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January 13, 2006

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments of Alliance for Justice in Response to Notice of Proposed Rulemaking 2005-28, "Coordinated Communications"

Dear Mr. Deutsch:

These comments are submitted on behalf of our client, Alliance for Justice, located at 11 Dupont Circle, NW, Second Floor, Washington, DC 20036. Alliance for Justice is a national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to the public policymaking process. Most of Alliance for Justice's members are charitable organizations, recognized as tax-exempt under Internal Revenue Code ("IRC") Section 501(c)(3), and therefore prohibited from supporting or opposing candidates for public office. In addition, a significant number of Alliance for Justice's members also work with or are affiliated with social welfare and advocacy organizations, recognized under IRC Section 501(c)(4), that engage in substantial amounts of lobbying and some political activity. We welcome the opportunity to provide these comments on behalf of Alliance for Justice in response to Notice of Proposed Rulemaking ("NPRM") 2005-28.

General Principles

Alliance for Justice recognizes the importance of the task the Federal Election Commission ("Commission") is undertaking in this coordinated communications rulemaking, and fully supports the goal of crafting regulations that prevent coordinated communications related to an election from being used to circumvent otherwise applicable contribution limits. On the other hand, we recognize equally the danger that an overly-broad rule could limit or chill grassroots lobbying activity, which neither Congress nor the Commission is constitutionally empowered to restrict. Our comments will show how these essential nonprofit advocacy rights may be threatened by calls for greater regulation of coordinated communications, and will attempt to balance these interests within the specific alternatives proposed by the Commission.

I. THE IMPORTANCE OF NONPROFIT ADVOCACY

The role of nonprofits as advocates in the legislative process is protected by Constitutional guarantees of free speech, freedom of association, and the right to petition the government for

redress of grievances. A long line of Supreme Court decisions highlights the Court's vigilance in protecting communications concerning matters of public policy. Speech on public policy "occupies the core of the protection afforded by the First Amendment. . . . No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's [handing out leaflets in the advocacy of a politically controversial viewpoint]."[1] Nor is *McIntyre* alone. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[2] "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[3] There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[4]

Public policy advocacy implicates not only the First Amendment right to speak but also the right to associate. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[5] "[F]reedom to associate with others for the common advancement of political beliefs and ideas is a[n] activity protected by the First and Fourteenth Amendments."[6]

The advocacy of all groups of citizens on matters of public concern is granted heightened protection under constitutional analysis, but 501(c)(3)s in particular play an essential role in the public policy process that Congress and the courts have long recognized. Charities are uniquely positioned to provide information about key social problems and solutions. To retain their tax-exempt status, 501(c)(3)s must operate not for profit, but for a charitable, educational, scientific, or religious purpose. Public charities must also receive the majority of their support from the general public or government. Because many 501(c)(3)s provide direct services to their communities — healthcare, housing, education, legal services, etc. — they have a grassroots view of the underlying social problems that create these needs. Frequently, these organizations know from first-hand experience which policy solutions offer a greater promise for addressing these problems. In addition, 501(c)(3)s have a credibility in discussing these concerns because their charitable missions make their positions less likely to be tainted by a desire for profit or the interests of a small group of individuals.

The contribution of nonprofits to sound policymaking has long been recognized by Congress. In 1976, Congress enacted sections 501(h) and 4911 of the IRC, indicating an affirmative Congressional intent to encourage limited lobbying activities by public charities.[7] This

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[1] *McIntyre v. Ohio Election Comm.*, 514 U.S. 334, 346 –347 (1995).
[2] *Roth v. United States*, 354 U.S. 476, 484 (1957).
[3] *Mills v. Alabama*, 384 U.S. 214, 218 (1966).
[4] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citations omitted).
[5] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).
[6] *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (citations omitted).
[7] Pub. L. No. 94-455, 90 Stat. 1520, 1720-9, § 1307.

Congressional action stood in sharp contrast to its action only seven years earlier imposing a punitive excise tax on such activities by private foundations.[8] The 1976 legislation clarified and simplified the applicable rules to encourage lobbying by charities within defined limits. It also explicitly recognized the value of policy advocacy by these organizations by excluding entirely from the lobbying limits certain legislative advocacy communications. "Making available the results of nonpartisan analysis, study, or research," is not treated as lobbying.[9] Significantly, the law also allows without limit, "providing of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be."[10] A similar exception applies even to private foundations, which are otherwise severely restricted from lobbying.[11] Congress understood that its policymaking is enhanced by the technical and practical expertise of the nonprofit sector, and took care to ensure that the limits on lobbying by 501(c)(3)s would not operate to deprive Congress of that benefit.[12] Although coordinated electoral activity is disfavored by being treated as a (hard money) contribution, coordinated policymaking is not. The rules developed to define the former should be careful to avoid capturing the latter.

