 days;

- retained the express advocacy standard as the principal standard by which ads outside the time frames are regulated;

- created a safe harbor for certain endorsements and solicitations by federal candidates;

- revised the temporal limit of the common vendor and former employee conduct standards by reducing it from the "current election cycle" to 120 days;

- created a safe harbor for the use of publicly available information; and

- created a safe harbor for the establishment and use of a firewall.

Final Rules and Explanation and Justification for Coordinated Communications, 71 Fed. Reg. 33190 (June 8, 2006).

1. *Shays III* District Court

In *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007) ("*Shays III District*"), the principal House sponsors of BCRA once again challenged, *inter alia*, several aspects of the Commission's "coordination" rules. The *Shays III* district court began its analysis of the "coordination" rules by recounting the history of "coordination" regulation under federal law. *Id.* at 33-37. The court then moved on to analyze the time frames used in the "coordination" rule content standard at 11 C.F.R. § 109.21(c)(4), explaining that:

> The Commission's revised content standard thus shortens the time period in which a public communication referring to a congressional candidate may be deemed coordinated from 120 days to 90 days, and retains the "gap period" between primary night and the general election window. In contrast, for presidential candidates, the Commission has closed the "gap period," while retaining the 120-day window prior to primary elections. Again, outside of the applicable windows, communications will not be deemed coordinated unless they republish a candidate's own campaign materials or "expressly advocate[ ] the election or defeat of a clearly identified candidate for Federal office."

Shays III District, 508 F. Supp. 2d at 37-38.

With respect to the time frames, the district court determined that the "FEC thus reasonably concluded, based on [the CMAG] data, that a vast majority of [Congressional] candidate advertising occurred within the 90 days prior to primary and general elections" and that the "Commission's conclusions regarding the differences in the patterns of advertising in presidential and congressional elections appear similarly reasonable." *Id.* at 42. The court continued:

> The revised content standard, however, contains more than just the pre-election windows, within which communications are held to a higher standard. Under the revised content standard, outside of the pre-election windows, communications will not be deemed coordinated unless they republish a candidate's own campaign materials or "expressly advocate[ ] the election or defeat of a clearly identified candidate for Federal office." *Id.* § 109.21(c)(2)-(3). As Plaintiff correctly points out, the E&J (and the Commission's opening brief) "reads as if the Commission faced only one assignment on remand: identifying and justifying when a pre-election period of heightened regulation of coordinated expenditures should begin…. But the D.C. Circuit made clear that the Commission was required to address *two* distinct (though related) issues: (1) 'the 120-day time frame,' and (2) 'the weak restraints appl[ied] outside of it.'" Pl.'s Br. at 26-27 (quoting *Shays I Appeal*, 414 F.3d at 100).

Shays III District, 508 F. Supp. 2d at 43-44.

The district court therefore turned to the question of whether the "weak restraints" applied outside the timeframes represented "reasoned decisionmaking." *Id.* at 44. The court explained:

> FECA provides that expenditures that are coordinated with a candidate constitute campaign contributions, 2 U.S.C. § 441(a)(a)(7)(B)(i), and, in turn, defines an "expenditure" as "*any* purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, *made by any person for the purpose of influencing any election for Federal office*," *id.* § 431(9)(A)(i) (emphasis added). As the D.C. Circuit summarized, "if someone makes a purchase or gift with the purpose of influencing an election and does so in coordination with a candidate, FECA counts that payment as a campaign contribution." *Shays I Appeal*, 414 F.3d at 97. The relevant goal, then, in designing regulations defining coordinated communication is to "capture the universe of electorally oriented communication." *Id.* at 100; *cf.* 71 Fed. Reg. at 33,191 ("The purpose of the content prong is to ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a Federal election, and therefore are not expenditures subject to regulation under the Act.") (internal quotation omitted).

Shays III District, 508 F. Supp. 2d at 44 (emphasis in original).

The court continued:

> The FEC's E&J, however, fails to provide any assurance that its revised content standards actually "capture the universe" of communications made for the purpose of influencing a federal election. Here, the *National Journal* articles proffered by Plaintiff are relevant because, regardless of their statistical significance in comparison with the CMAG data, they provide irrebuttable evidence that candidates produce advertisements outside the pre-election windows—presumably for the purpose of influencing federal elections. Nevertheless, the E&J contains only a cursory dismissal of the *National Journal* articles, treatment that skates dangerously close to the line of arbitrary and capricious decisionmaking. The E&J dismisses the advertisements described in the *National Journal* as not "empirical data," 71 Fed. Reg. at 33,192, and because there was no evidence that the advertisements had been coordinated with a candidate or political party, *id.* at 33,196-97. However, the *National Journal* articles are directly responsive to the FEC's NPRM, which requests "examples of communications from previous election cycles demonstrating that an alternative may be either underinclusive or overinclusive," and information as to whether "early electoral communications, for example, that occur more than 120 days before an election, have an effect on election results." 70 Fed. Reg. at 73,949. Furthermore, the *National Journal* articles describe 236 discrete advertisements, and represent the only evidence of candidate spending-other than the FEC's own CMAG data-introduced during the rulemaking.

Shays III District, 508 F. Supp. 2d at 44.

Not only did the *Shays III* district court find that the *National Journal* ads which we submitted to the Commission "provide irrebuttable evidence that candidates produce advertisements outside the pre-election windows," *id.*, but further found:

> [T]he evidentiary value of the *National Journal* articles is compounded by facts revealed by the FEC's own analysis of the CMAG data: that House candidates aired 8.56% of their pre-primary TV ads more than 90 days before the relevant primaries, that 8.44% of all TV ads aired by candidates prior to the 2004 presidential primaries were aired outside the 120-day pre-primary window, and that 16% of all TV ads run by presidential candidates in Iowa before the January 2004 caucuses were aired more than 120 days prior to the caucuses. <u>These percentages translate into significant numbers of advertisements and amounts of money</u>—the 3,838 ads aired more than 120 days before the 2004 presidential primaries included were valued at more than $802,544, *see* FEC Graph P8, and the 3,013 advertisements aired by House candidates more 90 days before their respective primaries were valued at $653,892, *see* FEC Graph H2. It is clear from both the *National Journal* articles and the CMAG data that candidates spend money on advertisements aired outside the pre-election windows. The question, then, is whether the E&J provides a "persuasive justification" for the "weak

restraints appl[ied] outside [of the pre-election windows]."

Shays III District, 508 F. Supp. 2d at 45 (emphasis added) (quoting *Shays I Appeal*, 414 F.3d at 100).

The court noted that the Commission attempted "to discount the significance of the evidence of candidate advertising outside the pre-election windows by claiming that a 'minimal amount of activity occurs' outside of the windows, and that 'outside of those time periods where candidate advertising occurs, there is little risk that coordinated activity presents the risk or appearance of corruption.'" *Id.* (quoting Final Rules and E&J, Coordinated Communications, 71 Fed. Reg. at 33,194 and 33,196). The court continued:

> This argument, however, is logically flawed. As the Supreme Court recognized in *McConnell*, expenditures "made after a 'wink or nod' often will be 'as useful to the candidate as cash.'" 540 U.S. at 221-222, 124 S.Ct. 619. Where advertisements are coordinated with, and controlled by, a candidate, the risk is present that they will be "given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 221, 124 S.Ct. 619. The Commission's third conclusion in its E&J—that "the minimal value of advertising outside of the revised time frames limits the risk of corruption from candidates and collaborators shifting coordinated spending to outside the time frames"—turns this logic on its head. *See* 71 Fed. Reg. at 33,196. According to the Commission, the fact that candidates spent proportionally less on advertisements outside the pre-election windows indicates that they value those advertisements less, and therefore are less likely to engage in *quid pro quo* arrangements with respect to those advertisements. *Id.* This conclusion, however, considers only the comparative value of that advertising, and not its absolute value. It is obvious that *more* advertisement occurs as elections approach, but that truism does not negate that *some* candidate spending *does* occur outside the pre-election windows, indicating that candidates *do* place some value on early advertisements. As a result, a risk or appearance of corruption is still present with respect to advertising outside of the pre-election windows.

