

RECEIVED

By Office of the Commission Secretary at 4:03 pm, Dec 12, 2018



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 18-55-A
AGENDA ITEM
For the meeting of December 13, 2018
SUBMITTED LATE

December 12, 2018

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by CDG*
Acting General Counsel

Neven F. Stipanovic *NFS by CDG*
Acting Associate General Counsel

Robert M. Knop *RMK by CDG*
Assistant General Counsel

Joanna S. Waldstreicher *JSW*
Attorney

SUBJECT: REG 2014-02 (Draft Final Rule and Explanation and Justification for Reporting Multistate Independent Expenditures and Electioneering Communications)

Attached is a draft Final Rule and Explanation and Justification for Reporting Multistate Independent Expenditures and Electioneering Communications. We request that this draft be placed on the agenda for December 13, 2018.

Attachment

DRAFT

FEDERAL ELECTION COMMISSION

11 CFR Parts 104 and 109

[NOTICE 2018–xx]

Reporting Multistate Independent Expenditures and Electioneering Communications

AGENCY: Federal Election Commission.

ACTION: Final Rule.

SUMMARY: The Commission is adopting final rules in 11 CFR parts 104 and 109 to address reporting of independent expenditures and electioneering communications that relate to presidential primary elections and that are publicly distributed in multiple states but that do not refer to any particular state’s primary election.

DATES: These rules will be effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Ms. Joanna S. Waldstreicher, Attorney, 1050 First St. NE, Washington, DC 20463, (202) 694-1650 or (800) 424-9530. Documents relating to the rulemaking record are available on the Commission’s website at <http://sers.fec.gov/fosers>, reference REG 2014-02.

SUPPLEMENTARY INFORMATION:

The Commission is revising its regulations concerning independent expenditures and electioneering communications as they apply to communications that relate to presidential primary elections and that are publicly distributed in multiple states but that do not refer to any particular state’s primary election (a “multistate independent expenditure” or “multistate electioneering communication”). The Act and Commission regulations require persons who make independent expenditures and electioneering communications to report certain information

DRAFT

1 to the Commission within specified periods of time. See 52 U.S.C. 30104(b)-(c), (f), (g);
2 11 CFR 104.3, 104.4, 104.20, 109.10. The Commission is revising its regulations to clarify
3 when and how multistate independent expenditures and multistate electioneering
4 communications must be reported.

5 Although the Commission also proposed revising its regulations concerning independent
6 expenditures by authorized committees of candidates, the Commission could not reach
7 agreement to revise those regulations at this time. See Independent Expenditures by Authorized
8 Committees; Reporting Multistate Independent Expenditures and Electioneering
9 Communications, 83 FR 3996, 3999-4000 (Jan. 29, 2018). The Commission may reconsider
10 revisions to those regulations in a separate rulemaking at a later date.

11 **Transmission of Final Rules to Congress**

12 Before final promulgation of any rules or regulations to carry out the provisions of the
13 Federal Election Campaign Act, the Commission transmits the rules or regulations to the Speaker
14 of the House of Representatives and the President of the Senate for a thirty-legislative-day
15 review period. 52 U.S.C. 30111(d). The final rules that follow were transmitted to Congress on
16 [date].

17 **Explanation and Justification**

18 **I. Background**

19 The Act and Commission regulations require that political committees report all
20 disbursements. 52 U.S.C. 30104(b)(4); 11 CFR 104.3(b). Political committees must also
21 itemize their disbursements according to specific categories. 52 U.S.C. 30104(b)(4); 11 CFR
22 104.3(b)(1)-(2). An “independent expenditure” is an expenditure that expressly advocates the
23 election or defeat of a clearly identified federal candidate and is not coordinated with such
24 candidate (or his or her opponent) or political party. 52 U.S.C. 30101(17); see also 11 CFR

1 100.16(a). Under existing regulations, a political committee (other than an authorized
2 committee) that makes independent expenditures must itemize those expenditures on its regular
3 periodic reports, stating, among other things, the name of the candidate whom the expenditure
4 supports or opposes and the office sought by that candidate. 52 U.S.C. 30104(b)(4)(H)(iii),
5 (6)(B)(iii); 11 CFR 104.4(a). Any person other than a political committee that makes
6 independent expenditures aggregating in excess of \$250 during a calendar year must disclose the
7 same information in a statement filed with the Commission.¹ 52 U.S.C. 30104(c); 11 CFR
8 109.10(b).

9 In addition, any person that makes independent expenditures aggregating \$10,000 or
10 more for an election in any calendar year, up to and including the 20th day before an election,
11 must report the expenditures within 48 hours. 52 U.S.C. 30104(g)(2)(A); 11 CFR 104.4(b)(2),
12 109.10(c). Additional reports must be filed within 48 hours each time the person makes further
13 independent expenditures aggregating \$10,000 or more with respect to the same election. 52
14 U.S.C. 30104(g)(2)(B); 11 CFR 104.4(b)(2), 109.10(c).

