



## Independent Expenditures

*What are they and what are the rules?*

The 2010 *Citizens United* decision by the Supreme Court may have reinvented political spending, but it did not invent the independent expenditure. Organizations—largely through their political action committees (PACs)—have engaged in independent expenditures to elevate their issues and influence—election outcomes for decades.<sup>1</sup> What the Court’s ruling *did*, was to allow—for the first time—corporations (including nonprofit corporations like 501(c)(4)s and labor unions) to make independent expenditures from their own bank accounts without having to rely on a connected PAC. It also triggered a wave of court decisions and Federal Election Commission (FEC) advisory opinions that redefined how and what money can be spent on elections, invalidated entire sections of the Federal Election Campaign Act (FECA), and helped create a new type of political organization.

This guide explains what an independent expenditure is, briefly addresses how different types of organizations may effectively make independent expenditures, and reviews the rules and federal law that govern them.<sup>2</sup> It ends with Frequently Asked Questions that apply the rules and concepts to common activities in which you may be engaging. Because the rules governing these activities are complicated and evolving, we encourage you to consult more detailed publications like [The Connection: Strategies for Creating and Operating 501\(c\)\(3\)s, 501\(c\)\(4\)s and Political Organizations](#), available through Alliance for Justice (AFJ) and consult your legal counsel.

### What IS an Independent Expenditure?

Broadly speaking, an independent expenditure is a communication (flyer, speech, robocall, etc.) you pay for that a) encourages the election (or defeat!) of a candidate and b) is made without working with a candidate or political party.

More specifically, an independent expenditure is a communication that “expressly advocates” for the election or defeat of a candidate and is made independently of any campaign, candidate, political party and their agents. A communication constitutes “express advocacy” if it uses phrases to urge the election or defeat of a clearly identified candidate or if the communication as a whole, considering its proximity to an election, could only be interpreted by a reasonable person as urging the election or defeat of a candidate. The clearest example of express advocacy is a message such as *Reelect Sherrod Brown* or *Hillary Clinton for President*.

An independent expenditure is a communication that may be distributed in a variety of ways: direct mail, television or cable advertising, phone bank, robocall, door-to-door canvass, etc. As a result, it is possible to undertake an independent expenditure campaign with even a modest budget, opening the door for many 501(c)(4) organizations to engage in this process. However, doing so requires careful planning to ensure that the organization maintains its independence from any candidate, campaign, or political party.

---

<sup>1</sup> A limited number of 501(c)(4) qualified nonprofit corporations have engaged in independent expenditures since 1986.

<sup>2</sup> State campaign finance laws take different approaches to the definition and disclosure of independent expenditures. This fact sheet addresses federal law only.



Under federal law, independent expenditure communications are not subject to any dollar limits. Consequently, an entity may spend as much as it chooses on independent expenditures. In contrast, communications that are coordinated with a candidate, campaign, or party committee are considered in-kind contributions and are subject to contribution limits and source restrictions (e.g. unions and corporations may not make direct or in-kind contributions to federal candidates).

“Coordinated communication” is defined by the FEC regulations and determined under a three-pronged test. All three prongs of the test—payment, content, and conduct—must be met for a communication to be deemed coordinated. The clearest example of a coordinated communication is one in which the PAC paying for the communication (which may take the form of a phone bank, mailing, advertisement etc.) consults with the benefiting campaign or candidate regarding the audience, timing or content (or message). For a detailed explanation of coordination and the three-prong test, see the AFJ publication, [The Connection: Strategies for Creating and Operating 501\(c\)\(3\)s, 501\(c\)\(4\)s and Political Organizations](#).

### What Types of Groups May Make Independent Expenditure? <sup>3</sup>

Over the years, we have witnessed the evolution of federal campaign finance law—from the creation of the PAC to the 527 issue advocacy organization<sup>4</sup> to more recently, “Super PACs” and “Hybrid PACs.”<sup>5</sup> Each of these entities has transformed the way political activity is undertaken. After *Citizens United*, 501(c)(4) organizations not only use these vehicles, but now may make independent expenditures directly using their general funds. The most common vehicles for independent expenditures—general corporate funds, a connected “traditional Federal PAC,” and an independent Expenditure-Only PAC (Super PAC) —are described below.

