(3) The lender must certify that the equity requirement was determined using balance sheets prepared in accordance with GAAP and met upon giving effect to the entirety of the loan in the calculation, whether or not the loan itself is fully advanced, as of the date the guaranteed loan is closed.

* * * * *

Dated: May 30, 2006.

Thomas C. Dorr,

Under Secretary, Rural Development.

[FR Doc. E6–8891 Filed 6–7–06; 8:45 am]

BILLING CODE 3410–XY–P

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

RIN: 3150–AH83

Revision of Fee Schedules; Fee Recovery for FY 2006; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule; correction.

SUMMARY: This document corrects a final rule appearing in the **Federal Register** on May 30, 2006 (71 FR 30722) concerning the licensing, inspection, and annual fees charged to NRC applicants and licensees in compliance with the Omnibus Budget Reconciliation Act of 1990, as amended. This action is necessary to correct typographical and printing errors.

DATES: *Effective Date:* July 31, 2006.

FOR FURTHER INFORMATION CONTACT: Tammy Croote, telephone 301–415–6041; Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

■ 1. On page 30735, in the third column, in the last line of the continued paragraph, the reference to ''Section III.B.3.a–'' is corrected to read ''Section III.B.3.a–h''.

■ 2. On page 30741, under Table XIV.—ANNUAL FEE SUMMARY CALCULATIONS FOR THE SPENT FUEL STORAGE/REACTOR DECOMMISSIONING FEE CLASS, in the first column, in the fourth line, the phrase ''60 prorated annual fee'' is corrected to read ''60 percent prorated annual fee''.

§ 171.16 [Corrected]

■ 3. On page 30755, the second sentence of footnote 1 is corrected to read, ''However, the annual fee is waived for those materials licenses and holders of certificates, registrations, and approvals who either filed for termination of their licenses or approvals or filed for possession only/storage licenses before October 1, 2005, and permanently ceased licensed activities entirely by September 30, 2005.''

§ 171.19 [Corrected]

■ 4. On page 30756, in the first complete paragraph, the third sentence is corrected to read, ''The materials licensees that are billed on the anniversary date of the license are those covered by fee categories 1C, 1D, 2(A)(2), 2(A)(3), 2(A)(4), 2B, 2C, 3A through 3P, and 4B through 9D.''

Dated at Rockville, Maryland, this 2nd day of June, 2006.

For the Nuclear Regulatory Commission.

Peter J. Rabideau,

Acting Chief Financial Officer.

[FR Doc. E6–8923 Filed 6–7–06; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL ELECTION COMMISSION

11 CFR Part 109

[Notice 2006–10]

Coordinated Communications

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of rules to Congress.

SUMMARY: The Federal Election Commission is revising its regulations regarding communications that are coordinated with Federal candidates and political party committees. The Commission's 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. These final rules implement the recent decision of the Court of Appeals in *Shays* v. *Federal Election Commission,* in which the court determined that the Commission needs to provide a more complete explanation and justification for its rules pursuant to the Administrative Procedure Act. To comply with the court's decision, and to address other issues involving the coordinated communication rules, the Commission is issuing these Final Rules and Explanation and Justification. Further information is provided in the supplementary information that follows.

DATES: Effective July 10, 2006.

FOR FURTHER INFORMATION CONTACT: Mr. Brad C. Deutsch, Assistant General Counsel, Mr. Ron B. Katwan, Ms. Margaret G. Perl, or Ms. Esa L. Sferra, Attorneys, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Scope of Regulatory Changes

The Commission is revising its regulations regarding communications that are coordinated with Federal candidates and political party committees. The Commission is: (1) Revising the fourth content standard at 11 CFR 109.21(c)(4) to establish separate time frames for communications referring to political parties, Congressional and Presidential candidates; (2) creating a safe harbor for certain endorsements and solicitations by Federal candidates; (3) revising the temporal limit of the common vendor and former employee conduct standards; (4) creating a safe harbor for the use of publicly available information; (5) creating a safe harbor for the establishment and use of a firewall; (6) clarifying that the payment prong of the coordinated communication test is satisfied if an outside person pays for only part of the costs of a communication; and (7) revising 11 CFR 109.37 to include the applicable time frame and safe harbor revisions in 11 CFR 109.21.

Transmission of Final Rules to Congress

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules that follow were transmitted to Congress on June 2, 2006.

Explanation and Justification

I. Background

A. Bipartisan Campaign Reform Act and 2002 Coordination Rulemaking

The Bipartisan Campaign Reform Act of 2002,[1] (''BCRA''), 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.[2] Congress specified in BCRA that the Commission's new regulations ''shall not require agreement or formal collaboration to establish coordination.''

[1] Pub. L. 107–155, 116 Stat. 81 (2002); amending the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* (the ''Act'' or ''FECA'').

[2] Pub. L. 107–155, sec. 214(b), (c) (2002).

BCRA, sec. 214(c), 116 Stat. 81 at 95. ''Apart from this negative command—'shall not require'—BCRA merely listed several topics the rules 'shall address,' providing no guidance as to how the FEC should address them.'' *Shays* v. *FEC,* 414 F.3d 76, 97–98 (D.C. Cir. 2005). On December 17, 2002, the Commission promulgated regulations as required by BCRA. *See* 11 CFR 109.21; *see also, Final Rules and Explanation and Justification on Coordinated and Independent Expenditures,* 68 FR 421 (Jan. 3, 2003) (''*2002 Coordination Final Rules*'').

The Commission's 2002 coordinated communication regulations set forth a three-prong test for determining whether a communication is a coordinated communication, and therefore an in-kind contribution to, and an expenditure by, a candidate, a candidate's authorized committee, or a political party committee. *See* 11 CFR 109.21(a). First, the communication must be paid for by someone other than a candidate, a candidate's authorized committee, a political party committee, or their agents (the ''payment prong''). *See* 11 CFR 109.21(a)(1). Second, the communication must satisfy one of four content standards (the ''content prong''). *See* 11 CFR 109.21(a)(2) and (c). Third, the communication must satisfy 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.''

B. Content Prong Challenged in Shays v. *FEC*

In 2003, Representatives Shays and Meehan brought suit in Federal District Court challenging, among other Commission regulations, the content prong of the Commission's coordination regulations. *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). The content prong is comprised of four sub-categories of communications. A communication that falls in any of the four categories satisfies the prong. The purpose of the content prong is to ''ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a Federal election,'' and therefore are not ''expenditures'' subject to regulation under the Act. *See 2002 Coordination Final Rules* at 426. Accordingly, each of the four content standards that comprise the ''content prong'' identifies a category of communications whose ''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).[3] This content standard implements the statutory directive that disbursements for coordinated electioneering communications be treated as in-kind contributions to, and expenditures by, the candidate or political party supported by the communication.

The second content standard is satisfied by a public communication[4] made at any time that disseminates, distributes, or republishes campaign materials prepared by a candidate, a candidate's authorized committee, or agents thereof. *See* 11 CFR 109.21(c)(2). This content standard implements Congress's mandate that the Commission's rules on coordinated communications address the ''republication of campaign materials.'' *See* Pub. L. 107–155, sec. 214(c)(1) (2002). The Commission concluded that communications that disseminate, distribute, or republish campaign materials, no matter when such communications are made, can be reasonably construed only as for the purpose of influencing an election.

The third content standard is satisfied if a public communication made at any time expressly advocates[5] the election or defeat of a clearly identified candidate for Federal office. See 11 CFR 109.21(c)(3). 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 in the 2002 rule 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;[6] 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) (2002).

In incorporating the 120-day time frame into the fourth content standard, the Commission sought to create a bright-line rule that provided clear guidance for those seeking to produce and distribute public communications that do not republish campaign materials and do not contain express advocacy, communications that are already covered by the second and third content standards, respectively. 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.'' Id. (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 in part on the fact that, in BCRA, Congress defined ''Federal election activity'' (''FEA'') as, *inter alia,* voter registration activity ''during the period that begins on the date that is 120 days'' before a Federal election. The Commission concluded 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)).

1. Shays District Court Decision

The District Court held that the ''content prong'' of the Commission's coordinated communication regulations satisfied the first step of *Chevron* analysis, but did not satisfy the second

[3] 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); 11 CFR 100.29.

[4] 11 CFR 100.26 defines a ''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 general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.'' *See Final Rules and Explanation and Justification: Internet Communications,* 71 FR 18589 (published April 12, 2006; effective May 12, 2006); *see also* 2 U.S.C. 431(22).

[5] The term ''expressly advocating'' is defined in the Commission's regulations at 11 CFR 100.22.

[6] The term ''election'' includes general elections, primary elections, runoff elections, caucuses or conventions, and special elections. *See* 11 CFR 100.2.

step of *Chevron* review.[7] *Shays District* at 62–65. The District Court concluded that limiting the coordinated communication definition to communications that satisfy the content standards at 11 CFR 109.21(c)(1) through (4), ''undercuts FECA's statutory purposes and therefore these aspects of the regulations are entitled to no deference.'' *Shays District* at 65. 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. *Id.* at 63–64. Therefore, the Commission's exclusion of communications under the 120-day test failed the second step of Chevron review. *Id.* at 64–65.

2. Shays Court of Appeals Decision

The Commission appealed the District Court's decision. In 2005, a three-judge panel of the Court of Appeals for the D.C. Circuit considered the Commission's appeal. *See Shays Appeal* at 97–102. The Court of Appeals found that the Commission's regulations satisfied *Chevron* step one, and, contrary to the District Court's opinion, satisfied *Chevron* step two as well. *Shays Appeal* at 99–100. The Court of Appeals concluded: ''Accordingly, we reject Shays's and Meehan's argument that FECA precludes content-based standards under *Chevron* step one. And for the same reasons, we disagree 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.

In reaching its holding, the Court of Appeals found that Congress provided the Commission with an ''open-ended directive'' under which to promulgate coordination regulations. *Shays Appeal* at 97–98. ''[I]n the BCRA provision most clearly on point—the directive calling for new regulations—Congress studiously avoided prescribing any specific standard, save abrogation of the 'collaboration or agreement' test. Given this 'lack of guidance in the statute,' we cannot say that BCRA clearly forecloses the FEC's approach. Nor do we see clearly contrary intent, as do Shays and Meehan, in FECA's preexisting 'expenditure' and 'contribution' definitions.'' *Id.* at 99 (internal citation omitted).

The Court of Appeals noted that under the statute, a communication that is a coordinated expenditure ''shall be considered to be a contribution,'' and the Commission ''lacks discretion to exclude that communication from its coordinated communication rule.'' *Id.* at 99. ''Yet to qualify as [an] 'expenditure' in the first place, *spending must be undertaken 'for the purpose of influencing' a federal election* (or else involve 'financing' for redistribution of campaign materials).'' *Id.* (emphasis added). The Court of Appeals emphasized that ''time, place, and content may be critical indicia of communicative purpose.'' *Shays Appeal* at 99. The Court of Appeals recognized, ''Insofar as such statements may relate to political or legislative goals independent from any electoral race—goals like influencing legislators' votes or increasing public awareness—we cannot conclude that Congress unambiguously intended to count them as 'expenditures' (and thus as 'contributions' when coordinated). To the contrary, giving appropriate *Chevron* deference, we think the FEC could construe the expenditure definition's purposive language as leaving space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign. Moreover, we can hardly fault the FEC's efforts to develop an 'objective, bright-line test [that] does not unduly compromise the Act's purposes,' considering that we approved just such a test for 'contribution' in *Orloski.* 795 F.2d at 165.'' *Id.* Accordingly, the Court of Appeals concluded that the Commission's regulation satisfied *Chevron* steps one and two. *Id.* at 99–100.

While finding the content prong was a permissible construction of Congressional intent, the Court of Appeals held that the content prong was inadequately explained under the Administrative Procedure Act. *Id.* at 100. The Court of Appeals stated, ''while we accept the FEC's premise that time, place, and content may illuminate communicative purpose and thus distinguish FECA 'expenditures' from other communications, we detect no support in the record for the specific content-based standard the Commission has promulgated.'' *Id.* at 102. In response to this finding by the Court of Appeals, the Commission opened the present rulemaking.

C. Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking

The Commission published a Notice of Proposed Rulemaking (*''NPRM''*) on December 14, 2005, in which it sought comment on a number of alternatives for retaining or revising the content standard of the coordinated communication regulations and on several other issues involving the coordinated communication rules. *See* 70 FR 73946 (December 14, 2005). The comment period closed on January 13, 2006. The Commission received written comments from 28 commenters. The Commission held a public hearing on January 25 and 26, 2006, at which 18 witnesses testified. The comments and a transcript of the public hearing are available at *http://www.fec.gov/law/law_rulemakings.shtml#coordinated.*[8]

In the *NPRM,* the Commission specifically requested that commenters submit empirical data showing the time period before an election during which campaign communications generally occur. *NPRM* at 73949. None of the commenters provided empirical data in response to the Commission's request, either in written comments or at the public hearing. One joint comment did provide a compilation of selected advertisements run during recent election cycles.

