

Coordinated Communications and Independent Expenditures

Federal Election Commission

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Please Note:

The Commission's regulations on coordinated communications were at issue in the "Shays III" litigation. Shays v. FEC (06-1247). Please visit the FEC's Litigation page (http://www.fec.gov/law/litigation_CCA_Alpha.shtml#shays_o6) for additional information.

Portions of this publication may be affected by the Supreme Court's decision in Citizens United v. FEC on January 21, 2010 (http://www.fec.gov/law/litigation/cu_sc08_opinion.pdf). Essentially, the Court's ruling permits corporations and labor organizations to use treasury funds to make independent expenditures in connection with federal elections and to fund electioneering communications. The ruling did not affect the ban on corporate or union contributions or the reporting requirements for independent expenditures and electioneering communications. The Commission is studying the Court's opinion and will provide additional guidance as soon as possible.

Introduction

When financing communications in connection with federal elections, it is important to understand that the rules differ significantly depending on whether the communication is coordinated with a candidate or party committee or is produced and distributed independently. In general, amounts spent for coordinated communications are limited, but independent expenditures are unlimited.

This brochure defines the terms "coordinated communication" and "independent expenditure," and explains reporting and other requirements that apply to each.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. 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. Such distribution, alone, will not jeopardize the independence of expenditures made by the recipient.

Key Terms

Before discussing the distinctions between coordinated and independent communications, it is helpful to define a few key terms: public communication, express advocacy and clearly identified candidate.

¹ Citations refer to Federal Election Commission (FEC) regulations and to the Federal Election Campaign Act (the Act). 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.).

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.” Communications over the Internet are not public communications unless the communications are placed for a fee on another person’s web site.” 11 CFR 100.26.

A communication “expressly advocates” if it includes a message that unmistakably urges the election or defeat of a clearly identified candidate. See 11 CFR 100.22.

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

Coordinated Communications

When an individual or political committee pays for a communication that is coordinated with a candidate or party committee, the communication is considered an in-kind contribution to that candidate or party committee and is subject to the limits, prohibitions and reporting requirements of the federal campaign finance law.

In general, a payment for a communication is “coordinated” if it is 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 109.21. 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 must have actual authorization, either express or implied, from a specific principal to engage in specific activities, and then engage in those activities on behalf of that specific principal. Such activities would also 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).

Candidate-Prepared Material

Generally, an expenditure made to distribute or republish campaign material produced or prepared by a candidate's campaign is an in-kind contribution to that candidate, and not an independent expenditure.² 11 CFR 109.23. However, exceptions related to volunteer activity for party committees and candidates may apply.

Three-Prong Coordination Test

FEC regulations establish a three-prong test to determine whether a communication is coordinated. All three prongs of the test—payment, content and conduct—must be met for a communication to be deemed coordinated and thus an in-kind contribution.

² The Commission’s rules on Internet activity exempt certain online campaign activity by uncompensated individuals or groups of individuals from the definitions of contribution and expenditure. 11 CFR 100.94 and 100.155. For more information, please consult the brochure, “Internet Communications and Activity.”

Payment Prong

In order to satisfy the payment prong, the communication need only be paid for, in whole or in part, by someone other than a candidate, a candidate's authorized committee, a political party committee or an agent of the above.

Content Prong

The content prong relates to the subject matter and timing of the communication. A communication that meets **any one** of these four standards satisfies this part of the test:

1. A public communication that expressly advocates the election or defeat of a clearly identified candidate;
2. A communication that is an "**electioneering communication**" as defined in 11 CFR 100.29 (i.e. a broadcast communication that mentions a federal candidate and is distributed to the relevant electorate 30 days before the primary election or 60 days before the general election);
3. A public communication that republishes, disseminates or distributes in whole or in part **campaign materials** prepared by a candidate or a candidate's campaign committee; or
4.
 - a. A public communication made within **90 days before an election** that:
 - Refers to a clearly identified House or Senate candidate and is publicly distributed in that candidate's jurisdiction; or
 - Refers to a political party, is coordinated with a House or Senate candidate, and is publicly distributed in that candidate's jurisdiction; or
 - Refers to a political party, is coordinated with a political party, and is publicly distributed during a midterm election cycle.
 - b. A public communication made **120 days before a Presidential primary election through the general election** that:
 - Refers to a clearly identified Presidential or Vice Presidential candidate and is publicly distributed in a jurisdiction before the clearly identified federal candidate's election in that jurisdiction; or
 - Refers to a party, is coordinated with a Presidential or Vice Presidential candidate, and is publicly distributed in that candidate's jurisdiction; or
 - Refers to a political party, is coordinated with a political party, and is publicly distributed during the Presidential election cycle.

For communications that refer to both a party and a clearly identified federal candidate see 109.21(c)(4)(i)-(iv).

