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

FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 109

[Notice 2009—23]

Coordinated Communications

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission seeks comments on proposed changes to its rules regarding coordinated communications under the Federal Election Campaign Act of 1971, as amended. These proposed changes are in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*. The Commission has made no final decision on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.

DATES: Comments must be received on or before January 19, 2010. The Commission will hold a hearing on these proposed rules and will announce the date of the hearing at a later date. Anyone wishing to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

ADDRESSES: All comments must be in writing, addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and submitted in either electronic, facsimile or hard copy form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to CoordinationShays3@fec.gov. If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219-3923, with hard copy follow-up. Hard copy comments and hard copy follow-up of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name

and postal service address of the commenter or they will not be considered. The Commission will post comments on its Web site after the comment period ends. The hearing will be held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC

FOR FURTHER INFORMATION, CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, or Attorneys Ms. Jessica Selinkoff, Ms. Esther D. Heiden or Ms. Joanna S. Waldstreicher, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002¹ ("BCRA") contained extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* ("the Act"). The Commission promulgated a number of rules to implement BCRA, including rules defining "coordinated communications" at 11 CFR 109.21. The Court of Appeals for the District of Columbia Circuit found aspects of these rules invalid in *Shays v. FEC*, 528 F.3d 914 (DC Cir. 2008) ("*Shays III Appeal*").

In response to the *Shays III Appeal* decision, the Commission seeks comment on possible changes to the "coordinated communication" regulations at 109.21, which govern communications made in coordination with Federal candidates, their authorized committees, or political party committees, but paid for by persons other than the candidate, the authorized committee, or the political party committee with whom the communication is coordinated. The Commission's rules at 11 CFR 109.37 regulate communications made in coordination with Federal candidates or their authorized committee, but paid for by a political party committee with which the coordination occurred ("party coordinated communication" regulations). The party coordinated communication regulations (11 CFR 109.37) mirror, to a large extent, the coordinated communications regulations.² The Commission is not

proposing to revise the party coordinated communication rules in this rulemaking because they were not addressed by the *Shays III Appeal* decision, but invites comment on whether it should issue a notice of proposed rulemaking on this subject.

I. Background Information

The Act and Commission regulations limit the amount a person may contribute to a candidate and that candidate's authorized political committee with respect to any election for Federal office, and also limit the amount a person may contribute to other political committees in a given calendar year. *See* 2 U.S.C. 441a(a)(1); 11 CFR 110.1(b)(1), (c)(1), (d); *see also* 2 U.S.C. 441b; 11 CFR 114.2 (prohibitions on corporate contributions). A "contribution" may take the form of money or "anything of value," including an in-kind contribution, provided to a candidate or political committee for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i), (9)(A)(i); 11 CFR 100.52(a), (d)(1), 100.111(a), (e)(1). An expenditure made in coordination with a candidate, or with a candidate's authorized political committee, constitutes an in-kind contribution to that candidate subject to contribution limits and prohibitions and must, subject to certain exceptions, be reported as an expenditure by that candidate. *See* 2 U.S.C. 441a(a)(7); 11 CFR 109.20, 109.21(b).

The national committees and State committees of political parties may also make "coordinated party expenditures" in connection with the general election campaigns of Federal candidates, within certain limits. 2 U.S.C. 441a(d); 11 CFR 109.32(a), (b). Coordinated party expenditures are in addition to any contributions by the political party committees to candidates within the contribution limits of 11 CFR 110.1 and 110.2. 2 U.S.C. 441a(d); 11 CFR 109.32(a)(3), (b)(4).

to those affected by BCRA." *See* Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003). When the Commission revised its coordinated communications rules in 2006, the Commission gave consideration as to whether its party coordinated communication rules at 11 CFR 109.37 should continue to mirror the coordinated communication rules at 11 CFR 109.21.

¹ Public Law 107-155, 116 Stat. 81 (2002).

² When the Commission revised its coordinated communications rules in 2002 pursuant to the statutory mandate in BCRA, the Commission also adopted substantially parallel party coordinated communication rules to address coordinated communications that were paid for by political party committees in order "to give clear guidance

A. Before BCRA

The Supreme Court first examined independent expenditures and coordination or cooperation between candidates and other persons in *Buckley v. Valeo*, 424 U.S. 1, 58 (1976), though coordination was not explicitly addressed in the Act at that time. See Public Law 93–443, 88 Stat. 1263 (1974); Public Law 92–225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. 431 *et seq.*). In *Buckley*, the Court distinguished expenditures that were not truly independent—that is, expenditures made in coordination with a candidate or the candidate’s authorized committee—from constitutionally protected “independent expenditures.” *Buckley*, 424 U.S. at 78–82. The Court noted that a third party’s “prearrangement and coordination of an expenditure with the candidate or his agent” presents a “danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” *Id.* at 47. The Court further noted that the Act’s contribution limits must not be circumvented through “prearranged or coordinated expenditures amounting to disguised contributions.” *Id.* The Court concluded that a “contribution” includes “all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.” *Id.* at 78; *see also id.* at 47 n.53.

After *Buckley*, Congress amended the Act to define an “independent expenditure” as excluding an expenditure made in “cooperation or consultation with” or “in concert with, or at the request or suggestion of” a candidate or the candidate’s authorized committee or agent. Public Law 94–283 (1976) (now codified at 2 U.S.C. 431(17)). Congress also amended the Act to provide that an expenditure “shall be considered to be a contribution” when it is made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of” a candidate, a candidate’s authorized committees, or their agents. Public Law 94–283 (1976) (codified at 2 U.S.C. 441a(a)(7)(B)(i) (1976)). The Act treats expenditures made for the dissemination, distribution, or republication of campaign materials prepared by a candidate, a candidate’s authorized committees, or their agents as contributions. See Public Law 94–283 (1976) (now codified at 2 U.S.C. 441a(a)(7)(B)(iii)). Although Congress made some adjustments to the Act in the decades following *Buckley*, as discussed below, the coordination

provisions remained substantively unchanged until BCRA.

Prior to the enactment of BCRA, the Commission adopted new coordination regulations in response to several court decisions.³ See 11 CFR 100.23 (2001); Explanation and Justification for Final Rules on General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 FR 76138 (Dec. 6, 2000). Drawing on judicial guidance in *Christian Coalition*, the Commission defined a new term, “coordinated general public political communication” (“GPPC”), to determine whether expenditures for communications by unauthorized committees, advocacy groups, and individuals qualified as independent expenditures or were coordinated with candidates or party committees. A GPPC that “included” a clearly identified candidate was coordinated if a third party paid for it and if it was created, produced, or distributed (1) at the candidate’s or party committee’s request or suggestion; (2) after the candidate or party committee exercised control or decision-making authority over certain factors; or (3) after “substantial discussion or negotiation” with the candidate or party committee regarding certain factors. 11 CFR 100.23(b), (c) (2001). The regulations explained that “substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election.” 11 CFR 100.23(c)(2)(iii) (2001).

B. Impact of BCRA

In 2002, Congress revised the coordination provisions in the Act. See BCRA at secs. 202, 214, 116 Stat. at 90–91, 94–95. BCRA retained the statutory provision that an expenditure is a contribution to a candidate when it is made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of” that candidate, the candidate’s authorized committee,

³ See *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (concluding that political parties may make independent expenditures on behalf of their Federal candidates); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999) (“*Christian Coalition*”) (concluding that an “expressive expenditure” only becomes “coordinated” when the candidate requests or suggests the expenditure or when a candidate can exercise control over or when there has been substantial discussion or negotiation between the candidate and the spender over a communication’s: (1) Content; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) “volume” (e.g., number of copies of printed materials or frequency of media spots)).

or their agents. See 2 U.S.C. 441a(a)(7)(B)(i). BCRA added a similar provision governing coordination with political party committees: Expenditures made by any person, other than a candidate or the candidate’s authorized committee, “in cooperation, consultation, or concert, with, or at the request or suggestion of” a national, State, or local party committee, are contributions to that political party committee. 2 U.S.C. 441a(a)(7)(B)(ii). BCRA also amended the Act to specify that a coordinated electioneering communication shall be a contribution to, and expenditure by, the candidate supported by that communication or that candidate’s party. See 2 U.S.C. 441a(a)(7)(C).

BCRA expressly repealed the GPPC regulation at 11 CFR 100.23 and directed the Commission to promulgate new regulations on “coordinated communications” in their place. See BCRA at sec. 214, 116 Stat. at 94–95. Although Congress did not define the term “coordinated communications” in BCRA, the statute specified that the Commission’s new regulations “shall not require agreement or formal collaboration to establish coordination.”⁴ BCRA at sec. 214(c), 116 Stat. at 95. BCRA also required that, “[i]n addition to any subject determined by the Commission, the regulations shall address (1) payments for the republication of campaign materials; (2) payments for the use of a common vendor; (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.” BCRA at sec. 214(c), 116 Stat. at 95; 2 U.S.C. 441a(7)(B)(ii) note.

As detailed below, the Commission promulgated revised coordinated communications regulations in 2002 as required by BCRA. Several aspects of those revised regulations were successfully challenged in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (“*Shays I District*”), *aff’d*, *Shays v. FEC*, 414 F.3d 76 (DC Cir. 2005) (“*Shays I Appeal*”), *petition for reh’g en banc denied*, No. 04–5352 (DC Cir. Oct. 21, 2005). In 2006, the Commission further revised its coordination regulations in

⁴ The Court of Appeals for the District of Columbia has noted that “[a]part from this negative command—‘shall not require’—BCRA merely listed several topics the rules ‘shall address,’ providing no guidance as to how the FEC should address them.” *Shays v. Federal FEC*, 414 F.3d 76, 97–98 (DC Cir. 2005).

response to *Shays I Appeal*. These revised rules were themselves challenged in *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007) (“*Shays III District*”), *aff’d*, *Shays v. FEC*, 528 F.3d 914 (DC Cir. 2008) (“*Shays III Appeal*”).⁵ The Commission is issuing this Notice of Proposed Rulemaking (“NPRM”) in response to *Shays III Appeal*.

C. 2002 Rulemaking

On December 17, 2002, the Commission promulgated regulations as required by BCRA. See 11 CFR 109.21 (2003); see also Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003) (“2002 E&J”). The Commission’s 2002 coordinated communication regulations set forth a three-prong test for determining whether a communication is a coordinated communication, and therefore an in-kind contribution to, and an expenditure by, a candidate, a candidate’s authorized committee, or a political party committee. See 11 CFR 109.21(a). First, the communication must be paid for by someone other than a candidate, a candidate’s authorized committee, a political party committee, or their agents (the “payment prong”). See 11 CFR 109.21(a)(1) (2003). Second, the communication must satisfy one of four content standards (the “content prong”). See 11 CFR 109.21(a)(2), (c) (2003). Third, the communication must satisfy one of five conduct standards (the “conduct prong”).⁶ See 11 CFR 109.21(a)(3), (d) (2003). A communication must satisfy all three prongs to be a “coordinated communication.”

1. Content Standards

As stated in the 2002 E&J, each of the four standards that comprise the content prong of the 2002 coordinated communication regulation identified a category of communications whose “subject matter is reasonably related to an election.” 2002 E&J, 68 FR at 427. The first content standard is satisfied if the communication is an electioneering communication. See 11 CFR 109.21(c)(1) (2003). The second content standard is satisfied by a public communication made at any time that disseminates, distributes, or republishes

campaign materials prepared by a candidate, a candidate’s authorized committee, or agents thereof. See 11 CFR 109.21(c)(2) (2003), 109.37(a)(2)(i) (2003). The third content standard is satisfied if a public communication made at any time expressly advocates the election or defeat of a clearly identified candidate for Federal office. See 11 CFR 109.21(c)(3) (2003), 109.37(a)(2)(ii) (2003). The fourth content standard is satisfied if a public communication (1) refers to a political party or a clearly identified Federal candidate;⁷ (2) is publicly distributed or publicly disseminated 120 days or fewer before an election (the “120-Day Time Window”); and (3) is directed to voters in the jurisdiction of the clearly identified Federal candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot. See 11 CFR 109.21(c)(4) (2003).

2. Conduct Standards

The 2002 coordinated communication regulations also contained five conduct standards.⁸ A communication created, produced, or distributed (1) at the request or suggestion of, (2) after material involvement by, or (3) after substantial discussion with, a candidate, a candidate’s authorized committee, or a political party committee, would satisfy the first three conduct standards. See 11 CFR 109.21(d)(1)–(3) (2003). These three conduct standards were not at issue in *Shays III Appeal*, and are not addressed in this rulemaking.

The remaining two conduct standards, which are at issue in this rulemaking, are the (1) “common vendor” and (2) “former employee” standards. The common vendor conduct standard is satisfied if (1) the person paying for the communication contracts with, or employs, a “commercial vendor” to create, produce, or distribute the communication, (2) the commercial vendor has provided certain specified services to the political party committee or the clearly identified candidate referred to in the communication within the current election cycle, and (3) the commercial vendor uses or conveys information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee,

or information used by the commercial vendor in serving the candidate or political party committee, and that information is material to the creation, production, or distribution of the communication. See 11 CFR 109.21(d)(4) (2003).

The former employee conduct standard is satisfied if (1) the communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate or the political party committee clearly identified in the communication within the current election cycle, and (2) the former employee or independent contractor uses or conveys information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or information used by the former employee or independent contractor in serving the candidate or political party committee, and that information is material to the creation, distribution, or production of the communication. See 11 CFR 109.21(d)(5) (2003).