Because no commenters provided empirical data in response to the Commission's request, the Commission licensed data from TNS Media Intelligence/CMAG (''CMAG'') regarding television advertising spots run by Presidential, Senate, and House of Representatives candidates during the 2004 election cycle. CMAG is a leading provider of political advertising tracking and provides media analysis services to a wide variety of clients, including national media organizations, foundations, academics, and Fortune 100 companies. *See* www.tnsmi-cmag.com. CMAG also provided data to the Brennan Center in conjunction with its 2000 study ''Buying Time,'' which was cited by BCRA's principal sponsors

[7] 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).

[8] For purposes of this document, the terms ''comment'' and ''commenter'' apply to both written comments and oral testimony at the public hearing.

in support of BCRA's provisions. *See, e.g.*, 148 Cong. Rec. S2141 (daily ed. March 20, 2002) (statement of Sen. McCain) (''According to the Brennan Center's 'Buying Time 2000' study, less than one percent of the group-sponsored soft-money ads covered by this provision of the bill were genuine issue discussion, more than 99 percent of these ads were campaign ads. This degree of accuracy is more than sufficient to overcome any claim of substantial overbreadth.'').

The Commission produced graphical representations derived from the CMAG data and made these graphs and the underlying data available on its Web site. The Commission then published a Supplemental Notice of Proposed Rulemaking (*''SNPRM''*) in the **Federal Register** on March 15, 2006, that re-opened the comment period for this rulemaking. 71 FR 13306 (March 15, 2006). The graphs and data are available at the Commission's Web site at *http://www.fec.gov/pdf/nprm/coord_commun/suppNPRMmaterials.shtml.*[9] In the *SNPRM*, the Commission sought additional comment, in light of the information presented by the data, on the issues and questions raised in the *NPRM* regarding the content prong time frame.

The reopened comment period for the *SNPRM* closed on March 22, 2006. The Commission received written comments on the *SNPRM* from 12 commenters, which are also available at *http://www.fec.gov/law/law_rulemakings.shtml#coordinated.*

II. Revised Time Frames for Coordinated Communications (11 CFR 109.21(c)(4))

A. The Commission Has Determined To Retain the Content Prong With Revised Time Frames

The *Shays* Court of Appeals emphasized that retaining a time frame as part of the fourth content standard requires the Commission to undertake a factual inquiry to determine whether the temporal line it draws ''reasonably defines the period before an election when non-express advocacy likely relates to purposes other than 'influencing' a federal election.'' *Shays Appeal* at 101–02. The Court presented three questions to guide the Commission's inquiry: (1) ''Do candidates in fact limit campaign-related advocacy to the four months surrounding elections, or does substantial election-related communication occur outside that window?''; (2) ''Do congressional, senatorial, and presidential races—all covered by this rule—occur on the same cycle, or should different rules apply to each?''; and (3) ''[T]o the extent election-related advocacy now occurs primarily within 120 days, would candidates and collaborators aiming to influence elections simply shift coordinated spending outside that period to avoid the challenged rules' restrictions?'' *Id.* at 102.

Based on its inquiry into the Court of Appeals' questions, the Commission has decided to retain the existing content prong, but revise the applicable time frames in the fourth content standard at 11 CFR 109.21(c)(4). The revision creates separate time frames for communications based on whether they refer to (1) Congressional candidates, (2) Presidential candidates, or (3) political parties. For those communications that refer to Senate and House of Representatives candidates in Congressional primary[10] and general elections, the revised time frame begins 90 days before each candidate's election and ends on the date of that candidate's election. For communications that refer to Presidential candidates, the revised time frame covers, on a State-by-State basis, the period of time from 120 days before the date of a Presidential primary up to and including the date of the general election.[11]

For those communications that reference political parties and do not reference a clearly identified Federal candidate, when such communications occur in a non-Presidential election cycle, the revised time frame period begins 90 days before each election and ends on the date of that election; when such communications occur in a Presidential election cycle, the revised time period covers, on a State-by-State basis, the period of time from 120 days before the date of a primary through the general election. For communications that reference a political party and a clearly identified Federal candidate, the applicable time frame is either the Congressional or Presidential candidate time period, depending upon (1) whether the communication is coordinated with the political party committee or the candidate, (2) whether the upcoming general election is a Presidential or non-Presidential election, and (3) whether the communication is aired in the referenced candidate's jurisdiction.

1. Senate and House Candidates Conduct Nearly All Campaign-Related Advocacy Within 60 Days of an Election

The data obtained by the Commission respond directly to the first question posed by the Court of Appeals: ''Do candidates in fact limit campaign-related advocacy to the four months surrounding elections, or does substantial election-related communication occur outside that window?'' *Shays Appeal* at 102. This question is relevant to the Commission's inquiry because the purpose of the content standard is to provide a bright-line delineation between those coordinated advertisements that are for the purpose of influencing an election—and therefore are ''expenditures'' regulated by the Act—and those that are not. As the *Shays* Court of Appeals stated, ''Insofar as such statements may relate to political or legislative goals independent from any electoral race—goals like influencing legislators' votes or increasing public awareness—we cannot conclude that Congress unambiguously intended to count them as ''expenditures'' (and thus as 'contributions' when coordinated).'' *Shays Appeal* at 99 (''[T]o qualify as [an] 'expenditure' in the first place, spending must be undertaken 'for the purpose of influencing' a federal election.'').

Any time a candidate uses campaign funds to pay for an advertisement, it can be presumed that this advertisement is aired for the purpose of influencing the candidate's election. Additionally, candidates and their campaign staff are experienced and knowledgeable in matters of advertising strategy and are highly motivated to run advertisements at a time when they are likely to influence voters. Thus, data showing when candidates spend their own campaign funds on advertisements

[9] Available at *http://www.fec.gov/pdf/nprm/coord_commun/suppNPRMmaterials.shtml* are ten graphs covering Presidential election data, four graphs covering Senate election data, and four graphs covering House election data, as well as an explanation of the methodology used for each graph. These graphs are titled, and referenced herein, as P1–P10, S1–S4, and H1–H4, respectively. An additional chart regarding Presidential spending in individual ''battleground'' States, *see* note 21, below, is available at *http://www.fec.gov/pdf/nprm/coord_commun/chart_20060407.pdf.* This chart is referenced herein as Chart P11.

[10] The method of choosing nominees for election to Federal office, either by a primary or a preference election, a caucus, or a convention, differs from State to State. This document uses the term ''primary election'' to refer to any election that chooses a nominee for the general election. *See also* note 6, above.

[11] Thus, if State A conducts its Presidential primary on February 1st of the Presidential election year, the time frame in State A for Presidential candidates would begin on approximately October 1st of the year preceding the Presidential election and would end on the date of the Presidential general election. Similarly, if State B held its Presidential primary on June 1st of the Presidential election year, the time frame in State B for Presidential candidates would begin on approximately February 1st of the Presidential election year and end on the date of the Presidential general election.

provide an empirical basis for predicting when advertising that has the purpose of influencing a Federal election occurs. Moreover, in the context of coordination, a candidate has an incentive to ask an outside group to pay for advertisements to be aired precisely during the time period when the candidate believes these advertisements would be effective. Advertisements run outside of the effective time frame are of little value to the candidate, and therefore do not present the potential for corruption or the appearance of corruption that BCRA and the Act intend to prevent.

Commenters agreed that a time frame is helpful in identifying communications that are made for the purpose of influencing an election. As one commenter noted: ''The Commission is reasonable in its belief that election-influencing communications are generally susceptible of temporal definition and limitation. The Commission should continue to determine where that temporal limitation is.'' Moreover, commenters generally agreed that proximity to an election factors into the value of the communication.

The data analyzed by the Commission show that nearly all Senate and House candidate advertising takes place within 60 days of an election. Senate candidates aired 91.60 percent and 94.73 percent of their advertisements within 60 days of the primary and general election, respectively.[12] This represented 93.32 percent and 97.20 percent of the estimated costs of advertisements the Senate candidates ran before the primary and general elections, respectively.[13] House candidates aired 88.16 percent and 98.09 percent of their advertisements within 60 days of the primary and general elections, respectively.[14] This represented 92.68 percent and 98.75 percent of the estimated costs of the advertisements House candidates ran before the primary and general elections, respectively.[15]

The data show that a minimal amount of activity occurs between 60 and 90 days before an election, and that beyond 90 days, the amount of candidate advertising approaches zero. Senate candidates aired only 0.87 percent and 0.39 percent of their advertisements more than 90 days before their primary and general elections, respectively,[16] which represented 0.66 percent and 0.15 percent of the total estimated costs of advertisements run by Senate candidates before the primary and general elections, respectively.[17] Similarly, House candidates aired only 8.56 percent and 0.28 percent of their advertisements more than 90 days before their primary and general elections, respectively.[18] This represented 3.79 percent and 0.13 percent of the total estimated costs of advertisements run by House candidates before the primary and general elections, respectively.[19]

The data are consistent with the comments received by the Commission. Commenters stated that a 60-day time frame comports with the practical reality of when candidates run advertisements. Comments submitted by the Democratic National Committee, the Democratic Senatorial Campaign Committee, the Democratic Congressional Campaign Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee (''NRCC'') all stated that in their experience, coordinated activities occurred within 60 days of the 2004 elections. The NRCC further stated that both its coordinated and independent expenditures for the 2004 general election were all made within 60 days of that election.

A 60-day time frame is also consistent with past Congressional, Supreme Court, and Commission findings. As one commenter stated, ''this time period [60 days] would be consistent with Congressional line-drawing in the context of electoral and political speech in the BCRA itself.'' Comments submitted by the BCRA Congressional sponsors in 2002 stated, ''Title II of BCRA reflects congressional judgment that communications concerning federal elected officials during the 60 day period prior to a general election and the 30 day period prior to a primary is usually campaign related.'' In *McConnell* v. *FEC*, the Supreme Court upheld the 30- and 60-day time frames for electioneering communications, concluding that Congress had adequately explained its decision to regulate the ''virtual torrent of televised election-related ads during the periods immediately preceding federal elections' and that ''[t]he record amply justifies Congress' line drawing.'' *McConnell* v. *FEC*, 540 U.S. 93, 207–08 (2003). As the FEC successfully argued in *McConnell*:

> The timing requirement is also directly tied to Congress's objective of capturing advertisements that are likely to influence the outcome of federal elections. The record 'overwhelmingly demonstrate[s] the appropriateness of BCRA's sixty and thirty day benchmarks,' and confirms with remarkable clarity the common-sense conclusion 'that issue advertisements aimed at influencing federal elections are aired in the period right before an election. Supp. App. 725sa–728sa, 847sa–848sa (Kollar-Kotelly) (discussing evidence); *see id.* at 851sa ('The sixty and thirty day figures are not arbitrary numbers selected by Congress, but appropriate time periods tied to empirically verifiable data.')

Brief for the Federal Election Commission *et al.* at 94, *McConnell* v. *FEC*, 540 U.S. 93 (2003) (discussing the timing requirement under the definition of electioneering communication).

The record before Congress when passing BCRA and before the Supreme Court in *McConnell* included the Brennan Center's ''Buying Time'' study, which further supports the conclusion that the vast majority of election related advocacy occurs immediately before an election. The Brennan Center found that, ''[i]n the 2000 election, genuine issue ads are rather evenly distributed throughout the year, while group-sponsored electioneering ads make a sudden and overwhelming appearance immediately before elections.'' Craig B. Holman and Luke P. McLoughlin, ''Buying Time 2000: Television Advertising in the 2000 Federal Elections,'' 56 (2002). Another study supported the 60-day time frame and was entered into the Congressional Record by Senator Snowe. Jonathan Krasno and Kenneth Goldstein, ''The Facts About Television Advertising and the McCain-Feingold Bill,'' 35(2) PS: Political Science and Politics 207 (2002); *see also* 147 Cong. Rec. S3070–01, S3074. This study found that in 1998 and 2000 ''the greatest deluge of issue ads began appearing after Labor Day.'' *Id.* at S3075.

The 60-day time frame is also consistent with existing Commission regulations. As a commenter stated, ''Setting the time period at 60 days is also supported by the FEC's regulatory time periods for the depreciation of polling data in 11 CFR 106.4(g), under which the FEC has determined that on the 61st day after the polling event, the data is worth only 5% of its original value.''

Therefore, in response to the Court of Appeals' first question, the data analyzed and comments reviewed by the Commission establish that Senate and House candidates focus their campaign advocacy not during the last 120 days before an election, but during

[12] *See* Graphs S1 and S3.

[13] *See* Graphs S2 and S4.

[14] *See* Graphs H1 and H3.

[15] *See* Graphs H2 and H4.

[16] *See* Graphs S1 and S3.

[17] *See* Graphs S2 and S4.

[18] *See* Graphs H1 and H3.

