

Research, and Consumer Information Order (conducted under the Mushroom Promotion, Research, and Consumer Information Act), under the criteria contained in Section 610 of the Regulatory Flexibility Act (RFA).

**DATES:** Written comments on this document must be received by February 13, 2006.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this notice of review to the Docket Clerk, Research and Promotion Branch, Fruit and Vegetable Programs (FV), Agricultural Marketing Service (AMS), USDA, Stop 0244, Room 2535-S, 1400 Independence Avenue, SW., Washington, DC 20250-0244. Comments should be submitted in triplicate and will be made available for public inspection at the above address during regular business hours. Comments may also be submitted electronically to:

*Deborah.simmons@usda.gov* or Internet: <http://www.regulations.gov>. All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. A copy of this notice may be found at: <http://www.ams.usda.gov/fv/rpdocketlist.htm>.

**FOR FURTHER INFORMATION CONTACT:**

Debbie Simmons, Research and Promotion Branch, FV, AMS, USDA, Stop 0244, 1400 Independence Avenue, SW., Room 2535-S, Washington, DC 20250-0244; telephone: (888) 720-9915; fax: (202) 205-2800; or e-mail: *Deborah.simmons@usda.gov*.

**SUPPLEMENTARY INFORMATION:** The Mushroom Promotion, Research, and Consumer Information Act of 1990, (7 U.S.C. 6101 *et seq.*) authorized the Mushroom Promotion, Research, and Consumer Information Program which is industry operated and funded, with oversight by USDA. The program's objective is to carry out an effective, continuous, and coordinated program of promotion, research, consumer information, and industry information designed to strengthen the mushroom industry's position in the marketplace, maintain and expand existing markets and uses for mushrooms, develop new markets and uses for mushrooms, and to carry out programs, plans, and projects designed to provide maximum benefits to the mushroom industry.

The program became effective on January 8, 1993, when the Mushroom Promotion, Research, and Consumer Information Order (7 CFR part 1209) was issued. Assessments began in 1993 at the rate of 0.0025 cents per pound and have fluctuated from 0.0010 to

0.0045 cents per pound. The current rate is 0.0024 cents per pound.

Assessments under this program are used to fund retail category management, research concerning nutritional attributes of mushrooms, foodservice training, and industry information and to enable it to exercise its duties in accordance with the Order.

The program is administered by the Mushroom Council (Council) which is composed of producers and may include importers, appointed by the Secretary of Agriculture from nominations submitted by eligible producers or importers. Producer membership on the Board is based upon mushroom production within each of four predestinated geographic regions within the U.S. and a fifth region representing importers, when imports, on average, equal or exceed 35,000,000 pounds of mushrooms annually. All members serve terms of three years.

AMS published in the **Federal Register** (63 FR 8014; February 18, 1999) its plan to review certain regulations, including the Mushroom Promotion, Research, and Consumer Information Order, (conducted under the Mushroom Promotion, Research, and Consumer Information Act), under criteria contained in Section 610 of the Regulatory Flexibility Act (RFA; 5 U.S.C. 601-612). The plan was updated in the **Federal Register** on August 14, 2003 (68 FR 48574). Because many AMS regulations impact small entities, AMS decided, as a matter of policy, to review certain regulations which, although they may not meet the threshold requirement under section 610 of the RFA, warrant review. Accordingly, this notice and request for comments is made for the Mushroom Promotion, Research, and Consumer Information Order.

The purpose of the review is to determine whether the Mushroom Promotion, Research, and Consumer Information Order should be continued without change, amended, or rescinded (consistent with the objectives of the Mushroom Promotion, Research, and Consumer Information Act of 1990) to minimize the impacts on small entities. AMS will consider the continued need for the Order; the nature of complaints or comments received from the public concerning the Order; the complexity of the Order; the extent to which the Order overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local regulations; and the length of time since the Order has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the Order.

Written comments, views, opinions, and other information regarding the Order's impact on small businesses are invited.

Dated: December 8, 2005.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

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## FEDERAL ELECTION COMMISSION

### 11 CFR Part 109

[Notice 2005-28]

#### Coordinated Communications

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Election Commission requests comment on proposed revisions to its regulations regarding communications that have been coordinated with Federal candidates and political party committees. The Commission's current rules set out a three-prong test for determining whether a communication is "coordinated" with, and therefore an in-kind contribution to, a Federal candidate or a political party committee. In *Shays v. FEC*, the Court of Appeals invalidated one aspect of the so-called content prong of the coordinated communications test, because the court believed that the Commission had not provided adequate explanation and justification for the current rules under the Administrative Procedure Act. To comply with the decision of the Court of Appeals, and to address other issues involving the coordinated communication rules, the Commission is issuing this Notice of Proposed Rulemaking. No final decision has been made by the Commission 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 13, 2006. The Commission will hold a hearing on the proposed rules on January 25 or 26, 2006, or both at 9:30 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.

**ADDRESSES:** All comments must be in writing, must be addressed to Mr. Brad C. Deutsch, Assistant General Counsel, and must be submitted in either e-mail, facsimile, or paper copy form. Commenters are strongly encouraged to submit comments by e-mail or fax to

ensure timely receipt and consideration. E-mail comments must be sent to either [coordination@fec.gov](mailto:coordination@fec.gov) or submitted through the Federal eRegulations Portal at [www.regulations.gov](http://www.regulations.gov). If e-mail comments include an attachment, the attachment must be in either Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219-3923, with paper copy follow-up. Paper comments and paper copy follow-up of faxed comments must 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:** Mr. Brad C. Deutsch, Assistant General Counsel, Ms. Amy Rothstein, or Mr. Ron B. Katwan, Attorneys, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002) ("BCRA"), amended the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* (the "Act"), in a number of respects. In the portion of BCRA relevant to this proceeding, Congress repealed the Commission's pre-BCRA regulations regarding "coordinated general public political communications" and directed the Commission to promulgate new regulations on "coordinated communications" in their place. Pub. L. 107-155, sec. 214(b), (c) (2002). On December 17, 2002, the Commission adopted regulations at 11 CFR 109.21 to implement BCRA's provisions regarding payments for communications that are coordinated with a candidate, a candidate's authorized committee, or a political party committee. See *Final Rules and Explanation and Justification on Coordinated and Independent Expenditures*, 68 FR 421 (Jan. 3, 2003) ("*2002 Coordination Final Rules*").

Under the Act, as amended by BCRA, an expenditure "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of" a Federal candidate, a candidate's authorized committee, the national, State, or local committee of a political party, or agents of any of the foregoing, is an in-kind contribution to the candidate or political party committee with which it has been coordinated, and is thus subject to the limitations,

prohibitions, and reporting requirements of the Act. 2 U.S.C. 441a(a)(7)(B)(i) and (ii). An "expenditure" is any payment "made by any person for the purpose of influencing any election for Federal office."<sup>1</sup> 2 U.S.C. 431(9)(A)(i).

Thus, under the Act, a payment for a communication constitutes an in-kind contribution if two conditions are satisfied. First, the payment must qualify as an "expenditure"; that is, it must be made for the purpose of influencing a Federal election. Second, the payment must be made "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate or political party committee or agents thereof. In addition, the Act provides that any disbursement for an "electioneering communication"<sup>2</sup> that is coordinated with a candidate, a candidate's authorized committee, a political party committee, or agents thereof, is an in-kind contribution to the candidate or political party supported by the communication. 2 U.S.C. 441a(a)(7)(C).

To implement these provisions of the Act, 11 CFR 109.21 sets forth a three-prong test for determining whether a communication is a coordinated communication, and therefore an in-kind contribution to, 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). Second, the communication must meet one of four content standards (the "content prong"). See 11 CFR 109.21(a)(2) and (c). Third, the communication must meet one of five conduct standards (the "conduct prong"). See 11 CFR 109.21(a)(3) and (d). A communication must satisfy all three prongs to be a "coordinated communication."

<sup>1</sup> In addition, the Act specifically provides that the financing of the republication of campaign materials prepared by the candidate, the candidate's authorized committee, or agents thereof, is an expenditure. 2 U.S.C. 441a(a)(7)(B)(iii).

<sup>2</sup> The Act and Commission regulations define an electioneering communication as 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 or 30 days before a primary election for the office sought by the candidate referenced in the communication; and (3) can be received by 50,000 or more persons within the geographic area that the candidate referenced in the communication seeks to represent. See 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29.