These two conduct standards covered former employees, independent contractors, and vendors⁹ only if they had provided services to a candidate or party committee during the “current election cycle,” as defined in 11 CFR 100.3. 2002 E&J, 68 FR at 436; 11 CFR 109.21(d)(4), (5) (2003).

D. *Shays I Appeal*

The Court of Appeals in *Shays I Appeal* found that the content prong regulations did not run counter to the unambiguously expressed intent of Congress. *Shays I Appeal*, 414 F.3d at 99–100 (applying *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Nonetheless, the court found the 120-Day Time Window in the fourth standard of the content prong of the coordinated communication regulations to be unsupported by adequate explanation and justification and, thus, arbitrary and capricious under the Administrative Procedure Act (“APA”) and affirmed the *Shays I District* court’s invalidation of the rule. *Shays I Appeal*, 414 F.3d at 102. Although the Court of Appeals found the explanation for the particular time frame adopted to be lacking, the *Shays I Appeal* court rejected the argument that the Commission is precluded from establishing a “bright line test.” *Id.* at 99.

⁹ See 11 CFR 109.21(d)(4)(ii) for the specific services that a vendor must provide in order to trigger the common vendor standard.

⁵ A third case filed by the same Plaintiff, referred to as “*Shays II*,” addressed the Commission’s approach to regulating so-called “527” organizations and is not relevant to the coordination rules at issue in this NPRM. See *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007).

⁶ A sixth conduct standard clarifies the application of the other five to the dissemination, distribution, or republication of campaign materials. See 11 CFR 109.21(d)(6) (2003).

⁷ The party coordinated communications content prong contains a similar standard, except that element (1) includes only references to clearly identified Federal candidates. 11 CFR 109.37(a)(2)(iii) (2003).

⁸ The party coordinated communications rule incorporated the same conduct standards by reference to 11 CFR 109.21(d)(1) through (d)(6). See 11 CFR 109.37(a)(3) (2003).

The *Shays I Appeal* court concluded that the regulation's "fatal defect" was in offering no persuasive justification for the 120-Day Time Window and "the weak restraints applying outside of it." *Id.* at 100. The court concluded that, by limiting coordinated communications made outside of the 120-Day Time 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.* Indeed, the "most important" question the court asked was, "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 *Shays I Appeal* court required the Commission to undertake a factual inquiry to determine whether the temporal line that it drew "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." *Id.* at 101–02.

E. 2005 Rulemaking

In 2005, in the post-*Shays I Appeal* rulemaking, the Commission proposed seven alternatives for revising the content prong. See Notice of Proposed Rulemaking on Coordinated Communications, 70 FR 73946 (Dec. 14, 2005) ("2005 NPRM"). The Commission also used licensed data that provided empirical information regarding the timing, frequency and cost of television advertising spots in the 2004 election cycle. See Supplemental Notice of Proposed Rulemaking on Coordinated Communications, 71 FR 13306 (Mar. 15, 2006).

Although not challenged in *Shays I Appeal*, the "election cycle" time frame of the common vendor and former employee conduct standards at 11 CFR 109.21(d)(4) and (5), among other aspects of that prong, was also reconsidered in the 2005 NPRM. The Commission sought comment on how the "election cycle" time limitation works in practice and whether the strategic value of information on a candidate's plans, products, and activities lasts throughout the election cycle. 2005 NPRM, 70 FR at 73955–56.

The Commission also noted that the party coordinated communication regulation, while not addressed in *Shays I Appeal*, contained a three-prong

test that was "substantially the same" as the coordinated communication regulation that had been invalidated by the *Shays I Appeal* court. 2005 NPRM, 70 FR at 73956. The Commission sought comment on whether it should make conforming changes to the party coordinated communication regulation if it revised the existing coordinated communication regulation. 2005 NPRM, 70 FR at 73956.

In 2006, the Commission promulgated revised rules that retained the content prong at 11 CFR 109.21(c), but revised the time periods in the fourth content standard. Relying on the licensed empirical data, the Commission revised the coordinated communication regulation at 11 CFR 109.21(c)(4) and applied different time periods for communications coordinated with Presidential candidates (120 days before a State's primary through the general election), congressional candidates (separate 90-day time windows before a primary and before a general election), and political parties (tied to either the Presidential or congressional time periods, depending on the communication and election cycle). See Explanation and Justification for Final Rules on Coordinated Communications, 71 FR 33190 (June 8, 2006) ("2006 E&J").

The 2006 coordinated communication regulations also reduced the period of time during which a common vendor's or former employee's relationship with the authorized committee or political party committee referred to in the communication could satisfy the conduct prong, from the entire election cycle to 120 days. 2006 E&J, 71 FR at 33204. The 2006 E&J noted that, especially in regard to the six-year Senate election cycles, the "election cycle" time limit was "overly broad and unnecessary to the effective implementation of the coordination provisions." *Id.* The 2006 E&J reasoned that 120 days was a "more appropriate" limit. *Id.*

Although the party coordinated communication regulations were not addressed in the *Shays I Appeal*, in 2006 the Commission also revised the regulations at 11 CFR 109.37 to provide consistency with revisions to the coordinated communication regulations at 11 CFR 109.21. Specifically, the Commission revised the time periods in the content standard at 11 CFR 109.37(a)(2)(iii) of the party coordinated communication regulations, adopting the same time periods for presidential candidates (120 days before a State's primary through the general election) and congressional candidates (90 days before the primary and general

elections) as in the coordinated communication regulations at 11 CFR 109.21(c)(4). See 2006 E&J, 71 FR at 33207. The Commission also incorporated into the party coordinated communication regulations the new safe harbors at 11 CFR 109.21(d)(2)–(5) for use of publicly available information, and the safe harbors at 11 CFR 109.21(g) for endorsements and solicitations by Federal candidates, and at 11 CFR 109.21(h) for the establishment and use of a firewall. See 2006 E&J, 71 FR at 33207–08.

F. *Shays III Appeal*

On June 13, 2008, the Court of Appeals issued its opinion in *Shays III Appeal*.

1. Content Standards

The *Shays III Appeal* court held that the Commission's decision to apply "express advocacy" as the only content standard¹⁰ outside the 90-day and 120-day windows "runs counter to BCRA's purpose as well as the APA." *Shays III Appeal*, 528 F.3d at 926. The court found that, although the administrative record demonstrated that the "vast majority" of advertisements were run in the more strictly regulated 90-day and 120-day windows, a "significant number" of advertisements ran before those windows and "very few ads contain magic words."¹¹ *Id.* at 924. The *Shays III Appeal* court held that "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.* at 924 (quoting *McConnell v. FEC*, 540 U.S. 93, 193 (2003)) (concluding that *Buckley's* 'magic words' requirement is "functionally meaningless"); see also *McConnell v. FEC*, 251 F. Supp. 2d 176, 303–04 (D.D.C. 2003) (Henderson, J.); *id.* at 534 (Kollar-Kotelly, J.); *id.* at 875–79 (Leon, J.) (discussing "magic words").

The court noted that "although the FEC * * * 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.'" ¹² *Shays III Appeal*, 528

¹⁰ The court did not address the republication of campaign materials, see 11 CFR 109.21(c)(2), in its analysis of the period outside the time windows.

¹¹ "Magic words" are "examples of words of express advocacy, such as 'vote for,' 'elect,' 'support,' * * * 'defeat,' [and] 'reject.'" *McConnell v. FEC*, 540 U.S. 93, 191 (2003) (quoting *Buckley*, 424 U.S. at 44 n.52).

¹² An "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, or

F.3d at 926 (quoting *Shays I Appeal*, 414 F.3d at 102). The court stated that “the ‘express advocacy’ standard fails that test,” but did not explicitly articulate a less restrictive standard that would meet the test. *Id.*

The court expressed particular concern about a possible scenario in which, “more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain magic words.” *Id.* at 925. The court noted that the Commission “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.” *Id.* The court held that such a rule not only frustrates Congress’s purpose to prohibit funds in excess of the applicable contribution limits from being used in connection with Federal elections, but “provides a clear roadmap for doing so.” *Id.*

2. Conduct Standards

The *Shays III Appeal* court also invalidated the 120-day period of time during which a common vendor’s or former campaign employee’s relationship with an authorized committee or political party committee could satisfy the conduct prong at 11 CFR 109.21(d)(4) and (d)(5). *Shays III Appeal*, 528 F.3d at 928–29. The *Shays III Appeal* court found that with respect to the change in the 2006 coordinated communication regulations from the “current election cycle” to a 120-day period, “the Commission’s generalization that material information may not remain material for long overlooks the possibility that some information * * * may very well remain material for at least the duration of a campaign.” *Id.* at 928. The court therefore found that the Commission had failed to justify the change to a 120-day time window, and, as such, the change was arbitrary and capricious. *Id.* The court concluded that, while the Commission may have discretion in drawing a bright line in this area, it had not provided an adequate explanation for the 120-day time period, and that the Commission must support its decision with reasoning and evidence. *Id.* at 929.

II. Proposals To Address Coordinated Communications Content Standards

To address the *Shays III Appeal* court’s concern regarding election-related communications taking place

outside the 90-day and 120-day windows, the Commission is considering retaining the existing four content standards in 11 CFR 109.21(c), and adopting one or more of the following four approaches: (1) 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”); (2) 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) (the “Modified WRTL content standard”); (3) clarifying that the existing content standard includes express advocacy as defined under both 11 CFR 100.22(a) and (b); and (4) adopting a standard that pairs a public communication standard with a new conduct standard (the “Explicit Agreement” standard).¹³ The Commission has not made any determination as to which, if any, of these standards to adopt in the final rules, or whether it should adopt a combination of these standards, or some other standard altogether.

The Commission invites comment on which, if any, of the four proposals best complies with the *Shays III Appeal* decision and why. The Commission is particularly interested in whether any of the proposals, standing alone, would satisfy the decision of the Court of Appeals in *Shays III Appeal*. Additionally, several of the alternatives propose broader content standards than those that are currently in 11 CFR 109.21, thus potentially bringing a broader range of communications under the Commission’s more restrictive contribution regulations. The Commission invites comment on how this possibility relates to (1) the Commission’s jurisdictional limitations; (2) the distinction courts have drawn between contributions versus independent spending and other protected speech (see, e.g., *Buckley*, 524 U.S. at 22; *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (“*Colorado II*”); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (“*Colorado I*”)); and (3) the possibility that enforcement of the Commission’s regulations that draw the

line between independent and coordinated speech may have the potential to chill independent speech.

A. Alternative 1—The PASO Standard—Proposed 11 CFR 109.21(c)(3) and Proposed PASO Definition Alternatives A and B at 11 CFR 100.23

Alternative 1 would amend 11 CFR 109.21(c) by replacing the express advocacy standard with a PASO standard. Under the 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, without regard to when the communication is made or the targeted audience. The Commission also is considering two alternative definitions of promote, support, attack, or oppose (“PASO”).

1. Background

In BCRA, Congress created a number of new campaign finance provisions that apply to communications that PASO Federal candidates. For example, Congress included public communications that refer to a candidate for Federal office and that PASO a candidate for that office as one type of Federal election activity (“Type III” Federal election activity). BCRA requires that State, district, and local party committees, Federal candidates, and State candidates pay for PASO communications entirely with Federal funds. See 2 U.S.C. 431(20)(A)(iii); 441i(b), (e), (f); see also 2 U.S.C. 441i(d) (prohibiting national, State, district, and local party committees from soliciting donations for tax-exempt organizations that make expenditures or disbursements for Federal election activity).

Congress also included PASO in the backup definition of “electioneering communication,” should that term’s primary definition be found to be constitutionally insufficient. See 2 U.S.C. 434(f)(3)(A)(ii). In addition, Congress also incorporated by reference Type III Federal election activity as a limit on the exemptions that the Commission may make from the definition of “electioneering communication.” See 2 U.S.C. 434(f)(3)(B)(iv); see also 2 U.S.C. 431(20)(A)(iii). Congress did not define PASO or any of its component terms.

Accordingly, the Commission incorporated PASO in its regulations defining “Federal election activity,” and in the soft money rules governing State and local party committee communications and the allocation of funds for these communications. See 11

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); see also 11 CFR 100.111(a).

¹³ A “public communication” is “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site.” 11 CFR 100.26; see also 2 U.S.C. 431(22).

CFR 100.24(b)(3) and (c)(1); 11 CFR 300.33(c), 300.71, 300.72. The Commission also incorporated PASO as a limit to the exemption for State and local candidates from the definition of "electioneering communication," and as a limit to the safe harbors from the coordinated communications rules for endorsements and solicitations. See 11 CFR 100.29(c)(5) and 109.21(g). To date, the Commission has not adopted a regulatory definition of either PASO or any of its component terms.

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.*

The Commission seeks comment on whether the Supreme Court's statement that the "words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act" applies (1) only to party committees, or also to other speakers; and (2) only to Federal election activity, or also in other contexts. After *McConnell*, is any rule defining PASO, or its component terms, necessary? Would a regulatory definition nonetheless be helpful in providing guidance and explicit standards whereby persons would know which communications are intended to be covered and which ones are not?

Additionally, does the Court's decision in *Wisconsin Right to Life* have any effect on the scope of the definition of PASO? After *Wisconsin Right to Life*, is it permissible for the Commission to regulate any speech, whether independent or not, that does not fall within either the Court's definition of "express advocacy" or its definition of

the "functional equivalent of express advocacy"? Is the decision in *Wisconsin Right to Life* applicable in the coordinated communications context, since the Court's decision was confined to independent electioneering communications?

