



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

AGENDA ITEM

For Meeting of: 2-28-02

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

N. Bradley Litchfield
Associate General Counsel

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SUBJECT: Final Rules and Explanation and Justification on Independent Expenditure Reporting

In accordance with the Regulations Committee direction on February 15, 2002, the Office of General Counsel has prepared for Commission consideration the attached draft final rules on independent expenditure reporting and an accompanying Explanation and Justification. The document is identical to the draft circulated to the Regulations Committee on December 27, 2001, with the exception of lines 18 through 20 on page 7. These lines have been revised to clarify that the new provisions on self-verification of the independence of the expenditures will apply to all reports of independent expenditures and not just 24-hour reports filed shortly before the election. All additions to and deletions and changes from the text of the current rules have been indicated by double underlining and strikethroughs.

This Office notes that the campaign finance reform legislation that passed the Senate and the House of Representatives would make a number of modifications to 2 U.S.C. § 434, including a new provision regarding independent expenditure reporting. H.R. 2356, which contains an effective date of Nov. 6, 2002, specifies that-

- 1) Reports must be filed when a person "makes or contracts to make independent expenditures";

- 2) 48-hour reports are required for independent expenditures aggregating \$10,000 or more made at any time up to the 20th day before the election;
- 3) Any independent expenditure report is to be filed with the Commission; and
- 4) The contents of the report "shall contain the information required by subsection (b)(6)(B)(iii) including the name of each candidate whom an expenditure is intended to support or oppose."

Recommendation

The Office of General Counsel recommends that the Commission approve the attached final rules and Explanation and Justification for publication in the *Federal Register* and transmittal to Congress.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 100, 104, and 109**

3 **[NOTICE 2002->]**

4 **INDEPENDENT EXPENDITURE REPORTING**

5
6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Final Rules and Transmittal of Regulations to Congress.

8 **SUMMARY:** The Federal Election Commission is revising its regulations to
9 implement statutory changes to the deadlines for filing certain reports
10 of independent expenditures. Under the new law, reports of last minute
11 independent expenditures ("24-hour reports") must be actually received
12 by the Commission or the Secretary of the Senate's office within 24
13 hours of the time the independent expenditure was made. To assist
14 those who must meet this new reporting deadline, the revised rules
15 allow reports of last minute independent expenditures to be filed by
16 facsimile machine or electronic mail, unless the filer participates in the
17 Commission's electronic filing program. Electronic filers must
18 continue to file all reports of independent expenditures (24-hour reports
19 as well as regularly scheduled reports) using the Commission's
20 electronic filing system. Further information is provided in the
21 supplementary information that follows.

22 **DATES:** Further action, including the announcement of an effective date, will be
23 taken after these regulations have been before Congress for 30

1 legislative days. 2 U.S.C. 438(d). A document announcing the
2 effective date will be published in the Federal Register.

3 **FOR FURTHER**
4 **INFORMATION**

5 **CONTACT:**

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6 Fowle, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202)
7 694-1650 or (800) 424-9530.

8 **SUPPLEMENTARY**

9 **INFORMATION:**

The Commission is issuing revised regulations at 11 CFR 100.19, 104.4,
10 104.5, 104.14, 104.18, 109.1 and 109.2. These revised rules implement Public Law 106-346
11 (Department of Transportation and Related Agencies Appropriations Act, 2001, 114 Stat. 1356
12 (2000)), which amended the Federal Election Campaign Act of 1971, 2 U.S.C. 431 et seq., ("the
13 Act" or "FECA"). Paragraphs (b) and (c) of 2 U.S.C. 434 require political committees and other
14 persons making independent expenditures to file reports or statements if their independent
15 expenditures exceed \$250. In addition, if independent expenditures of \$1,000 or more are made
16 less than twenty (20) days but more than twenty-four (24) hours before the day of an election, an
17 additional statement must be filed within 24 hours. Public Law 106-346 required, inter alia, the
18 Commission to issue rules requiring that reports of independent expenditures made less than
19 twenty (20) days but more than twenty-four (24) hours before an election ("24-hour reports") be
20 received by the Commission or the Secretary of the Senate, as appropriate,¹ within 24 hours of
21 the time the independent expenditure was made. The statutory change permits those who must

¹ The Secretary of the United States Senate Office of Public Records is the proper recipient of reports of independent expenditures that either support or oppose only candidates for the United States Senate. 11 CFR 104.4(c)(2).

1 file 24-hour reports to do so using facsimile machines or electronic mail, except for those
2 required to file electronically (see 11 CFR 104.18). In addition to their 24-hour reports, persons
3 other than political committees may file by fax or e-mail other reports of independent
4 expenditures in accordance with the regular filing schedule (see 11 CFR 104.5). Public Law
5 106-346 also requires the Commission to provide methods of verification of documents (other
6 than requiring a signature on the document) for all purposes, including submission under penalty
7 of perjury. These new filing methods are intended to speed up disclosure and to provide political
8 committees and other filers with more flexibility in choosing methods of compliance with
9 reporting requirements. The new law requires these methods to be in place for elections
10 occurring after January 1, 2001, subject to regulations to be promulgated by the Commission.

11 In addition to the amendments regarding independent expenditures, the new law also requires
12 the Commission to amend its regulations to exclude from the definition of "contribution" loans
13 that candidates receive from brokerage accounts, lines of credit, or other credit instruments as
14 long as the loans were made under commercially reasonable terms and were from a source that
15 provides such loans in the normal course of business. That topic is being addressed in a separate
16 rulemaking. See Notice of Proposed Rulemaking, 65 Federal Register 38576 (Wednesday, July
17 25, 2001).