## I. The Content Prong

This rulemaking is being initiated in response to court decisions that invalidated one aspect of the "content prong" of the coordinated communication test. See *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays District*"), *aff'd*, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays Appeal*") (*pet. for reh'g en banc denied* Oct. 21, 2005) (No. 04-5352). As described more fully below, the District Court held the content prong as a whole to be invalid, while the Court of Appeals held the Commission's justification for one aspect of the content prong (specifically, the 120-day time frame in the fourth content standard) to be inadequate.

The purpose of the content prong is to "ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a Federal election." *2002 Coordination Final Rules* at 426. Accordingly, each of the four content standards that comprise the "content prong" identifies a category of communications that satisfies the content prong because its "subject matter is reasonably related to an election." *Id.* at 427.

The first content standard is satisfied if the communication is an electioneering communication. See 11 CFR 109.21(c)(1). This content standard implements the statutory directive, described above, that disbursements for coordinated electioneering communications be treated as in-kind contributions to the candidate or political party supported by the communication.

The second content standard is satisfied by a public communication<sup>3</sup> made at any time that disseminates, distributes, or republishes campaign materials prepared by the candidate, the

<sup>3</sup> 11 CFR 100.26 defines "public communication" as "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 public communication shall not include communications over the Internet." The District Court rejected the definition of "public communication" in the Commission's regulations because the definition categorically excludes all Internet communications. *Shays District* at 70. To comply with the *Shays District* decision, the Commission issued a Notice of Proposed Rulemaking that proposes to include certain Internet communications in the definition of "public communication." See *Notice of Proposed Rulemaking on Internet Communications*, 70 FR 16967 (April 4, 2005). The proposed revision to the definition of "public communication" would have the effect of including certain Internet communications in the definition of "coordinated communication," as well. The Commission has not yet issued final rules in this rulemaking.

candidate's authorized committee, or agents thereof. See 11 CFR 109.21(c)(2). This content standard implements the Congressional mandate that the Commission's rules on coordinated communications address the "replication of campaign materials." See Pub. L. 107-155, sec. 214(c)(1) (2002).

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); see also 11 CFR 100.22. The Commission concluded that express advocacy communications, no matter when such communications are made, can be reasonably construed only as for the purpose of influencing an election.

The fourth content standard is satisfied if a public communication (1) refers to a political party or a clearly identified Federal candidate; (2) is publicly distributed or publicly disseminated 120 days or fewer before an election;<sup>4</sup> 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).

In adopting the 120-day time frame for public communications for the fourth content standard, the Commission sought to create a bright-line rule for public communications that fall short of express advocacy and do not republish campaign materials. The 120-day time frame "focuses the regulation on activity reasonably close to an election, but not so distant from the election as to implicate political discussion at other times." 2002 *Coordination Final Rules* at 430. The Commission noted that its intent was "to require as little characterization of the meaning or the content of the communication, or inquiry into the subjective effect of the communication on the reader, viewer, or listener as possible." 2002 *Coordination Final Rules* at 430 (citing *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976)). The Commission emphasized that the regulation "is applied by asking if certain things are true or false about the face of the public communication or with limited reference to external facts on the public record." *Id.*

In adopting this time frame, the Commission relied on the fact that, in BCRA, Congress defined "Federal election activity" ("FEA"), in part, as

<sup>4</sup> The term "election" includes general elections, primary elections, runoff elections, caucuses or conventions, and special elections. See 11 CFR 100.2.

voter registration activity "during the period that begins on the date that is 120 days" before a Federal election. The Commission reasoned that, in doing so, Congress "deem[ed] that period of time before an election to be reasonably related to that election." *Id.* (citing 2 U.S.C. 431(20)(A)(i)).

## II. Overview of Court Decisions in *Shays v. FEC*

In *Shays District*, the District Court held that the Commission's coordinated communication regulations did not survive the second step of *Chevron* review.<sup>5</sup> *Shays District* at 61-62. Specifically, the court concluded that limiting the coordinated communication definition to communications that satisfy the content standards at 11 CFR 109.21(c)(1) through (4) would "undercut[] [the Act's] statutory purpose of regulating campaign finance and preventing circumvention of the campaign finance rules." *Id.* at 63. The District Court reasoned that communications that have been coordinated with a candidate, a candidate's authorized committee, or a political party committee have value for, and therefore are in-kind contributions to, that candidate or committee, regardless of the content, timing, or geographic reach of the communications. See *Shays District* at 63-64.

The Court of Appeals, however, disagreed "with the district court's suggestion that any standard looking beyond collaboration to content would necessarily 'create an immense loophole,' thus exceeding the range of permissible readings under *Chevron* step two." *Shays Appeal* at 99-100. The Court of Appeals noted that "we can hardly fault the [Commission's] effort to develop an objective, bright-line test [that] does not unduly compromise the Act's purposes." *Shays Appeal* at 99 (internal quotations omitted). Moreover, the Court of Appeals expressly "reject[ed] *Shays* and *Meehan's* argument that [the Act] precludes

<sup>5</sup> The District Court described the first step of the *Chevron* analysis, which courts use to review an agency's regulations: "a court first asks 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" See *Shays District*, at 51 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)). According to the District Court, in the second step of the *Chevron* analysis, the court determines if the agency's interpretation is a permissible construction of the statute that does not "unduly compromise" [the Act's] purposes by "creat[ing] the potential for gross abuse." See *Shays District* at 91, citing *Orloski v. FEC*, 795 F.2d 156, 164-65 (D.C. Cir. 1986) (internal citations omitted).

content-based standards under *Chevron* Step One." *Id.* As the Court of Appeals emphasized, "time, place, and content may be critical indicia of communicative purpose. While election-related intent is obvious, for example, in statements urging voters to 'elect' or 'defeat' a specified candidate or party, the same may not be true of [other types of] ads [.]" *Id.* Instead, the Court of Appeals found that "the challenged regulation's fatal defect is not that the [Commission] drew distinctions based on content, time, and place, but rather that, contrary to the [Administrative Procedure Act], the Commission offered no persuasive justification for \* \* \* the 120-day time-frame and the weak restraints applying outside of it." *Id.* at 100. Specifically, the Court of Appeals concluded that, by limiting "coordinated communications" made outside of the 120-day window to communications containing express advocacy or the republication of campaign materials, "the [Commission] has in effect allowed a coordinated communication free-for-all for much of each election cycle." *Id.*

The Court of Appeals found that the Commission had not adequately explained why "120 days reasonably defines the period before an election when non-express advocacy likely relates to purposes other than 'influencing' a Federal election." *Id.* at 101. Regarding the Commission's reliance on Congress's use of a 120-day time frame in BCRA's definition of FEA as voter registration activity, the Court observed that the Commission had provided no evidence that voter registration activity occurs on cycles similar to "coordinated communications." *Id.* at 100.

For these reasons, the Court of Appeals concluded that the Commission had not provided adequate explanation under the Administrative Procedure Act ("APA") for the Commission's decision to exclude communications distributed more than 120 days before an election, unless a communication contains express advocacy or republishes campaign materials. Therefore, the Court of Appeals affirmed the District Court's invalidation of the Commission's coordinated communication rules. *Id.* at 101.

## III. Alternative Proposals for Revising the Content Prong in 11 CFR 109.21(c)

The Commission is considering the seven alternatives described below to comply with the Court of Appeals decision in *Shays Appeal*. The regulatory text for each alternative,

except one,<sup>6</sup> is set forth at the end of this NPRM. The Commission seeks comment on each alternative, including responses to the following questions: Is the alternative too broad or too narrow? Would the alternative potentially include public communications that are not made for the purpose of influencing a Federal election and that therefore should not be restricted and treated as in-kind contributions? Conversely, would the alternative potentially exclude public communications that are made for the purpose of influencing a Federal election and therefore should be treated as an in-kind contribution, provided that the payment and conduct prongs are also satisfied? The Commission invites commenters to provide examples of communications from previous election cycles demonstrating that an alternative may be either underinclusive or overinclusive. Would the alternative address the Court of Appeals' concerns regarding the potential for circumvention of the Act and for corruption or the appearance of corruption? Would the alternative properly effectuate congressional intent? Would the alternative provide sufficient guidance to individuals and organizations seeking to be actively involved in politics and to comply with the Commission's coordination rules?