Conduct Prong

The conduct prong examines the interactions between the person paying for the communication and the candidate, authorized committee or political party committee, or their agents. A communication satisfies this part of the test if it meets **any one** of the **five standards** regarding the conduct of the person paying for the communication and the candidate, the candidate's committee, a political party committee or agents of the above:

1. If the communication is created, produced or distributed 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 the 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, the candidate's 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 communication. 11 CFR 109.21(d)(2).
3. If the communication is created, produced or distributed after one or more **substantial discussions**³ about the communication between the person paying for the communication or the employees or agents of that person and the candidate, the candidate's committee, the candidate's opponent or opponent's committee, a political party committee or agents of the above. 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:
 - Is currently providing services or provided services within the previous 120 days with the candidate or 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; and
 - 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. If a person who has previously been an **employee or independent contractor** of a candidate's campaign committee or a party committee during the previous 120 days uses or conveys information about the plans or needs of the candidate or political party committee to the person paying for the communication, and that information is material to the creation, production or distribution of the communication. 11 CFR 109.21(d)(5).

Formal agreement or collaboration between the person paying for the communication and the candidate, authorized committee or political party committee, or their agents, is not required. 11 CFR 109.21(e).

Safe Harbors

Several safe harbors exist that exempt certain communications from the coordinated communications regulations. Please note that these safe harbors only address whether or not communications are coordinated.

³ A discussion is "substantial" 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).

Endorsements and Solicitations: Federal candidates may endorse other federal and nonfederal candidates without running afoul of the coordination rules. They may also solicit federal funds for other federal and nonfederal candidates, political committees and certain tax-exempt 501(c) organizations as permitted by 11 CFR 300.65.⁴

Such endorsements or solicitations are not coordinated communications (i.e., in-kind contributions) with respect to the endorsing or soliciting candidate unless the communication promotes his or her candidacy or attacks his or her opponent. This safe harbor applies no matter when the endorsement or solicitation communication is distributed. 11 CFR 109.21(g). However, this safe harbor does not apply to endorsements of, or solicitations for, state ballot initiatives or referenda.

Legislative Inquiries: 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, does not satisfy any of the conduct standards. 11 CFR 109.21(f).

Publicly Available Information: Persons may use publicly available information in creating, producing or distributing a communication, and such use does not, in and of itself, satisfy four of the five conduct standards in 11 CFR 109.21(d). This safe harbor does not apply to the "request or suggestion" conduct standard. To qualify, the person paying for the communication must demonstrate that the information used in creating, producing or distributing the communication was obtained from a publicly available source.

Establishment and Use of a Firewall: When a commercial vendor, former employee or political committee establishes and uses a firewall to prevent the sharing of information about the candidate or political party's plans, projects, activities or needs, the conduct standards of 11 CFR 109.21(d) will not be satisfied. To qualify for the safe harbor, the firewall must be described in a written policy that is distributed to all relevant employees, consultants and clients affected by the policy.⁵ The firewall must be designed and implemented to prohibit the flow of information between:

- Employees or consultants providing services for the person paying for the communication; and
- Those currently or previously providing services to the candidate, the authorized committee, the candidate's opponent, the opponent's authorized committee or a political party committee.

The Commission does not require firewalls and will not draw a negative inference from the lack of such a screening policy. 11 CFR 109.21(h).

⁴ However, under the Act, federal candidates, officeholders and their agents may face other restrictions on their abilities to solicit funds. 11 CFR 300.60-300.65.

⁵ This provision does not dictate specific procedures required to prevent the flow of information, since a firewall is more effective if established and implemented by each organization based on its specific organization, clients and personnel. However, a good example of an acceptable firewall is described in MUR 5506 (EMILY's List), First General Counsel's Report at 6-7. That firewall prohibited personnel who worked directly with candidate committees from discussing and conveying material information to the staff who handled the advertising buys for those candidates.

Who May Make Coordinated Communications

If a communication is coordinated it is considered an in-kind contribution subject to the Act's contribution limits and source prohibitions. Therefore, only permissible sources (such as individuals and political committees) may make coordinated communications. 11 CFR 109.22. Those persons prohibited from making contributions or expenditures in connection with federal elections (such as corporations, labor organizations, and individuals or businesses with federal government contracts) are similarly prohibited from making coordinated communications. Qualified Nonprofit Corporations (QNCs) are also prohibited from making coordinated communications.

Disclaimer Requirements for Coordinated Communications

The following types of communications require a "disclaimer" statement identifying the person paying for the communication:

1. Any public communication made by a political committee;
2. Electronic mail of more than 500 substantially similar communications when sent by a political committee;
3. A political committee web site available to the general public; or
4. Any public communication made by any person that contains express advocacy, solicits a contribution or qualifies as an "electioneering communication" under 11 CFR 100.29.

A disclaimer statement must be clear and conspicuous, cannot be difficult to read or hear or placed in such a way that it is easily overlooked. 11 CFR 110.11(c)(1). Additional requirements apply to print, radio and television advertisements.

For messages that are authorized, but not financed by a candidate or a candidate committee, the disclaimer statement must:

- State that the communication was authorized by the candidate or the candidate's committee; and
- Identify who paid for the communication.

Here is an example of a disclaimer notice for a printed coordinated communication paid for by XYZ Political Action Committee (PAC):

"Paid for by XYZ PAC and authorized by the
Sheridan for Congress Committee."