II. THREAT OF COORDINATED COMMUNICATIONS RULES TO NONPROFIT POLICY ADVOCACY

A. Threat of Enforcement

Uncertainty in the definition of coordinated communications within the Federal Election Campaign Act ("FECA") penalizes constitutionally permissible speech, chilling speakers not just through fear of the penalties, but also through fear of a costly, time-consuming investigation by the Commission. The risk of a penalty for violating FECA Section 441b is not insignificant, but in many ways it is exceeded by the threat of a complaint and Commission investigation. If the new coordinated communications rules are drafted to require the target of a complaint to document the circumstances and content of every contact between the organization and a campaign, even an investigation that clears the organization could consume hundreds of hours of staff time and thousands of dollars in legal fees. This loss of time and budget would devastate small and even moderate-sized 501(c)(3) nonprofits.

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[8] Pub. L. No. 91-172, 83 Stat. 487. Both private foundations and public charities are exempt from taxation under IRC Section 501(c)(3). 501(c)(3) organizations are considered "public" if they fall into certain classes of entities (such as churches or schools), or receive their funding from a broad section of the public. Private foundations, in contrast, are generally funded from a few private sources, and are much more extensively regulated under the tax code.

[9] 26 U.S.C. § 4911(d)(2)(A).

[10] 26 U.S.C. § 4911(d)(2)(B).

[11] 26 U.S.C. § 4945(e)(2).

[12] The Internal Revenue Service has also created a similar exemption in its regulations defining activity by 501(c) organizations that triggers the tax on investment income under IRC Section 527. 26 C.F.R. § 1.527-6(b)(4). This exception for appearances before a legislative body in response to a written request by such body implicitly recognizes that the legislature would not seek to tax, and thereby discourage, the expression of an opinion that it has affirmatively requested.

While an overbroad or unclear definition of coordination creates burdens for all types of individual and corporate speakers, including nonprofit corporations, for a 501(c)(3) organization there is an additional danger. While public charities are permitted to participate in the policymaking process, Section 501(c)(3) of the IRC forbids charities from intervening in political campaigns. In general, this provision is far more restrictive than the FECA. In fact, many 501(c)(3) organizations are surprised to learn that any aspects of the FECA are relevant to them in light of the strong IRC prohibition. The penalty for violating the IRC's campaign intervention prohibition is loss of the organization's tax-exempt status, seen in the nonprofit world as virtually an organizational death penalty. The Internal Revenue Service ("IRS") would almost certainly find that an FEC finding that a 501(c)(3) has made any "contribution" – whether coordinated or not – to a political campaign would prove a violation of the IRC's campaign intervention prohibition. Thus, if the Commission were to find that coordination between a 501(c)(3) and a political campaign had turned a public communication into a prohibited contribution under FECA section 441b, the IRS could act to revoke the organization's tax-exempt status. The threat of this additional penalty could deter these organizations from exposing themselves to any risk that even a *bona fide* lobbying activity undertaken in consultation with Congressional allies might provide the basis for an allegation of improper coordination.

B. Problems of Overbreadth and Vagueness

As Alliance for Justice has indicated in previous rulemaking comments, our touchstone is the need to craft any restrictions narrowly to ensure that essential voices in the political debate, particularly those of the nonprofit sector, are not silenced. The numerous proposals in this NPRM have the potential to apply to organizations engaged primarily in charitable work with limited policy advocacy, to a greater extent than is frequently the case with the Commission's work. These groups are not likely to be familiar with the intricacies of campaign finance law. If they do not have a bright line, or at least a clear standard to follow, there is a high likelihood that their non-electoral speech will be chilled.

As the Supreme Court wisely advised in *FEC v. Massachusetts Citizens for Life*, "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."[13] In addition to avoiding regulatory overbreadth that inadvertently reaches protected speech, the First Amendment concerns also demand that we avoid rules that, while not banning protected speech, create a fear of regulation so great that it unduly restrains the speaker from participating in public debate.