15 Any person that makes independent expenditures aggregating at least \$1,000 less than 20
16 days, but more than 24 hours, before the date of an election must report the expenditures within
17 24 hours. 52 U.S.C. 30104(g)(1)(A); 11 CFR 104.4(c), 109.10(d). Additional reports must be
18 filed within 24 hours each time the person makes further independent expenditures aggregating
19 \$1,000 or more with respect to the same election. 52 U.S.C. 30104(g)(1)(B); 11 CFR 104.4(c),
20 109.10(d).

¹ Further, Commission regulations provide that persons other than political committees “shall file a report or statement . . . in any quarterly reporting period thereafter in which additional independent expenditures are made.” 11 CFR 109.10(b).

1 The 48- and 24-hour filing requirements begin to run when the independent expenditures
2 aggregating at least \$10,000 or \$1,000, respectively, are “publicly distributed or otherwise
3 publicly disseminated.” 11 CFR 104.4(b)(2), (c), (f), 109.10(c)-(d). For purposes of calculating
4 these expenditures and determining if a communication is “publicly distributed” within an
5 applicable 20-day pre-election period, each state’s presidential primary election is considered a
6 separate election. See Advisory Opinion 2003-40 (U.S. Navy Veterans’ Good Government
7 Fund) at 3-4 (noting that “publicly distributed” in section 104.4 has same meaning as the term in
8 11 CFR 100.29(b)(3)(ii)(A), under which each state’s presidential primary election is a separate
9 election) (citing Bipartisan Campaign Reform Act of 2002 Reporting, 68 FR 404, 407 (Jan. 3,
10 2003); Electioneering Communications, 67 FR 65190, 65194 (Oct. 23, 2002)).

11 An “electioneering communication,” in the context of a presidential election, is a
12 broadcast, cable, or satellite communication that refers to a clearly identified candidate for
13 President or Vice President and is “publicly distributed” within 60 days before a general election
14 or 30 days before a primary election or nominating convention. 52 U.S.C. 30104(f)(3)(A)(i); 11
15 CFR 100.29(a). If the candidate identified in the communication is seeking a party’s nomination
16 for the presidential or vice presidential election, “publicly distributed” means the communication
17 can be received by at least 50,000 people in a state where a primary election is being held within
18 30 days, or that it can be received by at least 50,000 people anywhere in the United States within
19 the period between 30 days before the first day of the national nominating convention and the
20 conclusion of the convention. 11 CFR 100.29(b)(3).

21 A person who makes electioneering communications that aggregate in excess of \$10,000
22 in a calendar year must file a statement with the Commission disclosing certain information
23 about the electioneering communication, including the election to which the electioneering

1 communication pertains. 52 U.S.C. 30104(f); 11 CFR 104.20(b)-(c). As with independent
2 expenditures, each state’s presidential primary election is considered a separate election for
3 purposes of determining whether an electioneering communication is “publicly distributed”
4 within the pre-election reporting window. See Advisory Opinion 2003-40 (U.S. Navy Veterans’
5 Good Government Fund) at 3-4.

6 The Commission’s current regulations do not specifically address how the public
7 distribution criteria and other reporting requirements apply to independent expenditures or
8 electioneering communications that are made in the context of a presidential primary election
9 and that are distributed in multiple states. In particular, the regulations do not specify which
10 state’s primary election date is relevant for determining whether the communication falls within
11 the 24-hour reporting window (for independent expenditures) or the 30-day definitional window
12 (for electioneering communications).

13 In a 2012 advisory opinion, the Commission considered how the independent expenditure
14 reporting requirements applied to independent expenditures that supported or opposed a
15 presidential primary candidate and were distributed nationwide without referring to any specific
16 state’s primary election. See Advisory Opinion 2011-28 (Western Representation PAC). In that
17 advisory opinion, the Commission concluded that a political committee making such an
18 independent expenditure should divide the cost of the independent expenditure by the number of
19 states that had not yet held their primary elections, and should use the resulting amounts to
20 determine whether the committee must file 24- and 48-hour reports and for which states. Id.