[19] *See* Graphs H2 and H4.

the last 60 days before an election. Moreover, beyond 90 days from an election, Senate and House candidate advertising nearly ceases. As suggested by the Court of Appeals' second question, however, the data on Presidential candidates show a different advertising pattern, and are discussed below.

2. Campaign Advertising in Presidential Races Occurs on a Different Cycle Than in Senate and House Races

The data and comments examined by the Commission respond directly to the second question posed by the Court of Appeals: ''Do congressional, senatorial, and presidential races—all covered by this rule—occur on the same cycle, or should different rules apply to each?'' *Shays Appeal* at 102. The data show that advertising in the Presidential race does in fact occur on a different cycle than advertising in Senate and House races. Appreciable spending occurred outside of the 120-day time frame with regard to the Presidential general election.[20] Specifically, in the media markets contained within individual ''battleground'' States,[21] the 120-day time frame before the general election covered less than 75 percent of the estimated spending.[22]

Under the Commission's 2002 regulations, the general election coordinated communication window effectively extended further back than 120 days before the general election because the Presidential nominating conventions of the political parties are also elections for purposes of determining whether a communication satisfies the fourth content standard in former 11 CFR 109.21(c)(4). *See* 11 CFR 100.2(e). Accordingly, in 2004, the general election coordinated communication window overlapped with the coordinated communication windows before the Presidential nominating conventions and therefore the coordination regulations applied for the entire 184 days before the general election for Republican Presidential candidates and for 219 days before the general election for Democratic Presidential candidates.[23] Even with this extended general election window, however, in several States there was still a time period between the primary elections and the start of the extended window during which public communications were not covered by the 120-day time frame in the 2002 rules (''gap period''). Moreover, the length of the gap period was solely a function of the parties' selection of convention dates. To the extent advertising was continuous during the time period between the primary and general elections, the amount that was subject to the existing 120-day rule depended on the dates the parties set for their conventions, rather than on the purposeful application of the rule.

The Commission received several comments addressing the issue of communications made during the Presidential gap periods. Some commenters were in favor of regulating communications run during this gap period, noting that post-primary communications are ''overwhelmingly likely to be for the purpose of influencing the candidate's election.'' One joint commenter submitted voluminous appendices and argued that a significant amount of campaign advertising occurs during this gap period.[24] As another commenter argued, ''a period starting 120 days prior to a primary and running all the way to the general election would be appropriate to capture ads that are most likely to influence an election.'' In contrast, other commenters argued against extending the regulation into this gap period, asserting that campaigns do not advertise significantly during this time, and therefore, according to some, regulation would unnecessarily infringe on constitutionally protected speech. A commenter representing a political party committee argued that political party committees would already be covered by Federal reporting and spending limitations and that covering this gap period is therefore unnecessary.

The CMAG data show that, in 2004, Presidential candidates spent appreciable amounts on advertisements run during the gap period between the State primaries and the beginning of the 184-day Republican and the 219-day Democratic extended general election windows, respectively. Specifically, in media markets contained fully within individual ''battleground'' States, the Republican Presidential candidate spent a total of $9,475,679 on television advertisements run during the gap period, which amounted to 14 percent of the total costs of media spots aired by the Republican Presidential candidate in those media markets after the State primaries.[25] In some of these media markets, the percentage was significantly higher.[26] For example, in the Seattle, WA, media market, 38 percent of the post-primary Republican spending occurred during the gap period, and, in the Madison and Milwaukee, WI, media markets, 20 percent of the post-primary Republican spending occurred during the gap period.[27] Democratic Presidential candidates spent $1,221,045 on post-primary television advertisements that occurred during the gap period.[28] Thus, nearly $10.7 million was spent by Presidential candidates on television advertisements during the gap periods.[29]

In response to the Court of Appeals' second question, the data and comments confirm that campaign advertising in Presidential races does in fact take place on a different cycle than Senate and House races. Rather than the 60-day cycle in Senate and House races, the data and comments confirm that nearly all Presidential advertisement spending took place during the time period from 120 days before the primary elections up through the date of the general election. According to the data, in the 2004 election cycle, over 99 percent of the estimated media spot spending by Presidential candidates in media markets fully contained within individual ''battleground'' States occurred during this time period.[30] This time period is now fully covered by the Commission's revised content standard at 11 CFR 109.21(c)(4).

[20] *See* Graphs P2 and P4.

[21] The Commission decided to limit the data appearing in these graphical representations to those States in which the 2004 Presidential race was the most highly contested. The States determined to be the 2004 ''battleground'' States are: Arizona, Arkansas, Colorado, Florida, Iowa, Louisiana, Maine, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wisconsin. A list of ''battleground'' States was determined from the following sources: *Cook Political Report* (*http://www.cookpolitical.com/column/2004/021704.php*); *ABC News/Washington Post* (*http://www/abcnews.go.com/sections/us/WorldNewsTonight/battlegrounds_poll_040422.html*); *National Journal* (*http://nationaljournal.com/members/campaign/2004/swingstates/*); *Wall Street Journal/Zogby International* (*http://online.wsj.com/public/resources/documents/info-battleground04-print.html*).

[22] *See* Graph P10.

[23] The general election coordinated communication window began on July 5, 2004, for all candidates. The Republican National Convention was held on August 30–September 2, 2004, and the coordinated communication window for that convention began on May 2, 2004, which was 184 days before the general election. The Democratic National Convention was held on July 27–29, 2004, and the coordinated communication window for that convention began on March 28, 2004, which was 219 days before the general election.

[24] Some of the advertisements presented by the commenter were run during the pre-convention window, and therefore, were covered by the Commission's existing coordination regulations.

[25] *See* Chart P11.

[26] *See* Chart P11.

[27] *See* Chart P11.

[28] *See* CMAG Data.

[29] *See* Chart P11 and CMAG Data.

[30] *See* Graphs P8 and P10.

3. The Minimal Value of Advertising Outside of the Revised Time Frames Limits the Risk of Corruption From Candidates and Collaborators Shifting Coordinated Spending to Outside the Time Frames

The data and comments reviewed by the Commission also respond to the third question posed by the Court of Appeals: ''[T]o the extent election-related advocacy now occurs primarily within 120 days, would candidates and collaborators aiming to influence elections simply shift coordinated spending outside that period to avoid the challenged rules' restrictions?'' *Shays Appeal* at 102. As discussed above, candidates have little incentive to ask outside groups to pay for advertisements aired outside of periods where the candidates' own spending indicates they would be effective. Therefore, outside of those time periods where candidate advertising occurs, there is little risk that coordinated activity presents the risk or appearance of corruption.

As discussed above, the data and comments analyzed in response to the Court of Appeals' first question overwhelmingly support a 60-day time frame for Congressional candidate communications. However, in order to foreclose the possibility that candidates and groups will shift spending outside the applicable time frame, the Commission has determined to set the Congressional time frame at 90 days. Congressional candidates aired a minimal percentage of their advertisements more than 60 days before an election, and beyond 90 days aired virtually no advertisements.[31] Candidates have little or no incentive to shift spending beyond 90 days. The limited value of advertising beyond 90 days is reflected in the data, with Senate candidates spending less than a quarter of one percent of their television advertising budgets on spots that aired between 90 and 120 days before either a primary or a general election.[32] Similarly, House candidates spent less than three percent of their television advertising budgets on spots that aired between 90 and 120 days before a primary election [33] and less than a quarter of one percent of their television advertising budgets on spots that aired between 90 and 120 days before a general election.[34]

For Presidential candidates, while the data show that the existing 120-day time frames captured a majority of Presidential spending, some appreciable spending occurred in the gap period not covered by the current 120-day rule.[35] Accordingly, the Commission has determined to close the gap period and extend the applicable time frame from 120 days before the primary election in a State continuously through the day of the general election in that State. This revised time frame would have covered more than 99 percent of Presidential advertising spending in 2004.[36]

One group of commenters, including plaintiffs in the *Shays* litigation, argued that the 120-day time frame was under-inclusive and should be supplemented with a complex, multi-factored approach that would use a different test, based not on time but instead on the identity of the entity paying for any communication made outside of the 120-day time period. The commenters proposed the Commission adopt the following regulation:

(4) A public communication, as defined in 11 CFR 100.26, made by a political committee, which is an expenditure directed to voters in the jurisdiction of the candidate with whom the communication is coordinated, or if coordinated with a political party, is an expenditure directed to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

(5) A public communication, as defined in 11 CFR 100.26, made by an organization described in section 527 of the Internal Revenue Code and not registered as a political committee, which:

(i)(A) Is distributed or disseminated during the period beginning 30 days prior to the primary election or 60 days prior to the general election of the federal candidate with whom the communication is coordinated, or, if coordinated with a political party, during the period beginning 30 days prior to the primary election or 60 days prior to the general election in which one or more candidates of the political party appear on the ballot, and (B) is directed to voters in the jurisdiction of that candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot, regardless of whether the communication refers to a clearly identified candidate for federal office, or party; or

(ii)(A) Is distributed or disseminated during the period beginning 120 days prior to the primary election and ending on the day of the general election, (B) refers to a clearly identified candidate for federal office or to a political party, and (C) 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; or

(iii)(A) Is distributed or disseminated more than 120 days prior to the primary election, (B) promotes, attacks, supports or opposes a clearly identified candidate for federal office, or if the ad is coordinated with a political party, promotes, attacks, supports or opposes the party or its candidates, and (C) 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.

(6) A public communication, as defined in 11 CFR 100.26, made by any person other than a political committee or other organization described in section 527 of the Internal Revenue Code which:

(i)(A) Is distributed or disseminated during the period beginning 30 days prior to the primary election or 60 days prior to the general election of the federal candidate with whom the communication is coordinated, or, if coordinated with a political party, during the period beginning 30 days prior to the primary election or 60 days prior to the general election in which one or more candidates of the political party appear on the ballot, and (B) is directed to voters in that candidate's jurisdiction, regardless of whether the communication refers to a clearly identified candidate for federal office, or party; or

(ii)(A) Is distributed or disseminated during the period beginning 120 days prior to the primary election and ending on the day of the general election, (B) refers to a clearly identified candidate for federal office or to a political party, and (C) 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; or

(iii)(A) Is distributed or disseminated more than 120 days prior to the primary election, (B) refers to the character or the qualifications or fitness for office of a clearly identified candidate for federal office, or if the ad is coordinated with a political party, refers to the character or the qualifications or fitness for office of the party generically or of candidates of that party, and (C) 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.

The Commission believes the record does not support the time frames in the commenters' proposed regulation, nor the disparate regulatory schemes for various entities. Moreover, the Commission agrees with other witnesses at the hearing that if the Commission were to adopt the proposed regulation, its complexity would likely place an extreme burden upon the regulated community. The commenters also submitted summaries of advertisements from recent election cycles that, according to the commenters, were run more than 120 days before the primary or general election they were intended to influence. However, at the hearing, these commenters acknowledged that there was no evidence that any of these advertisements had been coordinated with a candidate or a political party

[31] *See* Graphs S1, S3 and H1, H3.

[32] *See* Graphs S2 and S4.

[33] *See* Graph H2.

[34] *See* Graph H4.

[35] *See* Chart P11.

[36] This figure represents Presidential spending in media markets fully contained within individual ''battleground'' States. *See* Graphs P8 and P10.

committee. The lack of evidence that these advertisements were coordinated with candidates comports with the conclusion drawn from the CMAG data and comments; specifically, that candidates perceive little value in airing advertisements beyond 90 days from an election, and have little incentive to seek such advertising in exchange for political favoritism.

4. Communications That Refer to Political Parties

As set forth in new 11 CFR 109.21(c)(4)(iii) and (iv), communications that refer to political parties are now subject to different time periods depending upon: (1) Whether the communication is coordinated with a candidate or political party committee; (2) whether the upcoming general election is a midterm or Presidential election; and (3) if the communication also refers to a clearly identified Federal candidate, whether it is run in the clearly identified candidate's jurisdiction.

When communications are paid for by outside groups, refer to a political party, are coordinated with a *candidate*, and are publicly distributed or otherwise disseminated in that candidate's jurisdiction, they can generally be presumed to be for the purpose of influencing that candidate's election whether or not they also refer to the candidate with whom they are coordinated. Accordingly, it is appropriate to use the time frame established for communications that refer to a House or Senate candidate (90 days before a primary, special, or general election) where the communications refer only to a political party and not to a clearly identified Federal candidate, but are coordinated with a House or Senate candidate and distributed in that candidate's jurisdiction, even if such communications are distributed during a Presidential election cycle. *See* 11 CFR 109.21(c)(4)(iii)(A). Similarly, if a communication were coordinated with a Presidential candidate, it would be appropriate to use the same 120-day time period established for communications referring to Presidential candidates. *See* 11 CFR 109.21(c)(4)(iii)(A).

