

# Independent Expenditures

## What Are They and What Are the Rules?

In any election contest, campaign activities are conducted by many players, it is not just candidates or political party committees asking for your vote. Outside groups, including **political action committees** (PACs) and corporations of all types (excluding 501(c)(3) organizations) can advocate for their choice of candidates and make the case independently to voters. In fact, independent expenditure spending in federal elections has skyrocketed in the past several cycles. This memo discusses independent expenditure spending at the federal level and the federal regulations that apply when a 501(c)(4) (or other entity) makes independent expenditures in support or opposition to candidates for federal public office. It does not discuss the rules that apply when engaging in independent expenditures to support or oppose state-level candidates, so please **consult state law** for more information about permissible state-level activities and relevant reporting requirements.

The 2010 *Citizens United* decision by the Supreme Court may have reinvented political spending, but it did not invent independent expenditures. 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, and invalidated entire sections of the Federal Election Campaign Act (FECA).

This fact sheet 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*, 5th Edition, available through Alliance for Justice (AFJ) or consult your legal counsel.

### What is an Independent Expenditure?

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,

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

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

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 “**Re-elect Mary for Senate**” or “**Hillary for President**.”

Under federal law, independent expenditure communications are not subject to any dollar limits. They are also not subject to source restrictions other than restrictions that prohibit contributions from federal contractors, federal banks, and foreign nationals. Consequently, an entity may spend as much as it chooses on independent expenditures under FECA.<sup>3</sup> 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. For example, labor organizations and corporations (including 501(c)(4)s) may not make direct or in-kind contributions to federal candidates since they are prohibited by the Federal Election Campaign Act.

A “coordinated communication” (as opposed to an independent expenditure) 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.

An independent expenditure is a communication that may be distributed in a variety of ways:

- Direct mail,
- Television or cable advertising,
- Phone bank,
- Robocall, text messaging, 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.

Earlier in 2024, the FEC published Advisory Opinion (AO) 2024-01 on door-to-door communications. This activity is not considered to be a public communication and therefore it may not rise to the level of a coordinated communication or expenditure. As such, it may be possible to conduct door-to-door programs with a federal candidate’s campaign without violating the contribution or source limits. The FEC outlined a safe-harbor example within the AO. Please see AFJ Action’s blog post [here](#) for more information.

### What Types of Groups May Make Independent Expenditures?<sup>4</sup>

Over the years, we have witnessed the evolution of federal campaign finance law — from the

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<sup>3</sup>. Under IRS regulations, a 501(c)(4) social welfare organization is limited in the amount of political activity it may conduct. Political activity must be its secondary purpose. *Rev. Rul. 81-95, 1981-1 C.B. 332.*

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

creation of the PAC to the 527 issue advocacy organization<sup>5</sup> to most recently, the “Super PAC.”<sup>6</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)s

The *Citizens United* ruling permits all corporations — including nonprofit corporations — to use their general treasury funds to pay for independent expenditure communications.<sup>7</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.

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 so 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>8</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>9</sup> the organization may want to choose to establish or use a political organization, like an IE PAC or Super PAC, to fund its independent expenditure communications.<sup>10</sup>

### Traditional Federal PACs

#### SEPARATE SEGREGATED FUND

A 501(c)(4) may establish and pay the administrative costs, such as staff, legal compliance, and

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5. 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.
  6. 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.
  7. Due to federal tax law rules, 501(c)(3) organizations cannot make independent expenditures – or any other communications – that support or oppose candidates.
  8. 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.
  9. 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](#).
  10. A political organization is a nonprofit entity that exists primarily to influence the outcome of elections.

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 COMMITTEE

Individuals associated with a 501(c)(4) may establish a Nonconnected Federal PAC. 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 traditional Nonconnected Federal PAC may not be affiliated with a nonprofit corporation, such as a 501(c)(4), or any other corporate entity. Nonconnected committees are subject to contribution limits and source restrictions. Therefore corporations (including 501(c)(4) organizations), cannot make contributions to Nonconnected PACs. For more information, see the [FEC Guidebook on Nonconnected Committees](#).

## Super PACs

The independent expenditure only PAC — commonly referred to as a “Super PAC” — is a more recent development to campaign finance law. It may not make contributions, either direct or in-kind, to federal candidates. 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. As such, a 501(c)(4) organization may contribute to a Super PAC as a political or secondary activity. 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 LCV Victory Fund or Senate Majority PAC, in contrast to a connected SSF, it may solicit contributions from the general public, domestic corporations, and labor unions. Individuals associated with a tax-exempt organization, like a 501(c)(4), may form a SUPER PAC, but it must be maintained as a separate legal entity. As a nonconnected committee it must pay its own administrative and fundraising expenses and not benefit from the resources of the 501(c)(4). There are special rules for establishing a SUPER PAC that is a nonconnected committee, which you can review in the latest edition of AFJ's [The Connection](#) publication.

