
Coolidge-Reagan Foundation

To Defend, Protect and Advance Political Speech

March 27, 2018

Mr. Robert M. Knop
Assistant General Counsel
Federal Election Commission
1050 First Street, NE
Washington, D.C. 20463

RE: Public Comment of Coolidge-Reagan Foundation Concerning REG 2014-02

Dear Mr. Knop:

The Coolidge-Reagan Foundation respectfully submits this comment in response to the Federal Election Commission’s (“FEC” or “Commission”) Notice of Public Rulemaking (“NPRM”) concerning “independent expenditures and electioneering communications that relate to presidential primary elections and that are publicly distributed in multiple states but that do not refer to any particular state’s primary election.” FEC, *Independent Expenditures by Authorized Committees; Reporting Multistate Independent Expenditures and Electioneering Communications*, Notice 2018-01, 83 FED. REG. 3,996, 3,996 (Jan. 29, 2018).

BACKGROUND

The NPRM concerns a person’s obligation to report certain independent expenditures supporting or opposing a candidate for nomination for the office of President of the United States (“President”), as well as the proper manner of reporting such expenditures.

The two major national political parties—Democratic and Republican—use a complex process to nominate their respective candidates for President. Each party nominates its candidates at a national convention comprised of thousands of delegates from across the nation. *See, e.g.*, Democratic Nat’l Comm., Call for the 2016 Democratic National Convention, art. VIII(C)(7)(b) (2014) (hereafter, “DNC Call”); Republican Nat’l Comm., Rules of the Republican Party r. 40(d) (2016) (hereafter, “Republican Rules”). Each state party selects the delegates to its party’s national convention in a variety of different manners, including primary elections, districtwide caucuses or conventions, appointment by the state party committee, or a statewide convention. *See Reforming the Contested Convention: Rethinking the Presidential Nomination Process*, 85 FORDHAM L. REV. 1073, 1087-88 (2016) (hereafter, “*Presidential Nomination Process*”). Additionally, almost every state in the country holds a presidential preference primary election or presidential preference caucus. The outcome of a state’s primary or caucus typically plays a role in determining the candidate for whom delegates to the national convention from that state will be “bound” to vote at the national convention, at least in the early rounds of voting. Democratic Nat’l Comm., Democratic Delegate Selection Rules r. 10(C), 13(A)-(B) (2014); Republican Rules, *supra* at r. 16(a)(1). The FEC regards each presidential preference primary or caucus, as well as the ultimate nominating convention of each party, as a separate election. *See U.S. Navy Veterans’ Good Government Fund*, A.O. 2003-40, at 4 (Feb. 6, 2004).

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Importantly, the outcomes of presidential preference primaries or caucuses have no legally mandated connection to the selection of a political party’s nominee for President. The rules governing each party’s national convention determine whether state party requirements that delegates vote for particular presidential candidates based on the results of that state’s presidential preference primaries or caucuses are enforceable. *Presidential Nomination Process, supra* at 1090. Neither state nor national political parties are required to compel national convention delegates to vote at the national convention for a presidential candidate who prevailed, or even received a substantial percentage of the vote, in that state. Indeed, convention rules could allow national convention delegates to nominate a candidate for president who did not even run in any presidential preference primaries. The rules governing each convention are neither approved nor binding, however, until they are ratified on the opening day of the convention—well after presidential preference primaries and caucuses have been held. *Id.* at 1091. Thus, a national party convention is a legally, politically, and practically distinct event from the various presidential preference primary elections and caucuses, as well as district and state conventions, leading up to it, and is the only event directly involving the nomination of a party’s presidential candidate.

Federal campaign finance law requires both individuals and PACs to file reports with the Commission concerning their independent expenditures. An “independent expenditure” is an expenditure made to pay for a communication “expressly advocating the election or defeat of a clearly identified candidate” for federal office and is not coordinated with that candidate. 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.16(a). The term “candidate” is defined as an individual “who seeks nomination for election, or election, to Federal office,” 52 U.S.C. § 30101(2), including the “office of President or Vice President,” *id.* § 30101(3). The term “election” includes:

- (A) a primary election;
- (B) a convention . . . of a political party which has authority to nominate a candidate;
- (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and
- (D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

Id. § 30101(1)(A)-(D).