A communication that refers to a political party without referring to a clearly identified Federal candidate, otherwise satisfies the content prong, is paid for by an outside group, and is coordinated with a *political party*, can generally be presumed to be for the purpose of influencing the elections of all of the party's candidates within that jurisdiction during the relevant time period before an election. During a midterm election cycle (in which only House and Senate candidates are on the ballot), new 11 CFR 109.21(c)(4)(iii)(B) provides that communications referring to political parties are subject to the same 90-day time period as communications referring to House and Senate candidates. Likewise, the new rules provide that during a Presidential election cycle, communications referring to political parties are presumed to be for the purpose of influencing the elections of all of the party's candidates, including the party's Presidential candidate. Accordingly, such communications are subject to the same 120-day time period as communications referring to Presidential candidates. *See* new 11 CFR 109.21(c)(4)(iii)(C).

If the communication refers to both a political party and a clearly identified Federal candidate, the communication is subject to the time frame applicable to that clearly identified candidate under 11 CFR 109.21(c)(4)(i) or (ii) when the communication is coordinated with either a candidate or a political party and is distributed or disseminated within the clearly identified candidate's jurisdiction. *See* 11 CFR 109.21(c)(4)(iv)(A) and (B). Such communication is subject to the applicable time frames for party references when coordinated with a political party and distributed and disseminated outside the candidate's jurisdiction. *See* 11 CFR 109.21(c)(4)(iv)(C). Any such communication coordinated with a candidate, but distributed outside that candidate's jurisdiction, would not constitute a coordinated communication.

5. Other Considerations

In the Commission's judgment, the foregoing time frames encompass the periods in which effective political party, Congressional, and Presidential election-related advertising occurs, and therefore political parties, candidates, and collaborators will have little incentive to shift spending outside of these time frames. None of the commenters submitted any evidence that, during the recent election cycles during which the Commission's 2002 coordination rules were in effect, House or Senate candidates asked outside groups to run advertisements more than 90 days before House or Senate primary or general elections. Since the 2002 rule took effect, the Commission has received very few complaints alleging that House or Senate candidates or their agents coordinated with outside groups to produce or distribute communications that ran between 90 and 120 days before a House or Senate primary or general election. Moreover, commenters did not submit any evidence that during the recent election cycles in which the Commission's 2002 coordination rules were in effect, Presidential candidates or their agents asked outside groups to run advertisements more than 120 days before Presidential primaries or the general election.

Retaining a longer time frame that is not supported by the record could potentially subject political speech protected under the First Amendment to Commission investigation. Subjecting activity to investigation that the evidence shows is unlikely to be for the purpose of influencing Federal elections could chill legitimate lobbying and legislative activity. As the Supreme Court has emphasized, where First Amendment rights are affected, ''[p]recision of regulation must be the touchstone,'' *Edenfield* v. *Fane*, 507 U.S. 761, 777 (1993).

The Court of Appeals emphasized that it ''can hardly fault the [Commission's] effort to develop an objective, bright-line test.'' *Shays Appeal* at 99. As the D.C. Circuit noted in an analogous context, ''a subjective test based on a totality of the circumstances * * * would inevitably curtail permissible conduct.'' *Orloski* v. *FEC*, 795 F.2d 156 (D.C. Cir. 1986). In *Orloski*, the D.C. Circuit further warned that:

> [A] subjective test would also unduly burden the FEC with requests for advisory opinions * * * and with complaints by disgruntled opponents who could take advantage of a totality of the circumstances test to harass the sponsoring candidate and his supporters. It would further burden the agency by forcing it to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint, even those involving the most mundane allegations.

Id. at 165.

Considering the political, expressive, and associational rights at stake, the Commission has determined not to extend the time frame beyond that period supported by the record.

B. Revised 11 CFR 109.21(c)(4)

The Commission continues to believe that an objective, bright-line coordination test provides the clearest guidance to candidates, political party committees, and outside organizations. Moreover, as discussed above, the CMAG data show that in the 2004 election cycle, nearly all television advertisements paid for by candidates were aired within certain time frames before an election. These data, therefore, provide empirical support for the

Commission's decision to use time frames as part of a bright-line test for determining whether a communication is made for the purpose of influencing Federal elections.

Accordingly, as set forth in new 11 CFR 109.21(c)(4)(i), public communications that refer to a Senate or House of Representatives candidate are subject to two 90-day time periods. One time period runs from 90 days before any primary in which the Congressional candidate is on the ballot through the date of the primary. Then, another time period starts 90 days before any general election in which the candidate is on the ballot and runs through the date of the general election. In some States, these periods will overlap if a primary election is held fewer than 90 days before a general election.

Under new 11 CFR 109.21(c)(4)(ii), communications that refer to a candidate for President or Vice President are subject to a single time period that begins 120 days before a State's primary election up to and including the date of the general election.

Under new 11 CFR 109.21(c)(4)(iii), communications that refer to a political party but not to a clearly identified Federal candidate are subject to different time periods under different circumstances. For those communications that are coordinated with a candidate and reference a political party, but do not reference a clearly identified Federal candidate, the time frame that would be applicable if that candidate were clearly identified in the communication under 11 CFR 109.21(c)(4)(i) or (ii) applies when the communication is distributed or disseminated within that candidate's jurisdiction. *See* 11 CFR 109.21(c)(4)(iii)(A). For communications coordinated with a political party committee and distributed during the two-year election cycle ending in a non-Presidential general election, one time period runs from 90 days before any primary in which a candidate of that party is on the ballot through the date of the primary. *See* 11 CFR 109.21(c)(4)(iii)(B). Then, another time period begins 90 days before any general election in which a candidate of that party is on the ballot and runs through the date of the general election. In some States, these periods will overlap if a primary election is held fewer than 90 days before a general election. For communications coordinated with a political party committee and distributed during the two-year election cycle ending in a Presidential general election, a single time period begins 120 days before a candidate of that party's primary election in a State up to and including the date of the general election. *See* 11 CFR 109.21(c)(4)(iii)(C).

Under new 11 CFR 109.21(c)(4)(iv), communications that refer to both a political party and a clearly identified candidate are subject to the time frame applicable to that clearly identified candidate under 11 CFR 109.21(c)(4)(i) or (ii) when the communication is distributed or disseminated within the clearly identified candidate's jurisdiction. *See* 11 CFR 109.21(c)(4)(iv)(A) and (B). However, communications that refer to both a political party and a clearly identified candidate, are coordinated with a political party committee, and are distributed outside the clearly identified candidate's jurisdiction are subject to the time period that would apply to communications that refer only to a political party. *See* 11 CFR 109.21(c)(4)(iv)(C).

C. Clarification of Time Frame Requirement

The Commission is also taking this opportunity to clarify that a public communication satisfies the content standards in 11 CFR 109.21(c)(4)(i) and (ii) with respect to a candidate for Federal office only if the public communication is publicly distributed or otherwise publicly disseminated during the relevant time periods before an election in which that candidate or another candidate seeking election to the same office is on the ballot.

This clarification addresses the situation presented in Advisory Opinion 2004–01 (Bush-Cheney/Kerr). This advisory opinion concerned President Bush's appearance in a television advertisement paid for by a Congressional candidate in which 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 a 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)). Thus, in determining whether the Congressional candidate's payment for the communication would be an in-kind contribution to President Bush, the Commission looked at whether the communication was aired within 120 days before President Bush's election rather than whether it was aired within the time period applicable to the paying Congressional candidate.

In the *NPRM*, the Commission sought comment on whether it should clarify its coordinated communication rules to incorporate the approach taken in Advisory Opinion 2004–01 and to make clear that a public communication satisfies the content prong with respect to a Federal candidate only if it is distributed within the applicable time period before that candidate's election. For example, a Senator whose reelection is not until 2008 appears in an advertisement with a 2006 candidate for the House of Representatives. The advertisement is aired within 90 days of the House candidate's election, is paid for by the House candidate's campaign committee, and is disseminated in the State where the Senator will seek reelection in 2008. The proposed clarification of the rule would explain that the advertisement would not be an in-kind contribution to the Senator because the advertisement was not aired within 90 days of the Senator's 2008 election. Two commenters supported the proposed clarification and no commenters opposed it. Accordingly, the Commission is revising 11 CFR 109.21(c)(4)(i) and (ii) to make clear that the public communication at issue must be publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction before the clearly identified candidate's election in that jurisdiction. Read in conjunction with the ''payment prong'' at 11 CFR 109.21(a), which requires that the communication be paid for by someone other than the candidate at issue, this revision codifies the Commission's decision in Advisory Opinion 2004–01. *See also* Advisory Opinion 2005–18 (Reyes) (Concurring opinion of Commissioners Thomas, Toner, Mason, McDonald, and Weintraub).

The Commission notes that 11 CFR 109.21(c)(4)(i) and (ii) also cover advertisements coordinated with a candidate and disseminated within the applicable time period before an election of that candidate's opponent or potential opponent.[37] For example, Candidate Smith has already won the Democratic nomination for the U.S. Senate in State A, but the Republican Party has not yet held its primary in that State. At the request or suggestion of Candidate Smith, Organization X pays to run advertisements a week before the Republican primary attacking Candidate Jones, who is the frontrunner in the Republican primary race for U.S. Senate in State A and hopes to compete in the subsequent general election against Smith. Although Candidate Smith is not on the ballot in the Republican primary

[37] *See* note 44, below (defining ''potential opponent'' and identifying criteria that must be met for a person to be a ''candidate'' under the Act.).

in State A and his general election is more than 90 days away, the advertisement attacking Candidate Jones is an in-kind contribution to Candidate Smith because its purpose is to oppose Candidate Smith's potential opponent in the general election and thus influence Smith's election.

III. Alternative Proposals for Revising the Content Prong Not Adopted

The *NPRM* presented seven alternatives for retaining or revising the ''content prong'' of the 2002 coordination rules at 11 CFR 109.21(c). The Commission sought comment on each of these alternatives, as well as on whether a combination of components from different alternatives would be appropriate. Alternative 1 was to retain the 120-day time frame and Alternative 2 was to replace it with another time frame. In light of the Court of Appeals' rejection of the District Court's conclusion that ''FECA precludes content-based standards,'' (*Shays Appeal*, 414 F.3d at 99), and in light of the Court of Appeals' ruling that ''time, place, and content may be critical indicia of communicative purpose,'' (*Id.* at 99) the Commission has decided to adopt a combination of Alternative 1 and Alternative 2 based on a careful review of the comments and the CMAG data on candidate advertising during the 2004 election cycle. The Commission has therefore decided not to adopt any of the remaining five alternatives, each of which is discussed briefly below.

Alternative 3

Alternative 3 was to eliminate the time frame from the fourth content standard altogether. Commenters generally opposed this approach because they believed it would be unconstitutionally overbroad and would unnecessarily sweep into the area of ''grassroots lobbying'' efforts. One group of commenters argued that such an approach was adequate for political committees, but was overbroad with regard to speakers other than political committees.

The Commission agrees with the majority of the commenters who believe that eliminating the time frame from the fourth content standard in 11 CFR 109.21(c)(4) would unnecessarily capture a substantial amount of speech that is unrelated to elections, thereby raising substantial First Amendment issues. This alternative would apply to *any* public communication that refers to a Federal candidate and is publicly disseminated in the jurisdiction of the Federal candidate, even if the communication is made years before any election in which the candidate participates and is made without any purpose of influencing a Federal election. Such an approach is inconsistent with the Court of Appeals' recognition that ''to qualify as [an] 'expenditure' in the first place, spending must be undertaken 'for the purpose of influencing' a federal election.'' *Shays Appeal* at 99. Such an approach also runs counter to the Court of Appeals' conclusion that the Commission may appropriately apply a content standard to determine which communications are made for the purpose of influencing a Federal election and that the timing of a communication may be a critical indicium of an election-influencing purpose. *Shays Appeal* at 99. Such an approach is not justified by the need to prevent circumvention of the Act's contribution limits because, as discussed above, the CMAG data show that public communications made by candidates for the purpose of influencing a Federal election overwhelmingly take place within certain limited time frames before elections (*i.e.*, 90 days before House and Senate elections and 120 days before Presidential primaries through the day of the general election).

Alternative 4

Alternative 4 proposed to replace the time frame in the fourth content standard with a test based on whether a communication promotes, supports, attacks, or opposes (''PASOs'') [38] a political party or clearly identified Federal candidate. No commenter fully supported Alternative 4. One group of commenters argued that a PASO standard should not be applied to political committees but should be applied to entities described in section 527 of the Internal Revenue Code that are not registered with the Commission as political committees. Other commenters proposed combining the PASO standard with a time restriction, namely, the 30/60-day time frame used in the ''electioneering communication'' regulations.[39] Other commenters opposed adoption of a PASO standard, arguing that a PASO standard in place of a time frame is unworkable, inadequate, and overly broad. One joint commenter asserted that the legislative history in BCRA's coordination provisions implies that the Commission lacks the authority to use a PASO standard as part of the coordinated communication test. In rejecting a PASO standard, most commenters agreed that the Commission should continue to use a bright-line rule to determine whether a communication satisfies the content prong of the coordinated communication test. As one commenter stressed, ''We agree with the Court of Appeals when it said it could 'hardly fault the [Commission's] effort to develop an objective, bright-line test [that] does not unduly compromise the Act's purpose.' Thus, we urge the Commission to maintain a bright-line test in the area of coordination.''