21 In 2014, the Commission made available for public comment three alternative draft
22 interpretive rules on this topic. Draft Notices of Interpretive Rule Regarding Reporting
23 Nationwide Independent Expenditures in Presidential Primary Elections (Jan. 17, 2014) (“Draft

1 Interpretive Rules”).² Draft A would have followed the approach set forth in Advisory Opinion
2 2011-28 (Western Representation PAC), instructing persons making a nationwide independent
3 expenditure to divide the cost of the nationwide independent expenditure by the number of states
4 with upcoming presidential primary elections. Draft B would have instructed persons making a
5 nationwide independent expenditure to report it as a single expenditure without indicating a state
6 where the expenditure was made, instead using “memo text”³ to indicate that the independent
7 expenditure was made nationwide. Draft B also would have instructed filers to use the first day
8 of the candidate’s national nominating convention as the election date for determining whether
9 they must file 24- and 48-hour reports. Finally, Draft C would have provided the same reporting
10 guidance as Draft B, except that Draft C would have instructed filers to use the date of the next
11 presidential primary election (rather than the beginning of the national nominating convention)
12 as the election date.

13 The Commission received two comments on the Draft Interpretive Rules.⁴ Both
14 comments generally supported Draft B. Both comments also argued that the approach in Draft A
15 was unnecessarily complex and would not provide clear information to the public about the
16 reported independent expenditures. After reviewing the comments and engaging in further

² Available at <https://transition.fec.gov/law/policy/nationwideiereporting/draftnationwideiereporting.pdf>. The Draft Interpretive Rules referred to the type of independent expenditures that are the subject of this rulemaking as “nationwide independent expenditures.” As discussed below, however, the Commission has determined that an independent expenditure or electioneering communication need not be distributed in all states to fall under the proposed rules. Accordingly, such communications are referred to in this document as “multistate” — rather than “nationwide” — independent expenditures and electioneering communications.

³ “Memo text” refers to a means of including additional information or explanation about a receipt or disbursement on a Commission form. See FEC, Campaign Guide for Nonconnected Committees (2008), <https://www.fec.gov/resources/cms-content/documents/nongui.pdf>.

⁴ These comments are available on the Commission’s website at <http://www.fec.gov/law/policy.shtml>.

1 deliberation, the Commission determined that this issue would be better addressed through
2 regulatory amendments than through an interpretive rule.

3 The Commission published a Notice of Proposed Rulemaking (“NPRM”) in the Federal
4 Register on January 29, 2018. Independent Expenditures by Authorized Committees; Reporting
5 Multistate Independent Expenditures and Electioneering Communications, 83 FR 3996 (Jan. 29,
6 2018). The NPRM provided three alternative sets of proposed rules – Alternative A, Alternative
7 B, and Alternative C – and sought public comment on each of them. The comment period ended
8 on March 30, 2018. The Commission received 11 substantive comments from 14 commenters in
9 response to the NPRM.⁵

10 **II. Revised 11 CFR 104.3 and 104.4 – Reporting Multistate Independent Expenditures**
11 **by Political Committees**

12 As set forth below, the Commission is revising section 104.3, concerning the content of
13 independent expenditure reports by political committees, and section 104.4, concerning the
14 timing of independent expenditure reports by political committees. The Commission is making
15 these revisions to clarify the reporting obligations of a political committee when it makes a
16 multistate independent expenditure. Of the three alternatives proposed in the NPRM for revising
17 these regulations, the Commission is adopting Alternative B.

18 1. New 11 CFR 104.3(b)(3)(vii)(C) – Content of Reports

19 As described above, political committees — other than authorized committees — must
20 provide for each reported disbursement in connection with an independent expenditure the date,
21 amount, and purpose of the independent expenditure, a statement indicating whether the
22 independent expenditure was in support of, or in opposition to, a candidate, the name and office

⁵ The Internal Revenue Service also submitted a comment indicating that it sees no conflict between this rulemaking and the Internal Revenue Code or Treasury regulations. See 52 U.S.C. 30111(f).

1 sought by that candidate, and a certification that the expenditure was, in fact, independent. 52
2 U.S.C. 30104(b)(6)(B); 11 CFR 104.3(b)(3)(vii).

3 The Commission proposed three alternatives for revising this paragraph to more clearly
4 indicate how political committees should provide the required information for multistate
5 independent expenditures. Alternatives A and B both would add a new paragraph (b)(3)(vii)(C),
6 requiring that when a political committee makes an independent expenditure in support of or in
7 opposition to a candidate in a presidential primary election, and the communication is publicly
8 distributed or otherwise disseminated in more than a specified number of states but does not refer
9 to any particular state, the political committee must report the independent expenditure as a
10 single expenditure and use memo text to indicate the states where the communication is
11 distributed. Under Alternatives A and B, the Commission would also redesignate current
12 paragraph (b)(3)(vii)(C) as paragraph (b)(3)(vii)(D).

13 Under Alternative C, which also would have added a new paragraph (b)(3)(vii)(C),
14 political committees would allocate the amount of the independent expenditure among the states
15 where it is distributed whose primary elections have yet to occur, according to a ratio based on
16 the number of U.S. House of Representatives districts apportioned to each state, and report the
17 amount spent for each such state.

