

Independent Expenditures

Federal Election Commission

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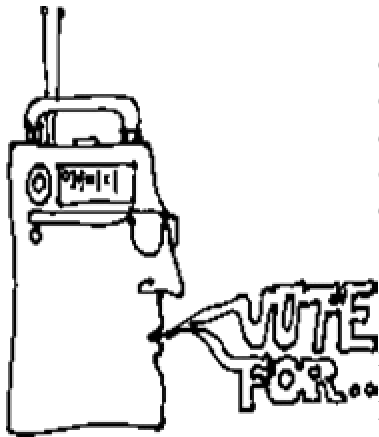
Introduction

Individuals, groups of individuals and political committees may support candidates for federal office by making independent expenditures on their behalf. Independent expenditures may be made without limit since they do not count against the contribution limits established by the Federal Election Campaign Act (the Act). (However, contributions made to an independent expenditure committee are subject to the Act's monetary limits, as explained below.) This brochure defines the term "independent expenditure" and explains reporting and other requirements involved in making independent expenditures. Citations refer to Federal Election Commission (FEC) regulations and to the Act.¹ If you have any questions after reading this brochure, please call the Commission in Washington, DC at 202/694-1100 or toll free at 800/424-9530.² More information is also available at www.fec.gov.

Note that candidates and their committees may distribute this brochure to anyone **who requests** Commission guidelines on independent expenditures.

What are Independent Expenditures

An independent expenditure is an expenditure for communications "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 or its agents." 11 CFR 100.16(a). See also 11 CFR 100.22 (defining "expressly advocating").



A "clearly identified candidate" is one whose name, nickname, photograph or drawing appears, or whose identity is apparent through unambiguous reference, such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia." 11 CFR 100.17.

¹ Commission regulations are contained in Title 11 of the Code of Federal Regulations (11 CFR); the Act is contained in Title 2 of the United States Code (2 U.S.C.).

² The reader should not rely solely on this brochure but also consult the Act and Commission regulations.

To be an “agent” of a candidate, candidate’s committee or political party committee for the purposes of determining whether a communication is coordinated, a person would have to:

- Receive actual authorization, either express or implied, from a specific principal to engage in specific activities;
- Engage in those activities on behalf of that specific principal; and
- Those activities would result in a coordinated communication if carried out directly by the candidate, authorized committee staff, or a political party official.

11 CFR 109.3(a) and (b)

What is Not an Independent Expenditure

Candidate-Prepared Material

With certain exceptions, any expenditure to distribute or republish campaign material (print or broadcast) produced or prepared by a candidate's campaign is an in-kind contribution to that candidate, and not an independent expenditure. 11 CFR 109.23.

Payments for “Coordinated Communications”

Three-Part Coordination Test

FEC regulations establish a three-part test to determine whether a communication is coordinated. The Commission may determine that a communication is coordinated even where there is no agreement or formal collaboration between the person paying for the communication, and the candidate, campaign committee, party committee, or agents. 11 CFR 109.21(e). All three parts of the test must be met for a communication to be deemed coordinated, and thus not an independent expenditure:

- The communication is paid for by someone other than a candidate, his authorized committee, a political party committee, or agent of the above;
- The communication meets one of the “content standards” regarding the subject matter of the communication; and
- The communication meets one of the “conduct standards” regarding the interactions between the person paying for the communication and the candidate, authorized committee, or political party committee, or agents of the above.

11 CFR 109.21(a).

The Content Standard

A communication will satisfy this part of the test if it meets any one of these four standards regarding its content:

1. The communication is an “**Electioneering Communication**”³;

³ For the definition of electioneering communication, please see 11 CFR 100.29.

2. The communication is a **public communication**⁴ that republishes, disseminates or distributes **campaign materials** prepared by a candidate or a candidate's campaign committee;
3. The communication is a public communication that contains **express advocacy**;
- or
4. The communication is a **public communication** that:
 - Refers to a political party or a *clearly identified candidate*;
 - Is publicly distributed or disseminated *120 days or fewer* before an election; and
 - Is *directed to voters* in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction where one or more candidates of the political party appear on the ballot. 11 CFR 109.21(c).

Conduct Standard

A communication will satisfy this part of the test if it meets any one of these five standards regarding the conduct of the person paying for the communication and the candidate, his committee, a political party committee, or agents of the above:

1. If the communication is created at the **request or suggestion** of the candidate, candidate's committee, a party committee or agents of the above; or the communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, political party committee, or agent of any of the foregoing, assents to the suggestion. 11 CFR 109.21(d)(1).
2. If the candidate, his authorized committee or party committee is **materially involved** in decisions regarding the content, intended audience, means or mode of the communication, specific media outlet used, the timing or frequency, or size or prominence of a printed communication or duration of a communication by means of broadcast, cable or satellite. 11 CFR 109.21(d)(2).
3. If the communication is created, produced or distributed after one or more **substantial discussions**⁵ about the communication between the person and the candidate, his committee, his opponent or opponent's committee, a political party committee, or agents of the above. 11 CFR 109.21(d)(3).