#### *501(c)(4)*

The *Citizens United* ruling permits all corporations—including nonprofit corporations—to use their general treasury funds to pay for independent expenditure communications.<sup>6</sup> The important aspect of the decision is that, to be lawful, the communication must be independent (and not coordinated). Corporations are still prohibited from making direct or in-kind contributions to candidates under federal law.

---

<sup>3</sup> Rules related to fundraising for an independent expenditure campaign are discussed in the Alliance for Justice Action Campaign toolkit, [Fundraising for your 501\(c\)\(4\)](#).

<sup>4</sup> With the emergence of Independent Expenditure-Only PACs (also known as Super PACs), this type of political organization, is not as frequently used. While a 527 registered with the IRS may engage in limited independent expenditures, if its “major” purpose is to influence federal elections, it would trigger registration and reporting to the FEC as a political committee. (“Major purpose” is an undefined term in federal election law, but it at least means that a majority of what a political committee spends over time pertains to federal elections.) Therefore, the 527 organization’s activities are usually limited to issue advocacy, generic get-out-the-vote efforts, and state-based political spending.

<sup>5</sup> All of these entities are tax-exempt under Section 527 of the tax code, but are commonly referred to by names that reflect their objectives or activities and their status under federal election law.

<sup>6</sup> Due to federal tax law rules, 501(c)(3) organizations cannot engage in partisan political activity. This means they cannot make independent expenditures - or any other communications - that support or oppose candidates.



A 501(c)(4) organization—such as the League of Conservation Voters, Human Rights Campaign, or Planned Parenthood Action Fund—may carry out political activities without jeopardizing its tax-exempt status as long as it is engaged primarily in non-electoral activities that promote social welfare. Activities that promote social welfare include lobbying, “social improvement,” and “civic betterment.” For some 501(c)(4)s there can be tax consequences for using their general funds for political activity.<sup>7</sup> If a 501(c)(4) has significant investment income or wants to engage in extensive political activity that might cause it to exceed the primary purpose test,<sup>8</sup> the organization may want to choose to use a political organization to fund its independent expenditure communications.<sup>9</sup>

### *Separate Segregated Fund*

A 501(c)(4) may establish and pay the administrative costs, such as staff, legal compliance and reporting, rent, and phones, of a separate segregated fund (SSF) or connected PAC registered with the FEC. The name of the SSF must include a reference to the sponsoring organization, such as the Sierra Club Political Committee. An SSF may only solicit contributions from the connected organization’s bona fide members, as well as its executive and administrative personnel and their families (those contributions are limited to \$5,000 per year). An SSF may engage in a range of political activities and is permitted to make direct and in-kind contributions to candidates and make independent expenditures in support of or opposition to a candidate. Prior to the *Citizens United* ruling, having a traditional Federal PAC was the only way most corporations could engage in public express advocacy communications. For information on creating and operating an SSF, please see AFJ’s publication, [The Connection: Strategies for Creating and Operating 501\(c\)\(3\)s, 501\(c\)\(4\)s and Political Organizations](#).

### *Nonconnected PAC*

Individuals associated with a 501(c)(4) (or 501(c)(3)) may establish a Nonconnected Federal PAC.<sup>10</sup> These are PACs established by individuals, not corporations. The major benefit of a Nonconnected Federal PAC is that, unlike an SSF, they can solicit the general public for contributions. However, a Nonconnected Federal PAC may not be affiliated with another nonprofit corporation, such as a 501(c)(4), or any other corporate entity.<sup>11</sup> Furthermore, corporations and incorporated 501(c)(4) organizations cannot make contributions to Nonconnected PACs.

---

<sup>7</sup> Under IRC section 527(f), a tax is imposed at the highest corporate rate on the lesser of the organization’s annual net investment income (interest, dividends, rents, and royalties, and the gains from the sale or exchange of assets minus the losses for such assets and investment management expenses), or the aggregate amount expended on political activities during that year. Those 501(c)(4)s with no investment income are not subject to tax.

<sup>8</sup> For more information on the primary purpose test, see the AFJ publication, [The Connection: Strategies for Creating and Operating 501\(c\)\(3\)s, 501\(c\)\(4\)s and Political Organizations](#).

<sup>9</sup> A political organization is a nonprofit entity that exists primarily to influence the outcome of elections.

