

AGENDA DOCUMENT NO. 14-7

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 15, 2014

MEMORANDUM

TO: The Commission

FROM: Lisa Stevenson
Deputy General Counsel

Adav Noti
Acting Associate General Counsel

Robert M. Knop
Assistant General Counsel

Joanna S. Waldstreicher
Attorney

SUBJECT: Notice of Interpretive Rule on Reporting Nationwide Independent
Expenditures in Presidential Primary Elections – Drafts A, B, and C

Attached are Drafts A, B, and C of a notice of interpretive rule regarding reporting nationwide independent expenditures in Presidential primary elections. We have been asked to place these drafts on the Open Meeting Agenda for January 16, 2014.

Attachment

AGENDA ITEM

For Meeting of 1-16-14

SUBMITTED LATE

FEDERAL ELECTION COMMISSION

[Notice 2014-XX]

Reporting Nationwide Independent Expenditures in Presidential Primary Elections

AGENCY: Federal Election Commission.

ACTION: Notice of interpretive rule.

SUMMARY: The Federal Election Commission is clarifying its interpretation of how its regulations concerning political committees' reporting of independent expenditures for presidential primary elections apply to independent expenditures that are distributed nationwide and do not reference or target a specific State's primary election.

DATES: [Insert date of publication in FEDERAL REGISTER]

**FOR FURTHER
INFORMATION**

CONTACT: Robert M. Knop, Assistant General Counsel, or Joanna S. Waldstreicher, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY
INFORMATION:**

Under the Federal Election Campaign Act (the "Act") and Commission regulations, political committees must file reports disclosing independent expenditures. The Commission is issuing this Notice to clarify its interpretation of these requirements as they apply to the reporting of independent expenditures that are made in connection with presidential primary elections but that do not reference or target a specific State's primary election.

An "independent expenditure" is an expenditure that expressly advocates the election or defeat of a clearly identified federal candidate and is not coordinated with a candidate or political party. 2 U.S.C. 431(17); 11 CFR 100.16(a). Under the Act and

1 Commission regulations, a political committee that makes independent expenditures must
2 disclose those expenditures on its regular periodic reports, stating, among other things,
3 the name of the candidate whom the expenditure supports or opposes and the office
4 sought by that candidate. 2 U.S.C. 434(b)(4)(H)(iii), (6)(B)(iii); 11 CFR 104.4(a).

5 In addition, a political committee that makes independent expenditures
6 aggregating to at least \$10,000 during the calendar year up to the 20th day before a given
7 election must file a report describing the expenditures within 48 hours. 2 U.S.C.
8 434(g)(2)(A); 11 CFR 104.4(b)(2). Additional reports must be filed within 48 hours each
9 time the political committee makes further independent expenditures aggregating to
10 \$10,000 or more with respect to the same election as that to which the initial report
11 relates. 2 U.S.C. 434(g)(2)(B); 11 CFR 104.4(b)(2).

12 Similarly, a political committee that makes independent expenditures aggregating
13 to \$1,000 or more less than 20 days, but more than 24 hours, before the date of a given
14 election must file a report describing the expenditures within 24 hours. 2 U.S.C.
15 434(g)(1)(A); 11 CFR 104.4(c). Additional reports must be filed within 24 hours each
16 time the political committee makes further independent expenditures aggregating \$1,000
17 or more with respect to the same election as that to which the initial report relates.
18 2 U.S.C. 434(g)(1)(B); 11 CFR 104.4(c).

19 The 48- and 24-hour filing requirements begin to run when the independent
20 expenditures aggregating more than \$10,000 or \$1,000, respectively, are “publicly
21 distributed or otherwise publicly disseminated.” 11 CFR 104.4(b)(2), (c), (f). For
22 purposes of calculating these expenditures and determining if a communication is
23 “publicly distributed” within an applicable 24- or 48-hour pre-election filing window,

1 each State’s presidential primary election is considered a separate election. See Advisory
2 Opinion 2003-40 (Navy Veterans) at 3-4 (noting that “publicly distributed” in section
3 104.4 has same meaning as term in 11 CFR 100.29(b)(3)(ii)(A), under which each State’s
4 presidential primary election is a separate election) (citing Bipartisan Campaign Reform
5 Act of 2002 Reporting, 68 FR 404, 407 (Jan. 3, 2003); Electioneering Communications,
6 67 FR 65190, 65194 (Oct. 23, 2002)).