Independent expenditures trigger three reporting requirements. First, political committees must report the amount of each independent expenditure, as well as the total amount of independent expenditures, they make in each reporting period. 52 U.S.C. § 30104(b)(4)(H)(iii). Second, a person (including a political committee) must file a report within 48 hours when making independent expenditures totaling \$10,000 or more at least twenty days “before the date of an election.” *Id.* § 30104(g)(2)(A), and additional 48-hour reports whenever subsequent independent expenditures “with respect to the same election” exceed \$10,000. *Id.* § 30104(g)(2)(B). Third, any person (including political committees) must file a report within 24 hours upon making independent expenditures totaling \$1,000 or more less than twenty days “before the date of an

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election.” *Id.* § 30104(g)(1)(A), and file additional 24-hour reports whenever subsequent independent expenditures “with respect to the same election” exceed \$1,000. *Id.* § 30104(g)(1)(B).

Each report must disclose, among other things:

- the person to whom the independent expenditure funds were paid;
- the “date, amount, and purpose” of the independent expenditure;
- a statement specifying whether the independent expenditure “is in support of, or in opposition to, a candidate,” as well as the “name and office sought by such candidate,” and
- a sworn statement about whether the expenditure was made “in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee.”

52 U.S.C. § 30104(b)(6)(B)(iii); *accord* 11 C.F.R. § 104.3(b)(3)(vii)(B).

PROCEDURAL HISTORY

A. Western Representation PAC AOR

Undersigned counsel first raised the issue the proposed regulations address in an advisory opinion request (“AOR”) filed on behalf of Western Representation PAC (“WRPAC”) in 2012. *See* Western Representation PAC, A.O. 2011-28 (Feb. 3, 2012). WRPAC sought guidance concerning its “reporting obligations for independent expenditures to be made to place advertisements on Facebook during the 2012 Presidential primary elections.” *Id.* at 1. WRPAC wished to place ads on Facebook during the Republican presidential primary season expressly advocating the election or defeat of a particular presidential candidate. *Id.* The ads would neither “reference a specific Presidential primary election,” nor be “geographically targeted to a particular State.” *Id.* at 2. For brevity, this letter will refer to such communications as “National IEs.”

Despite the fact that WRPAC’s proposed advertisements were aimed at a national audience and were intended to influence the choice of a presidential nominee at the national convention, the Commission concluded advertisements relating to potential presidential nominees which were not targeted to a particular state or presidential preference primary or caucus must be treated and reported as relating to all upcoming presidential preference primaries and caucuses. *Id.* at 4. Accordingly, the Commission directed WRPAC to divide the cost of any independent expenditure relating to the presidential nomination process by the number of upcoming state presidential preference primaries or caucuses, and report an expenditure in that amount for each of those states. *Id.* at 3-4. Thus, a committee making a single Internet-based national independent expenditure that does not target a particular geographic area or state presidential preference primary or caucus must report the transaction as a series of up to 56 distinct independent expenditures, each relating to a different state presidential preference primary or caucus. Undersigned counsel cautioned the

Commission such an approach would not only reduce the amount of information available to the public, as discussed below, *see infra* p. 7, but impose substantial reporting burdens on people wishing to engage in pure speech about presidential nominees. Even a single Internet-based independent expenditure would have to be reported as up to 56 distinct expenditures, exponentially multiplying the reporting burden on speakers, particularly for smaller entities—burdens with which many Commissioners typically lack personal experience. *See infra* pp. 10-11.

