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Citizens United:

How the Supreme Court's Decision Will Impact Associations and Their Members

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Due to the length of the *Citizens United v. FEC* opinion (183 pages), it is not reproduced here. It can be downloaded at: http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf

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Citizens United: How the Supreme Court's Decision Will Impact Associations and Their Members

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Agenda for Today

- Overview of Campaign Finance Law
- Explanation of the Decision
  - What changes?
  - What does not?
- Considerations for Associations
- A Hypothetical
- Looking Ahead

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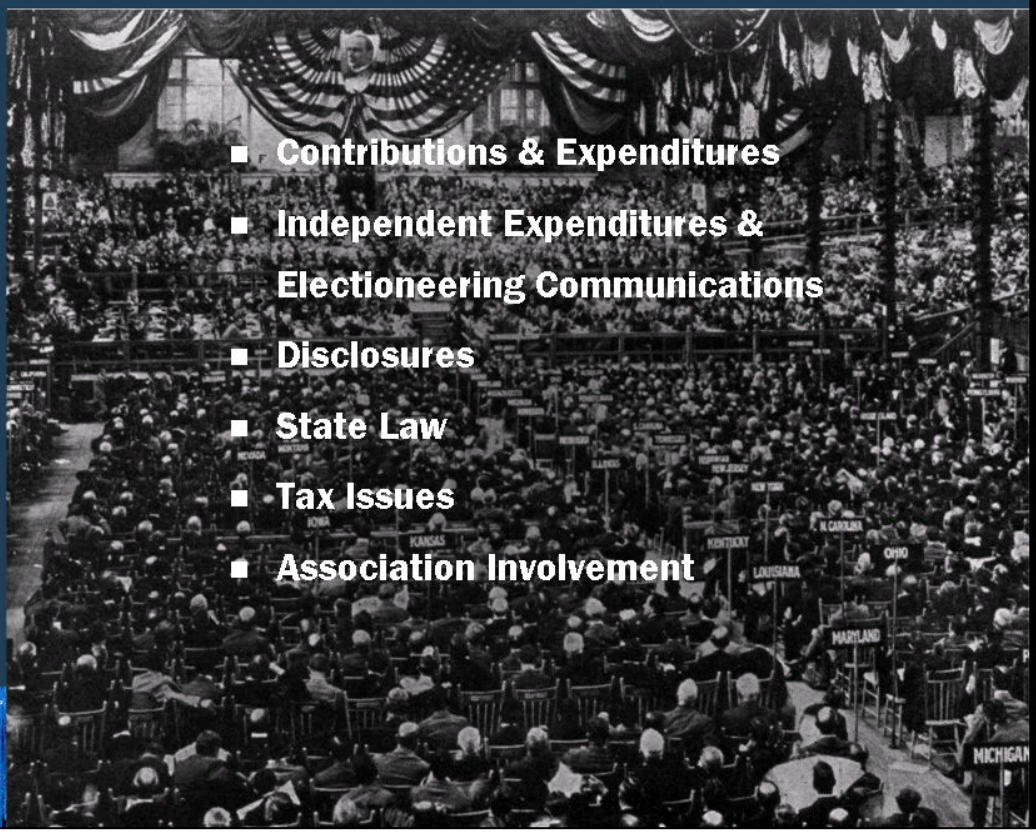
Campaign Finance Overview



- Contributions & Expenditures
- Independent Expenditures & Electioneering Communications
- Disclosures
- State Law
- Tax Issues
- Association Involvement

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Background Information

Expenditures Versus Contributions

- Contributions:
  - Money or in-kind given to a candidate, party, or other committee
- Expenditures:
  - Payments for communications
  - Must be made independently
- Coordination:
  - Transforms an expenditure into a contribution

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Background Information

Independent Expenditures & Electioneering Communications

- Independent Expenditures
  - Expressly advocates election or defeat of a clearly identified candidate
- Electioneering Communications
  - 30 days before primary
  - 60 days before general
  - Broadcast to relevant electorate
  - Any reference to a candidate → narrowed by Supreme Court to functional equivalent of express advocacy

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Background Information

Disclosures

- Independent Expenditures
  - Must disclose if cost exceeds $250 per election
  - Must disclose donors of more than $200 if the contribution "was made for the purpose of furthering the reported independent expenditure"
  - Timing of reports depends on amount and date of election

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Background Information

Disclosures

- Electioneering Communications
  - If more than $10,000 must file disclosure reports
  - Detailed information required
  - ECs presumed to have been made from a segregated account → disclosure of contributions of $1,000 or more

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Background Information

State Versus Federal Rules

- Federal Law:
  - Prohibited corporations from making independent expenditures or electioneering communications
  - Narrow exception under MCFL
- State Law:
  - Varies from state to state
  - Some allow corporate activities

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Background Information

Tax Issues for Associations

- Limits on Total Association Political Activity
  - 501(c)(6)-may not be "primary" activity
  - 501(c)(3)-ban
  - Affiliated-organization issues
- Nondeductibility of Dues
- Tax on Political Expenditures
  - Form 1120-POL
  - Forms 8871 and 8872

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Background Information

Association Involvement

- PACs
- Issue Advertising
- Expenditures in States
- Use of 527 Committees
- Activity by 501(c)(4) Organizations
- 501(c)(3) Organizations → no involvement

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Overview of the Decision

- **What Does Not Change**
- **What Does Change**
- **Associations**

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What **Does Not** Change

- Corporations may not make contributions
  - PACs remain important tool
- Coordination will still transform expenditures into contributions
- Disclosure requirements remain in place
- Tax law does not change

Citizens United

What **Does** Change

- Corporations may make independent expenditures and electioneering communications
  - Funded with general treasury funds
- Decision applies to federal law, but states will have to follow
  - Some have already announced
- FEC has decided the decision applies to unions as well
  - Not clear that this has to be the result

Citizens United

Why Associations Will Have Larger Role

- For-profit entities likely do not want to be viewed as having a prominent role in the political sphere
- Highly regulated companies may not want to be visible
- Shareholders may restrict involvement
- Organizations can receive funding
- Associations are trusted by their members
- Associations already play an active role with policy and political matters

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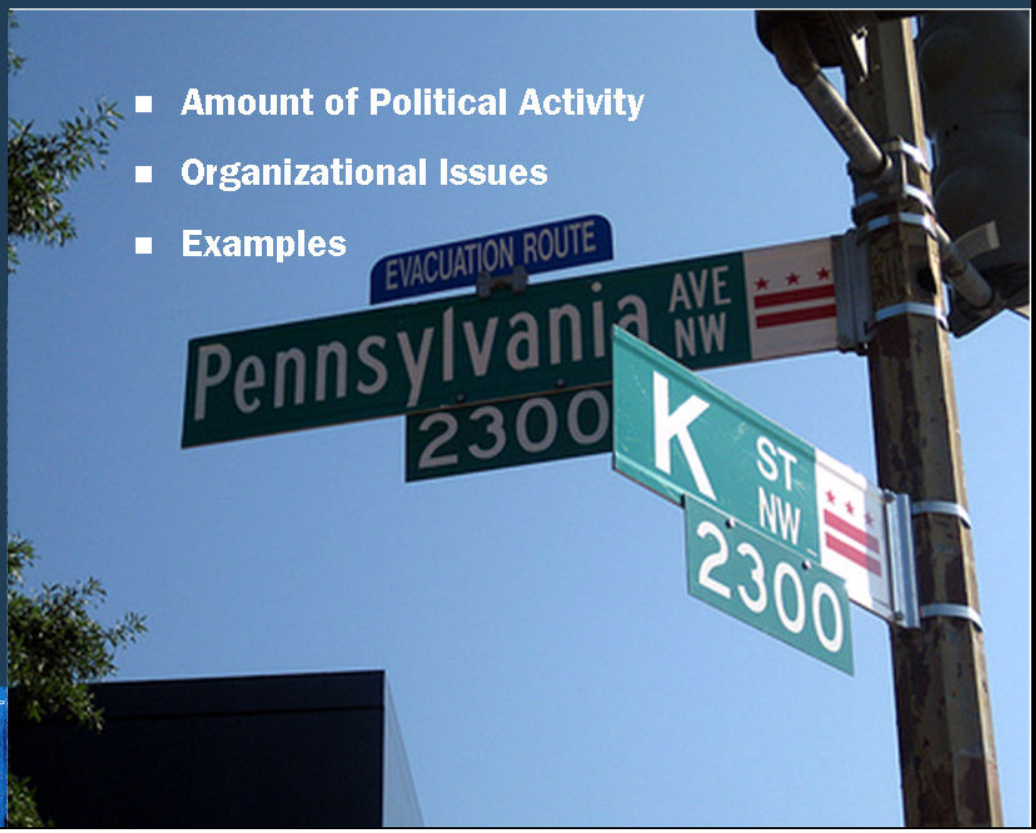
Association Considerations

- Amount of Political Activity
- Organizational Issues
- Examples



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Considerations for Associations

Amount of Political Activity

- Will the association become a political committee?
  - Receives more than $1,000 in contributions per calendar year
  - Makes expenditures of more than $1,000 per calendar year
  - Major purpose test
- How much political activity does the IRS allow?
  - Primary purpose test

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Considerations for Associations

Organizational Issues

- Do the articles or bylaws restrict political activity
- Has the association engaged in activity that could result in "coordination"
- Will there be disclosure issues
- Will the association have to pay tax
- Do the members approve of the political activity
- Is there proper separation from 501(c)(3) affiliate

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What Can an Association Do?

Examples

- Paid media
- Web sites
- Blogs
- Communications to general public
- Issue advocacy that mentions candidates
- Voter guides with teeth
- Voting records with teeth
- Endorsements to the public

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Practical Example

What Kind of Communication?

- Is it an independent expenditure and/or electioneering communication?
  - Content
  - Timing
  - Method of distribution

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Practical Example

How is it Funded?

- General Treasury Funds
  - Is there a tax issue
- Specific Contributions
  - What are the disclosure ramifications
- General "Political Account"
  - Tax issue
  - Disclosure

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Practical Example

Are There Other Concerns

- Coordination
  - Association giving
  - Association staff
  - Association activity with officials
- Member Concerns

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Looking Ahead

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Looking Ahead

FEC Actions

- Announcement of non-enforcement
- Coordination rulemakings
- Conforming changes to rules
- Political committee issues

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Looking Ahead

Legislation

- Public Financing
  - Does this solve the problem
- Increase Limits
  - To candidates
  - Party coordination
- Amend the Constitution
- Other Corporate Restrictions
  - Government contractors
  - Foreign corporations
  - Shareholder votes

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Looking Ahead

New Litigation

- *Speech Now* decision
- Will other limits be challenged?
  - Tax restrictions
  - Direct contribution limits
- Unions

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Looking Ahead

State Law Changes

- Conforming changes to state laws
- Will states experiment with regulation
- Limits on corporate charters

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Supreme Court Decision Opens New Doors for Associations

by Ronald M. Jacobs, Esq. and Alexandra Megaris, Esq.

The U.S. Supreme Court has issued its long-awaited decision in *Citizens United v. FEC*. The Court struck down a federal ban on "independent expenditures" and "electioneering communications" made by nonprofit and for-profit corporations. A number of states have similar bans, and those too will likely fall under the reasoning of *Citizens United*. A related question is whether a similar ban on expenditures by labor unions will fall.

The decision did *not* impact direct giving to candidates, political action committees ("PACs"), or parties. Thus, corporations, including associations, may not use their general funds to make contributions to candidates. Accordingly, individuals and PACs will have to continue to make direct contributions.

Although for-profits and nonprofits alike are now free to engage political speech, given the perception that for-profit entities may not be willing to engage in public candidate-advocacy directly, it is likely that much of the work will be done by associations on behalf of their members. This article explains the *Citizens United* decision and how it may benefit associations.

Brief Legal Background

The laws at issue in *Citizens United* prohibited two types of corporate expenditures:

(1) ***Independent Expenditures:*** any expenditure—at any time, through any medium—that expressly advocated the election or defeat of a clearly identified candidate for federal office. Examples include television advertisements, newspaper advertisements, and postings on corporate blogs, which contain phrases such as "Reelect Congressman Jones" or "Vote Against Smith."

(2) ***Electioneering Communications:*** expenditures by corporations made within 60 days of a general election or 30 days of a primary election if the expenditure is used to fund a communication that is made by broadcast, cable, or satellite, and refers to a clearly identified candidate for federal office. Prior to *Citizens United*, the Supreme Court had already narrowed this definition to include communications that are the "functional equivalent" of express advocacy and the FEC has adopted a complicated 11-factor test to make such a determination.

Before *Citizens United*, associations could make these two types of communications only through their PACs. In reality, this was a major limit on funding such expenditures, given the rules restricting how associations solicit for their PACs and the relatively low limits on contributions to a PAC ($5,000 per year). Now, however, associations will be able to fund these expenditures from their general treasury funds.

Conduct Permitted by the Decision

One direct impact of this decision is that for-profits may engage directly in independent expenditures. More important for associations, however, is that for-profit companies may now donate to associations for the specific purpose of having those nonprofits make independent expenditures. In addition, nonprofit corporations—other than 501(c)(3) organizations—may use their general funds, even if those include payments from corporations, to make independent expenditures.

As a result of the *Citizens United* decision, there are a number of specific activities now permitted, some obvious, some not so obvious:

1.) Paying for print, internet, radio, television, satellite, and cable advertising;
2.) Placing endorsements on association web sites;
3.) Placing advertisements on association web sites;
4.) Using association email lists to support candidates; and
5.) Using association blogs to post messages of support for candidates.

Coordination Not Permitted

Any such activity, however, may not be coordinated with a candidate; coordinating such activity would change the independent expenditure into an in-kind contribution, which is still prohibited. The FEC is currently working on regulations defining what it means to coordinate with a candidate. The definitions are broader and much more complex than what many might consider to be "coordinating" with another entity. The regulatory framework is complicated by the fact that the Court of Appeals for the District of Columbia Circuit has struck down the FEC's two previous attempts to create such regulations in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays I*") and *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*").

Under the original and revised rules, promulgated in 2002 and 2006, respectively, a public communication is coordinated (and thus is a contribution) if:

(1) someone other than the candidate, party, or official campaign pays for it;
(2) the communication itself meets specified "content standards"; and
(3) the payer's interaction with the candidate/party satisfies specified "conduct standards."

The FEC has proposed a number of ways to satisfy the content and conduct prongs, several of which have been the subject of court challenges over the years. In October 2009, the FEC issued a Notice of Proposed Rulemaking to revise the content and conduct standards in accordance with *Shays III*.

Content Standards. The content prong is satisfied if the communication either:

(1) is an electioneering communication;
(2) distributes or republishes campaign materials prepared by a candidate or his authorized committee;
(3) expressly advocates the election or defeat of a clearly identified candidate for federal office; *or*
(4) if it refers to a political party or clearly identified federal candidate, is publicly distributed 120 or 90 days or fewer before an election (depending on whether the

coordination is with a Presidential candidate, congressional candidate, or political party), and is directed to certain voters.

The fourth standard was successfully challenged in *Shays I* and *Shays III*. In *Shays III*, the Court of Appeals expressed concern that more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads contain no "magic words" (such as "vote for" or "vote against" which would qualify them as express advocacy communications).

To address the court's concerns, the FEC proposes to retain the existing four content standards and adopt one or more of the following: (1) a standard to cover communications that promote, attack, support, or oppose a political party or a clearly identified federal candidate (the "PASO standard"); (2) a standard to cover communications that are the "functional equivalent of express advocacy"; (3) clarification that the existing express advocacy standard includes communications containing more than just "magic words", such as certain campaign slogans; and (4) a standard that expressly prohibits explicit agreements to establish coordination.

Prior to *Citizens United*, a corporation's ability to fund the types of communications covered by the content prong was significantly limited. Because corporations can now make such expenditures from their general treasury funds, it is likely that the use of such communications will increase. As such, corporations and associations will have to be especially mindful that their communications do not meet any of the conduct standards, described below.

Conduct Standards. The conduct prong of the FEC's test for determining whether a communication is coordinated is comprised of five standards. The first three conduct standards are be satisfied if a communication was created 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. The remaining two standards are satisfied if a candidate's former vendor or employee created or distributed a communication using material information about campaign plans, activities, or needs, or shared such information with the person funding the communication, for 120 days.

The FEC proposals presently under consideration retain the five conduct standards, but offer three alternatives for the time periods in the former vendor and employee standards. The FEC aims to tailor the time periods to "the realistic 'shelf life' of the types of information that a campaign vendor or former employee is likely to possess."

Even after *Citizens United*, associations, in particular those whose members are, or even formerly were, active in federal political campaigns, must ensure that any advertisements that they fund do not fall within one of the five conduct standards. Under both the current or proposed rules, the range of interaction between the candidate/party and the association that may establish impermissible coordination is wide. For example, under the former vendor or employee standards, an association may be "coordinating" with a candidate without ever communicating with that candidate or his campaign.

Disclosures and Disclaimers

While it overturned a number of restrictions, the Supreme Court did, however, uphold certain disclosure obligations that apply to electioneering communications. "Disclaimer and disclosure requirements may burden the ability to speak," the Court reasoned, "but they 'impose no ceiling on campaign-related activities,' . . . and 'do not prevent anyone from speaking.'"

Therefore, to the extent a corporation spends over $10,000 during any calendar year to fund communications through broadcast, radio, satellite, or cable that refer to clearly identified candidates within 30 days of a primary election or 60 days of a general election, it will have to file disclosures with the FEC revealing the corporation making the communication, the amount spent, and certain contributors.[1]

In addition, each electioneering communication must include certain specified disclaimers. Communications not authorized by the candidate, as would almost certainly be the case for an independent expenditure or electioneering communication not coordinated with the candidate, must provide a name and address (or web address) for the entity making the communication, state that the communication is not authorized by any candidate, and include the following audio statement: "___ is responsible for the content of this advertising." If transmitted through television, this statement must also appear on screen in accordance with specifications set forth in FEC regulations.

Expenditures for express advocacy must be reported to the FEC when they aggregate more than $250 for an election. This includes information about the amount of the expenditures and information about contributors who gave more then $200 if the contribution "was made for the purpose of furthering the reported independent expenditure." If the independent expenditures exceed $10,000, then reports must be filed with the FEC within two days of the expenditure (one day for expenditures that exceed $1,000 made within 20 say of the election).

Independent expenditures must include disclaimers that are similar to those required for electioneering communications.

The Broad Impact of the Decision

Although the specific legal impact of the decision is clear, it is not clear exactly how corporations will make use of their new right to make independent expenditures. Consider:

- Will a for-profit corporation be willing to spend money on a television advertisement for or against a candidate and risk alienating customers or employees?
- Will highly-regulated industries (*e.g.,* banks, car manufacturers, government contractors, etc.) be willing to alienate an incumbent office holder?
- Will those highly-regulated companies feel compelled to support an incumbent office-holder, given the influence the government has over their business?
- Will for-profit corporations—in tough economic times—be willing to give larger sums to nonprofits that will then make independent expenditures?
- Will shareholders allow companies to make independent expenditures or give to groups that will do so? Several shareholder's rights groups have force companies to disclose their political activities in an effort to limit such activities. Indeed, some companies specifically prohibit their trade associations from using their dues payments for political expenditures.
- Will PACs become a less-favored approach to participation in the political process?

The Court's Reasoning

[1] The Court further found that such disclosure requirements could be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed.

In 1990, the Court upheld a state ban on independent expenditures by corporations in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The Court has never directly considered the federal ban on corporate expenditures before *Citizens United*. Following the Bipartisan Campaign Reform Act in 2002, the Court upheld the ban on electioneering communications in *McConnell v. FEC*, 540 U.S. 93 (2003). That decision relied on *Austin*.

The majority opinion—authored by Justice Kennedy, and joined by Chief Justice Roberts, and Justices Scalia, Thomas, and Alito—takes the First Amendment at face value: Congress shall make no law . . . abridging the freedom of speech." The Court succinctly explains that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress speech altogether."

