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**INTERPRETIVE BULLETIN**

**Express and Issue Advocacy, Independent Expenditures,  
Electioneering Communications and Coordinated Communications**

This bulletin provides guidance regarding whether communications supporting or opposing a candidate may involve the making of in-kind contributions or independent expenditures subject to the requirements of the Massachusetts campaign finance law, M.G.L. c. 55. The bulletin also discusses communications that may involve either "issue advocacy" or "electioneering communications." In addition, the bulletin summarizes the impact of "coordination" on communications that would otherwise be issue advocacy, independent expenditure communications, or electioneering communications.

**I. Background**

This office is frequently asked for guidance regarding the applicability of the Massachusetts campaign finance law to communications that might be viewed as "issue oriented," but which might also appear to be supporting or opposing a candidate. Whether such communication is an in-kind contribution subject to the limits of the campaign finance law, an independent expenditure, or an electioneering communication, depends on the content and timing of the communication and whether the communication was "coordinated" with the candidate or the candidate's committee.

Communications that *expressly advocate* (i.e., urge the viewer or reader to vote for or against a specific candidate) are subject to the campaign finance law as either "expenditures" or "contributions." Communications by an individual or group<sup>1</sup> that contain "express advocacy" may require the filing of reports to disclose independent expenditures, or might reflect the making of an in-kind contribution reportable by the recipient candidate/committee. Alternatively, if a communication does not contain express advocacy, it may be considered either issue advocacy or an electioneering communication, depending on the timing of the communication and the means by which it is distributed.

<sup>1</sup> Except where stated in this bulletin (in particular, in the discussion of independent expenditures on pages 3-5), the guidance in this bulletin applies to communications by individuals or groups other than political committees.



Issue-oriented communications that refer to a clearly identified candidate, and do not include express advocacy, which are aired or published *without coordination* with a candidate or candidate's committee within 90 days of a general or special election are, by definition, "electioneering communications," and are subject to disclosure. See M.G.L. c. 55, § 1. *If coordinated and distributed within 90 days of an election*, issue-oriented communications clearly identifying a candidate are generally considered to be in-kind contributions subject to contribution limits and disclosure. See 970 CMR 2.21(4).<sup>2</sup>

## II. Express Advocacy

In general, the costs incurred by an individual or group in making a communication must be disclosed by the individual or group if the communication contains "express advocacy," as opposed to "issue advocacy." A communication contains "express advocacy" regarding a clearly identified candidate if it contains one of the following:

- (1) Explicit words that urge the nomination, election or defeat of the candidate, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Senate," "vote against," "defeat," or "reject" or synonymous words, such as "unseat";
- (2) Individual words 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 "Smith in 2018," "Smith/Jones for Massachusetts," etc.; or
- (3) A communication that, when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates because (a) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (b) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or encourages some other kind of electoral action. See 970 CMR 2.21 (4)(c). For example, a symbol or other graphic representation explicitly supporting or opposing a candidate, if combined with a word or symbol relating to the nomination or election of the candidate (such as the candidate's name with an "x" drawn through it combined with a reference to the date of the election, or a copy of the ballot with only one candidate's name checked) would be considered express advocacy.

In Buckley v. Valeo, 424 U.S. 1 (1976) the Supreme Court articulated a distinction between contributions and expenditures, stating that while restrictions on contributions entail only a marginal restriction upon the contributor's ability to engage in free communication, restrictions on expenditures for political communication represent substantial restraints on political speech and are

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<sup>2</sup> Coordination is discussed in detail on pages 7-9.

therefore entitled to the closest scrutiny. Buckley, 424 U.S. at 19-26. Applying this level of scrutiny, the Court determined that the Federal Election Campaign Act's limit on expenditures "relative to a clearly identified candidate" in 2 U.S.C. § 608(e)(1) was impermissibly vague. *See Buckley*, 424 U.S. at 39-45.