<sup>10</sup> See, e.g., FEC Advisory Opinions 2000-20, 1997-26, 1997-15, 1995-38, 1991-37, and 1984-12.

<sup>11</sup> Federal Election Commission, Campaign Guide for Nonconnected Committees available at <https://transition.fec.gov/pdf/nongui.pdf>; FEC Advisory Opinion 1984-12.



A 501(c)(3) or 501(c)(4) with which the individuals are associated may not provide any financial support, directly or indirectly, to the Nonconnected Federal PAC. Rather, all costs of organizing and operating the PAC must be paid from voluntary individual contributions to the PAC. This separation is particularly important in the case of a 501(c)(3) because a 501(c)(3) is strictly prohibited under tax law from having an affiliated political organization that supports or opposes candidates. Staff, directors, or members of a 501(c)(3) or 501(c)(4), as individuals, not as agents or members of the 501(c)(3) or 501(c)(4), may form or serve on the board of a Nonconnected Federal PAC to support local, state, or federal candidates.

### *Super PAC*

The independent expenditure only PAC—commonly referred to as a “Super PAC” —is the newest development in campaign finance law. In *SpeechNow.org v. FEC*, the U.S. Court of Appeals for the District of Columbia held that if a PAC makes independent expenditures only and does not make any direct monetary or in-kind contributions to federal candidates, the PAC may accept unlimited contributions from individual donors. Subsequently, the FEC issued two advisory opinions that a Super PAC may also receive unlimited contributions from domestic corporations and unions. A Super PAC must register with and report its activities to the FEC.

If the Super PAC is organized as a nonconnected political committee, such as American Crossroads or Senate Majority PAC, in contrast to a connected SSF, it may solicit contributions from the general public, domestic corporations, and labor unions. However, if it is established as an SSF of a nonprofit corporation, it is likely restricted to solicitation of its members, executive and administrative personnel and their families in a manner similar to the traditional Federal PAC discussed above. There are some key differences between operating a connected Super PAC and a traditional Federal PAC, however, including the treatment of expenses incurred by a 501(c)(4) for the administration of a Super PAC.

### *Hybrid PAC*

A Hybrid PAC (also known as a Carey Committee) is any nonconnected political committee with a “non-contribution” account. These PACs maintain one bank account for making contributions in connection with federal elections and a separate “non-contribution account” for making independent expenditures. The first account is subject to all of the limits and prohibitions of a regular PAC, but the non-contribution account may accept unlimited contributions from individuals, corporations, labor organizations, and other political committees.<sup>12</sup>

The rules discussed above would apply to the two arms of the Hybrid PAC, and organizations operating a Hybrid PAC may want to establish a firewall to establish independence between the two accounts.

### Communication Disclaimers

Virtually all independent expenditure communications are required to carry a disclaimer identifying who paid for them. In general, disclaimers must be “clear and conspicuous” to give the viewer, listener, or reader adequate notice of the entity paying for and authorizing the communication. The disclaimer must not be difficult to read or hear, and may not be

---

<sup>12</sup> <https://www.fec.gov/press/resources-journalists/political-action-committees-pacs/>



easily overlooked. Specific disclaimer requirements vary based on the method of communication - print, broadcast, or phone bank.<sup>13</sup> Disclaimer requirements also vary by state - check out Bolder Advocacy's [state law resources](#) for more information.

### *Printed Communications*

FEC regulations require that disclaimers for all printed or paid web-based communications—whether independent or coordinated—be contained in a printed box, printed with reasonable contrast, and set apart from the rest of the communication. A disclaimer in a 12-point font satisfies the requirement when used in materials no larger than 2 feet by 3 feet. In addition, disclaimers must include the name and address of the political committee or corporation responsible for the communication and the name of the sponsoring committee's connected organization if its name is not already included in the name of the political committee. See the examples below.

#### **PAC Disclaimer**

Paid for by Clean Water Now PAC, [www.cwn.org](http://www.cwn.org), and not authorized by any candidate or candidate or candidate's committee

#### **501(c)(4) Disclaimer**

Paid for by Clean Water Now PAC, [www.cwn.org](http://www.cwn.org), and not authorized by any candidate or candidate's committee.