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

Reporting Requirements for Coordinated Communications

Coordinated communications are reported as in-kind contributions. PACs must itemize the disbursement of the in-kind contribution on Schedule B supporting Line 23 (Contributions to Federal Candidates) of the *Detailed Summary Page*. Candidate committees must report the receipt of the in-kind contribution as an itemized receipt on Schedule A. In addition, in order to avoid inflating cash on hand, candidate committees must report an itemized disbursement on Schedule B for Line 17 (Operating Expenditures) of the *Detailed Summary Page*. Party committees that make disbursements for coordinated party communications on behalf of a federal candidate

may report them as either in-kind contributions on Schedule B supporting Line 23 or as coordinated party expenditures on Schedule F supporting Line 25 (Coordinated Party Expenditures) of the *Detailed Summary Page*. Individuals do not have reporting requirements for contributions they make. 11 CFR 109.21(b).

Independent Expenditures

An independent expenditure is an expenditure 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 or its agents.” 11 CFR 100.16(a).

Who May Make Independent Expenditures

Persons permitted to make contributions in connection with federal elections (such as individuals and political committees) may make independent expenditures. Persons prohibited from making contributions or expenditures in connection with federal elections (such as corporations, labor organizations and individuals or businesses with federal government contracts) are similarly prohibited from making independent expenditures. However, there is one exception to this rule.

Certain Nonprofit Corporations May Make Independent Expenditures

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*, the Supreme Court outlined a limited exception to the general prohibition on corporate expenditures. The Court said that MCFL, a nonprofit corporation, could make independent expenditures because it had certain essential features. These features are included in the Commission’s regulatory definition of Qualified Nonprofit Corporations (QNCs).

11 CFR 114.10. A QNC is a corporation that has all of the following five characteristics:

- It is a nonprofit, social welfare organization described in 26 U.S.C. § 501(c)(4);
- It was formed for the express purpose of promoting political ideas;
- It does not engage in business activities;
- It has no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and
- It was not established by a business corporation or a labor union and does not accept contributions from such entities. 11 CFR 114.10.

Disclaimer Requirements for Independent Expenditures

See page 5 for a list of communications that require a “disclaimer” statement identifying the person paying for the communication.

For messages that are not authorized, and are not financed by a candidate or a candidate committee, the disclaimer statement must:

- State that the communication is not authorized by any candidate or the candidate’s 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).

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 for Independent Expenditures

Political Committee

A PAC or party committee must itemize its payments for independent expenditures on Schedule E once the calendar-year total paid to a vendor or other person exceeds \$200 with respect to a particular election. 11 CFR 104.3(b)(3)(vii)(A); 104.4(a), (b) and (c). The total of unitemized independent expenditures is also reported on Schedule E. 11 CFR 104.3(b)(3)(vii)(C).

For help determining 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.

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) and (ii); 109.10(b), (c) and (d).

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 calendar 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), (e)(2)(ii) 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. 11 CFR 104.3(b)(1)(vii).

24-Hour Reports

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, before an election, the independent expenditure 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), (e)(2)(ii) 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. 11 CFR 104.3(b)(1)(vii).

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. 11 CFR 104.4(f).

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 prior to the 20th day 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

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 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;⁶
- 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.⁷ 11 CFR 104.3(b)(3)(vii) and 109.10(e).

Certification of Independence. All reports of independent expenditures must also contain a certification 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 reporting an independent expenditure 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, including political committees, making independent expenditures are subject to the limitations and prohibitions of the Act. 11 CFR 110.5(d) and 110.1(n). See also 11 CFR 109.10(e)(1)(vi). 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, if Citizen Jones contributes \$1,000 to a political committee established to make independent expenditures exclusively on behalf of Candidate Smith, this amount is treated as a contribution to Candidate Smith.

⁶ 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).

⁷ Political committees already disclose their contributors.

Thus, Jones may only contribute \$1,500 more to Smith's campaign, since Jones' contributions to Smith would then reach the \$2,500⁸ per-candidate, per-election limit. 11 CFR 110.1(h).

*This publication provides guidance on certain aspects of federal campaign finance law. This publication is not intended to replace the law or to change its meaning, nor does this publication create or confer any rights for or on any person or bind the Federal Election Commission (Commission) or the public. The reader is encouraged also to consult the Federal Election Campaign Act of 1971, as amended (2 U.S.C. 431 *et seq.*), Commission regulations (Title 11 of the Code of Federal Regulations), Commission advisory opinions, and applicable court decisions. For further information, please contact:*

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Washington, DC 20463
(800) 424-9530; (202) 694-1100
info@fec.gov
www.fec.gov*

⁸ Certain contribution limits are indexed for inflation in odd-numbered years. These limits include contributions made by individuals and nonmulticandidate committees to federal candidates and national party committees, the individual biennial limit and the special limit afforded to the national party committees to support Senate candidates. 11 CFR 110.17(e). The contribution limit from individuals to candidate committees is \$2,500 per election for 2011-12.