Proposed Rules

Federal Register
Vol. 67, No. 152
Wednesday, August 7, 2002

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 104, 105 and 114

[Notice 2002–13]

Electioneering Communications

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission is seeking comment on proposed rules regarding electioneering communications, which are certain broadcast, cable, and satellite communications that refer to a clearly identified Federal candidate within 60 days of a general election or within 30 days of a primary election for Federal office. The proposed rules implement the Bipartisan Campaign Reform Act of 2002 (''BCRA''), which adds to the Federal Election Campaign Act (''FECA'' or ''the Act'') new provisions regarding ''electioneering communications.'' The proposed rules would require any person who makes disbursements for electioneering communications in excess of $10,000 in a calendar year to file a disclosure statement within 24 hours of the time the disbursements exceed $10,000. Additionally, BCRA prohibits incorporated entities and labor organizations from making electioneering communications. The proposed rules would implement this prohibition. Please note that the draft rules that follow do not represent a final decision by the Commission on the issues presented by this rulemaking. In fact, some of the draft rules are offered as alternatives. Regardless, the Commission seeks comments on all of the issues that are raised in this rulemaking. Further information is provided in the supplementary information that follows.

DATES: The Commission will hold a hearing on these proposed rules on August 28–29, 2002, at 9:30 a.m. Commenters wishing to testify at the hearing must submit their request to testify along with their written or electronic comments by August 21, 2002. Commenters who do not wish to testify must submit their written or electronic comments by August 29, 2002.

ADDRESSES: All comments should be addressed to Ms. Mai T. Dinh, Acting Assistant General Counsel, and must be submitted in either electronic or written form. Electronic mail comments should be sent to *Electioneering@fec.gov* and must include the full name, electronic mail address, and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address, and the postal service address of the commenter will not be considered. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. The Commission will make every effort to post public comments on its Web site within ten business days of the close of each comment period. The hearing will be held in the Commission's ninth floor meeting room, 999 E. St. NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Acting Assistant General Counsel, Mr. J. Duane Pugh, Jr., Acting Special Assistant General Counsel, or Mr. Anthony T. Buckley, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, 116 Stat. 81 (March 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* This is one of a series of Notices of Proposed Rulemakings (''NPRM'') the Commission will publish over the next several months in order to meet the rulemaking deadlines set out in BCRA.

This NPRM addresses electioneering communications, that is, certain broadcast, cable, or satellite communications that refer to a clearly identified candidate for Federal election that are made within 60 days of a general election or within 30 days of a primary election. Other rulemakings have addressed or will address: (1) Non-Federal funds or ''soft money'' promulgated on June 22, 2002 (67 FR 49063 (July 29, 2002)); (2) coordinated and independent expenditures; [1] (3) the so-called ''millionaires' amendment,'' which increases contribution limits for congressional candidates facing self-financed candidates on a sliding scale, based on the amount of personal funds the opponent contributes to his or her campaign; (4) new or amended contribution limitations and prohibitions; (5) other new and amended provisions, including inaugural committees, fraudulent solicitations, disclaimers, personal use of campaign funds, and civil penalties; (6) reporting; and (7) reorganization of ''contribution'' and ''expenditure'' definitions. The reporting NPRM will contain the reporting rules proposed in several of the other NPRMs and will restructure 11 CFR part 104 to make the reporting rules more user-friendly. The deadline for the promulgation of the remaining rules (including those proposed in this NPRM) is 270 days after the date of BCRA's enactment, or December 22, 2002.

What Is an Electioneering Communication?

I. Introduction

BCRA at 2 U.S.C. 434(f)(3) defines a new term, called ''electioneering communications.'' This term includes broadcast, cable, or satellite communications: (1) That refer to a clearly identified Federal candidate; (2) that are transmitted within certain time periods before a primary or general election; and (3) that are ''targeted to the relevant electorate,'' that is, the relevant congressional district or State that candidates for the U.S. House of Representatives or the U.S. Senate seek to represent. Communications that refer to candidates for President or Vice-President do not need to be targeted to be electioneering communications. Those paying for the communications must meet certain disclosure requirements, and they cannot use funds from national banks, corporations, foreign nationals,[2] or labor organizations to pay for the communications. *See* 2 U.S.C.

[1] That future NPRM will also address electioneering communications that are coordinated with candidate and political party committees.

[2] The ban on foreign national funds will be addressed in a separate rulemaking.

