



Advice Regarding Independent Expenditures for the 2012 Municipal Elections

This memo answers some frequently asked questions about whether independent expenditure reporting in municipal elections is required. A copy of the relevant law (21-A M.R.S.A. § 1019-B) is attached with the corresponding Commission rule regarding independent expenditures. For advice about how to file an independent expenditure report, please see the instructions on the reporting form.

What is an “independent expenditure?”

Independent expenditures are payments or obligations made by individuals and organizations, acting independently of candidate campaigns, for certain communications referring to clearly identified candidates.

More specifically, payments or obligations made for communications (for example, advertisements in print or on television or the Internet, literature, robocalls) that expressly advocate the election or defeat of a candidate are always considered independent expenditures.

If the communication does not expressly advocate for the election or defeat of a candidate in a municipal election, it is not an independent expenditure and no report is required.

How do I know if my advertisement or literature “expressly advocates” the election or defeat of a candidate?

The term “expressly advocate” is defined in Chapter 1, Section 10(2)(B) of the Commission rules, which is attached to this memo. The definition includes phrases such as “Jones for House of Representatives” or “Vote for the Governor,” and other words which in context can have no reasonable meaning other than to urge the election or defeat of one or more clearly identified candidates.

Since the Commission adopted the rule, the Commission has been asked whether certain communications constitute express advocacy. In order to provide better guidance to organizations making campaign-related expenditures, the Commission has attached to this memo three examples of campaign literature, which are discussed below. Although these examples involve candidates for the Maine Legislature, the principles still apply to municipal candidates.

In February 2010, the Commission gave further consideration to some of its prior determinations applying the express advocacy rule. As a result of this review, the Commission decided to clarify that, in a communication to voters, the identification of the office sought by a candidate named in the communication is a factor that the Commission generally will consider in favor of a determination that the meaning of the communication is to urge the election or defeat of a candidate. The determination of whether the communication constitutes express advocacy will be based on the entire content of the communication, and whether the communication has any reasonable meaning other than to urge the election or defeat of a candidate.

The Commission offers the following guidance on the attached three examples of campaign literature

- In the 2008 general election, the Maine Democratic Party mailed the attached literature concerning Peter Kent. Mr. Kent was a candidate for the Maine House of Representatives, but the literature did not mention his candidacy or the election.

This communication was determined not to contain express advocacy.

- In the 2006 general election, the Maine Democratic Party sent the attached literature in support of Anne Rand. In that election, Ms. Rand was a candidate for the Maine House of Representatives, but she was not an incumbent. Nevertheless, the front of the card included the phrase “Anne Rand/State Representative.”
- In the 2008 general election, the Maine Republican Party mailed literature concerning Jane Knapp. Ms. Knapp was a candidate for the House of Representatives, and was not an incumbent. The literature did not mention her candidacy explicitly, but it contained the phrase “Maine Families Deserve a Representative Who Will Fight for Them.”

With respect to the Anne Rand and Jane Knapp literature, the Commission advises that the identification of the office sought by a candidate named in a communication will favor a determination that the only reasonable meaning of the communication was to urge the election or defeat of a candidate.

How do I report independent expenditures?

Please see the independent expenditure reporting form for instructions on how to file the report. Under the Commission’s rules, entering into an obligation to make an independent expenditure may require filing a report regardless of when the payment for the communication is made.

Does making an independent expenditure turn me or my organization into a political action committee?

If an organization spends more than \$5,000 in a calendar year to influence municipal candidate elections, it must register with the municipal clerk as a political action committee, even if its major purpose is something other than the influencing of candidate elections. (21-A M.R.S.A. § 1052(5)(A)(5))

The term “influence” means to promote, support, oppose or defeat. (21-A M.R.S.A. § 1052(4-A))

If your organization’s major purpose is to influence candidate or ballot question elections, a lower threshold (\$1,500) for the registration requirement may apply. Please contact your municipal clerk or the Commission to find out what your registration and reporting requirements are.

This requirement does not apply to individuals.

I have heard that I should not coordinate my spending with the candidate I want to support. Why?

Independent expenditures must be independent of the candidate. Any expenditure made by a third-party in consultation or cooperation with a candidate is considered to be a contribution to the candidate and is not an independent expenditure. For example, if a supporter wants to place an ad supporting a

candidate in the local newspaper and asks for and obtains a campaign photograph from the candidate or the candidate's campaign manager, that is enough to make the entire cost of the ad a contribution to the candidate. The cost would have to be reported by the candidate as a contribution. The supporter would not be required to file an independent expenditure report.