In reaching this conclusion, the Commission rejected most of the analysis it found persuasive when considering how candidates seeking a party’s nomination for president should report contributions received during the primary process. In *Forbes for President*, A.O. 1995-44 (Jan. 11, 1996), the Commission held presidential candidates need not attribute contributions to particular state presidential preference primaries or caucuses, but rather may treat each contribution as relating solely to the nominating convention itself. Treating each presidential preference primary or caucus as a separate election would require each candidate to “simultaneously track overlapping 20 day notification periods for several different primary elections.” *Id.* at 2. Moreover, attributing contributions to particular state primaries or caucuses “can be difficult or arbitrary given the national nature of most presidential primary campaigns.” *Id.* Requiring presidential candidates to attribute a contribution to various state primaries or caucuses would also require committees “to submit 48 hour notifications on an almost continual basis.” *Id.* Though the Commission did not mention it, federal campaign finance law also specifies that, for the purpose of contribution limits, “all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.” 52 U.S.C. § 30116(a)(6).

Consequently, in *Western Representation PAC* the Commission employed a very different approach concerning the process for reporting National IEs than it applied in *Forbes for President* with regard to contributions. The Commission’s only rationale was its terse, unsupported, conclusory assertion, “[I]t is neither difficult nor especially burdensome to attribute an equal amount” for an expenditure “to each subsequent election.” A.O. 2011-28, at 4 n.3. The same is equally true, of course, for contributions.

B. Initial Draft NPRM

Following undersigned counsel’s AOR in *Western Representation PAC*, and the emergence of multiple National IE campaigns in the 2012 primary precisely as predicted by *Western Representation PAC*, the burdens, reporting difficulties, and decreased transparency he warned of came to pass. In response to the numerous problems posed by *Western Representation PAC*’s requirements, the Commission considered three possible interpretive rules to reform the process for reporting National IEs. *See* Memo. from Deputy Gen. Counsel Lisa J. Stevenson, et al. to Comm’n Sec’y, *Draft Notices of Interpretive Rule Regarding Reporting Nationwide Independent Expenditures in Presidential Primary Elections*, Agenda Doc. 14-7 (Jan. 17, 2014), at <https://transition.fec.gov/law/policy/nationwideiereporting/draftnationwideiereporting.pdf>. Draft A would have declared the Commission’s Advisory Opinion in *Western Representation PAC* applies “to all political committees that make nationwide independent expenditures that support or

oppose presidential primary candidates but do not reference or target a specific State’s presidential primary election.” *Id.*, Draft A, at 3-4. Draft A reiterated:

The political committee should divide the total cost of the expenditure by the number of States that have not yet held the relevant presidential primary and report the portions of the expenditure attributable to each State’s primary election as separate entries Conducting this calculation will also allow the political committee to determine whether and when it has triggered the spending thresholds that would obligate it to file a 48- or 24-hour independent expenditure report in connection with any of the States’ primaries.

Id. at 4.

Draft B would have applied the reasoning from *Forbes for President* to national IEs. *Id.*, Draft B at 4. The draft recognized, “Requiring committees to attribute the expenditure equally to each State in which it runs is arbitrary and impracticable.” *Id.* Moreover, requiring committees to report a single National IE as a series of “confusing and overlapping entries on multiple reports would not further” the Federal Election Campaign Act’s (“FECA”) purpose of “ensur[ing] that the public receives accurate information regarding the financing of express advocacy about candidates.” *Id.* Rather, “such reporting would misrepresent the nature of the expenditure being reported.” *Id.*

Draft B would have specified political committees need not “report the State” for National IEs “that relate to presidential primary candidates but do not refer to any specific State’s primary,” but rather specify that the expenditure was “disseminated ‘nationally’ or ‘nationwide.’” *Id.* at 4-5. Committees should treat the national convention as the election to which such National IEs apply, and the first date of the convention as the election date for determining whether 24- or 48-hour reports are required. *Id.* at 5.

Draft C also embraced the reasoning of *Forbes for President*, but specified committees should use the date of the closest upcoming presidential preference primary or caucus as the date of the election to which National IEs pertain. *Id.*, Draft C at 5. Like Draft B, however, Draft C would have alleviated the need for committees to report each National IE as a series of separate, state-specific expenditures. *Id.* This alternative was, by far, the worst of the three. Due to the timing of the 56 different presidential preference primaries and caucuses, a political committee would almost constantly be slipping into, and out of, one or more 48- and 24-hour reporting periods for different jurisdictions over the course of approximately six months.