The Commission agrees with the commenters that an objective, bright-line test, based on a sound evidentiary record, provides the clearest guidance to those seeking to comply with the coordination regulations. The Commission also invited comment on whether under Alternative 4, instead of using a PASO standard, the Commission should create a safe harbor exemption from the coordinated communication rules for certain types of communications that are not made for the purpose of influencing Federal elections. Several commenters supported the creation of such a safe harbor. One joint commenter argued that adopting a more focused safe harbor is both ''the most supportive [approach] of political speech and the most consistent with the legislative history of BCRA's coordination provisions.'' In this vein, as discussed below, the Commission is adding a safe harbor for public communications in which a Federal candidate endorses another candidate, or solicits contributions for certain tax-exempt organizations, candidates, and political committees. *See* Section V, below, and new 11 CFR 109.21(g). The Commission, however, has determined that a temporal standard, rather than a PASO standard, best effectuates the purposes of the Act, while providing clear guidance to the regulated community.

[38] The PASO standard is found in BCRA and applies to candidates and political party committees with respect to Federal Election Activity (''FEA''). *See* 2 U.S.C. 431(20)(A)(iii). 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). In addition, BCRA 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 Supreme Court, in rejecting a constitutional vagueness challenge to the PASO standard, held that ''the words 'promote,' 'oppose,' 'attack,' and 'support' * * * 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)).

[39] *See* note 3, above.

Alternative 5

Alternative 5 proposed to eliminate the time frame from the fourth content standard for political committees only. Many of the commenters opposed this approach. Several commenters argued that by eliminating a time frame only for political committees, the Commission would be presuming that communications paid for by political committees are made solely for the purpose of influencing Federal elections, when they believed that many of a political committee's communications are made for other purposes, such as issue advocacy. Another commenter objected that such an approach would retain the existing time frame for organizations that are not subject to the prohibitions and limitations of the Act while tightening regulation for organizations that are already subject to numerous regulations because of their status as political committees. As that commenter pointed out, political committees are subject to the Act's contribution limits and prohibitions, are required to disclose their activities to the Commission, and receive relatively small contributions, mostly from individuals. In addition, several commenters opposed this alternative because it is not supported by empirical evidence. One joint commenter, however, supported Alternative 5 based on the assertion that groups whose 'major purpose' is to influence elections should be subject to broader regulatory standards. Accordingly, the joint commenter concluded that under Alternative 5, ''an 'expenditure' by a political committee should satisfy the 'content' test without regard to a time frame.'' For the same reason, the commenter also urged the Commission to abolish the time frame for public communications made by entities described in section 527 of the Internal Revenue Code.

The Commission has decided not to adopt Alternative 5 because, as discussed above, the Court of Appeals rejected the argument that ''FECA precludes content-based standards'' and concluded that ''time, place, and content may be critical indicia of communicative purpose.'' *Shays Appeal* at 99. As discussed above, the CMAG data provide overwhelming empirical support for the Commission's decision to use time frames as part of a bright-line test for determining whether a communication is made for the purpose of influencing Federal elections. In contrast, there is no evidence that political committees are more likely than other groups to coordinate communications outside of these time frames.

Alternative 6

In Alternative 6, the Commission proposed to replace the fourth content standard with a test that simply relies on the statutory language ''made for the purpose of influencing a Federal election.'' The majority of commenters were opposed to this standard because they believe it would require the Commission to determine whether a public communication is a coordinated communication based on a totality of the circumstances test and would fail to give those subject to the Commission's regulations adequate notice of what behavior will come within the coordination regulations. One joint commenter believed that adoption of this alternative would deter individuals and organizations from making public communications regarding policy matters because ''they would have no idea whether their subsequent public communication would be covered by the prohibition on coordinated expenditures.''

On the other hand, some commenters argued that modified versions of Alternative 6 might be acceptable. For example, one commenter suggested that the alternative should include the 30/60-day temporal limit used in the electioneering communication regulations.[40] Another joint commenter supported the use of a ''for the purpose of influencing a Federal election'' test as part of a complex, tiered approach that would apply different content standards depending on the identity of the entity paying for the communication.

The Commission has decided not to adopt Alternative 6 because a bright-line test based on proximity to an election provides the clearest guidance to those seeking to comply with the regulations and provides a more manageable standard for enforcement than the more general ''for the purpose of influencing a Federal election'' standard.

Alternative 7

Alternative 7 proposed to eliminate the entire 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. This approach was universally rejected by commenters. Some commenters disapproved of this alternative on the grounds that it would be overbroad, was not supported by any evidence in the record or indication of Congressional intent, would have unintended consequences, and would unnecessarily chill constitutionally protected speech. Another commenter asserted that this proposal was in direct contradiction with the legislative history of BCRA, which demonstrated that Congress ''affirmatively intended that any coordination regulation issued by the Commission should protect against interference with lobbying and similar activities.''

When the Commission promulgated the *2002 Coordination Final Rules,* it stated ''the Commission believes that a content standard provides a clear and useful component of a coordination definition in that it helps 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,* 68 FR at 426. In order to ensure that the coordination regulations do not inadvertently encompass communications not made for the purpose of influencing a Federal election, the Commission is rejecting Alternative 7.

IV. The ''Directed to Voters'' Requirement in 11 CFR 109.21(c)(4)

The 2002 rules provided that to satisfy the fourth content standard, a public communication must be directed to voters in the jurisdiction where the clearly identified Federal candidate is on the ballot or where one or more candidates of the political party are on the ballot. *See* former 11 CFR 109.21(c)(4)(iii). The Commission is removing the phrase ''directed to voters in the jurisdiction.'' In the revised rule, to satisfy the content standard in 11 CFR 109.21(c)(4), a public communication must be ''publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction'' or, if the public communication refers to a political party, but not to a clearly identified Federal candidate, in a jurisdiction in which one or more candidates of a political party appear on the ballot. These revisions clarify that a communication is potentially for the purpose of influencing a Federal election where the persons receiving the communication that is coordinated can vote for or against the referenced candidate or candidate's opponent in that election, or in the case of a general party reference, a candidate of the referenced party in that election. The revisions also clarify that for communications that refer solely to a political party and are coordinated with a candidate, the analysis turns on whether the communication is publicly distributed or otherwise publicly

[40] *See* note 3, above.

disseminated in the jurisdiction of the candidate with whom it is coordinated.[41]

The *NPRM* also sought comment on whether the fourth content standard at former 11 CFR 109.21(c)(4)(iii) should be changed to specify a minimum number of persons that must be able to receive a communication and, if so, what the required minimum number of persons should be. The Act and Commission regulations defining ''electioneering communication'' require that 50,000 or more persons be able to receive an ''electioneering communication'' in the jurisdiction where the clearly identified Federal candidate is on the ballot.[42] Similarly, the definitions of ''mass mailing'' and ''telephone bank'' contained in the Act and Commission regulations as part of the definition of ''public communication'' contain a minimum threshold of 500. *See* 2 U.S.C. 431(23) and (24); 11 CFR 100.27, 100.28, and 100.29 (defining ''mass mailing'' as a mailing of more than 500 pieces of mail of an identical or substantially similar nature sent within a 30-day period and ''telephone bank'' as more than 500 telephone calls of an identical or substantially similar nature made within a 30-day period). In contrast, 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).

The Commission has decided not to specify a minimum number of persons that must be able to receive a communication for the fourth content standard to apply. While the 50,000 threshold for ''electioneering communication'' and the 500 threshold for mass mailings and telephone banks are contained in BCRA, there is no analogous statutory provision to suggest that Congress intended either of these thresholds, or any other threshold, for coordinated communications. Moreover, because the coordinated communication rules apply to different types of communications, no single minimum threshold is appropriate for all communications. For example, unlike the ''electioneering communication'' provisions, which cover only broadcast, cable, and satellite communications (*i.e.*, television and radio advertisements), the coordinated communication rules apply to print media and telephone banks as well. Adopting, for instance, a 50,000 or even 30,000-person threshold could have the effect of creating a blanket exemption for print advertisements placed in small town newspapers with a relatively low circulation.

In the *NPRM,* the Commission also invited comment on whether a ''directed to voters in the candidate's jurisdiction'' requirement should be added to the second and third content standards, which cover the republication of campaign materials and express advocacy. Three commenters supported adding the requirement to the second and third content standards because, in the words of one of these commenters, a communication ''cannot be said to influence the outcome of an election if the people cannot vote in that particular election.'' In contrast, a different commenter argued that BCRA does not permit the Commission to add a ''directed to voters'' requirement for the republication of campaign materials content standard.

The Commission has decided not to add a ''directed to voters in the candidate's jurisdiction'' requirement to the second and third content standards. The purpose of the content prong of the coordinated communication test is to determine whether a communication has the purpose of influencing a Federal election. Communications that expressly advocate the election or defeat of a Federal candidate or republish campaign materials are by their very nature for the purpose of influencing a Federal election and therefore are in-kind contributions if their creation or distribution is coordinated with a candidate or political party committee.

V. Safe Harbor for Endorsements and Solicitations by Federal Candidates (New 11 CFR 109.21(g))

A. Endorsements of, and Solicitations for, Federal or Non-Federal Candidates, Political Committees, and Certain Tax-Exempt Organizations

The Commission is creating a new safe harbor in 11 CFR 109.21(g) for endorsements by Federal candidates of other Federal and non-Federal candidates, and for solicitations by Federal candidates for other Federal and non-Federal candidates, political committees, and certain tax-exempt organizations described in section 501(c) of the Internal Revenue Code as permitted by 11 CFR 300.65.[43] Specifically, the new regulation provides that a public communication in which a candidate for Federal office endorses another candidate for Federal or non-Federal office, or solicits funds for another candidate, or for a political committee or section 501(c) organization as permitted by 11 CFR 300.65, is not a coordinated communication with respect to the endorsing or soliciting Federal candidate unless the public communication PASOs the endorsing or soliciting candidate, or another candidate who seeks election to the same office as the endorsing or soliciting candidate.[44] This safe harbor applies regardless of the timing and proximity to an election of the endorsement or solicitation.

Most commenters who addressed this issue supported the creation of a safe harbor on the grounds that such communications are not intended to benefit the endorsing or soliciting candidate's election and are not made for the purpose of influencing the endorsing or soliciting candidate's election. *See Shays Appeal* at 99 (''[T]o qualify as [an] expenditure in the first place, spending must be undertaken ''for the purpose of influencing'' a federal election.''). One commenter stated ''solicitations are regularly directed to individuals who are not even eligible to vote for the soliciting candidate.'' Another commenter observed that ''often the solicitation is directed to an audience whose members include few, if any, of the candidate's own electorate.'' In the context of endorsements, one commenter argued that ''[a] coordinated expenditure,

[41] For communications coordinated between a candidate and a political party and paid for by a political party, *see* 11 CFR 109.37.

[42] *See* note 3, above.

[43] 11 CFR 300.65 permits a Federal candidate or officeholder to make certain solicitations of funds on behalf of any organization described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a). *See also* 2 U.S.C. 441i(e)(4). The Commission notes that those organizations not covered by this safe harbor are not subject to a coordination finding, unless their activities separately meet the conduct, content, and payment prongs.

[44] The phrase ''another candidate who seeks election to the same office as the endorsing or soliciting candidate'' covers not only a candidate's actual opponent but also a candidate's potential opponent, *i.e.*, a candidate who seeks election to the same office as the endorsing or soliciting candidate but who has not yet secured his or her party's nomination and therefore is not yet the endorsing or soliciting candidate's actual opponent. *See* 11 CFR 100.3(a) and 2 U.S.C. 431(2) (setting forth the criteria that must be met for a person to be a ''candidate'' under the Act). Thus, for example, an advertisement in which a Presidential candidate endorses a candidate for Senate but that also attacks one of the opposing party's candidates for nomination for President would satisfy the fourth content standard at 11 CFR 109.21(c)(4) because it attacks a candidate seeking election to the same office as the endorsing Presidential candidate. In Subpart C of 11 CFR Part 109 the term ''opponent'' includes a candidate's potential opponent. The term ''candidate's opponent'' turns on whether the opponent will be an opponent of the soliciting or endorsing candidate during the two-year election cycle and whether the opponent qualifies as a candidate for the same office.

treated as a contribution subject to the limits and source restrictions, must meet the test of benefiting a candidate. This is not true of an endorsement, which is a speech act performed for the benefit of another.'' Similarly, another commenter noted that the ''purpose of a federal candidate's endorsement message is to aid the *endorsed* candidate * * * not to aid the *endorsing* candidate's own election,'' (emphasis in original) while another commenter observed that ''endorsements are seldom, if ever, of electoral value to the endorsing candidate.''