It would be permissible for a municipal candidate to accept a supporter's payment for an ad as an in-kind contribution, but only up to \$750 because that is the contribution limit per election for municipal candidates. The candidate would have to reimburse the supporter for any amount over \$750.

To find out more about what is considered to be coordination and what is not, please refer to the Commission's rule on coordination which is attached to this memo. You can also contact the municipal clerk or the Commission staff.

What if the cost of a communication is less than \$100 per candidate?

The definition of independent expenditure applies only to expenditures for communications. If the person making the communication did not spend or obligate more than \$100 per candidate to design, produce, or disseminate the communication, no independent expenditure report or rebuttal statement is necessary. However, once the aggregated costs for any candidate exceed \$100, a report must be filed for communications regarding that candidate.

Example: a community organization maintains a list of e-mail addresses of individuals who are concerned about local economic development issues. At no cost, it sends an e-mail to the concerned citizens endorsing a legislative candidate. The organization would not be required to file an independent expenditure report or submit a rebuttal statement because the communication involved no expense.

Please note that if an organization uses materials produced by another entity (e.g., a legislative scorecard), the cost of producing that material must be included in the total amount for that communication (see below).

Are there any expenditures that are exempt from the reporting requirement?

Certain election-related activities are excluded from the legal definition of "expenditure" or "independent expenditure" in the Election Law. They do not need to be reported as independent expenditures. These excluded costs include:

- News stories and editorials distributed through a broadcasting station, newspaper, or other periodical publication, unless the facilities are owned or controlled by any political party, political committee, candidate or candidate's immediate family;
- Any communication from a membership organization (e.g., a union or trade association) or corporation to its members or stockholders if that organization is not organized primarily for the purpose of influencing the nomination or election of any person for state or county office;
- Activity or communication designed to encourage individuals to register to vote or to vote if that activity or communication does not mention a clearly identified candidate;
- The use of offices, telephones, computers, or similar equipment when that use does not result in additional cost to the provider;
- The payment by a party committee for a slate card or party candidate listing (see definition below);

- A telephone survey that meets generally accepted standards for polling research and that is not conducted for the purpose of changing the call recipient's voting position or discouraging the recipient from voting;
- A telephone call made to identify an individual's position on a candidate, ballot question or political party as long as the communication contains no advocacy for or against a candidate; and
- A voter guide that consists primarily of candidates' responses to surveys and questionnaires and that contains no advocacy for or against a candidate.

For a full list of exceptions to the legal definition of "expenditure," see 21-A M.R.S.A. § 1012(3)(B).

Isn't there an exception for communications naming three or more candidates?

There is an exception for communications involving three or more candidates, but it applies only to state and local party committees and only to communications that meet the following requirements:

- The communication lists the names of at least three candidates for election to public office (this can be a combination of federal, state, and local candidates).
- The communication is distributed through public advertising such as broadcast stations, cable television, newspapers and similar media, or through direct mail, telephone, electronic mail, publicly accessible sites on the Internet, or personal delivery.
- The treatment of all candidates in the communication is substantially similar (although if required by federal law, a federal candidate may be treated differently).
- The content of the communication is limited to:
 - (1) The identification of each candidate, with which pictures may be used;
 - (2) The offices sought;
 - (3) The offices currently held by the candidates;
 - (4) The party affiliation of the candidates and a brief statement, including campaign slogans, about the party's or the candidates' positions, philosophy, goals, accomplishments, or biographies;
 - (5) Encouragement to vote for the candidates identified;
 - (6) Information about voting, such as voting hours and locations; and
 - (7) Campaign or party logos.

If the communication contains language outside the categories of this paragraph, it does not qualify as a slate card.

Does my membership organization have to report its communications to its members?

The Election Law contains an exemption for certain communications by membership organizations that are not organized primarily for the purpose of influencing an election. Communications from those organizations to their members are not considered expenditures, and therefore are not considered independent expenditures. However, if the communication expressly advocates for the election or defeat of a candidate and the cost of the communication is more than \$50 in any one candidate's election, the expenditures must be disclosed in a special report required by 21-A M.R.S.A. § 1019-A.

What if the costs of producing the communication are paid for by an organization that is different than the organization that disseminates the communication? Which organization must file an independent expenditure report?

Some of the questions posed to the Commission suggest that organizations may purchase or produce copies of a written communication and provide them to another organization that will distribute them. Persons paying for or disseminating communications will be expected to demonstrate a high degree of good faith to ensure that all design, production, and distribution costs are reported to the clerk.