2. Content Standard

The court in *Shays III Appeal* held that the Commission "must demonstrate that the standard it selects 'rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition.'" *Shays III Appeal*, 528 F.3d at 926 (quoting *Shays I Appeal*, 414 F.3d at 102). The Commission seeks comment, consistent with the decision in *Shays III Appeal*, on whether use of the PASO standard, which would replace, but incorporate, the express advocacy standard, and whether alone or in conjunction with a definition of PASO, would rationally separate election-related advocacy from other communications falling outside the Act's expenditure definition.

The Commission also seeks comment on whether the PASO standard, either alone, or in conjunction with a definition of PASO, could potentially encompass public communications that are not made for the purpose of influencing a Federal election. If so, should the PASO standard 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? See, e.g., Alternative B at proposed 11 CFR 100.23(b)(4). Alternatively, 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? One such example would be a communication distributed outside Ohio that states: "Write your friends in Ohio and urge them to support/oppose candidate X."

Conversely, the Commission seeks comment on whether limiting the PASO standard could potentially exclude public communications that are made for the purpose of influencing a Federal election provided that the payment and conduct prongs of the coordinated communication regulation are also satisfied. Would limiting the PASO standard 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?

3. PASO Definitions

As part of its consideration of a PASO content standard, the Commission is also considering whether it should adopt a definition of PASO. This NPRM sets forth two possible approaches to defining PASO. In brief, the proposed PASO definition in Alternative A provides a specific definition for each of the component terms, which applies when any of those terms is used in conjunction with one or more of the other terms. See Alternative A at proposed 11 CFR 100.23(b). The proposed PASO definition in Alternative B utilizes a multi-prong test to determine whether a given communication PASOs. See Alternative B at proposed 11 CFR 100.23(b). The Commission seeks public comment on the proposed alternative definitions at 11 CFR 100.23. In light of the Supreme Court's conclusion in *McConnell*, as discussed above, that the component terms of the PASO standard "provide explicit standards for those who apply them and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,'" *McConnell*, 540 U.S. at 170 n.64, the Commission seeks comment on whether any regulatory definition is necessary or whether such a definition would be confusing.

a. Proposed Applicability

The proposed PASO definitions differ in their applicability. Proposed Alternative A would apply to those instances in the Commission regulations in which two or more of the four component PASO words are used together. See Alternative A at proposed 11 CFR 100.23(a). Proposed Alternative B would apply to those instances in the Commission regulations in which all four of the component PASO words are used together. See Alternative B at proposed 11 CFR 100.23(a). The Commission seeks comment on whether the proposed applicability of either alternative is underinclusive or overinclusive.

The Act articulates the PASO concept by using the following phraseology: "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office." 2 U.S.C. 431(20)(A)(iii) (definition of "Federal election activity"); 434(f)(3)(A)(ii) (backup definition of "electioneering communication"). The Commission has adopted several similar, though not identical, phrases throughout its regulations. Some of the regulations group the four words in two disjunctive groups of two (e.g., promote or support,

or attack or oppose)¹⁴ and some of the regulations group the words in one disjunctive group of four (e.g., promote, support, attack, or oppose).¹⁵

Additionally, the words “promote,” “support,” and “oppose” appear throughout the Act and Commission regulations often in other contexts unrelated to communications that PASO and unrelated to any electoral context. For example, the word “support” is used individually throughout the Act and Commission regulations in the context of technical, administrative, or financial support or “supporting documentation.”¹⁶ The word “support” is also used individually in Commission regulations with respect to political committees and individuals that support candidates financially or in other, non-communicative, ways.¹⁷ The word “opposed” is used individually in the Commission’s definition of “election.” See 11 CFR 100.2(a) (definition of “election” includes “opposed” and “unopposed” individuals).

The words are also used in combinations of less than four in some contexts that may be closer to that contemplated by the Commission in proposing the PASO definition. For example, many of the reporting requirements in the Act and Commission regulations concern communications that support or oppose clearly identified candidates.¹⁸ Also, several provisions in the Act and

Commission regulations treat certain communications or disbursements differently on the basis of whether they support, promote, or oppose candidates.¹⁹

Given the many uses of the words “promote,” “support,” and “oppose” throughout the Act and Commission regulations, the Commission seeks comment on whether the PASO definition should apply only when at least two of the four PASO component words appear together (as in Alternative A). Should the PASO definition apply instead only when all four PASO component words appear together (as in Alternative B)? Or, should the PASO definition apply wherever any one of the four PASO component words appears in the Commission’s regulations? Are there particular rules that use only one or two of the four PASO words—such as the expenditure reporting rules²⁰—to which the proposed definitions should or should not apply? Should the proposed PASO definition apply to the definition of “generic campaign activity” in 11 CFR 100.25 because section 100.25 implements BCRA? Finally, the Commission seeks comment on whether it should limit the applicability of the proposed definitions of PASO to only coordinated communications. Such an approach could result in divergent meanings of PASO in coordination and other contexts, such as Federal election activity or electioneering communications. Would this create confusion?

In addition, the Commission seeks comment on whether, in the absence of the proposed guidance above, it would be clear from a particular regulation’s use of “promote,” “support,” “attack,” and “oppose” alone, that the PASO definitions would apply based on whether the word is used in an electoral context.

b. Proposed Dictionary Definitions

Consistent with the Supreme Court’s statement concerning PASO in *McConnell*, both proposed PASO definitions would construe the words “promote,” “support,” “attack,” and “oppose” according to the words’ commonly understood meaning applicable to the election context. The proposed PASO definitions do,

however, differ in some of the particulars. Proposed Alternative A would define each of the four component PASO words separately according to dictionary definitions. Proposed Alternative B would not define any of the four PASO words, but does provide that a communication PASOs if it unambiguously performs one of several actions described in the dictionary definitions of the component words.

Dictionary definitions of the word “promote” include “to help or encourage to exist or flourish; further; to advance in rank, dignity, position, *etc.*” and “to encourage the sales, acceptance, *etc.* of (a product), esp. through advertising or publicity.” Webster’s Unabridged Dictionary 1548 (Random House 2nd ed. 2005) (“Webster’s Dictionary”); *see also* American Heritage Dictionary of the English Language 1095 (4th ed. 2006) (“American Heritage”) (defining “promote” as “to advance; further; to help”). The dictionary also identifies “support * * * elevate, raise, exalt” as synonyms of “promote.” Webster’s Dictionary at 1548.

Dictionary definitions of the word “support” include “to uphold (a person, cause, policy, *etc.*) by aid, countenance, one’s vote, *etc.*” and “to * * * advocate (a theory, principle, *etc.*)” Webster’s Dictionary at 1913; *see also* American Heritage Dictionary at 1364 (defining “support” as “to aid; to argue in favor of; advocate”).

Dictionary definitions of the word “attack” include “to blame; to direct unfavorable criticism against; criticize severely; argue with strongly.” Webster’s Dictionary at 133; *see also* American Heritage Dictionary at 88 (defining “attack” as “to criticize strongly or in a hostile manner”).

Dictionary definitions of the word “oppose” include “to act against or provide resistance to; to stand in the way of; hinder; obstruct; to set as an opponent or adversary; to be hostile or adverse to, as in opinion.” Webster’s Dictionary at 1359.

Based on these definitions, proposed Alternative A defines “promote” as “to help, encourage, further, or advance.” It defines “support” as “to uphold, aid, or advocate.” “Attack” is defined to mean “to argue with, blame or criticize.” “Oppose” is defined as “to act against, hinder, obstruct, be hostile or adverse to.” See proposed Alternative A at 11 CFR 100.23(a). Based on these definitions, proposed Alternative B requires that a communication only PASOs if it “helps, encourages, advocates for, praises, furthers, argues with, sets as an adversary, is hostile or

¹⁴ See, e.g., 11 CFR 100.24(b)(3) (definition of Federal election activity) (“promotes or supports, or attacks or opposes any candidate for Federal office”), 100.24(c)(1) (exception from definition of Federal election activity) (“promote or support, or attack or oppose a clearly identified candidate for Federal office”), and 300.71 (Federal funds for certain public communications) (“promotes or supports any candidate for that Federal office, or attacks or opposes any candidate for that Federal office”).

¹⁵ See, e.g., 11 CFR 100.29(c)(5) (electioneering communications) (“promote, support, attack, or oppose”), 109.21(g) (coordinated communications safe harbor) (“promotes, supports, attacks, or opposes”), 300.33 (allocation of Federal election activity) (“promote, support, attack, or oppose”), and 300.72 (Federal funds not required for certain public communications) (“promote, support, attack, or oppose”).

¹⁶ See, e.g., 2 U.S.C. 442 (technical support); 11 CFR 110.14(j)(2)(viii) (administrative support); *see also* 11 CFR 200.3(a)(1) (comments “in support of or opposition to” Commission **Federal Register** publication).

¹⁷ See, e.g., 2 U.S.C. 434(a)(10) (reporting requirements for committees supporting vice presidential candidates), (f)(3)(B)(iii) (communications which promote debates or forums); 11 CFR 110.2(l)(1)(iii)(A) (the use of polling to determine the support level for a candidate), and 9008.50 (promotion of convention city by national convention committee).

¹⁸ See, e.g., 2 U.S.C. 434(b)(6)(B), (c)(2)(A) (reporting of expenditures); 11 CFR 104.4(b)(2), (c) and (e) (reporting independent expenditures).

¹⁹ See, e.g., 2 U.S.C. 431(21) (“generic campaign activity” defined as “promotes a political party” but not a candidate); 11 CFR 100.25 (“generic campaign activity”), 100.57 (solicitations to support or oppose a candidate), 114.9(a)(1) and (b)(1) (use of corporate or labor organization facilities).

²⁰ See, e.g., 11 CFR 104.3(b)(3)(vii)(B), 104.4(b)(2), (c) and (e); 11 CFR 104.5(g)(3), 104.6(c)(4), 109.10(e)(1)(iv).

adverse to, or criticizes.” See proposed Alternative B at 11 CFR 100.23(b)(2).

The Commission seeks comment on whether defining each of the component terms individually, as in Alternative A, or a single definition for PASO, as in Alternative B, provides the clearest guidance. Alternatively, would a definition that combines some, but not all, of the terms (such as “promote or support” or “attack or oppose”) be preferable?

c. Relationship Between PASO and Express Advocacy

In addition to these dictionary definitions, both proposed PASO definitions would state that all communications that expressly advocate the election or defeat of a clearly identified candidate also PASO that candidate. See Alternative A at proposed 11 CFR 100.23(b) and Alternative B at proposed 11 CFR 100.23(b)(2). The Commission seeks comment on whether this recognition that all communications that expressly advocate will PASO—that is, that express advocacy is a subset of PASO—provides useful guidance. Additionally, the Commission seeks comment on whether both proposed PASO definitions apply to a broader range of communications than the express advocacy standard as intended.

d. Scope of Proposed PASO Definitions

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.

For PASO with respect to candidates, Alternative B’s definition of “clearly identified” incorporates by reference the definition in 11 CFR 100.17 of the same term; with respect to parties, the definition is adapted from 11 CFR 100.17. The Commission invites comment on whether a reference to a clearly identified candidate or party is necessary or appropriate. Alternatively, would a limited application of the proposed PASO definition—i.e., to apply it only to those communications that constitute Federal election activity, to communications coordinated with candidates or parties, and as a limit to the exemptions from the definition of

“electioneering communication”—suffice in lieu of a “refers to” criterion? The Commission seeks comment on whether either Alternative A or Alternative B is too broad or too narrow in this respect.

Conversely, not all communications that refer to a clearly identified Federal candidate necessarily PASO that candidate. The Commission has concluded that a particular proposed endorsement did not PASO the endorser. See Advisory Opinion 2003–25 (Weinzapfel) (the proposed communication—a television advertisement in which Senator Bayh would identify himself and endorse Jonathan Weinzapfel, a candidate for State office—did not PASO Senator Bayh).²¹ Both alternatives are intended to reflect the principle in the Weinzapfel AO that a communication in which a Federal candidate endorses another candidate does not, by itself, PASO the endorser. Both alternatives are also intended to reflect the idea—in BCRA’s legislative history and in the Commission’s prior analysis of PASO—that identification of a candidate does not automatically PASO that candidate. Should the Commission revise the proposed definitions to better reflect these principles?

Alternative A, in proposed 11 CFR 100.23(b), also is intended to recognize that many types of communications may PASO, even if, on their face, they also serve another function. For example, the proposed inclusion of “in whole or in part” is intended to incorporate the Commission’s previous analysis that communications may promote both a business or organization and a candidate. Additionally, this proposed paragraph is consistent with the Commission’s previous analysis that a communication may have dual purposes. See Explanation and Justification for Final Rules on Electioneering Communications, 70 FR 75713, 75714 (Dec. 21, 2005). Proposed paragraph 100.23(b) in Alternative A would define PASO so that a communication may PASO a candidate not as a candidate *per se*, but in another capacity such as a prominent individual, legislator, or public official.