In assessing the potential impact of the current proposed regulations governing coordinated communications, it is important to appreciate the extent of contacts wholly unrelated to elections that routinely take place between groups of citizens and elected lawmakers. Most officeholders

[13] 479 U.S. 238, 265 (1986).

are perpetual candidates; even if they have not declared their intention to seek re-election, it is likely they will do so in the near future. Under both current rules and all the variants proposed in this rulemaking, even if a time window applies to the making of a potentially coordinated communication, the conduct that may be held to constitute coordination could take place at any time.[14] As a result, a broad definition has the potential to affect contact with policymakers that occurs at a point distant in time from an actual election day.

C. Responses and Solutions

Our comments on these proposed rules seek, when possible, to include the use of bright- line tests and safe harbors. Bright lines provide the clarity necessary to reassure organizations that might otherwise be fearful to introduce their unique and essential contributions into the public policy debate. A properly drafted content test will leave unregulated a sufficiently wide swath of policy advocacy to allow these groups to carry out their critical mission. Safe harbors and carve-outs can supplement a potentially overbroad bright-line rule to further shelter non-electoral activity that ought not to be regulated.

To be sure, the existing regulations do provide a safe harbor for inquiries about a candidate's or political party's position on legislative or policy issues.[15] Although this exception appropriately protects such inquiries from triggering application of the coordination rules, this is a narrow exception. It permits an organization to learn where a candidate stands on a policy issue, but that is only the starting point in a meaningful effort to influence legislation. In addition to ongoing conversations with legislators in need of persuading with regard to a pending policy proposal, nonprofits frequently meet to strategize with those legislators who most strongly support their legislative agenda. It is also common to coordinate legislative strategy with party officials. While the Commission no doubt encounters political parties primarily as organizations seeking to achieve the election of their candidates, parties also adopt and seek to promote policy and issue agendas. Effective advocacy is often best served by careful coordination among coalitions of organizations interested in an issue and, where those groups' interests overlap with a political party or member of Congress, legislative efforts necessarily entail coordination with them, including specific coordination of public communications around the issue.

III. SPECIFIC COMMENTS

In light of the important role played by nonprofit organizations in the legislative and policymaking process, the current rulemaking raises two specific concerns. First, prior communications between an organization and a political party or legislative officials about legislative or other policy issues should *not* be a basis for finding that subsequent independent electoral advocacy has been impermissibly coordinated. And second, any rule adopted should

[14] The proposal suggests that perhaps the common vendor rules would be more limited in the time window to which they would apply, but where it is the organization's own direct conduct that leads to alleged coordination, no time limit appears to apply.
[15] 11 C.F.R. § 109.21(f).

recognize that not all communications made by or coordinated with parties or candidates are election-related; the Commission should strive to leave unregulated those communications that pertain to policies and not campaigns. Policy advocacy communications may indeed be "coordinated" as the term is used in the conduct prong of these regulations, but if they are not somehow "in connection with" a federal election, there is no legal or constitutional basis for constraining them.

These concerns informed Alliance for Justice's thinking as we contemplated each of the Commission's proposals within both the content and conduct prongs of the coordinated communications rulemaking. After full consideration of the goals of FECA, the Commission's intentions, and the important advocacy rights of nonprofit organizations, we believe the best approach is to combine a 120-day bright-line rule with clearly stated safe harbors that would apply within that pre-election window to protect *bona fide* lobbying and other non-electoral communications.

A. Content Prong

We note with approval that most of the alternatives in this rulemaking retain the fundamental structure of the existing coordinated communications regulations, and in particular the content test. As the accompanying memorandum notes, the content prong of the regulations was adopted in order to "ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a Federal election."[16] Because the Commission lacks both statutory and constitutional authority to regulate such communications, we urge that the final rule adopted should retain a content test that is crafted to capture only speech that is "reasonably related to" an election.[17] Absent a demonstrated electoral nexus, there is no basis for regulating speech, whether coordinated or independent.

1. Alternative 1

Alternative 1, which retains the current 120-day rule, has the virtue of providing a bright-line rule that is easily applied. It leaves a significant period of time in the election cycle when organizations can communicate freely with the public about legislators and issues, and with political parties and legislators, without concern for allegations of improper coordination.

Of course, the drawback of this approach is that it creates an apparently irrebuttable presumption that public communications made within the 120-day pre-election window that refer in any way to a federal candidate have the requisite electoral nexus, even if those communications are legitimate grassroots lobbying or permissible issue advocacy that do not influence the election. The result is that citizens will be prevented from engaging in policy advocacy in cooperation with elected officials during this period of time or, alternatively, forced to modify their advocacy messages to avoid references to specific elected officials who happen to be candidates for re-

[16] NPRM at 73947.
[17] NPRM at 73948.

election. Contrary to the assertions that some have made, including in the context of the *Shays* litigation[18] that gave rise to this rulemaking, a four-month pre-election window is not insignificant. In any given race, the 120 days before both general and primary elections occupy a full 2/3 of the election year.