7 The Commission has previously provided guidance regarding how political
8 committees should report independent expenditures that support or oppose presidential
9 primary candidates and are distributed nationwide but do not refer to or target any
10 specific State’s primary. In Advisory Opinion 2011-28 (Western Representation PAC), a
11 nonconnected political committee intended to finance independent expenditures on
12 Facebook in connection with the 2012 Republican presidential primary elections. Id. at
13 1. The planned ads would not be geographically limited in their distribution or reference
14 any specific State’s primary. Id. at 2. The Commission noted that, under such
15 circumstances, the political committee would be making an independent expenditure in
16 each State’s presidential primary (except for States that had already held their primaries
17 by the time the expenditures were distributed). Therefore, the Commission concluded
18 that the appropriate way to calculate the independent expenditures — both for
19 determining when 24- or 48-hour reports are required and for determining the amount to
20 report in connection with each State’s primary — would be to “divide the cost of placing
21 each advertisement by the number of upcoming primary elections.” Id. at 3-4.

22 The Commission’s conclusion in Advisory Opinion 2011-28 (Western
23 Representation PAC) is equally applicable to all political committees that make

1 nationwide independent expenditures that support or oppose presidential primary
2 candidates but do not reference or target a specific State's presidential primary election.
3 The political committee should divide the total cost of the expenditure by the number of
4 States that have not yet held the relevant presidential primary and report the portions of
5 the expenditure attributable to each State's primary election as separate entries on Form
6 3X, Schedule E. (For each entry, the State to whose primary the amount is attributed
7 should be entered in the "Office Sought" section of the form.) Conducting this
8 calculation will also allow the political committee to determine whether and when it has
9 triggered the spending thresholds that would obligate it to file a 48- or 24-hour
10 independent expenditure report in connection with any of the States' primaries.

11 For example, assume a political committee makes an independent expenditure of
12 \$10,000 for a communication that refers to a clearly identified presidential primary
13 candidate and is distributed nationwide — but does not refer to a particular State's
14 primary election — at a time when there are five presidential primary elections remaining
15 in the election cycle. The communication is an independent expenditure in all five
16 remaining presidential primary elections, so the total cost should be divided equally
17 among them, resulting in a \$2,000 independent expenditure to be reported for each of
18 those five States. If the communication is distributed less than 20 days but more than 24
19 hours before any of the five primary elections, the political committee should file a report
20 for each such expenditure within 24 hours, describing the independent expenditure and
21 attributing it to that State, because the expenditure exceeds the \$1,000 reporting
22 threshold. If the communication is distributed more than 20 days before all five of the
23 primary elections (and assuming that the political committee has not made previous

1 independent expenditures in the same State election that would aggregate to \$10,000), the
2 political committee should report the expenditure on its next regularly scheduled report.

3 In Advisory Opinion 2011-28 (Western Representation PAC), the Commission
4 also explained how the 24- and 48-hour reporting requirements apply when a political
5 committee does not know the exact cost of an independent expenditure by the time the
6 committee is required to file a report for that expenditure. In that advisory opinion, the
7 requestor stated that it would not know the precise costs of some ads until after the
8 relevant filing deadline because of the manner in which Facebook billed its advertisers.
9 The Commission concluded that, in such cases, a political committee “should estimate
10 the cost, and, if, based on that estimate, a report is required, indicate that the reported
11 amount is an estimate.” Id. at 4-5. If the political committee later receives information
12 regarding the actual cost of the ad, and that actual cost differs from the estimate, the
13 committee “should report the correct amount on [its] next regular report and reference the
14 earlier estimate.” Id. at 5. The Commission noted that so long as the political committee
15 made a reasonable, good faith effort to estimate the cost of the independent expenditure,
16 the committee would be considered to have made its “best efforts” to satisfy its
17 independent expenditure reporting obligations. See 2 U.S.C. 432(i); 11 CFR 104.7(a).
18 The Commission’s conclusion in that advisory opinion is equally applicable to any
19 political committee that makes the type of independent expenditures discussed in this
20 Notice.

21 This interpretive rule clarifies the Commission’s interpretation of existing
22 statutory and regulatory provisions and therefore does not constitute an agency action
23 subject to notice-and-comment requirements or a delayed effective date under the

Administrative Procedure Act. See 5 U.S.C. 553. The provisions of the Regulatory Flexibility Act, which apply when notice and comment are required by the Administrative Procedure Act or another statute, do not apply. See 5 U.S.C. 603(a). The Commission is not required to submit this interpretive rule for congressional review. See 2 U.S.C. 438(d)(1), (4).

On behalf of the Commission,

Lee E. Goodman
Chairman
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-P

FEDERAL ELECTION COMMISSION

[Notice 2014-XX]

Reporting Nationwide Independent Expenditures in Presidential Primary Elections

AGENCY: Federal Election Commission.

ACTION: Notice of interpretive rule.