The Commission seeks comment on whether Alternative A—in which the PASO component of a communication may be only one part of the

communication and in which the communication may not have an explicit electoral nexus—is consistent with the Supreme Court’s decisions in *Buckley*, *McConnell*, and *Wisconsin Right to Life*. Should Alternative A be explicitly limited to apply only to those communications that constitute Federal election activity, to communications coordinated with candidates or parties, and as a limit to the exemptions from the definition of “electioneering communication”? Alternatively, or additionally, should Alternative A define PASO to include fewer communications, such as by requiring that, in the absence of an explicit electoral nexus, the communication must PASO the candidate’s character, qualifications, or fitness for office? See, e.g., *Wis. Right to Life*, 551 U.S. at 470; 11 CFR 114.15(b)(2), (c)(1)(ii) (referring to character, qualifications, or fitness for office as indicia of express advocacy). Conversely, the Commission seeks comment on whether Alternative A should define PASO to include more communications and, if so, how.

Alternative B is intended to exclude communications directed only at legislation or some other cause by requiring PASO to be directed unambiguously at a candidate or party. Additionally, Alternative B’s clear nexus criterion is intended to exclude communications that merely refer to an individual who may be a candidate for Federal office. For example, Alternative B is intended to exclude an advertisement that merely discusses a Senator’s position on a legislative issue and promotes that position, but does not discuss the Senator’s candidacy for reelection. Does Alternative B exclude more than mere references to individuals who are candidates for office or discussions of a candidate’s position on legislative issues?

The Commission seeks comment on whether proposed Alternative B’s requirement that a communication have a “clear nexus” to an upcoming Federal election or to a candidacy for such election is appropriate. In *Buckley*, the Court explained that its narrowing construction of the Act’s disclosure provisions would ensure that reporting of independent expenditures by persons other than candidates or political committees would “shed the light of publicity on spending that is unambiguously campaign related.” *Buckley*, 424 U.S. at 81. Is the phrase “unambiguously campaign related” relevant or appropriate in the context of coordinated communications? Does the proposed “clear nexus” criterion properly capture or implement the Act’s definition of a contribution, which

²¹ “The mere identification of an individual who is a Federal candidate does not automatically promote, support, attack, or oppose that candidate.” 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) (quoted in 2006 E&J, 71 FR at 33202) (PASO exception to the coordinated communications solicitation and endorsement safe harbor).

includes anything of value given “for the purpose of influencing any election for Federal office”? When used in this context, do the terms “unambiguous” and “clear nexus” provide sufficiently clear guidance?

Commonly, during an election season, ads are run that compare opposing candidates’ records or positions on legislative issues without mentioning their candidacies or an election. For instance, the “Willie Horton” ad, referenced below, is an example of this type of communication. Would ads like these be encompassed by either Alternative A or B? Should they be?

In short, do the proposed “unambiguous” and “clear nexus” criteria properly capture or implement the Act’s definition of a contribution? Conversely, do these requirements overly narrow the scope of the PASO definition?

e. Verbal or Pictorial Means

Alternative B contains the additional requirement that the element of the communication that unambiguously PASOs be done through verbal (whether by visual text or audio speech) or pictorial (whether depictions of party officials, candidates, or their respective logos) means, or a combination of the two. Alternative B further provides that “photographic or videographic alterations, facial expressions, body language, poses, or similar features” may not be considered in determining whether the communication PASOs. In contrast, Alternative A would not restrict the manner in which a communication PASOs a candidate.

Are Alternative B’s limits clear? Should any of the following elements of communications be excluded from the PASO determination: song lyrics, images of the American flag, patriotic or frightening music, or altered candidate images? The Commission seeks comment on whether to exclude from the PASO definition digital or other manipulation of images, for example an image that shows the candidate’s face morphing into the visage of either Adolph Hitler, Mother Theresa, or a popular or unpopular political figure.

The Commission seeks comment on whether non-speech elements are often relevant, or even essential, in determining whether the communication promotes, supports, attacks, or opposes a candidate for Federal office.

Commenters are invited to provide the Commission with specific examples of communications in which non-speech elements are necessary to the communicative purpose. Which approach is clearer, more objective and

administrable? Which approach best effectuates congressional intent?

f. Jurisdiction

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. This criterion is based on the content reference standard of the current coordinated communications regulation at 11 CFR 109.21(c)(4). However, unlike the content reference standard, the fourth criterion in the proposed PASO definition does not contain the 90/120-day window. The proposed jurisdictional requirement is intended to provide an objective, bright-line standard by which to determine PASO. Does this requirement distinguish between those communications that are made for the purpose of influencing a Federal election and those that are not? Alternative A does not contain a jurisdictional requirement.

The Commission invites comment on the proposed jurisdictional criterion. In *Shays III Appeal*, the court held that the Commission’s revised content standard must “rationally separate[] election-related advocacy from other activity falling outside FECA’s expenditure definition.” *Shays III Appeal*, 528 F.3d at 926. Does the proposed jurisdictional criterion accomplish this? Conversely, does this requirement overly narrow the scope of the PASO definition? Are there communications outside a candidate’s jurisdiction that nonetheless are made for the purpose of influencing that candidate’s election (e.g., solicitations of funds, volunteers, or requests to contact voters)?

Additionally, are the phrases “publicly distributed” and “publicly disseminated” sufficiently objective, or are they too vague? Are the phrases under- or overinclusive? Should the Commission adopt a different jurisdictional element, such as one adapted from the electioneering communications definition at 11 CFR 100.29(b)(5)?

The Commission also invites comment on whether a jurisdictional criterion appropriately limits the PASO definition to those communications made for the purpose of influencing a Federal election. See, e.g., *Shays I Appeal*, 414 F.3d at 99 (“Nor is such purpose [of influencing a Federal election] necessarily evident in statements, referring, say, to a Connecticut senator but running only in San Francisco media markets.”). Alternatively, could communications arguably favorable or critical of a candidate but disseminated outside that

candidate’s jurisdiction still be made for the purpose of influencing the election? How, for example, should the definition treat a communication that urges people outside a candidate’s jurisdiction to influence their friends inside the jurisdiction? Would a geographic jurisdictional limit be too narrow?

g. Proposed Examples ²²

Finally, both proposed PASO definitions also provide several examples, some of which are adapted from closed Commission enforcement matters,²³ of communications that would and would not PASO. Alternatives A and B treat the examples differently. The Commission seeks comments on these differences.

The Commission invites comment on (1) whether including examples would be helpful, either in the final rule or in the Explanation and Justification, if the definition is adopted; (2) whether the proposed examples properly apply the proposed definitions; (3) whether the examples provide sufficient context for determining whether specific communications PASO; and (4) whether additional or different examples are needed, such as an example adapted from Advisory Opinion 2003–25 (Weinzapfel).

The Commission seeks comment on whether the proposed alternative definitions for 11 CFR 100.23, in all their parts, provide clear guidance as to PASO, and if not, what aspects of the proposed definitions require further explanation or clarification.

²² Please note that the examples in the alternative proposed PASO definitions are different from, and in addition to, the examples discussed below in the coordination-specific sections.

²³ The example at proposed Alternative A at 11 CFR 100.23(c)(1) and Alternative B at 11 CFR 100.23(d)(1) is adapted from Matter Under Review (“MUR”) 6019 (Dominic Caserta for Assembly); the example at proposed Alternative A at 11 CFR 100.23(c)(2) and proposed Alternative B at 11 CFR 100.23(d)(2) is adapted from MURs 5365 (Club for Growth) and 5694 (Americans for Job Security); the example at proposed Alternative A at 11 CFR 100.23(d)(1) and proposed Alternative B at 11 CFR 100.23(e)(2) is adapted from MUR 6064 (Missouri State University); the example at proposed Alternative A at 11 CFR 100.23(d)(2) and proposed Alternative B at 11 CFR 100.23(e)(3) is adapted from MUR 5387 (Welch for Wisconsin); the example at proposed Alternative A at 11 CFR 100.23(e)(1) and proposed Alternative B at 11 CFR 100.23(d)(3) is adapted from ADR Case 250 (Your Art Here); the example at proposed Alternative A at 11 CFR 100.23(e)(2) and proposed Alternative B at 11 CFR 100.23(e)(5) is adapted from MUR 5974 (New Summit Republicans); and the example at proposed Alternative A at 11 CFR 100.23(e)(3) and proposed Alternative B at 11 CFR 100.23(d)(4) is adapted from MUR 5714 (Montana State Democratic Central Committee).

B. Alternative 2—The Modified WRTL Content Standard—Proposed 11 CFR 109.21(c)(5)

Alternative 2 would add a new content standard that would apply to any public communication that is the “functional equivalent of express advocacy.” The proposed standard specifies 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 Federal candidate. This standard is based on the test articulated in *Wisconsin Right to Life*, 551 U.S. at 469–70, and *McConnell*, 540 U.S. at 204–06, both addressing electioneering communications. The proposed Modified WRTL content standard would apply without regard to the timing of the communication or the targeted audience. 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. Would a content standard that covers communications containing the “functional equivalent of express advocacy” comply with the *Shays III Appeal* requirement that the Commission adopt a standard more restrictive than “express advocacy” outside the 90-day and 120-day time windows?

In *Wisconsin Right to Life*, the Supreme Court decided an as-applied challenge to the BCRA provision prohibiting the use of general treasury funds by corporations and labor organizations to pay for electioneering communications.²⁴ 551 U.S. at 449; see also 2 U.S.C. 441b(b)(2) (corporate and labor organization funding prohibitions); 434(f)(3) (defining electioneering communications). *Wisconsin Right to Life* limited the reach of the electioneering communication funding prohibitions to communications by corporations and labor organizations that contain the

functional equivalent of express advocacy. 551 U.S. at 456–57. Following the *Wisconsin Right to Life* decision, the Commission promulgated rules that incorporated the *Wisconsin Right to Life* test in a provision governing the funding of electioneering communications by corporations and labor organizations. See 11 CFR 114.15.

The proposed Modified WRTL content standard for coordinated communications uses the same language as 11 CFR 114.15(a). The proposed Modified WRTL content standard in the coordinated communications content prong does not, however, refer to or incorporate any other provision from 11 CFR 114.15. For example, the proposed Modified WRTL content standard does not contain the safe harbor in 11 CFR 114.15(b),²⁵ the rules of interpretation in 11 CFR 114.15(c), or the limitation on information to be considered in 11 CFR 114.15(d). Does the proposed Modified WRTL content standard, without these elements, provide sufficient guidance for compliance with the Commission’s coordination rules? Would including in the Modified WRTL content standard any of these, or similar, elements provide clear guidance? Does the proposed Modified WRTL content standard, with or without the additional elements from 11 CFR 114.15, satisfy 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? The Commission seeks comment on the practical effect, if any, of creating two different approaches to the Modified WRTL content standard if the Commission does not incorporate all aspects of 11 CFR 114.15 in the coordinated communication Modified WRTL content standard.

The Commission also seeks comment on whether the proposed Modified WRTL content standard and the existing express advocacy content standard are too similar to give effect to the *Shays III Appeal* court’s decision. Does the Modified WRTL content standard’s formulation of the “functional equivalent of express advocacy” as communications that are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” bear substantial resemblance to components of the Commission’s definition of “expressly

advocating” at 11 CFR 100.22? Would a content standard that covers communications containing the “functional equivalent of express advocacy” comply with the *Shays III Appeal* requirement that the Commission adopt a standard other than “magic words” or “express advocacy” outside the 90- and 120-day time windows?

The Commission also seeks comment on whether the Modified WRTL content standard lends itself to applications outside of the “electioneering communication” context. The Supreme Court, in *McConnell*, observed that the electioneering communication definition was not unconstitutionally vague because it contained narrowly tailored, easily understood, and objectively determinable elements. *McConnell*, 540 U.S. at 194. And *Wisconsin Right to Life* suggested that the *Wisconsin Right to Life* “test is only triggered if the speech meets the bright-line requirements of [the definition of electioneering communications] in the first place.” *Wis. Right to Life*, 551 U.S. at 474 n.7. Untethered from the temporal and jurisdictional limitations present in the electioneering communication definition, is the Modified WRTL content standard too vague, broad, or overinclusive? If so, should the Modified WRTL content standard for coordinated communications be limited by, for example, requiring, as proposed PASO definition B does, that the communication be targeted to the relevant jurisdiction, or contain some other restriction? Alternatively, could communications disseminated outside the jurisdiction in which the election is sought still be made for the purpose of influencing the election, for example, by soliciting funds or volunteers, or requesting that the recipient of the communication contact voters within the jurisdiction?

In addressing electioneering communications, the Supreme Court in *Wisconsin Right to Life* stated that “in a debatable case” the “tie goes to the speaker.” *Wis. Right to Life*, 551 U.S. at 474; *id.* at n.7. Does that concept have any application to the proposed Modified WRTL content standard? Does it have application outside of the corporate and labor organization funding restriction at issue in *Wisconsin Right to Life*? The Commission seeks comment on whether application of the proposed Modified WRTL content standard as well as the payment and conduct prongs raises the same First Amendment issues that underlie the Supreme Court’s decision in *Wisconsin Right to Life*.

²⁴ Electioneering communications are broadcast, cable or satellite communications that refer to a clearly identified candidate for Federal office, are publicly distributed within sixty days before a general election or thirty days before a primary election, and are targeted to the relevant electorate. See 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29. By definition, an electioneering communication is a communication that is not an expenditure or an independent expenditure. 2 U.S.C. 434(f)(3)(B)(ii). Thus, by definition, a communication that contains express advocacy is not an electioneering communication. See 2 U.S.C. 431(17).

²⁵ Although the proposed Modified WRTL content standard does not contain the 11 CFR 114.15(b) safe harbor, the Commission also is proposing safe harbors at 11 CFR 109.21(i) and (j) that are generally applicable to all coordinated communications. These safe harbors are similar to the provision at 11 CFR 114.15(b). See below.