Shays III District, 508 F. Supp. 2d at 45-46 (emphasis in original).

The *Shays III* district court then rejected the Commission's argument that its rule is supported by a lack of evidence in the administrative record of actual coordination since the Commission's "coordination" regulations took effect, recognizing that the lack of complaints alleging coordination "is hardly surprising in light of the fact that the 2002 rules established an absolute 'safe harbor' for communications publicly disseminated more than 120 days before an election, regardless of the level of coordination they involved." *Id*. at 46.

The *Shays III* district court concluded that the "administrative record, including both the *National Journal* articles and the CMAG data, demonstrates that candidates do advertise—and thus engage in activity intended to influence a federal election—outside of the pre-election windows included in the revised content standards," but that "[n]evertheless, outside those

windows, the revised content standards continue to regulate only republication of a candidate's own materials and 'express advocacy.'" *Id.* "By continuing to rely on the express advocacy standard—which the Supreme Court has declared to be "functionally meaningless," *McConnell*, 540 U.S. at 193, 124 S.Ct. 619—the Commission has essentially concluded that communications made outside of the pre-election windows require virtually no regulation at all." *Id.* According to the court, the "relevant inquiry" was whether the Commission "met its burden under the APA of establishing 'that its rule rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition'" and the court held that the "Commission has simply failed to meet this burden." *Id.* at 48-49 (quoting *Shays I Appeal*, 414 F.3d at 102).

In summary, with respect to the Commission's revisions to the "coordination" regulation content standards in 2006, the *Shays III* district court held:

> The record before the FEC during the rulemaking demonstrates that candidates do run advertisements—which do not necessarily include express advocacy, but are nevertheless intended to influence federal elections—outside of the pre-election windows included in the revised content standard. The E&J presents no persuasive justification for writing off that evidence and does not suggest that it would somehow be captured by the "functionally meaningless" express advocacy standard. As such, the E&J fails to meet the APA's standard of reasoned decisionmaking.

Shays III District, 508 F. Supp. 2d at 48-49 (footnote omitted).

In addition to challenging the "coordination" regulation's content prong time frames and the standards applicable outside of those time frames, plaintiffs in *Shays III* also challenged the Commission's revision of "the temporal limit in the common vendor and former employee conduct standards to encompass 120 days rather than the entire 'current election cycle.'" *Id.* at 49. The court determined that the revision survived scrutiny under *Chevron* steps one and two and then turned to the question of "whether the FEC has provided a rational justification for [its regulation], as required by the APA's arbitrary and capricious standard." *Id.* at 50 (alteration in original) (internal quotation omitted).

The *Shays III* district court rejected the Commission's two primary explanations for the revised temporal limit—*i.e.*, the Commission's simple conclusions (1) that an "election cycle" limit is overly broad and unnecessary to the effective implementation of the coordination provisions and (2) that reducing the temporal limit to 120 days will not undermine the effectiveness of the conduct standards because the rulemaking record indicates that material information regarding candidate and political party campaigns, strategy, plans, needs, and activities does not remain material for long during an election cycle. *Id*. at 50-51. The court found that the Commission had provided absolutely no "persuasive justification" for its conclusion that "a limit of *120 days* is more than sufficient to reduce the risk of circumvention of the Act." *Id.* at 51 (emphasis in original). Consequently, the court concluded:

> Here, the Commission has revised the temporal limit for the common vendor and former employee content standards, reversing its earlier position that the "election

> cycle [temporal limit] provides a clearly defined period of time that is reasonably related to an election." 68 Fed Reg. at 436. The Commission has done so without adequately explaining how its revised regulation will capture the universe of communications made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate." 2 U.S.C. § 441a(a)(7)(B)(i). The Court therefore concludes that the Commission's revised temporal limit is arbitrary and capricious, and in violation of the APA.

Shays III District, 508 F. Supp. 2d at 52.

2. *Shays III* Appeal

The Commission appealed the *Shays III* district court decision invalidating aspects of the Commission's revised "coordination" rules. In June 2008, the D.C. Circuit issued its decision affirming the district court. *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III Appeal*").

At the outset, the *Shays III* circuit court noted that in 2002 "Congress passed [BCRA] … in an effort to rid American politics of two perceived evils: the corrupting influence of large, unregulated donations called 'soft money,' and the use of 'issue ads' purportedly aimed at influencing people's policy views but actually directed at swaying their views of candidates." *Id.* at 916 (internal citation omitted). The court went on to explain that after the passage of BCRA, the Commission had promulgated regulations to implement it, but that the court in *Shays I* had "rejected several of them as either contrary to the Act or arbitrary and capricious, concluding that the Commission had largely disregarded the Act in an effort to preserve the pre-BCRA status quo." *Id.* at 916-17. The court continued:

> Now the FEC has revised the regulations we earlier rejected and issued several new ones, three of which are before us here: (1) a "coordinated communication" standard, the original version of which we rejected in *Shays II* [*sic*]; (2) definitions of "get-out-the-vote activity" and "voter registration activity"; and (3) a rule allowing federal candidates to solicit soft money at state party fundraisers. Although we uphold one part of the coordinated communication standard known as the "firewall safe harbor," we reject the balance of the regulations as either contrary to the Act or arbitrary and capricious. We remand these regulations in the hope that, as the nation enters the thick of the fourth election cycle since BCRA's passage, the Commission will issue regulations consistent with the Act's text and purpose.

Id. at 917 (emphasis added). This was nearly a year and a half ago, and we are now "enter[ing] the thick of" the fifth election cycle since BCRA's passage, and the Commission has yet to "issue regulations consistent with the Act's text and purpose."

After reviewing the procedural history of the Commission's post-BCRA rulemakings and the *Shays I* and *Shays III* litigation, the court moved on to the merits of the case, beginning:

> The first and most important issue before us is the FEC's revised "coordinated communication" standard. Federal election law "has long restricted coordination of election-related spending between official campaigns and outside groups. The reason ... is obvious. Without a coordination rule, politicians could evade contribution limits and other restrictions by having donors finance campaign activity directly," e.g., by asking a donor to buy air time for a campaign-produced advertisement.
>
> To prevent such evasion, FECA defines "contributions" to include "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate." 2 U.S.C. § 441a(a)(7)(B)(i).

Shays III Appeal, 528 F.3d at 919-20 (internal citation omitted).

The *Shays III* circuit court recounted that, in *Shays I*, it had invalidated the Commission's earlier "coordination" rule's reliance on an express advocacy test outside of the 120-day pre-election time frame because "contrary to the APA, the Commission offered no persuasive justification for the provisions challenged …, i.e., the 120-day time-frame and the weak restraints applying outside of it." *Id*. at 921 (quoting *Shays I Appeal*, 414 F.3d at 100). The court explained that it had remanded the rule and "directed the FEC to provide 'some cogent explanation' for it, 'not least because' it effectively 'allowed a coordinated communication free-for-all for much of each election cycle.'" *Id.* (quoting *Shays I Appeal,* 414 F.3d at 100).