18 Before final promulgation of any rules or regulations to carry out the provisions of Title 2 of
19 the United States Code, the Commission transmits the rules or regulations to the Speaker of the
20 House of Representatives and the President of the Senate for a thirty legislative day review
21 period. 2 U.S.C. 438(d). These rules on independent expenditure reporting were transmitted to
2 Congress on March 2, 2002.
3

1 **Explanation and Justification**

2 The Commission published a Notice of Proposed Rulemaking (“NPRM”) in the Federal
3 Register on May 9, 2001, 65 FR 23628 (May 9, 2001). The NPRM contained proposed rules at
4 11 CFR 100.19, 104.4, 104.5, 104.15, 109.1 and 109.2 regarding, inter alia, when 24-hour
5 reports are considered filed, the filing of 24-hour reports by facsimile machine or electronic mail,
6 and a definition of when an independent expenditure is made. Additionally, the NPRM
7 explicitly recognized that authorized committees may file reports of last-minute contributions
8 (48-hour notices) using facsimile machines or the Commission’s web site.

9 The comment period ended on June 8, 2001. The Commission received one written
10 comment from the James Madison Center for Free Speech (“Madison Center”).

1 **Section 100.19 File, filed or filing (2 U.S.C. 434(a))**

2 The Commission’s regulations at 11 CFR 100.19 define file, filed, and filing. The
3 introductory text of this section states that a document is considered filed if it is: (a) delivered to
4 the appropriate filing office of the appropriate office, (b) sent by registered or certified mail and
5 postmarked by midnight of the prescribed filing date – except for pre-election reports, or (c)
6 electronically filed, and received and validated by the Commission’s electronic filing system on
7 or before 11:59 p.m. eastern time on the prescribed filing date. For clarification, the Commission
8 has added a definition of “document” which mirrors the definition in the electronic filing
9 regulations (11 CFR 104.18). A document is any report, statement, notice or designation
0 required by the Act to be filed with the Commission or the Secretary of the Senate.

Paragraph (a) of this section states that a document is timely filed upon delivery to the
Commission or Secretary of the Senate, as appropriate, by the close of the prescribed filing date.

1 As explained below, revised paragraph (a) clarifies that the definition of "timely filed" is
2 different for paper filers and electronic filers.

3 Under paragraph (b) of section 100.19 of the previous regulations, 24-hour reports were
4 considered timely filed if they were deposited at a Post Office and were postmarked for certified
5 or registered mail within 24 hours of the time the independent expenditure was made. Under
6 Public Law 106-346 and the revised regulations at paragraph (b), 24-hour reports will only be
7 considered timely filed if they are received by the Commission or Secretary of the Senate within
8 24 hours of the time the expenditure was made. Thus, sending 24-hour reports by mail will no
9 longer be a viable option because it is unlikely that these reports will be received by the
10 Commission within 24 hours of the making of the expenditure.

11 New paragraph (d) of section 100.19 defines "timely filed" with regard to 24-hour reports of
12 independent expenditures. The new paragraph states that such reports are timely filed when they
13 are received by the Commission or the Secretary of the Senate within 24 hours of the time the
14 independent expenditure is made. The new paragraph also states that such 24-hour reports may
15 be filed by facsimile machine or electronic mail, in addition to other permissible means of filing
16 (e.g., hand delivery or overnight courier).

17 New paragraph (e) expressly incorporates the Commission's practice of allowing authorized
18 committees to file their reports of contributions of \$1,000 or more made less than twenty (20)
19 days but more than forty-eight (48) hours before the day of an election (48-hour reports) using a
20 fax machine or the Commission's web site. This change does not stem from P.L. 106-346.
21 Rather, the Commission has for some time allowed authorized committees (if they are not
22 electronic filers) to file these reports by facsimile machine in addition to other permissible filing
23 methods. See Advisory Opinion ("AO") 1988-32. In the fall of 2000, the Commission began

1 allowing all authorized committees who file with the Commission (including electronic filers) to
2 file 48-hour reports on-line through the Commission's web site. Note that 48-hour reports filed
3 with the Secretary of the Senate cannot be filed using the on-line program at the Commission's
4 web site. They can, however be filed by fax to the Secretary of the Senate. New paragraph (e) of
5 11 CFR 100.19 specifically incorporates those filing methods in the regulations. The
6 Commission received no comments on this section.

7 Note, that the final rules differ from the rule proposed in the NPRM with regard to the web
8 based filing of 48-hour reports. The proposed rule stated that only those who do not file
9 electronically could use the Web based filing system implemented in the autumn of 2000. The
10 Commission currently allows electronic filers to file 48 hour reports using either the electronic
11 filing program or on the Commission's web site. Thus the final rules allow all authorized
12 committees (including those who participate in the electronic filing program) to file their 48-hour
13 notices using the Commission's web site.

4 **Section 104.4 Independent expenditures by political committees (2 U.S.C. 434(c)).**

5 The Commission's regulations at 11 CFR 104.4 set forth the requirements for political
6 committees reporting independent expenditures. Paragraph (b) of this section is being revised in
7 three respects. First, this paragraph is being revised to state that 24-hour reports must be
8 received by the appropriate officers (the Commission or Secretary of the Senate) within 24 hours
9 of the time the independent expenditure is made. Such reports were previously timely if they
0 were postmarked as certified or registered mail within 24 hours of the making of the independent
1 expenditure.

1 Second, to enable filers to meet the new deadline, amended paragraph (b) of section 104.4
2 permits political committees to file 24-hour reports by facsimile machine or electronic mail, as
3 long as the filer is not part of the electronic filing program under 11 CFR 104.18.

4 Third, section 104.4(b) is being modified to make it easier for political committees to certify
5 the independence of the expenditures falling under this paragraph. Schedule E contains a
6 notarized certification under penalty of perjury as to whether the committee's expenditures were
7 "coordinated" with any candidate, authorized committee or agent thereof, and, if the independent
8 expenditures were made by a corporation, that the maker is a qualified nonprofit corporation (see
9 11 CFR 114.10). No other campaign finance reports filed with the Commission or the Secretary
10 of the Senate need to be notarized.