The Court stated that the vagueness issue could, however, be avoided "by reading [the statute] as limited to communications that include *explicit words of advocacy of election or defeat of a candidate*," such as "vote for," "elect," "defeat," or "reject." This came to be known as the "magic words" requirement. In addition, the Court examined the disclosure provisions in 2 U.S.C. § 431, which defined "expenditure" to include the use of money or other assets "for the purpose of ... influencing" a federal election. *See Buckley*, 424 U.S. at 61. Again, the Court determined that to avoid vagueness problems, the statute should be interpreted to reach only funds used for communications that contain explicit words of advocacy. *Id.*

The "magic words" requirement led to a situation where groups could finance certain communications with money not regulated by the federal campaign finance statute if those communications avoided explicit words of advocacy even if the communications were, in reality, designed to support or oppose candidates. These communications became known as "issue ads."<sup>3</sup>

In response, in later cases, the Supreme Court stated that there are limited instances where express advocacy may be found in a communication that does not contain "magic words." *See Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S. Ct. 876, 889 (2010) (in which the Court indicated that a film that does not contain "magic words," but which emphasizes the negative impact of a vote for a particular candidate, is the "functional equivalent of express advocacy" since there could be "no reasonable interpretation" of the film "other than as an appeal to vote" against the referenced candidate).

Accordingly, a communication will not be considered express advocacy unless it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate. Any doubt will be resolved in favor of the communication not being considered express advocacy. Wisconsin Right to Life, Inc. v. FEC, 551 U.S. 449, 451 (2007).

### **III. Independent Expenditures (Express Advocacy not Coordinated)**

In Buckley, the Court, in addition to drawing a distinction between express and issue advocacy, also stated that *independent expenditures* are subject to constitutional protection. Buckley, 424 U.S. at 26-29. Section 1 of the Massachusetts campaign finance law defines "independent expenditures," and Section 18A establishes the disclosure required when independent expenditures are made. *See M.G.L. c. 55, §§ 1 and 18A.*

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<sup>3</sup> To obtain disclosure for such communications made shortly before an election, Congress and some state legislatures enacted "electioneering communications" statutes such as M.G.L. c. 55, § 18F (*see* Part IV of this bulletin).

An "independent expenditure" is an "expenditure made or liability incurred by an individual, group, association, corporation, labor union, political committee or other entity...to expressly advocate the election or defeat of a clearly identified candidate; provided, however, that the expenditure is made or incurred without cooperation or consultation with any candidate, or a nonelected political committee organized on behalf of the candidate, or any agent of the candidate and is not made or incurred in concert with or at the request or suggestion of the candidate, a nonelected political committee organized on behalf of the candidate or agent of the candidate." *See* M.G.L. c. 55, § 1.

#### A. Disclosure

Section 18A requires any "individual, group, association, corporation, labor union, political committee, or other entity that makes independent expenditures in an aggregate amount exceeding \$250 during any calendar year for the express purpose of promoting the election or defeat of a candidate" to file a report disclosing those independent expenditures.

Independent expenditure reports must be filed within seven (7) business days of the date the goods or services purchased are utilized. *See* 970 CMR 2.17(3). If the independent expenditure, however, is made "after the 10th day, but more than 24 hours, before the date of any election," the report must be filed within 24 hours of making the expenditure.<sup>4</sup> If the exact amount of the expenditure made within ten days of an election is not known, a preliminary report must be filed within 24 hours of making the expenditure, with an estimated amount, and a follow-up final report can then be filed within seven (7) business days to report the actual amount of the expenditure.<sup>5</sup>

A political committee may also make independent expenditures.<sup>6</sup> If a committee makes such an expenditure, it must, like any entity making independent expenditures, a political committee making an independent expenditure must file a report of independent expenditures within 7 business days of the date the goods or services are utilized. In addition, it must disclose the making of the independent expenditure in its regularly filed campaign finance reports. *See* M-14-03, which states that a committee making an independent expenditure must include, in its reports, a notation that the expenditure was an "independent expenditure" and also state the name of the candidate(s) supported or opposed and whether the expenditure supported or opposed the candidate(s).