> On remand, the Commission published a new notice of proposed rulemaking, took comments, held hearings, and analyzed extensive data on television advertising by candidates for federal office. It then issued a revised regulation identical to the original regulation except that it shortened the length of stricter regulation in congressional races to 90 days. … Outside the 90/120-day windows, however, the regulation still prohibits only coordinated advertisements that " disseminate[ ], distribute[ ], or republish [ ] … campaign materials prepared by a candidate," or "expressly advocate [ ] the election or defeat of a clearly identified candidate."

Id. at 921-22 (quoting 11 C.F.R. § 109.21(c)).

With respect to the CMAG data considered by the Commission in its 2005-06 rulemaking, the *Shays III* circuit court recognized that "[w]hile these percentages [of ads run outside of the 90/120-day windows] are small, the total amount spent on pre-window ads was substantial, totaling into the millions of dollars." *Id.* at 924. The circuit court also referenced the *National Journal* materials which we submitted to the Commission, noting: "In addition to evidence about spending by candidates, the Commission had before it many examples of expenditures by outside groups before the 90/120-day windows[,]" citing the 2004 Alaska Senate race ads by the U.S. Chamber of Commerce, the 2004 Florida Senate race ads attacking candidate Mel Martinez, the 2006 Pennsylvania Senate race ads by "Americans for Job Security" supporting Senator Rick Santorum, Club for Growth's 2004 ads attacking Senator Tom Daschle in the South Dakota Senate race, and 2006 ads attacking Senator Lincoln Chafee in Rhode

Island. *Id.* at 924.

Importantly, the *Shays III* circuit court recognized that "[b]ecause none of these ads contained the 'magic words' of express advocacy, all could have been coordinated with candidates under the Commission's rule." *Id.* Further, the court explained:

> The record also reveals that the vast majority of campaign ads omit "express advocacy." "In the 1998 election cycle, just 4% of candidate advertisements used magic words; in 2000, that number was a mere 5%." "Indeed, campaign professionals" told Congress while it was considering BCRA "that the most effective campaign ads … avoid the use of the magic words." Because campaign advertisements rarely use magic words, the Supreme Court has declared the express advocacy test "functionally meaningless."

Id. (internal citation omitted) (quoting *McConnell*, 540 U.S. at 127 n.18, 127, 193).

Based on this evidence, the *Shays III* circuit court found:

> [T]he record demonstrates several key points: (1) the vast majority of advertising by candidates occurs in the 90/120-day windows the FEC regulates more strictly; (2) candidates and outside groups nonetheless run a significant number of ads before the 90/120-day windows; and (3) very few ads contain magic words. These facts lead us to two inexorable conclusions: the FEC's decision to regulate ads more strictly within the 90/120-day windows was perfectly reasonable, but its decision to apply a "functionally meaningless" standard outside those windows was not.

Id. (quoting *McConnell*, 540 U.S. at 193).

Faced with the issue of whether the "FEC's decision to regulate only ads containing express advocacy outside the 90/120-day windows fails *Chevron* step two review or violates the APA," the court reasoned that the "question, then, is this: Does the challenged regulation frustrate Congress's goal of 'prohibiting soft money from being used in connection with federal elections'?" *Id.* at 924-25 (quoting *McConnell*, 540 U.S. at 177 n.69). The *Shays III* circuit court concluded:

> We think it does. Outside the 90/120-day windows, the regulation allows candidates to evade-almost completely-BCRA's restrictions on the use of soft money. As FEC counsel conceded at oral argument, Oral Arg. at 0:46-2:00, the regulation still permits exactly what we worried about in *Shays II* [*sic*], i.e., more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads contain no magic words. 414 F.3d at 98. Indeed, pressed at oral argument, counsel admitted that the FEC would do nothing about such coordination, even if a contract formalizing the coordination and specifying that it was "for the purpose of influencing a federal election" appeared on the front page of the New York Times. Oral Arg. at 7:34-8:03.

> Thus, the FEC's rule not only makes it eminently possible for soft money to be "used in connection with federal elections," *McConnell*, 540 U.S. at 177 n. 69, 124 S.Ct. 619, but also provides a clear roadmap for doing so, directly frustrating BCRA's purpose. Moreover, by allowing soft money a continuing role in the form of coordinated expenditures, the FEC's proposed rule would lead to the exact perception and possibility of corruption Congress sought to stamp out in BCRA, for "expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash,'" *id.* at 221, 124 S.Ct. 619 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442, 446, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001)), and "[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude," *id.* at 145, 124 S.Ct. 619.

Shays III Appeal, 528 F.3d at 925.

The *Shays III* circuit court explicitly rejected four arguments made by the Commission in support of its rule. First, the court rejected the argument that the rule protects the First Amendment rights of outside groups conducting independent expenditures because any standard more vague than express advocacy would unacceptably chill the speech of such groups. The court reiterated what it had said to this point in *Shays I*—"'regulating nothing at all' would achieve the same purpose, 'and that would hardly comport with the statute.'" *Id.* (quoting *Shays I Appeal*, 414 F.3d at 101). "In sum, although the FEC, properly motivated by First Amendment concerns, may choose a content standard less restrictive than the most restrictive it could impose, it must demonstrate that the standard it selects 'rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition.' Because the 'express advocacy' standard fails that test, it runs counter to BCRA's purpose as well as the APA." *Id.* at 926 (quoting *Shays I Appeal*, 414 F.3d at 102).

Second, the court rejected the Commission's argument that it should reach the same conclusion it reached in *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir.1986)—deferring to the Commission to uphold a rule "at the outer bounds of permissible choice." *Shays III Appeal*, 528 F.3d at 926 (quoting *Orloski*, 795 F.2d at 167). The *Shays III* circuit court reasoned that, unlike the rule at issue in *Orloski*, which did "not create the potential for gross abuse," the rule at issue in this case "'unduly compromises' the Act's purpose of 'prohibiting soft money from being used in connection with federal elections.'" *Id.* at 926-27 (quoting *McConnell*, 540 U.S. at 177 n.69).

Third, the *Shays III* circuit court rejected the Commission's disparagement of the *National Journal* evidence which we introduced in the 2005-06 rulemaking. The court recognized that the FEC's own study showed that almost 10% of primary election ads by House candidates in 2004 ran before the pre-election window and that, "[n]otably, many of Shays's examples came from media markets excluded from the FEC's study, and they suggest that the percentage of early advertising may be even greater than that captured by the FEC's analysis. Shays's evidence, combined with the FEC's study, proves his point." *Id.* at 927.

Finally, the court rejected the Commission's contention that the lack of complaints filed

in recent years alleging illegal coordination outside the 90/120-day windows should allay any court concerns about the standard applicable outside the 90/120-day windows. The court correctly recognized that "[t]his argument flies in the face of common sense." *Id.* "Of course the FEC hasn't received many complaints," the court explained, "the challenged rule allows unlimited coordination so long as the resulting advertisements omit express advocacy. In other words, people have had no reason to report this type of coordination because it is perfectly legal under the FEC's rule." *Id.* The court continued: "Moreover, the Commission's prediction about what will happen in the future disregards everything Congress, the Supreme Court, and this court have said about campaign finance regulation." *Id.*

> Under the present rules, any lawyer worth her salt, if asked by an organization how to influence a federal candidate's election, would undoubtedly point to the possibility of coordinating pre-window expenditures. The FEC's claim that no one will take advantage of the enormous loophole it has created ignores both history and human nature.

Id. at 928.

The *Shays III* circuit court then moved on to the common vendor/former employee rule. The court explained:

> Because campaign vendors and employees complained that the regulation [of their activities throughout an election cycle] was unnecessarily cumbersome—they claimed that the information they possess quickly loses value—the FEC decided to change the rule so that it only prohibits vendors and former employees from using "material information" about "campaign plans, projects, activities, or needs," or sharing such information with the person funding the ad, for 120 days, rather than throughout the whole election cycle.

