

February 19, 2014

Chairman Lee E. Goodman
Vice Chair Ann M. Ravel
Commissioner Caroline C. Hunter
Commissioner Matthew S. Petersen
Commissioner Steven T. Walther
Commissioner Ellen L. Weintraub
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**Re: Agenda Document 14-7, Draft Notices of Interpretive Rule Regarding
Reporting Nationwide Independent Expenditures in Presidential Primary
Elections**

Dear Commissioners,

These comments are submitted in our individual capacities, and not on behalf of any client. We have advised clients on preparing independent expenditure reports under the method outlined in Advisory Opinion 2011-28, and are familiar with its requirements.

The Draft Notices do not address what the Commission's independent expenditure reporting form (Schedule E of Form 3X and Form 5) requires or allows, and we believe it is important to consider the actual form when considering the questions presented.

**SCHEDULE E (FEC Form 3X)
ITEMIZED INDEPENDENT EXPENDITURES**

PAGE OF
FOR LINE 24 OF FORM 3X

NAME OF COMMITTEE (In Full)		FEC IDENTIFICATION NUMBER ▼ C	
Check if <input type="checkbox"/> 24-hour report <input type="checkbox"/> 48-hour report <input type="checkbox"/> New report <input type="checkbox"/> Amends report filed on		M - M / D - D / Y - Y - Y - Y	
Full Name of Payee		Date of Public Distribution/Dissemination M - M / D - D / Y - Y - Y - Y	
Mailing Address		Amount	
City State Zip Code		Date of Disbursement or Obligation M - M / D - D / Y - Y - Y - Y	
Purpose of Expenditure	Category/Type		
Name of Federal Candidate	<input type="checkbox"/> Support <input type="checkbox"/> Oppose	Office Sought: <input type="checkbox"/> House District: _____ <input type="checkbox"/> President <input type="checkbox"/> Senate State: _____	
Calendar Year-To-Date Per Election for Office Sought		Disbursement For: <input type="checkbox"/> Primary <input type="checkbox"/> General <input type="checkbox"/> Other (specify) ▶ _____	

As shown above, the itemized entry form provides a space for the filer to input the state that corresponds to the office sought by the candidate identified in the independent expenditure. If a report is filed electronically using either FECfile or the Commission’s online platform, only one state can be input in each entry. This works fine for U.S. House and Senate elections – they do not cross state borders. However, the Commission’s reporting form and software do not readily accommodate an independent expenditure that is distributed nationwide (or regionally). This leaves the filer with two options: (1) omit the state entry altogether (which could prompt an inquiry); or (2) divide the expenditure between two or more states.

Suppose, for example, that Committee X makes an independent expenditure totaling \$150,000 in support of Presidential Candidate Y during the primary season, at a time when three primary elections remain before the national convention. This independent expenditure is aired nationwide on CNN or Fox News and it does not reference or target any of those three remaining primary elections or states. It might make sense to report that this \$150,000 independent expenditure was made to support Presidential Candidate Y in the primary elections to be held States 1, 2 and 3. However, it is only possible to input one state per itemized entry on Schedule 5-E. As a result, under the Commission’s current guidance, Committee X must artificially divide its expenditure into thirds, and report three separate \$50,000 independent expenditures, made in States 1, 2, and 3. Unlike an electioneering communication filing, which requires the identification of the reported advertisement’s title, there is no way to “connect” Committee X’s three reported expenditures after they are allocated among different elections. Once reported as instructed by the Commission, no one can tell that this was actually a single \$150,000 advertisement.

Draft A reflects, and would further formalize, this current practice. However, there is no acknowledgment in Draft A that this practice likely has more to do with adapting to the existing reporting form than it does with conforming to the law's requirements. While a fourth option to consider would be to adjust the reporting forms and the Commission's filing software to allow for multiple state entries, of the three Drafts presented, we urge the Commission to adopt either Draft B or Draft C. Drafts B and C reflect the better interpretation and application of the state identification rule. We agree that the approach taken in Draft A and Advisory Opinion 2011-28 reflects an "unnecessarily complex and arbitrary reporting regime" that at least has the potential to obscure meaningful information about the reported expenditures.