In October 2015, after receiving comments on the various drafts, the Commission considered a draft NPRM that would have amended FEC regulations rather than merely issuing an interpretive rule. *See* Memo. from Acting General Counsel Daniel A. Petalas to the Comm’n, *Draft Notice of Proposed Rulemaking for Reporting Multistate Independent Expenditures and Electioneering Communications*, Agenda Item 15-50-A (Oct. 1, 2015), at <http://sers.fec.gov/fosers/showpdf.htm?docid=341222>. The draft NPRM proposed adding a new 11 C.F.R. § 104.3(b)(3)(vii)(C), which would specify an independent expenditure supporting or

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opposing the nomination of a presidential candidate which is distributed “in more than a specified number of states” and “do[es] not refer to any particular state” must be reported as “a single expenditure,” with the memo text either declaring the expenditure was distributed “nationwide” or identifying the states in which it was distributed. *Id.* at 8-9. The Commission expressed concern that limiting the new regulation only to expenditures made on a completely nationwide basis would exclude too many expenditures. *Id.* at 8. It sought public comment on whether the proposal would promote “full, accurate and timely disclosure to the public regarding multistate independent expenditures that are made by political committees.” *Id.*

The draft NRPM also proposed a new 11 C.F.R. § 104.4(f)(2), to specify the date of the election to which National IEs relate. In accordance with Drafts B and C of the interpretive rule the FEC had considered, the proposed regulation contained two alternatives: the date of the election would be either the date of the national convention for the political party of the candidate to which the expenditure related, or the date of the next upcoming presidential preference primary or caucus for that party. *Id.* at 11. Finally, the draft NPRM contained conforming revisions to 11 C.F.R. § 109.10, for expenditures made by persons other than political committees. *Id.* at 12. The Commission voted to hold over the draft NPRM for several meetings, then eventually deadlocked on it. See FEC, *Minutes of an Open Meeting* 14-15 (Dec. 17, 2015), at <http://sers.fec.gov/fosers/showpdf.htm?docid=347751>.

C. Stop Hillary PAC and Conservative Action Fund MURs

In late 2016, undersigned counsel received notices from the Commission’s Office of General Counsel that the Reports Analysis Division (“RAD”) had referred various reports submitted by Stop Hillary PAC (“SHP”) and Conservative Action Fund (“CAF”) for possible enforcement action based on the manner in which they reported their National IEs during the 2016 presidential nomination process. Both committees responded, explaining their disclosures did not violate federal law and, in any event, the FEC’s approach to reporting National IEs violated the First Amendment.

The Commission’s notice to SHP arose from three National IEs SHP had made in the course of the 2016 Democratic presidential preference primaries:

- On October 8, 2015, SHP had made an expenditure of \$13,200 to Strategic Media Placement for a National IE in opposition to the nomination of Hillary Rodham Clinton at the Democratic National Convention. In its timely-submitted 48-hour report dated October 9, 2015, SHP specified the election to which the expenditure related was “Dem. Nat. Convention.”
- On October 20, 2015, SHP had made an expenditure of \$10,000 to CD, Inc., for a National IE in opposition to the nomination of Hillary Rodham Clinton at the Democratic National Convention. In its timely-submitted 48-hour report dated October 20, 2015, SHP specified the election to which the expenditure related was “Dem. Nat. Convention.”

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- On October 26, 2016, SHP filed an amended 48-hour report disclosing an additional \$5,000 payment to The Strategy Group for Media for a national IE in opposition to the nomination of Hillary Rodham Clinton at the Democratic National Convention. The amended report specified the election to which the expenditure related was “Dem. Nat. Convention.”

SHP’s year-end report contained materially identical disclosures concerning each of these expenditures.