One of the key themes in the decision is that the campaign finance laws have become overly convoluted and complicated. "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing most salient political issues of our day." As a result, such laws silence permissible speech because they are so complicated. Unlike prior decisions in this area upholding additional rules and limits to avoid circumventing the rules already in place, the Court decided "informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights."

The Court explained that any restriction on speech—including corporate speech—must survive strict scrutiny, which requires a compelling governmental interest. The government advanced three such interests and the Court rejected them all.

Anti-Distortion: Under the Court's 1990 *Austin v. Michigan* decision, the Court had found that because corporations have perpetual existence and can amass great wealth, there is a compelling governmental interest in restricting their influence on elections. This theory ran counter to earlier precedents that had held that campaign finance laws cannot be used to balance the scales between the wealthy and less wealthy. In *Citizens United*, the Court held that "[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."

The Court went even further, recognizing that "[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The first Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas."

Finally, the Court reasoned that the idea of leveling the playing field actually hurt smaller corporations. For example, when big business communicates with the government directly, "the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with Government."

Anti-Corruption: The Court had previously held that campaign finance laws can legitimately be used to prevent both actual corruption (*i.e., quid pro quo* bribery) and the more nebulous "appearance of corruption." The Court made clear, however, that because it was addressing only independent expenditures, there was no threat of actual or perceived corruption. "[I]ndependent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption."

Dissenting Shareholders: Finally, the Court considered whether the law was a valid way to protect a shareholder who does not want the corporation to spend money on an election. It found this argument failed for three reasons. First, it would allow a law to limit the speech of any corporation, including a media corporation, solely to protect the shareholders who disagree with the editorial position of the company. Second, because the electioneering communications ban applied only during certain time periods, it was not an effective way to protect shareholders. Third, it applied to all corporations, including nonprofits and for-profits with a single shareholder.

* * * * *

Mr. Jacobs is a Washington-based partner in Venable's regulatory group. He heads the political law practice at Venable and counsels numerous associations on campaign finance, tax, lobbying disclosure, and ethics issues.

Ms. Megaris is an associate in Venable's regulatory group, where she focuses on transactional, regulatory, and policy matters in a broad range of industries, including nonprofit organizations and trade and professional associations.

For Immediate Release
February 5, 2010

Contact: Judith Ingram
Julia Queen
Christian Hilland

FEC Statement on the Supreme Court's Decision in *Citizens United v. FEC*

Washington – The Federal Election Commission today announced that, due to the Supreme Court's decision in *Citizens United v. FEC*, it will no longer enforce statutory and regulatory provisions prohibiting corporations and labor unions from making either independent expenditures or electioneering communications. The Commission also listed several actions it is taking to fully implement the *Citizens United* decision.

In *Citizens United v. FEC*, issued on January 21, 2010, the Supreme Court held that the prohibitions in the Federal Election Campaign Act (FECA) against corporate spending on independent expenditures or electioneering communications are unconstitutional. The Supreme Court upheld statutory provisions that require political ads to contain disclaimers and be reported to the Commission. Provisions addressed by the decision are described below.

- The Court struck down 2 U.S.C. 441b, which prohibits, in part, corporations and labor organizations from making electioneering communications and from making independent expenditures—communications to the general public that expressly advocate the election or defeat of clearly identified federal candidates.

- The Court upheld 2 U.S.C. 441d, which requires that political advertising consisting of independent expenditures or electioneering communications contain a disclaimer clearly stating who paid for such communication.

- The Court upheld 2 U.S.C. 434, which requires certain information about electioneering communications and independent expenditures, and the contributions received for such spending, to be disclosed to the Commission and to be made public.

The Commission is taking the following steps to conform to the Supreme Court's decision.

- The Commission will no longer enforce the statutory provisions or its regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications.

- The Commission is reviewing all pending enforcement matters to determine which matters may be affected by the *Citizens United* decision and will no longer pursue claims involving violations of the invalidated provisions. In addition, the Commission will no longer pursue information requests or audit issues with respect to the invalidated provisions.

- The Commission is considering the effect of the *Citizens United* decision on its ongoing litigation.

- The Commission intends to initiate a rulemaking to implement the *Citizens United* opinion. It is reviewing the regulations affected by the invalidated provisions, including but not necessarily limited to the following:

    1. 11CFR114.2(b)(2) and (3), which implement the FECA's prohibition on corporate and labor organization independent expenditures and electioneering communications;
    2. 11 CFR 114.4, which restricts the types of communications corporations and labor organizations may make to those not within their restricted class;
    3. 11 CFR 114.10, which permits certain qualified nonprofit corporations to use their treasury funds to make independent expenditures and electioneering communications under certain conditions;
    4. 11 CFR 114.14, which places restrictions on the use of corporate and labor union funds for electioneering communications; and
    5. 11 CFR 114.15, which the Commission adopted to implement the Supreme Court's decision in *Wisconsin Right to Life, Inc. v. FEC*.

- The Commission is also considering the effect of *Citizens United* on the ongoing Coordinated Communications rulemaking. 74 FR 53893 (Oct. 21, 2009). The Commission is issuing a Supplemental Notice of Proposed Rulemaking so that interested persons may submit comments regarding issues presented by *Citizens United*. The additional comment period will close on February 24, 2010. The Commission intends to hold a hearing on the Coordinated Communications rulemaking on March 2 and 3, 2010.

- Revisions to Commission reporting requirements, forms, instructions, and electronic software, may be required.

Corporations and labor organizations that intend to finance independent expenditures or electioneering communications should:

- Include disclaimers on their communications, consistent with FEC regulations at 11 CFR 110.11;
- Disclose independent expenditures on FEC Form 5, consistent with FEC regulations at 11 CFR 109.10; and
- Disclose electioneering communications on FEC Form 9, consistent with FEC regulations at 11 CFR 104.20.

The Commission notes that the prohibitions on corporations or labor organizations making contributions contained in 2 U.S.C. 441b remain in effect.

Political committees with specific questions regarding their reporting obligations may contact the Reports Analysis Division at (800) 424-9350 (at the prompt, press 5). Others may contact the Information Division at (800) 424-9530.

The Federal Election Commission (FEC) is an independent regulatory agency that administers and enforces federal campaign finance laws. The FEC has jurisdiction over the financing of campaigns for the U.S. House of Representatives, the U.S. Senate, the Presidency and the Vice Presidency. Established in 1975, the FEC is composed of six Commissioners who are nominated by the President and confirmed by the U.S. Senate.

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Tax Regulations

the books, but not allocated as patronage dividends, rebates, or refunds.

Example 2. The facts are the same as example 1, it additionally appearing that at the close of 1955 it is determined by Cooperative E to allocate as cash patronage dividends, rebates, or refunds to patrons of 1954, $5,000, the amount retained as *reasonable reserves* for 1954 in accordance with the provisions of section 521. On March 1, 1956, such amount is allocated. There may be added to the cost of goods sold by Cooperative E for 1955, $5,000, the amount allocated with respect to patronage of a preceding year, 1954, properly maintained as a reserve under section 521.

§ 1.522–4 Taxable years affected.

Section 522 and §§ 1.522–1, 1.522–2, and 1.522–3, are applicable to taxable years beginning before January 1, 1963, and also to amounts paid during taxable years beginning after December 31, 1962, the tax treatment of which is not prescribed in section 1382 and the regulations thereunder.

[T.D. 6643, 28 FR 3163, Apr. 2, 1963]

§ 1.527–1 Political organizations; generally.

Section 527 provides that a political organization is considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes. A political organization is subject to tax only to the extent provided in section 527. In general, a political organization is an organization that is organized and operated primarily for an exempt function as defined in § 1.527–2(c). Section 527 provides that a political organization is taxed on its political organization taxable income (see § 1.527–4) which, in general, does not include the exempt function income (see § 1.527–3) of the political organization. Furthermore, section 527 provides that an exempt organization, other than a political organization, may be subject to tax under section 527 when it expends an amount for an exempt function, see § 1.527–6. The taxation of newsletter funds is provided under section 527(g) and § 1.527–7. A special rule for principal campaign committees is provided under section 527(h) and § 1.527–9.

[T.D. 8041, 50 FR 30817, July 30, 1985]

§ 1.527–2 Definitions.

For purposes of section 527 and these regulations:

(a) *Political organization*—(1) *In general.* A *political organization* is a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures for an exempt function activity (as defined in paragraph (c) of this section). Accordingly, a political organization may include a committee or other group which accepts contributions or makes expenditures for the purpose of promoting the nomination of an individual for an elective public office in a primary election, or in a meeting or caucus of a political party. A segregated fund (as defined in paragraph (b) of this section) established and maintained by an individual may qualify as a political organization.

(2) *Organizational test.* A political organization meets the organizational test if its articles of organization provide that the primary purpose of the organization is to carry on one or more exempt functions. A political organization is not required to be formally chartered or established as a corporation, trust, or association. If an organization has no formal articles of organization, consideration is given to statements of the members of the organization at the time the organization is formed that they intend to operate the organization primarily to carry on one or more exempt functions.

(3) *Operational test.* A political organization does not have to engage exclusively in activities that are an exempt function. For example, a political organization may:

(i) Sponsor nonpartisan educational workshops which are not intended to influence or attempt to influence the selection, nomination, election, or appointment of any individual for public office,

(ii) Pay an incumbent's office expenses, or

(iii) Carry on social activities which are unrelated to its exempt function,

provided these are not the organization's primary activities. However, expenditures for purposes described in

the preceding sentence are not for an exempt function. See §1.527–2 (c) and (d). Furthermore, it is not necessary that a political organization operate in accordance with normal corporate formalities as ordinarily established in bylaws or under state law.

(b) *Segregated fund*—(1) *General rule.* A *segregated fund* is a fund which is established and maintained by a political organization or an individual separate from the assets of the organization or the personal assets of the individual. The purpose of such a fund must be to receive and segregate exempt function income (and earnings on such income) for use only for an exempt function or for an activity necessary to fulfill an exempt function. Accordingly, the amounts in the fund must be dedicated for use only for an exempt function. Thus, expenditures for the establishment or administration of a political organization or the solicitation of political contributions may be made from the segregated fund, if necessary to fulfill an exempt function. The fund must be clearly identified and established for the pruposes intended. A savings or checking account into which only contributions to the political organization are placed and from which only expenditures for exempt functions are made may be a segregated fund. If an organization that had designated a fund to be a segregated fund for purposes of segregating amounts referred to in section 527(c)(3) (A) through (D), expends more than an insubstantial amount from the segregated fund for activities that are not for an exempt function during a taxable year, the fund will not be treated as a segregated fund for such year. In such a case amounts referred to in section 527(c)(3)(A)–(D),segregated in such fund will not be exempt function income. Further, if more than insubstantial amounts segregated for an exempt function in prior years are expended for other than an exempt function the facts and circumstances may indicate that the fund was never a segregated fund as defined in this paragraph.

(2) *Record keeping.* The organization or individual maintaining a segregated fund must keep records that are adequate to verify receipts and disbursements of the fund and identify the exempt function activity for which each expenditure is made.

(c) *Exempt function*—(1) *Directly related expenses.* An *exempt function*, as defined in section 527(e)(2), includes all activities that are directly related to and support the process of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to public office or office in a political organization (the selection process). Whether an expenditure is for an exempt function depends upon all the facts and circumstances. Generally, where an organization supports an individual's campaign for public office, the organization's activities and expenditures in futherance of the individual's election or appointment to that office are for an exempt function of the organization. The individual does not have to be an announced candidate for the office. Furthermore, the fact that an individual never becomes a candidate is not crucial in determining whether an organization is engaging in an exempt function. An activity engaged in between elections which is directly related to, and supports, the process of selection, nomination, or election of an individual in the next applicable political campaign is an exempt function activity.

(2) *Indirect expenses.* Expenditures that are not directly related to influencing or attempting to influence the selection process may also be an expenditure for an exempt function by a political organization. These are expenses which are necessary to support the directly related activities of the political organization. Activities which support the directly related activities are those which must be engaged in to allow the political organization to carry out the activity of influencing or attempting to influence the selection process. For example, expenses for overhead and record keeping are necessary to allow the political organization to be established and to engage in political activities. Similarly, expenses incurred in soliciting contributions to the political organization are necessary to support the activities of the political organization.

(3) *Terminating activities.* An exempt function includes an activity which is

in furtherance of the process of terminating a political organization's existence. For example, where a political organization is established for a single campaign, payment of campaign debts after the conclusion of the campaign is an exempt function activity.

(4) *Illegal expenditures.* Expenditures which are illegal or are for a judicially determined illegal activity are not considered expenditures in furtherance of an exempt function, even though such expenditures are made in connection with the selection process.

(5) *Examples.* The following examples illustrate the principles of paragraph (c) of this section. The term *exempt function* when used in the following examples means exempt function within the meaning of section 527(e)(2).

(i) *Example 1.* A wants to run for election to public office in State X. A is not a candidate. A travels throughout X in order to rally support for A's intended candidacy. While in X, A attends a convention of an organization for the purpose of attempting to solicit its support. The amount expended for travel, lodging, food, and similar expenses are for an exempt function.

(ii) *Example 2.* B, a member of the United States House of Representatives, is a candidate for reelection. B travels with B's spouse to the district B represents. B feels it is important for B's reelection that B's spouse accompany B. While in the district, B makes speeches and appearances for the purpose of persuading voters to reelect B. The travel expenses of B and B's spouse are for an exempt function.

(iii) *Example 3.* C is a candidate for public office. In connection with C's campaign, C takes voice and speech lessons to improve C's skills. The expenses for these lessons are for an exempt function.

(iv) *Example 4.* D, an officeholder and candidate for reelection, purchases tickets to a testimonial dinner. D's attendance at the dinner is intended to aid D's reelection. Such expenditures are for an exempt function.

(v) *Example 5.* E, an officeholder, expends amounts for periodicals of general circulation in order to keep informed on national and local issues. Such expenditures are not for an exempt function.

(vi) *Example 6.* N is an organization described in section 501(c) and is exempt from taxation under section 501(a). F is employed as president of N. F, as a representative of N, testifies in response to a written request from a Congressional committee in support of the confirmation of an individual to a cabinet position. The expenditures by N that are directly related to F's testimony are not for an exempt function.

(vii) *Example 7.* P is a political organization described in section 527(e)(2). Between elections P does not support any particular individual for public office. However, P does train staff members for the next election, drafts party rules, implements party reform proposals, and sponsors a party convention. The expenditures for these activities are for an exempt function.

(viii) *Example 8.* Q is a political organization described in section 527(e)(2). Q finances seminars and conferences which are intended to influence persons who attend to support individuals to public office whose political philosophy is in harmony with the political philosophy of Q. The expenditures for these activities are for an exempt function.

(d) *Public office.* The facts and circumstances of each case will determine whether a particular Federal, State, or local office is a *public office.* Principles consistent with those found under §53.4946–1(g)(2) (relating to the definition of public office) will be applied.

(e) *Principal campaign committee.* A *principal campaign committee* is the political committee designated by a candidate for Congress as his or her principal campaign committee for purposes of section 302(e) of the Federal Election Campaign Act of 1971 (2 U.S.C. section 432(e)), as amended, and section 527(h) and §1.527–9.

[T.D. 7744, 45 FR 85731, Dec. 30, 1980; as amended by T.D. 8041, 50 FR 30817, July 30, 1985]

§1.527–3 Exempt function income.

(a) *General rule*—(1) For purposes of section 527, exempt function income consists solely of amounts received as:

(i) Contributions of money or other property,

(ii) Membership dues, fees, or assessments from a member of a political organization, or

(iii) Proceeds from a political fund raising or entertainment event, or proceeds from the sale of political campaign materials, which are not received in the ordinary course of any trade or business,

but only to the extent such income is segregated for use only for exempt functions of the political organization.

(2) Income will be considered segregated for use only for an exempt function only if it is received into and disbursed from a segregated fund as defined in §1.527–2(b).

(b) *Contributions.* The rules of section 271(b)(2) apply in determining whether the transfer of money or other property constitutes a contribution. Generally, money or other property, whether solicited personally, by mail, or through advertising, qualifies as a contribution. In addition, to the extent a political organization receives Federal, State, or local funds under the $1 *checkoff* provision (sections 9001–9013), or any other provision for financing of campaigns, such amounts are to be treated as contributions.

(c) *Dues, fees, and assessments.* Amounts received as membership fees and assessments from members of a political organization may constitute exempt function income to the political organization. Membership fees and assessments received in consideration for services, goods, or other items of value do not constitute exempt function income. However, filing fees paid by an individual directly or indirectly to a political party in order that the individual may run as a candidate in a primary election of the party (or run in a general election as a candidate of that party) are to be treated as exempt function income. For example, some States provide that a certain percentage of the first year's salary of the office sought must be paid to the State as a filing (or *qualifying*) fee and party assessment. The State then transfers part of this fee to the candidate's party. In such a case, the entire amount transferred to the party is to be treated as exempt function income. Furthermore, amounts paid by an individual directly to the party as a qualification fee are treated similarly.

(d) *Fund raising events*—(1) *In general.* Amounts received from fund raising and entertainment events are eligible for treatment as exempt function income if the events are political in nature and are not carried on in the ordinary course of a trade or business. Whether an event is *political* in nature depends on all facts and circumstances. One factor that indicates an event is a political event is the extent to which the event is related to a political activity aside from the need of the organization for income or funds. For example, an event that is intended to rally and encourage support for an individual for public office would be a political fund raising event. Examples of political events can include dinners, breakfasts, receptions, picnics, dances, and athletic exhibitions.

(2) *Ordinary course of any trade or business.* Whether an activity is in the ordinary course of a trade or business depends on the facts and circumstances of each case. Generally, proceeds from casual, sporadic fund raising or entertainment events are not in the ordinary course of a trade or business. Factors to be taken into account in determining whether an activity is a trade or business include the frequency of the activity, the manner in which the activity is conducted, and the span of time over which the activity is carried on.

(e) *Sale of campaign materials.* Amounts received from the sale of campaign materials are eligible for treatment as exempt function income if the sale is not carried on in the ordinary course of a trade or business (as defined in paragraph (d)(2) of this section), and is related to a political activity of the organization aside from the need of such organization for income or funds. Proceeds from the sale of political memorabilia, bumper stickers, campaign buttons, hats, shirts, political posters, stationery, jewelry, or cookbooks are related to such a political acitivity where such items can be identified as relating to distributing political literature or organizing voters to vote for a candidate for public office.

[T.D. 7744, 45 FR 85732, Dec. 30, 1980]

§ 1.527–4 Special rules for computation of political organization taxable income.

(a) *In general.* Political organization taxable income is determined according to the provisions of section 527(b) and the rules set forth in this section.

(b) *Limitation on capital losses.* If for any taxable year a political organization has a net capital loss, the rules of sections 1211(a) and 1212(a) apply.

(c) *Allowable deductions*—(1) *In general.* To be deductible in computing political organization taxable income, expenses, depreciation, and similar items must not only qualify as deductions allowed by chapter 1 of the Code, but must also be directly connected with the production of political organization taxable income.

(2) *Directly connected with defined.* To be *directly connected with* the production of political organization taxable income, an item of deduction must have a proximate and primary relationship to the production of such income and have been incurred in the production of such income. Items of deduction attributable solely to items of political organization taxable income are proximately and primarily related to such income. Whether an item of deduction is incurred in the production of political organization taxable income is determined on the basis of all the facts and circumstances of each case.

