

Corporate/Labor/Trade Communications and Resources



February 23, 2012
Tab #7



Objectives

- Examine restrictions on corporate/labor communications
- Review definitions of:
 - Express advocacy
 - Coordination
 - Electioneering communication
- Explain how corporation/labor organization's facilities and resources can be used for election-related events and purposes

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Prohibited Source

Key Points:

- ▶ Corporations & labor organizations cannot make contributions in connection with federal elections.
- ▶ The law includes limited exceptions that permit establishment of SSF and certain other activities.

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COMMUNICATIONS

I. What's Prohibited, Restricted and Permitted

A. Basic Prohibition

Keep in mind that underlying these rules is the basic prohibition on corporate/labor contributions in connection with federal election.



What's Restricted

Coordinated communications by corporations and labor organizations must be limited to restricted class

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- B. Post-Citizens United: What's Restricted and Permitted**
 - 1. Coordinated Communications**
Only allowed if limited to restricted class.



What's Permitted

Corporations and labor organizations may use treasury funds to make independent expenditures and electioneering communications

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What's Permitted

Independent expenditures and
electioneering communications must
include disclaimers and be reported

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2. **Independent Expenditures and Electioneering Communications:**
Both permitted, but require:
 - a) Disclaimers
 - b) Disclosure

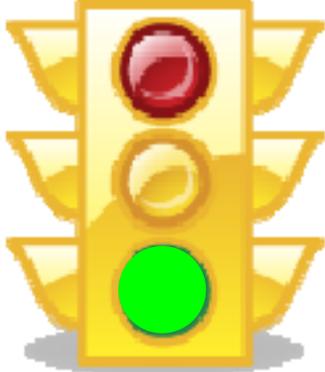


Organization Communications

Coordinated Messages
to General Public

Other Communications
to General Public

Communications
within Restricted Class



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II. Organization Communications

In general, corporate/labor communications are limited as follows:

- **Red Light: Coordinated messages to public prohibited**
- **Caution: Other types of communications are not prohibited, but certain requirements apply (e.g., disclaimers)**
- **Green Light: Communications with the restricted class are unrestricted**



Restricted Class Message

A corporation, labor organization, trade or membership organization may communicate to its restricted class on any subject, without restriction.

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- A. Within the Restricted Class**
- 1. Express advocacy is OK on any subject without restriction.**
 - 2. Coordination with candidate or party is OK.**



Restricted Class

- **Corporations**
 - ▶ Stockholders, executive and administrative personnel, and families of both groups.
- **Labor Organizations**
 - ▶ Members, executive and administrative personnel of organization, and family of both groups.
- **Membership Organizations**
 - ▶ Noncorporate members, representatives of corporate members, executive and administrative personnel, and family of all three groups.
- **Trade Associations**
 - ▶ Executive and administrative personnel and noncorporate members,
 - ▶ Representatives of corporate members with whom association normally conducts business.

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B. Definition of Restricted Class for Communications

1. Corporations

Stockholders, executive and administrative personnel, and families of both groups.

2. Labor Organizations

Members, executive and administrative personnel of organization, and family of both groups.

3. Membership Organizations

a) Who is Included

Noncorporate members, representatives of corporate members, executive and administrative personnel, and family of all three groups.

b) AO 1996-21:

- (1) Membership organization could send express advocacy communications to member representatives with whom member organization usually did organization business.
- (2) Not more than 2 or so representatives per corporate member.

4. Trade Associations

a) Who is Included

Restricted class, defined for purposes of receiving communications, is not identical to group that can be solicited for contributions to the Trade Association's PAC.

b) Who is Included

- (1) Executive and administrative personnel and noncorporate members,
- (2) Representatives of corporate members with whom association normally conducts business.
- (3) AO 1991-24: Representatives of member corporations could distribute communication to corporation's restricted class.



Restricted Class Message

Message	Restricted Class
Express Advocacy	Okay
Coordinated	Okay
Reporting	Form 7

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Express Advocacy

Message unmistakably urges election or defeat of clearly identified federal candidate.

Two Part Definition:

- Part A: Specific Call to Action
- Part B: Only Reasonable Interpretation Test

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III. Express Advocacy – Definition (11 CFR 100.22)

Message unmistakably urges election or defeat of one or more clearly identified federal candidates or the candidates of a clearly identified political party.

