

970 CMR 2.21: Independent versus Coordinated Expenditures (12/23/15 draft)

- (1) The definition of “independent expenditure” in M.G.L. c. 55, § 1 includes expenditures made “without cooperation or consultation with any candidate or a nonelected political committee organized on behalf of the candidate or an agent of the candidate” and specifies that the expenditures may not be made “in concert with or at the request or suggestion of the candidate” or a committee organized on behalf of the candidate.
- (2) The definition of an “electioneering communication” in M.G.L. c. 55, § 1 includes issue-oriented communications aired or published within 90 days of a general or special election.
- (3) Throughout this regulation, the terms “candidate” and “committee” include their agents, when the agent is acting within the scope of his or her authority. For the purposes of 970 CMR 2.21, an “agent” of a candidate or committee is any person or entity who has actual authority, either express or implied, to engage in activities on behalf of the candidate or committee. An “entity” is any group, including but not limited to an Independent Expenditure PAC, that either makes an independent expenditure or electioneering communication expenditure, as those terms are defined in M.G.L. c. 55, § 1.
- (4) *Coordinated expenditures are treated as Contributions.* For purposes of 970 CMR 2.21, any expenditure is considered a contribution if it is coordinated and funds a communication that: (i) expressly advocates the nomination, election or defeat of a clearly identified candidate or candidates; or (ii) is an electioneering communication, i.e., a communication that names a clearly identified candidate or candidates and is distributed within 90 days of an election; or (iii) taken as a whole, unambiguously urges a particular result in an election.
- (5) *Conduct constituting coordination.* A communication is coordinated if made under any of the following circumstances:
 - (a) *General Coordination Prior to Communication.* The expenditure is made at the request, suggestion, or direction of, or in cooperation, arrangement, consultation, concert or coordination with the candidate or committee on whose behalf, or for whose benefit the expenditure is made. Such contact must occur prior to the publication or airing of the communication.

(b) *Involvement in the Specifics of the Communication.* The communication is created, produced, or disseminated after discussion or consultation between the creator, producer, or distributor of the communication, or the person or entity paying for that communication, and the candidate or committee benefited by the communication, regarding the content, timing, location, mode, intended audience, volume of distribution, or frequency of the communication.

(6) *Expenditures Presumed to be Coordinated.* In addition to the general conduct constituting coordination described in 970 CMR 2.21(5), there is a presumption that an expenditure funding a communication subject to 970 CMR 2.21 would be a coordinated communication and a contribution under any of the following circumstances:

(a) *Expenditures made through an agent.* The expenditure is made by or through an agent of the candidate or committee in the course of the agent's involvement in the current campaign. The "current campaign" means the primary, preliminary or general election for an elective office, and also means any special election for an elective office.

(b) *Common consultants.* The person or entity making the expenditure retains the services of a person or entity such as a political, media or legal consultant, or polling firm, who also provides either the candidate or the committee with professional services related to strategy for the current campaign. This presumption does not apply, however, to an attorney providing professional services to a candidate or committee solely on compliance or reporting requirements of the campaign finance law. The presumption may be rebutted, in accordance with 970 CMR 2.21(7), by evidence demonstrating that the services were provided consistent with a previously established written firewall policy that prohibits the flow of strategic non-public information to the person or entity making the expenditure.

(c) *Former staff.* The person or entity making the expenditure employs a staff member who previously worked in a senior position or advisory capacity on the candidate's or officeholder's staff within ninety days prior to the date of the election in which the expenditure is made. If the expenditure is made by an entity, the expenditure is presumed to be coordinated if the entity is

established, run, or staffed in a leadership role, or advised, by an individual who previously worked in a senior position or advisory capacity on the candidate's or officeholder's staff within sixty days prior to the date of the election in which the expenditure is made. The presumption may be rebutted, in accordance with 970 CMR 2.21(7), by evidence demonstrating that the services were provided consistent with a written firewall policy that prohibits the flow of strategic non-public information to the person or entity making the expenditure.

- (d) *Campaign Needs.* The expenditure is based on information about the candidate's or committee's campaign needs or plans that the candidate or committee provided to the person or entity making the expenditure, such as information concerning campaign messaging, planned expenditures or polling data.
- (e) *Fundraising.* In the course of the current campaign, the candidate who benefits from the expenditure solicits funds for or appears as a speaker or draw at a fundraiser held by the person or entity making the expenditure.
- (f) *Candidate's family.* The person making the expenditure is a member of the candidate's immediate family, or if the expenditure is made by an entity, the entity making the expenditure is established, run, staffed in a leadership role, or principally funded by an individual who is an immediate family member of the candidate.
- (g) *Republication.* A communication relating to a candidate republishes, in whole or in part, a communication available to the public including a communication posted on the candidate's Internet or social media site. This presumption shall not apply, however, to the use of photographs taken from the candidate's Internet or social media site, provided there is no discussion with the candidate or committee prior to the expenditure relating to the details of the expenditure.
- (h) *Advance notification.* The person or entity making a communication provides advance notification to the candidate or committee of the planned expenditure.

(7) *Rebuttal of Presumption and Expenditures Not Presumed to be Coordinated.* An expenditure is not considered to be coordinated if made consistent with a firewall policy described in 970 CMR 2.21(7)(a). In addition, a person or entity that has made an expenditure that is presumptively coordinated may seek to rebut the presumption by submitting evidence to OCPF demonstrating that the expenditure was independent. Relevant facts that may be submitted include the expenditure maker's history of making independent expenditures or electioneering communications, as well as facts relating to the timing, content and geographic distribution of a communication. In addition, expenditures that take place solely under the circumstances described in 970 CMR 2.21(7)(b)-(k) are also not presumed to be coordinated:

- (a) *Written Firewall Policy.* A person or entity that provides a candidate or committee with professional services related to campaign or fundraising strategy implements a firewall policy that meets the criteria in 970 CMR 2.21(7)(a) to prohibit the flow of strategic non-public information between the individual or entity and the campaign.
 - i. The firewall policy must designate specific staff that will solely service the candidate, and specific staff that will solely service persons making independent expenditures or electioneering communications;
 - ii. The firewall policy must provide for physical and technological separations to ensure that strategic non-public information does not flow between the person or entity and the candidate or committee; and
 - iii. The firewall policy must be written, and distributed to all relevant employees, consultants, and clients affected by the policy.

- (b) *Photographs.* The person or entity making the expenditure uses a photograph of the candidate, provided there is no discussion with the candidate or committee prior to the expenditure relating to the details of the expenditure.

- (c) *Prior contribution.* The person or entity making the expenditure has previously made a contribution to the candidate or committee.

(d) *Informed after the fact.* A person or entity informs a candidate or committee after the publication or airing of a communication that the person or entity has paid for the communication, if there is no other exchange of information, not otherwise available to the public, relating to the details of the expenditure and no discussion or exchange of information relating to any future expenditure that may be made by the person or entity.

(e) *Candidate or committee forwards the communication after the fact.* The candidate or committee learn of the communication after the fact and then forwards the communication to potential supporters.

(f) *Hyperlink.* The communication includes a hyperlink to the Internet website or a social media page of a candidate or committee, provided there is no discussion with the candidate or committee regarding the planned use of the hyperlink.

(8) *Ballot Question Related Expenditures.* 970 CMR 2.21 (4)-(7) apply to communications made to support or oppose a ballot question. For example, a communication made to support a ballot question must be disclosed as an in-kind contribution to the ballot question committee supporting the question by the individual or entity paying for the communication if the individual or entity coordinated the communication with the ballot question committee.