The *NPRM* invited comment on whether any safe harbor for endorsements and solicitations by Federal candidates should be limited to communications that do not PASO or, alternatively, do not expressly advocate, the endorsing or soliciting candidate or the candidate's opponent or potential opponent. Most commenters, including two who had opposed the proposed safe harbors in their written comments, agreed that it would be appropriate for the Commission to create the proposed safe harbors so long as they do not extend to communications intended to influence the election of the endorsing or soliciting candidate. Moreover, at the hearing, most commenters agreed that the PASO standard would be an appropriate and workable standard for determining whether communications containing endorsements or solicitations have the purpose of influencing the endorsing or soliciting candidates' elections. Congress has already determined that a State candidate who wishes to sponsor an advertisement featuring a Federal candidate is prohibited by 2 U.S.C. 441i(f) from promoting or supporting the Federal candidate with non-Federal funds. *See* 2 U.S.C. 441i(f) and 11 CFR 300.71. A witness from a reform organization stated that ''if the endorsement doesn't promote the candidate doing the endorsement, then it should be okay * * * [T]here should be a standard, whether it's a PASO standard or for the purpose of influencing.''

The coordinated communication regulation identifies communications that are for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(9) and 11 CFR 109.21. Because the Commission agrees that endorsements and solicitations are not made for the purpose of influencing the endorsing or soliciting candidate's own election, the Commission is adopting a safe harbor for endorsements of Federal and non-Federal candidates and solicitations made by a Federal candidate for Federal or non-Federal candidates, certain tax-exempt organizations as permitted by 11 CFR 300.65, and for political committees. There is no evidence that Congress intended to restrict the established practice of candidate endorsements and solicitations when the endorsements and solicitations do not PASO the endorsing or soliciting candidate. To the contrary, in floor statements regarding BCRA, Senator Feingold explained that the relevant BCRA provisions would not prohibit ''spending non-Federal money to run advertisements that mention that [State candidates] have been endorsed by a Federal candidate * * * so long as those advertisements do not support, attack, promote, or oppose the Federal candidate.'' 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002). The Commission's safe harbor for candidate endorsements is fashioned consistent with this legislative history.

The new rule at 11 CFR 109.21(g) provides that a communication is eligible for the safe harbor only if it does not PASO the endorsing or soliciting candidate or another candidate seeking election to the same Federal office as the endorsing or soliciting candidate.[45] When the safe harbor is applicable, the endorsing or soliciting candidate (and the candidate's agents) may be involved in the development of the communication, in determining the content of the communication, as well as determining the means or mode and timing or frequency of the communication.

The new regulation addresses issues presented in Advisory Opinions 2004–01 (Bush-Cheney/Kerr) and 2003–25 (Weinzapfel). As discussed above, in Advisory Opinion 2004–01, the Commission considered a television advertisement that featured President Bush endorsing a Congressional candidate. The Commission determined that, for any advertisement distributed within 120 days of the Presidential primary in the State in which the advertisement aired, the advertisement's 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 authorized committee from the Congressional candidate's committee. Similarly, in Advisory Opinion 2003–25, the Commission considered an advertisement featuring a U.S. Senator endorsing a mayoral candidate and concluded that the communication did not satisfy the fourth content standard because it was not distributed within 120 days of a Federal election.[46]

These advisory opinions are superseded to the extent they concluded that communications containing endorsements by Federal candidates are in-kind contributions to the endorsing Federal candidate if they otherwise satisfy the coordinated communication test, irrespective of whether the communication PASOs the endorsing candidate.

B. Endorsements of, and Solicitations for, State Ballot Initiatives

In the *NPRM,* the Commission also sought comment on whether a similar safe harbor should apply to a Federal candidate's appearance in communications that endorse, or solicit funds for, State ballot initiatives. Only two commenters addressed the safe harbor proposal and both supported such a safe harbor, arguing that, like endorsements of other candidates, endorsements of State ballot initiatives are not made for the purpose of influencing the election of the endorsing candidate, but rather to influence the outcome of the State ballot initiative. No other commenters addressed the proposal. In light of the limited record produced by the commenters regarding a safe harbor for ballot initiatives, the Commission has decided not to extend a safe harbor for endorsements and solicitations for State ballot initiatives at this time.

VI. Amendments to the Conduct Prong (11 CFR 109.21(d) and (h))

The conduct prong of the Commission's coordinated communication regulations was not challenged in *Shays* v. *FEC.* Nonetheless, in the *NPRM,* the Commission took the opportunity to seek comment on how certain aspects of the conduct prong have worked in practice since the coordination regulations were promulgated in 2002. Several issues regarding the conduct prong are addressed below.

A. The ''Request or Suggest'' Conduct Standard (11 CFR 109.21(d)(1))

In the *NPRM,* the Commission invited comment on whether a communication that is paid for by a person other than a candidate, authorized committee, political party committee, or their agents and that satisfies the first

[45] The Act, as amended by BCRA, generally prohibits Federal candidates and officeholders from soliciting funds on behalf of other Federal or non-Federal candidates, unless the funds are subject to the limitations and prohibitions of the Act. 2 U.S.C. 441i(e)(1)(A) and (B). *See also* 11 CFR 300.61 and 300.62.

[46] The Commission also determined in Advisory Opinion 2003–25 that the proposed advertisement did not PASO the endorsing Federal candidate.

conduct standard (*i.e.*, it is made at the request or suggestion of a candidate or a political party) should automatically qualify as a coordinated communication without also having to satisfy one of the content standards. Specifically, the Commission asked whether a public communication paid for by another person that is made at the request or suggestion of a candidate or a political party committee presumptively has value to that candidate, or political party, regardless of its timing or content.

One commenter supported this proposal generally, while all other commenters addressing this issue opposed it. This latter group of commenters asserted that the proposal could turn ''grassroots lobbying,'' or issue advocacy communications, into in-kind contributions solely because the communication was created at the request or suggestion of a candidate or political party committee. One commenter stated that ''[a]n officeholder that suggests that his constituents engage in grassroots lobbying is not suggesting that the constituents engage in communications that are for the purpose of influencing an election.'' Another commenter asserted that a request or suggestion by a candidate should not be enough to show that a communication is a coordinated communication under the Commission's regulations because ''[a]bsent some other indicia of an electoral nexus, the fact that a communication is made at the request or suggestion of a candidate is not sufficient to demonstrate that it is the functional equivalent of a campaign contribution.'' Additionally, another commenter stated that ''interactions between members of Congress or staff with citizens and citizens groups on legislative issues, strategies, and policies do NOT automatically taint subsequent public communications regarding that issue, legislation or matter by the citizens or citizens group.'' (emphasis in original).

The Commission agrees with these commenters that the ''request or suggestion'' conduct prong should not be amended. In BCRA floor debate, Senator McCain clarified that:

> [N]othing in the section 214 should or can be read to suggest * * * that lobbying meetings between a group and a candidate concerning legislative issues could alone lead to a conclusion that ads that the group runs subsequently concerning the legislation that was the subject of the meeting are coordinated with the candidate * * *. We do not intend for the FEC to promulgate rules, however, that would lead to a finding of coordination solely because the organization that runs such ads has previously had lobbying contacts with a candidate.

148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

When the Commission promulgated the *2002 Coordination Final Rules,* it stated that ''the Commission believes that a content standard provides a clear and useful component of a coordination definition in that it helps 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,* 68 FR 421, 426. The Court of Appeals recognized that ''statements may relate to political or legislative goals independent from any electoral race—goals like influencing legislators'' votes or increasing public awareness'' and that ''the FEC could construe the expenditure definition's purposive language as leaving space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign.'' *Shays Appeal* at 99. Therefore, consistent with the Court of Appeals' observations and the comments received in this proceeding, and in order to ensure that the coordination regulations are tailored to reach only communications made for the purpose of influencing a Federal election, the Commission is not amending the ''request or suggest'' conduct standard.

B. ''Common Vendor'' and ''Former Employee'' Conduct Standards (11 CFR 109.21(d)(4) and (5))

The fourth and fifth conduct standards involve common vendors and former employees, respectively. *See* 11 CFR 109.21(d)(4) and (5). These two conduct standards implement the requirement of 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'' in the context of coordination. *See* BCRA, Pub. L. 107–155, sec. 214(c)(2) and (3) (2002).

The ''common vendor'' conduct standard in the 2002 coordination rules is satisfied if (1) the person paying for a communication contracts with, or employs, a ''commercial vendor'' to create, produce, or distribute the communication; (2) the commercial vendor has provided one or more specified types of services, within the ''current election cycle,'' [47] to the clearly identified candidate, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee or political party committee; and (3) the commercial vendor uses or conveys information about the campaign plans, projects, activities, or needs of the candidate or political party committee that is material to the creation, production, or distribution of the communication obtained from the work done for the candidate or political party committee when working for the person paying for the communication. See former 11 CFR 109.21(d)(4).

Similarly, the ''former employee'' conduct standard in the 2002 coordination rules is satisfied if (1) the person paying for a communication was, or is, employing a person who was a former employee or independent contractor, within the ''current election cycle,'' of the clearly identified candidate or the political party committee referred to in the communication; and (2) the former employee uses or conveys material information about the plans, projects, activities, or needs of the candidate or political party committee obtained from work done for the candidate or political party committee when working for the person paying for the communication. *See* former 11 CFR 109.21(d)(5).

The *NPRM* sought comment on whether these two conduct standards should be limited to cover only common vendors and former employees who are agents of a candidate or political party, and whether the Commission should change the temporal limit of the ''current election cycle'' in the standards. The Commission has decided not to limit these conduct standards to agents, but to revise the temporal limit in the common vendor and former employee conduct standards to encompass 120 days rather than the entire ''current election cycle.''

1. Agents

First, the Commission sought comment on whether it should change the coordinated communication regulations to cover common vendors and former employees only if they are agents of the candidate or political party committee under the Commission's definition of ''agent'' in 11 CFR 109.3. The *NPRM* also asked if the Commission should instead eliminate the common vendor and former employee conduct standards since restricting these standards to agents would render these standards superfluous because, if limited to agents, the conduct of former employees and common vendors would already be covered by the first three

[47] The term ''election cycle'' is defined in 11 CFR 100.3(b) (''An election cycle shall begin on the first day following the date of the previous general election for the office or seat which the candidate seeks * * * The election cycle shall end on the date on which the general election for the office or seat that the individual seeks is held.'').

conduct standards at 11 CFR 109.21(d)(1) through (d)(3).

The commenters were divided as to whether restricting these conduct standards to agents, or eliminating the standards completely, was within the Commission's statutory authority. Some commenters argued that BCRA sections 214(c)(2) and (3) did not mandate that the Commission restrict common vendors and former employees, but only that the Commission consider these issues when deciding what coordination rules to adopt. These commenters argued that the Commission is authorized to restrict or eliminate these standards after proper consideration of the issue. In contrast, other commenters argued that limiting the common vendor and former employee conduct standards would ''fundamentally compromise'' the purpose and intent of BCRA's requirement.

After consideration of the comments and the BCRA provisions regarding common vendors and former employees, the Commission has decided not to change the conduct standards in this manner at this time. The Commission recognizes that these conduct standards focus on the conduct of third party vendors and former employees who might no longer be the candidate's or political party committee's agents, and therefore apply to some persons not covered by the other conduct standards. However, under 11 CFR 109.21(b)(2), a candidate or a political party committee with whom a communication is coordinated does not receive or accept an in-kind contribution if the coordination only results from conduct under the common vendor and former employee standards. *See* 11 CFR 109.21(b)(2). Coupled with this pre-existing safeguard, these conduct standards continue to apply regardless of whether the common vendor or former employee would be considered an agent under 11 CFR 109.3.

2. Election Cycle Temporal Limit

The *NPRM* also sought comment regarding whether the Commission should revise the current ''election cycle'' temporal limit in the common vendor and former employee conduct standards. Many commenters suggested that including the entire election cycle in the conduct standard was over-inclusive, especially with regard to six-year Senate election cycles. One commenter noted that the ''revolving door'' ethics rules for Congress limit subsequent employment for only one year, and argued that no other ethics rule included as long a period as the current rule in these conduct standards. One commenter observed that a ''temporal limit of an entire election cycle creates significant and unnecessary legal risks for individuals who are not in a position to violate the coordination rules.'' Many commenters observed that information relevant to the common vendor and former employee conduct standards, such as campaign strategy, tends to have a ''very short shelf life,'' that is, it becomes irrelevant quickly during an election year. Some commenters suggested revising the temporal limit to a 60-day period based upon the Commission's long-standing rule at 11 CFR 106.4(g) regarding the valuation of polling information, which treats poll results that are between 61 to 180 days old as ''worth'' only 5 percent of their initial value. Poll results more than 180 days old need not be reported as having any value. *See* 11 CFR 106.4(g).

