

AGENDA DOCUMENT NO. 11-52



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2011 AUG 31 P 5: 52

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Cynthia L. Bauerly *CB*
Chair

Caroline C. Hunter *CCH*
Vice Chair

DATE: August 31, 2011

RE: Draft Interpretive Rule on When Certain Independent Expenditures are
"Publicly Disseminated" for Reporting Purposes

For Meeting of 9-1-11

SUBMITTED LATE

The Commission intends to consider the topic of when certain independent expenditures are "publicly disseminated" for reporting purposes at its open meeting on September 22, 2011.

The attached draft of an interpretive rule on this topic has been prepared and is being made public in advance of the Commission's open meeting on September 1, 2011, in order to invite and facilitate public comment. Any comments on the draft must be received by September 19, 2011 and should be addressed to the Commission Secretary, 999 E Street NW., Washington, DC 20463, via: 202-208-3333 (fax) or secretary@fec.gov.

Attachment

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FEDERAL ELECTION COMMISSION

[Notice 2011 - __]

Interpretive Rule on When Certain Independent Expenditures are “Publicly Disseminated” for Reporting Purposes

AGENCY: Federal Election Commission.

ACTION: Notice of interpretive rule.

SUMMARY: The Federal Election Commission is issuing guidance on when independent expenditure communications that take the form of yard signs, mini-billboards, handbills, t-shirts, hats, buttons, and similar items are “publicly disseminated” for purposes of certain reporting requirements in Commission regulations.

DATES: [Insert date of publication in Federal Register]

FOR FURTHER INFORMATION

CONTACT: Ms. Amy Rothstein, Assistant General Counsel, Ms. Cheryl A. F. Hensley or Mr. Theodore M. Lutz, Attorneys, 999 E Street NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

An independent expenditure is “an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not 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.” 11 CFR 100.16; *see also* 2 U.S.C. 431(17). Political committees and other persons making independent expenditures (“Filers”) must file

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1 reports disclosing their independent expenditures at certain regular intervals. *See*
2 2 U.S.C. 434(a)(4) and (c); 11 CFR 104.4 and 109.10(b). In addition, Filers must report
3 all independent expenditures that aggregate more than certain dollar amounts during
4 certain reporting periods within either 24 hours or 48 hours of the date on which the
5 person makes or contracts to make independent expenditures. 2 U.S.C. 434(g). The
6 Commission's regulation requires that Filers "ensure that the Commission receives these
7 reports by [either 24 hours or 48 hours] following the date on which a communication
8 that constitutes an independent expenditure is publicly distributed or otherwise publicly
9 disseminated." 11 CFR 104.4(b)(2); see also 11 CFR 104.4(c), and (f), and 109.10(c) and
10 (d).

11 The actual public dissemination date of independent expenditure communications
12 that take the form of items such as yard signs, mini-billboards, handbills, t-shirts, hats,
13 and buttons may be difficult to ascertain, however, particularly where the items are
14 disseminated in stages or where the Filer is an organization that purchases the items from
15 a vendor, and then retains the items for a period of time before distributing them to
16 affiliate or member organizations or to individuals, such as the organization's employees,
17 members or customers, to wear or display in public. For this reason, the Commission is
18 issuing this notice to clarify that a range of acceptable dates may be used as the public
19 dissemination date¹ for these forms of independent expenditure communications for both
20 individual and organizational Filers.

¹ This notice focuses on the date on which independent expenditures are "publicly disseminated," rather than the date on which they are "publicly distributed." Generally, independent expenditures that are made public by broadcast, cable or satellite are "publicly distributed." *See* 11 CFR 100.29(b)(2); *see also* Explanation and Justification for Final Rules on Bipartisan Campaign Reform Act of 2002 Reporting, 68 FR 404, 407 (Jan. 3, 2003). In contrast, all other forms of independent expenditure communications, such as those made public in newspapers, magazines, or via handbills are considered to be "publicly

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1 For purposes of the reporting requirements in 11 CFR 104.4(b)(2), (c), and (f),
2 and 109.10(c) and (d), the Commission hereby clarifies that the Filer may report
3 independent expenditure communications that take the form of items such as yard signs,
4 mini-billboards, handbills, t-shirts, hats, buttons, as “publicly disseminated” on any
5 reasonable date starting with the date the Filer receives or exercises control over the items
6 in the usual and normal course of dissemination, up to and including the date that the
7 communications are actually disseminated to the public. Reasonable dates that may be
8 treated as the date of public dissemination include, but are not limited to (1) the date that
9 a Filer receives delivery of the communication, (2) the date that a Filer distributes the
10 communication to its members or employees for later public dissemination, (3) the date
11 that a Filer distributes the communications to its affiliate or member organizations for
12 later public dissemination, (4) the date as of which the Filer authorizes its members or
13 employees to display the communication, or (5) the date of actual public dissemination, if
14 that date is known to the Filer.² In no event, however, may a Filer choose a date that is
15 later than the actual date of dissemination. Similarly, in no event may a Filer choose a
16 date that is subsequent to the date of the election to which the independent expenditure
17 communication pertains.

18 The Commission believes that this interpretation of its regulations provides Filers
19 with an administratively workable method for determining the date of dissemination for
20 these types of independent expenditure communications, consistent with the

disseminated.” See Explanation and Justification for Final Rules on Bipartisan Campaign Reform Act of 2002 Reporting, 68 FR 404, 407 (Jan. 3, 2003).

² The Commission notes that, for any given independent expenditure communication, Filers should list the same date of dissemination on their regularly scheduled FEC reports as the date they listed on their 24- and 48-Hour Independent Expenditure reports.

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1 “[c]ongressional intent to emphasize and ensure timely disclosure” of independent
2 expenditures. Explanation and Justification for Final Rules on Independent Expenditure
3 Reporting, 67 FR 12834, 12837 (Mar. 20, 2002).

4 This notice is an interpretive rule announcing the general course of action that the
5 Commission intends to follow. This interpretive rule does not constitute an agency action
6 requiring notice of proposed rulemaking, opportunities for public participation, prior
7 publication, or delay in effective date under 5 U.S.C. 553 of the Administrative
8 Procedures Act. It does not bind the Commission or any members of the general public,
9 nor does it create or remove any rights, duties, or obligations. The provisions of the
10 Regulatory Flexibility Act, which apply when notice and comment are required by the
11 Administrative Procedures Act or another statute, do not apply. *See* 5 U.S.C. 603(a).

12
13 On behalf of the Commission,

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15 _____
16 Cynthia L. Bauerly
17 Chair
18 Federal Election Commission
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20 DATED: _____