SUMMARY: The Federal Election Commission is clarifying its interpretation of how its regulations concerning political committees' reporting of independent expenditures for presidential primary elections apply to independent expenditures that are distributed nationwide and do not reference or target a specific State's primary election.

DATES: [Insert date of publication in FEDERAL REGISTER]

**FOR FURTHER
INFORMATION**

CONTACT: Robert M. Knop, Assistant General Counsel, or Joanna S. Waldstreicher, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY
INFORMATION:**

Under the Federal Election Campaign Act (the "Act") and Commission regulations, political committees must file reports disclosing independent expenditures. The Commission is issuing this Notice to clarify its interpretation of these requirements as they apply to the reporting of independent expenditures that are made in connection with presidential primary elections but that do not reference or target a specific State's primary election.

An "independent expenditure" is an expenditure that expressly advocates the election or defeat of a clearly identified federal candidate and is not coordinated with a candidate or political party. 2 U.S.C. 431(17); 11 CFR 100.16(a). Under the Act and

1 Commission regulations, a political committee that makes independent expenditures must
2 disclose those expenditures on its regular periodic reports, stating, among other things,
3 the name of the candidate whom the expenditure supports or opposes and the office
4 sought by that candidate. 2 U.S.C. 434(b)(4)(H)(iii), (6)(B)(iii); 11 CFR 104.4(a). Also,
5 although not required under the Act, Commission regulations require that political
6 committees reporting independent expenditures also include the “State and Congressional
7 District, when applicable” on their reports filed. 11 CFR 104.3(b)(3)(vii)(B).

8 In addition, a political committee that makes independent expenditures
9 aggregating to at least \$10,000 during the calendar year up to the 20th day before a given
10 election must file a report describing the expenditures within 48 hours. 2 U.S.C.
11 434(g)(2)(A); 11 CFR 104.4(b)(2). Additional reports must be filed within 48 hours each
12 time the political committee makes further independent expenditures aggregating to
13 \$10,000 or more with respect to the same election as that to which the initial report
14 relates. 2 U.S.C. 434(g)(2)(B); 11 CFR 104.4(b)(2).

15 Similarly, a political committee that makes independent expenditures aggregating
16 to \$1,000 or more less than 20 days, but more than 24 hours, before the date of a given
17 election must file a report describing the expenditures within 24 hours. 2 U.S.C.
18 434(g)(1)(A); 11 CFR 104.4(c). Additional reports must be filed within 24 hours each
19 time the political committee makes further independent expenditures aggregating \$1,000
20 or more with respect to the same election as that to which the initial report relates.
21 2 U.S.C. 434(g)(1)(B); 11 CFR 104.4(c).

22 The 48- and 24-hour filing requirements begin to run when the independent
23 expenditures aggregating more than \$10,000 or \$1,000, respectively, are “publicly

distributed or otherwise publicly disseminated.” 11 CFR 104.4(b)(2), (c), (f). For purposes of calculating these expenditures and determining when a communication is “publicly distributed,” each State’s presidential primary election is considered a separate election. See Advisory Opinion 2003-40 (Navy Veterans) at 3-4 (noting that “publicly distributed” in section 104.4 has same meaning as term in 11 CFR 100.29(b)(3)(ii)(A), under which each State’s presidential primary election is a separate election) (citing Bipartisan Campaign Reform Act of 2002 Reporting, 68 FR 404, 407 (Jan. 3, 2003); Electioneering Communications, 67 FR 65190, 65194 (Oct. 23, 2002)).

The Commission has previously provided guidance regarding how political committees should report transactions that relate to presidential primary candidates but do not target any specific State’s primary. In Advisory Opinion 1995-44 (Forbes for President), the Commission addressed the requirement that candidate committees report within 48 hours any contributions of more than \$1,000 received less than 20 days (but more than 48 hours) before an election. See 2 U.S.C. 434(a)(6)(A); 11 CFR 104.5(f). The Commission observed that because “the presidential primary season is made up of a series of separate primary elections,” requiring presidential primary candidates to comply with the 48-hour contribution notification requirement would require such candidates “to submit 48 hour notifications on an almost continual basis.” Advisory Opinion 1995-44 (Forbes for President) at 2. The Commission also noted that imposing such a requirement would force the candidate “to attribute the contributions it receives to a particular primary election, a task that can be difficult or arbitrary given the national nature of most presidential primary campaigns.” Id. To avoid mandating this unnecessarily complex and arbitrary reporting regime, the Commission concluded that a

1 presidential campaign committee could comply with its disclosure obligations by
2 reporting its received contributions on its regular monthly reports. Id.

