

FEC DISCLAIMER AND DISCLOSURE REQUIREMENTS

(Updated 10-2-2012)

What this document is: A summary for 501(c) organizations of things they may be able to do legally under federal election law but that will trigger reporting or other specific requirements. It should be used for planning purposes, to help you flag when there is a reporting or disclaimer obligation before you engage in a given activity. Readers are advised that this material is intended as a general introduction only and does not constitute legal advice. To determine the application of the legal principles outlined herein to a particular factual situation, you should consult qualified legal counsel.

What this is not: A comprehensive statement of every detail on the reporting requirements. If you determine that a planned activity triggers additional requirements, seek further guidance from legal counsel or the FEC web site (www.fec.gov). This is also not a description of reporting requirements for a federal PAC.

Triggering Activities

In the wake of Citizens United, there are a number of things that are perfectly legal for a 501(c) corporation¹, but that require reporting to the FEC or inclusion of specific language known as a disclaimer.

- Electioneering Communications. Broadcast, cable, or satellite communications that
 - refer to a clearly identified candidate for federal office;
 - run within 30 days before a primary, caucus, or Presidential nominating convention or 60 days before a general election the candidate is running in; and
 - for House and Senate candidates, is able to be viewed by 50,000 or more people in the district or state, and for presidential primary candidates, is able to be viewed by 50,000 or more people in the state where the primary or caucus is being held or 50,000 or more people anywhere in the US during the period between 30 days prior to the convention through the end of the convention.

Electioneering Communications (“ECs”) do not expressly advocate for or against a candidate; including this kind of language turns them into independent expenditures (see below). Note that there is no other content requirement. These ads may have absolutely no reference to voting or elections; they may be entirely 501(c)(3)-permissible lobbying. This means that ***501(c)(3) organizations may have to report some of their communications to the FEC as “Electioneering Communications.”*** Note: ECs should

¹ Perfectly legal under federal election law, but 501(c)(3) organizations are still prohibited by the Internal Revenue Code from engaging in political campaign intervention, and other 501(c) organizations are limited in how much electoral activity they may safely conduct in order to remain tax-exempt.



never be made at the request or suggestion of or in coordination with candidates, political parties, or their agents.

EC reporting is triggered by spending more than \$10,000. Reports are filed on FEC Form 9. The first report for a given ad is not due until the day after it first airs; subsequent reports must be filed by the end of the day after the costs incurred since the last filing exceed \$10,000. Reports generally must include the date and title of the communication, the name and address of any donor who gave the organization \$1,000 or more since the first day of the previous year for the purpose of furthering ECs, as well as the officers, directors, and executive director of the organization.² If the organization has other FEC requirements and must or chooses to file electronically, it must file the Form 9 electronically as well.

- Independent Expenditures. Communications to the public in any medium that expressly advocate the election or defeat of a clearly identified candidate for federal office and which are not made at the request or suggestion of or otherwise in coordination with candidates, political parties, or their agents. Independent Expenditures (“IEs”) must be reported when the organization spends \$250 with respect to a given election.

Reports are filed on FEC Form 5. Information reported includes the identity of any payee, candidate supported or opposed, and name, address, employer, and occupation for any donor who gave more than \$200 in the year for the purpose of making reported IEs.

Reports are filed quarterly, with extra pre-election (due 12 days before) and post-election (due 30 days after) reports. In addition, when an organization has spent \$10,000 not previously reported on IEs with respect to a given election, it must file a report within 48 hours of incurring the cost. After the 20th day before the election, additional spending of \$1000 triggers a 24-hour reporting requirement. Organizations that spend or expect to spend over \$50,000 on IEs must file electronically. Getting the password required to set up electronic filing can take several business days during heavy filing periods, so it is important to prepare in advance rather than waiting until the day the report is due.

- Express Advocacy to Members. Even before Citizens United, nonprofits could freely communicate endorsements to their members, but were required to report if expenditures for these communications exceeded two thousand dollars per election. For this purpose, an election is two separate processes in any election year: one includes all Federal primaries, and the second is all general elections for Federal office.

² The FEC rule limiting the donor disclosure requirement to only those donors who contribute for the purpose of furthering ECs is the subject of ongoing litigation. A federal district court suspended the rule in May 2012, requiring makers of electioneering communications to identify all donors who contribute \$1,000 or more since the beginning of the prior year. See *Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012). However, the DC Circuit Court of Appeals reinstated the limitation (or loophole, depending on your point of view) in September 2012, leaving it to the FEC to better explain its rationale for the rule or write a new one. Organizations that wish to make ECs should check the current status of this litigation prior to doing so.



These separate reporting requirements for express advocacy to members survive, at last for now. The costs of materials must be reported only if they are not primarily devoted to other subjects. So, for instance, a newsletter with many articles and a single item listing the organization's endorsed candidates would not have to be counted. Reports are filed quarterly, with extra pre-election (due 12 days before) and post-election (due 30 days after) reports. Membership communications are reported on FEC Form 7. The reports include only fairly basic information about the type of communication, date made, candidate in question, whether supported or opposed, and amount spent.

Disclaimers

In addition to reporting, FEC rules require certain information to be included with certain types of communications.

IEs and ECs must include a disclaimer that clearly indicates:

- The full name of the organization that paid for the communication;
- The permanent street address, telephone number, or web address of the organization;
- Whether the communication was authorized by a candidate, and authorized political committee of a candidate, or its agents. [The answer to this needs to be “no” or the cost of the communication will be treated as an in-kind contribution to the candidate.]

In addition, TV or radio communications must include the spoken statement, “XYZ is responsible for the content of this advertising.” There are specific requirements applicable to different media that state how these disclaimers must be presented. For instance, in print media the disclaimer must appear in a box set apart from the rest of the text.

Disclaimers are not required on small items on which it is not easy to print them, such as bumper stickers, buttons, or pens, or wearing apparel or other media where including a disclaimer would not be practical.