(3) *Dual use of facilities or personnel.* Expenses, depreciation, and similar items that are attributable to the production of exempt function income and political organization taxable income shall be allocated between the two on a reasonable and consistent basis. For example, where facilities are used both for an exempt function of the organization and for the production of political organization taxable income, expenses, depreciation, and similar items attributable to such facilities (for example, items of overhead) shall be allocated between the two uses of a reasonable and consistent basis. Similarly, where personnel are employed both for an exempt function and for the production of political organization taxable income, expenses and similar items attributable to such personnel (for example, items of salary) shall be allocated between the activities on a reasonable and consistent basis. The portion of any such item so allocated to the production of political organization taxable income is directly connected with such income and is allowable as a deduction in computing political organization taxable income to the extent that it qualifies as an item of deduction allowed by chapter 1 of the Code. Thus, for example, assume that X, a political organization, pays its manager a salary of $10,000 a year and that it derives political organization taxable income. If 10 percent of the manager's time during the year is devoted to deriving X's gross income (other than exempt function income), a deduction of $1,000 (10 percent of $10,000) would generally be allowable for purposes of computing X's political organization taxable income.

[T.D. 7744, 45 FR 85733, Dec. 30, 1980]

§ 1.527–5 Activities resulting in gross income to an individual or political organization.

(a) *In general*—(1) *General rule.* Amounts expended by a political organization for an exempt function are not income to the individual or individuals on whose behalf such expenditures are made. However, where a political organization expends any other amount for the personal use of any individual, the individual on whose behalf the amount is expended will be in receipt of income. Amounts are expended for the personal use of an individual where a direct or indirect financial benefit accrues to such individual. For example, if a political organization pays a personal legal obligation of a candidate for public office, such as the candidate's federal income tax liability, the amount paid is includible in such candidate's gross income. Similarly, if a political organization expends anyamount of its exempt function income for other than an exempt function, and the expenditure results in a direct or indirect financial benefit to the political organization, it must include the amount of such expenditure in its gross income. For example, if a political organization expends exempt function income for making an improvement or addition to its facilities, or for equipment, which is not necessary for or used in carrying out an

exempt function, the amount of the expenditure will be included in the political organization's gross income. However, if a political organization expends exempt function income to make ordinary and necessary repairs on the facilities the political organization uses in conducting its exempt function, such amounts will not be included in the political organization's gross income.

(2) *Expenditure for an illegal activity.* Expenditures by a political organization that are illegal or for an activity that is judicially determined to be illegal are treated as amounts not segregated for use only for the exempt function and shall be included in the political organization's taxable income. However, expenses incurred in defense of civil or criminal suits against the organization are not treated as taxable to the organization. Similarly, voluntary reimbursement to the participants in the illegal activity for similar expenses incurred by them are not taxable to the organization if the organization can demonstrate that such payments do not constitute a part of the inducement to engage in the illegal activity or part of the agreed upon compensation therefor. However, if the organization entered into an agreement with the participants to defray such expenses as part of the inducement, such payments would be treated as an expenditure for an illegal activity. Except where necessary to prevent the period of limitation for assessment and collection of a tax from expiring, a notice of deficiency will not generally be issued until after there has been a final determination of illegality by an appropriate court in a criminal proceeding.

(b) *Certain uses not treated as income to a candidate.* Except as otherwise provided in paragraph (a) of this section, if a political organization:

(1) Contributes any amount to or for the use of any political organization described in section 527(e)(1) or newsletter fund described in section 527(g),

(2) Contributes any amount to or for the use of any organization described in paragraph (1) and (2) of section 509(a) which is exempt from taxation under section 501(a), or

(3) Deposits any amount in the general fund of the U.S. Treasury or in the general fund of any State or local government,

such amount shall not be treated as an amount expended for the personal use of a candidate or other person. No deduction shall be allowed under the Internal Revenue Code of 1954 for the contribution or deposit described in the preceding sentence.

(c) *Excess funds*—(1) *General rule.* Generally, funds controlled by a political organization or other person after a campaign or election are excess funds and are treated as expended for the personal use of the person having control over the ultimate use of such funds. However, such funds will not be treated as excess funds to the extent they are:

(i) Transferred within a reasonable period of time by the person controlling the funds in accordance with paragraph (b) of this section, or

(ii) Held in reasonable anticipation of being used by the political organization for future exempt functions.

(2) *Excess funds transferred at death.* Where excess funds are held by an individual who dies, and these funds go to the individual's estate or any other person (other than an organization or fund described in paragraph (b) of this section), the funds are income of the decedent and will be included in the decedent's gross estate unless the estate or other person receiving such funds transfers the funds within a reasonable period of time in accordance with paragraph (b) of this section.

This paragraph (c)(2) will not apply where the individual who dies provides that the funds be transferred to an organization or fund described in paragraph (b) of this section.

[T.D. 7744, 45 FR 85733, Dec. 30, 1980]

§ 1.527–6 Inclusion of certain amounts in the gross income of an exempt organization which is not a political organization.

(a) *Exempt organizations—General rule.* If an organization described in section 501(c) which is exempt from tax under section 501(a) expends any amount for an exempt function, it may be subject to tax. There is included in the gross income of such organization for the

taxable year an amount equal to the lesser of:

(1) The net investment income of such organization for the taxable year, or

(2) The aggregate amount expended during the taxable year for an exempt function.

The amount included will be treated as political organization taxable income.

(b) *Exempt function expenditures*—(1) *Directly related expenses.* (i) Except as provided in this section, the term *exempt function* will generally have the same meaning it has in §1.527–2(c). Thus, expenditures which are directly related to the selection process as defined in §1.527–2(c)(1) are expenditures for an exempt function. Expenditures for indirect expenses as defined in §1.527–2(c)(2), when made by a section 501(c) organization are for an exempt function only to the extent provided in paragraph (b)(2) of this section. Expenditures of a section 501 (c) organization which are otherwise allowable under the Federal Election Campaign Act or similar State statute are for an exempt function only to the extent provided in paragraph (b)(3) of this section.

(ii) An expenditure may be made for an exempt function directly or through another organization. A section 501(c) organization will not be absolutely liable under section 527(f)(1) for amounts transferred to an individual or organization. A section 501(c) organization is, however, required to take reasonable steps to ensure that the transferee does not use such amounts for an exempt function.

(2) *Indirect expenses.* [Reserved]

(3) *Expenditures allowed by Federal Election Campaign Act.* [Reserved]

(4) *Appointments or confirmations.* Where an organization described in paragraph (a) of this section appears before any legislative body in response to a written request by such body for the purpose of influencing the appointment or confirmation of an individual to a public office, any expenditure directly related to such appearance is not treated as an expenditure for an exempt function.

(5) *Nonpartisan activity.* Expenditures for nonpartisan activities by an organization to which paragraph (a) of this section applies are not expenditures for an exempt function. Nonpartisan activities include voter registration and *get-out-the-vote* campaigns. To be nonpartisan voter registration and *get-out-the-vote* campaigns must not be specifically identified by the organization with any candidate or political party.

(c) *Character of items included in gross income*—(1) *General rule.* The items of income included in the gross income of an organization under paragraph (a) of this section retain their character as ordinary income or capital gain.

(2) *Special rule in determining character of item.* If the amount included in gross income is determined under paragraph (a)(2)(ii) of this section, the character of the items of income is determined by multiplying the total amount included in gross income under such paragraph by a fraction, the numerator of which is the portion of the organization's net investment income that is gain from the sale or exchange of a capital asset, and the denominator of which is the organization's net investment income. For example, if $5,000 is included in the gross income of an organization under paragraph (a)(2) of this section, and the organization had $100,000 of net investment income of which $10,000 is long term capital gain, then $500 would be treated as long term capital gain:

$$\frac{\text{Capital gain}}{\text{net investment income}} \times \text{Amount expended on an exempt function} = \text{Portion of income subject to tax under SS section 1201}$$

$$\frac{\$10{,}000}{\$100{,}000} \times \$5{,}000 = \$500$$

(d) *Modifications.* The modifications described in section 527(c)(2) apply in computing the tax under paragraph (a)(2) of this section. Thus, no net operating loss is allowed under section 172 nor is any deduction allowed under part VIII of subchapter B. However, there is allowed a specific deduction of $100.

(e) *Transfer not treated as exempt function expenditures.* Provided the provisions of this paragraph (e) are met, a transfer of political contributions or dues collected by a section 501(c) organization to a separate segregated fund as defined in paragraph (f) of this section is not treated as an expenditure for an exempt function (within the meaning of §1.527–2(c)). Such transfers must be made promptly after the receipt of such amounts by the section 501(c) organization, and must be made directly to the separate segregated fund. A transfer is considered promptly and directly made if:

(1) The procedures followed by the section 501(c) organization satisfy the requirements of applicable Federal or State campaign law and regulations;

(2) The section 501(c) organization maintains adequate records to demonstrate that amounts transferred in fact consist of political contributions or dues, rather than investment income; and

(3) The political contributions or dues transferred were not used to earn investment income for the section 501(c) organization.

(f) *Separate segregated fund.* An organization or fund described in section 527(f)(3) is a separate segregated fund. To avoid the application of paragraph (a) of this section, an organization described in section 501(c) that is exempt from taxation under section 501(a) may, if it is consistent with its exempt status, establish and maintain such a separate segregated fund to receive contributions and make expenditures in a political campaign. If such a fund meets the requirements of §1.527–2(a) (relating to the definition of a political organization), it shall be treated as a political organization subject to the provisions of section 527. A segregated fund established under the Federal Election Campaign Act will continue to be treated as a segregated fund when it engages in exempt function activities as defined in §1.527–2(c), relating to State campaigns.

(g) *Effect of expenditures on exempt status.* Section 527(f) and this section do not sanction the intervention in any political campaign by an organization described in section 501(c) if such activity is inconsistent with its exempt status under section 501(c). For example, an organization described in section 501(c)(3) is precluded from engaging in any political campaign activities. The fact that section 527 imposes a tax on the exempt function (as defined in §1.527–2(c)) expenditures of section 501(c) organizations and permits such organizations to establish separate segregated funds to engage in campaign activities does not sanction the participation in these activities by section 501(c)(3) organizations.

[T.D. 7744, 45 FR 85734, Dec. 30, 1980]

§1.527–7 Newsletter funds.

(a) *In general.* For purposes of this section, a fund established and maintained by an individual who holds, has been elected to, or is a candidate (within the meaning of section 41(c)(2)) for nomination or election to, any Federal, State, or local elective public office for the use by such individual exclusively for an exempt function, as defined in paragraph (c) of this section, shall be a newsletter fund. If assets of a newsletter fund are used for any purpose other than the exempt function of the newsletter fund as defined in paragraph (c) of this section, such amount shall be treated as expended for the personal use of the individual who established and maintained such fund. In addition, future contributions to such fund are treated as income to the individual who established and maintained the fund. In such a case, the facts and circumstances may indicate that the fund was never established and maintained exclusively for an exempt function as defined in paragraph (c) of this section.

(b) *Determination of taxable income.* A newsletter fund shall be treated as if it were a political organization for purposes of determining its taxable income. However, the specific $100 deduction provided by section 527(c)(2)(A) shall not be allowed.

(c) *Exempt function.* For purposes of this section, the exempt function of a newsletter fund consists solely of the preparation and circulation of the newsletter. Among the expenditures treated as preparation and circulation expenditures of the newsletter are:

(1) Secretarial services,

(2) Printing,

(3) Addressing, and

(4) Mailing.

(d) *Nonexempt function purposes.* Newsletter fund assets may not be used for campaign activities. Therefore, an exempt function of a newsletter fund does not include:

(1) Expenditures for an exempt function as defined in §1.527–2(c) or

(2) Transfers of unexpended amounts to a political organization described in section 527(e)(1).

(e) *Excess funds.* Excess funds held by a newsletter fund which has ceased to engage in the preparation and circulation of the newsletter are treated as expended for the personal use of the individual who established and maintained such fund. However, to the extent such excess funds are within a reasonable period of time:

(1) Contributed to or for the use of any organization described in paragraph (1) or (2) of section 509(a) which is exempt from taxation under section 501(a),

(2) Deposited in the general fund of the U.S. Treasury or in the general fund of any State or local government (including the District of Columbia), or

(3) Contributed to any other newsletter fund as described in paragraph (a) of this section,

the excess funds are not treated as expended for the personal use of such individual. In such a case the individual is not allowed a deduction under the Internal Revenue Code of 1954 for such contribution or deposit.

[T.D. 7744, 45 FR 85735, Dec. 30, 1980]

§1.527–8 Effective date; filing requirements; and miscellaneous provisions.

(a) *Assessment and collections.* Since the taxes imposed by section 527 are taxes imposed by subtitle A of the Code, all provisions of law and of the regulations applicable to the taxes imposed by subtitle A are applicable to the assessment and collection of the taxes imposed by section 527. Organizations subject to the tax imposed by section 527 are subject to the same provisions, including penalties, as are provided for corporations, in general, except that the requirements of section 6154 concerning the payment of estimated tax do not apply. See, generally, sections 6151, et. seq., and the regulations prescribed thereunder, for provisions relating to payment of tax.

(b) *Returns.* For requirements of filing annual returns with respect to political organization taxable income, see section 6012 (a) (6) and the applicable regulations.

(c) *Taxable years, method of accounting, etc.* The taxable year (fiscal year or calendar year, as the case may be) of a political organization is determined without regard to the fact that such organization may have been exempt from tax during any prior period. See sections 441 and 446, and the regulations thereunder in this part, and section 7701 and the regulations in Part 301 of this chapter (Regulations on Procedure and Administration). Similarly, in computing political organization taxable income, the determination of the taxable year for which an item of income or expense is taken into account is made under the provisions of sections 441, 446, 451, 461, and the regulations thereunder, whether or not the item arose during a taxable year beginning before, on, or after the effective date of the provisions imposing a tax upon political organization taxable income. If a method for treating bad debts was selected in a return of income (other than an information return) for a previous taxable year, the taxpayer must follow such method in its returns under section 527, unless such method is changed inaccordance with the provisions of §1.166–1. A taxpayer who has not previously selected a method for treating bad debts may, in its first return under section 6012 (a) (6), exercise the option granted in §1.166–1.

(d) *Effective date.* Except as provided in paragraph (b)(2) of §1.527–6 and in paragraph (a) of §1.527–9, the regulations under section 527 apply to taxable

years beginning after December 31, 1974.

[T.D. 7744, 45 FR 85735, Dec. 30, 1980; as amended by T.D. 8041, 50 FR 30817, July 30, 1985]

§ 1.527–9 Special rule for principal campaign committees.

(a) *In general.* Effective with respect to taxable years beginning after December 31, 1981, the tax imposed by section 527(b) on the political organization taxable income of a principal campaign committee shall be computed by multiplying the political organization taxable income by the appropriate rates of tax specified in section 11(b). The political organization taxable income of a campaign committee not a principal campaign committee is taxed at the highest rate of tax specified in section 11(b). A candidate for Congress may designate one political committee to serve as his or her principal campaign committee for purposes of section 527(h)(1). If a designation is made, it shall be made in accordance with the requirements of paragraph (b) of this section. A candidate for Congress may have only one designation in effect at any time. Under 11 CFR 102.12, no political committee may be designated as the principal campaign committee of more than one candidate for Congress. Further, no political committee that supports or has supported more than one candidate for Congress may be designated as a principal campaign committee. No designation need be made where there is only one political campaign committee with respect to a candidate.

(b) *Manner of designation.* If a candidate for Congress elects to make a designation under section 527(h) and this section, he or she shall designate his or her principal campaign committee by appending a copy of his or her Statement of Candidacy (that is, the Federal Election Commission Form 2, or equivalent statement that the candidate filed with the Federal Election Commission under 11 CFR 101.1(a)), to the Form 1120–POL filed by the principal campaign committee for each taxable year for which the designation is effective. This designation may also be made by appending to the Form 1120–POL statement containing the following information: The name and address of the candidate for Congress; his or her taxpayer identification number; his or her party affiliation and the office sought; the district and State in which the office is sought; and the name and address of the principal campaign comittee. This designation shall be made on or before the due date (as extended) for filing Form 1120–POL. Only a candidate for Congress may make a designation in accordance with this paragraph.

(c) *Manner of revoking designation.* A designation of a principal campaign committee that has been filed in accordance with this section may be revoked only with the consent of the Commissioner. In general, the Commissioner will grant such consent in every case where the candidate for Congress has revoked his or her designation in compliance with the requirements of the Federal Election Commission by filing an amended Statement of Organization or its equivalent pursuant to 11 CFR 102.2(a)(2). In the case of the revocation of the designation of a principal campaign committee by a candidate followed by the designation of another principal campaign committee by such candidate, for purposes of determining the appropriate rate of tax under section 11(b) for a taxable year, the political organization taxable income of the first principal campaign committee shall be treated as that of the subsequent principal campaign committee. In a case where consent to revoke a designation of a principal campaign committee is granted and a new designation is filed, the Commissioner may condition his consent upon the agreement of the candidate for Congress to insure compliance with the preceding sentence.

[T.D. 8041, 50 FR 30817, July 30, 1985]

HOMEOWNERS ASSOCIATIONS

§ 1.528–1 Homeowners associations.

(a) *In general.* Section 528 only applies to taxable years of homeowners associations beginning after December 31, 1973. To qualify as a homeowners association an organization must either be a condominium management association or a residential real estate

§ 100.26 Public communication (2 U.S.C. 431(22)).

Public communication means 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.

[71 FR 18612, Apr. 12, 2006]

§ 100.27 Mass mailing (2 U.S.C. 431(23)).

Mass mailing means a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period. A mass mailing does not include electronic mail or Internet communications. For purposes of this section, *substantially similar* includes communications that include substantially the same template or language, but vary in non-material respects such as communications customized by the recipient's name, occupation, or geographic location.

[67 FR 49110, July 29, 2002]

§ 100.28 Telephone bank (2 U.S.C. 431(24)).

Telephone bank means more than 500 telephone calls of an identical or substantially similar nature within any 30-day period. A telephone bank does not include electronic mail or Internet communications transmitted over telephone lines. For purposes of this section, *substantially similar* includes communications that include substantially the same template or language, but vary in non-material respects such as communications customized by the recipient's name, occupation, or geographic location.

[67 FR 49110, July 29, 2002]

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section—(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) *Refers to a clearly identified candidate* means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as ''the President,'' ''your Congressman,'' or ''the incumbent,'' or through an unambiguous reference to his or her status as a candidate such as ''the Democratic presidential nominee'' or ''the Republican candidate for Senate in the State of Georgia.''

(3)(i) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, *publicly distributed* means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) *A special election* or a *runoff election* is a primary election if held to nominate a candidate. A *special election*

or a *runoff election* is a general election if held to elect a candidate.

(5) *Targeted to the relevant electorate* means the communication can be received by 50,000 or more persons—

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, *http://www.fcc.gov*. A link to that site is available on the Federal Election Commission's Web site, *http://www.fec.gov*. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) *Can be received by 50,000 or more persons* means—

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour—

(*1*) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(*2*) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that—

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) The following communications are exempt from the definition of electioneering *communication*. Any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(5) Is paid for by a candidate for State or local office in connection with an election to State or local office, provided that the communication does not promote, support, attack or oppose any Federal candidate. *See* 11 CFR 300.71 for communications paid for by a candidate for State or local office that promotes, supports, attacks or opposes a Federal candidate.

[67 FR 65210, 65217, Oct. 23, 2002, as amended at 70 FR 75717, Dec. 21, 2005]

consolidation shall be made on FEC Form 3–Z and shall be submitted with the reports of the principal campaign committee and with the reports, or applicable portions thereof, of the committees shown on the consolidation.

(g) *Building funds.* (1) A political party committee must report gifts, subscriptions, loans, advances, deposits of money, or anything of value that are used by the political party committee's Federal accounts to defray the costs of construction or purchase of the committee's office building. See 11 CFR 300.35. Such a receipt is a contribution subject to the limitations and prohibitions of the Act and reportable as a contribution, regardless of whether the contributor has designated the funds or things of value for such purpose and regardless of whether such funds are deposited in a separate Federal account dedicated to that purpose.

(2) Gifts, subscriptions, loans, advances, deposits of money, or anything of value that are donated to a non-Federal account of a State or local party committee and are used by that party committee for the purchase or construction of its office building are not contributions subject to the reporting requirements of the Act. The reporting of such funds or things of value is subject to State law.

