



FEDERAL ELECTION COMMISSION
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AGENDA ITEM

For Meeting of: 2-28-02

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

N. Bradley Litchfield
Associate General Counsel

Rosemary C. Smith
Assistant General Counsel

Cheryl A. Fowle
Attorney

FEB 27 2002

SUBMITTED LATE

SUBJECT: Final Rules and Explanation and Justification on Independent Expenditure Reporting: Alternative Definition of When an Independent Expenditure is "Made"

At the request of the Chairman's office, the Office of General Counsel is circulating the attached document regarding the definition of when an independent expenditure is "made". This alternative to Agenda Document 02-15 would replace the definition in that document with one stating that an independent expenditure is made no later than the first date on which the communication is publicly disseminated. Further, the alternative would allow persons to file 24-hour reports of independent expenditures after a payment is made, or a reportable debt is incurred, for the independent expenditure, but the report must be received by the Commission or the Secretary of the Senate no later than 24 hours after the independent expenditure is made.

OGC has drafted and circulates this document to facilitate the Commission's discussion and consideration of the final rule proposals.

1 **The following changes to the final rules are intended to revise the definition of**
2 **when an independent expenditure is “made”.**

3
4 1. On page 5, line 13, replace “within 24 hours of” with “after a disbursement is made,
5 or a debt reportable under 11 CFR 104.11(b) is incurred, for the independent expenditure,
6 but no later than 24 hours from”

7
8 2. Replace page 13, line 4 through page 18, line 10 with the following:
9 broadcasters not to run the advertisements in question.

10 While the Commission does not necessarily agree with the commenter’s legal
11 analysis, the Commission is dropping the third prong of the proposed definition. New
12 paragraph (f) of the final regulations states that an independent expenditure is made no
13 later than the first date on which the communication is published, broadcast or otherwise
14 publicly disseminated. This new paragraph would, therefore, allow persons to report an
15 independent expenditure before the underlying communication is publicly disseminated,
16 notwithstanding other regulations that could fairly be read to require earlier disclosure.
17 The statutory change for 24-hour reports reflects Congressional intent to emphasize and
18 assure the timely disclosure of independent expenditures. Consequently, the final rules
19 will enhance timely disclosure by requiring that independent expenditures be reported
20 within 24 hours of the time they are first publicly disseminated.

21 Examples for Political Committees:

22 In some situations, a political committee will not make payment or incur a reportable
23 debt before the communication underlying the independent expenditure is publicly
24 disseminated. If the communication is both publicly disseminated and paid for in the
25 same reporting period, then the committee reports the independent expenditure on
26 Schedule E for that reporting period. If the communication is aired in one reporting
27 period (e.g., during the 24-hour reporting period) and payment is made in a later reporting
28 period (e.g., during the post-general election period), then the committee reports the
29 independent expenditure as a memo entry on Schedule E during the reporting period in
30 which the communication is publicly disseminated and reports it again as a positive entry
31 on Schedule E in the reporting period in which payment is made.

1 In other situations, however, a political committee may pay the production and
2 distributions costs associated with an independent expenditure in one reporting period,
3 but not publicly disseminate it until a later reporting period. In this case, the committee
4 reports the payment as a disbursement on Schedule B for operating expenditures. When,
5 in a subsequent reporting period, the communication is publicly disseminated, the
6 committee files a Schedule E for the independent expenditure referencing the earlier
7 Schedule B transaction. The committee also reports the disbursement for the independent
8 expenditure as a negative entry on Schedule B so the total disbursements are not inflated.
9 Alternatively, if the committee wishes to disclose the independent expenditure before the
10 communication is publicly disseminated, it could report the independent expenditure on
11 Schedule E for the reporting period in which the payment is made, with no further
12 reporting obligation at the time the communication is disseminated.

13 Obligations incurred but not yet paid (that are reportable debts), must be reported on
14 Schedule D. When, in a subsequent reporting period, the communication is publicly
15 disseminated, the committee must file a Schedule E referencing the debt on Schedule D.
16 The committee must continue to report the debt on Schedule D (and any payment on it on
17 Schedule E), until the debt is extinguished.