- A. **Two Part Definition of Unmistakably Urging Election or Defeat**
- **Part A: Specific Call to Action**
 - **Part B: “Only Reasonable Interpretation Test”**



Express Advocacy

- ▶ **Specific Call to Action**
 - Explicit words of advocacy for or against a federal candidate
 - Urging action with respect to candidates associated with a particular issue
 - Campaign slogan or words

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- B. **Part A: Specific Call to Action (11 CFR 100.22(a))**
- 1. Explicit Words of Advocacy For or Against a Federal Candidate**
Examples: "Re-elect your Congressman," "support your Democratic nominee," "reject the incumbent."
 - 2. Urging Action with Respect to Candidates Associated with a Particular Issue**
Example: "Vote Pro-Environment," when accompanied by names or photographs of candidates identified as supporting the issue.
 - 3. Campaign Slogan or Words (e.g., on bumper stickers & ads) that can have No Other Reasonable Meaning than to Support or Oppose Candidate,**
Examples: "Bush/Cheney!"; "Obama 2012"



Express Advocacy

► Only Reasonable Interpretation Test:

When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates.

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- C. Part B: “Only Reasonable Interpretation Test” (11 CFR 100.22(b))**
Absent explicit words of advocacy for or against a candidate, the communication, when taken as whole and with limited reference to external events, can only be interpreted by reasonable person as “encouraging action to elect or defeat” federal candidate.



Restricted Class Message

Message	Restricted Class
Express Advocacy	Okay
Coordinated	Okay
Reporting	Form 7

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Coordination

Made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a party committee or its agents

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IV. Coordination

A. Definition of Coordination (11 CFR 109.20)

Coordination means “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents.”

B. Coordinated Communication = In-Kind Contribution (11 CFR 109.21(b)(1))

1. Prohibited by corporation/labor organization
2. Subject to limitations when done by individual or PAC
3. Typically, reportable by campaign or party committee as in-kind contribution.



Three-Part Coordination Test

Review

As discussed in PAC Operations:

- ▶ Source of payment
- ▶ Content standard
- ▶ Conduct standard

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C. Three Part Test to Determine if Coordinated Communication (11 CFR 109.21) (Same definition as covered in PAC Operations workshop – see Tab 4.)

Three-part test; all three must be satisfied to justify conclusion that payments for a coordinated communication are for the purpose of influencing a federal election.

1. **Source of Payment**
2. **“Content Standard”**
3. **“Conduct Standard”**

D. Source of Payment

To be considered coordinated, communication must be paid for by someone other than a candidate, an authorized committee or a political party committee. (Obviously, if they paid for it themselves, coordination wouldn't be an issue.)

E. Content Standard

Will satisfy test if communication meets any one of these five standards:

1. **“Electioneering Communication” (11 CFR 100.29)**
2. **Public Communication that Republishes, Disseminates or Distributes Campaign Materials;**
3. **Public Communication with Express Advocacy**
4. **Public Communication Within Certain (Revised) Time Frame Before Election (No express advocacy required)**
5. **Communication that is “Functional Equivalent of Express Advocacy”**

F. Conduct Standard

Will satisfy test if communication meets any one of these five standards:

1. **Request or Suggestion (11 CFR 109.21(d)(1))**
2. **Material Involvement (11 CFR 109.21(d)(2))**
3. **Substantial Discussion (11 CFR 109.21(d)(3))**
4. **Employment of Common Vendor (11 CFR 109.21(d)(4))**
5. **Former Employee/Independent Contractor (11 CFR 109.21(d)(5))**



Restricted Class Message

Message	Restricted Class
Express Advocacy	Okay
Coordinated	Okay
Reporting	Form 7

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Reporting Costs

- If guidelines followed, no prohibited contribution results.
- Organization files FEC Form 7 if it spends more than \$2,000 for election.
- PAC may pay for expenses; no contribution results.

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V. Reporting Express Advocacy Communications to Restricted Class

A. Reporting by Corporations/Labor Organizations

Required if express advocacy communication costs exceeds \$2,000 when aggregated for primaries or general elections.

1. Use Form 7

2. Continuous Filing

If additional express advocacy communication expenses for primaries or general elections.