Requirements of the Act and Commission Regulations

The Federal Election Campaign Act, as amended, does not require an independent expenditure filing to identify the state or states in which an expenditure is made or targeted. Rather, an independent expenditure filer must report the "date, amount, and purpose" of an expenditure, and include "a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate." 2 U.S.C. § 434(b)(6)(B)(iii). The Commission's regulations impose the state identification requirement at 11 C.F.R. § 104.4(a), by reference to 11 C.F.R. § 104.3(b)(3)(vii), apparently as a way to help identify the candidate whose election or defeat is advocated. Specifically, the regulation requires the identification of "the name of the candidate and office sought by such candidate (*including State and Congressional district, when applicable*)" 11 C.F.R. § 104.3(b)(3)(vii)(B). Whatever the actual purpose of this additional, non-statutory requirement, the regulation presumes that "State and Congressional district" information is not always applicable.

The Commission may interpret its own regulation, and we believe the most reasonable reading of this provision is that the state identification requirement is not applicable in the context of a nationwide independent expenditure that supports or opposes a presidential primary candidate without referencing or targeting any specific state primary election.

Draft A

Draft A does not include any discussion of the statutory or regulatory language at issue. Rather, Draft A relies on the result reached in Advisory Opinion 2011-28 (Western Representation PAC). Advisory Opinion 2011-28, however, is largely the product of the factual representations made in the Request. The Requestor never asked *whether* specific state identifications were actually required on independent expenditure reports filed during the presidential primaries, and the Commission does not appear to have considered the question. Rather, the Requestor sought the Commission's permission to *not* file 24- or 48-hour

independent expenditure reports for certain online advertisements, and instead report these expenditures only on the committee's regular, monthly report. The Requestor argued that the 24- and 48-hour reporting requirement was "highly impracticable and a significant administrative burden" that "would operate as a de facto prior restraint." Advisory Opinion Request 2011-28. The Requestor sought relief from the burden of being forced to file independent expenditure reports on a daily basis and in connection with multiple primary elections simultaneously. (As noted by Commissioner McGahn at the Commission's Open Session consideration of Advisory Opinion 2011-28, the Requestor presented what was essentially an as-applied challenge to the reporting requirements that the Commission was not in a position to grant.) Omitting the state identifier on an independent expenditure report was not presented as a possible solution or alternative.

When arguing that a particular regulatory requirement imposes an unconstitutional burden, one typically describes the burden using the most burdensome details available. In the case of Advisory Opinion 2011-28, part of the burden described by the Requestor was the burden of allocating expenditures between different states holding primary elections and filing multiple reports. *See* Advisory Opinion Request 2011-28, Exhibit B; *see also* Public Comment of Requestor (Jan. 18, 2012) (describing the "exhaustive daily monitoring, calculations, data entry and reporting for each state, and potentially filing daily 24- and 48-hour reports for every state" and the "need to monitor expenditures, ascertain the appropriate states, divide the sum by that number of states, and to file separate 24- or 48-hour reports for each and every state, each and every day"). In other words, the Requestor represented that independent expenditure reporting during presidential primary elections *requires* an allocation of expenses among upcoming primary election states precisely because performing and reporting that allocation is burdensome. The Requestor did not ask the Commission to consider whether the state identification requirement at 11 C.F.R. § 104.3(b)(3)(vii)(B) might be interpreted differently.

Advisory Opinion 2011-28 should not be viewed as the Commission's recently-considered response to the question posed in the proposed Interpretive Rules. That Advisory Opinion considered a very different question (whether 24- and 48-hour reporting could be dispensed with altogether in certain circumstances), and the Commission does not appear to have considered the question of how best to read the regulatory phrase "including State and Congressional district, when applicable" in the context nationwide advertising distributed during the presidential primaries.

Drafts B and C

Both Drafts B and C remedy the major shortcomings of Draft A. Specifically, Drafts B and C recognize that the state identification requirement is not a statutory requirement, and that Commission regulations require the identification of "State and Congressional District" with the

qualification, “when applicable.” However, if the Commission adopts either Draft B or Draft C, we believe the Commission would be better served by focusing its rationale more on the regulatory phrase “when applicable,” and less on Advisory Opinion 1995-44 (Forbes for President), which did not involve independent expenditure reporting.