441b(b)(2) and 441e(a)(2), as amended by BCRA section 203(b) and 303.

BCRA's sponsors have explained that these new ''electioneering communications'' provisions, set out at new 2 U.S.C. 434(f) and 441b(b)(2), are designed to ensure that campaign advertisements are paid for with funds subject to the prohibitions and limitations of campaign finance laws. According to the sponsors, putative ''issue ads'' have been used to circumvent FECA's prohibition on the use of union and corporate treasury funds in connection with Federal elections. In the sponsors' view, this is accomplished by creating and airing advertisements that avoid the specific language that the Supreme Court has said expressly advocates the election or defeat of a candidate. *See* 148 Cong. Rec. S2140–2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain); *see also Buckley* v. *Valeo*, 424 U.S. 1, 44, fn. 52 (1976); 11 CFR 100.22.[3]

BCRA's sponsors cited various studies and investigations that they say show that the express advocacy test does not distinguish genuine issue ads from campaign ads. 148 Cong. Reg. at S2140–2141 (statement of Sen. McCain). For example, Senator McCain cited a study by the Brennan Center for Justice, *Buying Time 2000*, that found that ''97 percent of the electioneering ads reviewed'' did not use the words and phrases cited by the *Buckley* Court, and that more than 99 percent of the ''group-sponsored soft money ads'' studied were in fact campaign ads. *Id.* at S2141. Senators Snowe and Jeffords stated that, because the electioneering communications provisions focus on the key elements of when, how, and to whom a communication is made, rather than relying on the express advocacy test or the intent of the advertiser, they are a clearer, more accurate test of whether an advertisement is campaign-related. *Id.* at S2117–18 (statement of Sen. Jeffords); S2135–37 (statement of Sen. Snowe).

[3] ''Express advocacy'' was first defined by the Supreme Court as ''communications containing express words of advocacy of election or defeat, such as 'vote for,'' 'elect,'' 'cast your ballot for,'' 'Smith for Congress,'' 'vote against,'' 'defeat,'' 'reject.' '' *Buckley* at 44. fn. 52 (1976). The Supreme Court created the express advocacy test to save the statutory phrase ''for the purpose of * * * influencing''—the ''critical phrase'' within the definitions of ''expenditure'' and ''contribution'' at 2 U.S.C. 431(8) and (9)—from unconstitutional vagueness while furthering the goal of Congress ''to insure both the reality and the appearance of the purity and openess of the federal election process.'' *Buckley* v. *Valeo*. 424 U.S. 1, 77–78 (1976). The Court's express advocacy test marked the dividing line between advocacy regulated by the FECA and the advocacy of ''issues of public interest,'' both of which are constitutionally protected , *Id*. at 42, 44, 80.

Accordingly, the proposed rules would add a new definition for ''electioneering communication,'' to be located at proposed 11 CFR 100.29. The new definition would be added to current 11 CFR part 100 because it has general applicability to Title 11 of the *Code of Federal Regulations.*

II. Alternative Definition

BCRA at 2 U.S.C. 434(f)(3)(A)(ii) provides an alternative definition of ''electioneering communication,'' which would take effect in the event the definition in section 434(f)(3)(A)(i) is held to be constitutionally insufficient ''by final judicial decision.'' The alternative definition of ''electioneering communication'' is ''any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.'' *Id.* The Commission is not proposing regulations to implement this alternative statutory definition at this time. Proposing two definitions for the same term, one to take effect only after the other may be held invalid, could be confusing to those who are affected by this new law. Additionally, any court decision regarding 2 U.S.C. 434(f)(3)(A) may provide guidance as to the appropriate standard. Consequently, the Commission intends to promulgate regulations to implement this alternative definition when and if it becomes necessary to do so. Nevertheless, in the alternative, the Commission seeks comment as to whether it should promulgate an alternative definition now. If so, should this definition simply reiterate the wording of the statute, or should it provide additional guidance as to what types of communications promote, support, attack, or oppose a candidate and suggest no plausible meaning other than an exhortation to vote for or against a candidate?

III. Definition of ''Electioneering Communication''

A. Overview

BCRA amends 2 U.S.C. 434 by adding a new term, ''electioneering communication,'' at section 434(f)(3). BCRA defines ''electioneering communication'' as a broadcast, cable, or satellite communication that: (1) Refers to a clearly identified candidate for Federal office; (2) is made within 60 days before a general, special, or runoff election, or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; (3) does not fall within any of the exceptions to the electioneering communication specified in the statute; and (4) in the case of a candidate for an office other than President or Vice-President, is targeted to the relevant electorate. BCRA also provides exceptions to the definition, and authorizes the Commission to approve additional exceptions.