The Commission notes that the alternatives presented in this NPRM are not limited to the exact terms of the regulatory language set forth for each alternative at the end of the NPRM. Instead, as the narrative describing each alternative makes clear, the final rules may be a variation of one of the alternatives or even a combination of components from different alternatives. The Commission specifically invites comment on whether a combination of components from several different alternatives would be appropriate. The Commission also seeks comment on whether it should adopt a content standard that is not presented as one of the alternatives in this NPRM.

In addition, given that the content prong and the conduct prong of the coordinated communication test were intended to work together, the Commission seeks comment on whether adopting a given alternative with respect to the content prong would necessitate changing the conduct prong in 11 CFR 109.21(d) to ensure that only communications made for the purpose of influencing a Federal election are covered. If so, what amendments to the conduct prong should the Commission consider making?

*Alternative 1—Retain Current 11 CFR 109.21(c)(4) but Revise the Explanation and Justification*

Alternative 1 would retain the current coordinated communication test at 11 CFR 109.21, including the 120-day time frame in the fourth content standard at 11 CFR 109.21(c)(4)(ii), but would revise the Explanation and Justification for 11 CFR 109.21(c)(4)(ii) by providing further explanation supporting the 120-day time frame.<sup>7</sup>

The Court of Appeals emphasized that justifying the 120-day time frame, or another time frame, requires the Commission to undertake a factual inquiry to determine whether the temporal line that it draws “reasonably defines the period before an election when non-express advocacy likely relates to purposes other than ‘influencing’ a Federal election” or whether it “will permit exactly what BCRA aims to prevent: evasion of campaign finance restrictions through unregulated collaboration.” *Shays Appeal* at 101–02. Accordingly, the Commission seeks comment on the following questions raised by the Court of Appeals in *Shays Appeal* regarding the 120-day time frame:

(1) Are a significant number of communications outside the 120-day period made for the purpose of influencing Federal elections, or are communications to influence Federal elections predominantly made within 120 days of an election? Are there specific examples from the 2004 election cycle of communications that the current coordination rules should have reached but did not or, conversely, examples of communications that the current rules should not have reached but did? *Id.* at 102.

(2) Do communications made for the purpose of influencing House, Senate, and Presidential races—all covered by this rule—occur during approximately the same periods in relation to the general election or the primary election, or should different time frames apply to each? *Id.*

(3) If the Commission were to retain the 120-day time frame, would persons aiming to influence elections shift spending outside of that period to avoid the rules' restrictions? Would the same phenomenon potentially take place if the Commission adopted a time frame

longer or shorter than 120 days before a Federal election? In 2004, was there any evidence that spending shifted outside the 120-day period to avoid the rules' restrictions? *Id.*

The Commission specifically invites comments in the form of empirical data that show the time periods before an election in which electoral communications generally occur. Do outside persons make electoral communications during time frames that differ from candidates or parties? Do early electoral communications, for example, that occur more than 120 days before an election, have an effect on election results?

On its website, the Commission posts reports filed pursuant to the Act and Commission regulations. Some of these reports include information on independent expenditures by political committees filed under 11 CFR 104.4 and by persons other than political committees under 11 CFR 109.10. Additionally, all political committees must report coordinated expenditures along with all other in-kind contributions under 11 CFR 109.21(b)(3), while political party committees must report their coordinated party expenditures separately under 11 CFR 109.37. See Form 3X, line 25 (summarizing entries from Schedule F). For the convenience of commenters, the Commission has extracted these data from the reports and posted them on its website.<sup>8</sup> Do the data provide an empirical basis for retaining the 120-day time frame or establishing another time frame? For example, the data appear to indicate that, during the 2004 election cycle, (1) coordinated party expenditures made in connection with the general election were made mostly after September 1, 2004—roughly within 60 days of the general election, and (2) independent expenditures were made mostly after July 27, 2004—roughly within 90 days of the general election.<sup>9</sup> The Commission invites statistical analyses of these data. Specifically, to what extent is it possible to extrapolate from any identified patterns in party committee coordinated expenditures to

<sup>8</sup> These data are available at <http://www.fec.gov/press/coordruledata.shtml>.

<sup>9</sup> A political party committee authorized to make coordinated expenditures may make such expenditures in connection with the general election before or after its candidate has been nominated. See 2 U.S.C. 441a(d), 11 CFR 109.34. See also 11 CFR 109.32(a). Generally, it is less likely that such expenditures would be made much before a candidate has been nominated. The Commission also notes that expenditures reported by political party committees as “coordinated expenditures” include not only expenditures for communications but also all other coordinated expenditures.

<sup>7</sup> Although this first alternative proposal to implement the appellate court's decision in *Shays Appeal* would not change 11 CFR 109.21(c)(4), the regulatory text of Alternative 1 as set forth at the end of this NPRM reflects proposed changes to 11 CFR 109.21(c)(4)(ii), to address situations in which multiple candidates for Federal office appear in a given public communication. See Section IV–3 below.

<sup>6</sup> See note 11 below.

expenditures for coordinated communications by outside groups? Do the data support the conclusion that communications made for the purpose of influencing an election are almost always made, or are generally made, within the last 60 to 90 days before an election?

The Commission also seeks comment on whether other existing analyses provide a basis for choosing a particular time frame. See, e.g., Michael M. Franz et al., *The Election after Reform: Money, Politics and the Bipartisan Campaign Reform Act* ch. 7 (Michael J. Malbin ed., Rowman and Littlefield, forthcoming Mar. 2006), available at <http://www.cfinst.org/studies/ElectionAfterReform/chapters.html>; Ken Goldstein & Joel Rivlin, *Political Advertising in the 2002 Elections* ch. 3 (forthcoming), available at <http://polisci.wisc.edu/tvadvertising>; Craig B. Holman, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* 52–59 (2001), available at <http://www.brennancenter.org/programs/buyingtime2000.html>; Jonathan Krasno & Kenneth Goldstein, *The Facts About Television Advertising and the McCain-Feingold Bill*, 35(2) PS: Political Science and Politics 207 (2002), draft available at <http://www.cfinst.org/studies/papers/goldstein&krasno.pdf>; Donald F. McGahn, Remarks at Campaign Finance Reform Forum, Campaign Finance Institute (Jan. 14, 2005),<sup>10</sup> available at [www.cfinst.org/transcripts/pdf/1-14-05\\_Transcript\\_PanelThree.pdf](http://www.cfinst.org/transcripts/pdf/1-14-05_Transcript_PanelThree.pdf); see also data compiled by the University of Wisconsin Advertising Project, available at <http://polisci.wisc.edu/tvadvertising>.

#### *Alternative 2—Adopt a Different Time Frame*

The Commission seeks comment on whether a time frame other than 120 days would be more appropriate in bringing public communications that are made for the purpose of influencing a Federal election within the coordination regulations, while filtering out public communications that are not made for this purpose.<sup>11</sup> Does empirical evidence support the adoption of a different time frame? Some States hold primary elections early in the election year. Under the current rule, a public

communication that refers to a clearly identified candidate and is distributed within the 120-day period preceding a primary election would satisfy the content standard at 11 CFR 109.21(c)(4), but the same public communication distributed shortly after the primary but still more than 120 days before the subsequent general election would not satisfy that standard. Accordingly, rather than retain the current rule covering communications made within the 120-day period before an election, whether primary or general, should the Commission adopt a time frame that covers an uninterrupted period of time starting 120 days (or some other time period) before the primary election up to and including the day of the general election?

The Commission also invites comment on whether to adopt a time frame covering the period from January 1 of each election year through the day of the general election. Would such an “election year” time frame begin too late for States that hold primaries early in the year? Conversely, would an “election year” time frame begin too early for States that hold primaries in September? Would such a time frame be appropriate for Presidential elections?

In addition, the Commission seeks comment on whether to adopt a tiered approach, under which the range of communications that satisfy the fourth content standard would depend on the communication’s proximity to an election. For example, for communications made within 120 days before an election, the fourth content standard could be modified to capture any public communication that refers to a political party or clearly identified Federal candidate and is directed to the voters in the relevant geographical areas. For communications made between 120 and 240 days before an election, the fourth content standard could capture only public communications that promote, attack, support, or oppose (“PASO”) a political party or a clearly identified Federal candidate.<sup>12</sup> The Commission invites commenters to provide examples of communications from previous election cycles to show whether a given time frame would be either underinclusive or overinclusive.

