

television (*see* 11 CFR 100.29(b)(3)) and the term “publicly disseminated” refers to communications that are made public via other media, *e.g.*, newspaper, magazines, handbills. New paragraph (g)(4) explains when communications that are mailed are considered to be “publicly distributed.”

New paragraph (j) of section 104.5 addresses the filing dates for electioneering communications. Specifically, it provides that the 24-hour statements must be received by the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the disclosure date.

#### 11 CFR 104.19 [Reserved]

Section 104.19 of 11 CFR is added and reserved for future use.

#### 11 CFR 104.20 Reporting Electioneering Communications

##### 1. Introduction

In the Explanation and Justification for the Electioneering Communications Final Rules, the Commission stated it would revise the proposed rules on reporting electioneering communications and re-propose the rules as part of this rulemaking.<sup>1</sup> 67 FR at 65,209. Consequently, the NPRM for this reporting rulemaking included the revised proposed rules for the reporting requirements for electioneering communications at proposed 11 CFR 104.20. The following explanation and justification for 11 CFR 104.20 discusses comments resulting from the Reporting NPRM and the Electioneering Communications NPRM. Although the Electioneering Communications NPRM would have designated the reporting of electioneering communications as section 104.19, the proposed rules in the Reporting NPRM designated reporting of electioneering communications as proposed section 104.20. In the following explanation and justification, citations to 104.19 refer to the original proposed rules in the Electioneering Communications NPRM, and citations to 104.20 refer to the proposed rules in the Reporting NPRM and the final rules.

##### 2. 11 CFR 104.20(a) Definitions

New section 104.20(a) includes the definitions for the relevant terms that are used throughout new section 104.20. These terms are: (1) Disclosure date; (2) direct costs of producing or airing electioneering communications; (3) persons sharing or exercising direction or control; (4) identification; and (5) publicly distributed.

##### A. 11 CFR 104.20(a)(1) Definition of “Disclosure Date”

BCRA requires persons who make electioneering communications that cost more than \$10,000 to file disclosure statements with the Commission within 24 hours of the disclosure date. 2 U.S.C. 434(f)(1). In the Electioneering Communications NPRM, proposed section 104.19(b) would have defined “disclosure date” as “the first date by which a person has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing electioneering communications aggregating in excess of \$10,000.” 67 FR at 51,145. The Electioneering Communications NPRM, however, also sought comment on whether the disclosure date should be the date on which the electioneering communication aired. Thus, under this proposal, an organization could make disbursements or enter into a contract to make disbursements that exceed \$10,000, but would not be required to disclose the disbursements or contract until the electioneering communication is aired. Although BCRA uses the term “airing,” the Commission has determined that “publicly distributed” more accurately encompasses how electioneering communications are disseminated to the public, including the airing of these communications. *See* below for discussion of the definition of “publicly distributed.”

All of the commenters who addressed this issue disagreed with the proposed rule in the Electioneering Communications NPRM and advocated adopting a final rule that would define “disclosure date” as the date of the public distribution of the electioneering communication. They argued that there is no electioneering communication, and therefore no reporting requirement, until the communication is actually publicly distributed.

Taking into consideration the comments described above, proposed section 104.20(a)(1) in the Reporting NPRM would have defined “disclosure date” as the date on which an electioneering communication is publicly distributed where there have been disbursements, or executed contracts for disbursements, for the direct costs of producing or airing an electioneering communication aggregating in excess of \$10,000. The Commission received one comment on the revised proposed definition of “disclosure date” at section 104.20(a)(1), which supported this approach. The final rule in section 104.20(a)(1) is similar to the proposed

rule. This date reflects the Commission’s concerns that there are legal and practical issues associated with compelling disclosure of potential electioneering communications before they are finalized and publicly distributed, and premature disclosure may require reporting entities to divulge confidential strategic and political information about their possible future activities.

Consequently, under new section 104.20(a)(1)(i), “disclosure date” means the first time in a calendar year that an electioneering communication is publicly distributed where the maker of the electioneering communications has also surpassed the \$10,000 disbursement threshold. Counting toward the threshold are disbursements made at any time for the direct costs of producing or airing either that communication or any other previously unreported electioneering communication. Thus, even disbursements for the direct costs of producing or airing the electioneering communication made in calendar years prior to the public distribution of the electioneering communication are aggregated toward the \$10,000 threshold. Conversely, any costs already reported for earlier electioneering communications are not aggregated toward the \$10,000 threshold. After the first disclosure date, subsequent disclosure dates occur in the same calendar year in which an electioneering communication is publicly distributed, if that person has made additional disbursements for the direct costs of producing or airing an electioneering communication that, in the aggregate, exceed \$10,000. 11 CFR 104.20(a)(1)(ii). The following example illustrates how the definition of “disclosure date” operates. From November of one year to March of the next year, Person X spends \$25,000 in direct costs to produce and air an electioneering communication, and the communication is publicly distributed on March 15. Thus, March 15 is the initial disclosure date under 11 CFR 104.20(a)(1)(i). Person X then pays another \$5000 to publicly distribute the same communication on April 1. April 1 is not a disclosure date because the subsequent disbursement does not exceed \$10,000. On April 15, Person X publicly distributes a different electioneering communication for which she spent \$7000 in direct costs to produce and air. April 15 is a disclosure date under 11 CFR 104.20(a)(1)(ii) because that is the date on which the communication was publicly distributed and the aggregation of the

<sup>1</sup> The original proposed rules were part of the Electioneering Communications NPRM. *See* 67 FR at 51,145.