The proposed definition of electioneering communication at proposed 11 CFR 100.29(a) largely tracks the language in BCRA. However, the word ''made'' as in ''made within 60 days'' would be changed to ''publicly distributed'' to clarify that it refers to the broadcasting or airing of the communication rather than the making of a disbursement for an electioneering communication. The proposed definition would also clarify that, in the case of a candidate for nomination for President or Vice-President, the 30-day window applies in those States that will hold a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate for President or Vice-President, during that time.

The Commission's current rules at 11 CFR 100.2 contain definitions of ''general election,'' ''primary election,'' ''runoff election,'' ''caucus or convention,''and ''special election.'' Under 11 CFR 100.2(f), a ''special election'' could be a primary, general, or runoff election. BCRA, however, groups ''special election'' with general and runoff elections for purposes of an electioneering communication. Proposed new paragraph 100.29(a)(2) would clarify that, for purposes of section 100.29 only, ''special elections'' and ''runoff elections'' would be considered primary elections, if held to nominate a candidate; and general elections, if held to elect a candidate. Comments are sought on this approach.

B. Definition of ''Refers to a Clearly Identified Candidate''

Proposed 11 CFR 100.29(b) would set out definitions of the terms used in 11 CFR 100.29(a). The first definition, at proposed 11 CFR 100.29(b)(1), defines the term ''refers to a clearly identified candidate.'' This term is already defined in the Commission's rules at 11 CFR 100.17, which states that ''clearly identified'' means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate

is otherwise apparent through an unambiguous reference such as ''the President,'' ''your Congressman,'' or ''the incumbent,'' or through an unambiguous reference to his or her status as a candidate such as ''the Democratic presidential nominee'' or ''the Republican candidate for Senate in the State of Georgia.'' The proposed rule at 11 CFR 100.29(b) would track the language of the current rule in 11 CFR 100.17. This approach appears to be consistent with legislative intent. *See* 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold indicating that a communication ''refers to a clearly identified candidate'' if it ''mentions, identifies, cites, or directs the public to the candidate's name, photograph, drawing or otherwise makes an 'unambiguous reference' to the candidate's identity''). Please note that the definition would not be based on the intent or purpose of the person making the communication.

C. Definition of ''Broadcast, Cable or Satellite Communication''

Proposed 11 CFR 100.29(b)(2) would define ''broadcast, cable, or satellite communication'' to mean a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system. The term ''distribute'' reflects the legislation's apparent focus on the means of dissemination rather than on the means of receipt.

The definition would exclude ''webcasts'' or other communications that are distributed only over the Internet, but would include television or radio communications that are simultaneously webcast over the Internet, or archived for listening over the Internet. Internet subscribers would not be included in the calculation of how many persons a communication can reach in a particular district or state. The Commission seeks comment on whether this is an appropriate reading of the statute.

The legislative history, which is discussed below, makes it clear that this regulation should be limited to television and radio. The Commission seeks comment to confirm that this interpretation is correct. All other types of communications, such as print media, billboards, telephones, and the Internet, would therefore, *not* be considered electioneering communications. Consequently, proposed 11 CFR 100.29(c)(1) would specifically list these as exceptions to the definition.

The Commission also seeks comment on whether it would also be appropriate to exempt some types of television and radio broadcasting from the definition of ''broadcast, radio or satellite.'' The Commission seeks comment on whether communications transmitted by digital audio radio satellite would be considered electioneering communications. Although newly added section 304(f)(3)(a) of BCRA seems to include communications by satellite without limitation as to the type of transmission, section 316(c)(6)(B) suggests that the term is limited to ''satellite television service.'' Proposed 11 CFR 100.29(b) would exempt Low Power FM Radio (LPFM), Low Power Television (LPTV), and citizens band (CB) radio. Are there other types of television and broadcasting that should also be exempt? How should ''web TV'' (in which viewers access the Internet using television sets) be treated for purposes of these rules?