RAD complained SHP’s 48-hour reports had failed to identify the “state” to which each of these expenditures related. SHP repeatedly explained in a series of Form 99 submissions the independent expenditures were for nationally distributed communications that did not mention any particular state’s primary, but rather related to the 2016 Democratic national nominating convention. Moreover, none of the expenditures were targeted to the electorate of any particular state. Disaggregating the expenditures and reporting them as a series of small, state-specific expenditures would be false and misleading. SHP also pointed out the challenged National IEs totaled only \$28,600. Had it disaggregated them into 56 separate expenditures relating to 56 different presidential preference primaries and caucuses as RAD insisted, none of those expenditures would have been sufficiently large to trigger a 48-hour reporting requirement under 52 U.S.C. § 30104(g)(2)(A). In other words, under RAD’s view of the law, SHP would not have been required to file 48-hour reports concerning its National IEs, thereby *decreasing* public transparency concerning SHP’s expenditures.

The Commission’s notice to CAF arose from a series of nine independent expenditures CAF made in August 2015, totaling \$30,000 in support of the nomination of Donald Trump at the 2016 Republican National Convention. CAF filed a 48-hour report in late August disclosing the expenditures. Two months later, on October 30, 2015, CAF filed another 48-hour report disclosing a pair of National IEs it made on October 29, 2015, totaling \$10,000, also in support of Donald Trump’s nomination at the 2016 Republican National Convention. Again, RAD complained CAF’s 48-hour reports did not attribute these expenditures to a particular state, but instead disclosed they were made with regard to the “2016 GOP Convention.”

Like SHP, CAF responded by explaining that disaggregating and reporting its expenditures as a series of small, state-specific expenditures would be false and misleading. Moreover, its challenged National IEs totaled only \$40,000. Had it disaggregated them into 56 separate expenditures relating to 56 different presidential preference primaries and caucuses, none of them would have been large enough to trigger a 48-hour reporting requirement. Again, under RAD’s approach—which it derived from *Western Representation PAC*—the public would receive less useful information, and at a much later point in time. Based on SHP’s and CAF’s responses, the Commission declined to pursue enforcement actions against either committee.

D. Current NPRM

In response to the compelling issues undersigned counsel raised on behalf of Western Representation PAC, SHP, and CAF concerning the manner in which they reported their National

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IEs, the Commission has issued a new NPRM, proposing amendments to the pertinent regulations. See FEC, *Independent Expenditures by Authorized Committees; Reporting Multistate Independent Expenditures and Electioneering Communications*, Notice 2018-01, 83 Fed. Reg. 3,996 (Jan. 29, 2018). The Commission recognized its regulations “do not specifically address how the public distribution criteria and other reporting requirements apply to independent expenditures . . . that are made in the context of a presidential primary election and that are distributed in multiple states.” *Id.* at 3,998. It is considering three possible amendments to 11 C.F.R. § 104.3(b)(3)(vii)(C), concerning the manner in which National IEs must be reported, and 11 C.F.R. § 104.4(f)(2), concerning the date of the election to which National IEs are considered to be made.

Alternative A—This proposal would amend § 104.3(b)(3)(vii)(C) to require committees to report a National IE as a single expenditure, either specifying in the memo section of the report it made on a “nationwide” basis or identifying the states to which it related. This proposal would also add a new § 104.4(f)(2), specifying the date of the election to which a National IE relates is the first day of the national convention for the political party of the candidate which the expenditure supported or opposed. 83 Fed. Reg. at 4,000.

Alternative B—This proposal would amend § 104.3(b)(3)(vii)(C) in the same manner, but amend § 104.4(f)(2) to specify the date of the election to which a National IE relates is the date of the next upcoming presidential preference primary or caucus for the political party of the candidate which the expenditure supported or opposed (from among the states which the expenditure reached). 83 Fed. Reg. at 4,000-01.

Alternative C—This proposal would amend § 104.4(f)(2) to essentially codify an even more complicated version of the failed *Western Representation PAC* approach, requiring political committees to “allocate” the amount of a National IE “among the states where it is distributed whose primary elections have yet to occur,” according to a “ratio based on the number of U.S. House of Representatives districts apportioned to each state.” *Id.* at 4,001. The date of the election would be deemed the date of the next upcoming presidential preference primary or caucus for the political party of the candidate which the expenditure supported or opposed (from among the states which the expenditure reached). 83 Fed. Reg. at 4,000-01.