Restricted Class Message

Summary:

- Candidate and Organization can Expressly Advocate and Solicit Funds
- Campaign can Collect Contributions
- Organization can Coordinate with Campaign on Plans, Projects, Needs

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VI. Restricted Class Communications – Summary

When the communication is made to the restricted class:

- **Campaign/party and organization can expressly advocate for candidate and solicit contributions;**
- **Campaign/party may collect contributions at event;**
- **Organization can coordinate with campaign/party regarding its plans, projects and needs**



Organization Communications

Coordinated Messages
to General Public

Other Communications
to General Public

Communications
within Restricted Class



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Beyond Restricted Class

Message	Beyond the Restricted Class
Express Advocacy	Yes
Coordinated	No
Reporting	Yes

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VII. Communications Beyond Restricted Class

A. Basic Guidelines

Beyond the restricted class:

1. **Candidate and organization can expressly advocate**
2. **Organization may not coordinate communication with campaign/party**
“Coordination” would result in prohibited in-kind contribution
3. **Reporting of communication is required (as independent expenditure if express advocacy or as electioneering communication if applicable)**



The graphic features the Federal Election Commission logo on the left. A red diagonal banner in the top right corner contains the word "Review". The main title "Independent Expenditures" is centered at the top. Below it, a definition of independent expenditures is provided. At the bottom, the terms "EXPRESS ADVOCACY" and "NO COORDINATION" are displayed in large, bold, green and red letters respectively. The source "2012 FEC Information Division" is noted in the bottom right corner.

Independent Expenditures

Communications that expressly advocate the election or defeat of clearly identified candidate made without cooperation, consultation, request or suggestion of candidate or party committee

EXPRESS ADVOCACY
NO COORDINATION

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B. Independent Expenditures

1. Definition

Expenditure for communication that "expressly advocates" the election or defeat of a clearly identified candidate and that is not made in cooperation with, or at the suggestion of, the candidate or his/her campaign or its agents, or a political party or its agents.

2. Same Rules Apply

Rules for other entities making independent expenditures are similar to rules that apply to separate segregated funds making them. (See Tab 4.)



Electioneering Communications

Any broadcast, cable or satellite communication that:

- ✓ Refers to clearly ID'ed candidate;
- ✓ Is publicly distributed;
- ✓ Is distributed during certain time period before election; and
- ✓ Is targeted to the relevant electorate

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C. Electioneering Communications

1. "Electioneering Communication" Defined

An electioneering communication is any broadcast, cable or satellite communication which fulfills **each** of the following conditions:

- **The communication refers to a clearly identified candidate.**
- **The communication is publicly distributed.**
- **The communication is distributed during a certain time period before an election.**
- **The communication is targeted to the relevant electorate**

2. Elements of an Electioneering Communication

a) Clearly Defined Candidate

Same definition as in express advocacy (See Tab 4).

b) Publicly Distributed

A communication is publicly distributed if it is disseminated by a television station, radio station, cable television system or satellite system.

- (1) Both infomercials and commercials are included within the definition. 11 CFR 100.29(b)(3)(i).
- (2) Changes to rules (effective 1/20/06) eliminated the phrase "for a fee." 70 FR 75713 (12/21/05).

- c) **Distributed During a Certain Time Period Before an Election**
- (1) **Time Period**
Electioneering communications are transmitted within 60 days prior to a general election or 30 days prior to a primary election to federal office.
- (2) **Application**
- (a) This includes elections in which the candidate is unopposed.
- (b) A “primary election” includes any caucus or convention of a political party which has the authority to nominate a candidate to federal office. 11 CFR 100.29(a)(2).
- (c) The condition regarding the timing of the communication applies only to elections in which the candidate referred to is running.
- d) **Targeted to the Relevant Electorate**
- (1) **Definition of “targeted to the relevant electorate”**
The communication targets the relevant electorate if it can be received by 50,000 or more people in the district (in the case of a U.S. House candidate) or State (in the case of a Senate candidate) that the candidate seeks to represent. 11 CFR 100.29(b)(5).
- (2) **FCC Database for determining who can receive communication**
The Federal Communications Commission (FCC) provides on its web site (at <http://gulfoss2.fcc.gov/ecd/>) the information necessary to determine whether a communication can be received by 50,000 people.