⁴ A public communication is "a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term public communication shall not include communications over the Internet." 11 CFR 100.26.

⁵ A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication. 11 CFR 109.21(d)(3)

4. If the person paying for the communication **employs a common vendor** to create, produce or distribute the communication, and that vendor:
 - Has a previous or current relationship with the candidate or political party committee that puts the vendor in a position to acquire information about the campaign plans, projects, activities or needs of the candidate or political party committee;
 - The services were rendered during the current election cycle; and
 - The vendor uses or conveys information about the plans or needs of the candidate or political party, or information previously used by the vendor in serving the candidate or party, and that information is material to the creation, production or distribution of the communication.11 CFR 109.21(d)(4).
5. A person who has previously been an **employee or independent contractor** of a candidate's campaign committee or a political party committee during the current election cycle satisfies the conduct standard if he uses or conveys information about the plans or needs of the candidate or political party committee, or information used by the former employee in serving the candidate/party, to the person paying for the communication, and the information is material to the creation, production or distribution of the communication. 11 CFR 109.21(d)(5).

Safe Harbor

A candidate's or political party committee's response to an inquiry about that candidate's or party's positions on legislative or policy issues, which does not include discussion of campaign plans, projects, activities or needs, will not satisfy any of the conduct standards. 11 CFR 109.21(f).

Who May Make Independent Expenditures

Generally, individuals, groups and committees permitted to make contributions in connection with federal elections may make independent expenditures. Those persons prohibited from making contributions or expenditures in connection with federal elections (for example, incorporated entities, labor organizations and individuals or businesses under contract to the federal government) are similarly prohibited from making independent expenditures. However, there is one exception to this rule.

Certain Nonprofit Corporations Permissible

The Supreme Court carved out a limited exception to the general prohibition on corporate expenditures in *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986). The Court said that MCFL, a nonprofit corporation, could make independent expenditures because it had three essential features:

- It "was formed for the express purpose of promoting political ideas" and did not "engage in business activities."

- It had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings."
- It "was not established by a business corporation or a labor union" and did not "accept contributions from such entities."
- The Court also noted MCFL's small size and lack of formal organization. The Commission's regulations codifying the MCFL decision can be found at 11 CFR 114.10.

Disclaimer Notice Required

Any independent expenditure for a public communication⁶ must include a clear and conspicuous notice in the printed material or during the broadcast. The notice must:

- State that the communication is not authorized by any candidate or his committee; and
- Identify the name and street address, telephone number or World Wide Web address of the person who financed the communication. 11 CFR 109.11, 110.11(a)(2) and (b)(3).

A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if its placement is easily overlooked. 11 CFR 110.11(c)(1).

Here is an example of a disclaimer notice for a printed independent expenditure paid for by XYZ PAC:

"Paid for by the XYZ PAC and not authorized by any candidate or candidate's committee. Contact us at: XYZ PAC, 203 First Street SE, Washington, DC 20001."

For more information on disclaimers, consult the brochure "Special Notices on Communications and Solicitations."

Reporting Requirements

Political Committee

A federally-registered political committee must itemize on Schedule E independent expenditure disbursements to a person with respect to a given election that aggregate more than \$200 in a calendar year. 11 CFR 104.3(b)(3)(vii)(A); 104.4(a) and (b). The total of unitemized independent expenditures is also reported on Schedule E. 11 CFR 104.3(b)(3)(vii)(C).

For when an independent expenditure is considered "made," please see the section "Aggregation of Disbursements," below.

Please note that independent expenditures made by a political committee in connection with a primary election may trigger Pre-Primary reporting obligations.

⁶ The term "public communication," as it is used with respect to disclaimer notices in 11 CFR 100.11(a), includes unsolicited electronic mail of more than 500 substantially similar pieces and Internet websites of political committees in addition to the other types of communications listed in 11 CFR 100.26.

Likewise, if a political committee makes an independent expenditure in connection with the general election, it could also trigger Pre-General reporting obligations. Please see the FEC Web site at http://www.fec.gov/info/report_dates.shtml for details. 11 CFR 104.5(c)(1)(ii).

Any Other Person

Any other person (individual, partnership, qualified nonprofit corporation or group of individuals) must file a report with the FEC on FEC Form 5 at the end of the first reporting period in which independent expenditures with respect to a given election aggregate more than \$250 in a calendar year and in any succeeding period during the same year in which additional independent expenditures of any amount are made. 11 CFR 109.10(b).

Note: Regularly-scheduled reports, but not 48-hour or 24-hour reports, of independent expenditures pertaining only to U.S. Senate candidates are filed with the Secretary of the Senate. 11 CFR 104.4(e)(2)(i); 109.10(b).