The Commission asked a series of questions in connection with these proposals, including:

- whether its proposed changes “provide sufficient guidance” to political committees for National IEs;
- whether its proposed changes will “provide full, accurate, and timely disclosure to the public” about National IEs;
- the number of states to which an IE should extend to be deemed a National IE; and
- whether its proposed changes are superior to the approach set forth in *Western Representation PAC*, 83 Fed. Reg. at 4,000-02.

RECOMMENDATIONS

The Coolidge-Reagan Foundation strongly urges the Commission abandon the approach to National IEs set forth in *Western Representation PAC*. Disaggregating National IEs into a confusing, misleading series of small, state-specific expenditures serves no purpose other than stifling political participation and burdening speech by requiring speakers to secure expensive legal assistance. The Commission should instead adopt the regulatory amendments specified in Alternative A, with some sensible modification to reduce needless burdens on political speech. Part I discusses the numerous problems with the *Western Representation PAC* approach, explaining how Alternative A remedies them. Part II both summarizes the benefits of Alternative A and demonstrates its superiority to the other potential regulatory amendments under consideration.

I. THE COMMISSION SHOULD ABANDON THE WESTERN REPRESENTATION PAC APPROACH TO REPORTING NATIONAL INDEPENDENT EXPENDITURES CONCERNING CANDIDATES FOR PRESIDENTIAL NOMINATIONS

The *Western Representation PAC* approach of forcing political committees to allocate a single National IE among up to 56 jurisdictions, despite the fact it was made on a nationwide basis and did not refer to any particular state's presidential preference primary or caucus, is deficient in a variety of respects. *First*, it causes the public to receive less information, and in a less timely manner, than treating a National IE as a single expenditure. Political committees must file a 48-hour report when it makes independent expenditures totaling \$10,000 or more 20 days or more before an election, 52 U.S.C. § 30104(g)(2)(A), and a 24-hour report when it makes independent expenditures totaling \$1,000 or more less than 20 days before an election, *id.* § 30104(g)(1)(A). If political committees are required to disaggregate each National IE and treat it as series of separate state-level expenditures each relating to a different state presidential preference primary or caucus, then even sizeable expenditures may not trigger 24- or 48-hour reporting requirements. The FEC treats each state presidential preference primary or caucus as a separate election for reporting purposes. *U.S. Navy Veterans' Good Government Fund*, A.O. 2003-40, at 3 (Feb. 6, 2004). Consequently, even large expenditures would be broken down into a series of small expenditures that would be too small to require a 24- or 48-hour report.

At the outset of the presidential primary season, an expenditure would have to equal \$560,000 for a political committee to file a 48-hour report. The expenditure would be divided among the 56 jurisdictions (including the 50 states, District of Columbia, Puerto Rico, and other American possessions and territories) yet to conduct presidential preference primaries or caucuses and treated as a series of separate state-level expenditures of \$10,000 each. National IEs of less than \$560,000, in contrast, would total less than \$10,000 after being disaggregated into 56 separate state-level expenditures, and would not trigger 48-hour reporting requirements. Such expenditures would not be disclosed until the political committee's standard periodic reports. Consequently, *Western Representation PAC*'s disaggregation requirement actually frustrates FECA's main purpose by reducing transparency by delaying the disclosure of information to the public.

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Second, *Western Representation PAC*'s directives for National IE reporting presents information to the public in a much less useful form that misrepresents the true nature of the expenditures. As discussed above, *Western Representation PAC* requires political committees to report a single National IE as 56 smaller, separate, state-specific expenditures. Such inaccurate reporting misleads the public. Requiring political committees to disaggregate their National IEs makes a single expenditure appear to be numerous smaller ones. Moreover, because each large expenditure is reported as a series of smaller ones, it can be harder for members of the public to recognize the true magnitude of a particular expenditure.