(3) Gifts, subscriptions, loans, advances, deposits of money, or anything of value that are used by a national committee of a political party to defray the costs of construction or purchase of the national committee's office building are contributions subject to the requirements of paragraph (g)(1) of this section.

(h) *Legal and accounting services.* A committee which receives legal or accounting services pursuant to 11 CFR 100.85 and 100.86 shall report as a memo entry, on Schedule A, the amounts paid for these services by the regular employer of the person(s) providing such services; the date(s) such services were performed; and the name of each person performing such services.

(i) *Cumulative reports.* The reports required to be filed under §104.5 shall be cumulative for the calendar year (or for the election cycle, in the case of an authorized committee) to which they relate, but if there has been no change in a category reported in a previous report during that year (or during that election cycle, in the case of an authorized committee), only the amount thereof need be carried forward.

(j) *Earmarked contributions.* Earmarked contributions shall be reported in accordance with 11 CFR 110.6. *See also* 11 CFR 102.8(c).

(k) *Reporting Election Cycle Activity Occurring Prior to January 1, 2001.* The aggregate of each category of receipt listed in paragraph (a)(3) of this section, except those in paragraphs (a)(3)(i)(A) and (B) of this section, and for each category of disbursement listed in paragraph (b)(2) of this section shall include amounts received or disbursed on or after the day after the last general election for the seat or office for which the candidate is running through December 31, 2000.

[45 FR 15108, Mar. 7, 1980, as amended at 45 FR 21209, Apr. 1, 1980; 50 FR 50778, Dec. 12, 1985; 55 FR 26386, June 27, 1990; 56 FR 67124, Dec. 27, 1991; 60 FR 7874, Feb. 9, 1995; 61 FR 3549, Feb. 1, 1996; 65 FR 42623, July 11, 2000; 66 FR 59680, Nov. 30, 2001; 67 FR 38360, June 4, 2002; 67 FR 78680, Dec. 26, 2002; 68 FR 417, Jan. 3, 2003; 68 FR 611, Jan. 6, 2003; 68 FR 2871, Jan. 22, 2003; 68 FR 417, Jan. 3, 2003]

§ 104.4 Independent expenditures by political committees (2 U.S.C. 434(b), (d), and (g)).

(a) *Regularly scheduled reporting.* Every political committee that makes independent expenditures must report all such independent expenditures on Schedule E in accordance with 11 CFR 104.3(b)(3)(vii). Every person that is not a political committee must report independent expenditures in accordance with paragraphs (e) and (f) of this section and 11 CFR 109.10.

(b) *Reports of independent expenditures made at any time up to and including the 20th day before an election*—(1) *Independent expenditures aggregating less than $10,000 in a calendar year.* Political committees must report on Schedule E of FEC Form 3X at the time of their regular reports in accordance with 11 CFR 104.3, 104.5 and 104.9, all independent expenditures aggregating less than $10,000 with respect to a given election any time during the calendar year up to and including the 20th day before an election.

(2) *Independent expenditures aggregating $10,000 or more in a calendar year.* Political committees must report on Schedule E of FEC Form 3X all independent expenditures aggregating $10,000 or more with respect to a given election any time during the calendar year up to and including the 20th day before an election. Political committees must ensure that the Commission receives these reports by 11:59 p.m. Eastern Standard/Daylight Time on the second day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate an additional $10,000 or more, the political committee must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures by 11:59 p.m. Eastern Standard/Daylight Time on the second day following the date on which the communication is publicly distributed or otherwise publicly disseminated. (*See* paragraph (f) of this section for aggregation.) Each 48-hour report must contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved. In addition to other permissible means of filing, a political committee may file the 48-hour reports under this section by any of the means permissible under 11 CFR 100.19(d)(3).

(c) *Reports of independent expenditures made less than 20 days, but more than 24 hours before the day of an election.* Political committees must ensure that the Commission receives reports of independent expenditures aggregating $1,000 or more with respect to a given election, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of the election, by 11:59 p.m. Eastern Standard/Daylight Time on the day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate an additional $1,000 or more, the political committee must ensure that the Commission receives a new 24-hour report of the subsequent independent expenditures by 11:59 p.m. Eastern Standard/Daylight Time on the day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated. (See paragraph (f) of this section for aggregation.) Each 24-hour report shall contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved. Political committees may file reports under this section by any of the means permissible under 11 CFR 100.19(d)(3).

(d) *Verification.* Political committees must verify reports of independent expenditures filed under paragraph (b) or (c) of this section by one of the methods stated in paragraph (d)(1) or (2) of this section. Any report verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(1) For reports filed on paper (*e.g.*, by hand-delivery, U.S. Mail or facsimile machine), the treasurer of the political committee that made the independent expenditure must certify, under penalty of perjury, the independence of the expenditure by handwritten signature immediately following the certification required by 11 CFR 104.3(b)(3)(vii).

(2) For reports filed by electronic mail, the treasurer of the political committee that made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by typing the treasurer's name immediately following the certification required by 11 CFR 104.3(b)(3)(vii).

(e) *Where to file.* Reports of independent expenditures under this section and 11 CFR 109.10(b) shall be filed as follows:

(1) For independent expenditures in support of, or in opposition to, a candidate for President or Vice President: with the Commission and the Secretary of State for the State in which the expenditure is made.

(2) For independent expenditures in support of, or in opposition to, a candidate for the Senate:

(i) For regularly scheduled reports, with the Secretary of the Senate and the Secretary of State for the State in which the candidate is seeking election; or

(ii) For 24-hour and 48-hour reports, with the Commission and the Secretary of State for the State in which the candidate is seeking election.

(3) For independent expenditures in support of, or in opposition to, a candidate for the House of Representatives: with the Commission and the Secretary of State for the State in which the candidate is seeking election.

(4) Notwithstanding the requirements of paragraphs (e)(1), (2), and (3) of this section, political committees and other persons shall not be required to file reports of independent expenditures with the Secretary of State if that State has obtained a waiver under 11 CFR 108.1(b).

(f) *Aggregating independent expenditures for reporting purposes.* For purposes of determining whether 24-hour and 48-hour reports must be filed in accordance with paragraphs (b) and (c) of this section and 11 CFR 109.10(c) and (d), aggregations of independent expenditures must be calculated as of the first date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated, and as of the date that any such communication with respect to the same election is subsequently publicly distributed or otherwise publicly disseminated. Every person must include in the aggregate total all disbursements during the calendar year for independent expenditures, and all enforceable contracts, either oral or written, obligating funds for disbursements during the calendar year for independent expenditures, where those independent expenditures are made with respect to the same election for Federal office.

[68 FR 417, Jan. 3, 2003]

§ 104.5 Filing dates (2 U.S.C. 434(a)(2)).

(a) *Principal campaign committee of House of Representatives or Senate candidate.* Each treasurer of a principal campaign committee of a candidate for the House of Representatives or for the Senate must file quarterly reports on the dates specified in paragraph (a)(1) of this section in both election years and non-election years, and must file additional reports on the dates specified in paragraph (a)(2) of this section in election years.

(1) *Quarterly reports.* (i) Quarterly reports must be filed no later than the 15th day following the close of the immediately preceding calendar quarter (on April 15, July 15, and October 15), except that the report for the final calendar quarter of the year must be filed no later than January 31 of the following calendar year.

(ii) The report must be complete as of the last day of each calendar quarter.

(iii) The requirement for a quarterly report shall be waived if, under paragraph (a)(2) of this section, a pre-election report is required to be filed during the period beginning on the 5th day after the close of the calendar quarter and ending on the 15th day after the close of the calendar quarter.

(2) *Additional reports in the election year.* (i) *Pre-election reports.* (A) Pre-election reports for the primary and general election must be filed no later than 12 days before any primary or general election in which the candidate seeks election. If sent by registered or certified mail, Priority Mail or Express Mail with a delivery confirmation, or with an overnight delivery service and scheduled to be delivered the next business day after the date of deposit and recorded in the overnight delivery service's on-line tracking system, the postmark on the report must be dated no later than the 15th day before any election.

(B) The pre-election report must disclose all receipts and disbursements as of the 20th day before a primary or general election.

(ii) *Post-general election report.* (A) The post-general election report must be filed no later than 30 days after any general election in which the candidate seeks election.

(B) The post-general election report must be complete as of the 20th day after the general election.

(b) *Principal campaign committee of Presidential candidate.* Each treasurer of a principal campaign committee of a

(vi) The aggregate amount described in paragraph (b)(2)(ii) of this section minus the aggregate amount described in paragraph (b)(2)(iv) of this section.

[68 FR 3996, Jan. 27, 2003]

EFFECTIVE DATE NOTE: At 73 FR 79601, Dec. 30, 2008, §104.19 is removed and reserved, effective February 1, 2009.

§ 104.20 Reporting electioneering communications (2 U.S.C. 434(f)).

(a) *Definitions*—(1) *Disclosure date* means:

(i) The first date on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000; or

(ii) Any other date during the same calendar year on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000 since the most recent disclosure date during such calendar year.

(2) *Direct costs of producing or airing electioneering communications* means the following:

(i) Costs charged by a vendor, such as studio rental time, staff salaries, costs of video or audio recording media, and talent; or

(ii) The cost of airtime on broadcast, cable or satellite radio and television stations, studio time, material costs, and the charges for a broker to purchase the airtime.

(3) *Persons sharing or exercising direction or control* means officers, directors, executive directors or their equivalent, partners, and in the case of unincorporated organizations, owners, of the entity or person making the disbursement for the electioneering communication.

(4) *Identification* has the same meaning as in 11 CFR 100.12.

(5) *Publicly distributed* has the same meaning as in 11 CFR 100.29(b)(3).

(b) *Who must report and when.* Every person who has made an electioneering communication, as defined in 11 CFR 100.29, aggregating in excess of $10,000 during any calendar year shall file a statement with the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the disclosure date. The statement shall be filed under penalty of perjury, shall contain the information set forth in paragraph (c) of this section, and shall be filed on FEC Form 9. Political committees that make communications that are described in 11 CFR 100.29(a) must report such communications as expenditures or independent expenditures under 11 CFR 104.3 and 104.4, and not under this section.

(c) *Contents of statement.* Statements of electioneering communications filed under paragraph (b) of this section shall disclose the following information:

(1) The identification of the person who made the disbursement, or who executed a contract to make a disbursement, and, if the person is not an individual, the person's principal place of business;

(2) The identification of any person sharing or exercising direction or control over the activities of the person who made the disbursement or who executed a contract to make a disbursement;

(3) The identification of the custodian of the books and accounts from which the disbursements were made;

(4) The amount of each disbursement, or amount obligated, of more than $200 during the period covered by the statement, the date the disbursement was made, or the contract was executed, and the identification of the person to whom that disbursement was made;

(5) All clearly identified candidates referred to in the electioneering communication and the elections in which they are candidates;

(6) The disclosure date, as defined in paragraph (a) of this section;

(7)(i) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications not permissible under 11 CFR 114.15, consisting of funds

provided solely by individuals who are United States citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year; or

(ii) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications permissible under 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

(8) If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section and were not made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

(9) If the disbursements were made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

(d) *Recordkeeping.* All persons who make electioneering communications or who accept donations for the purpose of making electioneering communications must maintain records in accordance with 11 CFR 104.14.

(e) *State waivers.* Statements of electioneering communications that must be filed with the Commission must also be filed with the Secretary of State of the appropriate State if the State has not obtained a waiver under 11 CFR 108.1(b).

[68 FR 419, Jan. 3, 2003; 68 FR 5075, Jan. 31, 2003, as amended at 72 FR 72913, Dec. 26, 2007]

§ 104.21 Reporting by inaugural committees.

(a) *Definitions*—(1) *Inaugural committee.* Inaugural committee means the committee appointed by the President-elect to be in charge of the Presidential inaugural ceremony and functions and activities connected with the inaugural ceremony.

(2) *Donation.* For purposes of this section, donation has the same meaning as in 11 CFR 300.2(e).

(b) *Initial letter-filing by inaugural committees.* (1) In order to be considered the inaugural committee under 36 U.S.C. Chapter 5, within 15 days of appointment by the President-elect, the appointed committee must file a signed letter with the Commission containing the following:

(i) The name and address of the inaugural committee;

(ii) The name of the chairperson, or the name and title of another officer who will serve as the point of contact; and

(iii) A statement agreeing to comply with paragraphs (c) and (d) of this section and with 11 CFR 110.20(j).

(2) Upon receipt of the letter filed under this paragraph (b), the Commission will assign a FEC committee identification number to the inaugural committee. The inaugural committee must include this FEC committee identification number on all reports and supplements thereto required under paragraph (c) of this section, as well as on all communications with the Commission concerning the letter filed under this paragraph (b).

(c) *Reporting requirements for inaugural committees*—(1) *Who must report.* The chairperson or other officer identified in the letter-filing required by paragraph (b) of this section must file a report and any supplements thereto as required by this paragraph (c). Such person must sign the report and any supplements thereto in accordance with 11 CFR 104.14(a). The signature on the report and any supplements thereto certifies that the contents are true, correct, and complete, to the best of knowledge of the chairperson or other officer identified in the letter-filing required by paragraph (b) of this section.

(2) *When to file.* A report, and any supplements thereto, must be timely

(6) Application of State law to the funds used for the purchase or construction of a State or local party office building to the extent described in 11 CFR 300.35.

[45 FR 15117, Mar. 7, 1980, as amended at 67 FR 49119, July 29, 2002]

§ 108.8 Exemption for the District of Columbia.

Any copy of a report required to be filed with the equivalent officer in the District of Columbia shall be deemed to be filed if the original has been filed with the Secretary or the Commission, as appropriate.

[45 FR 15117, Mar. 7, 1980, as amended at 61 FR 6095, Feb. 16, 1996]

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

Sec.

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.

SOURCE: 68 FR 451, Jan. 3, 2003, unless otherwise noted.

Subpart A—Scope and Definitions

§ 109.1 When will this part apply?

This part applies to expenditures that are made independently from a candidate, an authorized committee, a political party committee, or their agents, and to those payments that are made in coordination with a candidate, an authorized committee, a political party committee, or their agents. The rules in this part explain how these types of payments must be reported and how they must be treated by candidates, authorized committees, and political party committees. In addition, subpart D of part 109 describes procedures and limits that apply only to payments, transfers, and assignments made by political party committees.

§ 109.2 [Reserved]

§ 109.3 Definitions.

For the purposes of 11 CFR part 109 only, agent means any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of the specified persons:

(a) In the case of a national, State, district, or local committee of a political party, any one or more of the activities listed in paragraphs (a)(1) through (a)(5) of this section:

(1) To request or suggest that a communication be created, produced, or distributed.

(2) To make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c).

(3) To create, produce, or distribute any communication at the request or suggestion of a candidate.

(4) To be materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or,

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(5) To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication with a candidate.

(b) In the case of an individual who is a Federal candidate or an individual holding Federal office, any one or more of the activities listed in paragraphs (b)(1) through (b)(6) of this section:

(1) To request or suggest that a communication be created, produced, or distributed.

(2) To make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c).

(3) To request or suggest that any other person create, produce, or distribute any communication.

(4) To be materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication;

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(5) To provide material or information to assist another person in the creation, production, or distribution of any communication.

(6) To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication with a different candidate.

Subpart B—Independent Expenditures

§ 109.10 How do political committees and other persons report independent expenditures?

(a) Political committees, including political party committees, must report independent expenditures under 11 CFR 104.4.

(b) Every person that is not a political committee and that makes independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year shall file a verified statement or report on FEC Form 5 in accordance with 11 CFR 104.4(e) containing the information required by paragraph (e) of this section. Every person filing a report or statement under this section shall do so in accordance with the quarterly reporting schedule specified in 11 CFR 104.5(a)(1)(i) and (ii) and shall file a report or statement for any quarterly period during which any such independent expenditures that aggregate in excess of $250 are made and in any quarterly reporting period thereafter in which additional independent expenditures are made.

(c) Every person that is not a political committee and that makes independent expenditures aggregating $10,000 or more with respect to a given election any time during the calendar year up to and including the 20th day before an election, must report the independent expenditures on FEC Form 5, or by signed statement if the person is not otherwise required to file electronically under 11 CFR 104.18. (See 11 CFR 104.4(f) for aggregation.) The person making the independent expenditures aggregating $10,000 or more must ensure that the Commission receives the report or statement by 11:59 p.m. Eastern Standard/Daylight Time on the second day following the date on

which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate an additional $10,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures. Each 48-hour report must contain the information required by paragraph (e)(1) of this section.

(d) Every person making, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of an election, independent expenditures aggregating $1,000 or more with respect to a given election must report those independent expenditures and ensure that the Commission receives the report or signed statement by 11:59 p.m. Eastern Standard/Daylight Time on the day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate $1,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 24-hour report of the subsequent independent expenditures. (See 11 CFR 104.4(f) for aggregation.) Such report or statement shall contain the information required by paragraph (e) of this section.

(e) Content of verified reports and statements and verification of reports and statements.

(1) *Contents of verified reports and statement.* If a signed report or statement is submitted, the report or statement shall include:

(i) The reporting person's name, mailing address, occupation, and the name of his or her employer, if any;

(ii) The identification (name and mailing address) of the person to whom the expenditure was made;

(iii) The amount, date, and purpose of each expenditure;

(iv) A statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;

(v) A verified certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents; and

(vi) The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.

(2) *Verification of independent expenditure statements and reports.* Every person shall verify reports and statements of independent expenditures filed pursuant to the requirements of this section by one of the methods stated in paragraph (e)(2)(i) or (ii) of this section. Any report or statement verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(i) For reports or statements filed on paper (*e.g.*, by hand-delivery, U.S. Mail, or facsimile machine), the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by handwritten signature immediately following the certification required by paragraph (e)(1)(v) of this section.

(ii) For reports or statements filed by electronic mail, the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by typing the treasurer's name immediately following the certification required by paragraph (e)(1)(v) of this section.

§ 109.11 When is a "non-authorization notice" (disclaimer) required?

Whenever any person makes an independent expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such person shall comply with the requirements of 11 CFR 110.11.

Subpart C—Coordination

§ 109.20 What does "coordinated" mean?

(a) *Coordinated* means made in cooperation, consultation or concert with, or at the request or suggestion of,

a candidate, a candidate's authorized committee, or a political party committee. For purposes of this subpart C, any reference to a candidate, or a candidate's authorized committee, or a political party committee includes an agent thereof.

(b) Any expenditure that is coordinated within the meaning of paragraph (a) of this section, but that is not made for a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37, is either an in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated and must be reported as an expenditure made by that candidate or political party committee, unless otherwise exempted under 11 CFR part 100, subparts C or E.

[68 FR 451, Jan. 3, 2003, as amended at 71 FR 33208, June 8, 2006]

§ 109.21 What is a "coordinated communication"?

(a) *Definition.* A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication:

(1) Is paid for, in whole or in part, by a person other than that candidate, authorized committee, or political party committee;

(2) Satisfies at least one of the content standards in paragraph (c) of this section; and

(3) Satisfies at least one of the conduct standards in paragraph (d) of this section.

(b) *Treatment as an in-kind contribution and expenditure; Reporting*—(1) *General rule.* A payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution under 11 CFR 100.52(d) to the candidate, authorized committee, or political party committee with whom or which it is coordinated, unless excepted under 11 CFR part 100, subpart C, and must be reported as an expenditure made by that candidate, authorized committee, or political party committee under 11 CFR 104.13, unless excepted under 11 CFR part 100, subpart E.

(2) *In-kind contributions resulting from conduct described in paragraphs (d)(4) or (d)(5) of this section.* Notwithstanding paragraph (b)(1) of this section, the candidate, authorized committee, or political party committee with whom or which a communication is coordinated does not receive or accept an in-kind contribution, and is not required to report an expenditure, that results from conduct described in paragraphs (d)(4) or (d)(5) of this section, unless the candidate, authorized committee, or political party committee engages in conduct described in paragraphs (d)(1) through (d)(3) of this section.