Finally, neither the Commission's electioneering communication definition nor the *Wisconsin Right to Life* decision addresses communications referring to political parties. Similarly, the proposed Modified *WRTL* content standard for coordinated communications would not address political parties, either. Congress in BCRA, however, amended the Act's coordination provisions to include expenditures made in coordination with political party committees. See 2 U.S.C. 441a(a)(7)(b)(ii). The Commission seeks comment on whether it should revise the proposed Modified *WRTL* content standard to include communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against" a political party.

C. Examples

In addition to the examples in the proposed PASO definitions in this NPRM, the Commission is considering whether to include in the final rule, or in its Explanation and Justification, additional examples of communications that would, and would not, satisfy the proposed PASO standard, the proposed Modified *WRTL* content standard, or both standards, if these standards are adopted. These examples are drawn from actual communications evaluated by the courts, the Commission, and from prior Explanations and Justifications for Commission rulemakings.

The Commission seeks comment on the application of the proposed PASO definition and content standard, as well as the proposed Modified *WRTL* content standard to the following examples, and asks whether further examples would be helpful.

Example 1 (from Koerber v. FEC, 583 F. Supp. 2d 740 (E.D.N.C. 2008)): Senator Obama. Why did you vote against protecting infants that survived late term abortions? Not once, but four times. Even Congress unanimously supported protections identical to those you blocked in Illinois. The Supreme Court upheld the ban on partial birth abortions. And yet today, you keep working to roll back this law. Call Senator Obama. Tell him to stop trying to overturn these basic human rights.

Example 2 (from Matter Under Review ("MUR") 5854 (The Lantern Project)): It's hard to make ends meet. Yet Rick Santorum voted against raising the minimum wage. But Santorum voted to allow his own pay to be raised by \$8000. What is he thinking?

Example 3 (from MUR 5991 (U.S. Term Limits, Inc.)): Today, we have more charter schools thanks to Bob Schaffer. Thanks, Bob! Thanks, Bob! Thanks, Bob! Thanks, Bob! We couldn't have done it without you. Thanks for standing up for us. Even when it was really, really hard. Bob does the right thing. Bob keeps his promises. Thanks, Bob Schaffer, for giving my daughter

a chance. Bob Schaffer helped create the Colorado Charter School Act. Tell Bob to keep giving us real education options. Thanks, Bob! Thanks, Bob!

Example 4 (from McConnell, 540 U.S. at 193 n.78): Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks law and order * * * but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

Example 5 (from Explanation and Justification for Final Rules on Electioneering Communications, 72 FR 72899 (Dec. 26, 2007)): [VISUAL OF CANDIDATE SALLY SMITH]: Hello, I'm Sally Smith. Most of us think of heart disease as a problem that mostly affects men. But today, heart disease is one of the leading causes of death among American women. It doesn't have to stay that way. Lower cholesterol, daily exercise, and regular visits to your doctor can help you fight back. So have heart, America, and together we can reduce the risk of heart disease.

VOICE OVER: This message brought to you by DISH Network.

Example 6 (from McConnell, 251 F. Supp. 2d 176, 876 (D.D.C. 2003)): It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.

Example 7 (from Wis. Right to Life v. FEC, 466 F. Supp. 2d 195, 198 n.4 (D.D.C. 2006)): LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well * * *

COUPLE: Yes, yes * * * we're listening. OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca * * *

VOICE-OVER: Sometimes it's just not fair to delay an important decision. But in Washington, it's happening. A group of Senators is using the filibuster delay tactic to block Federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: BeFair.org.

Example 8 (from MUR 6013 (Friends of Peter Teahen)): VOICE OVER AND APPEARANCE BY CANDIDATE PETER TEAHEN: My father served in the Navy and like many veterans he didn't talk about his military experience. But we all knew how much he loved his country. Dad had a big

flag pole in our front yard and I used to help him raise the flag. Now, when I see a flag, I think of Dad and all the men and women who sacrifice their lives for the sake of freedom. I'm Peter Teahen and I'm proud to be an American. Teahen Funeral Home: Life ends, but memories live on.

Example 9 (from MUR 6122 (National Association of Home Builders)): Protecting the American Dream. Gary voted to create a \$7,500 temporary first-time home buyer tax credit. Voted for legislation to make more mortgage bonds available. He voted for legislation to help victims of the sub-prime crisis.

Energy Independence Is No Longer Just An Economic Issue, But Also A National Security Issue. Gary supports increased development of clean coal, natural gas, and oil. Supports increasing domestic exploration in Alaska and off our coast. Congressman Miller supports incentives to encourage further development and use of alternative fuels.

Example 10 (from The Real Truth About Obama v. FEC, No. 3:08-CV-483, 2008 WL 4416282 (E.D. Va. 2008), aff'd, 575 F.3d 342 (4th Cir. 2009)):

WOMAN'S VOICE: Just what is the real truth about Democrat Barack Obama's position on abortion?

OBAMA-LIKE VOICE: Change. Here is how I would like to change America * * * about abortion: Make taxpayers pay for all 1.2 million abortions performed in America each year. Make sure that minor girls' abortions are kept secret from their parents. Make partial-birth abortion legal. Give Planned Parenthood lots more money to support abortion. Change current Federal and State laws so that babies who survive abortions will die soon after they are born. Appoint more liberal Justices on the U.S. Supreme Court. One thing I would not change about America is abortion on demand, for any reason, at any time during pregnancy, as many times as a woman wants one.

WOMAN'S VOICE: Now you know the real truth about Obama's position on abortion. Is this the change you can believe in?

VOICE OVER: To learn more real truth about Obama, visit www.TheRealTruthAboutObama.com.

Example 11: 1964 Presidential Campaign Television Spot, "Peace Little Girl" ("Daisy" Ad), available at LBJ Library and Museum Media Archives, <http://www.lbjlib.utexas.edu/johnson/media/daisyspot> (last visited Oct. 7, 2009) (but without express advocacy language).

Example 12: "Willie Horton Political Ad 1988," available at <http://www.youtube.com/watch?v=SLafbHYVqVE> (last visited Oct. 8, 2009).

Example 13 (from MUR 5525 (Swift Boat Veterans for Truth)):

JOHN KERRY: They had personally raped, cut off ears, cut off heads * * *

JOE PONDER: The accusations that John Kerry made against the veterans who served in Vietnam was just devastating.

JOHN KERRY: * * * randomly shot at civilians * * *

JOE PONDER: and it hurt me more than any physical wounds I had.

JOHN KERRY: * * * Cut off limbs, blown up bodies * * *

KEN CORDIER: That was part of the torture, was to sign a statement that you had committed war crimes.

JOHN KERRY: * * * razed villages in a fashion reminiscent of Ghengis Khan* * *

PAUL GALANTI: John Kerry gave the enemy for free what I and many of my comrades in North Vietnam in the prison camps took torture to avoid saying. It demoralized us.

JOHN KERRY: * * * Crimes committed on a day to day basis* * *

KEN CORDIER: He betrayed us in the past. How could we be loyal to him now?

JOHN KERRY: * * * Ravaged the countryside of South Vietnam* * *

PAUL GALANTI: He dishonored his country, but more importantly, the people he served with. He just sold them out.

ANNOUNCER: Swift Boat Veterans for Truth is responsible for the content of this advertisement.

The Commission seeks comment on whether such examples should be provided, and what other types of communications would be appropriate examples. Furthermore, the Commission invites commenters to provide additional examples of communications demonstrating that the proposed PASO standard or proposed Modified WRTL content standard would rationally separate election-related advocacy from other activity falling outside the Act's expenditure definition. Conversely, the Commission invites commenters to provide examples of communications demonstrating that the proposed PASO standard or proposed Modified WRTL content standard would be either underinclusive or overinclusive.

D. Alternative 3—Clarification of the Express Advocacy Standard—Revised 11 CFR 109.21(c)(3)

Alternative 3 would clarify existing 11 CFR 109.21(c)(3) by including a cross-reference to the express advocacy definition at 11 CFR 100.22. As discussed above, the *Shays III Appeal* court interpreted the existing express advocacy content standard as follows: “more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain magic words.” *Shays III Appeal*, 528 F.3d at 925 (emphasis added). However, “magic words” are only one part of the Commission’s express advocacy regulation. See 11 CFR 100.22(a). As noted above, paragraph (a) of the regulatory definition also includes any “campaign slogan(s) or individual word(s), which in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s).” *Id.*

Additionally, paragraph (b) of that regulation provides that a communication expressly advocates:

When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

See 11 CFR 100.22(b).

The Commission is considering adding an explicit reference to 11 CFR 100.22 in the current express advocacy content standard at 11 CFR 109.21(c)(3) to clarify that, outside of the 90/120-day window, communications containing more than just “magic words” are regulated, provided that the conduct and payment prong are also met. The Commission seeks comment on whether, by itself, the clarification of 11 CFR 109.21(c)(3) as encompassing not only “magic words,” but also the entirety of the express advocacy definition at 11 CFR 100.22, would fully address the court’s concern about the current limitations of the content prong (*i.e.*, the “decision to apply a ‘functionally meaningless’ standard” outside the 90- and 120-day windows). *Shays III Appeal*, 528 F.3d at 924. Or, did the court’s concern about the limitations of the express advocacy standard go beyond “magic words”?

E. Alternative 4—The “Explicit Agreement” Standard—Proposed 11 CFR 109.21(c)(5), (d)(7), and (e)

Congress specified in BCRA that the Commission’s regulations “shall not require agreement or formal collaboration to establish coordination.” BCRA at sec. 214(c), 116 Stat. at 95. However, the court in *Shays III Appeal* indicated that some agreements are so explicit that to ignore them would be to permit the evasion of the law as written by Congress. *Shays III Appeal*, 528 F.3d at 925. In concluding that the current coordinated communication regulations “frustrate Congress’s goal of ‘prohibiting soft money from being used in connection with Federal elections,’” the *Shays III Appeal* court stated that, “[o]utside the 90/120-day windows, the regulation allows candidates to evade—almost completely—BCRA’s restrictions on the use of soft money.” *Id.* (quoting *McConnell*, 540 U.S. at 177 n. 69). The court then presented an example (the “NY Times hypothetical”) to illustrate that “the regulation still permits exactly what we worried about” in *Shays I*

Appeal: “more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain magic words,” and the Commission would do nothing about this, “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.” *Id.* The *Shays III Appeal* court’s discussion referenced the identical concern raised in *Shays I Appeal*, where the court noted that:

[M]ore 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.

Shays III Appeal, 528 F.3d at 921 (quoting *Shays I Appeal*, 414 F.3d 98).

The NY Times scenario is a hypothetical. But recently, an actual case came to light in which a campaign operative, with the knowledge and acquiescence of the candidate, set up an organization, funded by the candidate’s donors, to run purportedly independent negative ads about the candidate’s chief opponent.²⁶ Should the coordination regulations capture this fact pattern? Does the answer depend on the content of the ads? When combined with the court’s hypothetical, does the existence of actual instances of such coordination heighten the need for this approach?

Alternative 4 is an attempt to address the underlying concern that appears to have motivated both *Shays* courts’ concerns: conduct that explicitly reveals both an unquestionable agreement and unequivocal intent to affect a Federal election is the quintessential conduct that Congress sought to regulate. The reason that coordinated expenditures are treated differently is precisely because of the collaboration between the candidate’s committee and outside groups. The Commission seeks comment on whether an “Explicit Agreement” standard addresses these

²⁶ David A. Lieb, *Lawmakers Plead Guilty in Obstruction Case, Resign*, Associated Press, Aug. 26, 2009 (“I wrongly believed we could conceal my campaign’s coordination with the independent operator” Smith confessed to U.S. District Judge Carol Jackson * * *); see also Jeff Smith, *Think You Won’t Get Caught? Think Again*, St. Louis Post-Dispatch, Sept. 8, 2009 (“As Election Day drew near, I authorized a close friend and two aides to help an outside consultant send out a mailer about my opponent but without disclosing my campaign’s connection.”).

concerns. Should the “Explicit Agreement” standard be adopted in conjunction with another proposed standard? The proposed “Explicit Agreement” standard requires a formal or informal agreement between a candidate, candidate’s committee or political party committee and the person paying for the “public communication,” as defined in 11 CFR 100.26. Either the agreement or the communication must be made for the purpose of influencing an election.

The Commission seeks comment on whether limiting the standard to those public communications that are explicitly made for the purpose of influencing an election, as in the Act’s definition of “expenditure,” is adequate to separate election-related advocacy from other communications. Like the other alternatives the Commission is now considering, the proposed “Explicit Agreement” standard would apply without regard to when the communication is made or the targeted audience. Should it be so limited? The Commission also seeks comment on whether the proposed “Explicit Agreement” standard is overinclusive, underinclusive, or vague. Should the proposed “Explicit Agreement” standard be limited by, for example, requiring a reference to a political party or a clearly identified candidate for Federal office?

The proposed rule states that whether the purpose of the communication is for the purpose of influencing a Federal election may be found in either the content of the communication or the agreement. This is a fact-specific determination. The Commission seeks comment on the types of facts that should lead to a determination of the purpose of a communication. For example, should the text, timing, or intended audience of the communication be considered? Should agreements entered into by a candidate’s campaign staff be treated differently from agreements entered into by a candidate’s congressional staff? Should the purpose be determined more broadly, *e.g.*, by inference, discussions, implicit agreements, or course of dealing?

