

competitive disadvantage. For these reasons, these commenters argued that the Commission should require limited, if any, disclosure of persons who share or exercise direction or control over the person who makes disbursements for electioneering communications or the activities involved in making electioneering communications.

In contrast, several commenters, including the Congressional sponsors of BCRA, disagreed with both alternatives because in their view neither would disclose sufficiently the information required by BCRA. See 2 U.S.C. 434(f)(2)(A). They asserted that BCRA requires disclosure of not only those who have direction or control over the electioneering communications, but also those who have direction or control over the organization that makes the electioneering communications.

While the Commission recognizes the concerns of those who objected to disclosure of the decision-making process of their organizations, BCRA requires persons who make electioneering communications to disclose those who share or exercise direction or control over the person making the disbursement for electioneering communications. 2 U.S.C. 434(f)(2)(A). Because neither Alternative 4-A nor Alternative 4-B in the Electioneering Communications NPRM appeared to encompass the disclosure required by BCRA, proposed section 104.20(c)(2) in the Reporting NPRM did not incorporate either of the two alternatives. Instead, proposed paragraph (c)(2) followed the wording of 2 U.S.C. 434(f)(2)(A).

To provide further guidance on proposed section 104.20(c)(2), the proposed rules included a definition of "sharing or exercising direction or control." Because it appears that the term "direction or control" in 2 U.S.C. 434(f)(2)(A) refers to the management or decision-making process of an organization, including a qualified nonprofit corporation ("QNC"), proposed section 104.20(a)(3) would have defined "sharing or exercising direction or control" to mean exercising authority or responsibility for policy formulation, day-to-day management, obligation of funds, or hiring or firing employees.

The Commission also sought comment on an alternative definition of "sharing or exercising direction or control" that was not in the proposed rule. Reporting NPRM, 67 FR at 64,560. Under the alternative definition described in the NPRM, the term would mean the officers, directors, partners, or any other individuals who have the authority to bind the organization,

entity, or person making the disbursement for electioneering communication. With this alternative the Commission sought a more objective, bright-line definition of "direction or control" that focused the definition on those persons who have the authority to act on behalf of the organization. One commenter addressed this issue. The commenter supported the alternative definition arguing that proposed section 104.20(a)(3) was overly broad and that the alternative definition better captured the requirements of BCRA. The commenter also suggested that the alternative definition be further narrowed to include only officers, directors, and partners.

The Commission is adopting this bright-line alternative approach described in the NPRM, with the clarifications described below, as new section 104.20(a)(3) because it properly encompasses BCRA's clear requirement to identify persons who exercise direction or control over the person making the electioneering communication. The Commission prefers the clarity of the bright-line approach to what may be the broader coverage of the NPRM's proposed rule text in order to avoid the vagueness involved in describing the functions that the rule intended to capture. New section 104.20(a)(3) defines "persons sharing or exercising direction or control" with a list of organizational positions that are readily known and verifiable: officer, director, executive director, partner, and in the case of unincorporated organizations, owner. In addition to this list, new section 104.20(a)(3) includes the "equivalent" of executive director. This term is intended to include the senior staff position in an organization, whatever its title, that functions as an executive director does. Thus, the Commission believes that the positions named or described in new section 104.20(a)(3) provide sufficient scope to capture responsible persons without sweeping too broadly.

D. 11 CFR 104.20(a)(4) Definition of "Identification"

New section 104.20(a)(4) incorporates the definition of the term "identification" in 11 CFR 100.12. This definition is identical to the proposed definition. No commenter discussed this definition.

E. 101 CFR 104.20(a)(5) Definition of "Publicly Distributed"

In the Electioneering Communications Final Rules, the Commission defines "publicly distributed" to mean "aired,

broadcast, cablecast, or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system." 11 CFR 100.29(b)(6). Therefore, new section 104.20(a)(5) adopts the definition of "publicly distributed" in 11 CFR 100.29(b)(6). The term "publicly distributed" is used throughout the final rules instead of "airing," except in the definition of "direct costs of producing or airing."

3. 11 CFR 104.20(b) Who Must Report and When

New section 104.20(b) details who must report electioneering communications to the Commission and when those statements are due. The final rule states that every person who makes a disbursement or executes a contract to make a disbursement for electioneering communications that exceeds \$10,000 in direct costs must file a statement with the Commission by the end of the day following the disclosure date. The various elements of this final rule are discussed in further detail below.

The definitions of "electioneering communication" in 11 CFR 100.29 and "disclosure date" in 11 CFR 104.20(a)(1) must be satisfied in order for an electioneering communication reporting obligation to arise. Thus, for example, because expenditures are exempted from the definition of "electioneering communication" by 2 U.S.C. 434(f)(3)(B)(ii) and 11 CFR 100.29(c)(3), political committees that pay for communications with funds reportable as expenditures do not report these payments under 11 CFR 104.20. Similarly, a "disclosure date" must have occurred, so the provisions of 11 CFR 104.20(a)(1)(i) or (ii) must have been satisfied.

BCRA requires that statements of electioneering communications be filed within 24 hours of the disclosure date, that is the date on which an electioneering communication is publicly distributed, assuming the \$10,000 threshold has been exceeded. 11 CFR 104.20(a)(1). One witness at the August 28, 2002 public hearing on electioneering communications acknowledged that in some cases it may be difficult to ascertain when an electioneering communication is publicly distributed for purposes of triggering the 24-hour reporting period. This is because the contract may not specify a precise time that the communication will be publicly distributed or because in some instances the broadcaster does not air the communication during the block of time specified in the contract, although the