Shays III Appeal, 528 F.3d at 928.

The circuit court explained that the district court "found the revised regulation arbitrary and capricious because the FEC had failed to justify its policy change" and that the circuit court agreed with this conclusion. *Id*. In reaching this conclusion, the circuit court summarized and then rejected the Commission's explanation and justification for the revised rule. According to the Commission, "[r]educing the temporal limit to 120 days will not undermine the effectiveness of the conduct standards and will not lead to circumvention of the Act" because "material information regarding candidate and political party committee campaigns, strategy, plans, needs, and activities … does not remain 'material' for long periods of time during an election cycle." *Id.* (quoting 71 Fed. Reg. 33204). The Commission further attempted to justify the revised rule by arguing that "a limit of 120 days is more than sufficient to reduce the risk of circumvention of the Act." *Id.* (quoting 71 Fed. Reg. 33205).

The *Shays III* circuit court rejected this rational on several grounds. First, it explained, as the district court had pointed out, "the Commission's generalization that material information does not remain material for long overlooks the possibility that *some* information—for instance,

a detailed state-by-state master plan prepared by a chief strategist—may very well remain material for at least the duration of a campaign." *Id.* (quoting *Shays III District,* 508 F. Supp. 2d at 51). The court noted that the Commission's "own regulations recognize that some types of information retain value for longer than 120 days. For example, the Commission says that polling data—arguably the campaign information that most quickly becomes obsolete—retains some value for 180 days." *Id.* at 928-29 (citing 11 C.F.R. § 106.4(g)).

Second, the *Shays III* circuit court observed that the FEC had "provided no explanation for why it believes 120 days is a sufficient time period to prevent circumvention of the Act." *Id.* at 929. The court concluded that, "[t]hough the Commission certainly has some discretion in choosing exactly where to draw a bright line such as this one, it must support its decision with reasoning and evidence, for 'a bright line can be drawn in the wrong place.'" *Id.* (quoting *Shays I Appeal*, 414 F.3d at 101).

IV. Present "Coordination" Rulemaking

Over two years after the *Shays III District* decision, and some sixteen months after the *Shays III Appeal* decision, the Commission finally initiated this rulemaking to correct the rules declared illegal in those decisions. To address the concern of the *Shays III* circuit court regarding election-related communications taking place outside the 90-day and 120-day windows, the Commission is considering four approaches, presented in NPRM 2009-23, for the content standard outside the pre-election window:

- Adopting a content standard to cover public communications that promote, support, attack, or oppose a political party or a clearly identified federal candidate (the "PASO standard");

- Adopting a content standard to cover public communications that are the "functional equivalent of express advocacy," as articulated in *FEC v. Wis. Right to Life, Inc*., 551 U.S. 449, 469-70 (2007);

- Clarifying that the existing content standard includes express advocacy as defined under both 11 CFR § 100.22(a) and (b); and

- Adopting a standard that pairs a public communication content standard with a new conduct standard (the "Explicit Agreement" standard).

See NPRM 2009-23, 74 Fed. Reg. at 53897.

To address the *Shays III* circuit court's invalidation of the common vendor/former employee provisions at 11 C.F.R. § 109.21(d), the Commission is considering three alternatives for the time periods covered by the rule:

- Retaining the 120-day period;

- Increasing the time period to two years; or

- Returning the regulation's coverage to the "current election cycle."

In addition to these issues, the Commission also proposes the creation of "safe harbors" for communications in support of 501(c)(3) organizations and for business and commercial communications—aspects of the "coordination" regulation not litigated in *Shays III*.

Below, we comment on each of these proposals in order. First, however, we explain why the Commission's preoccupation with express advocacy and the "functional equivalent of express advocacy"—both in the "coordination" regulation invalidated by the *Shays III* circuit court and in NPRM 2009-23—is unwarranted and inappropriate in the context of coordinated communications.

A. The Express Advocacy Test Is Inapplicable to Candidates and Political Party Committees and Is Therefore Irrelevant to the Regulation of "Coordination" With These Entities.

The Commission's preoccupation with express advocacy, both in the "coordination" regulation invalidated by the *Shays III* circuit court and in NPRM 2009-23, reflects an approach to regulating candidates and political parties that is contrary to the plain language of FECA as interpreted by the Supreme Court in *Buckley*, as well as contrary to common sense. In short, while the *Buckley* Court did hold that individuals and other non-"major purpose" entities are constitutionally entitled to the narrowing express advocacy construction of FECA's definition of "expenditure" in the context of making independent expenditures, the *Buckley* Court did not extend the express advocacy construction to "expenditures" by candidates, political parties and other groups with the "major purpose" of influencing elections, nor did it extend that construction to those individuals or groups making expenditures coordinated with candidates or parties.

When expenditures are coordinated with a candidate or party, they are legally indistinguishable from expenditures made by a candidate or party: indeed, as a matter of law they are treated as in-kind contributions to the candidate or party in the form of the coordinated expenditure. 2 U.S.C. § 441a(a)(7)(B). Thus, when made by a person in coordination with a candidate or party, the term "expenditure" is to be construed by the same standard as an "expenditure" when made by a candidate or party itself. And *Buckley* makes clear that the statutory definition of "expenditure"—spending "for the purpose of influencing an election," without the limiting gloss of the express advocacy standard—is to be applied to define the term "expenditure" when made by a candidate or party.

Thus, the express advocacy test has no application in this rulemaking, which pertains to the regulation of expenditures coordinated with candidates and political parties which, as a matter of law, are to be analyzed as expenditures made by candidates and parties.

To elaborate, FECA defines "political committee" to mean "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000

during a calendar year." 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a). A "contribution," in turn, is defined as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office…." 2 U.S.C. § 431(8)(A) (emphasis added); *see also* 11 C.F.R. § 100.52(a). And an "expenditure" is defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.…" 2 U.S.C. § 431(9)(A) (emphasis added); *see also* 11 C.F.R. § 100.111(a).

In *Buckley*, the Court construed the term "political committee" to "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." *Buckley*, 424 U.S. at 79 (emphasis added). Thus, under FECA as interpreted by the *Buckley* Court, two types of organizations can be regulated as "political committees"—candidate-controlled organizations and so-called "major purpose" groups (*i.e.*, groups that have a "major purpose" of influencing the nomination or election of a candidate), such as political party committees.

The *Buckley* Court analyzed the constitutionality not only of the FECA definition of "political committee," but also of the underlying term "expenditure." In doing so, the Court made a distinction critical to the effective enforcement of the statute's restrictions on expenditures made in coordination with candidates and political party committees. With respect to candidates and "major purpose" groups, the *Buckley* Court held that the FECA definition of "expenditure" (any payment made "for the purpose of influencing" a federal election) is sufficiently clear to be constitutional (*i.e.*, not unconstitutionally vague). Candidates and "major purpose" groups (such as, *e.g.*, political parties), the Court reasoned, are not vulnerable to concerns of vagueness in drawing a line between issue discussion and electioneering activities because their activities "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id*. at 79.

Thus, with respect to candidates and groups which have a "major purpose" of influencing elections, the *Buckley* Court held that FECA's "for the purpose of influencing" definition of "expenditure" raises no constitutional vagueness concerns—and is in no need of a narrowing express advocacy construction—because money spent by these entities is, by definition, campaign related.

By contrast, the Court developed and applied the express advocacy test only to spenders other than candidates and "major purpose" groups, reasoning:

> 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.

Buckley, 424 U.S. at 79-80 (emphasis added).