11 Public Law 106-346 at §502(a) requires the Commission to create methods, other than by
12 requiring a signature on the document, of verifying the independent expenditure certification on
13 24-hour reports for all purposes, including penalties of perjury. Consequently, the revised
14 regulations allow the 24-hour report filer to verify the report using self-verification. This means
15 that Schedule E no longer needs to be notarized. Instead, the political committee must self-verify
16 the document using either a handwritten signature of the treasurer on a paper document or by
17 typing the treasurer's name on e-mailed documents. The Commission intends to make the
18 appropriate conforming amendments to Schedule E after the promulgation of these rules. This
19 will extend self-verification to all reports of independent expenditures, including those made
20 before the 20th day before the election and those that exceed \$250 but are under \$1000.

1 New paragraphs (b)(1) and (2) of 11 CFR 104.4 set forth two methods for verifying 24-hour
2 reports of independent expenditures. Paper reports (e.g., filed by hand delivery or fax machine),
3 must be verified by the filer's signature under the certification of independence. Reports filed by

1 electronic mail must be verified by the filer typing his or her name under the certification.

2 As an alternative to self-verification, the NPRM sought comments on retaining the
3 notarization requirement for faxed reports and requiring electronic notarizations for e-mailed
4 reports. Additionally, the Commission sought comments on using digital signatures verified by a
5 "Trusted Third Party" for e-mailed reports. Digital signatures utilize a Public Key Infrastructure.
6 That structure uses Public and Private Keys to encode a message and to provide a method of
7 positively identifying the sender. The Commission received no comments addressing this topic
8 or offering other possible methods of verification.

9 The revised regulations remove the notarization requirement for several reasons. First, the
10 statute simply requires verification, not notarization. Second, no other reports filed with the
11 Commission require notarization. Third, the statement that the filer must sign carries the penalty
12 for perjury if falsely made.

13 The Commission decided not to institute electronic notarization or digital signatures because
14 they, as relatively new technologies, are not widespread enough to ensure access to everyone who
15 might make an independent expenditure. For example, only a handful of states have electronic
16 notarization statutes, effectively leaving citizens of other states without means of verification.
17 Digital signatures must be purchased and, generally, require the purchaser to have a computer on
18 which the private key (a computer generated string of digits) resides. The Commission is
19 concerned that such a requirement would unduly burden the making or reporting of independent
20 expenditures by those who do not have access to these means of verification.

21

1 **Section 104.5 Filing dates (2 U.S.C. 434(a)(2)).**

2 Section 104.5 sets forth the required filing dates for each type of political committee and
3 other individuals. The Commission is revising paragraph (f) of this section to follow new
4 paragraph (e) of 11 CFR 100.19 discussed above.

5 Revised paragraph (g) of 11 CFR 104.5 states that 24-hour reports of independent
6 expenditures must be received by the appropriate officers within 24 hours of the making of the
7 independent expenditure. Previously, 24-hour reports were considered timely filed when they
8 were postmarked to be sent by registered or certified mail. This change conforms to the
9 amendments to 11 CFR 100.19 and 104.4(b) discussed above.

10 The Commission received no comments on the amendments to this section.

11 **Section 104.14 Formal requirements regarding reports and statements.**

12 Under 11 CFR 104.14, reports and statements must be signed. Two conforming amendments
13 are being made to paragraph (a) of this section. First, new paragraph (a)(1) provides that reports
14 or statements of independent expenditures filed by facsimile machine or electronic mail under
15 11 CFR 104.4(b) or 11 CFR 109.2 must be verified in accordance with those sections. Secondly,
16 new paragraph (a)(2) states that reports, designations or statements filed electronically under
17 11 CFR 104.18 must follow the signature requirements of 11 CFR 104.18(g). The Commission
18 received no comments on this section.

19 **Section 104.18 Electronic filing of reports (2 U.S.C. 432(d) and 434(a)(11)).**

20 Under the previous regulations at 11 CFR 104.18(h), those participating in the Commission's
1 electronic filing program (either mandatory or voluntary) were required to file FEC Form 5 or
2 Schedule E electronically accompanied by a paper copy in order to file a notarized document.

1 Public Law 106-346 does not allow electronic filers to use fax machines or electronic mail to
2 file their independent expenditures reports. In order to afford all electronic filers the ability to
3 comply with the new requirement that 24-hour reports be received by the appropriate office
4 within 24 hours, the Commission is removing Schedule E and FEC Form 5 from the list in
5 paragraph (h) of reports that require a paper follow-up. Instead, the revised rules require those in
6 the electronic filing program to verify all reports of independent expenditures using the same
7 process they use in filing any other report. Paragraph (h) is being reorganized to clarify which
8 paper documents must accompany electronically filed reports, and when those paper copies must
9 be filed.

10 The Commission's electronic filing software, FECFile, currently creates Schedule E for
11 electronic filing by political committees. The Commission's electronic filing system accepts
12 FEC Form 5 if created by another entity using the Commission's specifications (available on the
13 FEC web site, www.fec.gov), but FECFile does not currently create Form 5. The Commission
14 intends to make FEC Form 5 available in the FECFile software package. Note that this software
15 is available for free from the Commission.

16 Further, the Commission is adding to the list of electronic filings that require paper follow-up
17 Schedule C-P-1, used by Presidential candidates to report loans and lines of credit from lending
18 institutions. Like Schedule C-1 (used by non-Presidential committees), Schedule C-P-1 requires
19 the lending institution agent's signature.

20 On July 25, 2001, the Commission published in the Federal Register a Notice of Proposed
21 Rulemaking on Brokerage Loans and Lines of Credit (65 FR 38576 (July 25, 2001)) which
22 sought comments on further revisions to 11 CFR 104.18(h). Thus, additional changes to this
23 section may be promulgated at a later time as part of that separate rulemaking.