When calculating whether it has spent more than \$100 per candidate, an organization that has been supplied printed communications and that distributes them must report *both* its own distribution costs *and* the value of the materials it has distributed. The organization should make a good faith effort to determine the value of the materials by ascertaining the *actual* design and production costs of the materials distributed. If the actual costs cannot be determined with a reasonable effort, the organization should estimate the fair market value of the materials it has distributed. Both the distribution costs and the value of the materials must be included in the independent expenditure report.

Example: A PAC receives 500 copies of literature referring to a candidate that it distributes one week before the general election in order to influence the outcome of the election. By checking with the person or organization that supplied the literature, the PAC determines that the actual cost of the literature was \$400. The PAC spends \$200 distributing the literature. The PAC should file an independent expenditure report with a total expenditure of \$600.

Are Section 527 organizations covered by the law?

National organizations are subject to the Maine Election Law if they raise or spend money regarding candidates for state, county or local offices in Maine. This includes so-called Section 527 organizations that are organized outside the state of Maine. If a Section 527 organization makes an expenditure that contains express advocacy, it is required to file an independent expenditure report. The organization may also have to register as a PAC if it spends more than \$5,000 to influence an election.

What is the consequence of filing an independent expenditure report late?

The late filing of an independent expenditure report can result in the assessment of a civil penalty up to \$5,000 except that if the total amount of expenditures in the report exceeds \$50,000, the maximum penalty is one-fifth of the amount reported late. (21-A M.R.S.A. § 1020-A(4-A) and (5-A))

STATUTORY PROVISION ON INDEPENDENT EXPENDITURES

21-A M.R.S.A. §1019-B. Reports of independent expenditures

1. Independent expenditures; definition. For the purposes of this section, an "independent expenditure":

A. Is any expenditure made by a person, party committee, political committee or political action committee, other than by contribution to a candidate or a candidate's authorized political committee, for any communication that expressly advocates the election or defeat of a clearly identified candidate; and

Please note: paragraph B does not apply in municipal elections.

B. Is presumed in races involving a candidate who is certified as a Maine Clean Election Act candidate under section 1125, subsection 5 to be any expenditure made to design, produce or disseminate a communication that names or depicts a clearly identified candidate and is disseminated during the 21 days, including election day, before a primary election; the 35 days, including election day, before a general election; or during a special election until and on election day.

Please note: subsection 2 does not apply in municipal elections.

2. Rebutting presumption. A person presumed under this section to have made an independent expenditure may rebut the presumption by filing a signed written statement with the commission within 48 hours of making the expenditure stating that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate, supported by any additional evidence the person chooses to submit. The commission may gather any additional evidence it deems relevant and material and must determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate.

3. Report required; content; rules. (REPEALED)

4. Report required; content; rules. A person, party committee, political committee or political action committee that makes independent expenditures aggregating in excess of \$100 during any one candidate's election shall file a report with the commission. In the case of a municipal election, the report must be filed with the municipal clerk.

A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements and matching fund provisions under chapter 14. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

B. A report required by this subsection must contain an itemized account of each expenditure aggregating in excess of \$100 in any one candidate's election, the date and purpose of each expenditure and the name of each payee or creditor. The report must state whether the expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17-A, section 451, a statement under oath or affirmation whether the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate.

C. A report required by this subsection must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form.

5. Exclusions. An independent expenditure does not include:

A. An expenditure made by a person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents;

B. A telephone survey that meets generally accepted standards for polling research and that is not conducted for the purpose of changing the voting position of the call recipients or discouraging them from voting;

C. A telephone call naming a clearly identified candidate that identifies an individual's position on a candidate, ballot question or political party for the purpose of encouraging the individual to vote, as long as the call contains no advocacy for or against any candidate; and

D. A voter guide that consists primarily of candidates' responses to surveys and questionnaires and that contains no advocacy for or against any candidate.