Thus, the Court in *Buckley* made a crucial distinction: when the spender is a candidate or an organization with a "major purpose" to influence candidate elections, such as a political party, the statutory definition of "expenditure" as spending "for the purpose of influencing" a federal election is sufficiently clear to be facially constitutional, because such organizations "are, by definition, campaign related" and their spending "can be assumed" to fall within the area properly regulated by Congress. Therefore, there is no need for an express advocacy limitation on the definition of "expenditure" in order to save the term from vagueness.

When spending by a person or group is coordinated with a candidate or party, it is the same as if the spending is by the candidate or party. Thus, any such coordinated spending must be analyzed as if done by the candidate or party. Since the express advocacy test does not apply to limit the definition of an "expenditure" when spending is done by a candidate or party, the express advocacy standard similarly is irrelevant to the determination of whether an "expenditure" made in coordination with a candidate or political party constitutes an in-kind contribution to that candidate or political party. Instead, <u>any</u> payment "for the purpose of influencing" a federal election 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." 2 U.S.C. §§ 431(9)(A)(i), 441a(a)(7)(B)(i). The Court affirmed this analysis in *McConnell*, where it cited and quoted the same language from *Buckley* in rejecting a vagueness challenge to the "promote, support, attack or oppose" standard in BCRA. *McConnell*, 540 U.S. at 170 n.64.

Put differently, neither the First Amendment nor the *Buckley* decision requires the Commission to limit the reach of its "coordination" content standard to express advocacy or the "functional equivalent of express advocacy" as the Commission proposes under Alternatives 2 and 3 of NPRM 2009-23.

B. Alternative 1—The PASO Standard

Alternative 1 would amend 11 C.F.R. § 109.21(c)(3) by replacing the express advocacy standard with a PASO standard—any public communication that promotes, supports, attacks, or opposes a political party or a clearly identified candidate for federal office would meet the content prong of the coordinated communications test. *See* NPRM 2009-23, 74 Fed. Reg. at 53897. <u>The effect of this would be to continue to capture any public communication that refers to a clearly identified candidate within the existing time frames, and to capture any PASO communication outside the time frames</u>.

We support Alternative 1 as necessary to address the concern of the *Shays III* circuit court regarding election-related communications taking place outside the 90-day and 120-day windows.

In principle, as we explain above, the test for whether a coordinated communication is an "expenditure" is the statutory definition of "expenditure"—whether the communication is "for the purpose of influencing" an election. While that test alone would be sufficient for these

purposes, the PASO standard is a fair proxy for the same question, and thus, for whether a communication meets that statutory test. It is also a standard developed by Congress and approved by the Supreme Court. Finally, in our judgment, it satisfies the key test imposed by the D.C. Circuit—it rationally separates election-related advocacy from non-election related advocacy outside the Commission's existing time frames. It is a fair premise to assume that if a spender coordinates with a candidate on an ad that promotes that candidate (or attacks his electoral opponent), the spending is done for the purpose of influencing the candidate's election.

We do not believe it is necessary (or advisable) for the Commission to adopt a new regulatory definition of the PASO test. In implementing BCRA, the Commission has already incorporated the PASO standard into multiple regulations: those defining "Federal election activity" in the soft money rules governing state and local party communications, and in the allocation of funds for these communications, *see* 11 C.F.R. §§ 100.24(b)(3) and (c)(1), 300.33(c), 300.71, 300.72.

Notwithstanding the fact that the Commission has used the PASO standard in regulations adopted over seven years ago, it has not seen the necessity of adopting a regulatory definition of PASO or any of its component terms. Indeed, it considered and rejected the need to write a regulatory definition of the PASO test during the course of its post-BCRA rulemakings.

In part, undoubtedly, this is because the Supreme Court itself has already said that the PASO standard is, on its own terms, clear enough. As the Commission recognizes in NPRM 2009-23:

> The Supreme Court in *McConnell* upheld the statutory PASO standard in the context of BCRA's provisions limiting party committees' Federal election activities to Federal funds, noting that "any public communication that promotes or attacks a clearly identified Federal candidate directly affects the election in which he is participating." *McConnell*, 540 U.S. at 170. The Court further found that Type III Federal election activity was not unconstitutionally vague because the "words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision." *Id.* at 170 n.64. The Court stated that the PASO words "'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Id.* (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972)). The Court stated that this is "particularly the case" with regard to Federal election activity, "since actions taken by political parties are presumed to be in connection with election campaigns." *Id.*

74 Fed. Reg. at 53898 (emphasis added).

McConnell thus makes clear that the PASO test is, on its own terms, sufficiently definite to satisfy constitutional requisites regarding vagueness, and that the Court's conclusion applies not only to party committees, but also to any "person of ordinary intelligence." *McConnell*, 540 U.S. at 170 n.64. That determination by the Court can only be understood as meaning that the

term is not vague even for spenders other than party committees. To be sure, the Court emphasized the term's facial clarity in the context of spending by party committees—the particular context at issue in *McConnell*—but it did so by making a broader statement about the term's clarity as applied to "any person" of "ordinary intelligence." In other words, the terms comprising PASO are clear on their face—regardless of the regulatory context in which they are employed.

In any event, the issue here is spending by a person in coordination with a candidate or party—not independent spending—so the spending is in effect done by the candidate or party. As such, it is "particularly the case" that the PASO standard is sufficiently clear, "since actions taken by [candidates and] political parties are presumed to be in connection with election campaigns." *Id*. For the same reason, the Supreme Court's decision in *Wisconsin Right to Life*—a decision regarding a provision of federal law applicable to the independent activities of non-"major purpose" groups—has no application to the regulation of expenditures coordinated with candidates and political parties.

For these reasons, we do not believe that a new regulation defining PASO is necessary or appropriate.

The Commission asks whether the PASO standard "should be limited by, for example, requiring that the communication be disseminated in the jurisdiction in which the clearly identified candidate seeks election, or in some other way?" 74 Fed. Reg. at 53898. "Alternatively," the Commission asks, "could communications disseminated outside the jurisdiction in which the clearly identified candidate seeks election still be made for the purpose of influencing the election, such as by soliciting funds for the election or generating other communications that will be directed to the jurisdiction?" *Id.*

The PASO standard should not be limited as suggested in the NPRM. Communications disseminated outside the candidate's jurisdiction could certainly be made for the purpose of influencing the election; both examples given by the Commission—fundraising appeals and appeals to contact voters within the jurisdiction—aptly illustrate this point. Limiting the PASO standard in this manner would "fail to address the court's concern in *Shays III Appeal* that the Commission rationally separate election-related advocacy from other communications falling outside the Act's expenditure definition." *Id*.

In the event that the Commission does decide to promulgate a regulatory definition of PASO, we do not oppose Alternative A, although we also do not believe it adds much nor do we urge its adoption. Alternative A would define each of the four component PASO words separately, essentially by adding a list of synonyms to each of the four PASO standards. We do not believe this detracts from the basic statutory test, although we are at the same time skeptical that it adds much either. Indeed, it invites a type of infinite-regression problem: if the word "promote" is defined to mean, *inter alia*, "encourage," what then is the meaning of "encourage"? Listing dictionary synonyms for a word is not a very useful means of defining the word for regulatory purposes.

As to the other aspects of Alternative A, we think clarifying that a communication may PASO a candidate even though it does not refer to an election, candidacy, party or voting is both correct and helpful, as is the obvious statement that any communication which expressly advocates a candidate's election also meets the PASO test.

On the other hand, we strongly oppose Alternative B, which would not define any of the four PASO words, but would provide that a communication PASOs a candidate only if it contains a clear and explicit nexus to the candidacy or the election of the candidate with whom the ad is coordinated. *See* 74 Fed. Reg. at 53899.