Presidential Candidates

Rules apply when communication can be received by 50,000 or more:

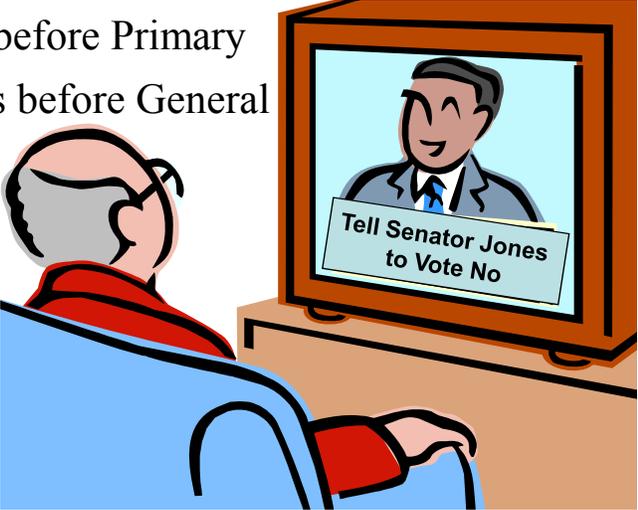
- In state where primary/caucus is being held within 30 days
- Anywhere in the US from 30 days prior to convention to end of convention
- Anywhere in the US within 60 days prior to general

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- 3. Application to Presidential/Vice-Presidential Candidates**

In the case of Presidential and Vice-Presidential candidates, the rules apply and the communication is considered “publicly distributed” if the communication can be received by 50,000 or more people:

 - In a State where a primary election or caucus is being held within 30 days;
 - Anywhere in the United States during the period between 30 days prior to the nominating convention and the conclusion of that convention; or
 - Anywhere in the United States within 60 days prior to the general election. 11 CFR 100.29(b)(3)(ii).



The illustration shows a man with glasses and a red jacket sitting in a blue chair, watching a television. The TV screen displays a man in a suit and tie, identified as Senator Jones, with a sign below him that reads "Tell Senator Jones to Vote No". To the left of the TV, the text reads "≤30 day before Primary" and "≤60 days before General". In the top left corner of the illustration area is the Federal Election Commission logo, which features an American flag and the text "FEDERAL ELECTION COMMISSION" and "UNITED STATES OF AMERICA".

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- 4. May Affect Lobbying/Issue Ads**

In addition to express advocacy communications, some organizations develop messages designed to urge action for/against a particular issue or certain legislation. Depending upon how/when the message is conveyed (among other factors), such a message fall within the definition of an electioneering communication above and thus be subject to FEC rules.



Electioneering Communications

- Electioneering communications aggregating \$10,000 or more must be disclosed to FEC within 24 hours of public distribution
- Disclosed on FEC Form 9

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5. Disclosure Requirements

a) Requirement

Electioneering communications made by corporations and labor organizations are subject to disclosure rules. Electioneering communications aggregating \$10,000 or more must be disclosed to the FEC within 24 hours of the date of public distribution.

b) Disclosed on FEC Form 9.

Links to Form 9, its instructions and reporting dates are available online at

- http://www.fec.gov/info/report_dates_2012.shtml#ec
(reporting dates)
- <http://www.fec.gov/info/forms.shtml#other>
(Form 9 and instructions)

c) Disclaimer under 11 CFR 110.11 required.



Organization Communications

Coordinated Messages
to General Public

Other Communications
to General Public

Communications
within Restricted Class



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Prohibited Source

Coordinated Prohibited
Communication = Contribution

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VIII. Coordinated Messages to General Public

- A. **Coordinated Communication = In-Kind Contribution (11 CFR 109.21(b)(1))**
Prohibited by entities such as corporations and labor organizations that are prohibited from making contributions



Key Point

Corporations and labor organizations must avoid coordination when communicating beyond the restricted class

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- B. **Key Point: Avoid Coordination of Messages to General Public**
If communication goes beyond the restricted class, avoid coordination between organization and campaign/party to avoid making a prohibited contribution.

USE OF FACILITIES AND RESOURCES



Objective

Explain how organization's facilities
and resources can be used for
election-related events and purposes

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I. Prohibition on Use of Facilities/Resources in Candidate/Party Fundraising (11 CFR 114.2(f) and 114.9)

As part of the broad prohibition on corporate and labor contributions, corporate, labor and membership organizations are generally prohibited from providing goods or services at less than the usual or normal charge.