COMMISSION RULE ON INDEPENDENT EXPENDITURES

SECTION 10. REPORTS OF INDEPENDENT EXPENDITURES

1. **General.** Any person, party committee, political committee or political action committee that makes an independent expenditure aggregating in excess of \$100 per candidate in an election must file a report with the Commission according to this section.
2. **Definitions.** For purposes of this section, the following phrases are defined as follows:
 - A. "Clearly identified," with respect to a candidate, has the same meaning as in Title 21-A, chapter 13, subchapter II.
 - B. "Expressly advocate" means any communication that
 - (1) uses phrases such as "vote for the Governor," "reelect your Representative," "support the Democratic nominee," "cast your ballot for the Republican challenger for Senate District 1," "Jones for House of Representatives," "Jean Smith in 2002," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Woody," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word (s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Pick Berry," "Harris in 2000," "Murphy/Stevens" or "Canavan!"; or
 - (2) is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate.
 - C. "Independent expenditure" has the same meaning as in Title 21-A §1019-B. Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate and is not an independent expenditure.
3. **Reporting Schedules.** Independent expenditures must be reported to the municipal clerk in accordance with the following provisions:
 - A. Independent expenditures aggregating in excess of \$100 per candidate per election made by any person, party committee, political committee or political action committee must be reported to the municipal clerk in accordance with the following reporting schedule, unless required to be reported according to the schedule in paragraph B.
 - (1-A) **60-Day Pre-Election Report.** A report must be filed by 5:00 p.m. on the 60th day before the election is held and be complete as of the 61st day before the election.

(1-B) **11-Day Pre-Election Report.** A report must be filed by 5:00 p.m. on the 11th day before the election is held and be complete as of the 14th day before the election.

If the total of independent expenditures made to support or oppose a candidate exceeds \$100, each subsequent amount spent to support or oppose the candidate must be reported as an independent expenditure according to the schedule in this paragraph or paragraph B.

B. Independent expenditures aggregating in excess of \$250 per candidate made during the sixty days before an election must be reported within two calendar days of those expenditures.

[NOTE: WHEN THE CUMULATIVE AMOUNT OF EXPENDITURES TO SUPPORT OR OPPOSE A CANDIDATE EXCEEDS \$250, AN INDEPENDENT EXPENDITURE REPORT MUST BE FILED WITH THE MUNICIPAL CLERK WITHIN TWO DAYS OF GOING OVER THE \$250 THRESHOLD.

FOR EXAMPLE, IF AN INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES THREE EXPENDITURES OF \$100 IN SUPPORT OF A CANDIDATE ON SEPTEMBER 8TH, SEPTEMBER 13TH, AND SEPTEMBER 29TH, FOR AN ELECTION ON NOVEMBER 6, 2012, AN INDEPENDENT EXPENDITURE REPORT MUST BE FILED BY OCTOBER 1ST. THE THIRD EXPENDITURE OF \$100 MADE THE CUMULATIVE TOTAL OF EXPENDITURES EXCEED \$250 AND THE TWO-DAY REPORTING REQUIREMENT WAS TRIGGERED ON SEPTEMBER 29TH. THE REPORT MUST INCLUDE ALL THREE EXPENDITURES.

AFTER SEPTEMBER 29TH, IF THAT INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES ADDITIONAL EXPENDITURES TO SUPPORT THAT CANDIDATE, THE REQUIREMENT TO FILE AN INDEPENDENT EXPENDITURE REPORT WITHIN TWO DAYS WILL APPLY ONLY IF THE CUMULATIVE TOTAL SPENT AFTER SEPTMEBER 29TH EXCEEDS \$250. FOR EXAMPLE, IF THE INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES TWO PAYMENTS OF \$200 TO PROMOTE THE CANDIDATE ON OCTOBER 8TH AND OCTOBER 13TH, ANOTHER INDEPENDENT EXPENDITURE REPORT MUST BE FILED BY OCTOBER 15TH DISCLOSING THOSE TWO EXPENDITURES.]

Independent expenditures aggregating in excess of \$100 per candidate made after the 14th day before an election must be reported within one calendar day of those expenditures.

For purposes of the filing deadlines in this paragraph, if the expenditure relates to a legislative or gubernatorial election and the filing deadline occurs on a weekend, holiday, or state government shutdown day, the report must be filed on the deadline. If the expenditure relates to a county or municipal election, the report may be filed on the next regular business day.

- C. Reports must contain information as required by Title 21-A, chapter 13, subchapter II (§§ 1016-1017-A), and must clearly identify the candidate and indicate whether the expenditure was made in support of or in opposition to the candidate. Reports filed after the eighth day before an election must include the following information:
 - 1. the date on which the person making the expenditure placed the order with the vendor for the goods or services;
 - 2. the approximate date when the vendor began providing design or any other services in connection with the expenditure;
 - 3. the date on which the person making the expenditure first learned of the total amount of the expenditure; and
 - 4. a statement why the expenditure could not be reported by the eighth day before the election.
 - D. A separate 24-Hour Report is not required for expenditures reported in an independent expenditure report.
 - E. An independent expenditure report may be provisionally filed by facsimile or by electronic mail to an address desgi
4. **Multi-Candidate Expenditures.** When a person or organization is required to report an independent expenditure for a communication that supports multiple candidates, the cost should be allocated among the candidates in rough proportion to the benefit received by each candidate.
- A. The allocation should be in rough proportion to the number of voters who will receive the communication and who are in electoral districts of candidates named or depicted in the communication. If the approximate number of voters in each district who will receive the communication cannot be determined, the cost may be divided evenly among the districts in which voters are likely to receive the communication.