Whereas under Alternative A the PASO definition would not require any reference to the fact that an individual is a federal candidate or any reference to a political party, the definition in Alternative B would require an "explicit" reference to either a clearly identified federal candidate or a political party. *See* proposed Alternative B at 100.23(b)(1)(ii). "Additionally, Alternative B requires the unambiguous PASOing of a candidate or party in addition to a clear nexus between that candidate or party and an upcoming election or candidacy." 74 Fed. Reg. 53900.

Requiring that the communication not only PASO a candidate or party but also make some explicit reference to an upcoming election or candidacy would render the regulation as functionally meaningless as the express advocacy standard it is intended to replace. Under Alternative B, a television ad fully coordinated with Senator Joe Smith that lavishly praised Smith and his record would nevertheless fail to meet the PASO standard (and thus not be covered by the coordination rules) if the ad made no reference to an upcoming election or to Smith's candidacy.

Limiting the PASO standard in this manner would fail to capture most of the ads we previously submitted to the Commission as examples of ads that promoted (or attacked) candidates and that had a clear election-related purpose. We submitted these ads as exhibits in the rulemaking record in the prior coordination rulemaking and they were part of the administrative record before the district court and appeals court in *Shays III*. These ads, by and large, did not expressly reference an election or candidacy, so just as they were not captured by the express advocacy test, so too they would not be captured by the Commission's proposed neutered version of the PASO test.

Consider the following ad, cited by the *Shays III* circuit court as an illustration of an election-related ad "supporting Senator Rick Santorum" that would not be captured by the express advocacy content standard. *Shays III Appeal*, 528 F.3d at 924. The ad was paid for by a group calling itself "Americans for Job Security," which made a $500,000 TV ad buy in November 2005 touting the virtues of then-incumbent Senator Santorum—nearly half a year before the Pennsylvania primary and nearly a full year before the general election:

> **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.

Under Alternative B, this ad would not "promote" or "support" Santorum—*i.e.*, would not meet the PASO test—because it does not contain a "clear nexus" between Santorum and his candidacy or his election. Thus, this ad—aired outside the 90 day pre-election time frame—would still fail to meet any Commission content standard. Under the Alternative B PASO rule, there would still be no restriction on any outside group fully coordinating this ad with Senator Santorum—indeed, having Santorum write the ad for the group—and then spending hundreds of thousands of dollars to air it.[11]

We refer the Commission to—and herein expressly incorporate by reference into this rulemaking docket—the hundreds of examples of actual ads that we submitted to the Commission in the prior coordination rulemaking that would present the identical problem: they

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[11] As another example we previously provided to the Commission, a group called the Reform Voter Project 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. 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.
>
> **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)*

Again, this ad makes no reference to the election or to President Bush' candidacy, so would not meet the Alternative B PASO test.

would not meet the Alternative B PASO test because they contain no explicit nexus to a candidacy or election, and thus would fall outside the coordination rule.[12] As such, ads that lavishly praise a candidate or attack his opponent could be fully coordinated with a candidate—indeed, written by the candidate with explicit directions to the spender as to when and where to run the ads—and paid for in unlimited amounts by an outside group, so long as they are run outside the 90 day time frame and omit any reference to the election or the candidate's candidacy.

The approach set forth in Alternative B would not solve the Commission's problem, for the PASO test, so defined, would "fail to address the court's concern in *Shays III Appeal* that the Commission rationally separate election-related advocacy from other communications falling outside the Act's expenditure definition." 74 Fed. Reg. at 53898.

Further, Alternative B contains the additional criterion that the communication be publicly distributed or disseminated in the clearly identified federal candidate's or party's jurisdiction. *Id.* at 53901. As noted above, the Commission itself has provided examples of communications distributed outside of a candidate's jurisdiction—fundraising appeals and appeals to contact voters within the jurisdiction—that nevertheless clearly have the purpose of influencing the candidate's election. This is yet another example of how Alternative B would fail to rationally separate election-related advocacy from other communications falling outside the Act's expenditure definition. The Commission asks whether communications "favorable or critical of a candidate but disseminated outside that candidate's jurisdiction [could] still be made for the purpose of influencing the election?" *Id*. The obvious answer to this question is yes.

For all of these reasons, while we support the promulgation of a content test incorporating the PASO standard, we think it is unnecessary to define the component terms of PASO. In the event the Commission nevertheless decides to promulgate a regulatory definition of the PASO terms, we do not oppose Alternative A, but we strongly oppose Alternative B because it simply replicates, and does not solve, the problem posed by the court to "rationally separate election-related advocacy from other communications falling outside the Act's expenditure definition." 74 Fed. Reg. at 53898.

C. Alternative 2—The Modified *WRTL* Content Standard

As a second alternative, the Commission proposes adding a new content standard that "would apply to any public communication that is the 'functional equivalent of express advocacy.'" 74 Fed. Reg. at 53902. The proposed standard would specify that "a communication is the 'functional equivalent of express advocacy' if it 'is susceptible of no reasonable interpretation other than as an appeal to vote for or against' a clearly identified

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[12] *See* Comments on Notice 2005-28, *supra* n. 7, at 16-28, APPENDICES I-VI. A review of the political advertising data compiled by the *National Journal* during the 2008 and current 2010 election cycles demonstrates that substantial election-related advertising continues to occur outside the 90 and 120-day regulatory time frames. If anything, the trend appears to be toward increased amounts of such early advertising at both the presidential and congressional campaign levels. *See Ad Spotlight*, NATIONAL JOURNAL, *available at* http://www.nationaljournal.com.

Federal candidate." *Id.* This standard is based on the test articulated by the Supreme Court in *WRTL* and is referred to by the Commission as the "modified *WRTL* content standard." *Id.*

"The Commission seeks comment on whether the proposed Modified *WRTL* content standard complies with the Court of Appeals' requirement in *Shays III Appeal* that the Commission adopt a standard that rationally separates election-related advocacy from other communications falling outside the Act's expenditure definition." *Id*.

We submit that, for the same reasons the *Shays III* circuit court invalidated the Commission's rule relying on express advocacy outside the 90/120-day time periods, so too would the court invalidate a rule relying on the "functional equivalent of express advocacy"—because such a rule would simply provide the functional equivalent of the same problems that made the express advocacy test itself a legally insufficient standard (*i.e.*, it would fail to rationally separate election-related advocacy from other communications falling outside the Act's expenditure definition).

The *Shays III* circuit court explained:

> The record also reveals that the vast majority of campaign ads omit "express advocacy." "In the 1998 election cycle, just 4% of candidate advertisements used magic words; in 2000, that number was a mere 5%." *McConnell*, 540 U.S. at 127 n. 18, 124 S.Ct. 619. "Indeed, campaign professionals" told Congress while it was considering BCRA "that the most effective campaign ads … avoid the use of the magic words." *Id.* at 127, 124 S.Ct. 619. Because campaign advertisements rarely use magic words, the Supreme Court has declared the express advocacy test "functionally meaningless." *Id.* at 193, 124 S.Ct. 619.

Shays III Appeal, 528 F.3d at 924. The court continued:

> Thus, "[n]otwithstanding 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," *id.* at 101-02 (citation omitted), which, remember, defines "expenditure" as "any purchase, payment, … or gift of money or anything of value, made by any person *for the purpose of influencing any election for Federal office*." 2 U.S.C. § 431(9)(A)(i) (emphasis added). Here the Commission failed to show that its rule rationally separates election-related advocacy from other speech, <u>for many of the ads its rule leaves unregulated are plainly intended to "influenc[e] an [ ] election for Federal office."</u> *Id.* … [T]here is no question that coordinated ads omitting magic words are often intended to influence federal elections. This is true even outside the 90/120-day windows, for as the FEC itself found, "*[a]ny time* a candidate uses campaign funds to pay for an advertisement, it can be presumed that this advertisement is aired for the purpose of influencing the candidate's election." 71 Fed. Reg. at 33,193 (emphasis added). We have no reason to think this is any less true of spending that candidates coordinate with outside groups. In

> sum, although the FEC, properly motivated by First Amendment concerns, may choose a content standard less restrictive than the most restrictive it could impose, it must demonstrate that the standard it selects "rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition." *Shays II* [*sic*], 414 F.3d at 102. Because the "express advocacy" standard fails that test, it runs counter to BCRA's purpose as well as the APA.