(3) *Reporting of coordinated communications.* A political committee, other than a political party committee, that makes a coordinated communication must report the payment for the communication as a contribution made to the candidate or political party committee with whom or which it was coordinated and as an expenditure in accordance with 11 CFR 104.3(b)(1)(v). A candidate, authorized committee, or political party committee with whom or which a communication paid for by another person is coordinated must report the usual and normal value of the communication as an in-kind contribution in accordance with 11 CFR 104.13, meaning that it must report the amount of the payment as a receipt under 11 CFR 104.3(a) and as an expenditure under 11 CFR 104.3(b).

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(4) satisfies the content standard of this section.

(1) A communication that is an electioneering communication under 11 CFR 100.29.

(2) A public communication, as defined in 11 CFR 100.26, that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates the election or defeat of a

clearly identified candidate for Federal office.

(4) A public communication, as defined in 11 CFR 100.26, that satisfies paragraph (c)(4)(i), (ii), (iii), or (iv) of this section:

(i) *References to House and Senate candidates.* The public communication refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus.

(ii) *References to Presidential and Vice Presidential candidates.* The public communication refers to a clearly identified Presidential or Vice Presidential candidate and is publicly distributed or otherwise publicly disseminated in a jurisdiction during the period of time beginning 120 days before the clearly identified candidate's primary or preference election in that jurisdiction, or nominating convention or caucus in that jurisdiction, up to and including the day of the general election.

(iii) *References to political parties.* The public communication refers to a political party, does not refer to a clearly identified Federal candidate, and is publicly distributed or otherwise publicly disseminated in a jurisdiction in which one or more candidates of that political party will appear on the ballot.

(A) When the public communication is coordinated with a candidate and it is publicly distributed or otherwise publicly disseminated in that candidate's jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing a reference to that candidate applies;

(B) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated during the two-year election cycle ending on the date of a regularly scheduled non-Presidential general election, the time period in paragraph (c)(4)(i) of this section applies;

(C) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated during the two-year election cycle ending on the date of a Presidential general election, the time period in paragraph (c)(4)(ii) of this section applies.

(iv) *References to both political parties and clearly identified Federal candidates.* The public communication refers to a political party and a clearly identified Federal candidate, and is publicly distributed or otherwise publicly disseminated in a jurisdiction in which one or more candidates of that political party will appear on the ballot.

(A) When the public communication is coordinated with a candidate and it is publicly distributed or otherwise publicly disseminated in that candidate's jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing a reference to that candidate applies;

(B) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing only a reference to that candidate applies;

(C) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated outside the clearly identified candidate's jurisdiction, the time period in paragraph (c)(4)(iii)(B) or (C) of this section that would apply to a communication containing only a reference to a political party applies.

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

(1) *Request or suggestion.* (i) The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion.

(2) *Material involvement.* This paragraph, (d)(2), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. A candidate, authorized committee, or political party committee is materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) *Substantial discussion.* This paragraph, (d)(3), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and 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. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

(4) *Common vendor.* All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor, as defined in 11 CFR 116.1(c), to create, produce, or distribute the communication;

(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:

(A) Development of media strategy, including the selection or purchasing of advertising slots;

(B) Selection of audiences;

(C) Polling;

(D) Fundraising;

(E) Developing the content of a public communication;

(F) Producing a public communication;

(G) Identifying voters or developing voter lists, mailing lists, or donor lists;

(H) Selecting personnel, contractors, or subcontractors; or

(I) Consulting or otherwise providing political or media advice; and

(iii) This paragraph, (d)(4)(iii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source. That commercial vendor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing 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, and that information is material to the creation, production, or distribution of the communication.

(5) *Former employee or independent contractor.* Both of the following statements in paragraphs (d)(5)(i) and (d)(5)(ii) of this section are true:

(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

(ii) This paragraph, (d)(5)(ii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the former employee or independent contractor was obtained from a publicly available source. That former employee or independent contractor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used by the former employee or independent contractor in providing 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, and that information is material to the creation, production, or distribution of the communication.

(6) *Dissemination, distribution, or republication of campaign material.* A communication that satisfies the content standard of paragraph (c)(2) of this section or 11 CFR 109.37(a)(2)(i) shall only satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section on the basis of conduct by the candidate, the candidate's authorized committee, or the agents of any of the foregoing, that occurs after the original preparation of the campaign materials that are disseminated, distributed, or republished. The conduct standards of paragraphs (d)(4) and (d)(5) of this section may also apply to such communications as provided in those paragraphs.

(e) *Agreement or formal collaboration.* Agreement or 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.

(f) *Safe harbor for responses to inquiries about legislative or policy issues.* A candidate's or a political party committee's response to an inquiry about that candidate's or political party committee's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards in paragraph (d) of this section.

(g) *Safe harbor for endorsements and solicitations by Federal candidates.* (1) A public communication in which a candidate for Federal office endorses another candidate for Federal or non-Federal office is not a coordinated communication with respect to the endorsing Federal candidate unless the public communication promotes, supports, attacks, or opposes the endorsing candidate or another candidate who seeks election to the same office as the endorsing candidate.

(2) A public communication in which a candidate for Federal office solicits funds for another candidate for Federal or non-Federal office, a political committee, or organizations as permitted by 11 CFR 300.65, is not a coordinated communication with respect to the soliciting Federal candidate unless the

public communication promotes, supports, attacks, or opposes the soliciting candidate or another candidate who seeks election to the same office as the soliciting candidate.

(h) *Safe harbor for establishment and use of a firewall.* The conduct standards in paragraph (d) of this section are not met if the commercial vendor, former employee, or political committee has established and implemented a firewall that meets the requirements of paragraphs (h)(1) and (h)(2) of this section. This safe harbor provision does not apply if specific information indicates that, despite the firewall, information about the candidate's or political party committee's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.

(1) The firewall must be designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing 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; and

(2) The firewall must be described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy.

[68 FR 451, Jan. 3, 2003, as amended at 71 FR 33208, June 8, 2006]

§ 109.22 Who is prohibited from making coordinated communications?

Any person who is otherwise prohibited from making contributions or expenditures under any part of the Act or Commission regulations is prohibited from paying for a coordinated communication.

§ 109.23 Dissemination, distribution, or republication of candidate campaign materials.

(a) *General rule.* The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either of the foregoing shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure. The candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.

(b) *Exceptions.* The following uses of campaign materials do not constitute a contribution to the candidate who originally prepared the materials:

(1) The campaign material is disseminated, distributed, or republished by the candidate or the candidate's authorized committee who prepared that material;

(2) The campaign material is incorporated into a communication that advocates the defeat of the candidate or party that prepared the material;

(3) The campaign material is disseminated, distributed, or republished in a news story, commentary, or editorial exempted under 11 CFR 100.73 or 11 CFR 100.132;

(4) The campaign material used consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views; or

(5) A national political party committee or a State or subordinate political party committee pays for such dissemination, distribution, or republication of campaign materials using coordinated party expenditure authority under 11 CFR 109.32.

[68 FR 451, Jan. 3, 2003, as amended at 71 FR 33210, June 8, 2006]

Subpart D—Special Provisions for Political Party Committees

§ 109.30 How are political party committees treated for purposes of coordinated and independent expenditures?

Political party committees may make independent expenditures subject

to the provisions in this subpart. *See* 11 CFR 109.36. Political party committees may also make coordinated party expenditures in connection with the general election campaign of a candidate, subject to the limits and other provisions in this subpart. *See* 11 CFR 109.32 through 11 CFR 109.34.

[69 FR 63920, Nov. 3, 2004]

§ 109.31 [Reserved]

§ 109.32 What are the coordinated party expenditure limits?

(a) *Coordinated party expenditures in Presidential elections.* (1) The national committee of a political party may make coordinated party expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party.

(2) The coordinated party expenditures shall not exceed an amount equal to two cents multiplied by the voting age population of the United States. See 11 CFR 110.18. This limitation shall be increased in accordance with 11 CFR 110.17.

(3) Any coordinated party expenditure under paragraph (a) of this section shall be in addition to—

(i) Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and

(ii) Any contribution by the national committee to the candidate permissible under 11 CFR 110.1 or 110.2.

(4) Any coordinated party expenditures made by the national committee of a political party pursuant to paragraph (a) of this section, or made by any other party committee under authority assigned by a national committee of a political party under 11 CFR 109.33, on behalf of that party's Presidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8.

(b) *Coordinated party expenditures in other Federal elections.* (1) The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make coordinated party expenditures in connection with the general election campaign of a candidate for Federal office in that State who is affiliated with the party.

(2) The coordinated party expenditures shall not exceed:

(i) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(A) Two cents multiplied by the voting age population of the State (see 11 CFR 110.18); or

(B) Twenty thousand dollars.

(ii) In the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(3) The limitations in paragraph (b)(2) of this section shall be increased in accordance with 11 CFR 110.17.

(4) Any coordinated party expenditure under paragraph (b) of this section shall be in addition to any contribution by a political party committee to the candidate permissible under 11 CFR 110.1 or 110.2.

§ 109.33 May a political party committee assign its coordinated party expenditure authority to another political party committee?

(a) *Assignment.* The national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may assign its authority to make coordinated party expenditures authorized by 11 CFR 109.32 to another political party committee. Such an assignment must be made in writing, must state the amount of the authority assigned, and must be received by the assignee committee before any coordinated party expenditure is made pursuant to the assignment.

(b) *Compliance.* For purposes of the coordinated party expenditure limits, *State committee* includes a subordinate committee of a State committee and includes a district or local committee to which coordinated party expenditure authority has been assigned. State committees and subordinate State committees and such district or local committees combined shall not exceed the coordinated party expenditure limits set forth in 11 CFR 109.32. The State

committee shall administer the limitation in one of the following ways:

(1) The State committee shall be responsible for insuring that the coordinated party expenditures of the entire party organization are within the coordinated party expenditure limits, including receiving reports from any subordinate committee of a State committee or district or local committee making coordinated party expenditures under 11 CFR 109.32, and filing consolidated reports showing all coordinated party expenditures in the State with the Commission; or

(2) Any other method, submitted in advance and approved by the Commission, that permits control over coordinated party expenditures.

(c) *Recordkeeping.* (1) A political party committee that assigns its authority to make coordinated party expenditures under this section must maintain the written assignment for at least three years in accordance with 11 CFR 104.14.

(2) A political party committee that is assigned authority to make coordinated party expenditures under this section must maintain the written assignment for at least three years in accordance with 11 CFR 104.14.

[68 FR 451, Jan. 3, 2003, as amended at 69 FR 63920, Nov. 3, 2004]

§ 109.34 When may a political party committee make coordinated party expenditures?

A political party committee authorized to make coordinated party expenditures may make such expenditures in connection with the general election campaign before or after its candidate has been nominated. All pre-nomination coordinated party expenditures shall be subject to the coordinated party expenditure limitations of this subpart, whether or not the candidate on whose behalf they are made receives the party's nomination.

§ 109.35 [Reserved]

§ 109.36 Are there circumstances under which a political party committee is prohibited from making independent expenditures?

The national committee of a political party must not make independent expenditures in connection with the general election campaign of a candidate for President of the United States if the national committee of that political party is designated as the authorized committee of its Presidential candidate pursuant to 11 CFR 9002.1(c).

§ 109.37 What is a "party coordinated communication"?

(a) *Definition.* A political party communication is coordinated with a candidate, a candidate's authorized committee, or agent of any of the foregoing, when the communication satisfies the conditions set forth in paragraphs (a)(1), (a)(2), and (a)(3) of this section.

(1) The communication is paid for by a political party committee or its agent.

(2) The communication satisfies at least one of the content standards described in paragraphs (a)(2)(i) through (a)(2)(iii) of this section.

(i) A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see 11 CFR 109.21(d)(6).

(ii) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(iii) A public communication, as defined in 11 CFR 100.26, that satisfies paragraphs (a)(2)(iii)(A) or (B) of this section:

(A) *References to House and Senate candidates.* The public communication refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus.

(B) *References to Presidential and Vice Presidential candidates.* The public communication refers to a clearly identified Presidential or Vice Presidential

candidate and is publicly distributed or otherwise publicly disseminated in a jurisdiction during the period of time beginning 120 days before the clearly identified candidate's primary or preference election in that jurisdiction, or nominating convention or caucus in that jurisdiction, up to and including the day of the general election.

(3) The communication satisfies at least one of the conduct standards in 11 CFR 109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR 109.21(e), (g), and (h). A candidate's response to an inquiry about that candidate's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards in 11 CFR 109.21(d)(1) through (d)(6). Notwithstanding paragraph (b)(1) of this section, the candidate with whom a party coordinated communication is coordinated does not receive or accept an in-kind contribution, and is not required to report an expenditure that results from conduct described in 11 CFR 109.21(d)(4) or (d)(5), unless the candidate, authorized committee, or an agent of any of the foregoing, engages in conduct described in 11 CFR 109.21(d)(1) through (d)(3).

(b) *Treatment of a party coordinated communication.* A payment by a political party committee for a communication that is coordinated with a candidate, and that is not otherwise exempted under 11 CFR part 100, subpart C or E, must be treated by the political party committee making the payment as either:

(1) An in-kind contribution for the purpose of influencing a Federal election under 11 CFR 100.52(d) to the candidate with whom it was coordinated, which must be reported under 11 CFR part 104; or

(2) A coordinated party expenditure pursuant to coordinated party expenditure authority under 11 CFR 109.32 in connection with the general election campaign of the candidate with whom it was coordinated, which must be reported under 11 CFR part 104.

[68 FR 451, Jan. 3, 2003, as amended at 71 FR 33210, June 8, 2006]

PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

Sec.

AUTHORITY: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d, 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h and 36 U.S.C. 510.

§ 110.1 Contributions by persons other than multicandidate political committees (2 U.S.C. 441a(a)(1)).

(a) *Scope.* This section applies to all contributions made by any person as defined in 11 CFR 110.10, except multicandidate political committees as defined in 11 CFR 100.5(e)(3) or entities and individuals prohibited from making contributions under 11 CFR 110.20 and 11 CFR parts 114 and 115.

(b) *Contributions to candidates; designations; and redesignations.* (1) No person shall make contributions to any

(iii) The presumptions in paragraphs (e)(2) (i) and (ii) of this section may be rebutted by a showing to the Commission that the appearance or event was, or was not, party-related, as the case may be.

(f)(1) Expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States.

(2) Expenditures from personal funds made by a candidate for Vice President shall be considered to be expenditures by the candidate for President, if the candidate is receiving General Election Public Financing, see §9003.2(c).

(g) An expenditure is made on behalf of a candidate, including a Vice-Presidential candidate, if it is made by—

(1) An authorized committee or any other agent of the candidate for purposes of making any expenditure;

(2) Any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate to make the expenditure; or

(3) A committee not authorized in writing, so long as it is requested by the candidate, an authorized committee of the candidate, or an agent of the candidate to make the expenditure.

[41 FR 35948, Aug. 25, 1976, as amended at 45 FR 21210, Apr. 1, 1980; 54 FR 34114, Aug. 17, 1989; 54 FR 48580, Nov. 24, 1989; 56 FR 35911, July 29, 1991; 68 FR 457, Jan. 3, 2003; 68 FR 6346, Feb. 7, 2003]

§ 110.9 Violation of limitations.

No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of 11 CFR part 110. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this part 110.

[67 FR 69949, Nov. 19, 2002]

§ 110.10 Expenditures by candidates.

Except as provided in 11 CFR parts 9001, *et seq.* and 9031, *et seq.*, candidates for Federal office may make unlimited expenditures from personal funds as defined in 11 CFR 100.33.

[68 FR 3996, Jan. 27, 2003]

§ 110.11 Communications; advertising; disclaimers (2 U.S.C 441d).

(a) *Scope.* The following communications must include disclaimers, as specified in this section:

(1) All public communications, as defined in 11 CFR 100.26, made by a political committee; electronic mail of more than 500 substantially similar communications when sent by a political committee; and all Internet websites of political committees available to the general public.

(2) All public communications, as defined in 11 CFR 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate.

(3) All public communications, as defined in 11 CFR 100.26, by any person that solicit any contribution.

(4) All electioneering communications by any person.

(b) *General content requirements.* A disclaimer required by paragraph (a) of this section must contain the following information:

(1) If the communication, including any solicitation, is paid for and authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state that the communication has been paid for by the authorized political committee;

(2) If the communication, including any solicitation, is authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee, or agent; or

(3) If the communication, including any solicitation, is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent

street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.

(c) *Disclaimer specifications*—(1) *Specifications for all disclaimers.* A disclaimer required by paragraph (a) of this section must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.

(2) *Specific requirements for printed communications.* In addition to the general requirement of paragraphs (b) and (c)(1) of this section, a disclaimer required by paragraph (a) of this section that appears on any printed public communication must comply with all of the following:

(i) The disclaimer must be of sufficient type size to be clearly readable by the recipient of the communication. A disclaimer in twelve (12)-point type size satisfies the size requirement of this paragraph (c)(2)(i) when it is used for signs, posters, flyers, newspapers, magazines, or other printed material that measure no more than twenty-four (24) inches by thirty-six (36) inches.

(ii) The disclaimer must be contained in a printed box set apart from the other contents of the communication.

(iii) The disclaimer must be printed with a reasonable degree of color contrast between the background and the printed statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(2)(iii) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication.

(iv) The disclaimer need not appear on the front or cover page of the communication as long as it appears within the communication, except on communications, such as billboards, that contain only a front face.

(v) A communication that would require a disclaimer if distributed separately, that is included in a package of materials, must contain the required disclaimer.

(3) *Specific requirements for radio and television communications authorized by candidates.* In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication that is authorized or paid for by a candidate or the authorized committee of a candidate (*see* paragraph (b)(1) or (b)(2) of this section) that is transmitted through radio or television, or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio must include an audio statement by the candidate that identifies the candidate and states that he or she has approved the communication; or

(ii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must include a statement that identifies the candidate and states that he or she has approved the communication. The candidate shall convey the statement either:

(A) Through an unobscured, full-screen view of himself or herself making the statement, or

(B) Through a voice-over by himself or herself, accompanied by a clearly identifiable photographic or similar image of the candidate. A photographic or similar image of the candidate shall be considered clearly identified if it is at least eighty (80) percent of the vertical screen height.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the television communication. To be clearly readable, this statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the text of the statement. A statement satisfies the color contrast requirement of this paragraph (c)(3)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the statement is no less than the color contrast between the background and the largest type size used in the communication.

(iv) The following are examples of acceptable statements that satisfy the spoken statement requirements of paragraph (c)(3) of this section with respect to a radio, television, or other broadcast, cable, or satellite communication, but they are not the only allowable statements:

(A) ''I am [insert name of candidate], a candidate for [insert Federal office sought], and I approved this advertisement.''

(B) ''My name is [insert name of candidate]. I am running for [insert Federal office sought], and I approved this message.''

(4) *Specific requirements for radio and television communications paid for by other persons and not authorized by a candidate.* In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication not authorized by a candidate or a candidate's authorized committee that is transmitted through radio or television or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio or television or through any broadcast, cable, or satellite transmission, must include the following audio statement, ''XXX is responsible for the content of this advertising,'' spoken clearly, with the blank to be filled in with the name of the political committee or other person paying for the communication, and the name of the connected organization, if any, of the payor unless the name of the connected organization is already provided in the ''XXX is responsible'' statement; and

(ii) A communication transmitted through television, or through any broadcast, cable, or satellite transmission, must include the audio statement required by paragraph (c)(4)(i) of this section. That statement must be conveyed by an unobscured full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the communication. To be clearly readable, the statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the disclaimer statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(4)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest type size used in the communication.

(d) *Coordinated party expenditures and independent expenditures by political party committees.* (1)(i) For a communication paid for by a political party committee pursuant to 2 U.S.C. 441a(d), the disclaimer required by paragraph (a) of this section must identify the political party committee that makes the expenditure as the person who paid for the communication, regardless of whether the political party committee was acting in its own capacity or as the designated agent of another political party committee.