18 In addition to comments on the proposals generally, the Commission specifically sought
19 comment on the number of states that would be the threshold for a communication to fall within
20 the new paragraph. Requiring an independent expenditure to be “nationwide” — i.e.,
21 disseminated in all fifty states plus the District of Columbia (and possibly Puerto Rico, Guam,
22 and American Samoa) — would exclude some independent expenditures that are distributed in a
23 large number of states (e.g., the entire continental United States). This would significantly limit

1 the benefits and application of the proposed reporting rule. Alternatively, applying the new
2 provision to independent expenditures that are disseminated in only a handful of states might
3 result in independent expenditures that are targeted to a specific state’s primary — but partially
4 distributed in neighboring states that share its media markets — being misleadingly reported as
5 “multistate” communications.

6 Most of the commenters were in agreement that either Alternative A or Alternative B
7 would be preferable to the reporting method identified in the Western Representation PAC
8 advisory opinion or the one proposed in Alternative C. These commenters generally agreed that
9 Alternatives A and B are both improvements over the existing guidance, in terms of the
10 transparency and accuracy of the information provided to the public as well as the burden on the
11 filer. Many of the commenters also agreed that Alternative C is similar to the approach of
12 Advisory Opinion 2011-28 (Western Representation PAC), and is more complex and less
13 transparent than Alternatives A and B.

14 Many of the commenters expressed a preference for Alternative A due to its simplicity
15 for filers, and one commenter also opined that Alternative A would operate better for digital ads
16 because they are more frequently intended to influence the general election on a national basis.
17 One commenter preferred Alternative B, contending that Alternative A would not satisfy the 24-
18 hour reporting requirement of the Act. Another commenter argued that both alternatives would
19 effectively require reporting multistate independent expenditures of more than \$1,000 in the
20 aggregate rather than \$1,000 per state of distribution as required by statute. The commenter
21 recommended that the Commission modify either of these alternatives to set the threshold
22 amount for reporting multistate independent expenditures at \$1,000 per state in which it is
23 distributed, to better implement the statutory reporting requirement. *Id.*

1 Six commenters addressed the minimum number of states in which a communication
2 would have to be publicly distributed before being considered a multistate independent
3 expenditure. The suggested number of states ranged from two to ten, though there was no
4 consensus among commenters on the actual number that should be used. However, several
5 commenters did agree that the Commission should take into consideration the fact that many
6 media markets cross state lines, and that a communication distributed in multiple states may in
7 fact be targeted at only one state’s primary election.

8 Based on the comments received and the applicable statutory requirements, the
9 Commission has decided to add new paragraph (b)(3)(vii)(C) in section 104.3, as proposed in
10 Alternatives A and B. The Commission agrees with the commenters who expressed the view
11 that these Alternatives are preferable to Alternative C because Alternatives A and B would be
12 less complex than Alternative C and would provide more accurate information to the public
13 concerning the true costs of multistate independent expenditures. The new paragraph requires
14 that when a political committee makes an independent expenditure in support of or in opposition
15 to a candidate in a presidential primary election, and the communication is publicly distributed or
16 otherwise disseminated in six or more states but does not refer to any particular state, the
17 political committee must report the independent expenditure as a single expenditure and use
18 memo text to indicate the states where the communication is distributed. The political
19 committee must also indicate the state with the next upcoming presidential primary among those
20 states where the independent expenditure is distributed, as specified in new section 104.4(f)(2)
21 and explained below. The Commission is also redesignating current paragraph (b)(3)(vii)(C) as
22 paragraph (b)(3)(vii)(D).

1 The Commission’s determination that the new section 104.3(b)(3)(vii)(C) should apply to
2 an independent expenditure that is publicly distributed or otherwise disseminated in at least six
3 states is based on the fact that U.S. media markets often overlap state lines. Some media markets
4 include parts of up to four states, and in one case, four states and the District of Columbia.⁶ An
5 independent expenditure distributed in a single such media market could be targeted to a single
6 state’s primary election, but would be considered a “multistate” independent expenditure if the
7 Commission set the threshold number for the new provision lower than six.

8 The Commission also proposed modifying the instructions for its forms to conform them
9 to the new reporting provisions. The Commission intends that the instructions will provide a
10 political committee with flexibility on how to report the states where a multistate independent
11 expenditure is distributed, in order to allow for timely and complete information to be available
12 to the public. After considering the comments received, the Commission has concluded that
13 filers may use descriptive memo text to indicate either the specific states or the regions where a
14 multistate independent expenditure is distributed, such as “nationwide” or “New England,” so
15 long as the description is sufficient to allow a member of the public to understand where the
16 communication was distributed. The Commission will publish non-exhaustive lists of adequate
17 and inadequate descriptions similar to its existing lists of adequate and inadequate “purpose of
18 disbursement” descriptions. See Purposes of Disbursement, [https://www.fec.gov/help-](https://www.fec.gov/help-candidates-and-committees/purposes-disbursement/)
19 [candidates-and-committees/purposes-disbursement/](https://www.fec.gov/help-candidates-and-committees/purposes-disbursement/). Filers should also indicate the state with the
20 next upcoming presidential primary among those states where the independent expenditure is
21 distributed, as specified in section 104.4(f)(2).