Nonetheless, we believe that the clarity of this 120-day bright line makes up for its overbreadth. As discussed below in connection with Alternative 4, we prefer to combine this bright line with additional safe harbors to protect some non-electoral speech within the 120-day window as a way to cure some of the rule's overbreadth. However, the benefits of having a clear, easily applied rule that leaves open a significant time frame for unfettered advocacy cannot be overstated.

Any rule that establishes a bright line will be imperfect to some degree. 120 days is not a magic number, just as there is nothing magical about the 60- or 30- day period used to define electioneering communications. No one believes that communications on day 121 are likely to be tremendously different in their effect from those on day 120, nor are ads running on day 61 meaningfully distinguishable from those running on day 60. But this is not to say that time is wholly irrelevant. Wherever the line is drawn, it is clear that public communications on the weekend before election day are far more likely to be in relation to the election than those made a year out. A defined time frame may reasonably capture the overwhelming majority of election-related communications.

The NPRM cited a number of sources of information that might provide data to support or rebut the reasonableness of a 120-day content rule. Unfortunately, we lack the resources to provide a meaningful analysis of these materials, and we hope that other commenters will be able to shed light on what the available analyses indicate about the time at which campaign communications are typically and/or effectively made. From our limited review, it seems particularly difficult to find any studies relating to the timing of non-broadcast public communications.

While we cannot pretend to have thoroughly reviewed the available literature, the available research we have reviewed certainly suggests that campaign-related communications are overwhelmingly likely to occur no longer than 120 days before an election. One particularly interesting study reviewed polls in presidential elections between 1944 and 2000 to discern how voter sentiment evolves over time.[19] A telling result was that the electorate's presidential preferences are most volatile during the period of time 90-120 days out from the election. Apparently it is during that time that voters are most open to persuasion and their opinions can be altered by external events.[20] If we are correctly interpreting this article's scholarly findings, it provides strong evidence that public communications more than 120 days out from a presidential election are likely to have little effect on public electoral sentiment. It is highly unlikely that

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[18] *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd, Shays v. FEC*, 414 F. 3d 76 (D.C. Cir. 2005)(*pet. for reh'g en banc denied October 21, 2005*).

[19] Christopher Wlezien and Robert S. Erikson, *The Timeline of Presidential Election Campaigns*, 64 THE JOURNAL OF POLITICS 969 (November 2002).

[20] *Id*. at 978-9.

voters are open to persuasion in House and Senate further out from the election. While this article may not provide conclusive proof, it is certainly some evidence that the 120-day rule establishes a reasonable framework to capture communications that are, indeed, made "in connection with" a federal election. Other studies we found did not focus on the question of timing, but examined the effectiveness of various types of voter contact.[21] The communications studied all seemed to come very close to the election. None of the scholarly studies we have found gave any indication that campaigns consider it effective to communicate with voters as far out as 120 days.[22]

2. Alternative 2

Although Alliance for Justice is not opposed to a different time frame, all the possibilities discussed in this alternative seem to contemplate a window greater than 120 days, including the period from 120 days before the primary through the general election, or the entire election year. We oppose any effort to establish a longer time frame if it is crafted with an irrebuttable presumption that communications made during that period that mention a federal candidate are to be treated as in-kind contributions if coordinated with a party or candidate. As discussed above, an array of policy advocacy may legitimately be coordinated with elected leaders yet have no reasonable connection to the electoral process. A conclusive presumption that eliminates or even severely curtails such advocacy in every even-numbered year is entirely unsupportable.

The Commission's discussion of this alternative suggests that outside a set pre-election time frame it might be appropriate to narrow the content test's reach to cover only communications that include an extra element. We do not, in principle, oppose this approach, so long as the rule derived is stated clearly and provides adequate guidance. However, the proposal discussed in the NPRM suffers from two defects. The less significant problem is the length of time to which the test might apply. Adding an additional 120 days of "content plus" to the eight months of the election year already covered potentially expands the reach of the regulations to govern communications made throughout the entire election year. On the other hand, it might be reasonable to adopt a rule that presumes an electoral nexus for communications within a narrower pre-election window, such as 30 or 60 days,[23] and regulates communications in a longer time period only if an additional element is present to indicate that the communication is made "in connection with" an election.

