

disbursements for the direct costs after the initial disclosure date (\$5000 plus \$7000) exceeds \$10,000.

*B. 11 CFR 104.20(a)(2) Definition of "Direct Costs of Producing or Airing Electioneering Communications"*

In the Electioneering Communications NPRM, proposed section 104.19(a) would have required every person who makes a disbursement, or executes a contract, for the direct costs of producing or airing electioneering communications that aggregate in excess of \$10,000 during a calendar year, to file a statement with the Commission. Electioneering Communications NPRM, 67 FR at 51,145–46. Furthermore, proposed section 104.19(a)(2) would have included a non-exhaustive list of what constitutes direct costs of electioneering communications. *Id.* The Commission sought comment on two issues relating to this proposed requirement. The first was whether the list in proposed section 104.19(a)(2) was adequate and whether the list should be exhaustive. The second issue was whether the direct costs of producing an electioneering communication and the direct costs of airing it should be aggregated separately or together to determine whether such costs exceed \$10,000. The second issue is discussed in further detail in the explanation and justification for new section 104.20(b).

The commenters on the Electioneering Communications NPRM were split on the issue of whether the list of direct costs in proposed section 104.19(a)(2) should be exhaustive or non-exhaustive. One commenter who supported an exhaustive list argued that it is clear what is involved in producing a communication, and the proposed rule adequately addresses those costs. Another commenter recommended a non-exhaustive list so that the Commission could retain flexibility to identify other costs associated with producing and airing communications not listed in the proposed rules.

In order to provide clear guidance on this issue, proposed 11 CFR 104.20(a)(2) in the Reporting NPRM included an exhaustive list of direct costs associated with producing or airing an electioneering communication. The Commission sought comments on whether the proposed definition should include any other direct costs associated with producing or airing electioneering communications. In particular, the Commission sought comment on what, if any, additional in-house production costs should be considered direct costs.

The final rule in new section 104.20(a)(2) is similar to the proposed rule in the Reporting NPRM, and

defines "direct costs of producing or airing" with an exhaustive list. Paragraph (a)(2)(i) has been clarified to include "costs charged by a vendor" to show that the nature of service, not the nature of the vendor providing the service, controls whether its cost should be included. (The NPRM version listed "costs charged by a production company," which unduly focused on the type of company providing the service.) Paragraph (a)(2)(ii) has been revised to include the cost of studio time and material costs, which are in-house out-of-pocket production costs. The Commission understands "direct cost of producing or airing electioneering communications" as used in 2 U.S.C. 434(f)(4)(A) and (B) to include all such out-of-pocket costs and to not distinguish between those provided by vendors or those provided by in-house resources.

One commenter addressed the issue of what should be included in an exhaustive list. The commenter supported an exhaustive list and agreed with the items on the list in proposed section 104.20(a)(2). The commenter also suggested that the Commission make clear in the final rule that the definition does not "include planning or preparatory costs such as polling and focus groups, or in-house costs such as staff compensation and other overhead."

Paragraph (a)(2)'s list of vendor production costs, in-house production costs, and airtime costs is exhaustive. Only costs that fit within these categories are included. Illustrative examples of costs charged by a vendor are also included in the regulation, and these examples are not exhaustive. Paragraph (a)(2)(ii) makes clear that part of the costs addressed by the commenter, which are described as "in-house costs such as staff compensation and other overhead," are not among the enumerated out-of-pocket costs, so they will not be included in paragraph (a)(2)(ii). The other of the commenter's examples of polling and focus groups are not production costs as they are too attenuated from the resulting communication to be considered "direct costs of producing or airing an electioneering communication" under 2 U.S.C. 434(f)(4).

The final rule requires statements of electioneering communications to be filed when the direct costs of producing or airing electioneering communications exceed \$10,000. In both the Reporting NPRM and the Electioneering Communications NPRM, the Commission sought comment on how to aggregate the direct costs of producing or airing an electioneering communication to determine whether

the \$10,000 threshold has been exceeded. The commenters on the Electioneering Communications NPRM disagreed on this issue. Some commenters argued that BCRA should be read to require that production costs should be aggregated separately for the airtime costs. Under this interpretation, if it costs a person \$7,000 to produce the electioneering communication and \$7,000 to air it, the threshold is not met because neither the direct costs of producing or airing the electioneering communication exceeded \$10,000. In contrast, other commenters argued that BCRA mandates that the direct costs of producing and airing the electioneering communication be aggregated. Under this approach, the example above would result in the \$10,000 threshold being met because the direct costs of producing and airing are \$14,000.

The Commission has decided that it is appropriate to require that the costs of producing and the costs of airing be added together, rather than counted separately, to determine whether the threshold has been met. Thus, when the direct costs of producing or airing an electioneering communication exceed \$10,000 when combined, the person who makes the electioneering communication would be required to file a statement with the Commission when the electioneering communication is publicly distributed. Additionally, the Commission agrees with a commenter who noted that, as a practical matter, for most electioneering communications, the \$10,000 threshold will be exceeded, regardless of whether the production costs and the airing costs are aggregated separately or together.

*C. 11 CFR 104.20(a)(3) Definition of "Persons Sharing or Exercising Direction or Control"*

The Electioneering Communications NPRM included two proposed alternatives, identified as Alternative 4–A and Alternative 4–B, to implement the BCRA requirement to disclose "any person sharing or exercising direction or control over the activities" of the person making the disbursement for electioneering communications. See 2 U.S.C. 434(f)(2)(A). Many of the commenters asserted that both alternatives were vague and could encompass a large number of people, especially for electioneering communications made by membership organizations. Some of the commenters were also concerned that disclosing this information may reveal sensitive or confidential information and the decision-making processes of organizations, especially non-profit organizations, thereby placing them at a