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

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

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

The 48- and 24-hour filing requirements begin to run when the independent 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 if a communication is “publicly distributed” within an applicable 24- or 48-hour pre-election filing window,
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
committes should report independent expenditures that support or oppose presidential
primary candidates and are distributed nationwide but do not refer to or target any
specific State’s primary. In Advisory Opinion 2011-28 (Western Representation PAC), a
nonconnected political committee intended to finance independent expenditures on
Facebook in connection with the 2012 Republican presidential primary elections. Id. at
1. The planned ads would not be geographically limited in their distribution or reference
any specific State’s primary. Id. at 2. The Commission noted that, under such
circumstances, the political committee would be making an independent expenditure in
each State’s presidential primary (except for States that had already held their primaries
by the time the expenditures were distributed). Therefore, the Commission concluded
that the appropriate way to calculate the independent expenditures — both for
determining when 24- or 48-hour reports are required and for determining the amount to
report in connection with each State’s primary — would be to “divide the cost of placing
each advertisement by the number of upcoming primary elections.” Id. at 3-4.

The Commission’s conclusion in Advisory Opinion 2011-28 (Western
Representation PAC) is equally applicable to all political committees that make
nationwide independent expenditures that support or oppose presidential primary candidates but do not reference or target a specific State’s presidential primary election. The political committee should divide the total cost of the expenditure by the number of States that have not yet held the relevant presidential primary and report the portions of the expenditure attributable to each State’s primary election as separate entries on Form 3X, Schedule E. (For each entry, the State to whose primary the amount is attributed should be entered in the “Office Sought” section of the form.) Conducting this calculation will also allow the political committee to determine whether and when it has triggered the spending thresholds that would obligate it to file a 48- or 24-hour independent expenditure report in connection with any of the States’ primaries.

For example, assume a political committee makes an independent expenditure of $10,000 for a communication that refers to a clearly identified presidential primary candidate and is distributed nationwide — but does not refer to a particular State’s primary election — at a time when there are five presidential primary elections remaining in the election cycle. The communication is an independent expenditure in all five remaining presidential primary elections, so the total cost should be divided equally among them, resulting in a $2,000 independent expenditure to be reported for each of those five States. If the communication is distributed less than 20 days but more than 24 hours before any of the five primary elections, the political committee should file a report for each such expenditure within 24 hours, describing the independent expenditure and attributing it to that State, because the expenditure exceeds the $1,000 reporting threshold. If the communication is distributed more than 20 days before all five of the primary elections (and assuming that the political committee has not made previous
independent expenditures in the same State election that would aggregate to $10,000), the political committee should report the expenditure on its next regularly scheduled report. In Advisory Opinion 2011-28 (Western Representation PAC), the Commission also explained how the 24- and 48-hour reporting requirements apply when a political committee does not know the exact cost of an independent expenditure by the time the committee is required to file a report for that expenditure. In that advisory opinion, the requestor stated that it would not know the precise costs of some ads until after the relevant filing deadline because of the manner in which Facebook billed its advertisers. The Commission concluded that, in such cases, a political committee “should estimate the cost, and, if, based on that estimate, a report is required, indicate that the reported amount is an estimate.” Id. at 4-5. If the political committee later receives information regarding the actual cost of the ad, and that actual cost differs from the estimate, the committee “should report the correct amount on [its] next regular report and reference the earlier estimate.” Id. at 5. The Commission noted that so long as the political committee made a reasonable, good faith effort to estimate the cost of the independent expenditure, the committee would be considered to have made its “best efforts” to satisfy its independent expenditure reporting obligations. See 2 U.S.C. 432(i); 11 CFR 104.7(a). The Commission’s conclusion in that advisory opinion is equally applicable to any political committee that makes the type of independent expenditures discussed in this Notice.

This interpretive rule clarifies the Commission’s interpretation of existing statutory and regulatory provisions and therefore does not constitute an agency action 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

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

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

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

The 48- and 24-hour filing requirements begin to run when the independent 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
presidential campaign committee could comply with its disclosure obligations by reporting its received contributions on its regular monthly reports. \textit{id.}

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

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

To avoid these concerns, and to further the Act’s purpose of fostering accurate disclosure, the Commission concludes that the requirement that political committees report the State does not apply to nationwide independent expenditures that relate to presidential primary candidates but do not refer to any specific State’s primary. Rather, a
political committee should use the date of the first day of the candidate's nominating
convention as the date of the primary election for the purpose of determining the
applicable thresholds for filing 24 and 48 hour reports. The committee should leave
blank the section where the State would be indicated, and include a memorandum entry
indicating that the expenditure was disseminated "nationally" or "nationwide." A
political committee should also disclose these independent expenditures on its regularly
scheduled reports. When reporting such an expenditure, rather than allocating it among
various States, the committee should report the expenditure as a single entry, and as with
the 24 and 48 hour reports, leave blank the section where the State would be indicated,
and include a memorandum entry indicating that the expenditure was disseminated
"nationally" or "nationwide." This reporting will ensure that the independent
expenditures are fully and accurately disclosed to the public, as the Act requires.

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

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Chairman
Federal Election Commission

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

This interpretive rule clarifies the Commission’s interpretation of existing statutory and regulatory provisions, and therefore does not constitute an agency action subject to the 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
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