Shays III Appeal, 528 F.3d at 925-26 (emphasis added).

Just as many of the ads left unregulated by the express advocacy standard are "plainly intended to 'influenc[e] an [ ] election for Federal office,'" *id.* at 926, so too are many of the ads that would be left unregulated by a "functional equivalent of express advocacy" standard. Similarly, just as the express advocacy standard fails the test of rationally separating election-related advocacy from other activity falling outside FECA's expenditure definition, so too would a "functional equivalent of express advocacy" standard.

For these reasons, the Alternative 2 proposal to revise the content standard to cover communications containing the "functional equivalent of express advocacy" is contrary to law, would be radically under-inclusive and would not comply with the *Shays III* circuit court remand.

D. Alternative 3—Clarification of the Express Advocacy Standard

As a third alternative, the Commission proposes clarifying section 109.21(c)(3) by including a cross-reference to the express advocacy definition at 11 C.F.R. § 100.22. *See* 74 Fed. Reg. at 53904.

For the same reasons set forth above with regard to Alternative 2, we strongly oppose Alternative 3. The Alternative 3 proposal to merely cross reference the existing regulatory definition of express advocacy would be as under-inclusive in its coverage of election-related communications as Alternative 2. Alternative 3 is still an express advocacy test, and for that reason is contrary to law, would be radically under-inclusive and would not comply with the *Shays III* circuit court remand.

E. Alternative 4—The "Explicit Agreement" Standard

As a fourth alternative, the Commission proposes amending the coordination content standards to include any "public communication" (as defined in 11 C.F.R. § 100.26) if, and only if, a new "explicit agreement" conduct standard at proposed 11 C.F.R. § 109.21(d)(7) is also met. Proposed 11 C.F.R. § 109.21(d)(7), in turn, would be met where:

> There is a formal or informal agreement between a candidate, authorized committee, or political party committee and a person paying for the communication to create, produce, or distribute the communication. For purposes of this paragraph (d)(7), either the communication or the agreement must be made for the purpose of influencing a Federal election.

74 Fed. Reg. at 53912.

We support the inclusion of the proposed "explicit agreement" standard in the revised "coordination" regulation, but only if this standard supplements and does not replace the other broader existing conduct standards, and so long as it is adopted in conjunction with the Alternative 1 PASO standard, as advocated above.[13]

We stress that this "explicit agreement" standard should be adopted only in addition to the existing conduct standards, and should apply broadly to "any public communication." The proposed "explicit agreement" standard is similar to the standard adopted by the Commission in 2000 following the district court ruling in the *Christian Coalition* case. That standard was expressly disapproved of by Congress in BCRA, which provides in section 214 that the Commission "shall not require agreement or formal collaboration to establish coordination." It would be in plain disregard of BCRA and of congressional intent for the Commission now to adopt an "explicit agreement" standard in the absence of the other, existing conduct standards.

The proposed Alternative 4 rule itself, *see* 74 Fed. Reg. at 53912, makes clear that the "explicit agreement" standard would be adopted in addition to the existing conduct tests. But the discussion in the NPRM is less clear on this point, and implies that the Commission is open to considering the adoption of this standard as the only conduct test. *See* 74 Fed. Reg. at 53905 ("Should the 'Explicit Agreement' standard be adopted in conjunction with another proposed standard?"). To follow that course would be flatly illegal.

The NPRM explanation of Alternative 4 relies on the D.C. Circuit's discussion in *Shays III*, but wholly misreads what the court said. In the portion quoted by the NPRM, the court was discussing the problem with the Commission's decision to have only an express advocacy content standard outside the pre-election windows, and the court made the point that a non-express advocacy ad promoting the candidate would not trigger the coordination rule even if there was an explicit agreement between the candidate and the spender to run the ad. *Shays III Appeal*, 528 F.3d at 921.

The court's point here was about how bad the express advocacy content standard is, not an endorsement of an "explicit agreement" conduct standard. But the remedy to an overly narrow content standard is not the adoption of an overly narrow conduct standard. To say, as the NPRM does, that the proposed "explicit agreement" conduct standard "is an attempt to address the underlying concern" of the *Shays III* court wholly misinterprets the court's concern, which

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[13] The Commission seeks comment on whether one, two, all, or none of the example scenarios should be covered by the proposed "Explicit Agreement" standard. 74 Fed. Reg. at 53905. Example 1 would be covered by the proposed "Explicit Agreement" standard. Example 2 would likewise be covered by the proposed "Explicit Agreement" standard. "Magic words" are not necessary under the standard; both the communication and the agreement in Example 2 are clearly "for the purpose of influencing the election" and, thus, covered by the proposed "Explicit Agreement" standard. Similarly, Example 3 is covered by the proposed "Explicit Agreement" standard. Candidate Jones' agreement with Jane Doe, as well as the communications "against Candidate Jones' opponent" are clearly "for the purpose of influencing the election."

was about the insufficiency of the express advocacy test as a content standard. It is of course true, as the court indicated, that conduct which meets the "explicit agreement" standard should be treated as coordinated, even in the absence of express advocacy. But to say that such conduct is sufficient for a finding of coordination does not mean it is necessary, and nothing in *Shays III* supports the proposition that the conduct test should be limited to "explicit agreement."

While we do not object to the adoption of this standard as a supplement to the existing conduct tests, as set forth in the text of the Alternative 4 proposed rule, we strongly object to the adoption of this conduct test in the absence of the other, existing conduct standards.

F. Proposals for Revising the Common Vendor and Former Employee Provisions at 11 C.F.R. § 109.21

In the 2006 rulemaking, the Commission reduced the period of time during which a common vendor or former employee's relationship with a candidate or party could satisfy the conduct standards in 11 C.F.R. § 109.21(d) from the "entire election cycle" to 120 days. The D.C. Circuit in the *Shays III* noted that the district court "found the revised regulation arbitrary and capricious because the FEC had failed to justify its policy change," and agreed with this conclusion. *Shays III Appeal*, 528 F.3d at 928. In reaching this conclusion, the circuit court rejected the Commission's claim that "[r]educing the temporal limit to 120 days will not undermine the effectiveness of the conduct standards and will not lead to circumvention of the Act" because "material information regarding candidate and political party committee campaigns, strategy, plans, needs, and activities … does not remain 'material' for long periods of time during an election cycle." *Id.* (quoting 71 Fed. Reg. 33204).

The *Shays III* circuit court explained, as the district court had pointed out, "the Commission's generalization that material information does not remain material for long overlooks the possibility that *some* information—for instance, a detailed state-by-state master plan prepared by a chief strategist—may very well remain material for at least the duration of a campaign." *Id.* (quoting *Shays III District,* 508 F. Supp. 2d at 51). The court noted that the Commission's "own regulations recognize that some types of information retain value for longer than 120 days. For example, the Commission says that polling data—arguably the campaign information that most quickly becomes obsolete—retains some value for 180 days." *Id.* at 928-29 (citing 11 C.F.R. § 106.4(g)).