⁶ Comment from Campaign Legal Center, March 29, 2018, at 3 (citing Kantar Media, *DMA County Coverage as Defined by Nielsen Media Research* (Fall 2016)).

1 For independent expenditures distributed in fewer than six states, there is no change in
2 reporting requirements. Each state’s presidential primary election is deemed a separate election,
3 and therefore filers will continue to report independent expenditures that do not fall within new
4 section 104.3(b)(3)(vii)(C) by itemizing each such independent expenditure by state and
5 aggregating the amount allocated to each state with other independent expenditures in that state.

6 2. New 11 CFR 104.4(f)(2) – Timing of Reports

7 In section 104.4, the Commission proposed to redesignate current paragraph (f) as
8 paragraph (f)(1) and add new paragraph (f)(2), concerning when a political committee must file a
9 24- or 48-hour report for a multistate independent expenditure. As described above, the Act and
10 Commission regulations require any person who makes independent expenditures aggregating at
11 or above certain threshold amounts and within certain periods prior to an election to report those
12 independent expenditures within 48 or 24 hours. 52 U.S.C. 30104(g)(1)(A), (2)(A); 11 CFR
13 104.4(b)(2), (c), 109.10(c)-(d). The Commission proposed three alternative revisions to sections
14 104.4 and 109.10 to clarify which state’s primary election date is relevant for determining
15 whether the communication falls within the 24-hour reporting window when an independent
16 expenditure is publicly distributed in multiple states but the communication does not refer to a
17 particular state’s primary.

18 Under Alternative A, a political committee making a multistate independent expenditure
19 would report it as a single expenditure, as discussed above, and would use the date of the
20 national nominating convention for the clearly identified candidate’s party as the date of the
21 election for purposes of determining whether the independent expenditure is within the 20 days
22 before the election and is therefore subject to the 24-hour reporting requirement under 52 U.S.C.
23 30104(g)(1). Under Alternative B, the political committee would use the date of the next
24 upcoming presidential primary among those to be held in the states in which the independent

1 expenditure is distributed or disseminated. Under Alternative C, the political committee would
2 allocate the amount of the expenditure among the states where it is distributed whose primary
3 elections have yet to occur, according to a ratio based on the number of U.S. House of
4 Representatives districts apportioned to each state. The political committee would use the date
5 of the next upcoming primary election among the states where the independent expenditure was
6 distributed to determine whether the independent expenditure was distributed within the 20 days
7 before the election, and the amount of the expenditure allocated to that state to determine
8 whether the political committee's aggregate spending in that state had exceeded the applicable
9 threshold for reporting.

10 Most of the commenters agreed that either Alternative A or Alternative B would be
11 preferable to the existing reporting method described in Advisory Opinion 2011-28 (Western
12 Representation PAC) or the proposal in Alternative C. The commenters were generally in
13 agreement that both Alternative A and Alternative B would provide greater transparency and
14 more accurate information to the public, and would reduce the burden on filers. Many of the
15 commenters expressed a preference for Alternative A due to its simplicity for filers, while one
16 commenter preferred Alternative B, contending that Alternative A would not satisfy the 24-hour
17 reporting requirement of the Act.

18 After considering the comments received and the applicable statutory requirements, the
19 Commission has decided to redesignate current paragraph (f) in section 104.4 as paragraph (f)(1)
20 and add new paragraph (f)(2) as proposed in Alternative B, concerning when a political
21 committee must file a 24- or 48-hour report for a multistate independent expenditure. As
22 described in the NPRM, a political committee that makes a multistate independent expenditure
23 must report it as a single expenditure, as discussed above, and the political committee must use

1 the date of the next upcoming presidential primary among the presidential primaries to be held in
2 the states in which the independent expenditure is distributed or disseminated as the date of the
3 election to determine whether the independent expenditure is within the 20 days before the
4 election and is therefore subject to the 24-hour reporting requirement under 52 U.S.C.
5 30104(g)(1).