The proposed “Explicit Agreement” standard requires a formal or informal agreement, and incorporates the current coordinated communication regulatory definition of “agreement” as “a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination.” 11 CFR 109.21(e). For purposes of the proposed “Explicit Agreement” standard, would this current definition suffice and does it

provide sufficient guidance? Should the definition not be incorporated in the proposed text? Why or why not? Does the difference between a formal and informal agreement need to be clarified, and if so, how?

Additionally, the requirement of a formal or informal agreement in the proposed “Explicit Agreement” standard would require certain conforming changes to the existing coordinated communications regulations. The Commission proposes to amend the statement in 11 CFR 109.21(d) that all conduct standards could be satisfied regardless of agreement. As revised, this statement would not apply to the proposed “Explicit Agreement” standard. Similarly, the statement in 11 CFR 109.21(e) that agreement is not required would be amended to exclude the proposed “Explicit Agreement” standard.

1. Examples

The Commission seeks comment on whether one, two, all, or none of the following scenarios should be, or are, covered by the proposed “Explicit Agreement” standard:

Example 1: Outside advocacy group G’s director meets Candidate Jones at a cafe. Jones says she wants to become known as “the education candidate” but expresses concern that her campaign coffers are low. G’s director tells Jones that her group could save Jones money by running the “education issue” component of Jones’ campaign. Jones agrees that that is a wonderful plan. Group G pays for a series of television advertisements stressing that one of the most important issues affecting the future of our nation is education. Jones runs ads in which she states, “I’m the education candidate.”

In this example, the candidate and outside group agree that the outside group will spend its funds to highlight what the candidate has identified as an issue of importance to her campaign through an issue ad or series of issue ads, which the candidate’s campaign could then build on. The ad would not clearly identify the candidate. Is this kind of “piggybacking” contemplated by the *Shays III Appeal*—NY Times hypothetical?

Example 2: Candidate Jones meets with a well-heeled supporter more than 120 days before the next election and suggests the supporter run ads about Candidate Jones’ record on education. Candidate Jones instructs the supporter that the ads should highlight Candidate Jones’ success in Congress on the issue and the ads should ask viewers to call Candidate Jones and thank her for her “strong voice for our State,” but should not contain “magic words.”

Example 3: Candidate Jones is approached by Jane Doe with an offer to produce and

distribute ads against Candidate Jones’ opponent. Candidate Jones agrees and directs members of his campaign to raise money for Ms. Doe and provide Ms. Doe with negative information about the opponent as well as mailing addresses. Ms. Doe distributes the ads, with no mention of Candidate Jones or his campaign committee. The ads name Candidate Jones’ opponent (Senator Black) and list a series of missed votes over the course of the previous year. The ads label Senator Black as the “Absent Senator” and end with the tag line: “Sorry Mr. Black, we need a Senator who shows up for work!”

III. Proposals for Revising the Common Vendor and Former Employee Provisions at 11 CFR 109.21

The fourth standard of the conduct prong (the “common vendor” standard) is satisfied if (1) the person paying for the communication contracts with or employs a “commercial vendor” to create, produce, or distribute the communication, (2) the commercial vendor has provided certain specified services to the candidate who is clearly identified in the communication, the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee during the previous 120 days, and (3) the commercial vendor uses or conveys to the person paying for the communication information about the plans, projects, activities, or needs of the candidate, candidate’s opponent, or political party committee that is material to the creation, production, or distribution of the communication, or information used previously by the commercial vendor in providing services to the candidate, the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or the political party committee that also is material to the creation, production, or distribution of the communication. *See* 11 CFR 109.21(d)(4).

The fifth conduct standard (the “former employee” standard) is satisfied if (1) the communication is paid for by a person or by the employer of a person who was an employee or independent contractor of the candidate clearly identified in the communication, or the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee during the previous 120 days, and (2) the former employee or independent contractor uses, or conveys to the person paying for the communication, information about the plans, projects, activities, or needs of the candidate or political party committee that is material to the creation, production, or distribution of the communication; or if the former

employee or independent contractor uses, or conveys to the person paying for the communication, information used previously by the former employee or independent contractor in providing services to the candidate, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or the political party committee that is material to the creation, production, or distribution of the communication. See 11 CFR 109.21(d)(5).

As discussed above, the 2006 coordinated communication regulations reduced the period of time during which a common vendor's or former employee's relationship with the authorized committee or political party committee referred to in the communication could satisfy the conduct prong, from the entire election cycle to 120 days. 2006 E&J, 71 FR at 33204.

In order to comply with the *Shays III Appeal* holding concerning the insufficient justification for the change from the "current election cycle" to a 120-day period in the common vendor and former employee conduct standards, the Commission invites comment on three alternatives for the time periods specified in the common vendor and former employee conduct standards. The Commission is not, at this time, proposing specific changes to any other aspects of these two conduct standards.

The Commission seeks comments on whether each of the three alternatives would comply with the court's holding in *Shays III Appeal* that the Commission failed to provide an adequate explanation for its revision of the common vendor and former employee conduct standards to cover a 120-day period rather than the "current election cycle." The Commission also seeks comments on whether it should adopt a different time period for these two conduct standards than those proposed.

With respect to all three alternatives, the Commission seeks comment on the following questions concerning different types of campaign vendors, employees, and campaign-related information. Such comments will help the Commission determine the realistic "shelf life" of the types of information that a campaign vendor, former employee, or independent contractor is likely to possess, and tailor the regulations accordingly. Does the *Shays III Appeal* decision suggest that empirical evidence is necessary? What factors affect how long campaign information retains its usefulness? Do some types of campaign information (e.g., polling data, campaign strategy, advertising purchases, slogans,

graphics, mailing lists, donor lists, or fundraising strategy) maintain their value to a campaign for a longer, or shorter, period of time than other types of information? What types of information tend to retain their usefulness the longest, and for how long? What types of information retain their usefulness for a shorter period, and for how long? Does the "shelf life" of campaign-related information depend on the type of campaign or election involved? That is, does information retain its usefulness longer for presidential campaigns, for example, than for Senate or House campaigns? Does the "shelf life" of campaign information vary depending on the particular vendor or type of media (e.g., print vs. television, direct mail vs. newspaper)?

The Commission also seeks comments on whether the date a candidate files a statement of candidacy for a given election is an accurate indicator of when the candidate begins actively campaigning for that election; Commission regulations require a candidate to file such a statement within fifteen days after receiving contributions or making expenditures in excess of \$5,000, or authorizing other persons to do so. 11 CFR 100.3(a) and 101.1(a). If the filing date of the statement of candidacy is an accurate indicator of the start of a campaign, is the duration of the campaign a reasonable proxy for the "shelf life" of campaign information? If so, should the Commission adopt a time period for the common vendor and former employee conduct standards that is based on when candidates typically file their statements of candidacy? If so, how should the Commission determine what is the typical date when candidates file their statements of candidacy? Alternatively, should the Commission use a date based on when individual candidates actually file their statements of candidacy? If not, is there some other date the Commission should use? The Commission has observed that when Federal officeholders win an election, many of them file statements of candidacy for the next election shortly thereafter, while challengers often file their statements of candidacy at a later date, closer to the election in which they plan to run. How should the Commission address this general discrepancy between incumbents and challengers?

In addition to the useful life of campaign information, the Commission seeks comment on any relevant distinctions between different types of vendors or campaign employees, and the types of information they are likely

to possess. Do different categories of vendors or campaign employees typically possess different types of campaign-related information that would affect how long their knowledge would remain material? If so, would adopting different time periods for different categories of vendors or employees, or different types of information, be too cumbersome for presidential, congressional, or other political committees to implement?

The Commission also seeks comment on whether the list of vendor services set forth at 11 CFR 109.21(d)(4)(ii) captures the appropriate range of services that are likely to result in a common vendor's conveying timely campaign information that is material to a communication to a person paying for the communication. Are the types of vendor services listed the appropriate types of services to be covered by this conduct standard? Should any of them be eliminated from the list? Should any other vendor services be added? Alternatively, should the list be abandoned?

A. Alternative 1—Retain 120-Day Period

Proposed Alternative 1 would not amend 11 CFR 109.21(d)(4) and (5). The *Shays III Appeal* court found that "the FEC has provided no explanation for why it believes 120 days is a sufficient time period to prevent circumvention of the Act," and that although the Commission has discretion in determining where to draw a bright-line rule, "it must support its decision with reasoning and evidence, for 'a bright line can be drawn in the wrong place.'" *Shays III Appeal*, 528 F.3d at 929 (quoting *Shays I Appeal*, 414 F.3d at 101). Thus, although the *Shays III Appeal* court held that the Commission had failed to justify sufficiently the 120-day period applicable to both common vendors and former employees, it did not hold that the 120-day period was inherently improper. The first alternative would therefore 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.

The Commission seeks comment on whether to adopt Alternative 1. Is the 120-day period an appropriate temporal limit on the operation of the regulation, in light of current campaign practices and with respect to the questions posed above? Does the 120-day period accurately reflect the period during which a vendor or former employee is

likely to possess and convey timely campaign information? Does 120 days approximate the length of time that a vendor or campaign employee is likely to possess information that remains useful to a campaign?

B. Alternative 2—Two-Year Period

Alternative 2 would amend 11 CFR 109.21(d)(4) and (5) by deleting the phrase “the previous 120 days” from paragraphs (d)(4)(ii) and (d)(5)(i), and replacing it with “the two-year period ending on the date of the general election for the office or seat that the candidate seeks.” The two-year period corresponds with the election cycle for the House of Representatives, the most common election cycle of those regulated by the Commission.

The Commission seeks comment on whether to adopt Alternative 2. Does this proposal represent the period during which the majority of candidates engage in active campaigning? Does the period of active campaigning for incumbent candidates differ from that of non-incumbent candidates? Does the period of active campaigning for Senate and presidential candidates differ significantly from that of House candidates? Is the two-year period a reasonable length of time for Senate and presidential candidates?

The specific language of this proposal (“ending on the date of the general election for the office or seat that the candidate seeks”) is intended to reflect the fact that a candidate may run in a primary election but not in the subsequent general election, or may run in a special election or other special circumstances. The period during which this provision would apply is the same regardless of whether a candidate participates in the primary and/or general election, and to obviate any uncertainty about when the two-year period begins for candidates who participate in elections, such as special elections, that are held at a different time from the usual general election. Does the language of the proposal accomplish these goals?

Should there be a different standard for the common vendor and former employee provisions in special elections? If so, what standard should apply to special elections?

C. Alternative 3—Current Election Cycle

Alternative 3 would amend 11 CFR 109.21(d)(4) and (5) by replacing the existing 120-day period in paragraphs (d)(4)(ii) and (d)(5)(i) with a “current election cycle” period, as in the pre-2006 version of the regulation. *See* 11 CFR 109.21(d)(4), (5) (2002). “Current election cycle” is defined in current

Commission regulations as beginning “on the first day following the date of the previous general election for the office or seat which the candidate seeks.” * * * The election cycle shall end on the date on which the general election for the office or seat that the individual seeks is held.” 11 CFR 100.3(b). The “current election cycle” period was not challenged in *Shays I Appeal*, and has not been invalidated or questioned by any court.

The Commission seeks comment on whether to adopt Alternative 3. Is the “current election cycle” an appropriate length of time to restrict the activities of former campaign employees and common vendors? That is, does the “current election cycle” accurately reflect the length of time that vendors and former employees are likely to possess and convey campaign information that is still relevant to the campaign? Given that the “current election cycle” differs in length for House, Senate, and presidential candidates, is this period more appropriate for some elections or candidates than for others? During previous rulemakings, several commenters asserted that “the current election cycle” was too long with respect to presidential and Senate candidates, whose election cycles are four and six years, respectively. Do Senate and presidential candidates typically engage in active campaigning for the entire election cycle, or for some shorter period preceding the actual election? If the latter, what shorter period is typical? If this proposal is adopted, should the definition of “current election cycle” be modified in any way for purposes of this provision, or is the definition set forth at 11 CFR 100.3(b) appropriate?

IV. Proposed Safe Harbors for Communications in Support of 501(c)(3) Organizations and for Business and Commercial Communications—Proposed 11 CFR 109.21(i) and (j)

The Commission is considering adding a safe harbor to 11 CFR 109.21(i) to address certain public communications in which Federal candidates endorse or solicit support for non-profit entities organized under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)), or for public policies or legislative proposals espoused by those organizations. The Commission also is considering adding a new safe harbor at 11 CFR 109.21(j) for certain commercial and business communications.

A. Proposed 11 CFR 109.21(j)—Safe Harbor for Public Communications in Support of Tax-Exempt Organizations

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. The Commission also seeks comment on the appropriate location of a safe harbor for communications that endorse or solicit support for non-profit organizations.

Currently, the coordinated communication rules contain safe harbors for public communications in which a Federal candidate endorses a Federal or non-Federal candidate, *see* 11 CFR 109.21(g)(1), and for public communications in which a candidate solicits funds for a Federal or non-Federal candidate or a particular organization, *see* 11 CFR 109.21(g)(2). These safe harbors do not apply, however, to public communications in which a candidate expresses or seeks non-monetary support for an organization’s mission, or for a legislative or policy initiative supported by the organization.