Contribution Ban

Providing goods or services at
less than the normal charge
results in a contribution

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Contribution Ban

Corporations and labor
organizations are prohibited
from making contributions

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Contribution Ban

Organizations may NOT permit
use of facilities/resources unless
paid or under specific exceptions

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This includes permitting the use of their facilities or other resources for fundraising or other activities in connection with federal elections. However, the regulations contain a number of narrow exceptions to this prohibition. The organization's facilities and resources may be used in prescribed ways in connection with election-related activities:



Campaign/Party Use of Facilities

- Advance payment for:
 - Staff
 - Mailing list
 - Food service
 - Everything, if PAC pays
- Reimbursement for other facilities

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II. Use of Corporate/Labor Facilities by Individual, Campaign, Party or SSF (11 CFR 114.2(f)(2), 114.9 and 114.13)

A candidate or party federal event to which the general public is invited may take place at the organization's facilities, provided that a permissible source (such as an individual, campaign, party committee or the organization PAC) pays for the event, as follows:

- The organization must receive **advance** payment for the use of its staff, mailing list and/or food services;
- **Advance** payment if SSF is paying for use of other facilities (e.g., meeting rooms, phones); and
- **Reimbursement** (payment after the fact) for the use of its facilities in other situations (i.e., individual, party or campaign pays for meeting rooms, phones).



Payment Issues

- Source must be permissible
- Payment by campaign/party itself is an operating expenditure
- Payment by PAC or individual is an in-kind contribution

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A. Payment Issues

1. "Advance Payment"

Means payment is made before services are provided.

2. Source of Payment

Payment must be made by one of following sources: candidate, organization's SSF, party, individual or some other permissible source.

3. Result of Payment

- a) Payment by candidate or party is operating expenditure.
- b) Payment by others is in-kind contribution to candidate or party.



Use of Directed Staff

- Advance payment for value of services, including salary, benefits and overhead
- No coercion
- No collecting or forwarding of contributions by staff

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B. Use of Directed Staff

Organization officials or employees may direct subordinate staff to work on fundraising for candidate or party, using organization's resources, provided that the following rules are observed:

1. Advance Payment

Organization must receive advance payment for value of staff services, including benefits and overhead.

2. No Coercion

No threats of force, detrimental job actions or financial reprisal if employee refuses to engage in fundraising.

3. Collection and Forwarding Prohibited

Employees may not collect or forward contributions to candidate or party.



Use of Lists and Food Services

Must pay organization fair market value in advance for:

- Use of customer/client lists
- Use of food services or catering arrangements

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C. Use of Customer/Client Lists

1. Organization May Permit Use with Advance Payment

Organization may allow use of the organization's lists of members, employees, vendors or others to send invitations or solicit the contributions, provided that the organization receives advance payment for fair market value of lists.

2. Application to E-Mail Address Lists of Corporation

- a) Advance payment required under 114.2(f).
- b) Counts as in-kind contribution by payee.
- c) Not exempt from definition of contribution:
 - (1) Payment for e-mail list made at direction of political committee; or
 - (2) E-mail list that is transferred to political committee. 11 CFR 100.94(e)(2) and (3) and 100.155(e)(2) and (3).

D. Use of Catering or Food Services

In connection with fundraising for candidate or party's federal account, the organization may operate or arrange for catering or other food services, provided that the organization receives advance payment for fair market value of services.



Use of Meeting Rooms

- **General Rule:**
Reimburse fair market value within commercially reasonable time
- **Exception:**
Free/discounted rate if normally offered to civic groups under same conditions and available to any other political committee upon request
- **If PAC pays:**
 - Must pay in advance

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E. Use of Meeting Rooms (11 CFR 114.9 and 114.13)

1. General Rule

Campaigns and political parties may rent meeting rooms of an organization if they reimburse the organization at the normal rental charge, within a commercially reasonable time.

2. Exception

An organization may offer meeting room to candidate or party at discount or for free if organization customarily makes meeting room available to civic, community or other groups under the same conditions and if it makes it available to any other candidate or committee on the same terms, upon request.

3. PAC Paying for Room

If a PAC pays for its connected organization's meeting room for an event as an in-kind contribution, the payment must be made in advance.