6 The Commission agrees with those commenters who expressed the view that Alternative
7 C is complex and would not improve the information available to the public about the true costs
8 of multistate independent expenditures. The Commission is adopting the new paragraph (f)(2) as
9 proposed in Alternative B because it implements the requirement in 52 U.S.C. 30104(g)(1) that
10 independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24 hours,
11 before an election be reported within 24 hours, more accurately than Alternative A would do.
12 The major parties' nominating conventions are held after all of the presidential primary elections
13 have taken place, more than five months after the earliest state presidential primary elections and
14 typically more than 20 days after even the latest primary elections.⁷ Under Alternative A,
15 multistate independent expenditures distributed in proximity to most, if not all, state primary
16 elections would effectively not be subject to the 24-hour reporting requirement because they
17 would be distributed more than 20 days before the nominating conventions, and the public would
18 be deprived of timely information about expenditures intended to influence those primary
19 elections. Because the state presidential primary elections are typically held more than 20 days
20 before the national nominating conventions, Alternative A would, in practice, require 24-hour

⁷ For example, in 2016 the Republican national nominating convention was held July 18-21 and the Democratic national nominating convention was held July 25-28, while the earliest state primary election was Feb. 9 (New Hampshire) and the latest was June 14 (District of Columbia). The full calendar of 2016 state presidential primary elections can be found at <https://www.nytimes.com/interactive/2016/us/elections/primary-calendar-and-results.html?>.

1 reports only for multistate independent expenditures intended to influence the national
2 conventions or the general election, even though such independent expenditures would fall
3 outside the 20-day window before the general election. By contrast, under Alternative B, the 24-
4 hour reporting requirement would apply to independent expenditures with the ability to influence
5 multiple states’ presidential primary elections, such as those held on Super Tuesday,⁸ as well as
6 those distributed within the 20-day period before the national nominating conventions. See 52
7 U.S.C. 30101(1)(B) (defining an “election,” in part, to include “a convention or caucus of a
8 political party, which has authority to nominate a candidate”).

9 The Commission acknowledges that it might be less burdensome for reporting
10 committees to comply with Alternative A because that proposal relies on a single election date
11 rather than multiple dates, but the Commission may not opt for ease of compliance at the
12 expense of conforming to the statute. Therefore the Commission is adopting Alternative B,
13 because it best complies with the statutory reporting requirement while also serving the public’s
14 interest in timely disclosure.

15 **IV. Revised 11 CFR 109.10 – Reporting Multistate Independent Expenditures by**
16 **Persons Other Than Political Committees**

17 The Commission proposed to incorporate by reference into 11 CFR 109.10(e) — which
18 addresses the content of independent expenditure reports filed by persons other than political
19 committees — the new requirements for reporting multistate independent expenditures that the
20 Commission is adding to section 104.3(b)(3)(vii)(C). Two commenters addressed this proposal,
21 agreeing generally that the same 24- and 48-hour reporting framework proposed for multistate
22 independent expenditures should apply to political committees and other persons.

⁸ In 2016, Super Tuesday was March 1, when 11 states held presidential primary elections. See <https://www.nytimes.com/elections/2016/results/2016-03-01>.

1 Taking into account the comments received and the reasons explained above regarding
2 the adoption of new section 104.3(b)(3)(vii)(C), the Commission concludes that applying the
3 same 24- and 48-hour independent expenditure reporting requirements to persons other than
4 political committees would lessen the chance of confusion among both filers and the public, best
5 serving the public’s interest in timely disclosure. Accordingly, the Commission is incorporating
6 by reference into 11 CFR 109.10(e) — which addresses the content of independent expenditure
7 reports filed by persons other than political committees — the requirements for reporting
8 multistate independent expenditures that the Commission is adding to section
9 104.3(b)(3)(vii)(C). Specifically, revised section 109.10(e)(1)(iv) provides that when a person
10 other than a political committee makes an expenditure meeting the criteria set forth in section
11 104.3(b)(3)(vii)(C) (i.e., an independent expenditure that supports or opposes a presidential
12 primary candidate and that is distributed in six or more states but does not refer to any particular
13 state), the person must report the expenditure pursuant to the provisions of section
14 104.3(b)(3)(vii)(C).

15 **V. Revised 11 CFR 104.20 — Electioneering Communications**

16 In section 104.20(c), which concerns the content of reports regarding electioneering
17 communications, the Commission proposed to add a new paragraph (c)(6) and redesignate
18 current paragraphs (c)(6)-(9) as paragraphs (c)(7)-(10), if it adopted Alternative A or B described
19 above. The new paragraph (c)(6) would apply when the relevant election is a presidential
20 primary election and the electioneering communication is distributed in more than a specified
21 number of states but does not refer to any particular state’s primary election. This new
22 paragraph would parallel the new reporting requirements for multistate independent expenditures
23 discussed above, providing that the reporting person must report the electioneering

1 communication as a single communication and use a memo text to indicate the states in which
2 the communication constitutes an electioneering communication (as defined in 11 CFR
3 100.29(a)). Two commenters addressed this proposal, one supporting it and one calling for
4 modifications to clarify the threshold amount for reporting.