1 **Section 109.1 Definitions (2 U.S.C. 432(17)).**

2 Section 109.1 of the Commission's regulations contains definitions relevant to independent
3 expenditures. Public Law 106-346 and the revised regulations at 11 CFR 100.19(d), 104.4(b),
4 104.5(g), and 109.2(b) require 24-hour reports to be received by the Commission or the Secretary
5 of the Senate within 24 hours of the time the independent expenditure is made.

6 The NPRM sought comments on a three-pronged definition of when an independent
7 expenditure is made that would apply to all independent expenditures, not just those reported on
8 a 24-hour basis. That definition was taken from the statutory and regulatory definitions of
9 "independent expenditure" (2 U.S.C. 431(17) and 11 C.F.R. 100.8(a)(2)) and "expenditure"
10 (2 U.S.C. 431(9)(A) and 11 C.F.R. 109.1). Proposed new paragraph (f) of 11 CFR 109.1 stated
11 that an independent expenditure is made at the earliest of three possible times: 1) The date on
12 which a written contract, including a media contract, promise or agreement to make an
13 independent expenditure is executed; 2) the first date on which the communication is printed,
14 broadcast, or otherwise publicly disseminated; or 3) the date on which the person making the
15 independent expenditure pays for it.

16 The sole commenter on this rulemaking objects to proposed paragraph (f) for several reasons.
17 First, the commenter argues that the definition is a substantive change to the current provisions of
18 the FECA and is, therefore, outside the Commission's regulatory authority. The commenter also
19 asserts that the definition is illogical and that an independent expenditure is not made until the
20 communication is disseminated to the public. Thus, the commenter argues, prong number one of
21 the definition is incorrect.

2 The Commission believes that a legal basis arguably would exist for the first prong of its
3 definition of "made". Language in the FECA states that an "independent expenditure is an

1 expenditure” (2 U.S.C. 431(17)). An expenditure includes a “written contract, promise, or
2 agreement to make an expenditure” (2 U.S.C. §431(9)(A)(ii)). Thus, independent expenditures
3 necessarily include written contracts, promises or agreements to make an expenditure for a
4 communication. Nonetheless, here the Commission is called upon to define when an
5 independent expenditure should be considered “made” for purposes of reporting. Some practical
6 and policy considerations come into play.

7 The Commission is dropping from the final rules the first prong of the test (the date on which
8 a written contract, including a media contract, promise or agreement to make an independent
9 expenditure, is executed). This will simplify the reporting rules, address the practical problem of
10 reporting such transactions as independent expenditures and ensure that the relatively detailed
11 rules on reporting debts at 11 CFR 104.11 apply only to political committees. Those latter rules
12 require a debt (which includes a written contract debt) to be reported only if it exceeds \$500 or is
13 for any amount that has been outstanding for more than 60 days.

4 The commenter also objects to the second prong of the proposed rule at 11 CFR 109.1(f)(2),
5 which stated that an independent expenditure would be made “on the first date on which the
6 communication is printed, broadcast or otherwise publicly disseminated.” The commenter
7 objects to the word “printed” on the grounds that fliers could be printed and sit in a garage for
8 months, and thus not being publicly disseminated. The Commission is changing the word
9 “printed” to “published” in the final rules to remove any confusion as to when a communication
0 for an independent expenditure is made.

1 The commenter further objects to what it believes to be a consequence of the revised
2 regulation which would, in some instances, require disclosure before publication of the
3 communication. The commenter expresses concern that this could lead to mischievous

1 interference with communications from opposing campaigns. The commenter argues that such
2 disclosure would allow incumbents the advantage of knowing when independent expenditures
3 have been made on behalf of their opponents, thus giving them the opportunity to convince
4 broadcasters not to run the advertisements in question. First, even if this practice were followed
5 more often on the part of incumbents, it would not override the Commission's need to follow the
6 most obvious legal interpretation of when an independent expenditure is made. Second, the
7 Commission notes that the statutory change for 24-hour reports reflects Congressional intent to
8 speed up timely disclosure of independent expenditures. The revised rules are consistent with
9 this goal to the extent they would require disclosure when payment is made before publication.

10 New paragraph (f) of the final regulations states that an independent expenditure is made on
11 the earlier of: (1) the first date on which the communication is published, broadcast or otherwise
12 publicly disseminated, or (2) the date on which any payment is made for the production or
13 dissemination of the communication, provided that the person making the payment knows the
14 payment constitutes an independent expenditure. The condition attached to the second prong of
15 the rules stems from the fact that in some cases a payment to a vendor may be made for
16 production work or advertising time or space without knowing whether the communication will
17 qualify as an independent expenditure.

18 Examples for Political Committees:

19 In most situations, the political committee paying for the communication will know before
20 the end of that reporting period that the communication will constitute an independent
21 expenditure. In these cases, the committee will simply report the independent expenditure on
22 Schedule E.

1 In some situations, a political committee making a payment for a communication may not
2 know by the end of that reporting period that the disbursement is for an independent expenditure
3 (e.g., purchasing air time before determining which specific candidate will be featured in the ad
4 that will run). In this case, the committee reports the purchase as a disbursement on Schedule B
5 for Operating Expenditures. When, in a subsequent reporting period, the committee determines
6 that the disbursement was for an independent expenditure it must file a Schedule E for the
7 independent expenditure referencing the earlier Schedule B transaction. The committee must
8 also report the disbursement for the independent expenditure as a negative entry on Schedule B
9 so the total disbursements are not inflated.