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<sup>4</sup> For purposes of calculating when a 24-hour report is required, "after the 10<sup>th</sup> day, but more than 24 hours before the date of any election" (the language in § 18A), means any time on the 9<sup>th</sup> day before the election through any time on the 2<sup>nd</sup> day before the election. For example, for an election held on November 10, a 24-hour report would be required for any independent expenditures made between November 1 and November 8.

<sup>5</sup> For independent expenditures that reference candidates who file with OCPF, independent expenditure reports are filed electronically with OCPF; if the independent expenditure references a candidate who files locally, the independent expenditure report is filed on paper with the local election official with whom the candidate files his or her campaign finance reports.

<sup>6</sup> Independent expenditures by candidate committees would not be subject to either the \$100 limitation on contributions made by one candidate committee to another, or the prohibition on contributions by statewide candidates receiving public financing to other candidates.

### B. Effect of Coordination

Where an organization, political committee, or individual makes an expenditure containing express advocacy in coordination or consultation with a candidate or the candidate's committee, the organization, political committee, or individual has made an in-kind contribution to the candidate.<sup>7</sup> In-kind contributions are subject to the limits (including the prohibition on corporate contributions) and disclosure requirements of the campaign finance law.

### C. Independent Expenditure PACs

If an organization, independently of a candidate or the candidate's committee, pays for a communication containing express advocacy *and also* raises funds for the purpose of paying for the communication, the organization or group becomes a political committee, known as an "independent expenditure PAC." Like other political committees, an independent expenditure PAC must disclose not only expenditures but also receipts. See 970 CMR 2.17(3) and IB-10-03. An independent expenditure PAC, however, may *only* make independent expenditures. It may not contribute to candidates or committees or coordinate expenditures with candidates or committees.

### D. Corporate contributions vs. independent expenditures

The Supreme Court has ruled that Citizens United applies to state laws similar to Section 8. See American Tradition Partnership Inc. v. Bullock, 567 U.S. 516 (2012), 132 S.Ct. 2490 (reversing a judgment of the Montana Supreme Court which had upheld a Montana statute prohibiting corporate campaign expenditures).

Section 8 states that business corporations and other entities specified in Section 8 (including partnerships, LLCs or LLPs) may not "expend or contribute...any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding or promoting or antagonizing the interest of any political party." In light of Citizens United and American Tradition Partnership, corporations or other entities named in Section 8 may make independent expenditures, but *still may not make contributions* to support or oppose Massachusetts candidates or political parties. If a corporation or other individual or entity makes an independent expenditure in excess of \$250, a report disclosing the independent expenditure must be filed, as required by M.G.L. c. 55, § 18A.

### E. Disclaimers

Advertisements and other communications that are independent expenditures may, in accordance with M.G.L. c. 55, § 18G, require special disclaimers in the communication. Section 18G specifies when disclaimers are required to identify the top five contributors to the entity

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<sup>7</sup> Coordinated electioneering communications, i.e., communications naming a candidate distributed within 90 days of an election, are also considered in-kind contributions. See 970 CMR 2.21(4).

making the communication, and also when a statement of responsibility identifying the person who authorized the communication, may be required. *See* 970 CMR 2.20.

#### **IV. Electioneering Communications**

Electioneering communications are defined in the Massachusetts campaign finance law as “any broadcast, cable, mail, satellite or print communication that: (1) refers to a clearly identified candidate; and (2) is publicly distributed within 90 days before an election in which the candidate is seeking election or reelection; ***provided, however, that “electioneering communication” shall not include*** the following communications: (1) a communication that is disseminated through a means other than a broadcast station, radio station, cable television system or satellite system, newspaper, magazine, periodical, billboard advertisement, or mail; (2) a communication to less than 100 recipients; (3) a news story, commentary, letter to the editor, news release, column, op-ed or editorial broadcast by a television station, radio station, cable television system or satellite system, or printed in a newspaper, magazine, or other periodical in general circulation; (4) ***expenditures or independent expenditures or contributions that must otherwise be reported under this chapter***; (5) a communication from a membership organization exclusively to its members and their families, otherwise known as a membership communication; (6) bona fide candidate debates or forums and advertising or promotion of the same; and (7) internet or email communications. (*Emphasis added*). M.G.L. c. 55, § 1.