5 The Commission concludes that adopting reporting requirements for multistate
6 electioneering communications that parallel the reporting requirements for multistate
7 independent expenditures will lessen the chance of confusion among both filers and the public,
8 best serving the public’s interest in timely disclosure. Accordingly, the Commission is adding a
9 new paragraph (c)(6) in section 104.20, and redesignating current paragraphs (c)(6)-(9) as
10 paragraphs (c)(7)-(10). New paragraph (c)(6) applies when the relevant election, which the
11 reporting person must identify under paragraph (c)(5), is a presidential primary election and the
12 electioneering communication is distributed in six or more states but does not refer to any
13 particular state’s primary election. In such situations, this new paragraph parallels the new
14 reporting requirements for multistate independent expenditures in new section
15 104.3(b)(3)(vii)(C). New paragraph (c)(6) of section 104.20 provides that the reporting person
16 must report the electioneering communication as a single communication and use a memo text to
17 indicate the states in which the communication constitutes an electioneering communication (as
18 defined in 11 CFR 100.29(a)).

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

20 The Commission certifies that the attached rules will not have a significant economic
21 impact on a substantial number of small entities. The rules provide for consolidated reporting of
22 certain independent expenditures and electioneering communications that the Commission’s
23 current reporting guidance indicates should be allocated among elections in multiple states. The

DRAFT

1 Commission anticipates that the consolidation of these reports will generally result in a modest
2 reduction of the administrative burdens on reporting entities, and it will not impose any new
3 reporting obligations. Thus, to the extent that any entities affected by these proposed rules might
4 fall within the definition of “small businesses” or “small organizations,” the economic impact of
5 complying with these rules will not be significant.

DRAFT

1 **List of Subjects**

2 11 CFR Part 104

3 Campaign funds, Political committees and parties, Reporting and recordkeeping
4 requirements.

5 11 CFR Part 109

6 Elections, Reporting and recordkeeping requirements.

7

1 For the reasons set out in the preamble, Subchapter A of Chapter I of Title 11 of the Code of
2 Federal Regulations is amended as follows:

3 **Part 104 – Reports by political committees and other persons (52 U.S.C. 30104)**

4 1. The authority citation for part 104 continues to read as follows:

5 Authority: 52 U.S.C. 30101(1), 30101(8), 30101(9), 30102(i), 30104, 30111(a)(8) and (b),
6 30114, 30116, 36 U.S.C. 510.

7 2. In § 104.3:

8 a. Redesignate paragraphs (b)(2)(vi) and (b)(2)(vii) as (b)(2)(vii) and (b)(2)(viii).

9 b. Add paragraph (b)(2)(vi) and revise paragraphs (b)(3) and (b)(4) to read as
10 follows:

11 **§ 104.3 Contents of Reports (52 U.S.C. 30104(b), 30114)**

12 * * * * *

13 (b) * * *

14 (2) * * *

15 (vi) Independent expenditures made by the reporting committee;

16 * * * * *

17 (3) * * *

18 (vii) * * *

19 (C) For an independent expenditure that is made in support of or
20 opposition to a presidential primary candidate and is publicly
21 distributed or otherwise publicly disseminated in six or more states
22 but does not refer to any particular state, the political committee
23 must report the independent expenditure as a single expenditure —

1 i.e., without allocating it among states — and must indicate the
2 state with the next upcoming presidential primary among those
3 states where the independent expenditure is distributed, as
4 specified in section 104.4(f)(2). The political committee must use
5 memo text to indicate the states in which the communication is
6 distributed.

7 (D) The information required by 11 CFR 104.3(b)(3)(vii)(A)-(C) shall
8 be reported on Schedule E as part of a report covering the reporting
9 period in which the aggregate disbursements for any independent
10 expenditure to any person exceed \$200 per calendar year.
11 Schedule E shall also include the total of all such expenditures of
12 \$200 or less made during the reporting period.

13 (4) * * *

14 (iv) (A) Each person who receives any disbursement during the reporting
15 period in an aggregate amount or value in excess of \$200 within the
16 calendar year in connection with an independent expenditure by the
17 reporting committee, together with the date, amount, and purpose of
18 any such independent expenditure(s);

19 (B) For each independent expenditure reported, the committee must
20 also provide a statement which indicates whether such independent
21 expenditure is in support of, or in opposition to a particular
22 candidate, as well as the name of the candidate and office sought
23 by such candidate (including State and Congressional district,

1 when applicable), and a certification, under penalty of perjury, as
2 to whether such independent expenditure is made in cooperation,
3 consultation or concert with, or at the request or suggestion of, any
4 other candidate or any other authorized committee or agent of such
5 committee;

6 (C) For an independent expenditure that is made in support of or
7 opposition to a presidential primary candidate and is publicly
8 distributed or otherwise publicly disseminated in six or more states
9 but does not refer to any particular state, the political committee
10 must report the independent expenditure as a single expenditure —
11 i.e., without allocating it among states — and must indicate the
12 state with the next upcoming presidential primary among those
13 states where the independent expenditure is distributed, as
14 specified in section 104.4(f)(2). The political committee must use
15 memo text to indicate the states in which the communication is
16 distributed.