18 Example 1: Committee A makes a \$10,000 payment on October 5 for a newspaper ad
19 urging the defeat of Candidate X, where the ad will run on the 10th day before the
20 November general election (i.e., during the 24 hour reporting period). The committee
21 reports the payment on Schedule B for Operating Expenditures for its pre-general election
22 report. The committee must file a 24-hour report on Schedule E no later than 24 hours
23 after the ad was first published. Further, on its post-general election report, the
24 committee must report the independent expenditure on Schedule E and report the
25 disbursement for the independent expenditure as a negative entry on Schedule B for
26 Operating Expenditures. Alternatively, the committee could report the independent
27 expenditure on Schedule E for its pre-general election report with no further reporting
28 obligation during the 24-hour reporting period.

29 Example 2: In September, Committee B, a quarterly filer, enters a contract, but does
30 not pay, for handbills containing an independent expenditure supporting candidate X.
31 The cost of the handbills is \$450. Because the debt is less than \$500, and has been
32 outstanding for less than 60 days, it is not reportable on Schedule D of the committee's

1 third quarter report. The handbills are distributed on October 5 (during the pre-general
2 reporting period). Committee B reports the independent expenditure on a 12-day pre-
3 general election report as a Memo Schedule E, using October 5 as the date. Payment is
4 made on November 1. No 24-hour report is needed, because the independent expenditure
5 was distributed before the 20 day before the general election. On the post-general
6 election report, Committee B reports the payment as a positive entry on Schedule E and
7 includes a cross-reference to the Memo Schedule E entry on the 12-day pre-general
8 report.

9 Example 3: Committee C, 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
11 the ads and the airtime will exceed \$500, but no payment is actually made during the
12 August, September, or pre-general reporting periods. These amounts are reportable as
13 debts on Schedule D. The ads run from October 31 through November 2. Payment is
14 made on November 1. Committee C files a 24-hour report of independent expenditures
15 on Memo Schedule E to be received by the Commission or the Secretary of the Senate, as
16 appropriate, within 24 hours of the first time the ad ran on October 31. This Memo
17 Schedule E uses October 31 as the date of the independent expenditure and includes the
18 committee's best estimate of the total cost as the amount. (In this case, the exact amount
19 would be known as of November 1.) The committee, on its post-general election report,
20 shows the November 1 payment to extinguish the debt on Schedule D and also reports the
21 independent expenditure payment as a positive disbursement on Schedule E so the line
22 totals on the Detailed Summary Page will be accurate.

23 Examples for Persons Other Than Political Committees

24 Persons other than political committees simply report their independent expenditures
25 on FEC Form 5 or by letter (if they are not required to file electronically). If the
26 independent expenditure is first distributed during the 24-hour reporting period (less than
27 20 days but more than 24 hours before an election), it must be reported no later than 24
28 hours after the first time the ad is distributed. If the independent expenditure is first
29 publicly disseminated outside the 24-hour reporting period, it must be reported no later
30 than by the end of the regular reporting period during which the ad is first distributed.

31 Example 4: Mr. Jones takes out a newspaper ad supporting Candidate X. The ad runs
32 October 4th through October 7th in an election year. Mr. Jones must report the

1 independent expenditure no later than 24 hours after the time the ad first runs on October
2 4th.

3
4 **3.** On page 22, line 6, replace “within” with “after a disbursement is made, or a debt
5 reportable under 11 CFR 104.11(b) is incurred, for an independent expenditure, but no
6 later than 24 hours from”

7
8 **4.** On page 22, line 23, replace “within” with “after a disbursement is made, or a
9 debt reportable under 11 CFR 104.11(b) is incurred, for an independent expenditure, but
10 no later than 24 hours from”

11
12 **5.** On page 24, line 11, replace “within” with “after a disbursement is made, or a
13 debt reportable under 11 CFR 104.11(b) is incurred, for an independent expenditure, but
14 no later than 24 hours from”

15
16 **6.** Replace page 26, lines 16 through 21 with the following:

17 (f) Notwithstanding 11 CFR 100.8(a)(2) and 104.11(b), an independent expenditure
18 is made no later than the first date on which the communication is published, broadcast or
19 otherwise publicly disseminated.