In contrast, other commenters opposed any shortening of the temporal limit for these conduct standards. These commenters argued that the 2002 rule properly addresses the danger of coordination presented by candidates' campaign committees and political party committees using common vendors and by individual employees moving back and forth between different candidates and political party committees during the same election cycle. These commenters stated that the ''election cycle'' temporal limit was a bright-line rule appropriately drawn by the Commission to avoid the dangers of coordination.

The Commission explained in the *2002 Coordination Final Rules* that the temporal limit in the common vendor and former employee standards was not intended to serve as a ''cooling off'' period where employment was forbidden. *2002 Coordination Final Rules* at 438. Nevertheless, many commenters noted that the ''election cycle'' temporal limit operated in practice as a ''period of disqualification'' in which a vendor or former employee may not work on any particular matter for particular clients merely because that vendor or employee once worked with a candidate or political party at some point during the election cycle. These commenters stated that the rule had a ''chilling effect'' on the retention of consultants and employees because organizations want to avoid the speculative allegations of improper coordination. One commenter asserted that the ''election cycle'' temporal limit ''caused substantial harm to individuals who lacked any material information that could be used for coordination purposes, and yet who were targeted in FEC complaints.'' These commenters described the difficult process that political committees use to interview and investigate commercial vendors, many of whom are in short supply, to determine if the commercial vendor is ''tainted'' under these standards before contracting with these vendors for political work. The record also indicates that some commercial vendors feel compelled under this rule to refuse work from political committees near the beginning of an election cycle in order to preserve the ability to work for a political party or a candidate as the election approaches.

After considering the comments, which reflect experience in the recent election cycles under these rules, the Commission concludes that an ''election cycle'' limit is overly broad and unnecessary to the effective implementation of the coordination provisions. The more appropriate temporal limit for the common vendor and former employee conduct standards is 120 days. This temporal limit begins on the last day of the most recent employment or provision of services, not on the dates when the communication is publicly distributed or is paid for. Therefore, the 120-day period starts on the last day of an individual's employment with a candidate or political party committee, or on the last day when a commercial vendor performed any of the services listed in 11 CFR 109.21(d)(4)(ii) for a candidate or political party committee. If the former employee or commercial vendor performs any work for the candidate or political party committee after the official termination of employment or contract, including any projects or plans formulated during the employment or contractual relationship to be performed after official termination, the calculation of the 120-day period will restart from that date. Thus, under the Commission's revised rule, the 120-day period begins on the last day that goods or services are provided.

Reducing the temporal limit to 120 days will not undermine the effectiveness of the conduct standards and will not lead to circumvention of the Act. The record in this rulemaking indicates that material information regarding candidate and political party committee ''campaigns, strategy, plans, needs, and activities''—the information that is central to the common vendor and former employee conduct standards—does not remain ''material'' for long periods of time during an election cycle. Indeed, both national and local events tend to render campaign plans and strategy obsolete on

a very rapid basis. Moreover, as some commenters noted, much of the information gained working for candidates during primary races becomes largely irrelevant for general elections. As one commenter noted:

> If you're involved in a primary race and you've got a competitive primary, you are totally focused on how to win the nomination. And all your polling and all the information that you're getting; all the strategy that you're working out is basically focused on how do you win that election. It is an entirely different process when you get into the general election * * * The information you had about a primary is [largely] irrelevant * * * [W]hat is happening in the world in June could be very different by the time you get to October or September * * * [Y]ou're not going to have a lot of relevant information that's going to make a difference anyway.

Thus, the Commission agrees that it is unlikely that participation in early strategy decisions for a Senate candidate in the beginning of a six-year election cycle provides material information that is relevant and useful to a communication created five years later in the final stages of the general election campaign, or even six months later. This approach is consistent with the Commission's polling regulations, which recognize that polling information quickly loses its value with the passage of time. *See* 11 CFR 106.4(g).

Based on all the evidence and comments received by the Commission and the Commission's experience in enforcing the common vendor regulations in prior enforcement actions, the Commission concludes that a limit of 120 days is more than sufficient to reduce the risk of circumvention of the Act.

C. Safe Harbor for the Use of Publicly Available Information (11 CFR 109.21(d)(2)–(5))

In the *NPRM,* the Commission sought comment on whether to create a safe harbor for the use of publicly available information. Specifically, the safe harbor was proposed to ensure that the use or conveyance of publicly available information in creating, producing, or distributing a communication would not, in and of itself, satisfy any of the conduct standards in 11 CFR 109.21(d).

All commenters addressing this issue supported a safe harbor to some extent. The Commission agrees and is adding a safe harbor for the use of publicly available information. Although the safe harbor proposed in the *NPRM* would have applied to all five conduct standards and would have been set forth in a new paragraph, the Commission has decided that the new safe harbor more appropriately applies to only four of the five conduct standards, and is being added to the paragraphs currently containing those four conduct standards.

Some commenters expressed concern that the safe harbor proposed in the *NPRM* would preclude certain communications from satisfying the coordinated communications test simply because a portion of a given communication was based on publicly available information, even if a candidate privately conveyed a request that a communication be made. To address this concern, the new safe harbor does not apply to the ''request or suggestion'' conduct standard in 11 CFR 109.21(d)(1). Moreover, the four conduct standards that are being revised to include a safe harbor for the use of publicly available information all concern conduct that conveys material information that is subsequently used to create a communication, whereas the ''request or suggestion'' conduct standard concerns only a candidate's or political party's request or suggestion that a communication be created, produced or distributed, and is not dependent upon the nature of information conveyed. *See* 11 CFR 109.21(d)(2) (requiring *material involvement* regarding the communication's content, intended audience, means or mode, specific media outlet, timing or frequency, and size, prominence, or duration); 109.21(d)(3) (requiring a *substantial discussion* about campaign plans, projects, activities, or needs); and 109.21(d)(4) and (5) (requiring use or conveyance by a *common vendor* or *former employee* of information about campaign plans, projects, activities, or needs). Thus, new language in paragraphs 109.21(d)(2), (d)(3), (d)(4)(iii), and (d)(5)(ii) explains that the conduct standards contained in 11 CFR 109.21(d)(2) through (d)(5) are not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source.

Under the new safe harbor, a communication created with information found, for instance, on a candidate's or political party's Web site, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication. The Commission emphasizes that this treatment of the use of publicly available information is consistent with the Commission's historical treatment of the use of such information. *See 2002 Coordination Final Rules,* 68 FR at 432–434 (noting that the conduct standards would not apply to ''a speech at a campaign rally'' and could not be satisfied by ''a speech to the general public''); *see also FEC* v. *Public Citizen,* 64 F. Supp. 2d 1327 (N.D. Ga. 1999) (finding that an organization's expenditures for communications supporting a candidate did not qualify as coordinated expenditures because the organization used information disseminated to the public by the candidate's campaign). This treatment is also consistent with legislative history indicating that certain conduct does not amount to coordination. *See* H.R. Conf. Rep. No. 94–1057, at 38 (April 28, 1976) (''[A] general request for assistance in a speech to a group of persons by itself should not be considered to be a ''suggestion'' that such persons make an expenditure to further such election or defeat.'').

To qualify for the safe harbor, the person paying for the communication bears the burden of showing that the information used in creating, producing, or distributing the communication was obtained from a publicly available source. The person paying for the communication may meet this burden in a wide variety of ways. For example, the person paying for a communication may demonstrate that media buying strategies regarding a communication were based on information obtained from a television station's public inspection file, and not on *private* communications with a candidate or political party committee.[48] Other sources of public information for the purposes of the safe harbor include, but are not limited to: Newspaper or magazine articles; candidate speeches or interviews; materials on a candidate's Web site or other publicly available Web site; transcripts from television shows; and press releases.

The Commission emphasizes that a communication that does not fall within this safe harbor will not automatically be presumed to satisfy the conduct prong of the coordinated communication test. For a coordinated communication to be established, the use of such non-public information must satisfy the conduct prongs, and the communication must also satisfy the content and payment prongs.

[48] *See, e.g.,* Matter Under Review (''MUR'') 5506 (EMILY's List), First General Counsel's Report at 7 (the Committee ''states that it made its decisions about placing and pulling ads based on information that television stations are required to make public.'')

D. Safe Harbor for Establishment and Use of a Firewall (New 11 CFR 109.21(h))

The *NPRM* sought comment on whether to create a rebuttable presumption that a common vendor or former employee has not engaged in coordinated conduct under 11 CFR 109.21(d)(4) or (5), if the vendor or employee has taken certain specified actions, such as the use of ''firewalls,'' to ensure that no information about the campaign plans, projects, activities, or needs of a candidate or political party committee that is material to the creation, production or distribution of the communication is used or conveyed to a third party. The *NPRM* did not include any proposed regulatory text. The *NPRM* also discussed the Commission's finding in a recent enforcement matter that the facts produced by a respondent indicating that a firewall had been established within a political committee were sufficient to refute allegations of coordination under the first three conduct standards in 11 CFR 109.21(d)(1)–(3). *See* MUR 5506 (EMILY's List), First General Counsel's Report at 5–8.

Many commenters supported the idea of a safe harbor and argued that a candidate, political party committee, or other organization should be able to rely upon assurances from a commercial vendor that it maintains a firewall to prevent any coordination with one of the vendor's other clients. Some commenters urged the Commission to codify its analysis in MUR 5506 and implement a safe harbor with respect to all of the conduct standards. These commenters argued that a safe harbor applicable to all conduct standards would reduce the ''chilling effect'' of the coordination rules with regard to organizations conducting lobbying-related meetings with officeholders who are also candidates and would encourage and enhance compliance with the coordination regulations. Many commenters also supported a firewall safe harbor as a way for organizations to respond to speculative complaints alleging coordination when organizations are faced with trying to ''prove a negative'' by showing that coordination did not occur.

Some commenters described various approaches that political party committees and other committees have used in the past to avoid the possibility of coordination when some employees of a committee work on independent expenditures at the same time that other employees of the committee work with candidates or political party committees on lobbying or other issues. The commenters described how specific employees are placed on separate teams (or ''silos'') within the organization, so that information does not pass between the employees who work on independent expenditures and the employees who work with candidates and their agents.

As these commenters noted, the Supreme Court has recognized that political party committees have the right to make unlimited independent expenditures [49] and that establishing firewalls and similar screening policies is an effective way to simultaneously protect that right and avoid improper coordination. Other commenters opposed the creation of a firewall safe harbor, arguing that such a safe harbor could compromise BCRA.

The Commission has decided to add a safe harbor provision at new 11 CFR 109.21(h) regarding the establishment and use of a firewall. This safe harbor codifies the Commission's conclusions in MUR 5506 (EMILY's List). The Commission concludes that it is possible for a commercial vendor or other employer to create an effective firewall between different employees or between different units within its organization that prevents information obtained from one client from being used on behalf of another, and thereby prevents its staff from conveying information from one client to another. Similarly, a political committee with an effective firewall can prevent involvement by, and discussions between, a candidate or political party committee and the individuals creating the communication. In the context of a political party committee, use of a firewall can ensure that staff responsible for the party's coordinated party expenditures do not share or convey information to staff who are simultaneously exercising the party's constitutional right to make unlimited independent expenditures.[50]

Accordingly, the new regulation provides that the conduct standards in 11 CFR 109.21(d) are not met if a commercial vendor, former employee, or political committee has designed and implemented an effective firewall that meets the requirements of this new provision. In order to be eligible for the safe harbor, the firewall must be designed and implemented to prohibit the flow of information about the candidate's or political party committee's campaign plans, projects, activities, or needs between those employees or consultants providing services for the person paying for the communication and those employees or consultants who currently provide, or previously provided, services for the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. See new 11 CFR 109.21(h)(1).

The safe harbor provision does not dictate specific procedures required to prevent the flow of information referenced in new 109.21(h) because a firewall is more effective if established and implemented by each organization in light of its specific organization, clients, and personnel. One example of procedures that, if implemented, would satisfy this first requirement is the firewall described by EMILY's List in MUR 5506. That organization's firewall procedures stated that employees, volunteers, and consultants who handle advertising buys were ''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 [were] also barred from interacting with others within EMILY's List regarding specified candidates or officeholders.'' *See* MUR 5506 (EMILY's List), First General Counsel's Report at 6–7. The EMILY's List firewall prohibited personnel who worked directly with the candidate committees from discussing and conveying material information to the staff who handled the advertising buys.

Any firewall must also be described in a written policy that is distributed to all relevant employees, consultants and clients affected by the policy. *See* new 11 CFR 109.21(h)(2). ''All relevant employees'' includes all employees or consultants actually providing services to the person paying for the communication or the candidate or political party committee. To ensure that the firewall is in place before any information is shared between the relevant employees, the written firewall policy should be distributed to all relevant employees before those employees begin work on the communication referencing the candidate or political party. In an enforcement context, the Commission will weigh the credibility and specificity of any allegation of coordination against the credibility and

[49] *See Colorado Republican Federal Campaign Committee* v. *Federal Election Commission,* 518 U.S. 604, 614, 618 (1996).