[NOTE: FOR EXAMPLE, IF CAMPAIGN LITERATURE NAMING SENATE CANDIDATE X AND HOUSE CANDIDATES Y AND Z ARE MAILED TO 10,000 VOTERS IN X'S DISTRICT AND 4,000 OF THOSE VOTERS RESIDE IN Y'S DISTRICT AND 6,000 OF THOSE VOTERS LIVE IN Z'S DISTRICT, THE ALLOCATION OF THE EXPENDITURE SHOULD BE REPORTED AS: 50% FOR X, 20% FOR Y, and 30% FOR Z.]
 - B. If multiple county or legislative candidates are named or depicted in a communication, but voters in some of the candidates' electoral districts will not receive the communication, those candidates should not be included in the allocation.

[NOTE: FOR EXAMPLE, IF AN EXPENDITURE ON A LEGISLATIVE SCORECARD THAT NAMES 150 LEGISLATORS IS DISTRIBUTED TO

VOTERS WITHIN A TOWN IN WHICH ONLY ONE LEGISLATOR IS SEEKING RE-ELECTION, 100% OF THE COST SHOULD BE ALLOCATED TO THAT LEGISLATOR'S RACE.]

Please note: Subsection 5 of Section 10 (Reports of Independent Expenditures) does not apply in municipal elections and is intentionally omitted from this attachment.

COMMISSION RULE ON COORDINATION

SECTION 6. CONTRIBUTIONS AND OTHER RECEIPTS

9. If an expenditure is made to promote or support the nomination or election of a candidate, or to oppose or defeat the candidate's opponent(s), and the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate, the expenditure is considered to be a contribution from the spender to the candidate. As used within this subsection, the term "candidate" includes a committee authorized by the candidate to promote or support his or her election, and all agents of the candidate or the authorized committee.
- A. In cooperation, consultation or in concert with includes, but is not limited to:
1. Discussion between the candidate and the creator, producer or distributor of a communication, or the person paying for that communication, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, and
 2. Participation by the candidate in making any decision regarding the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of the communication.
- B. An expenditure is presumed to be made in cooperation, consultation or concert with, or at the request or suggestion of a candidate, when
1. the expenditure is made in cooperation, consultation or in concert with any person who, during the twelve months preceding the expenditure, has been the candidate's treasurer or an officer of the candidate's authorized committee, has had a paid or unpaid position managing the candidate's campaign, or has received any campaign-related compensation or reimbursement from the candidate;
 2. when the candidate has directly shared the candidate's campaign plans, activities, or needs with the spender for the purpose of facilitating a payment by the spender on a communication to voters to promote or support the candidate; or
 3. the communication replicates, reproduces, republishes or disseminates, in whole or in substantial part, a communication designed, produced, paid for or distributed by the candidate.
- The candidate or spender may rebut the presumption by submitting sufficient contrary evidence.
- C. If a candidate requests that a party committee, political action committee, or other potential spender not make any expenditure to promote or support the candidate, or oppose or defeat the candidate's opponent(s), the request does not constitute cooperation or coordination.

- D. An expenditure will not be presumed to have been made in cooperation, consultation or concert with, or at the request or suggestion of a candidate, solely because:
1. the spender has obtained a photograph, biography, position paper, press release, logo, or similar material about the candidate from a publicly available source;
 2. the person making the expenditure has previously provided advice to the candidate on suggested communication strategies, budgets, issues of public policy, or other campaign plans or activities;
 3. the person makes an expenditure in response to a general, non-specific request for support by a candidate, provided that there is no discussion, cooperation or consultation with the candidate prior to the expenditure relating to the details of the expenditure;
 4. the spender has also made a contribution to the candidate, or has discussed with the candidate his or her campaign plans or activities as part of the candidate's solicitation for a donation;
 5. the expenditure is made by a for-profit or non-profit organization for invitations, announcements, food and beverages and similar costs associated with an event to which the candidate has been invited by the organization to make an appearance before the organization's members, employees, shareholders and the families thereof; or
 6. the expenditure is made by an individual who spends \$100 or less for costs associated with a sign that is lettered or printed individually by hand and that reproduces or replicates a candidate's campaign-related design or graphic.