The choice between Draft B and Draft C is, in practical effect, a choice between more or fewer 24-hour reports:

- Under Draft B, the reporting committee would use the first day of the candidate’s party nominating convention as the date of the primary election for purposes of determining the thresholds for filing 24- and 48-hour reports. For non-election specific, presidential primary candidate independent expenditures distributed on a nationwide basis, this approach yields a single 24-hour independent expenditure filing period that would run during the 20 days prior to the first date of the nominating convention.
- Under Draft C, the reporting committee would use the date of the next subsequent state primary election, and there would continue to be as many 24-hour independent expenditure filing periods as there are presidential primary elections, which includes direct elections, preference elections, caucuses, conventions, and even certain “elections” that never actually happen (in the case of an unopposed candidate).¹

Adopting Draft B appears to have two basic implications: (1) some expenditures would be reported one day later than under Draft C; and (2) some small expenditures of less than \$10,000 would not be subject to a 24-hour reporting requirement.²

For example, suppose Committee X runs a nationwide cable television advertisement advocating the election of Presidential Candidate Y in the middle of the presidential primary season. The advertisement is a \$100,000 independent expenditure that does not reference any state’s primary election, but the next upcoming presidential primary election will be held nine days after the date of this communication’s first airing, in State Z. Under Draft B, this expenditure must be reported on a 48-hour report pursuant to 11 C.F.R. § 104.4(b)(2), because the 24-hour reporting period exists only for the 20 days prior to the opening of the nominating convention, and this communication is not within that window. Under Draft C, however, this expenditure would be reported on a 24-hour report pursuant to 11 C.F.R. § 104.4(c) because the

¹ See 11 C.F.R. § 100.2(c), (e).

² In the context of “nationwide” advertising, direct mail, television, and radio advertising, and even phone banks and robocalls, will in nearly every case exceed the \$10,000 threshold that triggers the 48-hour reporting requirement. The only type of nationwide advertising that can reasonably be expected to fall under this \$10,000 threshold are the various and constantly evolving forms of paid-placement Internet-based advertising.

communication is distributed within 20 days of the primary election in State Z, which is the next upcoming primary election.

If Committee X instead ran an internet advertisement, at the same time and under the same circumstances as above, and the internet advertisement cost \$6,000, Draft B would not require the filing of a 48- or 24-hour report, because, for purposes of the 48-hour reporting requirement, the cost is less than \$10,000, and, for purposes of the 24-hour reporting requirement, the cost is greater than \$1,000, but the communication is not distributed within the 20 days prior to the nominating convention.³ However, the expenditure would still be reported on Committee X's next regularly-filed monthly or quarterly report, or on a subsequent 48-hour report that becomes due because Committee X makes additional independent expenditures that, when combined with the earlier expenditure, aggregate in excess of \$10,000. Draft C, on the other hand, would require a 24-hour report because the communication is distributed within 20 days of the upcoming primary election in State Z. Thus, under Draft B, a narrow class of relatively small expenditures (less than \$10,000) made by relatively inactive committees whose total expenditures do not aggregate \$10,000 or more with respect to a given candidate, would not be reported on 24- or 48-hour reports.

This result should not be characterized as “less disclosure.” Under the Commission's current approach, this hypothetical internet advertising expenditure would almost certainly *not* be reported on a 24-hour report either. The reporting committee would allocate the expenditure among as many primary elections as remain, as the Commission requires, and the result would be several separate expenditures, all of which are less than \$1,000, and none of which are reportable on a 24-hour report.

Both Drafts B and C promote more accurate and meaningful disclosure by eliminating the practice of artificially allocating an independent expenditure among different primary elections. Draft B offers obvious administrative benefits, and the likely practical effect is fewer 24-hour reports, and more 48-hour reports. Draft C retains much of the administrative complexity of the current practice, and, as a result, likely yields more 24-hour reporting, perhaps even more than is currently required.⁴ In our view, Draft B offers significant administrative advantages for the committees that are actually tasked with filing independent expenditure reports, is entirely consistent with the statute and regulations, and its benefits greatly outweigh

³ This example assumes that Committee X does not make any other communications about Presidential Candidate Y that would increase its aggregate expenditure figure to more than \$10,000.

⁴ Draft C would likely require more 24-hour reporting than is currently required by using the next subsequent state primary election for purposes of determining the thresholds for 24-hour reporting and also eliminating the current practice of allocating the expenditure among different primary elections. The current allocation practice can turn an otherwise reportable single expenditure into numerous smaller expenditures that fall below the \$1,000 threshold and thereby escape 24-hour reporting. Under Draft C, this allocation would no longer occur, but dozens of 24-hour reporting periods would still exist.

any perceived costs that may arise from the heightened emphasis on 48-hour reporting for the very narrow class of expenditures that are at issue here.

We appreciate the opportunity to submit these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tom Josefiak', with a long horizontal flourish extending to the right.

Tom Josefiak

Jason Torchinsky

Sean Cairncross

Michael Bayes