17 (D) The information required by 11 CFR 104.3(b)(4)(iv)(A)- (C) shall
18 be reported on Schedule E as part of a report covering the reporting
19 period in which the aggregate disbursements for any independent
20 expenditure to any person exceed \$200 per calendar year.
21 Schedule E shall also include the total of all such expenditures of
22 \$200 or less made during the reporting period.

23 * * * * *

1 3. In § 104.4:

2 a. In paragraphs (a), (b), (c), and (d), add “and 104.3(b)(4)(vi)” after “11 CFR
3 104.3(b)(3)(iv)”;

4 b. In paragraph (b) remove “FEC Form 3X” and add, in its place, the words “the
5 applicable FEC Form”;

6 b. Revise paragraph (f) as to read as follows:

7 **§ 104.4 Independent expenditures by political committees (52 U.S.C. 30104(b), (d), and (g))**

8 * * * * *

9 (f) Aggregating independent expenditures for reporting purposes

10 (1) For purposes of determining whether 24-hour and 48-hour reports must be
11 filed in accordance with paragraphs (b) and (c) of this section and 11 CFR
12 109.10(c) and (d), aggregations of independent expenditures must be
13 calculated as of the first date on which a communication that constitutes
14 an independent expenditure is publicly distributed or otherwise publicly
15 disseminated, and as of the date that any such communication with respect
16 to the same election is subsequently publicly distributed or otherwise
17 publicly disseminated. Every person must include in the aggregate total
18 all disbursements during the calendar year for independent expenditures,
19 and all enforceable contracts, either oral or written, obligating funds for
20 disbursements during the calendar year for independent expenditures,
21 where those independent expenditures are made with respect to the same
22 election for Federal office.

(2) For purposes of determining whether 24-hour or 48-hour reports must be filed in accordance with paragraphs (b) and (c) of this section and 11 CFR 109.10(c) and (d), if the independent expenditure is made in support of or opposition to a candidate in a presidential primary election and is publicly distributed or otherwise publicly disseminated in six or more states but does not refer to any particular state, the date of the election is the date of the next upcoming presidential primary election among the presidential primary elections to be held in the states in which the independent expenditure is publicly distributed or disseminated.

4. In § 104.20:

- a. Redesignate paragraphs (c)(6)-(c)(9) as paragraphs (c)(7)-(c)(10).
- b. Revise the heading and add paragraph (c)(6) to read as follows:

§ 104.20 Reporting electioneering communications (52 U.S.C. 30104(f)).

* * * * *

(c) * * *

(6) If the election identified pursuant to paragraph (c)(5) is a presidential primary election and the electioneering communication is publicly distributed or otherwise disseminated in six or more states but does not refer to any particular state, the electioneering communication shall be reported as a single communication, indicating the state with the next upcoming presidential primary among those states where the electioneering communication is distributed, , and the states in which it constitutes an electioneering communication (as defined in 11 CFR 100.29(a)) shall be indicated in memo text.

1 **Part 109 – Coordinated and Independent Expenditures (52 U.S.C. 30101(17), 30116(a) and**
2 **(d), and Pub. L. 107-155 Sec. 214(c))**

3 5. The authority citation for part 109 continues to read as follows:

4 Authority: 52 U.S.C. 30101(17), 30104(c), 30111(a)(8), 30116, 30120; Sec. 214(c), Pub. L. 107-
5 155, 116 Stat. 81.

6 6. Revise paragraph (e)(1)(iv) of § 109.10 as follows:

7 **§ 109.10 How do political committees and other persons report independent expenditures?**

8 * * * * *

9 (e) Content of verified reports and statements and verification of reports and
10 statements.

11 (1) * * *

12 (iv) A statement that indicates whether such expenditure was in support of, or
13 in opposition to a candidate, together with the candidate’s name and office sought; if the
14 expenditure meets the criteria set forth in section 104.3(b)(3)(vii)(C), memo text must be used to
15 indicate the states in which the communication is distributed, as prescribed in that section;

16 * * * * *

17

18 On behalf of the Commission,

19

20

21

22

23

24

25

26

27

Caroline C. Hunter,
Chair,
Federal Election Commission.

DATED: _____
BILLING CODE 6715-01-P