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.

## 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 easily overlooked. Specific disclaimer requirements vary based on the method of communication – print, broadcast, or phone bank.<sup>11</sup>

### 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 permanent address, telephone number or website 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. As demonstrated in the examples below, the public is informed who paid for the communication, how to contact the organization, and the fact that it is not coordinated.

PAC Disclaimer	501(c)(4) Disclaimer
Paid for by A NonprofitPAC, www.nonprofitPACnotareal.org and not authorized by any candidate or candidate’s committee.	Paid for by A Nonprofit Org, 555-555-1234, 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 on the next page.

<sup>11</sup>. For more information on disclaimers for public communications see <https://www.fec.gov/help-candidates-and-committees/advertising-and-disclaimers/>

### Broadcast Communications

PAC Disclaimer	501(c)(4) Disclaimer
Paid for by A Nonprofit PAC, <a href="http://www.nonprofitPACnotareal.org">www.nonprofitPACnotareal.org</a> , and not authorized by any candidate or candidate's committee. A Nonprofit PAC PAC is responsible for the content of this advertisement.	Paid for by A Nonprofit Org, <a href="http://www.nonprofitnotareal.org">www.nonprofitnotareal.org</a> and not authorized by any candidate or candidate's committee. A Better Tomorrow is responsible for the content of this advertisement.

### Phone Banks and Text Messaging

Phone banks are another way to deliver independent expenditure communications 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	501(c)(4) Disclaimer
This call is paid for by Not A Real PAC and is not authorized by any candidate or candidate's committee. You can learn more about Not A Real PAC at <a href="http://notarealpac.org">notarealpac.org</a> .	This call is paid for by Not A Real PAC and is not authorized by any candidate or candidate's committee. You can learn more about Not A Real PAC at <a href="http://notarealpac.org">notarealpac.org</a> .

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 new 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.

The use of text messaging to engage in election-related activity also triggers important legal requirements under federal and state law. Additional details regarding the laws that apply when engaging in robotexting campaigns are included in AFJ's **Robocalling** guide.

### Social Media Requirements

#### 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 per race. What that means is the money spent on supporting a candidate and the money that is spent in opposition to a candidate running for the same office counts toward that threshold. All expenditures must be individually itemized and donations received for conducting political expenditures must be reported on a quarterly basis.<sup>12</sup> 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:** What is a firewall?

**A:** A firewall is put in place to prevent the flow of non-public coordinated information to the side of the organization conducting independent expenditures. It provides a **safe-harbor from coordination**. The organization will want to establish a firewall in order to shield any IE activity from any coordinated activity plans, like a door-door-cavass.

<sup>12</sup> FEC provides [guidance](#) following U.S. District Court decision in *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018)



## Frequently Asked Questions

**Q:** Is it possible for staff of an organization to work on a coordinated campaign effort then switch to the independent expenditure side 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 inform the coordinated or the candidate side on the IE communication after the communication has been published. It is best to do this in a manner that is a one-way communication, with no possible response back.





## Frequently Asked Questions

**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. If a PAC or other organization republishes a candidate's campaign materials, it will result in an in-kind contribution.<sup>13</sup> Therefore, groups will want to develop a message that is distinct from the candidate's to reinforce the independence of their efforts.

**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 their campaign website or Facebook page, it is possible that this photo could be used in an IE communication.

**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 "Communication Disclaimers.")

**Q:** Can we let the candidate or their campaign know that we are conducting an independent expenditure campaign in their 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. A post-general election information sharing session must only look back, so no future planning should take place at these types of sessions. These types of post-election meetings should be limited to a single session and not a reoccurring activity. Another best practice is to schedule the session as soon as practicable after the general election and not wait until or postpone until the next election cycle is underway.

<sup>13</sup>. 11CFR109.23



## Frequently Asked Questions

**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 political activity.<sup>14</sup>

<sup>14</sup>. FEC provides guidance following U.S. District Court decision in [CREW v. FEC, 316 F. Supp. 3d 349](#) (D.D.C. 2018)

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The Alliance for Justice Action Campaign (AFJ Action) serves as the nation's leading resource on the legal framework for 501(c)(4) nonprofit advocacy efforts. AFJ Action 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.