

24-hour and 48-hour reports of independent expenditures relating to Senate candidates under BCRA, the Commission and not the Secretary of the Senate is the place of filing. 11 CFR 104.4(e)(2)(ii); see 2 U.S.C. 434(g)(3); see also the discussion of 11 CFR 105.2, below.

Proposed paragraph (e)(3) in the Reporting NPRM is being renumbered paragraph (e)(4), and it provides that if a State has obtained a waiver under 11 CFR 108.1(b), then reports of independent expenditures are not required to be filed with that State's Secretary of State.

7. 11 CFR 104.4(f) Aggregating Independent Expenditures for Reporting Purposes

Paragraph (f) of 11 CFR 104.4 addresses aggregation of independent expenditures for reporting purposes. The provisions of pre-BCRA 11 CFR 109.1(f) are being moved to this section and revised to explain when and how political committees and other persons making independent expenditures must aggregate independent expenditures for purposes of determining whether 48-hour and 24-hour reports must be filed. Note that this aggregation rule applies to independent expenditures by political committees, as well as other persons; new 11 CFR 109.10(c) and (d) cross-reference this paragraph. Paragraph (f) establishes that every date on which a communication that constitutes an independent expenditure is "publicly distributed" or otherwise publicly disseminated serves as the date used to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amounts (\$1,000 for 24-hour reports or \$10,000 for 48-hour reports). The term "publicly distributed" has the same meaning as provided in new 11 CFR 100.29(b)(3), which the Commission promulgated as part of the electioneering communications rulemaking. Electioneering Communications Final Rules, 67 FR 65,190, 65,192, 65,211 (Oct. 23, 2002). The term "publicly disseminated" refers to communications that are made public via other media, *e.g.*, newspaper, magazines, handbills. Thus, paragraph (f) sets the same date as the starting date from which a person would have one or two days, where applicable, to file a 24-hour or 48-hour report of independent expenditures.

Congress changed the reporting requirements for independent expenditures by adding the phrase "or contracts to make" in 2 U.S.C. 434(g)(1) and (2). By doing so, BCRA ties 24-hour and 48-hour reporting of independent

expenditures to the time when a person "makes or contracts to make independent expenditures" aggregating at or above the \$1,000 and \$10,000 thresholds, respectively. Therefore, under new 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. Under this new rule and the timing requirements described above, when a communication that constitutes an independent expenditure is publicly distributed or publicly disseminated, the person who paid for, or who contracted to pay for, the communication is able to determine whether the communication satisfies the "express advocacy" requirement of the definition of an independent expenditure (*see* 11 CFR 100.16) and therefore must determine whether the disbursement for that communication constitutes an independent expenditure. A person reaching or exceeding the applicable reporting threshold is required to submit a report by 11:59 p.m. Eastern Standard/Daylight Time on the day after, for 24-hour reporting, or two days after, for 48-hour reporting, the date of the public distribution or public dissemination of that communication. Please note that under these rules, independent expenditures must be reported by political committees after a disbursement is made, or a debt reportable under 11 CFR 104.11(b) is incurred, for an independent expenditure, but no later than 11:59 p.m. on the day following the date on which the independent expenditure is first publicly distributed or otherwise publicly disseminated.

In some situations, a political committee does not make a payment or incur a reportable debt before the communication that constitutes the independent expenditure is publicly distributed or otherwise publicly disseminated. If the communication is both publicly distributed or otherwise publicly disseminated and paid for in the same reporting period, then the political committee must report the independent expenditure on Schedule E for that reporting period. If the communication is aired in one reporting period (*e.g.*, during August for a monthly filer) and payment is made in a later reporting period (*e.g.*, during September), then the political committee must report the independent expenditure as a memo entry on Schedule E on its August report if the \$10,000 threshold has been exceeded

and on Schedule D if it is a reportable debt under 11 CFR 104.11. The September report should show a payment on Schedule E and the same payment on Schedule D, if applicable.

In other situations, however, a political committee may pay the production and distribution costs associated with an independent expenditure in one reporting period, but not publicly distribute or otherwise publicly disseminate it until a later reporting period. In this case, the political committee must report the payment as a disbursement on Schedule B for operating expenditures. When, in a subsequent reporting period, the communication is publicly distributed or otherwise publicly disseminated, the political committee must file a Schedule E for the independent expenditure referencing the earlier Schedule B transaction. The political committee must also report the disbursement for the independent expenditure as a negative entry on Schedule B so the total disbursements are not inflated. Alternatively, if the political committee wishes to disclose the independent expenditure before the communication is publicly disseminated, it could report the independent expenditure on Schedule E for the reporting period in which the disbursement is made, with no further reporting obligation except for the 48-hour report if the total amount of disbursements for independent expenditures equals or exceeds \$10,000 on the day the communication is publicly distributed or otherwise publicly disseminated.

Obligations incurred, but not yet paid that are reportable debts, must be reported on Schedule D. For independent expenditures once the \$10,000 threshold is exceeded, political committees must also report memo entries on Schedule E. When, in a subsequent reporting period, the communication is publicly distributed or otherwise publicly disseminated, the political committee must file a Schedule E referencing the debt on Schedule D. The political committee must continue to report the debt on Schedule D and any payment on the debt on Schedules D and E, until the debt is extinguished.

The Commission received one comment supporting this proposal to base reporting of independent expenditures on the date of public distribution or public dissemination, rather than on the date a contract is executed. The policy reasons for adopting this reading of BCRA are the same as those set forth in the Explanation and Justification below for the reporting of electioneering communications.