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[21] *E.g.*, 601 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Vol. 601, No. 1 (September 1, 2005) (entire issue focusing on analysis of voter mobilization techniques).

[22] *See, e.g.*, Emily Arthur Cardy, *An Experimental Field Study of the GOTV and Persuasion Effects of Partisan Direct Mail and Phone Calls*, *Id.* at 28.

[23] The statutory regulation of electioneering communications and underlying legislative record provide support for the proposition that communications in the 30 days before a primary or 60 days before a general election are reasonably likely to be "in connection with" the election. Although that provision relates only to broadcast messages, it is reasonable to conclude that less effective communications media are *per se* not influencing elections outside the EC window.

Unfortunately, the additional element proposed in the NPRM – words that promote, support, attack, or oppose ("PASO") a political party or federal candidate – does not come close to the degree of clarity required to provide adequate guidance to citizens' groups engaged in issue advocacy or to save the regulation from constitutional infirmity. This second defect is critical for 501(c)(3) organizations, in particular. Both Alliance for Justice and this law firm filed detailed comments in connection with the recently completed rulemaking on electioneering communications that emphasized the unworkability of "PASO" as a standard for nonprofits to apply. We will not reiterate here the litany of concerns raised by this vague and undefined standard. It is of note, however, that we were not alone in objecting to the application of PASO to 501(c)(3) organizations. In the electioneering communications rulemaking, where commenters found little common ground, this was a point of near universal agreement:

> [T]he proposal raises constitutional questions because it would impose a PASO standard that is not appropriate for application to individuals and entities other than candidates, political committees or other groups with a principal purpose to influence elections. . . [PASO] is potentially unconstitutional as applied to entities, such as section 501(c)(3) corporations, which are not "major purpose" entities.[24]

While we applaud the Commission's attempt to require a demonstrated electoral nexus in order to regulate coordinated communications, PASO is not a sufficiently developed standard to rely upon. Its vagueness means that speech will be chilled because of uncertainty about how it might be enforced. It is this Commission's job to adopt understandable rules and provide guidance to the regulated community. If the Commission is serious about this approach, it must do the hard work of articulating the factor(s) that, outside a narrow pre-election window, are sufficient to support the conclusion that a coordinated public communication is made "in connection with" a federal election. Lobbying and advocacy groups that are not primarily involved in electoral politics need a plain rule to apply, not an arcane term of art open to subjective interpretation and application.

3. Alternative 3

Alternative 3 proposes eliminating the pre-election timeframe entirely, so that any coordinated public communication that refers to a candidate or party at any time and for any purpose would be treated as an in-kind contribution. We strongly oppose this approach.

As discussed above, there is an array of policy advocacy on which citizens, nonprofit organizations, elected officials, and political parties work jointly throughout each year. This would in effect criminalize all such efforts. For example, this past year saw heated debate over the President's proposal to privatize Social Security. Proponents of this plan included Republican legislators, leaders of the Republican Party, conservative nonprofits and citizens belonging to those groups. Opponents of this plan included Democratic leaders, progressive

[24]Campaign Legal Center, Democracy 21, and the Center for Responsive Politics Comments in Response to Notice of Proposed Rulemaking 2005-20: Definition of "Electioneering Communication" at 18.

nonprofits, and concerned citizens. Public messages frequently referred to the President's proposal as the "Republican proposal." To suggest that this partisan reference is a sufficient basis to treat this policy-focused effort as somehow intending to influence an election is to stretch credibility.

Alliance for Justice's own experience provides another example of *bona fide* issue advocacy coordinated with elected officials.[25] One of the cornerstones of Alliance for Justice's mission is its Judicial Selection Project, which since 1985 has taken a leading role in efforts to ensure a fair and independent judiciary. In the spring of 2005, the issue of the use of the filibuster to block judicial nominations created a crisis in the U.S. Senate. As the confrontation over the issue headed to final showdown, Alliance for Justice aired on national television an advertisement featuring Senator Harry Reid of Nevada decrying stated plans by some Senators to change Senate rules and prevent filibusters during consideration of judicial nominees. As demonstrated by Senator Reid's appearance in the advertisement, Alliance for Justice worked closely with him in creating this message to mobilize public involvement around an issue that was critical to both Senator Reid as Senate minority leader and Alliance for Justice's mission.[26]

Alternative 3 would, in effect, represent a determination that political parties exist solely to elect candidates, and that their policy platforms and legislative strategies are somehow meaningless. It would be a conclusion that elected representatives engage in public debate for the sole purpose of winning re-election, that as legislators they do not have a stake in public policy debates. These conclusions simply do not stand up to any degree of scrutiny.