### *Broadcast Communications*

If the independent expenditure communication is broadcast on the radio, the statement must be spoken clearly. If the communication is transmitted on television, cable, or satellite, the statement must be accompanied by a voiceover stating the information, and the disclaimer must appear in writing at the end of the communication in a clearly readable manner, with a reasonable degree of color contrast to the background and be shown for a period of at least four seconds. See the examples below.

#### **PAC Disclaimer**

Paid for by Clean Water Now PAC, [www.cwn.org](http://www.cwn.org), and not authorized by any candidate or candidate's committee. Clean Water Now PAC is responsible for the content of this advertisement.

#### **501(c)(4) Disclaimer**

Paid for by Clean Water Now, [www.cwn.org](http://www.cwn.org), and not authorized by any candidate or candidate's committee. Clean Water Now is responsible for the content of this advertisement.

### *Phone Banks*

---

<sup>13</sup> For more information on disclaimers for public communications, see the AFJ publication, [The Connection: Strategies for Creating and Operating 501\(c\)\(3\)s, 501\(c\)\(4\)s and Political Organizations](#). As described on page 26, a "public communication includes any communication by means of broadcast, cable, or satellite; newspaper or magazine ad; billboard or mass mailing; phone bank to the general public; or other form of general public political advertising. General public political advertising does not include communications over the Internet other than communications placed for a fee (such as a pop-up and other types of ads) on another person's website."



Phone banks are another way to deliver an independent expenditure communication to the general public. A phone bank is defined by the Federal Communications Commission as more than 500 substantially similar phone calls within a 30-day period to individuals other than the group's members. These communications must also carry a clear and conspicuous disclaimer—delivered in a manner that is not hard to hear.

#### **PAC Disclaimer**

This call is paid for by Clean Water Now PAC and is not authorized by any candidate or candidate's committee. You can learn more about Clean Water Now PAC at [www.cwn.org](http://www.cwn.org).

#### **501(c)(4) Disclaimer**

This call is paid for by Clean Water Now and is not authorized by any candidate or candidate's committee. You can learn more about Clean Water Now at [www.cwn.org](http://www.cwn.org).

The federal Telephone Consumer Protection Act (TCPA) requires anyone calling a cell phone using any automated telephone dialing system (autodialer) to have prior express consent. This rule applies to all uses of autodialers and predictive dialers. Generally, if an individual voluntarily provides an organization with their cell phone number, there is prior express consent.

Additionally, many states have special disclaimer rules (and restrictions) for auto calls, calls using a predictive dialer, or "robocalls." Prior to engaging in a robocall program, you should also consult state law and review AFJ's publication, [Robocalling Rules: Before you Pick Up that Phone, Hold that Call—What You Need to Know about Robocalls, Robotexts, and Autodialers](#), for an in-depth discussion of these rules and how they apply to nonprofits.

## **Reporting Requirements**

Independent expenditures must be reported when a \$250 spending threshold is reached. Traditional Federal PACs and Super PACs must report their independent expenditures to the FEC on [Schedule E of Form 3X](#) as part of their regular campaign finance filings (quarterly or monthly). All expenditures must be individually itemized. Once expenditures in a single race reach \$10,000 or more, Schedule E must be filed within 48 hours of public dissemination or distribution of a communication. Each additional time that expenditures for that election reach \$10,000 up to 20 days before an election, the PAC must file another 48-hour report. Within the final 20 days before an election, the threshold amount drops to \$1,000 and the reporting period shortens to 24 hours.

Corporations - including 501(c)(4)s - must report their independent expenditures on [FEC Form 5](#) once the total spent has exceeded \$250. All expenditures must be individually itemized and donations received for the purpose of making independent expenditures must be reported on a quarterly basis. Once expenditures in a single race reach \$10,000 or more, Form 5 must be filed within 48 hours of public dissemination or distribution. Each additional time that expenditures for that election reach \$10,000 up to 20 days before an election, the PAC must file another 48-hour report. Within the final 20 days before an election, the threshold amount drops to \$1,000 and the reporting period shortens to 24 hours.



## Frequently Asked Questions

In the following section, we explore some of the common questions that are raised in the course of an independent expenditure campaign to provide a general sense of how these issues may be addressed. However, as these issues are very complex and the legal environment continues to evolve, organizations should consult legal counsel to evaluate these issues in the context of a specific program or activity.