Additionally, because each disaggregated expenditure is reported as being related to a different state, the true purpose of the National IE is masked. It appears as a series of individual state-level expenditures relating to various state-level primaries and caucuses, when it is actually a single expenditure that neither mentions any particular state's presidential preference primary nor is targeted to any state's population. The disclosures required by *Western Representation PAC* are inaccurate because the expenditures are actually aimed exclusively at the national convention (which FECA recognizes as a type of "election," 52 U.S.C. § 30101(1)(B)). Thus, treating a single National IE as a series of distinct state-level expenditures provides far more inaccurate and less useful information to the public than straightforwardly reporting the expenditure as a single transaction relating to the national convention.

Third, *Western Representation PAC*'s reporting requirements for National IEs raise serious constitutional issues. In general, the FEC may require entities to file reports disclosing independent expenditures. See *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010); *McConnell v. FEC*, 540 U.S. 93, 196-97 (2003); *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976) (per curiam). When compelling a private entity to engage in speech, however, the Government may not require it to make false statements—particularly under oath. See *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992) (plurality op.) (allowing state to compel private people to engage in speech only if it is "truthful and not misleading"); cf. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (holding state may compel disclosure of "purely factual and uncontroversial information").

When a speaker makes a nationally distributed communication relating to a national political convention that neither targets the population of any particular state, nor seeks to influence or mentions any state presidential preference contests, the FEC cannot compel it to falsely claim under oath it engaged in 56 different expenditures for the purpose of influencing 56 different primaries and caucuses. See *Mass. Ass'n of Private Career Schs. v. Healey*, 159 F. Supp. 3d 173, 206 (D. Mass. 2016) ("[I]f a disclosure is controversial enough or even compels false speech, it can act as a speech restriction. Specifically, if a speaker is faced with a choice between including a false disclosure in an advertisement and not advertising at all, he may choose not to speak."); *R.J. Reynolds Tobacco Co. v. U.S. FDA*, 845 F. Supp. 2d 266, 273 (D.D.C. 2012) (overturning disclosure requirement where compelled speech was not "accurate"), *aff'd* 696 F.3d 1205 (D.C. Cir. 2012), *overruled in part on other grounds*, *Am. Meat Inst. v. USDA*, 760 F.3d 18, 22 (D.C. Cir. 2014). Moreover, compelling a political committee that wishes to make a nationwide independent expenditure related to a national party convention to disaggregate and report it as relating to up to 56 different elections unnecessarily imposes an unnecessarily onerous burden.

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Under the current reporting system, to properly report the expenditure under *Western Representation PAC*'s interpretation of the law, the speaker would have to engage in the following series of steps within FECFile up to 56 different times with respect to each transaction:

1. Right-click on "Independent Expenditure" and select "New"
2. Enter the name of the recipient (*i.e.*, American Action News) in the field
3. Complete the correct organization
4. Complete the disbursement date field (*i.e.*, 8/6/2015)
5. Complete the amount field (*i.e.*, \$35.72)
6. Complete the dissemination date field (*i.e.*, 8/6/2015)
7. Complete the description field (*i.e.*, "Estimate of August monthly rental fees")
8. Click the "support" radio button
9. Complete the candidate field and select correct candidate (*i.e.*, Donald J. Trump)
10. Select the correct entry from the Category Code field (*i.e.*, Solicitation and Fundraising Expenses)
11. Select the correct entry from the Election field (*i.e.*, Primary)
12. Complete the year field (*i.e.*, 2016)
13. Complete the office field (*i.e.*, President)
14. Complete the state field (*i.e.*, Alabama)
15. Complete the district field (*i.e.*, 00)
16. Click OK
17. Create a 48-Hour Report and/or add the newly-created line-item entry to an existing report by using the Transactions tab
18. Select Add to Form.

Each of these 18 steps would have to be completed in the exact same way for up to 56 different jurisdictions—only the jurisdiction identified in Step 14 would change. Rather than a fairly self-contained 18-step process, RAD's approach would require the same information to be reported through a process that can require more than 1,000 steps (18 steps for each of 56 jurisdictions). Undersigned counsel has prepared a video of the reporting process for a single National IE to demonstrate the full extent of the burden the *Western Representation PAC* approach imposes, available at <https://www.political.law/nationalexpenditures>. This process is even more onerous, requiring thousands of additional steps, when an entity initially reports the estimated cost of a National IE, then later must amend its filing to report its actual cost.