#### *Alternative 3—Eliminate the Time Restriction From 11 CFR 109.21(c)(4)*

Alternative 3 would revise 11 CFR 109.21(c)(4) by eliminating any time restriction from the fourth content standard. Specifically, Alternative 3

would remove the requirement that a public communication be publicly distributed or otherwise publicly disseminated 120 days or fewer before an election. See 11 CFR 109.21(c)(4)(ii). Alternative 3 would, however, retain the requirements that (1) the public communication refer to a political party or clearly identified candidate and (2) be directed to voters in the jurisdiction of the clearly identified candidate or to voters in the jurisdiction in which one or more candidates of the political party appear on the ballot. See 11 CFR 109.21(c)(4)(i) and (iii). Thus, under this alternative, any public communication that refers to a clearly identified candidate or political party and is directed to voters in the relevant jurisdiction would satisfy the content prong of the coordinated communication test, regardless of when it is distributed.

The Commission seeks comment on whether the fourth content standard without a time frame would still be effective in distinguishing communications made for the purpose of influencing a Federal election from communications made for other purposes, such as communications made for the purpose of lobbying for or against certain legislation. The Court of Appeals noted that “to qualify as ‘expenditure’ in the first place, spending must be undertaken ‘for the purpose of influencing’ a federal election \* \* \* [T]ime, place, and content may be critical indicia of communicative purpose. While election-related intent is obvious, for example, in statements urging voters to ‘elect’ or ‘defeat’ a specified candidate or party, the same may not be true of ads identifying a federal politician but focusing on pending legislation[.]” *Shays Appeal* at 99. Does the fact that a communication refers to a clearly identified candidate or a political party and is directed to voters in the relevant geographical area by itself provide strong evidence that the communication is made for the purpose of influencing a Federal election, even if the communication is made a year or more before that election? Does the Commission have the statutory authority to regulate “other categories of non-electioneering speech—non-express advocacy, for example—outside the 120 days”? *Id.* at 101. How should the Commission separate communications made for the purpose of influencing a Federal election from those without such purpose?

The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 3

<sup>10</sup> “The hotspot of the campaign didn’t start until late September. \* \* \* This cycle was very compressed when it came to the heavy spending. It eventually had in essence a four-week sprint as opposed to the eight- to ten-week sprint that we used to pay for.”

<sup>11</sup> Because Alternative 2 does not propose a specific time frame, this NPRM does not set forth regulatory text for Alternative 2.

<sup>12</sup> See Alternative 4 below for a more detailed discussion of the PASO standard.

would be either underinclusive or overinclusive.

*Alternative 4—Replace the Content Standard in 11 CFR 109.21(c)(4) With a “PASO” Test*

Alternative 4 would replace the content standard in 11 CFR 109.21(c)(4) with a new standard providing that a public communication would satisfy the content prong of the coordinated communication test if it refers to a political party or a clearly identified Federal candidate, is directed to voters in the jurisdiction of the clearly identified Federal candidate or to voters in a jurisdiction in which one or more Federal candidates of a political party are on the ballot, and the communication PASOs the political party or the clearly identified Federal candidate.<sup>13</sup> Would such a standard have the potential to be unconstitutionally vague in practical application? Or, conversely, would such a 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 v. FEC*, 540 U.S. 93, 170 n.64 (2003) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972)).

Alternatively, the Commission invites comment on whether Alternative 4, instead of using a PASO standard, should create a safe harbor exemption from the coordinated communication rules for certain kinds of communications. A communication that satisfies these criteria would, as a matter of law, not be treated as a coordinated communication. For example, such criteria could include the following:

- The communication is devoted exclusively to a particular pending legislative or executive branch matter.
- The communication’s reference to a clearly identified Federal candidate is limited to urging the public to contact that candidate to persuade the candidate to take a particular position on the

pending legislative or executive branch matters.

- The communication does not refer to the political party affiliation or the political ideology (e.g., “liberal,” “conservative,” etc.) of a clearly identified Federal candidate.

- The communication does not refer to a clearly identified Federal candidate’s record or position on any issue.

- The communication does not refer to a clearly identified Federal candidate’s character, qualifications, or fitness for office.

- The communication does not refer to an election, voters or the voting public, or anyone’s candidacy.

If this criteria-based approach is adopted, should any of the criteria be eliminated from, or added to, the list? If adopted, should the regulation provide that a communication must meet all of the criteria on the list to qualify for the safe harbor exemption or should the regulation follow a more flexible approach and provide that a communication may meet some but not necessarily all of the criteria on the list and still qualify for the exemption? Should satisfaction of one or more specific criteria on the list, by itself, be sufficient to qualify for the exemption? By contrast, should any one or more criteria be critical to the analysis such that failure to meet these criteria would prohibit an organization from taking advantage of the safe harbor?

The Commission seeks comment as to whether Alternative 4 should incorporate a time period limitation, such as a specific number of days before an election. If so, should this time period be 120 days before an election or should a different time frame be adopted? The Commission invites commenters to submit supporting empirical data. The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 4 would be either underinclusive or overinclusive.

*Alternative 5—Eliminate the Time Restriction From 11 CFR 109.21(c)(4) for Political Committees Only*

Alternative 5 would adopt a bifurcated test under which application of the 120-day time frame would depend on the identity of the person paying for the public communication. If a registered political committee, or an organization that is required to register as a political committee, pays for a public communication that refers to a political party or a clearly identified Federal candidate and the public communication is directed to voters in

the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more of the candidates of the political party appear on the ballot, then that public communication would be deemed as a matter of law to have been made for the purpose of influencing a Federal election. Such a public communication, when paid for by a political committee, would be deemed to have been made for the purpose of influencing a Federal election regardless of when it is distributed, because a political committee is an organization whose major purpose is to influence elections.<sup>14</sup> Alternatively, should the time frame be eliminated only for public communications that are paid for by registered political committees or organizations that are required to register as political committees if the communication PASOs a political party or a clearly identified Federal candidate?

Under Alternative 5, if the person paying for the public communication is not a registered political committee or an organization that is required to register as a political committee, then the public communication would satisfy the content standard at 11 CFR 109.21(c)(4) only if it occurs 120 days or fewer before an election or during whatever other time frame might be adopted. Are there data to justify the 120-day window? Do the data support another time frame?

The Commission seeks comment on how such a bifurcated test would apply to other entities, such as non-Federal candidates and their campaign organizations. The Commission further seeks comment on how such a bifurcated test should apply to entities organized under section 527 of the Internal Revenue Code that are not registered with the Commission as political committees. The Commission also seeks comment on the effect that this alternative approach would have on a candidate who has contacts that meet the conduct standard with an organization that is not registered as a political committee. If that organization

<sup>13</sup>The PASO standard is found in BCRA and applies primarily to candidates and political party committees with respect to FEA. See 2 U.S.C. 431(20)(A)(iii). But Congress also applied the PASO standard to the activity of certain tax-exempt organizations. For example, BCRA prohibits party committees from soliciting funds for, or making or directing donations to, certain tax-exempt organizations that make expenditures or disbursements for FEA, which includes public communications that PASO a Federal candidate. See 2 U.S.C. 431(20)(A)(iii) and 441i(d)(1). BCRA also directed the Commission not to exempt any communications that PASO a clearly identified Federal candidate from the electioneering communication provisions. See 2 U.S.C. 434(f)(3)(B)(iv). The Commission provided examples of communications that PASO and communications that do not PASO in Advisory Opinion 2003–25.

<sup>14</sup>The Act defines a “political committee” as any committee, club, association, or other group of persons that receives “contributions” or makes “expenditures” aggregating in excess of \$1,000 during a calendar year. 2 U.S.C. 431(4)(A). See also 11 CFR 100.5. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court, in order to avoid vagueness, narrowed the Act’s references to “political committee” to prevent their “reach [to] groups engaged purely in issue discussion.” 424 U.S. at 79. The Court concluded that “[t]o fulfill the purposes of the Act [the words ‘political committee’] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Id.*

is subsequently found to have inappropriately failed to register as a political committee based on activity that was not known to the candidate, should the Commission provide in the regulation that the candidate would not be deemed to have accepted an in-kind contribution from the organization?

In addition, the Commission invites commenters to provide examples of communications from previous election cycles to show whether Alternative 5 would be either underinclusive or overinclusive.

