MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas
      General Counsel
      Adav Noti
      Acting Associate General Counsel
      Robert M. Knop
      Assistant General Counsel
      Joanna Waldstreicher
      Attorney

SUBJECT: Draft Interpretive Rule on Reporting Nationwide Independent Expenditures in Presidential Primary Elections

Attached is a draft interpretive rule on reporting nationwide independent expenditures in presidential primary elections. We request that this draft be placed on the agenda for October 1, 2015.

Attachment
FEDERAL ELECTION COMMISSION

[Notice 2015-XX]

Reporting Nationwide Independent Expenditures in Presidential Primary Elections

AGENCY: Federal Election Commission.

ACTION: Notice of interpretive rule.

SUMMARY: The Federal Election Commission is clarifying its interpretation of how its regulations concerning political committees' reporting of independent expenditures for presidential primary elections apply to independent expenditures that are distributed nationwide and do not reference or target a specific State's primary election.

DATES: [Insert date of publication in FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Robert M. Knop, Assistant General Counsel, or Joanna S. Waldstreicher, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: Under the Federal Election Campaign Act (the "Act") and Commission regulations, political committees must file reports disclosing independent expenditures. The Commission is issuing this Notice to clarify its interpretation of these requirements as they apply to the reporting of independent expenditures that are made in connection with presidential primary elections but that do not reference or target a specific State's primary election.

An "independent expenditure" is an expenditure that expressly advocates the election or defeat of a clearly identified federal candidate and is not coordinated with a candidate or political party. 52 U.S.C. 30101(17); 11 CFR 100.16(a). Under the Act and Commission regulations, a political committee that makes independent expenditures must
disclose those expenditures on its regular periodic reports, stating, among other things,
the name of the candidate whom the expenditure supports or opposes and the office

Also, although not required under the Act, Commission regulations require that political
committees reporting independent expenditures also include the “State and Congressional
District, when applicable” on their reports filed. 11 CFR 104.3(b)(3)(vii)(B).

in addition, a political committee that makes independent expenditures
aggregating to at least $10,000 during the calendar year up to the 20th day before a given
election must file a report describing the expenditures within 48 hours. 52 U.S.C.
30104(g)(2)(A); 11 CFR 104.4(b)(2). Additional reports must be filed within 48 hours
each time the political committee makes further independent expenditures aggregating to
$10,000 or more with respect to the same election as that to which the initial report
relates. 52 U.S.C. 30104(g)(2)(B); 11 CFR 104.4(b)(2).

Similarly, a political committee that makes independent expenditures aggregating
to $1,000 or more less than 20 days, but more than 24 hours, before the date of a given
election must file a report describing the expenditures within 24 hours. 52 U.S.C.
30104(g)(1)(A); 11 CFR 104.4(c). Additional reports must be filed within 24 hours each
time the political committee makes further independent expenditures aggregating $1,000
or more with respect to the same election as that to which the initial report relates.
52 U.S.C. 30104(g)(1)(B); 11 CFR 104.4(c).

The 48- and 24-hour filing requirements begin to run when the independent
expenditures aggregating more than $10,000 or $1,000, respectively, are “publicly
distributed or otherwise publicly disseminated.” 11 CFR 104.4(b)(2), (c), (f). For
purposes of calculating these expenditures and determining when a communication is
“publicly distributed,” each State’s presidential primary election is considered a separate
election. See Advisory Opinion 2003-40 (Navy Veterans) at 3-4 (noting that “publicly
distributed” in section 104.4 has same meaning as term in 11 CFR 100.29(b)(3)(ii)(A),
under which each State’s presidential primary election is a separate election) (citing
Bipartisan Campaign Reform Act of 2002 Reporting, 68 FR 404, 407 (Jan. 3, 2003);
Electioneering Communications, 67 FR 65190, 65194 (Oct. 23, 2002)).

The Commission has previously provided guidance regarding how political
committees should report transactions that relate to presidential primary candidates but
do not target any specific State’s primary. In Advisory Opinion 1995-44 (Forbes for
President), the Commission addressed the requirement that candidate committees report
within 48 hours any contributions of more than $1,000 received less than 20 days (but
more than 48 hours) before an election. See 52 U.S.C. 30104(a)(6)(A); 11 CFR 104.5(f).
The Commission observed that because “the presidential primary season is made up of a
series of separate primary elections,” requiring presidential primary candidates to comply
with the 48-hour contribution notification requirement would require such candidates “to
submit 48 hour notifications on an almost continual basis.” Advisory Opinion 1995-44
(Forbes for President) at 2. The Commission also noted that imposing such a
requirement would force the candidate “to attribute the contributions it receives to a
particular primary election, a task that can be difficult or arbitrary given the national
nature of most presidential primary campaigns.” Id. To avoid mandating this
unnecessarily complex and arbitrary reporting regime, the Commission concluded that a
presidential campaign committee could comply with its disclosure obligations by reporting its received contributions on its regular monthly reports. Id.

In the context of nationwide independent expenditures that support or oppose presidential primary candidates but do not refer to particular States’ primaries, reporting the State on independent expenditure reports raises precisely the same concerns as did 48-hour reporting of contributions in Advisory Opinion 1995-44 (Forbes for President).

Requiring committees to attribute the expenditure equally to each State in which it runs is arbitrary and impracticable. Rather, attributing a portion of each nationwide independent expenditure to various States for purposes of the reporting thresholds is precisely the sort of bookkeeping requirement that the Commission rejected in Advisory Opinion 1995-44 (Forbes for President).

In addition, the purpose of the Act’s independent expenditure disclosure provisions is to ensure that the public receives accurate information regarding the financing of express advocacy about candidates. Requiring political committees to divide a single expenditure into confusing and overlapping entries on multiple reports would not further that purpose. To the contrary, such reporting would misrepresent the nature of the expenditure being reported: A single nationwide advertising campaign would appear in the Commission’s records as a series of much smaller and more targeted expenditures, thereby potentially misleading the public as to the true nature of the reported spending.

To avoid these concerns, and to further the Act’s purpose of fostering accurate disclosure, the Commission concludes that the requirement that political committees report the State does not apply to nationwide independent expenditures that relate to presidential primary candidates but do not refer to any specific State’s primary. Rather, a
political committee should use the date of the first day of the candidate’s nominating
convention as the date of the primary election for the purpose of determining the
applicable thresholds for filing 24 and 48 hour reports. The committee should leave
blank the section where the State would be indicated, and include a memorandum entry
indicating that the expenditure was disseminated “nationally” or “nationwide.” A
political committee should also disclose these independent expenditures on its regularly
scheduled reports. When reporting such an expenditure, rather than allocating it among
various States, the committee should report the expenditure as a single entry, and as with
the 24 and 48 hour reports, leave blank the section where the State would be indicated,
and include a memorandum entry indicating that the expenditure was disseminated
“nationally” or “nationwide.” This reporting will ensure that the independent
expenditures are fully and accurately disclosed to the public, as the Act requires.
This interpretive rule clarifies the Commission’s interpretation of existing
statutory and regulatory provisions, and therefore does not constitute an agency action
subject to the notice and comment requirements or a delayed effective date under the
Flexibility Act, which apply when notice and comment are required by the
Administrative Procedure Act or another statute, do not apply. See 5 U.S.C. 603(a).
Commission is not required to submit this interpretive rule for congressional review. See 52 U.S.C. 30111(d)(1), (4).

On behalf of the Commission,

Ann M. Ravel,
Chair,
Federal Election Commission

DATED: 
BILLING CODE: 6715-01-P