4. Alternative 4

Alternative 4 suggests removing the time limitation of the current content test and adding an element stating that communications would be covered only if they PASO a candidate or party and are placed in the jurisdiction where federal candidates are on the ballot. As discussed above, PASO is not a workable standard for anyone to apply, much less for grassroots organizations that are not versed in the intricacies of FECA.

Depending on what PASO is interpreted to mean, this alternative is also potentially overbroad. If PASO is understood to mean "reasonably related to a federal election" – that is, PASO an individual *as a candidate* – it may be sufficient to demonstrate the electoral nexus necessary to support regulation when coordinated with a candidate or party. If, however, as some have urged,

[25] The example given here naturally reflects Alliance for Justice's position on this specific issue. Our concern, however, is not just that our speech and that of those who share our views will be silenced, but that the public debate will suffer as a whole. Alliance for Justice's commitment to the free speech rights of all organizations is firmly held, as demonstrated by the fact that it has recently filed an *amicus curiae* brief in the Supreme Court defending the right of Wisconsin Right to Life to advocate the opposite position on the precise issue of the Senate's filibuster of judicial nominees.

[26] Senator Reid was not a candidate at the time the ad ran, as he had just been reelected in the fall of 2004. However, this was not a consideration in the organization's planning, and it is entirely possible to imagine similar advocacy conducted jointly with an incumbent who was already an announced candidate.

PASO includes praise or criticism of a lawmaker's position on a policy issue – that is, addressing an individual *as a policymaker*, then a number of *bona fide* lobbying communications will be captured under that rubric. To treat coordinated lobbying on controversial policy issues no matter when it occurs as an in-kind contribution to a candidate or party reaches far beyond what is necessary to prevent evasion of FECA's contribution limits.

The NPRM suggests as an alternative to the PASO standard in Alternative 4 a safe harbor that would apparently carve out some lobbying messages. While we applaud the effort to protect legitimate policy advocacy, the proposal as drafted falls short. Primarily, the problem is that the burden should not fall on the speaker to demonstrate that her/his speech is non-electoral and therefore not regulable; the burden should always be on the government, and this Commission, to identify with clarity and precision the type of speech which is sufficiently closely tied to elections to merit regulation.

However, this safe harbor approach combined with a time-limited bright-line standard has the potential to accomplish the twin goals of regulating coordinated communications reasonably related to federal elections while still protecting the policy and issue advocacy rights of individuals and nonprofit organizations. Within the 120-day pre-election window, communications that are demonstrably related to policy and not electoral advocacy should remain free of regulation.

With regard to the specific criteria listed in Alternative 4, it should not be necessary that a communication meet each element in order to qualify for a safe harbor. Prohibiting mention of a legislator's position on an issue removes a critical tool of effective lobbying. Similarly, requiring no mention of party affiliation or ideology ties the hands of an advocate seeking to move an audience to take lobbying action. We suggest that the following factors are sufficient to demonstrate that a message should qualify for a safe harbor:

- The communication refers to and encourages action on a particular legislative or executive branch matter;
- The communication does not refer to a clearly identified Federal candidate's character, qualifications, or fitness for office; and
- The communication does not refer to an election, voters or the voting public, or anyone's candidacy.

Of course, we note that electioneering communications remain covered by one of the content test's prongs. As a result, this exception would apply only to non-broadcast media or broadcast ads outside the 60/30-day electioneering communications window. Absent a record to demonstrate that coordinated communications meeting the above test but not constituting electioneering communications have in fact been used to evade FECA's contribution limits, an attempt to restrict them is unlikely to survive the strict scrutiny applied to constraints on policy advocacy. An appropriately drawn safe harbor combined with a bright-line time frame can work together to insulate these regulations from constitutional challenge.

5. Alternative 5

Alternative 5 proposes retaining the 120-day time frame only for organizations that are not political committees. This would leave in place the bright-line rule we have advocated for above in the discussion of Alternative 1 for other organizations, including all 501(c) groups. We do not, however, support any rule that would create a conclusive presumption that public communications referring to parties or candidates are always election-related. True, political committees have a major purpose of influencing elections, but that is not necessarily their sole purpose. Indeed, we are aware of organizations and their advisors who have concluded that operating as a hard-money political committee is a safe and unimpeachable approach to advocacy in an uncertain and changing regulatory environment. In debates over the proper limits on 501(c)(3) organizations, or the extent to which 501(c)(4)s (and other 501(c)s) may engage in electoral advocacy, it is easy to rebut concerns about uncertainty by saying that an organization always has the option of using, or operating as, a PAC to pay for all communications mentioning federal candidates. If such communications made by political committees are to be subject to a different regulatory regime, that calculus will shift.