10 If the obligation is incurred but not yet paid and is a reportable debt, the committee reports it
11 on Schedule D. When, in a subsequent reporting period, the committee determines that the
12 communication will be an independent expenditure and makes a payment on the debt, it must file
13 a Schedule E showing the payment as an independent expenditure and referencing the debt on
14 Schedule D, and it must continue to report the debt on Schedule D (and any payment on it on
15 Schedule E), until the debt is extinguished. If the committee that has reported only debt on
16 Schedule D determines in a subsequent reporting period that the communication will be an
17 independent expenditure, but does not make any payment on it, it need only continue to report
18 the debt on Schedule D, identifying the candidate's name in the nature of debt (purpose) field.

19 Example 1: Committee A makes a \$10,000 payment on October 5 for a newspaper ad urging
20 the defeat of Candidate X it knows will be run on the 10th day before the November general
21 election (i.e., during the 24 hour reporting period). The committee reports the payment on
22 Schedule E for its pre-general election report. No further report need be filed when the ad
23 actually runs during the 24-hour reporting period.

1 Example 2: In March, Committee B, a quarterly filer, pays \$10,000 for airtime in late
2 September, but does not know whether it will run ads opposing candidate X or candidate Y.
3 Committee B reports the payment on Schedule B for Operating Expenditures in its first quarter
4 report. In early September (within the third quarter reporting period), the committee determines
5 that it will use the airtime for an independent expenditure targeting candidate X. The
6 nonconnected committee reports the independent expenditure on Schedule E on its third quarter
7 report referencing the previous Schedule B transaction. Additionally, in the third quarter report,
8 in order to not understate the committee's cash on hand, the committee backs out the previously
9 reported Operating Expenditure disbursement by reporting a negative entry on Schedule B with a
10 reference of the originally reported transaction.

11 Example 3: Committee C, a monthly filer, pays \$10,000 for airtime in March. The airtime
12 is on October 31 (within the 24-hour reporting period), and the committee does not decide until
13 that date that the ad will be an independent expenditure attacking candidate Y. As in the
14 previous example, the committee reports the expenditure in the report covering March as a
15 Schedule B item. The committee reports the independent expenditure on a Memo Schedule E
16 referencing the earlier Schedule B transaction, and files it in time to be received by the
17 Commission within 24 hours of the time the committee determined the ad to be an independent
18 expenditure (which here coincides with the time the ad first was broadcast). Then, in the post-
19 general election report, the committee reports the independent expenditure on Schedule E, again
20 referencing the original disbursement previously reported on Schedule B in March, and reports a
21 negative Schedule B entry referencing the same March disbursement to assure accurate totals.

22 Example 4: In September, Committee D, a quarterly filer, contracts, but does not pay, for
23 handbills containing an independent expenditure supporting candidate X. The cost of the

1 handbills is \$450. Because the debt is less than \$500 and has been outstanding for less than 60
2 days it is not reportable on Schedule D of the committee's third quarter report. The handbills are
3 distributed on October 5 (during the pre-general reporting period). The committee reports the
4 independent expenditure on a 12-day pre-general election report as a Memo Schedule E using
5 October 5 as the date. Payment is made on November 1. No 24-hour report is needed, since the
6 pre-general report disclosed the making of this independent expenditure. On the post-general
7 election report, the committee reports the payment as a positive entry on Schedule E and includes
8 a cross-reference to the Memo Schedule E entry on the 12-day pre-general report.

9 Example 5: Committee E, a monthly filer, contracts in August for airtime to begin on
10 October 31, five days before the November 5 general election. The costs of producing the ads
11 and the airtime will exceed \$500, but no payment is actually during the August, September, or
12 pre-general reporting periods. These obligations are reportable on Schedule D of these reports.
13 The ads run from October 31 through November 2. Payment is made on November 1. The
14 committee must file a 24-hour report of independent expenditures on Memo Schedule E to be
15 received by the Commission or the Secretary of the Senate, as appropriate, within 24 hours of the
16 first time the ad ran on October 31. This Memo Schedule E uses October 31 as the date of the
17 independent expenditure and uses the committee's best estimate of the total cost as the amount.
18 (In this case, the exact amount would be known as of November 1.) The committee, on its post-
19 general election report, shows the November 1 payment to extinguish the debt on Schedule D
20 and also reports the independent expenditure payment as a positive disbursement on Schedule E
21 so the line totals on the Detailed Summary Page will be accurate.

1 Examples for Individuals and Other Entities

2 Individuals and other entities that are not political committees have simpler reporting
3 requirements for independent expenditures. These persons report their independent expenditures
4 on FEC Form 5 or by letter in some cases. Consequently, they will be required to report only at
5 the earliest of 1) the date on which any payment is made for the production or dissemination of
6 the communication, provided the person making the payment knows the payment constitutes an
7 independent expenditure, or 2) the first date on which the communication is published, broadcast
8 or otherwise publicly disseminated. No memo entries need appear on Form 5 and no other
9 schedules, such as Schedule D's for debt reporting, need be filed.

10 Example 6: In August, Citizen X contracts, but does not pay, for \$1,000 of newspaper space
11 to run an independent expenditure ad three days before the November general election. Citizen
12 X pays for the ad in September (during the third quarter reporting period). He reports the
13 independent expenditure on FEC Form 5 (or by letter, if applicable) at the end of the third quarter
14 reporting period. No further reporting is required when the ad actually runs.

15 Example 7: In August, Citizen Y contracts, but does not pay, for airtime to broadcast an
16 independent expenditure ad three days before the general election (during the 24-hour reporting
17 period). Citizen Y does not pay for the ad until two days after the ad runs. Y must file FEC
18 Form 5 (or a letter, if appropriate), which must be received by the Commission within 24 hours
19 of the time the ad was first broadcast. Y must use the date the ad ran (three days before the
20 general election) as the date of the ad, and must use his best estimate as the amount). Y may file
21 Form 5 using a fax machine, e-mail or the Commission's web site.