*Alternative 6—Replace the Fourth Content Standard in 11 CFR 109.21(c)(4) With a Standard Covering Public Communications Made for the Purpose of Influencing a Federal Election*

Alternative 6 would replace the fourth content standard in 11 CFR 109.21(c)(4) with a new standard that would closely track the statute and simply require a communication to be a public communication made for the purpose of influencing a Federal election. The effect of adopting Alternative 6 would be to restrict some public communications that are not covered by current 11 CFR 109.21(c)(4), *i.e.*, communications that are made for the purpose of influencing a Federal election but that are either: (1) Made more than 120 days before an election, or (2) made at any time and do not refer to a political party or a clearly identified Federal candidate. In addition, Alternative 6 would exclude from regulation some communications that are covered by current 11 CFR 109.21(c)(4), *i.e.*, communications that are made within 120 days of an election and that do refer to a political party or a clearly identified Federal candidate but that are not made for the purpose of influencing a Federal election.

Whether a given public communication is for the purpose of influencing a Federal election would depend on the facts and would be decided on a case-by-case basis. This is the approach some Commissioners used before 2002 when the Commission adopted a content prong for its coordinated communication regulations. Under such a case-by-case approach, some public communications would be treated as having been made for the purpose of influencing a Federal election, even though no Federal candidate or political party is referenced in the communication, and regardless of how far in advance of an election such a communication is made. This approach would result in some public communications being restricted as coordinated communications without having to meet a content standard

defined in the Commission's regulations. The Commission seeks comment on whether such a case-by-case approach is appropriate and whether it would provide sufficient guidance to candidates, their authorized committees, political party committees, and outside organizations. Would such a standard have the potential to be unconstitutionally vague in practical application? Or, conversely, would such a 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 (quoting *Grayned*, 408 U.S. at 108–109); compare *Buckley v. Valeo*, 424 U.S. 1, 24, n. 24, 46–47, n. 53, 78 (Payments for media advertisements "controlled by or coordinated with the candidate" are treated as contributions, and "for the purpose of influencing" phrase "presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution."). The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 6 would be either underinclusive or overinclusive.

*Alternative 7—Eliminate the Content Prong in 11 CFR 109.21(c) and Replace It With the Requirement That the Communication Be a Public Communication as Defined in 11 CFR 100.26*

Alternative 7 would eliminate the entire content prong in 11 CFR 109.21(c), and would replace it with the requirement that the communication be a public communication as defined in 11 CFR 100.26.<sup>15</sup> Alternative 7 would also make some conforming amendments. Alternative 7 would be based on the assumption that if an organization or individual works with a candidate or a political party in making a public communication, then the communication inherently has value to the political entity it is coordinated with, regardless of timing or content. Accordingly, in Alternative 7, any public communication that satisfies the *conduct* prong of the coordinated communication test at 11 CFR 109.21(d) would be deemed to have been made for the purpose of influencing a Federal election and thus be a "coordinated communication," regardless of whether it refers to a clearly identified Federal candidate or political party and

regardless of when or to whom the communication is distributed.

The Commission notes that, even though Alternative 7 would eliminate the entire content prong, it would nonetheless comply with the statutory requirement that disbursements for coordinated electioneering communications be in-kind contributions to the candidate supported by them and with the congressional mandate that the Commission's coordination rules address the "republishing of campaign materials." Specifically, under Alternative 7, *all* public communications (including electioneering communications and communications that republish campaign materials) would be coordinated communications as long as they satisfy the conduct prong.

The Commission seeks comment on whether the conduct prong by itself, without any content prong, would be effective in distinguishing between public communications made for the purpose of influencing a Federal election and public communications made for other purposes, such as public communications made for the purpose of lobbying for or against certain legislation, or for supporting charitable or other non-political causes. Assuming that it is true that a candidate or political party would not coordinate with an outside organization or individual if the resulting communication did not have value for the candidate or political party, does such value necessarily consist of influencing the candidate's election or the election of a political party's candidates? Would the conduct prong by itself, without any content prong, have the potential to be unconstitutionally vague in practical application? Or, conversely, would such a regulation "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 (quoting *Grayned*, 408 U.S. at 108–109). The Commission also invites commenters to provide examples of communications from previous election cycles to show whether Alternative 7 would be either underinclusive or overinclusive.

**IV. Other Issues Regarding the Content Prong**

The Commission also seeks comment on the following related issues.

<sup>15</sup> See note 3 above.

1. The “Directed to Voters” Requirement in 11 CFR 109.21(c)(4)(iii)

In the event that the Commission decides to retain a content prong, the Commission seeks comment on modifying the requirement in the fourth content standard that a public communication must be directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot. See 11 CFR 109.21(c)(4)(iii). While the Act and Commission regulations defining “electioneering communications” require that 50,000 or more persons be able to receive the communication in the relevant geographic area, the fourth content standard does not specify how many persons must be able to receive a communication for it to be classified as a coordinated communication. See 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29(b)(3)(ii)(A) and (b)(5). Should 109.21(c)(4)(iii) be deemed satisfied if *any* person in the relevant geographic area can receive the communication? Should 11 CFR 109.21(c)(4)(iii) be changed to specify a minimum number of persons that must be able to receive the communication? If so, what should the required minimum number of persons be? Has the current regulation without a required minimum number presented any difficulties to, or created any confusion for, those seeking to comply with it?

The Commission notes that the fourth content standard applies to “public communications,” and thus to communications made by means of newspapers, magazines, periodicals, billboards, mass mailing, and telephone banks. See 11 CFR 100.26. Is it appropriate to set a minimum for the “directed to voters” requirement that would exclude small and medium sized publications? If so, should the minimum number be based on the number of copies distributed or on estimates of the number of readers reached by the publications? Similarly, the definition of “public communication” includes limited communications, such as 501 pieces of mail or 501 telephone calls of an identical or substantially similar nature. See 2 U.S.C. 431(23) and (24); 11 CFR 100.26, 100.27, 100.29. Would it be appropriate to exclude such limited mass mailings or telephone banks from the “directed to voters” requirement as *de minimis* even though they come within the Commission’s definition of “public communication”?

Under the current rules, the second and third content standards (*i.e.*, the republication of campaign material and

the express advocacy standards) do not contain a “directed to voters” requirement. Are communications that satisfy these standards so clearly made for the purpose of influencing a Federal election that a “directed to voters” requirement is unnecessary? In the alternative, should such a requirement be added to these two content standards as well?

The Commission also seeks comment on whether to exempt from the coordination regulations communications that are distributed in the jurisdiction of a clearly identified congressional candidate when such distribution is part of, and incidental to, a larger advertising campaign. For example, an advertisement distributed nationally on cable television that refers to a U.S. Representative seeking reelection as one of several sponsors of a piece of legislation will presumably reach voters in the U.S. Representative’s district. In such a case, the voters in the U.S. Representative’s district would be reached only incidentally as part of the larger lobbying campaign. Would an exemption for communications that reach voters in the jurisdiction of the clearly identified congressional candidate only incidentally provide a reliable way of distinguishing communications that are made for the purpose of influencing a Federal election from lobbying or issue advocacy communications? Would such a standard be sufficiently clear to provide persons with prior notice of the types of communications that are affected? For such a standard to provide effective prior notice, must the Commission specify how many viewers are “incidental”? In the alternative, should the Commission define “incidental” in terms of a certain ratio between the number of persons who can receive the communication in the State or district of the clearly identified Senate or House candidate and the number of persons who can receive the communication outside that State or district? Should such an exemption be limited to public communications that are distributed nationwide? The Commission also invites comment on whether the regulations should provide that such an exemption would apply only if a communication does not PASO the clearly identified candidate.

2. Federal Candidate Endorsements of, and Solicitations of Funds for, Other Federal or Non-Federal Candidates or State Ballot Initiatives

The Commission invites comment regarding the application of the coordinated communication test to situations in which Federal candidates

endorse, or solicit funds for, other Federal and non-Federal candidates or State ballot initiatives. In Advisory Opinion 2004–01, the Commission considered a television advertisement that featured President Bush endorsing a congressional candidate. The advertisement was publicly distributed within 120 days of the Presidential primary in the State in which the advertisement aired. The Commission concluded that the “material involvement” conduct standard in 11 CFR 109.21(d)(2) was satisfied because the President’s agents “review[ed] the final script in advance of the President’s appearance in the advertisements for legal compliance, factual accuracy, quality, consistency with the President’s position and any content that distracts from or distorts the ‘endorsement’ message that the President wishes to convey.”<sup>16</sup> Advisory Opinion 2004–01. Similarly, in Advisory Opinion 2003–25, the Commission considered an advertisement featuring a U.S. Senator’s endorsement of a candidate for mayor. In that opinion, the Commission determined that it was highly implausible that a Federal candidate would appear in a communication endorsing a local candidate without being materially involved in one or more of the decisions listed in the “material involvement” conduct standard.