Electioneering communications must be disclosed in accordance with M.G.L. c. 55, § 18F. Individuals or groups that make electioneering communication expenditures *exceeding* \$250 (aggregated for a candidate) in a calendar year must file a report disclosing the activity within 7 days of the date the communication was utilized. *See* M.G.L. c. 55, § 18F and 970 CMR 1.14(1).<sup>8</sup>

For example, an advertisement might support a candidate’s position on an issue, but stop short of asking for a vote in favor of the candidate. The communication is an electioneering communication only if: (1) it is made by mail, broadcast, or by one of the other methods<sup>9</sup> specified in M.G.L. c. 55, § 1; (2) the communication is made within 90 days of a general or special election<sup>10</sup>; and (3) there is no coordination between the candidate/committee and the individual or entity paying for the communication. In contrast, if a candidate or candidate’s committee works with the group paying for the ad, i.e., there is coordination, and if the ad is aired or published within 90 days of a general or special election, the ad would be an in-kind contribution, subject to contribution limits.

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<sup>8</sup> For guidance on whether an electioneering communication or independent expenditure communication requires a disclaimer under M.G.L. c. 55, § 18G, refer to IB-10-01.

<sup>9</sup> The definition of “electioneering communication” excludes communications “disseminated through a means other than a broadcast station, radio station, cable television system or satellite system, newspaper, magazine, periodical, billboard advertisement, or mail.” *See* M.G.L. c. 55, § 1.

<sup>10</sup> This means that, for an election in early November, the relevant period in which an electioneering communication may occur extends back 90 days, or to early August. There is no additional 90 day period before the primary, and an issue advocacy expenditure that clearly identifies a candidate made in July is not an electioneering communication. *See* 970 CMR 1.14(1).

Individuals or groups that make electioneering communication expenditures *exceeding* \$250 (aggregated for a particular candidate) in a calendar year must file a disclosure report of the activity *within 7 days of the date the goods or services purchased are utilized*. For example, if a group pays \$200 to publish an electioneering communication advertisement 80 days before a general election and then spends \$200 to publish a different electioneering communication for the same candidate which is published 40 days before the election, the report must be filed within 7 days after the date the second advertisement was published. If the expenditures are made for different candidates, however, no electioneering communication disclosure would be required. *See* M.G.L. c. 55, § 18F.

After the 7<sup>th</sup> day, but more than 48 hours, before any general or special election, an individual or group spending \$1,000 or more for an electioneering communication must file a disclosure report of the activity within 48 hours of when the communication is made. For example, if an electioneering communication ad that costs \$1,000 or more referencing a candidate for Governor is broadcast at 4:00 PM four days before an election, the electioneering communication disclosure report must be electronically filed no later than 4:00 PM two days before the election. In addition, a 48 hour report must also be filed to disclose expenditures made during the 7-day period before a primary or preliminary election.<sup>11</sup> *See* M.G.L. c. 55, § 18F and 970 CMR 1.14. If the funds used to make the expenditure came from a 3<sup>rd</sup> party, contributor information for persons contributing more than \$250 to the purchasing entity or individual must be disclosed as well.

Although the definition in Section 1 of “electioneering communication” does not explicitly reference voter guides, voter guides are excluded from the definition of “electioneering communication” by regulation. *See* 970 CMR 1.14(1). A voter guide is not an electioneering communication if all candidates running for the same office are asked the same questions and are given an equal opportunity to respond to the questions, and the communication does not contain additional language, images, or symbols, conveying support or opposition to any candidate(s).