2 Example 8: In June 2002, Qualified Nonprofit Corporation ("QNC") Z contracts, but does
3 not pay, for airtime in early October (which falls within the pre-general reporting period). QNC

1 Z does not know in June the specific contents of the ad. The cost of airtime is greater than \$500
2 but, because it is not a political committee, QNC Z has no obligation to report the debt. QNC Z
3 pays for the airtime in July (which falls within the third quarter reporting period) but does not
4 decide which of several communications it will air until the day it airs in early October. QNC Z
5 reports the independent expenditure on FEC Form 5 (or by letter, if appropriate) at anytime
6 before the due date of the 12 day pre-general election report.

7 Example 9: Using the previous example, suppose that QNC Z pays for the airtime in July
8 and knows at that time that the ad will be an independent expenditure supporting candidate X.
9 QNC Z reports the independent expenditure on FEC Form 5 (or by letter, if appropriate) anytime
10 before the October 15 deadline for 3rd quarter reports.

11 **Section 109.2 Reporting of independent expenditures by persons other than a political**
12 **committee (2 U.S.C. 434(c)).**

13 Section 109.2 of the Commission's regulations requires persons other than political
14 committees to report their independent expenditures on either FEC Form 5 or in a signed
15 statement containing certain information about the person who made the independent
16 expenditure and about the nature of the expenditure itself. Under the previous regulations,
17 regardless of whether the filer reported the independent expenditure on Form 5 or in a signed
18 statement, the report had to be notarized. As discussed in the Explanation and Justification for
19 11 CFR 104.4 above, the revised regulations no longer require notarization of reports of
20 independent expenditures, but do require filers to self-verify their reports. Accordingly, the
21 introductory text of paragraphs (a) and (a)(1) of section 109.2 is being revised to change the
22 signature requirement on reports of independent expenditures to the verification of reports of
23 independent expenditures. To implement the self-verification, the amendments to 11 CFR

1 109.2(a)(1)(v) require that persons other than political committees continue to include a
2 prescribed statement of certification as to the independence of the expenditure. The Commission
3 intends to make conforming amendments to FEC Form 5 at a later point.

4 The NPRM proposed adding new paragraph (a)(1)(vi) to section 109.2 (and renumbering
5 paragraph (a)(1)(vi) as (a)(1)(vii)). Proposed paragraph (a)(1)(vi) would have required those who
6 file a statement instead of FEC Form 5 to certify that the expenditure was not made to finance,
7 disseminate, distribute or republish campaign materials prepared by a candidate or a candidate's
8 agent or authorized committee. This statement is in addition to the statement of independence
9 required in 11 CFR 109.2(a)(1)(v), discussed above. While this "republishing statement" has
10 long been included in the certification on FEC Form 5 (and on Schedule E, filed by political
11 committees), it has not been required of those who file by letter. The NPRM further noted, that,
12 on the other hand, the statutory certifications required by 2 U.S.C. 434(b)(6)(B)(iii) and (c)(2)(A)
13 do not address distribution of candidate-prepared materials. Consequently, comments were
14 requested on not adding the certification statement to paragraph (a)(1)(vi) and removing that part
15 of the certification from FEC Form 5 and Schedule E. The commenter did not address this issue.

16 The Commission has decided to add the "republishing statement" to 11 CFR 109.2(a)(1)(vi)
17 for those filing by letter and to leave the statement on Form 5 and Schedule E. This decision is
18 supported by the legislative history of the FECA. The Conference Report to the 1976 FECA
19 explained that "any expenditure to finance publication of any campaign broadcast or any other
20 campaign materials prepared by a candidate shall be considered to be a contribution to that
21 candidate." H.R. Report No. 94-1057 at 55 (1976). Hence, such expenditures are considered in-
22 kind contributions rather than independent expenditures.

1 Conforming changes are being made to paragraph (b) of section 109.2 to indicate that 24-
2 hour reports must be received within 24 hours of the time the independent expenditure is made.

3 New paragraph (c) of 11 CFR 109.2 sets forth the acceptable methods of verification for both
4 e-mailed and paper reports. Note that faxed reports are considered to be filed on paper and must
5 contain the certification statement required by 11 CFR 109.2(a)(i) and new paragraph (a)(vi)
6 followed by the signature of the filer. Electronically mailed reports must contain the certification
7 statements and information required by 11 CFR 109.2(a)(i) through (a)(vii) followed by the
8 typewritten name of the filer. The Commission received no comments on these amendments.

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

10 The Commission certifies that these final rules will not have a significant economic impact
11 on a substantial number of small entities. The basis of this certification is that the Commission is
12 providing most filers with less than \$50,000 of activity with additional means of complying with
13 the law, thereby increasing the filers' flexibility by allowing them to choose the most convenient
14 and cost effective filing method. These additional filing methods will likely reduce costs for
15 small entities.

16 **List of Subjects**

17 **11 CFR Part 100**

18 Elections.

19 **11 CFR Part 104**

20 Campaign funds, Political committees and parties, Reporting and recordkeeping
21 requirements.

22 **11 CFR Part 109**

23 Elections, Reporting and recordkeeping requirements.

1 For the reasons set out in the preamble, Subchapter A of chapter 1 of title 11 of the Code
2 of Federal Regulations is amended to read as follows:

3 **PART 100--SCOPE AND DEFINITIONS (2 U.S.C. 431)**

4 1. The authority citation for part 100 is revised to read as follows:

5 Authority: 2 U.S.C. 431, 434(a)(11), 434(c) and 438(a)(8).

6 2. Section 100.19 is revised to read as follows:

7 **§ 100.19 File, filed or filing (2 U.S.C. 434(a)).**

8 With respect to ~~reports, statements, notices, and designations~~documents required to be
9 filed under 11 CFR parts 101, 102 104, 105, 107, 108 and 109, and any modifications or
10 amendments thereto, the terms file, filed, and filing mean ~~either one of the following actions set~~
11 forth in paragraphs (a) through (e) of this section. For purposes of this section, document means
12 any report, statement, notice or designation required by the Act to be filed with the Commission
13 or the Secretary of the Senate.