The Commission seeks comment on whether to exempt from the coordinated communication rules a Federal candidate’s appearance or use of a candidate’s name in a communication to endorse other Federal or non-Federal candidates. Do such endorsements benefit the endorsing candidate? The Commission also invites comment on whether any such exemption should be limited to communications that do not PASO the endorsing candidate. Does the fact that the *endorsing* candidate appears in the communication inevitably promote the endorsing candidate?

Similarly, the Commission seeks comment on whether to exempt from the coordinated communication rules a Federal candidate’s appearance in a communication that solicits funds for

<sup>16</sup> The Commission further determined that, for advertisements distributed within 120 days of the Presidential primary in the State in which the advertisement aired, the advertisements’ production and distribution costs paid for by the congressional candidate’s committee but attributable to the President’s authorized committee were contributions to the President’s committee by the congressional candidate’s committee, but that no contribution would result if the President’s committee reimbursed the congressional candidate’s committee for its attributable share of the costs.

other Federal or non-Federal candidates, party committees, political action committees, or other political committees. Do such solicitations benefit the candidate who makes them? The Commission also invites comment on whether any such exemption should be limited to communications that do not PASO the soliciting candidate, or, in the alternative, do not expressly advocate the election or defeat of the soliciting candidate.

The Commission also seeks comment on whether a similar exemption from the coordinated communication rules should also apply to a Federal candidate's appearance in communications that endorse, or solicit funds for, State ballot initiatives.

### 3. Proposed Clarification of Application of 120-day Time Frame Requirement in 11 CFR 109.21(c)(4)(ii)

Advisory Opinion 2004–01, discussed above, concerned President Bush's appearance in a television advertisement paid for by a congressional candidate where President Bush endorsed that congressional candidate. The Commission determined that any airing of the advertisement that occurred more than 120 days before the Presidential primary in the State in which the advertisement aired was not an in-kind contribution to President Bush because it did not satisfy the fourth content standard (*i.e.*, 11 CFR 109.21(c)(4)). In making this determination, the Commission looked at whether the communication was aired within 120 days before the non-paying candidate's (*i.e.*, President Bush's) election rather than whether it was aired within 120 days before the paying congressional candidate's election. The regulatory text for Alternative 1 reflects the Commission's proposal to amend its coordinated communication rules to incorporate the approach taken in Advisory Opinion 2004–01 and to make clear that the time frame applies only to the election of a Federal candidate who is clearly identified and who has not paid for the communication.

This alteration would clarify that no in-kind contribution is made under the coordinated communication regulations to a candidate for Federal office who is referred to in a public communication if the referenced candidate will not appear as a Federal candidate on a ballot within 120 days of the distribution of the communication. *See* Advisory Opinion 2005–18, Concurring Opinion of Chairman Thomas, Vice Chairman Toner, Commissioners Mason, McDonald, and Weintraub.

For example, a Senator whose reelection is not until 2008 appears in an advertisement with a 2006 House candidate. The advertisement is aired within 120 days of the House candidate's election, is paid for by the House candidate's campaign committee, and is aired in the State where the Senator will seek reelection in 2008. This advertisement would not be an in-kind contribution to the Senator because the advertisement was not aired within 120 days of the Senator's 2008 election.

The Commission seeks comment on whether the proposed language properly effectuates this clarification.

## V. Issues Regarding the Conduct Prong

The conduct prong of the Commission's coordinated communication regulations was not challenged in *Shays v. FEC*. Nonetheless, the Commission is taking this opportunity to evaluate how certain aspects of the conduct prong work in practice.

### 1. The "Request or Suggest" Conduct Standard in 11 CFR 109.21(d)(1)

The first conduct standard of the coordinated communications test is satisfied if a communication is created, produced or distributed at the request or suggestion of a candidate, a candidate's authorized committee, or a political party committee, or their agents. *See* 11 CFR 109.21(d)(1). The Commission invites comment on whether, even if the Commission decides to retain the *content* prong of the coordinated communication test, it should provide that if the first *conduct* standard is satisfied, the communication would automatically qualify as a coordinated communication without also having to satisfy any of the standards contained in the *content* prong. If a public communication is made at the request or suggestion of a candidate or a political party, then does that communication presumptively have value to the political entity that it was coordinated with, regardless of timing or content? Would such a proposal capture communications that are not made for the purpose of influencing elections? Are there examples of public communications, such as lobbying communications or communications supporting charitable or other non-political causes, that are made at the "request or suggestion" of a Federal candidate but that do not have value for the candidate's campaign?

### 2. The "Common Vendor" and "Former Employee" Conduct Standards in 11 CFR 109.21(d)(4) and (5)

The fourth standard of the conduct prong of the coordinated communication rules involves common vendors, and the fifth standard involves former employees. *See* 11 CFR 109.21(d)(4) and (5). The Commission intended these standards to implement Congress's requirement in BCRA that the Commission address "the use of a common vendor" and "persons who previously served as an employee of a candidate or a political party committee" in the context of coordination. BCRA, Pub. L. No. 107–55, sec. 214(c)(2) and (3) (2002).

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 a previous or current relationship with the political party committee or the clearly identified candidate referred to in the communication that puts the commercial vendor in a position to acquire material information about the plans, projects, activities, or needs of the candidate or political party committee, and (3) the commercial vendor uses or conveys material information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or material information used by the commercial vendor in serving the candidate or political party committee. *See* 11 CFR 109.21(d)(4).

The "former employee" conduct standard is satisfied if (1) the person paying for the communication was, or is, employing a person who was an employee of the candidate or the political party committee clearly identified in the communication, and (2) the former employee uses or conveys material information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or material information used by the former employee in serving the candidate or political party committee. *See* 11 CFR 109.21(d)(5).

The first three conduct standards in 11 CFR 109.21(d)(1)–(3) are satisfied only if either the principals themselves (*i.e.*, candidates, their authorized committees, or political party committees) or their agents coordinate with the person paying for the

communication.<sup>17</sup> However, because commercial vendors and former employees might not be agents of a candidate or a political party committee at the time they use or convey material information to a person paying for a communication, the “common vendor” and the “former employee” conduct standards can be satisfied by persons other than the principals themselves or their agents. The Commission seeks comment on whether it should change the coordinated communication regulations to cover common vendors and former employees only if these common vendors and former employees are agents under the Commission’s definition of agent in 11 CFR 109.3.<sup>18</sup> Does the Commission have authority under the Act to make this change? If the Commission does make this change, would such agents then be covered by the first three conduct standards in 11 CFR 109.21(d)(1)–(3) or would the “common vendor” and the “former employee” conduct standards still cover some activities not captured by the first three conduct standards? If the Commission revises the common vendor and former employee conduct standards to cover only common vendors and former employees who are also agents, would that render these two conduct standards superfluous? If so, should the Commission then eliminate the conduct

standards in 11 CFR 109.21(d)(4) and (5)? Given that BCRA specifically required the Commission to promulgate regulations that addressed payments for the use of common vendors and for communications directed or made by persons who previously served as employees of a candidate or political party, does the Commission have authority under the Act to eliminate 11 CFR 109.21(d)(4) and (5)?

In the rulemaking proceeding that resulted in the *2002 Coordination Final Rules*, the Commission received many comments on the common vendor conduct standard. Some of the comments expressed concern about the potential liability that would attach under the common vendor standard to candidates and party committees who employ the same vendors as other candidates and party committees because of the limited number of qualified vendors in a given geographic area.

The Commission addressed this and other concerns in the *2002 Coordination Final Rules* by limiting the common vendor conduct standard to commercial vendors whose usual and normal business includes the creation, production, or distribution of communications; who have provided certain enumerated services to a candidate or party committee that put the vendor in a position to acquire information about the plans, projects, activities or needs of the candidate or party committee material to the creation, production, or distribution of the communication; who provide the specified services during the current election cycle; and who use or convey information about the candidate’s or party committee’s campaign plans, projects, activities or needs that is material to the creation, production, or distribution of the communication. *See* 68 FR 436–37. The Commission also excluded lobbying activities and information not related to a campaign from the scope of the rule.

The Commission stated that it did not anticipate that a person who hired a vendor and followed prudent business practices would be inconvenienced by the common vendor conduct standard. *See id.* at 437. The Commission now invites comments on whether this supposition has proven to be correct.