Other Uses of Facilities

- General Rule: Campaign or party must reimburse at the usual/normal charge within a commercially reasonable time
- If PAC pays as in-kind contribution, it must pay in advance

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III. Other Campaign/Party Use of Organization's Facilities and Resources

A. Use of Facilities: General Rule

Campaigns and political parties may use the organization's offices and equipment provided they reimburse the organization at the usual and normal charge within a commercially reasonable time.

1. If Campaign/Party Pays:

Campaign or Party must reimburse the usual and normal charge within a commercially reasonable time – generally 30 days.

2. If PAC Pays

If organization's SSF is paying as in-kind contribution, must pay in advance.



Examples

- **Reproducing materials:**
Use current market rate for comparable materials
- **Office Space/Equipment:**
Use current market rental fees
- **Phone Banks:**
Use current market rate for phone bank set up

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B. Examples (11 CFR 114.9(c) and (d))

- 1. Reproducing Materials**
Use current market rate for reproducing comparable materials.
- 2. Office Space and Other Equipment**
Use current market rental fees
- 3. Phone Banks**
Use current market rate when using phone bank set-up of organization.

C. Use of Corporate/Labor Transportation



Employee Volunteer Activity

- **Incidental Use**
 - Work that doesn't prevent normal work
 - Safe Harbor: One hour/week or four hours/month
- **Reimbursement**
 - For increased overhead; or
 - If more than incidental use, reimburse entire cost of using facilities
- **Employee "Asked" to Volunteer – Incidental Use**
Exceptions do NOT apply!

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IV. Employee/Member Use of Facilities for Volunteer Activity: Incidental Use (11 CFR 114.9(a))

OK for employees of organization (and members and officials of organization) to make "incidental use" of facilities for their own individual volunteer activity in connection with federal election.

A. What is "Incidental Use?"

1. "Incidental use" means use that does not prevent employee or organization from completing normal work that would be completed during that period.
2. Safe Harbor: 1 hour per week or 4 hours per month.

B. Reimbursement

1. Individual must reimburse organization for any increased overhead (e.g., no need to pay for regular local phone bill, but would have to pay for long distance calls).
2. If more than incidental use - individual must reimburse organization the entire cost of using the facilities within commercially reasonable time.

C. Employee "Asked" to "Volunteer"

The "incidental use" allowance does not apply if the employee is asked by a superior to do the work as part of his/her regular duties.

Example: In MUR 5573, corporate executives that collected contributions intended for specific candidates claimed that they were doing so as individual volunteers. The Commission rejected this claim, as the evidence indicated that the executives “solicited, collected and bundled the contributions . . . using corporate resources” at the direction of the corporation, without any indication that they “devised the contribution plans on their own or that, absent their employment, they would have solicited contributions” from other corporate executives.

REVIEW OF OBJECTIVES



Objectives

- Review restrictions on corporate/labor communications
- Define the terms:
 - Express advocacy
 - Coordination
 - Electioneering communication
- Explain how corporation/labor organization’s facilities and resources can be used for election-related events and purposes

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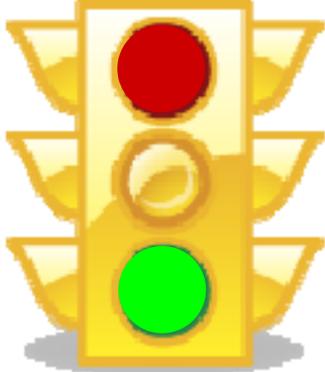
 **Organization Communications**

Review

Coordinated Messages
to General Public

Other Communications
to General Public

Communications
within Restricted Class



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As a result of the recent litigation, corporate/labor communications and uses of facilities and resources are limited as follows:

- **Red Light: Coordinated messages to the public are prohibited**
- **Caution: Other types of communications or uses of facilities are not prohibited, but requirements apply (e.g., disclaimers)**
- **Green Light: Communications with the restricted class are unrestricted**



Use of Facilities

- General Rule: Reimburse at fair market value w/in commercially reasonable time
- Advance payment for:
 - Staff
 - Mailing list
 - Food service
 - Everything, if organization's PAC pays

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Workshop Evaluation

Help Us Help You!

Please complete an evaluation
of this workshop.

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