As with independent expenditure communications, electioneering communications may also require disclaimers to identify top donors to the entity making the communication, as well as a statement of responsibility from the person authorizing the expenditures. *See* M.G.L. c. 55, § 18G and 970 CMR 2.20 and IB-10-01.

## **V. Coordination**

The distinction between in-kind contributions and independent expenditures is important because, as noted above, if a communication is coordinated, the expenditures made become in-kind contributions, and in-kind contributions, unlike independent expenditures, are subject to limits and

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<sup>11</sup> “Within 7 days before the date of an election,” as used in the part of M.G.L. c. 55, § 18F requiring the filing of reports of electioneering communication expenditures aggregating \$1,000 or more made” within seven days before the date of an election,” means the period within 7 days prior to a general election, or *within 7 days prior to a special, primary or preliminary election*. *See* 970 CMR 1.14(1).

prohibitions.<sup>12</sup> Any entity or person that is prohibited from making contributions under the campaign finance law is also prohibited from paying for coordinated communications.

OCPF has issued regulations, 970 CMR 2.21(5), to define when expenditures are considered coordinated. The regulations state that an expenditure is "coordinated" if it 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." Coordination may also be found if a 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."

The regulations also specify that certain conduct, while not necessarily reflecting coordination, creates a *presumption of coordination*, which may be rebutted. See 970 CMR 2.21(6). The following situations lead to a presumption that the individual or entity paying for a communication coordinated the expenditure with the candidate or committee:

- (a) The expenditure is made by the individual or entity through an agent of the committee;
- (b) The person or entity making the expenditure retains the services of a consultant or vendor, who concurrently provides either the candidate or the committee with professional services related to strategy;
- (c) 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;
- (d) 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 during the current campaign;
- (e) 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) 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;

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<sup>12</sup> In addition, political committees that coordinate contributions with other committees may be considered "affiliated" committees. See 970 CMR 1.06 (for purposes of contribution limitations, contributions are "considered to be made by a single political committee if made by more than one political committee established, financed, maintained, or controlled by any person, including any parent committee of a subsidiary committee or any person other than a natural person.")



(g) A communication relating to a candidate republishes, in whole or in part, a communication that is posted on the candidate's Internet or social media site; or

(h) The person or entity making a communication provides advance notification to the candidate or committee of the planned expenditure.

There are several ways to rebut a presumption of coordination. An entity may, for example, create a firewall to avoid the flow of information about campaign plans, projects, activities, or needs to the persons involved in a communication intended to be independent.<sup>13</sup> For it to successfully rebut the presumption of coordination, a firewall policy must be described in a previously created written policy that is distributed to all relevant employees, consultants, and clients affected by the policy. *See* AO-06-07.

In addition, the presumption of coordination may be rebutted by facts demonstrating that the individual or entity making an expenditure has a longstanding practice of acting independently of a candidate referenced in a communication. Also, the timing and content of the communication may further suggest that it was independent.

In the absence of a firewall or other facts rebutting the presumption of coordination, if a key officer of an organization that has coordinated communications for a candidate or party personally finances a communication regarding the same candidate or party or a communication containing express advocacy supporting the candidate or party, the communication will generally be seen as involving an in-kind contribution from that person to the candidate or committee.

## **VI. Conclusion**

Disclosure is generally not required if an individual or group pays for a communication that is publicly distributed more than 90 days before a general or special election, if the communication does not contain express advocacy. When an individual or group makes a communication referencing a candidate *within 90 days of a general or special election*, however, one of the following occurs:

(1) If the communication is coordinated with a candidate, it is an in-kind contribution to the candidate that must be disclosed by the committee. The funds the individual or group used to make the expenditure would be subject to the limits on contributions under the campaign finance law, including the prohibition on contributions from corporate or other business entities, as set forth in M.G.L. c. 55, § 8;

(2) If the communication is independent *express advocacy* of more than \$250, it is an independent expenditure that must be disclosed in accordance with M.G.L. c. 55, § 18A; or

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<sup>13</sup> Photographs may, however, be obtained from a publicly available source without triggering a presumption if there is no discussion with the candidate or committee prior to the expenditure.