The Commission also seeks comment on whether it should create a rebuttable presumption that a common vendor or former employee has not engaged in coordinated conduct under 11 CFR 109.21(d)(4) and (5), if the common vendor or former employee has taken certain specified actions, such as the use of so-called “firewalls,” to ensure that

no material information about the plans, projects, activities, or needs of a candidate or political party committee is used or conveyed to a third party. The Commission considered and rejected proposals to establish rebuttable presumptions and safe harbors in the common vendor conduct standard in the *2002 Coordination Final Rules*. *See id.* More recently, however, the Commission recognized in the context of the first three conduct standards (11 CFR 109.21(d)(1)–(3)) that the presence of a firewall between staff assigned by a political committee to work directly with a candidate and staff assigned by the political committee to work on advertisements supporting that candidate was sufficient to refute certain allegations of coordination in a particular case. *See* Matter Under Review (“MUR”) 5506, First General Counsel’s Report at 5–8 (Commission found no reason to believe EMILY’s List had violated section 441a of the Act based, in part, on a representation by EMILY’s List that it had created a firewall whereby employees, volunteers, and consultants who handle advertising buys are “barred, as a matter of policy, from interacting with federal candidates, political party committees, or the agents of the foregoing. These employees, volunteers and consultants are also barred from interacting with others within EMILY’s List regarding specified candidates or officeholders.”).

If the Commission decides to establish a rebuttable presumption or safe harbor in the common vendor and former employee conduct standards, what factors should the Commission consider in determining whether an effective firewall exists? Is the role of a firewall best addressed on a case-by-case basis through the enforcement process? Aside from setting up firewalls, are there other actions by a common vendor, former employee, or the political committees that engage them that the Commission should consider a safe harbor?

The common vendor conduct standard and the former employee conduct standard incorporate the current election cycle<sup>19</sup> as a temporal limit on their application. *See* 11 CFR 109.21(d)(4)(ii), (d)(5)(i). In the *2002 Coordination Final Rules*, the Commission explained that “[t]he election cycle provides a clearly defined period of time that is reasonably related to an election.” *2002 Coordination Final Rules* at 436. The Commission invites comments on how this temporal limit works in practice. Is information about a candidate’s campaign plans, products,

<sup>19</sup>The term “election cycle” is defined in 11 CFR 100.3(b).

<sup>17</sup>The first conduct standard addresses communications produced at the request or suggestion of a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing. *See* 11 CFR 109.21(d)(1). The second conduct standard addresses communications with which a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing has been materially involved. *See* 11 CFR 109.21(d)(2). The third conduct standard addresses communications produced after one or more substantial discussions between the person paying for the communication, or that person’s employees or agents, and the candidate clearly identified in the communication, the candidate’s authorized committee, the candidate’s opponent, or the opponent’s authorized committee, or an agent of any of the foregoing. *See* 11 CFR 109.21(d)(3).

<sup>18</sup>The definition of “agent” includes any person who has actual authority “to make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c)” on behalf of a political party committee or a Federal candidate or officeholder. *See* 11 CFR 109.3(a)(2) and (b)(2). For reasons unrelated to the issues addressed in this rulemaking, the *Shays District* court held that the Commission’s definition of agent at 11 CFR 109.3 violated APA requirements and remanded the regulation to the Commission for action consistent with its decision. *Shays District* at 88. In order to comply with the *Shays District* decision, the Commission has issued an NPRM that sought comment on whether the Commission should retain the current definition of “agent” and on several alternatives for revising the definition. *See Notice of Proposed Rulemaking on the Definition of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures*, 70 FR 5382 (Feb. 2, 2005). The Commission has not yet issued final rules in this rulemaking.

activities, or needs of such an ephemeral nature that its strategic significance dissipates shortly after the information is communicated, which may be long before the end of the election cycle, or does the information remain relevant throughout the election cycle? If the Commission concludes that the strategic value of such information does not necessarily last throughout an entire election cycle, should the Commission change the common vendor and former employee conduct standards to cover a shorter time frame? If so, how long should such a time frame be? Should the Commission adopt a 60-day time frame based on the Commission's determination, underlying its longstanding rule with respect to polling results, that such information outside of the 60-day time frame is of very little value?<sup>20</sup> Alternatively, does the Commission's experience with the polling regulations provide evidence that the Commission should adopt a 180-day window for its coordination regulations? Alternatively, would retention of the election cycle time frame in the current rule more accurately align the rule with existing campaign practices?

### 3. *The Use of Publicly Available Information in "Coordinated Communications"*—Proposed 11 CFR 109.21(g)

The Commission seeks comment on whether to create a safe harbor that would make clear as a matter of law that (1) the use of publicly available information in connection with a public communication by any person paying for that public communication does not satisfy any of the conduct standards, and (2) a candidate's or political party committee's conveyance of publicly available information to any person paying for a public communication does not satisfy any of the conduct standards. This safe harbor in proposed 11 CFR 109.21(g) would cover situations in

<sup>20</sup> The Commission's regulations on allocation of polling expenses at 11 CFR 106.4(g) provide that a candidate or political committee that receives poll results from a third party who commissioned and paid for the poll may report the value of the in-kind contribution as an allocated percentage of the original cost of the poll, so long as the candidate or political committee received the poll results more than 15 days after the initial recipient received such results. Section 106.4(g) of the Commission's rules provides three tiers of discounted allocation based on how long the gap is between the original receipt of poll results and their receipt by a candidate or political committee—poll results received by a candidate or political committee between 16 and 60 days following receipt by the initial recipient may be allocated at 50 percent of the original cost; between 61 and 180 days the allocation is at 5 percent of original cost; beyond 180 days, a candidate or political committee need not allocate any amount.

which a candidate, authorized committee, or political party committee has conveyed information publicly, such as, for example, at a campaign rally or on the candidate's or party's Web site or in a press release, or where such information is otherwise publicly available, such as having appeared in newspaper, television, or other press reports. Should such a safe harbor also cover situations in which the person paying for the communication has received the information both from the candidate, authorized committee, or political party committee, in a non-public context and also from a public source? How should the rules treat a situation in which the person paying for the communication did, in fact, receive the information only from the candidate, authorized committee, or political party committee, but could also have obtained the same information from a public source?

The Commission also seeks comment on whether, if it adopts this safe harbor for the use of publicly available information, the burden of establishing whether the information was publicly available should be on the Commission or on the party seeking to make use of the safe harbor. If that burden were on the Commission, how would the Commission be able to establish that the information was not publicly available at the relevant time, given that some information, especially information available through the Internet, may be in the public domain only for a limited time period?

### 4. *Relationship Between Conduct and Content Standards*

If the Commission broadens or eliminates the content standard for coordinated communications, the Commission seeks comment on whether it would be appropriate to narrow or otherwise modify any of the conduct standards. Are the conduct and content standards properly understood as dynamic and working in conjunction with each other?

### VI. Issue Regarding the Payment Prong

The payment prong (11 CFR 109.21(a)(1)) of the Commission's coordinated communication regulations was not challenged in *Shays v. FEC*. Nonetheless, the Commission is taking this opportunity to seek comment on whether it should clarify one aspect of the payment prong. Specifically, the Commission seeks comment on whether "in whole or in part" should be added to 11 CFR 109.21(a)(1) of the coordinated communication rules. The amendment would clarify that the payment prong is satisfied if a person

other than the candidate, the candidate's authorized committee, or political party committee, pays for only part of the costs of the communication. Under this proposed amendment, 11 CFR 109.21(a)(1) would be revised to read, "Is paid, in whole or in part, by a person other than that candidate, authorized committee, political party committee, or agent of any of the foregoing." Does this amendment best effectuate the intended clarification of the payment prong? Would this clarification alter the application of the content or conduct prongs of the coordinated communication rules? Would this clarification inadvertently capture communications properly attributed under the time and space rules set forth at 11 CFR 106.1(a)(1)?

### VII. Party Coordinated Communications (11 CFR 109.37)

The Commission notes that its "party coordinated communication" regulation at 11 CFR 109.37 also contains a three-prong test for determining whether a communication is coordinated between a candidate and a political party committee. Although not addressed in the *Shays* cases, 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).<sup>21</sup> See 11 CFR 109.37(a)(2). If the Commission decides to revise current 11 CFR 109.21 as described in the alternatives set forth above, the Commission seeks comment on whether it should make conforming changes to the party coordinated communication regulations in 11 CFR 109.37.

