

AGENDA DOCUMENT NO. 15-50-B



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Daniel A. Petalas *DAP*
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Adav Noti *AN*
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Assistant General Counsel

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

For Meeting of 10-1-15

SUBMITTED LATE

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

DRAFT

1 **FEDERAL ELECTION COMMISSION**

2 **[Notice 2015-XX]**

3 **Reporting Nationwide Independent Expenditures in Presidential Primary Elections**

4 **AGENCY:** Federal Election Commission.

5 **ACTION:** Notice of interpretive rule.

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

10 **DATES:** [Insert date of publication in FEDERAL REGISTER]

11 **FOR FURTHER INFORMATION CONTACT:** Robert M. Knop, Assistant General
12 Counsel, or Joanna S. Waldstreicher, Attorney, 999 E Street NW., Washington, DC
13 20463, (202) 694-1650 or (800) 424-9530.

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

20 An "independent expenditure" is an expenditure that expressly advocates the
21 election or defeat of a clearly identified federal candidate and is not coordinated with a
22 candidate or political party. 52 U.S.C. 30101(17); 11 CFR 100.16(a). Under the Act and
23 Commission regulations, a political committee that makes independent expenditures must

1 disclose those expenditures on its regular periodic reports, stating, among other things,
2 the name of the candidate whom the expenditure supports or opposes and the office
3 sought by that candidate. 52 U.S.C. 30104(b)(4)(H)(iii), (6)(B)(iii); 11 CFR 104.4(a).
4 Also, although not required under the Act, Commission regulations require that political
5 committees reporting independent expenditures also include the “State and Congressional
6 District, when applicable” on their reports filed. 11 CFR 104.3(b)(3)(vii)(B).

7 In addition, a political committee that makes independent expenditures
8 aggregating to at least \$10,000 during the calendar year up to the 20th day before a given
9 election must file a report describing the expenditures within 48 hours. 52 U.S.C.
10 30104(g)(2)(A); 11 CFR 104.4(b)(2). Additional reports must be filed within 48 hours
11 each time the political committee makes further independent expenditures aggregating to
12 \$10,000 or more with respect to the same election as that to which the initial report
13 relates. 52 U.S.C. 30104(g)(2)(B); 11 CFR 104.4(b)(2).

14 Similarly, a political committee that makes independent expenditures aggregating
15 to \$1,000 or more less than 20 days, but more than 24 hours, before the date of a given
16 election must file a report describing the expenditures within 24 hours. 52 U.S.C.
17 30104(g)(1)(A); 11 CFR 104.4(c). Additional reports must be filed within 24 hours each
18 time the political committee makes further independent expenditures aggregating \$1,000
19 or more with respect to the same election as that to which the initial report relates.
20 52 U.S.C. 30104(g)(1)(B); 11 CFR 104.4(c).

21 The 48- and 24-hour filing requirements begin to run when the independent
22 expenditures aggregating more than \$10,000 or \$1,000, respectively, are “publicly
23 distributed or otherwise publicly disseminated.” 11 CFR 104.4(b)(2), (c), (f). For

1 purposes of calculating these expenditures and determining when a communication is
2 “publicly distributed,” each State’s presidential primary election is considered a separate
3 election. See Advisory Opinion 2003-40 (Navy Veterans) at 3-4 (noting that “publicly
4 distributed” in section 104.4 has same meaning as term in 11 CFR 100.29(b)(3)(ii)(A),
5 under which each State’s presidential primary election is a separate election) (citing
6 Bipartisan Campaign Reform Act of 2002 Reporting, 68 FR 404, 407 (Jan. 3, 2003);
7 Electioneering Communications, 67 FR 65190, 65194 (Oct. 23, 2002)).

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

1 presidential campaign committee could comply with its disclosure obligations by
2 reporting its received contributions on its regular monthly reports. Id.

3 In the context of nationwide independent expenditures that support or oppose
4 presidential primary candidates but do not refer to particular States' primaries, reporting
5 the State on independent expenditure reports raises precisely the same concerns as did
6 48-hour reporting of contributions in Advisory Opinion 1995-44 (Forbes for President).
7 Requiring committees to attribute the expenditure equally to each State in which it runs is
8 arbitrary and impracticable. Rather, attributing a portion of each nationwide independent
9 expenditure to various States for purposes of the reporting thresholds is precisely the sort
10 of bookkeeping requirement that the Commission rejected in Advisory Opinion 1995-44
11 (Forbes for President).

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

20 To avoid these concerns, and to further the Act's purpose of fostering accurate
21 disclosure, the Commission concludes that the requirement that political committees
22 report the State does not apply to nationwide independent expenditures that relate to
23 presidential primary candidates but do not refer to any specific State's primary. Rather, a

1 political committee should use the date of the first day of the candidate's nominating
2 convention as the date of the primary election for the purpose of determining the
3 applicable thresholds for filing 24 and 48 hour reports. The committee should leave
4 blank the section where the State would be indicated, and include a memorandum entry
5 indicating that the expenditure was disseminated "nationally" or "nationwide." A
6 political committee should also disclose these independent expenditures on its regularly
7 scheduled reports. When reporting such an expenditure, rather than allocating it among
8 various States, the committee should report the expenditure as a single entry, and as with
9 the 24 and 48 hour reports, leave blank the section where the State would be indicated,
10 and include a memorandum entry indicating that the expenditure was disseminated
11 "nationally" or "nationwide." This reporting will ensure that the independent
12 expenditures are fully and accurately disclosed to the public, as the Act requires.

13 This interpretive rule clarifies the Commission's interpretation of existing
14 statutory and regulatory provisions, and therefore does not constitute an agency action
15 subject to the notice and comment requirements or a delayed effective date under the
16 Administrative Procedure Act. See 5 U.S.C. 553. The provisions of the Regulatory
17 Flexibility Act, which apply when notice and comment are required by the
18 Administrative Procedure Act or another statute, do not apply. See 5 U.S.C. 603(a). The

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1 Commission is not required to submit this interpretive rule for congressional review. See
2 52 U.S.C. 30111(d)(1), (4).

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On behalf of the Commission,

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Ann M. Ravel,

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Chair,

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Federal Election Commission

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12 DATED: _____

13 BILLING CODE: 6715-01-P

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