(ii) A communication made by a political party committee pursuant to 2 U.S.C. 441a(d) and distributed prior to the date the party's candidate is nominated shall satisfy the requirements of this section if it clearly states who paid for the communication.

(2) For purposes of this section, a communication paid for by a political

party committee, other than a communication covered by paragraph (d)(1)(ii) of this section, that is being treated as a coordinated expenditure under 2 U.S.C. 441a(d) and that was made with the approval of a candidate, a candidate's authorized committee, or the agent of either shall identify the political party that paid for the communication and shall state that the communication is authorized by the candidate or candidate's authorized committee.

(3) For a communication paid for by a political party committee that constitutes an independent expenditure under 11 CFR 100.16, the disclaimer required by this section must identify the political party committee that paid for the communication, and must state that the communication is not authorized by any candidate or candidate's authorized committee.

(e) *Exempt activities.* A public communication authorized by a candidate, authorized committee, or political party committee, that qualifies as an exempt activity under 11 CFR 100.140, 100.147, 100.148, or 100.149, must comply with the disclaimer requirements of paragraphs (a), (b), (c)(1), and (c)(2) of this section, unless excepted under paragraph (f)(1) of this section, but the disclaimer does not need to state whether the communication is authorized by a candidate, or any authorized committee or agent of any candidate.

(f) *Exceptions.* (1) The requirements of paragraphs (a) through (e) of this section do not apply to the following:

(i) Bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed;

(ii) Skywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable; or

(iii) Checks, receipts, and similar items of minimal value that are used for purely administrative purposes and do not contain a political message.

(2) For purposes of this section, whenever a separate segregated fund or its connected organization solicits contributions to the fund from those persons it may solicit under the applicable provisions of 11 CFR part 114, or makes a communication to those persons, such communication shall not be considered a type of public communication and need not contain the disclaimer required by paragraphs (a) through (c) of this section.

(g) *Comparable rate for campaign purposes.* (1) No person who sells space in a newspaper or magazine to a candidate, an authorized committee of a candidate, or an agent of the candidate, for use in connection with the candidate's campaign for nomination or for election, shall charge an amount for the space which exceeds the comparable rate for the space for non-campaign purposes.

(2) For purposed of this section, comparable rate means the rate charged to a national or general rate advertiser, and shall include discount privileges usually and normally available to a national or general rate advertiser.

[67 FR 76975, Dec. 13, 2002, as amended at 71 FR 18613, Apr. 12, 2006]

§ 110.12 Candidate appearances on public educational institution premises.

(a) *Rental of facilities at usual and normal charge.* Any unincorporated public educational institution exempt from federal taxation under 26 U.S.C. 115, such as a school, college or university, may make its facilities available to any candidate or political committee in the ordinary course of business and at the usual and normal charge. In this event, the requirements of paragraph (b) of this section are not applicable.

(b) *Use of facilities at no charge or at less than the usual and normal charge.* An unincorporated public educational institution exempt from federal taxation under 26 U.S.C. 115, such as a school, college or university, may sponsor appearances by candidates, candidates' representatives or representatives of political parties at which such individuals address or meet the institution's academic community or the general public (whichever is invited) on the educational institution's premises at no charge or at less than the usual and normal charge, if:

(1) The educational institution makes reasonable efforts to ensure that the appearances constitute speeches, question and answer sessions,

FEC Coordination

Proposed Rules

Federal Register
Vol. 75, No. 27
Wednesday, February 10, 2010

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

FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 109

[Notice 2010–01]

Coordinated Communications

AGENCY: Federal Election Commission.

ACTION: Supplemental Notice of Proposed Rulemaking.

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

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

ADDRESSES: All comments must be in writing, addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and submitted in either electronic, facsimile or paper form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to *CoordinationShays3@fec.gov.* If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219–3923, with paper follow-up. Paper comments and paper follow-up of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its website after the comment period ends. The hearing will be held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC.

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

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

I. Extension of Comment Period

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

[1] The Commission is reevaluating a number of other regulations in light of the *Citizens United* decision and intends to begin a separate rulemaking to address these other regulations. Commenters will have an opportunity to address these other issues at that time.

a. General Considerations

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

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

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

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

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

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

b. Content Standards

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

Additionally, the Commission seeks further comment on the examples given in the NPRM—both those in the proposed PASO definitions and those to which the proposed PASO and Modified *WRTL* content standards may or may not apply—in light of *Citizens United. See Citizens United,* slip op. at 3, 20–21, and 52–54; *see also NPRM,* 74 FR at 53903–04 and 53911–12. The Commission also seeks comment on the application of the proposed content standard alternatives to the communications at issue in *Citizens United. See Citizens United,* slip op. at 3, 52–54. What impact, if any, does the Court's conclusion that *Hillary: The Movie* is "the functional equivalent of express advocacy" have on the Commission's coordinated communications rules and in particular to the application of the "express advocacy" content standard outside the 90/120-day windows? Does the analysis change when the "functional equivalent of express advocacy" is not being applied to a communication in order to strike down a speech prohibition, as in *Citizens United,* but rather to restrict certain speech, as in the proposed coordination rules? *See, e.g., Citizens United,* slip op. at 10 ("First Amendment standards, however, 'must give the benefit of any doubt to protecting rather than stifling speech' ") (quoting *WRTL,* 551 U.S. at 469). Is there anything in the opinion to suggest that the Court intended its conclusion, that *Hillary: The Movie* is "the functional equivalent of express advocacy" to apply only in limited contexts?

Are the proposed PASO definitions sufficiently clear and unambiguous so as not to require "intricate case-by-case determinations" or to require prospective speakers to seek guidance from the Commission as to whether their proposed speech would be coordinated? *Id.* at 12. Do *Citizens United* and *WRTL* provide a constitutional limit on the reach of the proposed PASO standard? Are any content standards broader than express advocacy or its functional equivalent permissible after *Citizens United,* or are these the only standards that the Court has concluded are sufficiently clear? In light of the Supreme Court's statements that the PASO components "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," *McConnell* v. *FEC,* 540 U.S. 93, 170 n.64 (2003), and that any rule must "eschew the open-ended rough-and-tumble of factors," *Citizens United,* slip op. at 19 (quoting *WRTL,* 551 U.S. at 469), should the Commission adopt a PASO content standard without a definition? In the absence of a definition, would the rule provide specific enough guidance to prospective speakers? Would such a rule be enforceable by the Commission?

More generally, how should the Commission conduct investigations in enforcement actions arising from allegations of coordination? Does the Court's holding in *Citizens United* that corporations have a First Amendment right to make independent expenditures raise concerns about investigating potentially coordinated communications that do not exist in other contexts? Would investigations to determine whether a communication is independent or coordinated (and thus a contribution), chill protected speech? To avoid such a risk, should the Commission require a heightened standard (*e.g.,* requiring more particularity or specificity) in any complaint alleging coordination before opening an enforcement proceeding? Should such a heightened complaint standard be adopted with, or regardless of, any revised content standard? Would such a heightened complaint standard impair the Commission's ability to investigate allegations of contributions via coordination? Does anything in the Act (particularly 2 U.S.C. 437g(a)) authorize or preclude the Commission from adopting a heightened complaint standard for coordination allegations? If the Commission may not require a heightened complaint standard for coordination allegations, would that then preclude the application of a broader content standard? Why?

c. Safe Harbors

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

d. Consequences of Court's Media Exemption Analysis

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

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

II. Notice of Hearing

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

Dated: February 5, 2010.
On behalf of the Commission,

Matthew S. Petersen,

Chairman, Federal Election Commission.

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

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

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

Proposed Amendment of Class E Airspace; Emmetsburg, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

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

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

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2009–1153/Airspace Docket No. 09–ACE–13, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd, Fort Worth, TX 76137; *telephone:* (817) 321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2009–1153/Airspace Docket No. 09–ACE–13." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (*see* "**ADDRESSES**" section for address and phone number) between 9 a.m and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd, Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by adding additional Class E airspace extending upward from 700 feet above the surface for SIAPs operations at Emmetsburg Municipal Airport, Emmetsburg, IA. Controlled airspace is needed for the safety and management of IFR operations at the airport.

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

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the

Proposed Rules

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

FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 109

[Notice 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 2002[1] (''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).

[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 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.

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, 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

[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)).

[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 vendors[9] 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.

[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).

[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.

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 standard[10] 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 rules[20]—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! 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.

[FR Doc. E9–25240 Filed 10–20–09; 8:45 am]

BILLING CODE 6715–01–P

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.

Legislation Discussion

SUMMARY OF CITIZENS UNITED LEGISLATION

Introduced by Senator Charles E. Schumer & Congressman Chris Van Hollen

1. PREVENT FOREIGN INFLUENCE IN U.S. ELECTIONS

- The legislation prevents foreign governments, foreign companies and foreign nationals from influencing U.S. elections by banning corporations from spending money on U.S. elections if:

    - They have a foreign ownership of 20% or more;
    - A majority of their board of directors is foreign principals; or
    - Their U.S. operations, or their decision-making with respect to political activities, falls under the direction or control of a foreign entity, including a foreign government.

2. BAN PAY-TO-PLAY

- **Prevent Government Contractors from Spending Money on Elections.** Government contractors would be barred from making political expenditures.

- **Prevent Corporate Beneficiaries of TARP from Spending Money on Elections.** Corporations that received bailout funding from the federal government should not be permitted to use taxpayer money for political expenditures.

3. ENHANCE DISCLAIMERS TO IDENTIFY SPONSORS OF ADS

- **Require Corporate CEO's To Identify that they are Behind Political Ads.** If a corporation spends on a political ad, the CEO will be required to appear on camera to say that he or she "approves this message," just like candidates have to do now.

- **For Shadow Groups, Require Top Corporate Donors To Appear in Political Ads They Funded.** In order to prevent individuals and corporations from funneling money through shell groups in order to mask their activities, the legislation will include the following requirements:

    - The top funder of the advertisement must also record a stand-by-your-ad disclaimer.

    - The top five contributors to an organization for political purposes that purchases advertising will be listed on the screen at the end of advertisement.

4. ENHANCE REQUIREMENTS FOR DISCLOSURE OF POLITICAL EXPENDITURES

- The legislation ensures that the public will have full and timely disclosure of campaign-related expenditures made by corporations and labor organizations. The legislation imposes disclosure requirements that will mitigate the ability of corporate spenders to mask their electioneering activities through the use of intermediaries.

i. SETTING UP 'PAPER TRAILS' WITH THE FEC

- The legislation would require corporations, labor unions, and organizations organized under 501(c) 4, 5, or 6 laws—as well as 527 organizations—to, for the first time, establish separate "political broadcast spending" accounts to receive and disperse political expenditures.

- All funds received into these "political activities" accounts must be publicly reported to the FEC. The following information must also be disclosed:

    - Name of the individual who controls the account
    - Name of donors and transferors
    - Date of each donation and transfer in excess of $10,000,
    - Election or name of the candidate if the donation or transfer was so designated.

- All funds disbursed from the "political activities" accounts must be publicly reported to the FEC with the following information:

    - Name of the person making the disbursement
    - Amount of each disbursement of more than $ 200 during the required period, the election to which the disbursement is made
    - Independent Expenditure-related candidate and whether the expenditure is directed in support of or opposition to the candidate
    - Electioneering Communication-related candidate who is the subject of the communication and whether the candidate is being supported or opposed through the expenditure.
    - Certification by the CEO or the head of the entity responsible, that the independent expenditure or electioneering communication is not made in coordination with a candidate, candidate committee or party committee.

- All funds transferred from the "political activities" account for the purpose of a political expenditure, or that is not restricted for use for a political expenditure, must be publicly reported to the FEC with the following information:

    - Name of the transferor
    - Name of the recipient
    - Date and amount of the funds transferred
    - Whether the transferred funds are intended for use in a particular election or directed to a particular candidate and, if so, disclose the election and/or candidate.

ii. PROVIDING NOTICE TO SHAREHOLDERS DIRECTLY AND THROUGH SEC FILINGS

- All political expenditures made by a corporation should be disclosed within 24 hours on the corporation's website with a clear link on the homepage; disclosed to shareholders directly on a quarterly basis; and comprehensively disclosed within the corporation's annual report.

iii. REQUIRING LOBBYISTS TO DISCLOSE THEIR ACTIVITIES

- All registrants under the Lobbying Disclosure Act must disclose the following information:
    - Every campaign expenditure in excess of $1000
    - Date it was received
    - Recipient
    - Name of each "covered candidate" or political party expressly identified in any electioneering communication
    - Running total of the political expenditures.

5. PROVIDE LOWEST UNIT RATE FOR CANDIDATES AND PARTIES

- If a corporation buys airtime to run ads on broadcast, cable, or satellite television that support or oppose a candidate, then that candidate and political party or political party committee is allowed to receive the lowest unit rate for that media market.

- The broadcaster must also ensure that the candidate or political entity has reasonable access to airtime. This ensures that candidates and parties are not forced to run their

advertisements at, say, 2:00 am when no one is watching, or be blocked from purchasing any advertising time at all.

6. PREVENT CORPORATIONS FROM COORDINATING THEIR ACTIVITIES WITH CANDIDATES AND PARTIES

- The legislation ensures that corporations and others are not allowed to coordinate campaign-related expenditures with candidates and parties in violation of rules that require these expenditures to be independent.

    - Current FEC rules bar corporations and unions from coordinate with candidates and parties about most ads distributed within 90 days of a House or Senate primary election or within 90 days of the general election. For Presidential contests, current FEC rules allow coordination on ads referencing a presidential candidate 120 days before a state's Presidential primary election and continuing in that state through the general election.

    - This legislation would do the following:
        - For House and Senate races, the legislation would ban coordination between a corporation or union and the candidate on ads referencing a Congressional candidate within 90 days of the *primary* through the *general* election.
        - For all federal elections, at any time before the 90- or 120-day window opens, it would ban coordination of ads between a corporation or union and the candidate when they promote, support, attack or oppose a candidate**.**

The New York Times
Opinionator
Exclusive Online Commentary From The Times
February 1, 2010, 9:30 pm

What Is the First Amendment For?

By STANLEY FISH

Citizens United v. Federal Election commission — the recent case in which the Supreme Court invalidated a statute prohibiting corporations and unions from using general treasury funds either to support or defeat a candidate in the 30 days before an election, and overruled an earlier decision relied on by the minority — has now been commented on by almost everyone, including the president of the United States in his state of the union address.

I would like to step back from the debate about whether the decision enhances our First Amendment freedoms or hands the country over to big-money interests, and read it instead as the latest installment in an ongoing conflict between two ways of thinking about the First Amendment and its purposes.

We can approach the conflict by noting a semantic difference between the majority and concurring opinions on the one hand and the dissenting opinion — a 90-page outpouring of passion and anger by Justice Stevens — on the other. The word most important to Justice Kennedy's argument (he writes for the majority) is "chill," while the word most important to Stevens's argument is "corrupt."

Kennedy, along with Justices Roberts, Alito, Thomas and Scalia (the usual suspects), is worried that the restrictions on campaign expenditures imposed by the statute he strikes down will "chill" speech, that is, prevent some of it from entering the marketplace of ideas that must, he believes, be open to all voices if the First Amendment's stricture against the abridging of speech is to be honored. ("[A] statute which chills speech can and must be invalidated.") Stevens is worried — no, he is certain — that the form of speech Kennedy celebrates will corrupt the free flow of information so crucial to the health of a democratic society. "[T]he distinctive potential of corporations to corrupt the electoral process [has] long been recognized."

When Stevens writes "has long been recognized," he is invoking the force of history and asking us to take note of the reasons why many past court decisions (including one written by then-Chief Justice Rehnquist) have acknowledged the dangers posed by corporations, dangers that

provoked this declaration by Theodore Roosevelt in 1905: “All contributions by corporations to any political committee or for any political purpose should be forbidden by law.”

Behind such strong statements is a twin fear: (1) the fear that big money will not only talk (the metaphor that converts campaign expenditures into speech and therefore into a matter that merits First Amendment scrutiny), but will buy votes and influence, and (2) the fear that corporations and unions, with their huge treasuries, will crowd out smaller voices by purchasing all the air time and print space. The majority, Stevens admits, does “acknowledge the validity of the interest in preventing corruption,” but, he complains, it is not an interest it is interested in, for “it effectively discounts the value of that interest to zero.”

That’s not quite right. Kennedy and the others in the majority make the proper noises about corruption; they just don’t think that it is likely to occur and they spend much time explaining why corporations are citizens like anyone else (a proposition Stevens ridicules) and why, for various economic and public-relation reasons, they pose no threat to the integrity of the electoral process.

But even if they thought otherwise, even if they were persuaded by the dire predictions Stevens and those he cites make, they would come down where they do; not because they welcome corruption or have no interest in forestalling it, or discount the value of being concerned with it, but because they find another interest of more value, indeed of surpassing value. That is the value of being faithful to what they take to be the categorical imperative of the First Amendment, which, with respect to political speech, forbids the suppression of voices, especially voices “the Government deems to be suspect” (Kennedy); for if this voice now, why not other voices later?

Even if there were substance to the charge of “undue influence” exercised by those with deep pockets, it would still be outweighed, says Kennedy, citing an earlier case, “by the loss for democratic process resulting from the restrictions upon free and full discussion.” The question of where that discussion might take the country is of less interest than the overriding interest in assuring that it is full and free, that is, open to all and with no exclusions based on a calculation of either the motives or the likely actions of individual or corporate speakers. In this area, the majority insists, the state cannot act paternally. Voters are adults who must be “free to obtain information from diverse sources”; they are not to be schooled by a government that would protect them from sources it distrusts.

Notice how general Kennedy’s rhetoric has become. The specificity of Stevens’s concerns, rooted in the historical record and in the psychology and sociology of political actors, disappears in the overarching umbrella category of “information.” The syllogism is straightforward. Freedom of information is what the First Amendment protects; corporation and unions are sources of information; therefore their contributions — now imagined as wholly verbal not monetary; the conversion is complete — must be protected, come what may.

That, Kennedy is saying, is the Court's job, to allow the process to go forward unimpeded. It is not the Court's job to fiddle with the process in an effort to make it fairer or more representative, a point Chief Justice Roberts makes in his concurring opinion when he cites approvingly the Court's "repudiation," in Buckley v. Valeo (1976), "of any government interest in 'equalizing the relative ability of individuals and groups to influence the outcomes of elections.'" Equality may be a good thing; it might be nice if no one had a disproportionate share of influence; but it's not our job to engineer it. Let the market sort it out.

The majority's reasoning reaches back to a famous pronouncement by Oliver Wendell Holmes, who acknowledges in Gitlow v. New York (1925) that there are forms of discourse, which, if permitted to flourish, might very well bring disastrous results. Nevertheless, he says, "If in the long run the beliefs expressed . . . are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

Holmes's fatalism — let everyone speak and if the consequences are bad, so be it — stands in contrast to the epistemological optimism of Justice Brandeis who believes that if the marketplace is allowed to be completely open bad speech will be exposed and supplanted by good speech (a reverse Gresham's law): "The remedy to be supplied is more speech, not enforced silence" (Whitney v. California, 1927). Both justices reject state manipulation of the speech market , one because he is willing to take what comes — it is Holmes who said that if his fellow countrymen wanted to go to hell in a hand-basket, it was his job to help them — the other because he believes that what will come if speech is unfettered will be good.

The justices in the Citizens United majority are more in the Brandeis camp. They believe that free trade in ideas with as many trading partners as wish to join in will inevitability produce benign results for a democratic society. And since their confidence in these results is a matter of theoretical faith and not of empirical or historical observation — free speech is for them a religion with long-term rewards awaiting us down the road — they feel no obligation to concern themselves with short-term calculations and predictions.