**Q. Is it possible for an organization to conduct both coordinated and independent expenditure campaigns in the same election or race?**

A. Yes. It is possible for organizations to undertake both coordinated and independent activities in the same race, but this is an extremely complicated area of the law. Such efforts require very careful planning and a “firewall” is recommended to ensure that the organization is able to demonstrate (if needed) that the independent program activities are strictly separated from their coordinated activities.

**Q. Is it possible for staff of an organization to work on a coordinated campaign effort for a while and then switch to the independent expenditure campaign in the same race?**

A. Generally, no. Once you have been involved in the planning and execution of a coordinated campaign, it would be difficult, if not impossible, to switch over to work on the independent expenditure campaign in the same race without jeopardizing the independence of the expenditures.

**Q. May a member of our staff or board involved in an independent expenditure campaign talk to a candidate or member of a campaign? What if they call us?**

A. If the discussion is about legislative or policy issues, and does not include discussion of campaign plans, it is acceptable for any staff person or board member to have a conversation with the candidate. It is best for all communications with candidates and campaigns regarding campaign plans to be handled by those staff and board members authorized to coordinate with the candidate. If a campaign contacts a staff person or board member who is involved in the independent effort regarding their campaign, they should direct the caller to another member of the staff who is not working on the independent program. If there is no one else available to talk to the campaign, it is best to inform the campaign that you cannot discuss campaign plans.

**Q. May we tell the media and the public about our independent expenditure campaign activities?**

A. Yes. It is permissible to provide the press and the public with general information about your independent expenditure campaign. Additionally, you may tell the media, the public, *and candidates* about your independent expenditure campaign activities and communications after a communication has been disseminated.

**Q. Are there any limitations on the message we use in our independent expenditure campaign? For example, can we use the same message as the candidate’s campaign?**

A. Using the same message as the campaign could elevate the risk and appearance of coordination with the candidate or campaign. Therefore, groups may want to develop a



message that is distinct from the candidate's to reinforce the independence of their efforts. However, an expenditure to distributed or republish campaign materials would be considered an in-kind contribution.<sup>14</sup>

**Q. Is it permissible to use a candidate's photograph from the campaign's website or Facebook page in an independent expenditure communication?**

**A.** It depends. Generally, it is best to use publicly available photographs to avoid the appearance of coordination. However, if the campaign makes photographs available for download by the press and public on its campaign website or Facebook page, it is possible that this photo could be used in an independent communication. For more information on the use of photos, see AFJ's publication [Influencing Public Policy in the Digital Age](#).

**Q. How will the public know that our activities are independent and have not been coordinated with the candidate or her campaign?**

**A.** As discussed above, use of the correct disclaimers will indicate that a communication has been paid for by the organization and has "not been authorized by any candidate or candidate committee." (See above section on "Communication Disclaimers" for more information.)

**Q. Can we let the candidate or his campaign know that we are conducting an independent expenditure campaign in his race?**

**A.** The simplest way to avoid coordination is to not have contact with the candidate or the campaign. It is permissible to share information about the effort after the campaign has ended. This is particularly important because even a communication to which a candidate or campaign "assents" to a suggested activity constitutes coordination under federal law.

**Q. Do organizations making independent expenditures have to disclose their donors to the FEC?**

**A.** It depends on what type of entity makes the expenditure. Traditional Federal PACs and Super PACs must report all of their contributions and itemize those contributions in excess of \$200 in a calendar year by name, address, occupation and employer. Under current law, corporations, such as 501(c)(4)s, are required to disclose donors who give more than \$200 to support independent expenditures.

---

The Alliance for Justice Action Campaign (AFJAC) serves as the nation's leading resource on the legal framework for 501(c)(4) nonprofit advocacy efforts. AFJAC provides invaluable resources, training, and technical assistance to help nonprofit organizations and their donors advocate more efficiently and effectively. The information contained in this fact sheet and any attachments is being provided for informational purposes only and not as part of an attorney-client relationship. The information is not a substitute for expert legal, tax, or other professional advice tailored to your specific circumstances, and may not be relied upon for the purposes of avoiding any penalties that may be imposed under the Internal Revenue Code. Alliance for Justice Action Campaign publishes plain-language guides, offers educational workshops, and provides technical assistance for nonprofits engaging in advocacy

---

<sup>14</sup> [11 CFR 109.23](#)