[50] In *McConnell* v. *FEC,* 540 U.S. 93, 213–214 (2003), the Supreme Court struck down a provision of BCRA (sec. 213) that required political parties to choose between making coordinated and independent expenditures after nominating a candidate.

specificity of the facts presented in the response showing that the elements of the safe harbor are satisfied. A person paying for a communication seeking to use the firewall safe harbor should be prepared to provide reliable information (*e.g.*, affidavits) about an organization's firewall, and how and when the firewall policy was distributed and implemented.

The Commission notes that common leadership or overlapping administrative personnel does not defeat the use of a firewall. Moreover, mere contact or communications between persons on either side of a firewall does not compromise the firewall, as long as the firewall prevents information about the candidate's or political party committee's campaign plans, projects, activities or needs from passing between persons on either side of the firewall.

Once a firewall has been established, for the firewall to be vitiated and the safe harbor to be inapplicable, material information about the candidate's or political party committee's campaign plans, projects, activities or needs must pass between persons on either side of the firewall. The safe harbor does not apply if there is specific information indicating that, despite the firewall, either (1) information about the candidate's or political party committee's campaign plans, projects, activities or needs that is material to the creation, production, or distribution of the communication was used by the commercial vendor, former employee, or political committee; or (2) the common vendor, former employee, or political committee conveyed this information to the person paying for the communication. *See* new 11 CFR 109.21(h). The Commission emphasizes that the addition of this firewall safe harbor provision to the coordinated communication rules does not *require* commercial vendors, former employees and political committees to use a firewall. The Commission will not draw a negative inference from the lack of such a screening policy.

VII. Amendment to the Payment Prong (11 CFR 109.21(a)(1))

The Commission is amending the payment prong (11 CFR 109.21(a)(1)) of the Commission's coordinated communication test to read, ''Is paid for, *in whole or in part,* by a person other than that candidate, authorized committee, or political party committee.'' The addition of ''in whole or in part'' clarifies that the payment prong is satisfied not only when a person other than the candidate, the candidate's authorized committee, or political party committee, pays for the entire cost of a communication, but also if that person pays for only part of the costs. This clarification is consistent with the approach the Commission has taken in previous advisory opinions. *See* Advisory Opinions 2004–29 (Akin) and 2004–01 (Bush-Cheney/Kerr). The Commission notes that where a candidate or political party committee pays its allocable share of a joint communication, the payment prong has not been triggered and the communication is not a coordinated communication with respect to that candidate or political party.

VIII. Political Party Coordinated Communication Provisions (11 CFR 109.37)

In the NPRM, the Commission noted that the party coordinated communication regulations at 11 CFR 109.37 also contain a three-prong test for determining whether a communication is coordinated between a candidate and a political party committee. This ''party coordinated communication'' test in 11 CFR 109.37, which governs coordinated communications paid for by political party committees, has a content prong that is substantially the same as the one for ''coordinated communications'' in 11 CFR 109.21(c).[51] *See* 11 CFR 109.37(a)(2). Although the party coordinated communication regulations were not addressed in the *Shays* litigation, the Commission sought comment on whether it should make any changes to the 120-day time frame in 11 CFR 109.37 consistent with any changes made to the coordinated communication rules in 11 CFR 109.21. One commenter focused solely on this issue and encouraged the Commission to retain the 120-day time frame while adding a PASO standard. Other commenters noted only that their comments on this issue are the same as their comments on the coordinated communication rules in 11 CFR 109.21 regarding the 120-day time frame.

The Commission is revising its rules regarding party coordinated communications to ensure consistency with the revisions to the fourth content standard at 11 CFR 109.21(c)(4). Thus, revised section 109.37(a)(2)(iii), like revised section 109.21(c)(4), establishes separate time frames for communications referring to Congressional and Presidential candidates. For communications referring to Congressional candidates in primary and general elections, the revised time frame begins 90 days before each election and ends on the date of that election. For communications referring to Presidential candidates, the revised time frame covers, on a State-by-State basis, the entire period of time beginning 120 days before the date of a primary up to and including the date of the general election. Because the content standard in 11 CFR 109.37(a)(2) is not satisfied by a communication that refers only to a political party, revised 11 CFR 109.37, unlike revised 11 CFR 109.21(c)(4), does not contain a separate time frame for communications that refer to political parties.

The justification for the revised time frame in 11 CFR 109.37(a)(2)(iii) is the same as the justification for the revision of 11 CFR 109.21(c)(4). The CMAG data show that in the 2004 election cycle, nearly all television advertisements paid for by House and Senate candidates were aired within 90 days before primary or general elections and that nearly all advertisements paid for by Presidential candidates were aired during the time period that begins 120 days before a State's primary election up to and including the date of the general election. As discussed above, data showing when candidates spend their own campaign funds on advertisements provide an empirical basis for determining when advertising that has the purpose of influencing a Federal election occurs. Moreover, a candidate has an incentive to ask a political party committee to pay for advertisements to be aired precisely during the time period when the candidate believes these advertisements would be effective, which, as shown above, are the time periods when the candidate herself pays for such advertisements to be aired. The CMAG data, therefore, provide empirical support for using the revised time frames as part of a bright-line test for determining whether a communication that is paid for by a political party committee and is coordinated with a candidate is made for the purpose of influencing Federal elections. Finally, the Commission has been presented with no evidence that the revised time frame in 11 CFR 109.37(a)(2)(iii) would permit circumvention of the Act.

For the reasons discussed above, the Commission also incorporates into 11 CFR 109.37 the safe harbor provisions at new 11 CFR 109.21(d)(2)–(5) for use of publicly available information, as well

[51] 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.

as the safe harbors at new 11 CFR 109.21(g) and (h) for endorsements and solicitations by Federal candidates, and for the establishment and use of a firewall.

IX. Technical Changes Including Amendments to References to ''Agents'' (11 CFR 109.20, 109.21, and 109.23)

The Commission is also making certain technical, non-substantive changes to its coordinated communication rules to simplify them and enhance readability. One technical change of note is that the Commission is adding a sentence to 11 CFR 109.20(a) that explains that any reference in the coordinated communication rules to a candidate, a candidate's authorized committee, or a political party committee, also refers to any agent of the candidate, the candidate's authorized committee, or the political party committee. The Commission is adding this sentence to make explicit that an agent is included whenever a candidate, an authorized committee, or a political party committee is referenced, in order to remove the duplicative references to agents in 11 CFR 109.21 and 109.23.

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

The Commission certifies that the attached rules do 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 are affected by these rules are not ''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 are affected by these proposed rules are 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. 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 are affected by this proposed rule is not substantial, particularly the number that coordinate communications with candidates or other political committees in connection with a Federal election.

Furthermore, any separate segregated funds that are affected by these proposed rules are 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 are affected by these proposed rules are 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 other entities fall within the definition of ''small entities,'' any economic impact of complying with these rules is not significant.

With respect to commercial vendors whose clients include candidates, political party committees or other political committees, the final rules provide cost-effective methods for complying with the Act that are not required and that will reduce certain regulatory restrictions. Thus, rather than adding an economic burden, the rules 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 is amending 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. 107–155 SEC. 214(c))

■ 1. The authority citation for part 109 continues to read as follows:

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

■ 2. In § 109.20, paragraph (a) is revised to read as follows:

§ 109.20 What does ''coordinated'' mean?

(a) *Coordinated* means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee. For purposes of this subpart C, any reference to a candidate, or a candidate's authorized committee, or a political party committee includes an agent thereof.

* * * * *

■ 3. Section 109.21 is revised as follows:
■ a. Revise paragraph (a)(1);
■ b. Revise paragraph (b)(2);
■ c. Revise paragraphs (c)(2), (3), and (4);
■ d. Revise paragraphs (d)(1), (2), (3), (4), and (5);
■ e. Revise paragraph (e);
■ f. Add paragraph (g);
■ g. Add paragraph (h);

The additions and revisions 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, or political party committee;

* * * * *

(b) * * *

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

* * * * *

(c) * * *

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

communication that satisfies this content standard, see paragraph (d)(6) of this section.

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

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

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

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

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

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

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

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

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

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

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

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

(d) * * *

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

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

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

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

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

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

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

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

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

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

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

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

(B) Selection of audiences;

(C) Polling;

(D) Fundraising;

(E) Developing the content of a public communication;

(F) Producing a public communication;

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

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

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

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

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

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

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

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

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

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

(B) Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

* * * * *

(e) *Agreement or formal collaboration.* Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, is not required for a communication to be a coordinated communication. *Agreement* means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination. *Formal collaboration* means planned, or systematically organized, work on the communication.

* * * * *

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

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

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

(1) The firewall must be designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee; and

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

■ 4. In § 109.23, paragraph (b)(1) is revised to read as follows:

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

* * * * *

(b) * * *

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

* * * * *

■ 5. In § 109.37, paragraphs (a)(2) and (3) are revised to read as follows:

§ 109.37 What is a ''party coordinated communication''?

(a) * * *

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

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

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

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

(A) *References to House and Senate candidates.* The public communication refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's

general, special, or runoff election, or primary or preference election, or nominating convention or caucus.

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

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

* * * * *

Dated: June 2, 2006.

Michael E. Toner,

Chairman, Federal Election Commission.

[FR Doc. 06–5195 Filed 6–7–06; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 736 and 744

[Docket No. 060531141–6141–01]

RIN: 0694–AD76

Correction to General Order Concerning Mayrow General Trading and Related Entities

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule; Correction

SUMMARY: The Bureau of Industry and Security is correcting a final rule that appeared in the **Federal Register** on June 5, 2006 (71 FR 32272). This rule corrects an inadvertent error in the telephone number listed in the **FOR FURTHER INFORMATION CONTACT:** section of the preamble.

FOR FURTHER INFORMATION CONTACT: [Corrected] Michael D. Turner, Director, Office of Export Enforcement, Bureau of Industry and Security, Department of Commerce, P.O. Box 273, Washington, DC 20044; Phone: (202) 482–1208, x3; E-mail: *rpd2@bis.doc.gov;* Fax: (202) 482–0964.

Eileen Albanese,

Director, Office of Export Services.

[FR Doc. E6–8961 Filed 6–7–06; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 648

[Docket No. 060314069–6138–002; I.D. 030306B]

RIN 0648–AT25

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Framework 18

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This final rule implements Framework Adjustment 18 (Framework 18) to the Atlantic Sea Scallop Fishery Management Plan (FMP), which was developed by the New England Fishery Management Council (Council). The following management measures are implemented by this rule: Scallop fishery specifications for 2006 and 2007 (open area days-at-sea (DAS) and Scallop Access Area trip allocations); scallop Area Rotation Program adjustments; and revisions to management measures that would improve administration of the FMP. In addition, a seasonal closure of the Elephant Trunk Access Area (ETAA) is implemented to reduce potential interactions between the scallop fishery and sea turtles, and to reduce finfish and scallop bycatch mortality.

DATES: Effective June 15, 2006.

ADDRESSES: Copies of Framework 18, the Regulatory Impact Review (RIR), including the Initial Regulatory Flexibility Analysis (IRFA), and the Environmental Assessment (EA) are available on request from Paul J. Howard, Executive Director, New England Fishery Management Council (Council), 50 Water Street, Newburyport, MA 01950. These documents are also available online at *http://www.nefmc.org.* NMFS prepared a Final Regulatory Flexibility Analysis (FRFA), which is contained in the Classification section of the preamble of this rule. Copies of the FRFA and the Small Entity Compliance Guide are available from the Regional Administrator, Northeast Regional Office, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298, and are also available via the internet at *http://www.nero.nmfs.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule should be submitted to the Regional Administrator at One Blackburn Drive, Gloucester, MA, 01930, and by e-mail to *David_Rostker@omb.eop.gov*, or to the Federal e-rulemaking portal *http://www.regulations.gov*, or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Peter W. Christopher, Fishery Policy Analyst, 978–281–9288; fax 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

The Council adopted Framework 18 to the Atlantic Sea Scallop FMP on November 17, 2005, and submitted it to NMFS on December 16, 2005, for review and approval. Framework 18 was developed and adopted by the Council to meet the FMP's requirement to adjust biennially the management measures for the scallop fishery. The FMP requires the biennial adjustments to ensure that measures meet the target fishing mortality rate (F) and other goals of the FMP and achieve optimum yield (OY) from the scallop resource on a continuing basis. A proposed rule for Framework 18 was published on March 30, 2006 (71 FR 16091). The public comment period for the proposed rule ended on April 14, 2006. This rule implements management measures for the 2006 and 2007 fishing years, which are described in detail below.

Approved Management Measures

In the proposed rule, NMFS requested comments on all proposed management measures, and specifically highlighted a provision relating to the harvest of research set-aside from within an Access Area if the yellowtail flounder