14 (a) Except for documents electronically filed under paragraph (c) of this section, A document is
15 timely filed upon delivery to the Federal Election Commission, 999 E Street, NW., Washington,
16 DC 20463; or the Secretary of the United States Senate, Office of Public Records, 119 D Street
17 NE., Washington, DC 20510 as required by 11 CFR part 105, by the close of business on the
18 prescribed filing date.

19 (b) A document other than a 24-hour report of an independent expenditure under 11 CFR
20 104.4(b) or 109.2(c) is timely filed upon deposit as registered or certified mail in an established
21 U.S. Post Office and postmarked no later than midnight of the day of the filing date, except that
22 pre-election reports so mailed must be postmarked no later than midnight of the fifteenth day
23 before the date of the election. Documents sent by first class mail must be received by the close
24 of business on ~~of~~ the prescribed filing date to be timely filed.

1 (c) For electronic filing purposes, a document is timely filed when it is received and
2 validated by the Federal Election Commission at or before 11:59 p.m., Eastern Standard/Daylight
3 Time, on the filing date.

4 (d) A 24-hour report of independent expenditures under 11 CFR 104.4(b) or 109.2(c) is
5 timely filed when it is received by the appropriate filing officer as listed in 11 CFR 104.4(c)
6 within 24 hours of the time the independent expenditure was made. In addition to other
7 permissible means of filing, a 24-hour report may be filed using a facsimile machine or by
8 electronic mail if the filer is not required to file electronically in accordance with 11 CFR 104.18.

9 (e) In addition to other permissible means of filing, authorized committees that are not
10 required to file electronically may file 48-hour notifications of contributions using facsimile
11 machines. All authorized committees that file with the Commission, including electronic filers,
12 may use the Commission's web site's on-line program to file 48-hour notifications of
13 contributions. See 11 CFR 104.5(f).

14 **PART 104 -- REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)**

15 3. The authority citation for part 104 continues to read as follows:

16 Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b) and 439a.

17 4. Section 104.4 is amended by revising paragraph (b) to read as follows:

18 **§ 104.4 Independent expenditures by political committees (2 U.S.C. 434(c)).**

19 * * * * *

20 (b) 24-hour reports. Reports of aAny independent expenditures aggregating \$1,000 or more
1 made after the 20th day, but more than 24 hours, before 12:01 a.m. of the day of the election,
2 shall must be reported-received by the appropriate officers listed in paragraph (c) of this section
3 within 24 hours after such independent expenditure is made. Such report ~~shall be filed with the~~

1 ~~appropriate officers listed in 11 CFR 104.4(c) and~~ shall contain the information required by
2 11 CFR 104.3(b)(3)(vii) indicating whether the independent expenditure is made in support of, or
3 in opposition to, the candidate involved. In addition to other permissible means of filing, a 24-
4 hour report may be filed using a facsimile machine or electronic mail if the filer is not required to
5 file electronically in accordance with 11 CFR 104.18. Such report shall be verified by one of the
6 methods stated in paragraph (b)(1) or (b)(2) of this section. Any report verified under either of
7 these methods shall be treated for all purposes (including penalties for perjury) in the same
8 manner as a document verified by signature.

9 (1) For reports filed on paper (e.g., by hand delivery, U.S. Mail or facsimile
10 machine), the certification required by 11 CFR 104.3(b)(3)(vii) shall be
11 immediately followed by the handwritten signature of the treasurer of the political
12 committee that made the independent expenditure and who certifies, under
13 penalty of perjury, its independence.

14 (2) For reports filed by electronic mail, the certification required by 11 CFR
15 104.3(b)(3)(vii) shall be immediately followed by the typewritten name of the
16 treasurer of the political committee that made the independent expenditure and
17 who certifies, under penalty of perjury, its independence.

18 * * * * *

19 5. Section 104.5 is amended by revising paragraphs (f) and (g) to read as follows:

20 **§ 104.5 Filing dates (2 U.S.C. 434(a)(2)).**

21 * * * * *

22 (f) 48-hour notification of contributions. If any contribution of \$1,000 or more is received by
23 any authorized committee of a candidate after the 20th day, but more than 48 hours, before 12:01

1 a.m. of the day of the election, the principal campaign committee of that candidate shall notify
2 the Commission, the Secretary of the Senate and the Secretary of State, as appropriate, within 48
3 hours of receipt of the contribution. The notification shall be in writing and shall include the
4 name of the candidate and office sought by the candidate, the identification of the contributor,
5 and the date of receipt and amount of the contribution. The notification shall be filed in
6 accordance with 11 CFR 100.19. The notification shall be in addition to the reporting of these
7 contributions on the post-election report.

8 (g) 24-hour report of independent expenditures. Statements disclosing aAny independent
9 expenditures aggregating \$1,000 or more made after the 20th day, but more than 24 hours, before
10 12:01 a.m. of the day of the election, ~~shall must be reported~~ received by the appropriate officers
11 listed in 11 CFR 104.4(c) within 24 hours after such independent expenditure is made. Such
12 ~~statement report shall be filed with the appropriate officers listed in 11 CFR 104.4(c) and shall~~
13 contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent
14 expenditure is made in support of, or in opposition to, the candidate involved.

15 * * * * *

16 6. Section 104.14 is amended by revising paragraph (a) to read as follows:

17 **§ 104.14 Formal requirements regarding reports and statements.**

18 (a) Each individual having the responsibility to file a designation, report or statement
19 required under this subchapter shall sign the original designation, report or statement, except
20 that:

21 (1) Reports or statements of independent expenditures filed by facsimile machine or
22 electronic mail under 11 CFR 104.4(b) or 11 CFR 109.2 must be verified in
23 accordance with those sections; and

1 (2) Reports, designations, or statements filed electronically under 11 CFR 104.18
2 must follow the signature requirements of 11 CFR 104.18(g).