Such a communication was the subject of a recent enforcement action. *See* MUR 6020 (Alliance/Pelosi). The enforcement action involved a television advertisement sponsored by a 501(c)(3) organization. In the advertisement, a Federal candidate appeared, discussed environmental issues, and asked viewers to visit a Web site sponsored by the organization paying for the advertisement. The advertisement was a public communication that was distributed nationwide, including in the candidate’s jurisdiction, within 90 days before the candidate’s primary election, and therefore satisfied the fourth coordinated communications content standard at 11 CFR 109.21(c)(4). The advertisement solicited general support for the organization’s Web site and cause, but did not “solicit[] funds * * * for [an] organization[]” under the solicitation safe harbor at 11 CFR 109.21(g)(2).

Proposed 11 CFR 109.21(i) would, under certain circumstances, enable a Federal candidate to participate in such a public communication, without the communication being treated as an in-kind contribution to the candidate.

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.

Alternatively, rather than creating a new provision, would it be sufficient to expand the current safe harbor for endorsements at 11 CFR 109.21(g)(1) to include endorsements of an entity that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code?²⁷ Would expanding the safe harbor at 11 CFR 109.21(g)(1) adequately capture communications that solicit support for a nonprofit but neither explicitly endorse nor solicit funds for the entity? Would the expansion of existing 11 CFR 109.21(g)(1) address the same concerns that proposed 11 CFR 109.21(i) is intended to address? If so, is such an approach preferable to creating a new safe harbor at proposed 11 CFR 109.21(i)?

The Commission seeks comment on the proposed safe harbor with respect to both of the alternative proposed PASO definitions. The Commission is particularly interested in the following: Should the Commission exempt public communications in which a candidate expresses support for a tax-exempt organization as described above or for a position or action with respect to a specific legislative or public policy initiative, but does not PASO the candidate or another candidate seeking the same office, from regulation as coordinated communications? If so, does proposed 11 CFR 109.21(i) accomplish this goal?

Assuming that the Commission adopts such a safe harbor, what restrictions or conditions, if any, should apply to it, in addition to the existing PASO limitation? For example, should any proposed safe harbor be limited to public communications that are distributed nationwide? Should the proposed safe harbor be limited to public communications that are paid for by the tax-exempt organizations described above? Should proposed 11 CFR 109.21(i) “public policy or

legislative proposal” be limited to legislation that is before Congress? Should it encompass other types of public policies, such as urging the public to engage in charitable work or community service, or encouraging the public to seek medical testing or take other health measures? Can public communications containing any of these examples PASO the candidate who expresses or seeks support for them or for the tax-exempt organizations paying for the communications?

Would any communications that satisfy the content standards at 11 CFR 109.21(c)(2) (republication) or (c)(3) (express advocacy) qualify for the proposed safe harbor? Or would the proposed safe harbor, as a practical matter, exempt only communications covered by the content standards at 11 CFR 109.21(c)(1) (electioneering communications) and (c)(4) (reference to a candidate), because any communications that would satisfy the republication or express advocacy content standards would necessarily PASO?

The Commission previously has considered a similar exemption for public service announcements in the context of electioneering communications. See Notice of Proposed Rulemaking on Electioneering Communications, 67 FR 51131, 51136 (Aug. 7, 2002) (“2002 EC NPRM”). Under the Act, the Commission may promulgate regulations exempting certain communications from the definition of an electioneering communication, only if “the exempted communication [is] not * * * a ‘public communication’ that refers to a clearly identified candidate for Federal office and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.” 2002 EC E&J, 67 FR at 65198 (quoting 2 U.S.C. 434(f)(3)(B)(iv)).

In the 2002 electioneering communications rulemaking, the Commission asked whether the proposed electioneering communications regulation should include an exemption for public service announcements that refer to a clearly identified Federal candidate. The Commission also asked whether it “should limit any of [several possible] exemptions to ads that do not promote, support, attack, or oppose any clearly identified candidate.” 67 FR at 51136. The Commission 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.” 2002 EC E&J, 67 FR at 65202. The Commission concluded that “television and radio communications that include clearly identified candidates and that are distributed to a large audience in the candidate’s State or district for a fee are appropriately subject to the electioneering communications provisions in BCRA * * * . Consequently, a [public service announcement] exemption is not included in the final rules.” *Id.*

The Act does not limit the Commission’s authority to exempt certain types of communications from regulation as a coordinated communication to communications that do not PASO, as it does for electioneering communications. Would a public communication that PASOs a clearly identified Federal candidate nonetheless present similar concerns in the coordination context as it does in the electioneering communications context? If so, does the inclusion of a PASO limitation in the proposed safe harbor address that concern? What effect, if any, would the adoption of either of the proposed PASO definitions have on the PASO limitation in the proposed safe harbor? What effect, if any, would declining to adopt a definition of PASO have on the PASO limitation in the proposed safe harbor?

The Commission invites comments on the following hypothetical example. Tax-exempt Organization A pays for a television advertisement in which a candidate appears. The candidate states in the advertisement: “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.” Should this advertisement qualify for the proposed safe harbor, or should it continue to be treated as a coordinated communication? Does it PASO Candidate X? Why or why not?

Assuming the Commission determines that a safe harbor is necessary, is there a reason to prefer one approach to the other? Alternatively, does the Commission’s dismissal of MUR 6020 (Alliance/Pelosi) demonstrate that such a safe harbor is not necessary because the Commission has adequate means of addressing the concerns at issue? Is the proposed safe harbor described above appropriate and

²⁷ The safe harbor for solicitation by a Federal candidate at 11 CFR 109.21(g)(2) is broader than the safe harbor for endorsement by a Federal candidate at 11 CFR 109.21(g)(1), which is limited to endorsement of candidates for Federal and non-Federal office.

advisable? Is the proposed safe harbor under- or over-inclusive?

B. Proposed 11 CFR 109.21(j)—New Safe Harbor for Business and Commercial Communications

The Commission is also considering adding a new coordinated communications safe harbor at 11 CFR 109.21(j) to address certain commercial and business communications. 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.

The proposed new safe harbor is intended to encompass the types of commercial and business communications that were the subjects of several recent enforcement actions. In each enforcement action, a business owned by a Federal candidate that had been operating prior to the candidacy paid for television advertisements that included the name, image, and voice of the candidate and that were distributed in the candidate's district within 90 days before the election, thus satisfying the fourth coordinated communications content standard at 11 CFR 109.21(c)(4). See MUR 6013 (Teahen), MUR 5517 (Stork), and MUR 5410 (Oberweis); see also MUR 4999 (Bernstein).

The Commission seeks comments on the proposed new safe harbor. Should the Commission exclude these commercial and business communications from regulation as coordinated communications? If so, would the proposed safe harbor accomplish this goal? Are Federal candidates who own or operate businesses or who are involved in other commercial activity currently impeded under the coordinated communications rules from being able to conduct their business activities? In addressing the time windows that are applicable to common vendors and former employees, the *Shays III District* court determined that the Commission is "certainly not at liberty to accommodate" business activities "at the expense of BCRA's statutory goals." *Shays III District*, 508 F. Supp. 2d at 51. Notwithstanding this conclusion, could the current coordinated communications regulations be more narrowly tailored to accomplish BCRA's

statutory goals without unnecessarily impeding non-electoral business activities?

Alternatively, would the proposed safe harbor provide an electoral advantage to candidates who participate in business activities as opposed to their election opponents who do not? If so, would any such advantage depend on the type of business activity in question, the type or content of the public communication at issue, the office or seat the candidate seeks or holds, or other factors? In addressing the "Millionaires' Amendment," the Supreme Court reaffirmed that the government may not "level electoral opportunities" by equalizing candidates' advantages. *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008). Accordingly, may the Commission consider competitive advantages or disadvantages in fashioning its coordination rules?

Would the proposed safe harbor have the potential for circumvention of the Act's contribution limitations and prohibitions? If so, could that potential be minimized or eliminated, and if so, how?

What changes to the proposed safe harbor, if any, would better capture only *bona fide* business and commercial communications, without also encompassing election-related communications? Should the proposed safe harbor distinguish between pre-existing businesses and those that are established after a candidate files a statement of candidacy or after the beginning of the election cycle? Should it 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, or should firms be allowed to adjust their advertising based on *bona fide* commercial need, regardless of any candidacy? How would the Commission determine *bona fide* commercial need? Should the proposed safe harbor apply only to public communications on behalf of a business whose name includes the candidate's name, or should it also apply to public communications in which a candidate appears as a spokesperson for a business, product, or service that does not share his or her name? Should the proposed safe harbor require that the public communication explicitly propose a transaction, such as the purchase of a product or service? Should the proposed safe harbor require that the public communication include contact information such as the address, phone number, or Web site of the business? Would this proposal be more appropriately limited to being an

exception from only the content standard at 11 CFR 109.21(c)(4) regarding communications that refer to the candidate? What effect, if any, would the adoption of either of the proposed PASO definitions have on the PASO limitation in the proposed safe harbor? What effect, if any, would declining to adopt a definition of PASO have on the PASO limitation in the proposed safe harbor?

The Commission previously considered an exemption for business advertisements in the electioneering communications context. See 2002 EC NPRM at 51136. In that rulemaking, the Commission asked whether the proposed electioneering communications regulation should include an exemption for communications that refer to a clearly identified Federal candidate "but that promote a candidate's business or professional practice," but it did not provide proposed text for such an exemption. *Id.* As discussed above, the Commission also asked whether it "should limit any of [several proposed] exemptions to ads that do not promote, support, attack, or oppose any clearly identified candidate." *Id.* The Commission ultimately decided not to adopt an exemption for business advertisements, concluding that "it is likely that, if run during the period before an election, such communications could well be considered to promote or support the clearly identified candidate, even if they also serve a business purpose unrelated to the election." 2002 EC E&J at 65202.

Nevertheless, in response to the Supreme Court's *Wisconsin Right to Life* decision, the Commission adopted, in 2007, a safe harbor at 11 CFR 114.15(b) to exclude from the prohibition on corporate-funded electioneering communications, *inter alia*, an electioneering communication that "proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event," provided that the communication also does not mention any election, candidacy, political party, opposing candidate, or voting; and does not take a position on any candidate's or officeholder's character, qualification, or fitness for office. As the Commission explained, such an electioneering communication "could reasonably be interpreted as having a non-electoral, business or commercial purpose," and thus "is susceptible of a reasonable interpretation other than as an appeal to vote." Explanation and Justification for Final Rules on Electioneering

Communications, 72 FR 72899, 72904 (Dec. 26, 2007).

Does the rationale for adopting the electioneering communication safe harbor for business transactions carry over into the coordination context, or did the reasoning of *Wisconsin Right to Life* apply only to electioneering communications? Would the new safe harbor be over- or underinclusive or vague?

V. Party Coordinated Communication Provisions in 11 CFR 109.37

The party coordinated communication regulation at 11 CFR 109.37 contains a three-prong test for determining whether a communication paid for by a political party committee is coordinated between a candidate and the party committee. The party coordinated communication test in 11 CFR 109.37 has a content prong that is substantially the same as the one for coordinated communications in 11 CFR 109.21(c). See 11 CFR 109.37(a)(2). Also, the common vendor and former employee conduct standards of 11 CFR 109.21(d) that were struck down in *Shays III Appeal* are incorporated by reference in the party coordinated communication regulations. See 11 CFR 109.37(a)(3).

As pointed out in footnote 2, above, the Commission previously has adopted parallel regulations for coordinated communications at 11 CFR 109.21 and party coordinated communications at 11 CFR 109.37. However, the party coordinated communication regulations were never challenged by the plaintiffs in the *Shays* litigation, nor were they addressed or even referenced by the appellate or district court decisions. Section 109.37 does not incorporate by reference any of the content standards of 11 CFR 109.21 that are the subject of the other parts of this rulemaking. Accordingly, the Commission is not proposing to revise the party coordinated communication regulations to maintain parallelism with any revisions to the regulations for coordinated communications at 11 CFR 109.21 in this rulemaking but seeks comment on whether it should issue a notice of proposed rulemaking on this subject, and if so, when.

In the event, however, that the Commission revises the common vendor and former employee conduct standards of 11 CFR 109.21(d), any changes to the common vendor and former employee standards that the Commission adopts will apply automatically to 11 CFR 109.37(a)(3) because, as noted above, the latter incorporates by reference the former. The Commission seeks comment on whether this result is appropriate.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities. The basis for this certification is that any individuals and not-for-profit enterprises that would be affected by these proposed rules would not be “small entities” under 5 U.S.C. 601.

The definition of “small entity” does not include individuals, and includes a not-for-profit enterprise as a “small organization” if it is independently owned and operated and not dominant in its field. 5 U.S.C. 601(4). Any State, district, and local party committees that would be affected by these proposed rules would be not-for-profit committees that do not meet the definition of “small organization.” State political party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their State and are thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately.

Furthermore, any separate segregated funds that would be affected by these proposed rules would be not-for-profit political committees that do not meet the definition of “small organization” because they are financed by a combination of individual contributions and financial support for certain expenses from corporations, labor organizations, membership organizations, or trade associations, and therefore are not independently owned and operated. Most of the other political committees that would be affected by these proposed rules would be not-for-profit committees that do not meet the definition of “small organization.” Most political committees are not independently owned and operated because they are not financed by a small identifiable group of individuals. In addition, most political committees rely on contributions from a large number of individuals to fund the committees’ operations and activities.

To the extent that any State party committees representing minor political parties or any other political committees might be considered “small

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

These proposed rules would not impose any new requirements on commercial vendors. Any indirect economic effects that the proposed rules might have on commercial vendors would result from the decisions of their clients rather than Commission requirements.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 109

Coordinated and independent expenditures.