The evidentiary record does not support an irrebuttable presumption that the policy advocacy messages of all political committees are designed solely to influence elections and therefore serve as contributions when coordinated.

6. Alternative 6

Alternative 6 proposes replacing the content test with the requirement only that the public communication in question be made "for the purpose of influencing an election for Federal office." The discussion in the NPRM indicates that this would entail a fact-dependent, case-by-case inquiry. If that were true, we could not object more strenuously to this alternative. For all the reasons already discussed, nonprofit advocacy groups cannot constitutionally, and should not as a matter of sound policy, be subject to such a vague standard. A finding that a communication is "for the purpose of influencing" an election is the minimum necessity for this Commission to regulate speech, a statutory direction to the Commission to target its regulatory efforts. It is not a self-executing standard and on its own it provides no meaningful guidance as to what is permitted or not permitted.

Fortunately, the Supreme Court has already considered the vagueness of this language, and construed it definitively to reach only "communications that expressly advocate the election or defeat of a clearly identified candidate."[27] If Alternative 6 were so construed, Alliance for Justice would be delighted to support the test. Absent such a narrowing construction, or regulatory language to applying a clear and understandable definition to the concept, Alternative 6 cannot even be considered a good faith attempt to articulate a meaningful rule.

[27] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

7. Alternative 7

Alternative 7 would eliminate the content prong entirely, except to treat any coordinated public communication as a contribution. The underlying presumption of this proposal seems to be that if a communication is coordinated, it must have value to the candidate or party coordinating with the outside organization regardless of its actual language or intended purpose. This may be true, but to conclude that the communication is therefore necessarily made in connection with an election relies on the flawed assumption that candidates and parties have no other role than as electoral players, and can receive no non-electoral benefit from the coordinated communication. As we have demonstrated repeatedly throughout these comments, it is simply wrong to view political actors as only concerned with elections. The purpose of elections is to elect policymakers; FECA has no role regulating the policymaking process, and the Commission must take care in crafting its rules to avoid reaching beyond the electoral sphere with which it is charged.

In addition to the coordination of lobbying and other policy issue advocacy efforts discussed above, nonprofits benefit in many ways from cooperative efforts with legislators (who may also be candidates), many of which entail making public communications. The record in this Commission's recently completed rulemaking on electioneering communications contains a number of examples of Members of Congress who have recorded public service announcements to benefit nonprofit organizations. For instance, Senator John McCain has appeared in public service announcements supporting national mentoring month[28] and opposing violence against Arab-Americans in the aftermath of September 11, 2001.[29] Under Alternative 7, whenever an officeholder appears in a broadcast message, it appears it must *per se* be considered a coordinated communication. Yet it stretches credulity to attempt to assert that these public service appearances should be treated as campaign contributions.[30]

The discussion of this alternative's overbreadth could extend at great length, but these examples are sufficient evidence that this captures too much speech. Alternative 7 threatens to restrict speech far outside the electoral arena and to deprive both nonprofits and the public of the attendant benefits this speech brings.

"Directed To Voters"

[28] S*ee* http://www.hsph.harvard.edu/chc/mentoringmonth/psas.html (last accessed January 12, 2006).
[29] S*ee* www.aaiusa.org/psa.htm (last accessed January 12, 2006).
[30] We have not verified whether the Senator was a declared candidate at the time the public service announcements mentioned were released, but they provide useful examples of wholly non-electoral public communications coordinated with someone who may well have been a candidate. Alternative 7 would certainly impose tremendous limitations on the ability of House members to participate in such public service announcements, given the frequency with which they face reelection.

The NPRM inquires about the application of the requirement in the fourth content standard that a public communication must be directed to voters in the candidate's jurisdiction in order to be covered by the regulations. It inquires whether a communication that is disseminated nationally and therefore only incidentally reaches voters in the candidate's district be exempted from coverage of the regulations.