3 In the context of nationwide independent expenditures that support or oppose
4 presidential primary candidates but do not refer to particular States' primaries, reporting
5 the State on independent expenditure reports raises precisely the same concerns as did
6 48-hour reporting of contributions in Advisory Opinion 1995-44 (Forbes for President).
7 Requiring committees to attribute the expenditure equally to each State in which it runs is
8 arbitrary and impracticable. Rather, attributing a portion of each nationwide independent
9 expenditure to various States for purposes of the reporting thresholds is precisely the sort
10 of bookkeeping requirement that the Commission rejected in Advisory Opinion 1995-44
11 (Forbes for President).

12 In addition, the purpose of the Act's independent expenditure disclosure
13 provisions is to ensure that the public receives accurate information regarding the
14 financing of express advocacy about candidates. Requiring political committees to divide
15 a single expenditure into confusing and overlapping entries on multiple reports would not
16 further that purpose. To the contrary, such reporting would misrepresent the nature of the
17 expenditure being reported: A single nationwide advertising campaign would appear in
18 the Commission's records as a series of much smaller and more targeted expenditures,
19 thereby potentially misleading the public as to the true nature of the reported spending.

20 To avoid these concerns, and to further the Act's purpose of fostering accurate
21 disclosure, the Commission concludes that the requirement that political committees
22 report the State does not apply to nationwide independent expenditures that relate to
23 presidential primary candidates but do not refer to any specific State's primary. Rather, a

1 political committee should use the date of the first day of the candidate's nominating
2 convention as the date of the primary election for the purpose of determining the
3 applicable thresholds for filing 24 and 48 hour reports. The committee should leave
4 blank the section where the State would be indicated, and include a memorandum entry
5 indicating that the expenditure was disseminated "nationally" or "nationwide." A
6 political committee should also disclose these independent expenditures on its regularly
7 scheduled reports. When reporting such an expenditure, rather than allocating it among
8 various States, the committee should report the expenditure as a single entry, and as with
9 the 24 and 48 hour reports, leave blank the section where the State would be indicated,
10 and include a memorandum entry indicating that the expenditure was disseminated
11 "nationally" or "nationwide." This reporting will ensure that the independent
12 expenditures are fully and accurately disclosed to the public, as the Act requires.

13 This interpretive rule clarifies the Commission's interpretation of existing
14 statutory and regulatory provisions, and therefore does not constitute an agency action
15 subject to the notice and comment requirements or a delayed effective date under the
16 Administrative Procedure Act. See 5 U.S.C. 553. The provisions of the Regulatory
17 Flexibility Act, which apply when notice and comment are required by the

1 Administrative Procedure Act or another statute, do not apply. See 5 U.S.C. 603(a). The
2 Commission is not required to submit this interpretive rule for congressional review. See
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On behalf of the Commission,

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Lee E. Goodman

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Chairman

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Federal Election Commission

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15 The Commission observed that because “the presidential primary season is made up of a
16 series of separate primary elections,” requiring presidential primary candidates to comply
17 with the 48-hour contribution notification requirement would require such candidates “to
18 submit 48 hour notifications on an almost continual basis.” Advisory Opinion 1995-44
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20 requirement would force the candidate “to attribute the contributions it receives to a
21 particular primary election, a task that can be difficult or arbitrary given the national
22 nature of most presidential primary campaigns.” Id. To avoid mandating this
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15 a single expenditure into confusing and overlapping entries on multiple reports would not
16 further that purpose. To the contrary, such reporting would misrepresent the nature of the
17 expenditure being reported: A single nationwide advertising campaign would appear in
18 the Commission's records as a series of much smaller and more targeted expenditures,
19 thereby potentially misleading the public as to the true nature of the reported spending.

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21 disclosure, the Commission concludes that the requirement that political committees
22 report the State does not apply to nationwide independent expenditures that relate to
23 presidential primary candidates but do not refer to any specific State's primary. Rather, a

1 political committee should use the date of the next subsequent primary election as
2 defined in 11 CFR 100.2(c) as the date of the primary election for the purpose of
3 determining the applicable thresholds for filing 24 and 48 hour reports. The committee
4 should leave blank the section where the State would be indicated, and include a
5 memorandum entry indicating that the expenditure was disseminated “nationally” or
6 “nationwide.” A political committee should also disclose these independent expenditures
7 on its regularly scheduled reports. When reporting such an expenditure, rather than
8 allocating it among various States, the committee should report the expenditure as a
9 single entry, and as with the 24 and 48 hour reports, leave blank the section where the
10 State would be indicated, and include a memorandum entry indicating that the
11 expenditure was disseminated “nationally” or “nationwide.” This reporting will ensure
12 that the independent expenditures are fully and accurately disclosed to the public, as the
13 Act requires.

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