In order to address the *Shays III* circuit court's invalidation of the "coordination" rule's fourth and fifth conduct standards in 11 C.F.R. § 109.21(d)—pertaining to common vendors and former employees, respectively—the Commission is considering three alternatives for the time periods covered by the rule. 74 Fed. Reg. at 53906.

Alternative 1 would "retain the existing rule with the 120-day period, and the Commission would provide additional justification for that period, if it receives sufficient empirical data or other evidence using specific examples supplied in response to this NPRM demonstrating that the 120-day period is the appropriate standard." *See* 74 Fed. Reg. at 53906.

We oppose Alternative 1. As both the *Shays III* district court and the *Shays III* circuit court recognized, "*some* information—for instance, a detailed state-by-state master plan prepared by a chief strategist—may very well remain material for at least the duration of a campaign," and the Commission's "own regulations recognize that some types of information retain value for longer than 120 days" (*e.g.*, polling data). *Shays III Appeal*, 528 F.3d at 928. In response to specific questions posed in NPRM 2009-23, *see* 74 Fed. Reg. at 53906, a 120-day period does not accurately reflect the period during which a vendor or former employee is likely to possess and convey timely campaign information. A 120 days does not approximate the length of time that a vendor or campaign employee is likely to possess information that remains useful to a campaign. Some types of campaign information (*e.g.*, polling data, campaign strategy, advertising purchases, slogans, graphics, mailing lists, donor lists, or fundraising strategy) clearly maintain their value to a campaign for a period of time longer than 120 days.

Alternative 2 would amend 11 C.F.R. § 109.21(d)(4) and (5) by replacing the 120-day period with "the two-year period ending on the date of the general election for the office or seat that the candidate seeks." 74 Fed. Reg. at 53907. We do not oppose this approach. A two-year period would adequately approximate the length of time that a vendor or campaign employee is likely to possess information that remains useful to a campaign. Most types of campaign information do not maintain significant value to a campaign for a period of time longer than two years.

Alternative 3 would amend 11 C.F.R. § 109.21(d)(4) and (5) by replacing the existing 120-day period with a "current election cycle" period, as in the pre-2006 version of the regulation. We would also support Alternative 3.

G. Proposed Safe Harbor for Communications in Support of 501(c)(3) Organizations

In addition to addressing "coordination" issues as required by the *Shays III* circuit court, the Commission has also proposed amending the "coordination" regulation to create a safe harbor for communications in support of 501(c)(3) organizations—an issue not litigated in *Shays III*. The Commission explains:

> From time to time, Federal candidates and officeholders may choose to participate in public communications in support of 501(c)(3) tax-exempt organizations or public policies or legislative proposals espoused by those organizations. The Commission seeks comment on whether it should adopt a new safe harbor in the coordinated communications rules to exempt these communications from regulation as coordinated communications, under certain circumstances.

74 Fed. Reg. at 53907.

> Specifically, the proposed safe harbor would provide that a public communication paid for by a non-profit organization described in 26 U.S.C. 501(c)(3), in which a candidate expresses or seeks support for the payor organization, or for a public policy or legislative initiative espoused by the payor organization, would not be a

> coordinated communication, unless the public communication PASOs the candidate or another candidate who seeks the same office.

Id. at 53908.

Importantly, the Commission notes that it "previously has considered a similar exemption for public service announcements in the context of electioneering communications," but that it "ultimately decided not to exempt public service announcements, citing some commenters' assertions of 'the possibility that such an exemption could be easily abused by using a [public service announcement] to associate a Federal candidate with a public-spirited endeavor in an effort to promote or support that candidate.'" *Id.* (quoting 67 Fed. Reg. at 65202). And, though not quoted in the NPRM, the Commission went on to explain in its earlier rulemaking that "commenters explained that historically PSAs have been used for 'electorally related purposes' and that such communications are 'at the very heart of what the statute is trying to get to.'" 67 Fed. Reg. at 65202.

The Commission should reject a broad safe harbor from the coordination rules for communications paid for by 501(c)(3) organizations. Such an exemption could be abused by serving as a vehicle for ads, paid for by a 501(c)(3) organization, that are used by candidates to promote their campaign agenda, to set forth their policy views, or to associate themselves with a public-spirited endeavor, all for the purpose of influencing that candidate's election. As noted by the *Shays I* circuit court in the context of the "electioneering communication" rules, the mere association of a candidate with a "public spirited endeavor" could benefit and be desirable to the candidate. *Shays I Appeal*, 414 F.3d at 109.

As a practical matter, the proposed safe harbor would apply only within the immediate pre-election time frames. Outside the 90 (or 120) day period, as we urge above, the PASO test (as set forth in Alternative 1) would control, so that a candidate could participate in any PSA (and coordinate with the PSA sponsor) if the PSA does not PASO the candidate.

The issue, then, is whether a federal candidate should similarly be permitted to appear in a PSA <u>within</u> the 90 (or 120) day pre-election time period. But the problem presented by the draft rule is not simply whether a federal candidate should be allowed to raise money for a charity, like the American Heart Association. The proposed rule would allow the candidate to appear in an ad sponsored by a 501(c)(3) organization that "seeks support" not just for the organization, but also for "a position on a public policy or legislative proposal espoused by that organization."

The proposed exemption opens the door to a wide range of potential ads in which the candidate can associate himself not only with a charitable organization, but with a policy platform, a public cause, a legislative proposal, a ballot measure or an initiative proposal supported by the organization. An example set forth in the NPRM illustrates the problem well. The proposed ad states:

> My name is X, and I endorse Organization A because I believe in equality of educational opportunities for all children. I believe in robust early childhood

> programs. I believe in rigorous standards for teachers. And I believe that community involvement contributes to the quality of our schools. So join me in supporting the good work of Organization A.

74 Fed. Reg. at 53908. This ad is more about the candidate than it is about the organization. It is more an opportunity for the candidate to express his views and policies than it is an opportunity for the organization to solicit support for its views.

The potential benefit to a candidate's campaign is manifest when an organization pays to air ads that are primarily devoted to the candidate explaining his policy preferences. This is particularly so when the ad would be paid for by the outside group and aired in the weeks right before an election.

While we can certainly imagine appeals made by candidates in PSA ads of a genuinely charitable character and that are done for the promotion of the charity, not the candidate, the proposed rule does not confine the safe harbor to such ads. It does not distinguish between ads primarily about the charity from those primarily about the candidate. And it does not distinguish between ads directed to charitable work from those directed at "a position on public policy or a legislative proposal," indeed, it expressly includes such ads within the scope of the safe harbor.

It is true that absent the proposed safe harbor, the Commission would restrict the ability of federal candidates to participate in PSA ads. But this restriction would be only for a limited period of time and, as the Commission has already recognized, charitable organizations have many options for promoting themselves and their causes, even if they cannot rely on federal candidates to do so.

For these reasons, we oppose the proposed 501(c)(3) safe harbor rule, as currently drafted.

H. Proposed Safe Harbor for Business and Commercial Communications

The Commission is also considering adding a new safe harbor to the "coordination" rules at 11 C.F.R. § 109.21(j) for certain commercial and business communications. 74 Fed. Reg. at 53909.

> The proposed safe harbor would apply to any public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy, so long as the public communication does not PASO that candidate or another candidate who seeks the same office, and so long as the communication is consistent with other public communications made prior to the candidacy in terms of the medium, timing, content, and geographic distribution.

Id.

We do not oppose the proposed safe harbor for business and commercial communications as written. The safe harbor should be limited to communications that are consistent with those that were made prior to the candidacy in terms of medium, timing, content, and geographic distribution. We would support the limitation of the safe harbor public communications on behalf of a business whose name includes the candidate's name.

We appreciate the opportunity to submit these comments.

Sincerely,

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