For reasons set out in the preamble, Subchapter A of Chapter I of title 11 of the *Code of Federal Regulations* is proposed to be amended as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for Part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

2. Section 100.23 is added to read as follows:

Alternative A

§ 100.23 Promote, support, attack, or oppose.

(a) When “promote,” “support,” “attack,” or “oppose” is used in conjunction with one or more of the other three component terms in PASO (as in “promote or oppose” or “promotes or supports, or attacks or opposes”):

(1) The word *promote* means to help, encourage, further, or advance;

(2) The word *support* means to uphold, aid, or advocate;

(3) The word *attack* means to argue with, blame, or criticize; and

(4) The word *oppose* means to act against, hinder, obstruct, or be hostile or adverse to.

(b) A communication may promote, support, attack, or oppose a candidate for Federal office in whole or in part, even if it does not refer to any election, candidacy, political party, or voting. All communications that expressly advocate the election or defeat of a clearly

identified candidate under 11 CFR 100.22 also promote, support, attack, or oppose that candidate.

(c) The following are examples of communications that promote or support candidates for Federal office:

(1) In a communication by a candidate for State office, the State candidate states that, "We have an outstanding Democratic candidate running for President."

(2) Senator X is running for reelection and a tax advocacy group broadcasts a communication stating, "Senator X is working hard to lower your taxes. Senator X is the one getting it done. Call Senator X and tell him 'thanks.'"

(3) "Congressman X is an outstanding public servant and of the highest moral character. Join Congressman X in supporting the Literacy Now! Act."

(d) The following are examples of communications that do not promote or support a candidate for Federal office:

(1) A university mails postcards announcing the opening of a new campus building named after candidate X.

(2) Senator X is running for reelection and appears in a television advertisement stating, "I'm Senator X. Republicans in the statehouse passed a property tax freeze. The Governor vetoed the freeze. You can help override that veto. Visit this Web site: [___.org](#)."

(3) Governor X is a candidate for Federal office and appears in a television advertisement created by the State's tourism bureau, stating "Come see our State!"

(e) The following are examples of communications that attack or oppose a candidate for Federal office:

(1) A billboard consists of a picture of Candidate X and an arrow pointing from the word "Liar" to the candidate.

(2) A local party committee mailer to elect a local party chairman contains a picture of Federal Candidate X laughing, with the words: "Stop her laughing. We can beat her if we are united. But the county needs a new party chairman."

(3) Senator X is running for reelection. The State party committee in his State airs this communication: "Is X looking out for our State? In Washington, he takes \$136,000 from a notorious lobbyist now under Federal investigation. Then X fights for and passes legislation to give that lobbyist's client \$3 million, in another State. X doesn't pass the smell test. Call X: tell him to start working for our State."

(4) Congressman X is running for reelection and a group opposing X broadcasts a communication in which Candidate X's visage morphs into the visage of Hitler.

(f) The following is an example of a communication that does not attack or oppose a candidate for Federal office:

"We don't know where Congressman X stands on the Literacy Now! Act. Call Congressman X and tell him where you stand."

Alternative B

§ 100.23 Promotes, supports, attacks, or opposes (2 U.S.C. 431(20)(A)(iii)).

(a) The definition below shall apply to the term "promotes, supports, attacks, or opposes," as well as to any instance in which the terms "promotes or attacks" and "supports or opposes" are used in conjunction, regardless of the verb tense in which these terms are used, but shall not apply to occurrences of these terms when used individually or in isolation from any or all of the other terms.

(b) A communication *promotes, supports, attacks, or opposes* a candidate for Federal office or political party if it:

(1) Refers explicitly to a clearly identified candidate for Federal office or political party;

(i) With respect to a candidate, "clearly identified" shall have the same definition as in 11 CFR 100.17;

(ii) With respect to a political party, "clearly identified" shall mean the party's name, nickname, logo, or the identity of the party is otherwise apparent through an unambiguous reference such as "the party controlling the White House," "the party controlling the Senate," "the party controlling the House," or "the party controlling both houses of Congress";

(2) Unambiguously helps, encourages, advocates for, praises, furthers, argues with, sets as an adversary, is hostile or adverse to, or criticizes such political party or candidate for Federal office. All communications that expressly advocate the election or defeat of a clearly identified candidate under 11 CFR 100.22 also help, encourage, advocate for, praise, further, argue with, set as an adversary, are hostile or adverse to, or criticize such candidate;

(3) Contains a clear nexus between the clearly identified candidate for Federal office or political party and an upcoming Federal election or a candidacy for such election; and

(4) Is publicly distributed or otherwise publicly disseminated in the clearly identified Federal candidate's jurisdiction, in the case of a candidate, or in a jurisdiction in which one or more candidates of that political party will appear on the ballot, in the case of a political party.

(c) A communication does not promote, support, attack, or oppose

unless the element(s) of the communication that unambiguously helps, encourages, advocates for, praises, furthers, argues with, sets as an adversary, is hostile or adverse to, or criticizes is done through means that are verbal or pictorial, or a combination thereof; except that photographic or videographic alterations, facial expressions, body language, poses, or similar features of party officials or candidates, may not be considered in determining whether the communication promotes, supports, attacks, or opposes.

(1) For the purposes of this section, verbal means shall include visual text or audio speech.

(2) For the purposes of this section, pictorial means shall include depictions of party officials, candidates, or their respective logos.

(d) The following are examples of communications that promote, support, attack, or oppose, assuming each is publicly distributed or disseminated in the candidate's jurisdiction:

(1) In a public communication by a candidate for State office, the State candidate states that, "We have an outstanding Democrat, John Doe, at the top of the ticket this year, running for the White House."

(2) A tax advocacy group broadcasts a public communication which says, "Senator X is running for reelection. Senator X has been a champion for lowering your taxes. Senator X is the one getting it done."

(3) A billboard displayed in the congressional district Candidate X seeks to represent consists of a picture of Candidate X, an explicit identification of Candidate X as a candidate for Congress, and an arrow pointing from the word "Liar" to the picture of Candidate X.

(4) Senator X is running for reelection. The opposing party's State committee airs this public communication: "Is X looking out for our State? In Washington, he takes \$136,000 from a notorious lobbyist now under Federal investigation. Then X fights for and passes legislation to give that lobbyist's client \$3 million, in another State. This November when you cast your vote, think about this."

(5) A radio advertisement states, "Congressman X is running for reelection. Congressman X is an outstanding public servant and of the highest moral character, and has stood with us consistently on the Literacy Now! Act."

(e) The following are examples of communications that do not promote, support, attack, or oppose, even if they

are publicly distributed or disseminated in the candidate's jurisdiction:

(1) A radio advertisement states, "Congressman X is an outstanding public servant and of the highest moral character. Join Congressman X in supporting the Literacy Now! Act."

(2) A university mails postcards announcing the opening of a new campus building named after candidate X.

(3) Senator X is running for reelection and appears in a television advertisement stating, "I'm Senator X. Republicans in the statehouse passed a property tax freeze. The Governor vetoed the freeze. You can help override that veto. Visit this Web site: .org."

(4) Governor X is a candidate for Federal office and appears in a television advertisement created by the State's tourism bureau, stating "Come see our State!"

(5) A local party committee mailer to elect a local party chairman contains a picture of Federal Candidate X laughing, with the words: "Stop her laughing. We can beat her if we are united. But the county needs a new party chairman."

(6) A television advertisement features a picture of Congressman X. Underneath, the text on the screen gives the date of the upcoming election. In the background, the Imperial March theme song from Star Wars is played.

(7) Same as Number 6, but instead, the Star Spangled Banner is played.

(8) A television ad shows grainy video of a presidential candidate on a large screen silently speaking to a group of masses. A passerby throws a sledgehammer at the screen.

PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C 431(17), 441a(a) and (d), and Pub. L. 107–155 Sec. 214(c))

3. The authority citation for Part 109 continues to read as follows:

Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L. 107–155, 116 Stat. 81.

Content Alternative 1 (PASO Standard)

4. Section 109.21 is amended by revising paragraph (c)(3) to read as follows:

§ 109.21 What is a "coordinated communication"?

* * * * *

(c) * * *

(3) A public communication, as defined in 11 CFR 100.26, that promotes, supports, attacks, or opposes a political party or a clearly identified candidate for Federal office. All communications expressly advocating

the election or defeat of a clearly identified candidate under 11 CFR 100.22 also promote, support, attack, or oppose that candidate.

* * * * *

Content Alternative 2 (Modified WRTL Content Standard)

5. Section 109.21 is amended by revising paragraphs (c) introductory text and (c)(3), and adding new paragraph (c)(5) to read as follows:

§ 109.21 What is a "coordinated communication"?

* * * * *

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(5) of this section satisfies the content standard of this section.

* * * * *

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates, as defined in 11 CFR 100.22, the election or defeat of a clearly identified candidate for Federal office.

* * * * *

(5) A public communication, as defined in 11 CFR 100.26, that is the functional equivalent of express advocacy. For purposes of this section, 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 Federal candidate.

* * * * *

Content Alternative 3 (Clarification of Express Advocacy Standard)

6. Section 109.21 is amended by revising paragraph (c)(3) to read as follows:

§ 109.21 What is a "coordinated communication"?

* * * * *

(c) * * *

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates, as defined in 11 CFR 100.22, the election or defeat of a clearly identified candidate for Federal office.

* * * * *

Content Alternative 4 ("Explicit Agreement" Standard)

7. Section 109.21 is amended by revising paragraphs (c) introductory text, (c)(3), (d) introductory text, and (e), and adding new paragraphs (c)(5) and (d)(7) to read as follows:

§ 109.21 What is a "coordinated communication"?

* * * * *

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(5) of this section satisfies the content standard of this section.

* * * * *

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates, as defined in 11 CFR 100.22, the election or defeat of a clearly identified candidate for Federal office.

* * * * *

(5) A public communication, as defined in 11 CFR 100.26, but only if the conduct standard in paragraph (d)(7) of this section is also satisfied.

(d) *Conduct standards.* Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is formal collaboration, as defined in paragraph (e) of this section. The types of conduct described in paragraphs (d)(1) through (d)(6) of this section are satisfied whether or not there is agreement, as defined in paragraph (e) of this section:

* * * * *

(7) *Agreement.* 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.

(e) *Agreement or formal collaboration.* Agreement between the person paying for the communication and the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, is not required for a communication to be a coordinated communication if any of the types of conduct described in paragraphs (d)(1) through (d)(6) of this section are satisfied. Formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, is not required for a communication to be a coordinated communication. *Agreement* means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination. *Formal collaboration* means planned, or

systematically organized, work on the communication.

* * * * *

8. Section 109.21 is amended by revising paragraphs (d)(4)(ii) and (d)(5)(i) to read as follows:

§ 109.21 What is a “coordinated communication”?

* * * * *

(d) * * *

Conduct Alternative 1 (No Change)

(4) * * *

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days;

* * * * *

(5) * * *

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days; and

* * * * *

Conduct Alternative 2 (Two-Year Period)

(4) * * *

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the two-year period ending on the date of the general election for the office or seat that the candidate seeks;

* * * * *

(5) * * *

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120

days two-year period ending on the date of the general election for the office or seat that the candidate seeks; and

* * * * *

Conduct Alternative 3 (Current Election Cycle)

(4) * * *

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the current election cycle;

* * * * *

(5) * * *

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the current election cycle; and

* * * * *

■ 9. Section 109.21 is amended by adding new paragraphs (i) and (j) to read as follows:

§ 109.21 What is a “coordinated communication”?

* * * * *

(i) *Safe harbor for Federal candidates' support of public policies or legislative initiatives.* A public communication paid for by an organization described in 26 U.S.C. 501(c)(3) and exempt from taxation under 26 U.S.C. 501(a), in which a candidate for Federal office expresses or seeks support for that organization, or for a position on a public policy or legislative proposal espoused by that organization, is not a coordinated communication with respect to the candidate unless the public communication promotes, supports, attacks, or opposes the candidate or another candidate who seeks election to the same office as the candidate.

(j) *Safe harbor for commercial transactions.* A 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 is not a coordinated communication with respect to the clearly identified candidate if

(1) The medium, timing, content, and geographic distribution of the public

communication are consistent with public communications made prior to the candidacy; and

(2) The public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office as that candidate.

Dated: October 15, 2009.

On behalf of the Commission.

Steven T. Walther,

Chairman, Federal Election Commission.

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245-AF71

Small Business Size Standards: Accommodation and Food Services Industries

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to increase small business size standards for five industries in North American Industry Classification System (NAICS) Sector 72, Accommodation and Food Services—namely NAICS 721110, Hotels and Motels, from \$7.0 million to \$30 million; NAICS 721120, Casino Hotels, from \$7.0 million to \$30 million; NAICS 722211, Limited Service Restaurants, from \$7.0 million to \$10 million; NAICS 722212, Cafeterias, from \$7.0 million to \$25.5 million; and NAICS 722310, Food Service Contractors, from \$20.5 million to \$35.5 million. As part of its ongoing initiative to review all size standards, SBA has evaluated each industry in Sector 72 to determine whether the existing size standards should be retained or revised. This proposed rule is one of a series of proposals that will examine industries grouped by an NAICS Sector. As part of this series of proposed rules SBA is publishing concurrently in this issue of the **Federal Register** a proposed rule to modify small business size standards in Sector 44–45, Retail Trade, and Sector 81, Other Services. SBA has established its “Size Standards Methodology” and published elsewhere in this issue of the **Federal Register** a notice of its availability on SBA's Web site at <http://www.sba.gov/size>. SBA has applied “Size Standards Methodology” to this proposed rule.