In addressing the conduct of national party officers under the national party soft money ban at 2 U.S.C. 441(a), the Supreme Court stated, "[n]othing on the face of [section 441(a)] prohibits national party officers, whether acting in their official or individual capacities, from sitting down with state and local party committees or candidates to plan and advise how to raise and spend soft money. As long as the national party officer does not personally spend, receive, direct, or solicit soft money, [section 441(a)] permits a wide range of joint planning and electioneering activity." *McConnell*, 540 U.S. at 160 (citing to Brief for Intervenor-

<sup>21</sup> 11 CFR 109.37(a)(2) differs from 11 CFR 109.21(c) in two ways: first, it does not contain a separate content standard for electioneering communications and, second, the content standard in section 109.37(a)(2)(iii), the equivalent of the fourth content standard in section 109.21(c)(4), can be satisfied only by reference to a clearly identified Federal candidate and not, as in section 109.21(c)(4), also by reference to a political party.

Defendants Sen. John McCain *et al.* in No. 02-1674 *et al.*, p. 22, which stated that “BCRA leaves parties and candidates free to coordinate campaign plans and activities, political messages, and fund raising goals with one another”); *see also* Advisory Opinion 2005-02 (incorporating such principles). The Commission seeks comment on the relevance, if any, of this statement to the Commission’s coordinated communication regulations. Does *McConnell* render the application of the conduct standards to coordination between a candidate and a political party committee at 11 CFR 109.37(a)(3) obsolete? Does it preclude a finding of coordination under the material involvement prong at 11 CFR 109.21(d)(2)? Does the relationship between national party candidates and their parties justify adopting more permissive conduct standards for “party coordinated communications” in 11 CFR 109.37 than for coordinated communications in 11 CFR 109.21? If so, how should the conduct standards for “party coordinated communications” be amended?

#### **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 entities 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, but classifies 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).

Moreover, 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.

With respect to commercial vendors whose clients include political party committees or other political committees, the proposed rules consider ways to reduce the existing regulatory restrictions. Thus, rather than adding an economic burden, the proposed rules would potentially have a beneficial economic impact on such commercial vendors.

#### **List of Subjects in 11 CFR Part 109**

Elections, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend Subchapter A of Chapter I of Title 11 of the *Code of Federal Regulations* as follows:

#### **PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) AND (d), AND PUB. L. 107-55 SEC. 214(c))**

1. The authority citation for Part 109 would continue to read as follows:

**Authority:** 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L. 107-55, 116 Stat. 81.

##### **Alternative 1**

2. Section 109.21 would be amended by revising paragraphs (c)(1) and (c)(4) 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)(4) satisfies the content standard of this section.

(1) An electioneering communication under 11 CFR 100.29.

(2) 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 paragraph (d)(6) of this section.

(3) A public communication 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, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section is true. Payment for a public communication that otherwise satisfies paragraphs (c)(4)(i), (ii), and (iii) of this section is not an in-kind contribution to a candidate if the public communication is not publicly distributed or otherwise publicly disseminated 120 days or fewer before that candidate’s own election.

(i) The public communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or

more candidates of the political party appear on the ballot.

\* \* \* \* \*

**Alternative 3**

3. Section 109.21 would be amended by revising paragraphs (c)(4) to read as follows:

**§ 109.21 What is a “coordinated communication”?**

\* \* \* \* \*

(c) \* \* \*

(4) A public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i) and (ii) of this section is true.

(i) The public communication refers to a political party or to a clearly identified candidate for Federal office; and

(ii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

\* \* \* \* \*

**Alternative 4**

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

**§ 109.21 What is a “coordinated communication”?**

\* \* \* \* \*

(c) \* \* \*

(4) A public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section is true.

(i) The public communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication promotes, supports, attacks, or opposes or the political party or clearly identified candidate for Federal office; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

\* \* \* \* \*

**Alternative 5**

5. Section 109.21 would be amended revising the introductory language for paragraph (c) and by adding a 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) satisfies the content standard of this section.

\* \* \* \* \*

(5) A public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(5)(i), (ii), and (iii) of this section is true.

(i) The public communication is made by a political committee, as defined in 11 CFR 100.5;

(ii) The public communication refers to a political party or to a clearly identified candidate for Federal office; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

\* \* \* \* \*

**Alternative 6**

6. Section 109.21 would be amended by revising paragraph (c)(4) to read as follows:

**§ 109.21 What is a “coordinated communication”?**

\* \* \* \* \*

(c) \* \* \*

(4) A public communication, as defined in 11 CFR 100.26, that is made for the purpose of influencing an election for Federal office.

\* \* \* \* \*

**Alternative 7**

7. Section 109.3 would be amended by revising paragraphs (a)(2) and (b)(2) to read as follows:

**§ 109.3 Definitions.**

\* \* \* \* \*

(a) \* \* \*

(2) To make or authorize an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26.

\* \* \* \* \*

(b) \* \* \*

(2) To make or authorize an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26.

\* \* \* \* \*

8. Section 109.21 would be amended by:

- a. Revising paragraph (a)(2);
- b. Removing and reserving paragraph (c)

c. Revising the first sentence of paragraph (d)(6) to read as set forth below.

The additions and revisions would read as follows:

**§ 109.21 What is a “coordinated communication”?**

\* \* \* \* \*

(a) \* \* \*

(2) Is an electioneering communication as defined in 11 CFR 100.29 or a public communication as defined in 11 CFR 100.26; and

\* \* \* \* \*

(c) [Removed and reserved.].

(d) \* \* \*

(6) *Dissemination, distribution, or republication of campaign material.* A 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, shall satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section only 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. \* \* \*

\* \* \* \* \*

**Proposed Safe Harbor for Use of Publicly Available Information**

9. Section 109.21 would be amended by adding a new paragraph (g) to read as follows:

**§ 109.21 What is a “coordinated communication”?**

\* \* \* \* \*

(g) *Safe harbor for use of publicly available information.*

(1) The use of publicly available information by any person paying for a public communication in connection with a public communication does not satisfy any of the conduct standards in paragraph (d) of this section.

(2) A candidate’s or political party committee’s conveyance of publicly available information to any person paying for a public communication does not satisfy any of the conduct standards in paragraph (d) of this section.

**Proposed Clarification of “Payment Prong”**

10. Section 109.21 would be amended by revising paragraph (a)(1) to read as follows:

**§ 109.21 What is a “coordinated communication”?**

(a) \* \* \*

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

committee, or agent of any of the foregoing when the communication:

\* \* \* \* \*

Dated: December 8, 2005.

**Scott E. Thomas,**

*Chairman, Federal Election Commission.*

[FR Doc. E5-7293 Filed 12-13-05; 8:45 am]

BILLING CODE 6715-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2005-23075; Airspace Docket 05-ASO-12]

#### Proposed Establishment of Class E Airspace; Nicholasville, KY

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to establish Class E airspace at Nicholasville, KY. Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAPs) Runway (RWY) 9 and RWY 27 have been developed for Lucas Field Airport. As a result, controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain the SIAPs and for Instrument Flight Rules (IFR) operations at Lucas Field Airport. The operating status of the airport will change from Visual Flight Rules (VFR) to include IFR operations concurrent with the publication of the SIAPs.

**DATES:** Comments must be received on or before January 13, 2006.

**ADDRESSES:** Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590-0001. You must identify the docket number FAA-2005-23075; Airspace Docket 05-ASO-12, at the beginning of your comments. You may also submit comments on the Internet at <http://dms.dot.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 plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation

Administration, Room 550, 1701 Columbia Avenue, College Park, Georgia 30337.

#### FOR FURTHER INFORMATION CONTACT:

Mark D. Ward, Manager, Airspace and Operations Branch, Eastern En Route and Oceanic Service Area, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305-5586.

#### 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-2005-23075/Airspace Docket No. 05-ASO-12." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

##### Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at <http://dms.dot.gov>. Recently published rulemaking documents can also be accessed through the FAA's Web page at <http://www.faa.gov> or the Superintendent of Document's Web page at <http://www.access.gpo.gov/nara>. Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA-400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-8783. Communications must identify both docket numbers for this

notice. 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

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace at Nicholasville, KY. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface of the earth are published in Paragraph 6005 of FAA Order 7400.9N, dated September 1, 2005, and effective September 16, 2005, 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.

##### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

##### The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

#### **PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS**

1. The authority citation for Part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389.