

# Even Before 2019 Holiday Season, 2020 Pre-Election Time Windows Are Going Into Effect

---

November 2019

Iowa's presidential caucuses – scheduled for February 3 for the 2020 election cycle – have long been a significant mile marker on the path to the White House. But even before this “first in the nation” presidential electoral event is held, pre-election time windows regulating election-related activities already are starting to go into effect.

Companies, PACs, and other entities that intend to engage in any activities in connection with elections for federal or state office are faced with a complex regulatory calendar. Independent activities that occur close in time to an election, and even activities that are not, in fact, election-related, such as coordinated grassroots advocacy, could be regulated under these pre-election time windows.

**FEC Coordination Rules.** The first pre-election time window regulating the 2020 presidential race actually kicked in on October 6, 2019 – 120 days before the Iowa caucuses. Under Federal Election Commission (FEC) rules, any public communication in Iowa during this time window that refers to a presidential candidate seeking the nomination of any of the parties holding caucuses in Iowa may be regulated as an in-kind contribution if it is coordinated with one of the candidates, their campaigns, a political party, or their agents. For ads mentioning presidential candidates, this coordination time window lasts through the general election. For ads mentioning many U.S. House and Senate races, this pre-election coordination time window will begin on December 4, 2019 – 90 days before the March 3, 2020 “Super Tuesday” event, when many states will hold congressional and presidential primaries.

## Authors

---

D. Mark Renaud  
Partner  
202.719.7405  
mrenaud@wiley.law

## Practice Areas

---

Election Law & Government Ethics  
Federal Election Commission  
Representation

(The 120-day pre-election time window for communications that refer to a presidential candidate – known in FEC parlance as a “*content standard*” – should not be confused with the other 120-day time window under the FECs’ coordination rules. Under that “*conduct standard*,” hiring or retaining an employee or contractor who also has worked for a candidate, candidate’s committee, or political party within the past 120 days – irrespective of any upcoming election – also could trigger the coordination rules if one of the FEC’s five “content standards” is met as well.)

If a public communication is regulated as an in-kind contribution under the 90/120-day windows, it is subject to the limits and prohibitions that apply to monetary contributions. That means for a conventional PAC, the spending on the communication could exceed the PAC’s contribution limit, while for corporations (including trade associations and Section 501(c)(4) entities) and super PACs the spending would be prohibited outright.

**Electioneering Communications/Grassroots Advocacy.** As the infomercials say, “But wait, there’s more ... .” Under the FEC’s “electioneering communication” rules, advertisements that are run on broadcast, cable, or satellite television or broadcast radio may trigger reporting and disclaimer requirements if they refer to a federal candidate within 30 days before a primary (e.g., beginning January 4, 2020, for the upcoming Iowa presidential caucuses) or 60 days before a general election and are “targeted to the relevant electorate.”

Although the law deems them to be “electioneering,” such ads may include pure grassroots advocacy, such as ads urging constituents to contact their members of Congress to either support or oppose the impeachment proceedings. Such ads could be deemed “electioneering” with respect to named members of Congress up for re-election, President Trump, or both.

Notably, the electioneering communication reporting and disclaimer requirements apply regardless of whether an ad is coordinated. However, an ad that qualifies as an electioneering communication also triggers one of the above-mentioned “content standards” in the FEC’s coordination rules, and could therefore also be regulated as a coordinated communication if it also satisfies one of the coordination “conduct standards.”

As noted in the last issue of *Election Law News*, a number of states also have electioneering communication laws for ads that refer to candidates for state office. Many of these states follow the federal 30/60-day pre-election time windows. However, some states have much longer time windows: Alabama’s time window begins 120 days before any election, while Massachusetts’ begins 90 days before any election.

**IRS “Facts and Circumstances” Test.** For tax-exempt organizations, pre-election time windows matter not only for the purposes of coordination and electioneering communications under the campaign finance laws. Under the Internal Revenue Service’s (IRS) nebulous “facts and circumstances” test, whether a communication “is delivered close in time to [an] election” is a factor in determining whether the communication is political campaign activity if it can be construed as “favoring or opposing a candidate.” Section 501(c)(3) charities and educational institutions generally may not engage in any political campaign activity, while such activity is limited for Section 501(c)(4) advocacy groups and Section 501(c)(6) trade associations.

The IRS has never clearly articulated a bright-line rule for how “close” to an election is too close. However, a document the agency put out several years ago suggests the IRS follows the same 30/60-day pre-election time windows for “electioneering communications” under the federal campaign finance law. That is to say, if a public communication is disseminated within 30 days before a primary or within 60 days before a general election and refers to any candidate running in that election, it is at greater risk of being treated by the IRS as political campaign activity.

As we head into the final stretch of 2019, now is the time for politically active organizations to start marking their calendars for all of the pre-election time windows that may apply to them in connection with next year’s elections. Wiley Rein’s Election Law Practice tracks and advises clients on all federal and state laws that regulate activities within these windows.