(3) If the communication is independent *issue advocacy* that meets the definition of "electioneering communication" in Section 1, and is not subject to one of the exceptions to the definition of "electioneering communication" listed in M.G.L. c. 55, § 1, a report of an electioneering communication must be filed in accordance with Section 18F.

If a communication is non-coordinated issue advocacy and is made more than 90 days before a general or special election, no disclosure is required. The disclosure requirements are summarized in the attached chart.

We encourage candidates, committees and interested individuals or groups to contact OCPF if they have any questions regarding independent expenditures, electioneering communications, or coordination, or any other questions relating to this bulletin.<sup>14</sup>

  
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<sup>14</sup> Candidates and their committees may give this Interpretive Bulletin to anyone who requests guidelines regarding the making of independent expenditures. Such distribution, alone, will not involve "coordination" that would, by itself, jeopardize the independence of expenditures made by the recipient.

### Communication Disclosure Requirements

<b>Type</b>	<b>Coordination Allowed?</b>	<b>Timing</b>	<b>Disclosure Required?</b>	<b>When</b>	<b>Who must disclose?</b>	<b>Attribution required?</b>	<b>Cite<sup>1</sup></b>
<b>Electioneering communication</b>	No	Within 90 days of an election <sup>2</sup>	Yes, if more than \$250	Within 7 days. If over \$1,000 and made within 7 days of any primary or election, an additional report is required within 48 hours.	Purchaser	Yes, if transmitted through radio, TV or Internet <sup>3</sup>	M.G.L. c. 55, §§ 1, 18F and 18G; 970 CMR 1.14
<b>Issue ad</b>	Maybe <sup>4</sup>	May be published at any time, but if it mentions candidate and is within 90 days before an election, it is an electioneering communication. If coordinated and made within 90 days of an election, it generally would be an in-kind contribution. <sup>5</sup>	No	N/A	N/A	No	N/A
<b>In-kind contribution</b>	Yes (subject to limits)	Anytime	Yes	In regular campaign finance reports	Recipient Candidate/Committee	No	970 CMR 2.07(3)
<b>Independent expenditure</b>	No	Anytime	Yes, if more than \$250	Within 7 business days. If made after the tenth day but more than 24 hours before any primary or election, an additional report is required within 24 hours.	Purchaser <sup>6</sup>	Yes, if transmitted through radio, TV or Internet <sup>3</sup>	M.G.L. c. 55, §§ 1, 18A and 18G; 970 CMR 2.17

<sup>1</sup> This table provides **general** guidance only. For additional information, refer to the listed statutes or regulations, or to interpretive bulletins IB-06-01, IB-10-01 (disclaimers on independent expenditure and electioneering communications), or IB-10-01 (independent expenditure PACs), or contact OCPF.

<sup>2</sup> The relevant period for electioneering communications extends back 90 days from the general election. There is no additional 90 day period before the primary. See 970 CMR 1.14.

<sup>3</sup> The attribution language, requiring identification of the person who authorized the ad, is provided in M.G.L. c. 55, § 18G. In addition, a disclaimer of the top donors to the entity may be required.

<sup>4</sup> A coordinated issue ad may be considered an in-kind contribution, and would not be allowed if it would result in a prohibited or excess contribution. See Part V of IB-06-01.

<sup>5</sup> A coordinated issue ad by a political party committee that references a candidate is an in-kind contribution to the candidate even if the publication of the ad takes place more than 90 days prior to an election. Issue ads by other groups or individuals that are not coordinated and published more than 90 days prior to an election are not subject to regulation under the campaign finance law.

<sup>6</sup> If a political committee makes an independent expenditure, however, the committee must disclose the expenditure.