48-Hour Reports

Once an individual's or committee's aggregate independent expenditures during a calendar year reach or exceed \$10,000 with respect to a given election at any time up to and including the 20th day before an election, a 48-hour independent expenditure report must be filed with and received by the Commission by the end of the second day after the independent expenditure communication is publicly distributed or otherwise publicly disseminated. These reports must include all independent expenditures with respect to that election that have not been previously disclosed. Additional 48-hour reports are required for subsequent independent expenditures related to the same election that aggregate \$10,000 or more through 20 days before the election. 11 CFR 104.4(b)(2) and (f); 109.10(c).

A political committee must disclose an independent expenditure reported on a 48-hour report a second time: on a Schedule E filed with its next regularly-scheduled report. The committee may note on the Schedule E that the expenditure was previously reported.

Last-Minute Independent Expenditures

Once an individual's or political committee's aggregate independent expenditures reach or exceed \$1,000 with respect to a given election, and are made fewer than 20 days, but more than 24 hours, the independent expenditure before an election must be reported to and received by the FEC within 24 hours of the time the communication is publicly distributed or otherwise publicly disseminated. These reports must include all independent expenditures with respect to that election that have not been previously disclosed. 11 CFR 104.4(c) and (f); 109.10(d).

A political committee must disclose a last-minute independent expenditure a second time on a Schedule E filed with its next regularly-scheduled report. The committee may note on the Schedule E that the expenditure was previously reported.

Aggregation of Disbursements for Independent Expenditure Reporting

Every date on which a communication that constitutes an independent expenditure is publicly distributed or publicly disseminated serves as the date to determine whether the total amount of independent expenditures has reached or exceeded the threshold reporting amounts. This aggregation is calculated on a calendar year, per election, per office sought basis.

Each person must include in the calculation of the aggregate amount of independent expenditures both disbursements for independent expenditures and all contracts obligating funds for disbursements for independent expenditures. 11 CFR 104.4(f).

Example 1

If a political committee makes \$5,000 in independent expenditures in the form of advertisements with respect to a Senate candidate, and \$5,000 in independent expenditures in the form of advertisements with respect to a House candidate, and both of these ads are publicly distributed prior to the 20th day before the primary election, that political committee is not required to file 48-hour reports, but must disclose the independent expenditures on its regularly-scheduled reports.

Example 2

If, however, the political committee made \$6,000 in independent expenditures supporting a Senate candidate in the primary election, and \$4,000 in independent expenditures opposing that Senate candidate's opponent in the primary, and these communications are published in a newspaper more than 19 days before the primary, the political committee must file a 48-hour report. The committee would also need to disclose these independent expenditures on its next regularly-scheduled report.

Example 3

If the committee in example 2 made a further independent expenditure of \$1,700 supporting the same Senate candidate 17 days before the primary, the committee would need to file a 24-hour report. It would also need to disclose this independent expenditure again on its next regularly-scheduled report.

Contents of Reports

Identification

Political committees report independent expenditures on Schedule E of Form 3X. Individuals use FEC Form 5. Reports of independent expenditures must contain the following information:

- In the case of a person other than a political committee, the person's (or committee's) name, mailing address, occupation, and the name of his or her employer, if any;
- The identification (name and mailing address) of the person to whom the expenditure was made;⁷

⁷ In the case of a political committee, such identification is only made for persons who have received disbursements for independent expenditures from the political committee aggregating over \$200 during the calendar year with respect to a given election. 11 CFR 104.3(b)(3)(vii)(A).

- The amount, date, and purpose of each expenditure;
- A statement that indicates whether such expenditure was in support of, or in opposition to, a candidate, together with the candidate's name and office sought; and
- In the case of a person other than a political committee, the identification of each person who made a contribution in excess of \$200 to the person filing such report for the purpose of furthering the reported independent expenditure.⁸
11 CFR 104.3(b)(3)(vii) and 109.10(e)

Certification of Independence. All reports of independent expenditures must also contain a certification and verification under penalty of perjury that the expenditure was not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's committee, a political party committee or an agent of any of these.

11 CFR 104.3(b)(3)(vii)(B); 104.4(d)(1) and (2); 109.10(e)(1)(v) and (e)(2). A qualified nonprofit corporation must also certify that it meets the criteria for qualified nonprofit corporation status. 11 CFR 114.10(e).



Contributions to Persons Making Independent Expenditures

Contributions made to persons making independent expenditures are subject to all the limitations and prohibitions of the Act. In addition, when a person contributes to a political committee that makes independent expenditures exclusively in support of, or in opposition to, a single federal candidate, the contribution is subject to the per candidate, per election limit. For example, Citizen Jones contributes \$1,000 to an independent committee established to make independent expenditures exclusively on behalf of Candidate Smith. Jones may then only contribute \$1,000 more to Smith's campaign, since Jones' contributions benefiting Smith would then reach the \$2,000 per candidate, per election, limit. 11 CFR 110.1(h).

⁸ Political committees already disclose their contributors.