

In the new reporting provisions for electioneering communications in BCRA, the statute uses the terms “contributor” and “contributed,” “but it does not use the term “contribution.” 2 U.S.C. 434(f)(2)(E) and (F). BCRA uses the more general “disbursement” more frequently. 2 U.S.C. 434(f)(2)(A), (B), (C), (E), and (F). Nor does BCRA amend the definition of “contribution.” See 2 U.S.C. 431(8). Additionally, the Commission concluded that political committees do not make disbursements for electioneering communications by operation of the expenditure and independent expenditure exemptions. Based on this analysis, the Commission proposed to treat funds given to persons who make electioneering communications as “donations.” See also Reporting NPRM, 67 FR at 64,560–61. One commenter agreed with the Commission’s approach and none opposed it. At this point, the Commission concludes that its analysis of the statutory wording is correct. Accordingly, the final rules treat these funds as “donations” and not as “contributions.”

In reading 2 U.S.C. 434(f)(2)(E) and (F) together with 2 U.S.C. 441b(c)(3)(B), the Commission stated in the Electioneering Communications NPRM that the disclosure requirements for segregated bank accounts appear to apply only to qualified nonprofit corporations (QNCs) organized under 26 U.S.C. 501(c)(4). See 67 FR at 51,143 and 11 CFR 114.10. Therefore, proposed 11 CFR 104.19(b)(6) would have permitted only QNCs to use segregated bank accounts to limit disclosure of their donors to only those who donate \$1000 or more to that account. Commenters on the Electioneering Communications NPRM urged that this option be made available to all persons who make electioneering communications, and not just QNCs. Because the Commission agreed with this suggestion, proposed 104.20(c)(7) in the Reporting NPRM made this option available to all persons.

The Commission continues to agree with this approach. Accordingly, new section 104.20(c)(7) in the final rules allows all persons who establish a separate bank account consisting of funds provided solely by individuals who are United States citizens, nationals, or permanent residents to limit their reporting of the identities of their donors of \$1,000 or more to those donors who have given directly to that bank account, as long as only funds from the separate bank account are used to pay for electioneering communications. Please note that the final rules at 11 CFR 114.14(d)(2), as published previously in the

Electioneering Communications Final Rules, provide such persons that are not QNCs with the option of establishing a segregated bank account similar to that allowed to QNCs. 67 FR 65,212.

Although no commenter addressed this provision specifically, one joint comment questioned the requirement that QNCs disclose their donors. The joint commenter made constitutional arguments and cited *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (“*MCFL*”) and other cases in support of the assertions that disclosure of its donors imposes a burden on its free speech rights. They also stated that the segregated bank account option creates an administrative burden and would still require disclosure of some of their donors. The joint comment suggested that, with regard to QNCs, the Commission impose the same requirements for disclosure of electioneering communication as it does for independent expenditures arguing that legislative history indicates that Congress intended them to be treated similarly.

In some respects, the reporting rules applicable to QNCs’ electioneering communications require less disclosure than those applicable to QNCs’ independent expenditures. Electioneering communication rules require disclosure of donors of \$1,000 or more, while independent expenditure rules require disclosure of contributors of more than \$200. Compare new 11 CFR 104.20(c)(7) or (8) with new 11 CFR 109.10(e)(1)(vi). Additionally, electioneering communications are not subject to disclosure until disbursements related to them exceed \$10,000, and the similar threshold for independent expenditures is \$250. See 11 CFR 104.20(a)(1). While reporting of independent expenditure contributors is limited to those who contributed specifically for independent expenditures, 11 CFR 109.10(e)(1)(vi), QNCs can also reduce their reporting obligations by using separate bank accounts pursuant to 11 CFR 104.20(c)(7).

More generally, a commenter on the Electioneering Communications NPRM and the joint comment on the Reporting NPRM argued that the members of the organizations they represent could be subject to negative consequences if their names are disclosed in connection with an electioneering communication. The FECA provides for an advisory opinion process concerning the application of any of the statutes within the Commission’s jurisdiction or any regulations promulgated by the Commission, and such groups could also seek an advisory opinion from the

Commission to determine if the groups would be entitled to an exemption from disclosure that would be analogous to the exemption provided to the Socialist Workers Party. See Advisory Opinions 1990–13 and 1996–46 (both of which allowed the Socialist Workers Party to withhold the identities of its contributors and persons to whom it had disbursed funds because of a reasonable probability that the compelled disclosure of the party’s contributors’ names would subject them to threats, harassment, or reprisals from either Government officials or private parties). BCRA’s legislative history shows that some in Congress recognized the need for limited exceptions in these circumstances. See 148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (remarks of Sen. Snowe). The Commission disagrees with the joint commenters’ assertion that the standard for obtaining a waiver is too high, given the significant disclosure interests Congress sought to protect in the political arena.

Nevertheless, *MCFL* status does not exempt a corporation from the independent expenditure reporting requirements. It only exempts the *MCFL* corporation’s use of its own funds from the prohibitions of 2 U.S.C. 441b. The Supreme Court in *MCFL* specifically noted the reporting requirements of 2 U.S.C. 434(c) and stated that “these reporting obligations provide precisely the information necessary to monitor *MCFL*’s independent spending activity and its receipt of contributions.” *MCFL*, 479 U.S. at 262. Thus, the Commission’s extension of the exemption of *MCFL* does not apply to reporting requirements for electioneering communications. Therefore, the Commission declines to create separate electioneering communication reporting requirements for QNCs.

H. 11 CFR 104.20(c)(8) Disclosure of Donors When Not Using a Segregated Bank Account

The Electioneering Communications NPRM explaining proposed section 104.19(b)(7) clearly stated that all persons who make electioneering communications, including QNCs that do not use segregated bank accounts, would be required to disclose their contributors who contribute an aggregate of \$1,000 or more during the prescribed time period. 67 FR 51,143. Nevertheless, some commenters interpreted proposed section 104.19(b)(7) to apply only to QNCs and objected to limiting the disclosure requirements to only QNCs. They argued that BCRA does not limit the requirements of 2 U.S.C. 434(f)(2)(E) and (F) to just QNCs. Consequently, they