Stevens also values robust intellectual commerce, but he believes that allowing corporate voices to have their full and unregulated say "can distort the 'free trade in ideas' crucial to candidate elections." In his view free trade doesn't take care of itself, but must be engineered by the kind of restrictions the majority strikes down. The marketplace of ideas can become congealed and frozen; the free flow can be impeded, and when that happens the only way to preserve free speech values is to curtail or restrict some forms of speech, just as you might remove noxious weeds so that your garden can begin to grow again. Prohibitions on speech, Stevens says, can operate "to facilitate First Amendment values," and he openly scorns the majority's insistence that enlightened self-government "can arise only in the absence of regulation."

The idea that you may have to regulate speech in order to preserve its First Amendment value is called consequentialism. For a consequentialist like Stevens, freedom of speech is not a stand-alone value to be cherished for its own sake, but a policy that is adhered to because of the benign consequences it is thought to produce, consequences that are catalogued in the usual answers to the question, what is the First Amendment for?

Answers like the First Amendment facilitates the search for truth, or the First Amendment is essential to the free flow of ideas in a democratic polity, or the First Amendment encourages dissent, or the First Amendment provides the materials necessary for informed choice and individual self-realization. If you think of the First Amendment as a mechanism for achieving goals like these, you have to contemplate the possibility that some forms of speech will be subversive of those goals because, for instance, they impede the search for truth or block the free flow of ideas or crowd out dissent. And if such forms of speech appear along with their attendant dangers, you will be obligated — not in violation of the First Amendment, but in fidelity to it — to move against them, as Stevens advises us to do in his opinion.

The opposite view of the First Amendment — the view that leads you to be wary of chilling any speech even if it harbors a potential for corruption — is the principled or libertarian or deontological view. Rather than asking what is the First Amendment for and worrying about the negative effects a form of speech may have on the achievement of its goals, the principled view asks what does the First Amendment say and answers, simply, it says no state abridgement of speech. Not no abridgment of speech unless we dislike it or fear it or think of it as having low or no value, but no abridgment of speech, period, especially if the speech in question is implicated in the political process.

The cleanest formulation of this position I know is given by the distinguished First Amendment scholar William Van Alstyne: “The First Amendment does not link the protection it provides with any particular objective and may, accordingly, be deemed to operate without regard to anyone’s view of how well the speech it protects may or may not serve such an objective.”

In other words, forget about what speech does or does not do in the world; just take care not to restrict it. This makes things relatively easy. All you have to do is determine that it’s speech and then protect it, as Kennedy does when he observes that “Section 441b’s prohibition on corporate independent expenditures is . . . a ban on speech.” That’s it. Nothing more need be said, although Kennedy says a lot more, largely in order to explain why nothing more need be said and why everything Stevens says — about corruption, distortion, electoral integrity and undue influence — is beside the doctrinal point.

The majority’s purity of principle is somewhat alloyed when it upholds the disclosure requirements of the statute it is considering on the reasoning that the public has a right to be

informed about the identity of those who fund a corporation's ads and videos. "This transparency enables the electorate to make informed decisions."

Justice Thomas disagrees. The interest "in providing voters with additional relevant information" does not, he says, outweigh "'the right to anonymous speech.'" The majority's claim that disclosure requirements do not prevent anyone from speaking is, Thomas declares, false; those who know that their names will be on a list may refrain from contributing for fear of reprisals and thus be engaged in an act of self-censoring. The effect of disclosure requirements, he admonishes, is "to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights."

Only Thomas has the courage of the majority's declared convictions. Often the most principled of the judges (which doesn't mean that I always like his principles), he is willing to follow a principle all the way, and so he rebukes his colleagues in the majority for preferring the value of more information to the value the First Amendment mandates — absolutely free speech unburdened by any restriction whatsoever including the restriction of having to sign your name. Thomas has caught his fellow conservatives in a consequentialist moment.

The consequentialist and principled view of the First Amendment are irreconcilable. Their adherents can only talk past one another and become increasingly angered and frustrated by what they hear from the other side. This ongoing soap opera has been the content of First Amendment jurisprudence ever since it emerged full blown in the second decade of the 20th century. Citizens United is a virtual anthology of the limited repertoire of moves the saga affords. You could build an entire course around it. And that is why even though I agree with much of what Stevens says (I'm a consequentialist myself) and dislike the decision as a citizen, as a teacher of First Amendment law I absolutely love it.

About Stanley Fish:
Stanley Fish is a professor of law at Florida International University, in Miami, and dean emeritus of the College of Liberal Arts and Sciences at the University of Illinois at Chicago. His column appears here on Tuesdays. He has also taught at the University of California at Berkeley, Johns Hopkins and Duke University. He is the author of 11 books, most recently "Save the World On Your Own Time," on higher education. "The Fugitive in Flight," a study of the 1960s TV drama, will be published in 2010.

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George Constantine concentrates his practice exclusively on providing legal counseling to and advocacy for trade and professional associations and other nonprofit organizations. He has extensive experience with many of the major legal issues affecting associations, including contracts, tax, antitrust, governance, and political activity matters.

Mr. Constantine has represented exempt organization clients undergoing Internal Revenue Service examinations; he has assisted associations and other nonprofit organizations going through mergers, consolidations, joint ventures, and dissolutions; and he has provided ongoing counseling on numerous transactional and governance matters that are unique to nonprofit organizations.

Mr. Constantine has been appointed to the 2009-10 Legal Section Council of the American Society of Association Executives. In addition, Mr. Constantine is the former Staff Counsel of the American Society of Association Executives (ASAE), the 25,000-member national society for trade and professional association executives. As ASAE's sole staff attorney, he gained in-depth experience with the many legal issues facing associations. He also represented ASAE's interests before Congress and federal agencies.

AREAS OF PRACTICE

Antitrust

Political Law

Tax-Exempt Organizations

Tax Controversies

Recovery Act Task Force

Tax and Wealth Planning

INDUSTRIES

Nonprofit Organizations and Associations

Credit Counseling and Debt Services

BAR ADMISSIONS

Maryland

District of Columbia

EDUCATION

J.D., University of Maryland School of Law, 1998

- Recipient, Order of the Coif law school honors society
- Recipient, Judge R. Dorsey Watkins Award for excellence in torts

PUBLICATIONS

Mr. Constantine is the author of numerous articles regarding legal issues affecting associations and other nonprofit organizations published by ASAE, the Greater Washington Society of Association Executives, the American Chamber of Commerce Executives, the New York Society of Association Executives, and the Texas Society of Association Executives.

- January 2010, Supreme Court Strikes Down Laws Banning Corporate Expenditures, Political Law Alert
- October 6, 2009, Legal Traps of Internet Activities for Nonprofits
- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- March 3, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- September 22, 2008, The New IRS Form 990: What Does It Mean for Your Organization?
- May 19, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- March 4, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit

B.A., Loyola College In Maryland, 1989

Organization?

- February 15, 2008, Political Activity, Lobbying Law and Gift Rules Guide
- January 10, 2008, The Honest Leadership and Open Lobbying Act: New Lobbying and Ethics Rules
- June 13, 2007, Contracts - 10 Steps to a Better Contract
- November 2006, Pension Protection Act of 2006: Provisions of Interest to Exempt Organizations
- October 1, 2006, New Tax Law Establishes Additional Standards and Requirements for Credit Counseling Agencies
- September 7, 2006, Legal and Tax Issues for Nonprofit Associations
- January 2005, IRS Issues 'Virtual' Trade Show Guidance
- January 4, 2005, Characteristics of a Tax-Exempt Credit Counseling Agency
- October 27, 2004, New IRS Ruling Could Have Taxing Impact on 501(c)(3) Associations with Certification Programs
- August 10, 2004, Association Codes of Ethics: Identifying Legal Issues and Minimizing Risk
- April 16, 2004, Antitrust Concerns with Association Information Exchanges
- March 25, 2004, Untangling the Web - Internet Legal Issues for Associations
- November 4, 2003, Avoiding Association Tax Pitfalls in Cyberspace
- May 6, 2003, Summary of Provisions in S. 476 — The Charity Aid, Recovery, and Empowerment Act of 2003
- December 16, 2002, Good Governance — Ensuring That Your Association's Governing Documents Pass Legal Muster
- September 1, 2002, Association Activities Targeted in Recent Antitrust Enforcement Actions
- May 1, 2002, Corporate Sponsorship: The Final Regulations
- April 1, 2002, Associations and Campaign Finance Reform
- January 1, 2002, Recent Antitrust Decision on Salary Surveys Highlights Risks to Associations
- November 1, 2001, Legal and Tax Considerations for Capital Campaigns
- January - February 2001, New Campaign Finance Disclosure Law Hits the Wrong Target, *Journal of Taxation of Exempt Organizations*

SPEAKING ENGAGEMENTS

Mr. Constantine is a frequent lecturer on association and tax-exemption organization legal topics, including corporate and tax issues.

- February 26, 2010, "Form 990 Fallout; Lessons Learned," at the National Association of Independent Schools 2010 Annual Conference
- February 18, 2010, *Citizens United*: How the Supreme Court's Decision Will Impact Associations and Their Members
- February 18, 2010, "Legal Issues 2010: Keeping Your Association Out of Trouble" for the American Association of Medical Society Executives
- October 13, 2009, "Risk Management for Events and Meetings" course at the George Washington University's School of Business
- October 13, 2009, Presentation on meeting contracts to George Washington University students
- October 6, 2009, Legal Traps of Internet Activities for Nonprofits
- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts: A Roadmap for Nonprofits
- March 3, 2009, Steering Clear of the Most Common Legal Hazards in Hotel,

Convention Center and Meeting Contracts

- February 24, 2009, Legal Issues for Nonprofit Associations
- October 1, 2008, The New IRS Form 990: What Does it Mean for Your Organization?
- September 22, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- May 19, 2008, New IRS Form 990 Audioconference
- January 10, 2008, The Honest Leadership and Open Lobbying Act: New Lobbying and Ethics Rules
- November 5, 2007, American Public Health Association Annual Meeting
- September 28, 2007, Annual Association Law Symposium
- June 13, 2007, Contracts - 10 Steps to a Better Contract
- September 7, 2006, Legal and Tax Issues for Nonprofit Associations
- February 10, 2004, American Society of Association Executives Winter Conference
- November 4, 2003, Avoiding Association Tax Pitfalls in Cyberspace
- October 3, 2003, American Society of Association Executives 2003 DC Legal Symposium
- August 25, 2003, American Society of Association Executives' Annual Meeting
- April 17, 2003, Board Fiduciary Duties
- March 13, 2003, Protecting Your Chamber's Intellectual Property
- March 7, 2003, The Ins and Outs of Nonprofit Liability
- February 7, 2003, Legal and Tax Aspects of Raising Non-Dues Revenue
- December 10, 2002, ASAE 2002 Winter Conference

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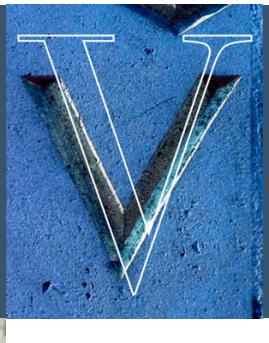

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Ronald Jacobs advises clients on all aspects of state and federal political law, including campaign finance, lobbying disclosure, gift and ethics rules, pay-to-play laws, and tax implications of political activities. He also assists clients with crises response to government investigations and enforcement actions, Congressional investigations, class-action law suits, and other high-profile problems that involve potentially damaging legal and public-relations matters.

Mr. Jacobs understands the often-contradictory rules imposed by the different laws that apply to political activities. He offers practical advice that considers not only the legal requirements, but also the reputational risk, of political activity to a broad range of clients, including large and small companies, trade associations, ideological groups, individuals, and political vendors. He has developed political compliance programs for Fortune 500 companies and other clients that lobby and make political contributions nationwide.

In addition to counseling clients on political law matters, Mr. Jacobs has extensive experience in the administrative rulemaking process and in litigating challenges to agency decisions in federal court. He has represented clients in administrative matters before the Federal Election Commission, the Merit Systems Protection Board, the Federal Trade Commission, the United States Congress, and in federal court.

Mr. Jacobs has also counseled and defended clients in a host of other regulatory matters, including disputes involving the Foreign Corrupt Practices Act, the Foreign Agents Registration Act, and privacy and data security issues.

AREAS OF PRACTICE

Legislative and Government Affairs

Political Law

Tax-Exempt Organizations

Recovery Act Task Force

Foreign Corrupt Practices Act and Anti-Corruption

Congressional Investigations

Appellate Litigation

INDUSTRIES

Nonprofit Organizations and Associations

Consumer Products and Services

Life Sciences

GOVERNMENT EXPERIENCE

Field Representative, United States House of Representatives, Office of Representative Steve Chabot (R-OH)

BAR ADMISSIONS

SIGNIFICANT MATTERS

Some of Mr. Jacobs's significant matters have included:

- Successfully defending a large, nationally-known trade association during a Congressional investigation into allegations of fraudulent grassroots lobbying activity.
- Representing a campaign finance reporting company through an FBI investigation of a former business partner accused of campaign fraud, ultimately convincing the government to return assets that had been wrongly seized from the company.
- Assisting a large social welfare organization with multiple Congressional investigations and several class action lawsuits.
- Successfully petitioning the FEC to reverse a long-standing rule to allow trade

District of Columbia

Virginia

COURT ADMISSIONS

U.S. Supreme Court

U.S. Court of Appeals for the D.C. Circuit

U.S. Court of Appeals for the Federal Circuit

U.S. District Court for the District of Columbia

U.S. Court of Appeals for the Seventh Circuit

U.S. District Court for the Eastern District of Virginia

U.S. Court of International Trade

EDUCATION

J.D., *high honors*, George Washington University Law School, 2001

Order of the Coif

Articles Editor, *The George Washington Law Review*

Imogene Williford Constitutional Law Award

B.A., *cum laude*, George Washington University, 1997

Omicron Delta Kappa

MEMBERSHIPS

American Bar Association

Federalist Society, Free Speech and Election Law practice group

associations to use payroll deduction for their PAC activities.

- Assisting a company in fending off government investigations and rebuilding its reputation following problems with a school program to attend the 2009 presidential inauguration.
- In a pro bono matter, convincing the D.C. Court of Appeals to establish new procedural protections for child custody cases similar to those used in many other states.
- Successfully litigating a Hatch Act case before the Merit Systems Protection Board involving a school district's ability to re-hire a teacher previously dismissed for campaigning for public office.
- Reversing a decision by Immigration and Customs Enforcement to revoke a language school's accreditation.

ACTIVITIES

Mr. Jacobs is a frequent speaker and author on campaign finance and lobbying regulation issues. He serves on the board of the Human Rights Foundation, a nonprofit organization dedicated to preserving democracy and protecting human rights in the Americas.

PUBLICATIONS

Mr. Jacobs has authored or co-authored a number or articles on campaign finance issues, the Telephone Consumer Protection Act, the Telemarketing Sales Rule (both of which govern the national do-not-call list), using the fax for marketing purposes, unsolicited email.

- February 3, 2010, Supreme Court Decision Opens New Doors for Associations
- January 2010, Supreme Court Strikes Down Laws Banning Corporate Expenditures, Political Law Alert
- July 31, 2009, Lobbying for Nonprofit Organizations: Tracking Political Activities Under the Tax Code and the Lobbying Disclosure Act, Political Law Alert
- July 31, 2009, Lobbying for 501(c)(3) Organizations: Tracking Political Activities Under the Tax Code and the Lobbying Disclosure Act, Political Law Alert
- June 17, 2009, Lobbying: What Does It Mean for 501(c)(3) Organizations?
- June 17, 2009, Lobbying: What Does It Mean for Nonprofits?
- January 2009, Legislative and Executive Branch Lobbying Changes and Increased Contribution Limits, Political Law Alert
- December 2008, FEC Enacts New Fundraising Regulations, Political Law Alert
- December 4, 2008, The New Form 990: Defusing Governance, Political Activities, Compensation, and Other Issues
- June 26, 2008, The Mechanics of Lobbying Disclosure Completing LD-1, 2, & 203
- June 2008, Playing Politics: A Menu of Options for Associations to Consider
- June 2008, Watch That PAC! Six Simple Steps to Securing Your Political Committee
- February 15, 2008, Political Activity, Lobbying Law and Gift Rules Guide
- January 10, 2008, The Honest Leadership and Open Lobbying Act: New Lobbying and Ethics Rules
- August 2007, Capitol View: Changes to Ethics and Lobbying Laws Will Impact Business in Washington, Capitol View
- August 2007, Changes to Ethics and Lobbying Laws Will Impact Business in Washington

- January 2007, To much fanfare, the House has adopted a series of changes to the rules governing gifts and travel
- October 25, 2006, Businesses Must Avoid Facilitating Political Campaign Contributions, *Sarbanes-Oxley Compliance Journal*
- September 22, 2006, Petition for Certiorari with the United States Supreme Court – FreeEats.com, Inc. v. State of North Dakota
- February 28, 2006, Federal Court Preempts California Fax Law For Interstate Faxes: The Implications for Associations Nationwide
- October 24, 2005, California Tries to Play by Its Own Fax Rules: The Impact on Associations
- July 14, 2005, FEC Permits Trade Associations to Use Payroll Deductions for Their PACs
- July 11, 2005, Update on Fax Laws: Congress Restores the "Established Business Relationship" Exception for Commercial Faxes
- February 11, 2005, Recent Court Rulings Undermine Suits Against Alcohol Advertising, *Washington Legal Foundation*
- March - April 2004, Phone, Fax...Fines?
- July 28, 2003, Model Association Fax Consent Form
- July 28, 2003, FCC Issues New Unsolicited Fax Rules: Prior Written Consent Now Required for Most Faxes Sent to Members and Others
- May 1, 2003, Obtaining and Retaining Your Chapter's Corporate and Tax Status
- April 23, 2003, Online Privacy and Security for the Mortgage Industry, *Mortgage Bankers Association Legal Issues/Regulatory Compliance Conference*
- January 8, 2003, The Telemarketing Sales Rule and Associations
- April 1, 2002, Associations and Campaign Finance Reform
- March 1, 2002, Campaign Finance Reform's Impact on Associations
- February 1, 2002, FTC Proposes New Regulation of Charitable and Association Telephone Solicitation
- February 1, 2002, Changing the Way the Message Gets Out: House Passes Campaign Finance Reform and Senate Looks Likely
- 2001, Defining the Line Between State and Federal Governance, *Foreword, The George Washington Law Review*

SPEAKING ENGAGEMENTS

Mr. Jacobs has participated in a number of panel discussions and seminars on the impact of various communication and privacy regulations on trade and professional associations and other businesses. He has addressed GWSAE, ASAE, The Direct Marketing Association, and the Mortgage Bankers Association.