Alliance for Justice supports such an exception, but considers it of limited utility. Certainly the Commission should not treat as electoral an advertisement that refers to a bill's sponsor and runs nationwide as part of a lobbying campaign. However, this approach alone is not enough to distinguish *bona fide* lobbying. Grassroots lobbying communications are directed at a legislator's constituents to mobilize them to contact their elected representatives. Typically a communication will be tailored to a particular district, to encourage the most effective communication from the constituents. Most importantly, the message will convey where the representative stands on the legislation so members of the public know whether they should thank her/him for supporting their position or lobby the representative to change her/his position. The generic nationwide ad naming a bill's sponsor and encouraging support for or opposition to a legislative measure is plainly non-electoral, but that description does not adequately capture the majority of lobbying messages. Fundamentally, voters and constituents are the same people. The fact that a message is targeted to that group of people may be an indication of electoral intent, but it may equally indicate a *bona fide* lobbying intent. Something more is needed to distinguish the two. The safe harbor suggested in the NPRM is good, but we cannot agree with the suggestion that it reliably distinguishes all lobbying communications from those that may properly be regulated.

B. Conduct Prong

Although it does not provide proposed language, the NPRM also seeks comment on a number of issues relating to the conduct prong of the regulations. We comment on a few of those points.

1. Request or Suggest

The NPRM inquires whether the fact that a public communication is made at the request or suggestion of a candidate or party means it presumptively has value to that candidate or party. As discussed in connection with Alternative 7 above, public communications may indeed have some value, but it does not necessarily follow that the communication has electoral value to the person with whom it is coordinated. Parties and candidates have legitimate interests in influencing policy debates, as well as promoting charitable causes, that may be furthered by coordinated public communications. Absent 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.

2. Common Vendor

Alliance for Justice supports the suggestion that the common vendor rules should be limited to cover only people who are acting as agents.[31] If the alleged intermediary who creates the avenue for coordination is not acting as an agent of a campaign, it makes little sense that the resulting communication would be sufficiently coordinated to be treated as a contribution. This is particularly true when applied to former employees who no longer have that direct relationship with the candidate. Having access to information about a campaign's plans or desires may make an organization's communication more effective, but that is not the same as being a substitute for a cash contribution.

Alliance for Justice supports in principle the firewall approach discussed in the NPRM. It is important, however, that any safe harbor be explicitly just that, and not a *de facto* requirement. Many smaller organizations, especially small nonprofits, cannot as a practical matter split their staff into coordinated and independent groups. These groups should nonetheless remain free to coordinate some lobbying and issue advocacy with officeholders without jeopardizing their ability to undertake separate and independent communications. Failure to comply with an available safe harbor should never create any negative inference.

3. Publicly Available Information Safe Harbor

Alliance for Justice supports the proposal to create a safe harbor to clarify that the use of publicly available information does not constitute coordination. This is a clear and common-sense rule that provides useful guidance to the regulated community and is consistent with statutory intent. Advocacy based on information available to the general public can hardly constitute the type of coordinated communication that Congress intended to treat as an in-kind contribution.

4. Interplay of Two Conduct and Content Standards

Theoretically, it makes sense to suggest that the conduct and content standards should be understood as a dynamic working in conjunction with each other. It may be reasonable to treat as contributions a broader set of communications made at the explicit suggestion of a candidate than if the conduct is less direct. (Of course, as discussed above, even in such a case there must be something to demonstrate an electoral nexus, either in the content of the message itself or based on some external factor such as temporal proximity.)

Unfortunately, it seems to us inevitable that such an approach would produce an unmanageably complex set of rules. It is already difficult for organizations to understand what they may and may not say to whom. We simply cannot support a proposal that would add an additional overlay of complexity.

[31] The regulatory definition of agent is in the process of being rewritten, but despite the attendant uncertainty we believe this is a reasonable proposal.

IV. CONCLUSION

The difficult task of balancing fidelity to the statutory purpose of FECA against unintentional overreaching and incursion into protected First Amendment rights is not a new one for this Commission. This rulemaking poses an even greater challenge than is usual. It requires careful distinctions to be drawn between coordinated speech that must be regulated in order to prevent evasion of FECA's contribution limits and public policy advocacy that may not be regulated because it does not implicate the compelling governmental interests that permit any limitation to be imposed on political speech.

It is not easy to develop a rule that curbs overbreadth, avoids the pitfall of vagueness, and yet does not create inappropriate loopholes. We believe that a 120-day rule that requires a reference to a clearly identified candidate and also incorporates safe-harbors within that timeframe is best calculated to achieve this end.

Sincerely,

/s/ *Elizabeth Kingsley*
Elizabeth Kingsley