Thus, replacing *Western Representation PAC* with a more efficient, accurate approach would alleviate the substantial unnecessary burden and avoid serious constitutional questions. For these reasons, the Commission should adopt new regulations governing disclosure of National IEs.

II. REPLACING WESTERN REPRESENTATION PAC WITH ALTERNATIVE "A" IN THE NPRM WOULD BEST PROMOTE FECA'S PURPOSES

The Commission should replace *Western Representation PAC* with Alternative A. Alternative A allows political committees to efficiently and accurately report their National IEs as single expenditures made on a nationwide basis. Because each National IE is reported as a single

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expenditure, rather than disaggregated into dozens of separate expenditures, such expenditures are more likely to trigger 24- and 48-hour reporting requirements. Such reports allow the public to obtain information about large expenditures in real time during the presidential nomination process, rather than having to wait for periodic reports. They also allow the public to more accurately understand the nature, purpose, and scope of such expenditures. Members of the public can see a single large expenditure was made on a nationwide basis relating to the nomination of a candidate at a national convention, rather than a series of small expenditures, each relating to a different state presidential preference primary or caucus.

Alternative A also would amend § 104.4(f)(2) to specify the election for which a National IE is made occurs on the first day of the national convention of the political party of the candidate which the National IE supports or opposes. Such an amendment is appropriate because Alternative A's revision to § 104.3(b)(3)(vii)(C) correctly treats a National IE as a single expenditure that does not relate to any particular state's presidential preference primary or caucus. A National IE that neither targets a particular geographic area nor mentions a particular state's presidential preference primary or caucus does not relate to an election in any particular state. It would therefore be inappropriate to arbitrarily apply the date of one or more such elections to the National IE. Rather, such nationwide communications should be treated as relating to the national convention at which a political party actually nominates its candidate for President.

Although Alternative A is the best alternative presented in the NPRM and far superior to the current *Western Representation PAC* approach, the Commission should modify this proposal to allow committees to import the notation for a National IE from a data file into the "Purpose Description" field, rather than requiring committees to manually input that an expenditure applies "nationwide" in a particular expenditure's memo field.

Alternative B would require National IE reports to specify that the election to which the expenditure refers will occur on the date of the next upcoming presidential preference primary or caucus for the political party of the candidate which the expenditure supports or opposes (from among the states which the expenditure reached). As explained above, by its very nature, a National IE does not relate to any particular state's presidential preference primary or caucus. Indeed, the entire premise of both Alternatives A and B is such communications cannot be disaggregated and attributed to certain states' elections. Consequently, using the date of the most imminent presidential preference votes as the date of the election to which a National IE relates would be inaccurate and misleading. Moreover, adopting Alternative B would subject persons engaging in National IEs to a continuous stream of 24- and 48-reporting deadlines over a six-month period, as various states' presidential preference primaries approach and are held. Alternative A, in contrast, establishes a consistent, transparent, far more manageable and less burdensome approach.

Finally, Alternative C is simply an even more complicated version of the failed *Western Representation PAC* approach. Rather than allocating a National IE equally among all the states yet to hold presidential preference votes, Alternative C would require political committees to allocate its expenditure among those states based on the relative number of congressional districts within each. Such obscure calculations bear no relationship to the purpose for which the

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expenditures are made. As with *Western Representation PAC* itself, this alternative requires political committees to misleadingly disaggregate National IEs into a series of smaller, state-level expenditures that each relate to a different presidential preference or primary. Moreover, the size of these disaggregated expenditures will often be too small to trigger 24- or 48-hour reporting requirements. Consequently, Alternative C not only fails to improve upon the *Western Representation PAC* approach, but manages to exacerbate its pervasive shortcomings.

CONCLUSION

For these reasons, the Commission should adopt Alternative A and promulgate the proposed amendments to 11 C.F.R. §§ 104.3(b)(3)(vii)(C), 104.4(f)(2). The Coolidge-Reagan Foundation wishes to present oral testimony at any hearing the Commission holds relating to this NPRM or any regulations promulgated pursuant thereto.

Respectfully submitted,

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