3 * * * * *

4 7. Section 104.18 is amended by revising paragraph (h) to read as follows:

5 **§ 104.18 Electronic filing of reports (2 U.S.C. 432(d) and 434(a)(11)).**

6 * * * * *

7 (h) Schedules and forms with special requirements. ~~The following list of schedules,~~
8 ~~materials, and forms have special signature and other requirements and reports containing these~~
9 ~~documents shall include, in addition to providing the required data within the electronic report,~~
10 ~~either a paper copy submitted with the political committee's or other person's electronic report or~~
11 ~~a digitized version submitted as a separate file in the electronic submission: Schedule C-1~~
12 ~~(Loans and Lines of Credit From Lending Institutions), including copies of loan agreements~~
13 ~~required to be filed with that Schedule, Schedule E (Itemized Independent Expenditures), Form 5~~
14 ~~(Report of Independent Expenditures made and Contributions Received), and Form 8 (Debt~~
15 ~~Settlement Plan). The political committee or other person shall submit any paper materials~~
16 ~~together with the electronic media containing the report.~~

17 (1) The following are schedules and forms that require the filing of additional
18 documents and that have special signature requirements:

19 (i) Schedules C-1 and C-P-1, Loans and Lines of Credit From Lending
20 Institutions (see 11 CFR 104.3(d)); and

21 (ii) Form 8, Debt Settlement Plan (see 11 CFR 116.7(e)).

22 (2) If a person files a report electronically by submitting a diskette to the Commission
23 and is required to file any of the schedules or forms listed in paragraph (h)(1) of

1 this section, the person shall file a paper copy of the required schedule or form
2 with the electronic submission, or a digitized version as a separate file in the
3 electronic submission, by the close of business on the prescribed filing date.

4 (3) If a person files a report electronically by uploading the data to the Commission's
5 electronic filing system and is required to file any schedules or forms listed in
6 paragraph (h)(1) of this section, the person shall file a paper copy or a digitized
7 version of the required schedule or form by the close of business on the prescribed
8 filing date.

9 * * * * *

10 **PART 109 — INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 434(c))**

11 8. The authority for part 109 continues to read as follows:

12 Authority: 2 U.S.C. 431(17), 434(a)(11) and (c), 438(a)(8), and 441d.

13 9. Section 109.1 is amended by adding new paragraph (f) to read as follows:

14 **§ 109.1 Definitions (2 U.S.C. 431(17)).**

15 * * * * *

16 (f) An independent expenditure is made on the earliest of -

17 (1) The first date on which the communication is published, broadcast or otherwise
18 publicly disseminated; or

19 (2) The date on which any payment is made for the production or dissemination of
20 the communication, provided that the person making the payment knows the
21 payment constitutes an independent expenditure.

1 10. Section 109.2 is amended by revising the introductory text in paragraphs (a) and (a)(1),
2 by revising paragraphs (a)(1)(v), (a)(2), and (b), by redesignating paragraph (a)(1)(vi) as
3 paragraph (a)(1)(vii), and adding new paragraphs (a)(1)(vi) and (c) to read as follows:

4 **§ 109.2 Reporting of independent expenditures by persons other than a political committee**
5 **(2 U.S.C. 434(c)).**

6 (a) Every person other than a political committee, who makes independent expenditures
7 aggregating in excess of \$250 in a calendar year shall file a signed/verified statement or report on
8 FEC Form 5 with the Commission or Secretary of the Senate in accordance with 11 CFR
9 104.4(c).

10 (1) If a signed/verified statement is submitted, the statement shall include:

11 * * * * *

12 (v) A signed/verified certification under penalty of perjury as to whether such
13 expenditure was made in cooperation, consultation or concert with, or at
14 the request or suggestion of any candidate or any authorized committee or
15 agent thereof;

16 (vi) A verified certification under penalty of perjury as to whether the
17 expenditure involved the financing, dissemination, distribution or
18 publication of any campaign materials prepared by a candidate or a
19 candidate's agent or authorized committee; and

20 * * * * *

21 (2) Reports or statements filed under this section shall be filed at the end of the
22 reporting period (quarterly, pre-election, post-election, semi-annual or annual)
23 (See 11 CFR 104.5)) during which any independent expenditure which aggregates

1 in excess of \$250 is made and in any reporting period thereafter in which
2 additional independent expenditures are made.

3 (b) Reports of independent expenditures aggregating \$1,000 or more made by any person
4 after the twentieth day, but more than 24 hours before 12:01 a.m. of the day of an election
5 shall must be received by the appropriate officers as listed in paragraph (c) of this section reported
6 within 24 hours after such independent expenditure is made. Such report or statement shall
7 contain the information required by paragraph (a) of this section indicating whether the
8 independent expenditure is made in support of, or in opposition to, a particular candidate. And
9 shall be filed with the appropriate officers in accordance with 11 CFR 104.4(e).

10 (c) Verification of independent expenditure statements and reports: For reports filed on
11 paper (e.g., by hand delivery, U.S. Mail or facsimile machine), the certification required by
12 paragraphs (a)(1)(v) and (a)(1)(vi) of this section must be immediately followed by the
13 handwritten signature of the person who made the independent expenditure and who certifies,
14 under penalty of perjury, its independence. For reports filed by electronic mail, the certification
15 required by paragraphs (a)(1)(v) and (a)(1)(vi) of this section must be immediately followed by
16 the typewritten name of the person who made the independent expenditure and who certifies,
17 under penalty of perjury, its independence.

18
19
20
21 _____
22 David M. Mason
23 Chairman
24 Federal Election Commission
25

26 DATED: _____
27 BILLING CODE: 6715-01-P