- February 18, 2010, *Citizens United*: How the Supreme Court's Decision Will Impact Associations and Their Members
- February 18, 2010, "Legal Issues 2010: Keeping Your Association Out of Trouble" for the American Association of Medical Society Executives
- February 1, 2010, Online Advocacy: Best Practices, Cost-Effective Tools and Guidance to Meet the Challenge
- January 23, 2010, "Legal Issues for Executive Directors" to the National Sheriffs' Association
- June 23, 2009, TechAmerica Procurement Policy Webinar Series
- June 8, 2009, "Legal Issues on Grassroots Lobbying" to the American League of

Lobbyists

- May 11, 2009, LDA, HLOGA and FARA: Filings, Regulatory Changes and What the Laws Require
- March 16, 2009, National Council of Higher Education Loan Programs
- February 23, 2009, Online Advocacy: Best Practices, Cost-Effective Tools and Guidance to Meet the Challenges
- December 4, 2008, Implementing the New IRS Form 990 Audioconference
- June 26, 2008, The Mechanics of Lobbying Disclosure Completing LD-1, 2, & 203
- June 26, 2008, Filing the LD-203: Preparing Associations for July Lobbying Filings
- February 11, 2008, Lobbying Law for Associations
- January 10, 2008, The Honest Leadership and Open Lobbying Act: New Lobbying and Ethics Rules
- December 7, 2007, Committee for Education Funding
- May 19, 2004, American Staffing Association Capitol Hill Day
- March 10, 2004, Education Finance Council Annual Meeting
- February 26, 2004, Online/Teleconference for American Chamber of Commerce Executives
- December 16, 2003, Greater Washington Society of Association Executives' "The New Federal Spam Law: What Does It Mean for Your Association?"
- August 14, 2003, Do Not Fax After August 25: Complying with the FCC's New Fax Ban
- July 23, 2003, Do Not Call, Fax or Email: New Marketing Challenges for Associations
- May 3, 2003, Alexander Graham Bell Association for the Deaf and Hard of Hearing
- May 1, 2003, Obtaining and Retaining Your Chapter's Corporate and Tax Status
- April 23, 2003, Online Privacy and Security for the Mortgage Industry
- April 23, 2003, Mortgage Bankers Association Legal Issues/Regulatory Compliance Conference
- March 25, 2003, Greater Washington Society of Association Executives Campaign Finance Forum

VENABLE® LLP

our people

Brock R. Landry

Partner

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Tysons Corner, VA Office

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brlandry@Venable.com

Brock Landry is Chairman of the Firm's Government Division that includes more than 150 lawyers and lobbyists in the legislative, regulatory, environmental, financial services, government contracts and local government practice areas. His own practice focuses on "trade association law," which, for Mr. Landry, has a far reach, including corporate governance, non-profit taxation, antitrust, regulatory issues (environmental, health, and safety), international trade, standards development, litigation, legislative, mergers and acquisitions and general corporate matters.

Mr. Landry brings to his work a full understanding of how industry coalitions and trade associations work to solve common problems and an approach to disputes which focuses first and foremost on effective negotiation and favorable resolution. His legal experience over the years includes work on trade association governance; contract negotiation; products liability, construction and probate litigation; appeals; workers' compensation and fire insurance rate-making; customs classification and procedures; anti-dumping; lobbying; administrative law; product safety; and antitrust and distribution issues. Mr. Landry's diverse experience in these matters brings broad perspective to his representations.

AREAS OF PRACTICE

Antitrust
Tax-Exempt Organizations
Environmental Law
Consumer Finance
Tax and Wealth Planning
Political Law

INDUSTRIES

Nonprofit Organizations and Associations
Life Sciences
Financial Services

BAR ADMISSIONS

District of Columbia
Illinois (inactive)

EDUCATION

J.D., University of Michigan Law School, 1974

Fettes College, Edinburgh, Scotland

B.A., *cum laude*, Yale University, 1970

REPRESENTATIVE CLIENTS

Mr. Landry's clients include: American Lumber Standard Committee, Incorporated; Composite Panel Association; Hardwood Plywood & Veneer Association; Metal Building Manufacturers Association; Roof Coatings Manufacturers Association; Managed Funds Association; Academy of Managed Care Pharmacy; American Forest & Paper Association; Bicycle Products Suppliers Association; American Iron & Steel Institute; Adhesive & Sealants Council; Recreation Vehicle Dealers Association of North America; United Way of the National Capitol Area and National Electrical Manufacturers Association; among many others.

SIGNIFICANT MATTERS

Mr. Landry has worked with a variety of industry groups in avoiding onerous and unreasonable regulation. He was instrumental in devising and carrying out a strategy for the banking industry to alter capital proposals of the Federal Housing Finance Board that could have crippled the Federal Home Loan Bank system. For more than thirty-five years he has represented the wood products, furniture and cabinet industries in the regulation of formaldehyde emissions from their products in proceedings at OSHA, EPA, CPSC, HUD, OMB and various state agencies. Most recently, he served as counsel to the California Wood Industries Coalition in achieving reasonable formaldehyde regulations from the California Air Resources Board.

He has successfully defended a range of industry associations in product-related conspiracy litigation. In Sizemore v. Georgia-Pacific, his client won summary judgment

MEMBERSHIPS

District of Columbia Bar Association

American Bar Association

in one of the most extensive and favorable opinions describing the bases of associational liability and appropriate defenses.

In the area of corporate governance, he was retained by the United Way of the National Capitol Area to assist in the rejuvenation of that charity after much publicized leadership improprieties.

He has recently handled significant trade association mergers including American Bankers Association / America's Community Bankers and American Electronics Association / Information Technology Association of America.

HONORS

English Speaking Union International Fellow, 1965-1966

AV® Peer-Review Rated by Martindale-Hubbell

ACTIVITIES

Active in community, civic, and charitable efforts, Mr. Landry devotes time to the Prevent Cancer Foundation, serving as a sustaining director and a member of the Finance Committee.

PUBLICATIONS

- January 26, 2010, The Building Blocks for a Successful Nonprofit Merger
- September 29, 2009, The Scope of State Power: Supreme Court Rules that National Banks are Subject to Enforcement of State Laws, *Community Banker*
- March 4, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- November 2006, Pension Protection Act of 2006: Provisions of Interest to Exempt Organizations
- July 1, 2005, Nonprofits Should Be Prepared for Increased Legal Scrutiny
- November 9, 2004, Summit on Nonprofit Governance: The Other Governance

SPEAKING ENGAGEMENTS

Mr. Landry is a frequent speaker before industry groups and trade associations.

- May 28, 2009, "Making the Major Decisions: From Mergers to Outsourcing" at the 2009 Beating the Recession: The Non-Profit Executive Tool Kit Conference
- February 11, 2008, Lobbying Law for Associations
- 2007, “Taking Your Case to the Public – The Dark Side of The Force” at the International Association of Association Management Companies
- 2007, “The Creative Use of Litigation by Associations” at the American Society of Association Executives Legal Symposium
- October 16, 2006, Composite Panel Association Annual Meeting
- October 4, 2006, Hardwood Plywood & Veneer Association's Annual Meeting
- November 9, 2004, Summit on Nonprofit Governance: The Other Governance

VENABLE® LLP

our experience

VENABLE SNAPSHOT

Nearly 600 lawyers nationally

Top 100 nationally
American Lawyer, 2009

Top 10 in Washington, DC
Washington Business Journal, 2009

Counsel to 40 of the Fortune 100

POLITICAL LAW QUICK FACTS

Attorneys with extensive political and practical experience including attorneys who have served as

- agency ethics officials
- campaign staff
- lobbyists
- nonprofit management
- treasurers of Political Action Committees (PACs)

CLIENT FOCUS

Businesses
Trade associations
Political action committees
Advocacy organizations
527 committees
Individuals
Charities
Nonprofits
Lobbying firms

PRACTICE FOCUS

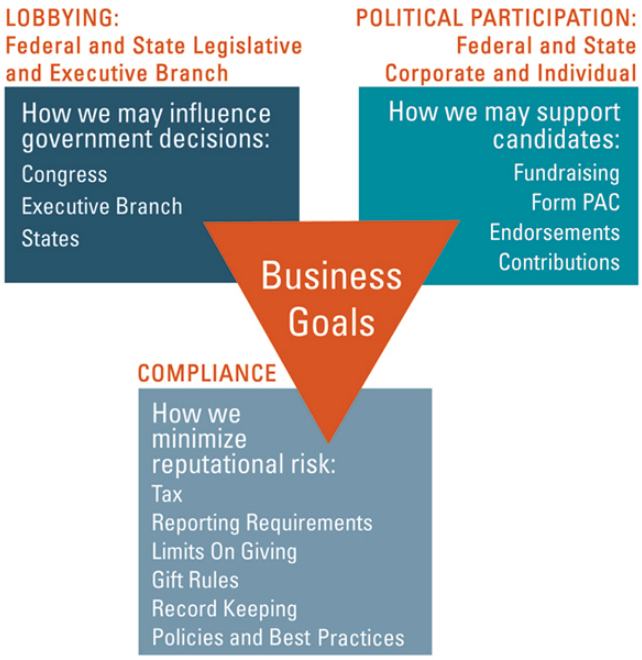
POLITICAL LAW

successfully navigating your interaction with the government

You want to be involved in the political process—or maybe you already are—by lobbying, making political contributions, issuing endorsements, generating grass-roots communications or influencing the nomination process for yourself or someone else. Whether it's planning a charitable event with a member of Congress; starting a Political Action Committee (PAC), advocacy group or coalition; taking a staffer to lunch; or making a campaign contribution; there are many rules that restrict what you can do, how you can do it and how you can pay for it.

We help clients navigate this minefield to accomplish their goals at the federal, state and local levels. Whether you are designing your own lobbying and electoral strategy or having Venable help, we work with you to make sure the options you choose won't land you in trouble—or even in the press.

COMPREHENSIVE VIEW TO POLITICAL STRATEGY



Our team and our approach.

We have been on both sides of the table, serving as PAC treasurers, lobbyists, in-house counsel and more. Our broad-based experience allows us to draw upon real-

Campaign finance advice

PAC formation

PAC administration

Lobbying disclosure

Tax implications of political activity

Ethics and gift rules

Federal, state, and local political laws

Foreign Agents Registration Act

Confirmation of nominees

Coalition formation

Corporate political activity

Event structuring and planning

Contribution limits and prohibitions

Political activities funding

WHAT WE DO

Advice on compliance and risks

Defense in civil and criminal investigations

Representation in audits

Planning events for compliance

50-state compliance

Developing policies and procedures for lobbying and political activity

Political compliance reviews and audits

world experience and an understanding of the way enforcement officials perceive different activities.

Our attorneys provide clients with creative solutions to their needs. Some clients need high-level advice, and others prefer an ongoing and close working relationship throughout their political activities. Regardless, we provide prompt and thorough advice to assist with day-to-day needs.

We have experience with compliance, defense of investigations and enforcement actions and policy making in the political law sphere. Venable attorneys have:

- successfully defended one of the nation's largest companies in an FEC investigation;
- assisted America's Community Bankers in a petition for rulemaking before the FEC in which the FEC reversed a 30-year-old rule prohibiting payroll deduction for trade association PACs;
- counseled Fortune 50 companies and major trade associations on lobbying disclosure and ethics rule compliance; and
- created PACs and provided ongoing compliance advice for companies and trade associations.

State and federal laws.

Our clients interact not only with the federal government, but also with state and local governments. We have developed resources for lobbying, ethics and campaign finance laws at all levels of government, so that we can assist clients across the country. Whether you are active in one or two states or everywhere, we can provide the answers you need quickly.

Campaign finance law.

Electing and retaining officials who understand your positions is essential. How you get involved in that process is complicated. State and federal laws limit who can give, how much they can give and how it has to be reported. It's not just a question of "How do I start a PAC?" You must also ask such questions as "What are my options?," "How can we raise the money?," "How can we spend it?," "What can my employees do to help?," "Can I ask my employees for contributions?" and "Can I host a fundraiser at the office?" We can help answer all of these questions and more. Our attorneys have counseled some of the largest PACs in the country to small startup PACs and have provided extensive advice on state and local giving.

Lobbying disclosure.

If you interact with the government on a regular basis—sometimes even less than a regular basis—then you face registration and reporting requirements at the federal, state and local level. We have advised clients about these rules in all 50 states, in a number of localities and, of course, at the federal level. Reporting obligations can be complicated, but we help design tracking systems, calendars and other compliance tools to keep it straight.

Gift and ethics rules.

From a casual lunch with a legislator's staff member to hosting events at the national political conventions to having a legislator attend an annual conference or board meeting, any time something of value is given to public officials, there are likely rules restricting how much can be given, when it can be given and by whom it must be reported. Our attorneys include former executive branch ethics officers and former legislative staffers, so they understand the rules from both sides.

Nominations.

Whether you are considering a high-level position with the government or are interested in supporting or opposing such a nomination, we can help. Our attorneys have shepherded a number of individuals through the nomination and confirmation process. This includes completing financial disclosure forms, background reviews

with an eye for what is and isn't important and preparing for committee hearings.

Foreign Agents Registration Act.

Foreign governments and political parties lobby the U.S. government every day. If they use private lobbyists—or agents—to conduct meetings or disseminate publicity information, then the agents must register and report with the Criminal Division of the Department of Justice. Unlike domestic lobbying disclosure, the Foreign Agents Registration Act involves complicated and detailed disclosures and ongoing filing of "propaganda" materials.

We can help with your political law needs at every step of the process. Whether you are an old hand, a newcomer who needs to understand what the rules are or someone who is facing an investigation, we can help.

We make participating in the government as simple as possible. We strive to give clients comfort in knowing they are complying with election and lobbying laws, while doing an effective job of making their views and needs known to legislators and agency decision makers.

How can we help you? To find out, please contact us at 1.888.VENABLE or www.Venable.com.

VENABLE® LLP

our experience

VENABLE SNAPSHOT

Nearly 600 lawyers nationally

Top 100 nationally
American Lawyer, 2009

Top 10 in Washington, DC
Washington Business Journal, 2009

Counsel to 40 of the Fortune 100

NONPROFIT ORGANIZATIONS AND ASSOCIATIONS QUICK FACTS

More than 40 attorneys focused on nonprofit issues, including former government counsel with the

- IRS Chief Counsel's Office
- Joint Committee on Taxation
- Senate Finance Committee
- U.S. Department of Justice, Tax Division

The American Bar Association's *Outstanding Nonprofit Lawyer of the Year*

Author of the *Association Tax Compliance Guide*, published by the American Society of Association Executives

Former legal counsel at the American Society of Association Executives

Attorneys recognized by *The Best Lawyers in America* for nonprofits/charities law

Exclusive Sponsor of the Association of Corporate Counsel's Nonprofit Organizations Committee

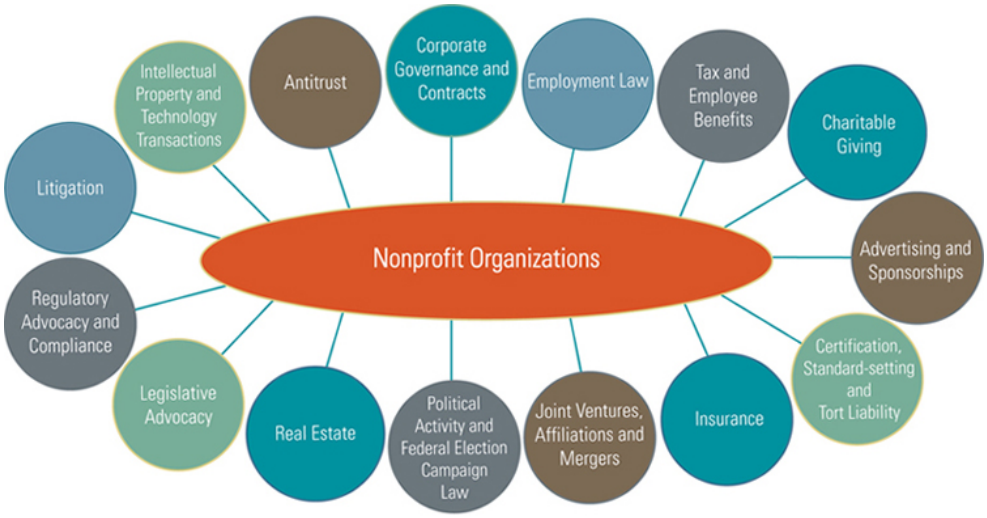
NONPROFIT ORGANIZATIONS AND ASSOCIATIONS

attorneys who are part of your world

With more than 600 nonprofit clients nationwide, Venable has the largest concentration of attorneys in the country providing counseling and advocacy for charities, hospitals, schools, foundations, trade associations, professional societies, advocacy groups and other nonprofit organizations.

Our clients—ranging from some of the nation's largest philanthropic charities to a "who's who" of trade and professional associations—call on us for assistance in matters of general nonprofit law and in matters unique to their industries, professions, causes or issues.

WE UNDERSTAND WHAT MAKES NONPROFITS DIFFERENT



The Venable advantage: deep experience with nonprofit legal issues.

As a result of our extensive experience in representing nonprofit organizations, virtually no legal issue or problem is new to us.

Experience with the most common and the most unusual issues enables us to provide precise answers and workable solutions with a legal style marked by ingenuity and pragmatic judgment.

Legal experience, reinforced by personal experience.

Our understanding of the nature and business of nonprofits—derived not only from our legal practice but from our deeply rooted participation in the nonprofit

PRACTICE FOCUS

Advertising and sponsorships

Corporate governance and contracts

Tax and employee benefits

Charitable giving

Employment law

Joint ventures, affiliations and mergers

Antitrust

Certification, standard-setting and tort liability

Intellectual property and technology transactions

Political activity and federal election campaign law

Legislative advocacy

Regulatory advocacy and compliance

Litigation

Insurance

Real estate

CLIENT FOCUS

Charities and foundations

Trade associations

Professional societies

Advocacy groups

Hospitals

Schools, colleges and universities

Representative Client List

community—enables us to offer broader and more useful counseling that recognizes the practical management, political and business considerations involved in the issues faced by nonprofits.

Our attorneys contribute to the nonprofit community in many ways, including giving speeches, writing articles, serving on boards and committees and offering their time and resources to numerous nonprofit events and initiatives. For example, we give dozens of presentations a year to nonprofit executives and regularly publish articles on nonprofit legal issues (see www.Venable.com/Nonprofits/Publications and www.Venable.com/Nonprofits/Events).

You won't hear "no" for an answer.

Instead of simply saying, "No, you can't do that," we pride ourselves on our ability to find innovative solutions to the seemingly most intractable problems and challenges facing our clients.

Seasoned attorneys who have walked in your shoes.

Venable maintains a core team of more than 20 attorneys who concentrate exclusively on the legal needs of nonprofit organizations. This team works day-in and day-out addressing the legal issues of nonprofit clients. They are leaders at what they do, with comprehensive resumes of credentials and achievements in their respective areas of concentration.

The team has several attorneys who previously worked in-house at nonprofits. This wide-ranging in-house experience has proven invaluable in understanding and relating to the unique needs of our clients. As individuals and as a team, we provide the responsive, efficient service needed by the nonprofit community.

Additionally, Venable operates the Venable Foundation, its own charitable vehicle to promote the health and well-being of the communities where Venable's clients and attorneys work and live. As such, we are more than just attorneys—we are partners with our clients in bettering our cities and communities.

Integrated legal services that bring a deep bench and a one-stop-shop to the full range of nonprofit legal challenges.

While members of our nonprofit team spend all of their time addressing the legal issues affecting nonprofit clients, our practice is much broader than that. We are fully integrated with the rest of our firm and frequently draw on the knowledge and experience of hundreds of Venable attorneys in every office of the firm. This network of attorneys not only brings an unmatched wealth of experience in areas such as those listed below (and many others), but it also brings an understanding of how these other areas of law apply to the unique characteristics of nonprofits, due to the frequency with which these attorneys work with our clients.

Our clients frequently remark about how much they appreciate Venable's ability to serve as a "one-stop-shop" for all of their legal needs. Our deep "bench" in virtually every legal area and issue affecting nonprofits enables us to tap into the experience required to deal with the most complex and nuanced legal challenges. Venable's various attorneys throughout the firm—coupled with our core nonprofit practitioners—form a powerful team that works seamlessly to provide our nonprofit clients with everything they could need or want from a law firm, in a manner that is both cost-efficient and effective.

Highly regarded by its nonprofit clients, Venable is steeped in the nuances, challenges and opportunities of nonprofit law—as well as the distinct culture, governance and politics of nonprofit organizations.

We have the experience and ingenuity to help our nonprofit clients meet the needs and demands of their members, constituencies and industries.

Our nonprofit practice provides its clients with pragmatic, creative solutions to their

legal challenges on a responsive, cost-efficient basis.

Our capabilities and experience in nonprofit law are strong nationwide, making Venable remarkably well prepared to meet each and every legal need of our clients across the country.

We take great pride in our leadership role in the nonprofit bar and will continue to be an active participant in the nonprofit community we represent.

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Please visit www.Venable.com/Nonprofits/Overview to download our complete Nonprofit Organizations and Associations brochure describing all of the capabilities and experience of our group.

How can we help you? To find out, please contact us at 1.888.VENABLE or www.Venable.com.