D. Definition of ''Targeted to the Relevant Electorate''

Proposed 11 CFR 100.29(b)(3) would track the language of BCRA at 2 U.S.C. 434(f)(3)(C) in defining ''targeted to the relevant electorate'' as a communication that can be received by 50,000 or more persons: In the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the U.S. House of Representatives; or in the State the candidate seeks to represent, in the case of a candidate for the U.S. Senate.

Please note that the definition of ''targeted to the relevant electorate'' would include communications that can be received beyond the relevant geographical area. A communication that can also be received by large numbers of persons outside the relevant district or State would still be considered a targeted communication, as long as 50,000 persons in the relevant area could also receive it. Conversely, for example, an electioneering communication would not include a communication that reaches fewer than 50,000 persons in the State or district where the clearly identified candidate is running, even if at the same time it also reaches 50,000 or more persons in a State or district where the clearly identified candidate is not running.

Regarding whether a communication reaches 50,000 or more persons, the Commission seeks comment as to how to measure, and where to obtain the data concerning, the number of persons a communication reaches. For example, what signal measurement (*e.g.,* Grade B contour) should be used in determining how many people a broadcast signal reaches, and how does one determine if a broadcast station's signal could potentially reach 50,000 or more persons in a particular district or state? Should a broadcast station be required to provide the Federal Communications Commission with information regarding the cable system(s) and satellite system(s) that carry it in order that the cable and satellite systems' audience can be included in the calculation of the number of persons reached by the broadcast station? If such audiences were included in this calculation, how could double counting of some viewers (those that can receive the station's signal both over the air and through a cable or satellite system) be avoided? Is subscriber information the only basis for measuring the audience of a cable or satellite system? If so, must the FCC compel cable and satellite companies to provide it with this data because they are the only possible source of this information? How should subscriber information be converted into the chosen definition of ''person'' in new 2 U.S.C. 434(f)(3)(C), discussed herein? If, for whatever reason, it cannot be determined whether a particular communication will reach 50,000 or more persons in a relevant district or state, should it be presumed that the communication reaches fewer or more than 50,000 persons?

Theoretically, one ad could be publicly distributed via several small outlets, each of which reaches fewer than 50,000 persons in the relevant area, but in the aggregate reach 50,000 or more persons in the relevant area. Practically, the size of radio and television audiences may eliminate this concern. The Commission seeks comments on whether the regulations should address this situation to require aggregation of recipients of the same ad from multiple outlets and, if so, whether the regulations should aggregate substantially similar ads for this purpose.

The term ''person'' is defined in 2 U.S.C. 431(11) and in current Commission regulations at 11 CFR 100.10 to mean an individual, partnership, association, corporation, labor organization and any other organization or group of persons. It is not clear from the legislative history of BCRA whether the term ''person'' in new 2 U.S.C. 434(f)(3)(C) is intended to be restricted to only individuals, households, U.S. citizens, voters, those within the voting age population, or any other category of ''person.'' The Commission believes that BCRA's policies are best served by construing the term ''person'' as applying to natural persons residing in a given jurisdiction, regardless of their citizenship status or whether they are of voting age. The

Commission seeks comments on which interpretation is correct. Whatever definition of ''person'' commenters choose should be associated with clearly identified sources of information needed to implement this section of BCRA.

Pursuant to section 201(b) of BCRA,[4] the Federal Communications Commission must ''compile and maintain'' any information the Federal Election Commission may require to ensure that proper disclosure of electioneering communications is made. The FCC is required to make such information publicly available on its website. These requirements appear to be necessary to promote compliance with the disclosure requirements in the new law regarding electioneering communications. Those who wish to make communications that meet the timing and medium requirements of the electioneering communication definition, must be able to easily determine whether the radio or television stations, cable systems, or satellite systems on which they wish to publicly distribute their communications will reach 50,000 or more persons in the State or congressional district in which the candidate mentioned in the communication is running for office. Consequently, the Commission has preliminarily concluded that a database searchable by State, congressional district, radio and television station call letters, cable system or satellite system, and radio station frequencies, should be created, and that a search under any of these options should reveal whether 50,000 or more persons in a specified State or congressional district are capable of receiving a communication transmitted through a broadcast station, cable system or satellite system. The Commission seeks comments as to whether any additional information or searchable options for the FCC's website are necessary or desirable.

It would also be helpful for the FCC's website to contain a link to the new electioneering communication forms (Form 9 and Schedule J) that the Commission will create for reporting electioneering communications. Further, the Commission anticipates placing a link on its own website to the page on the FCC website containing the database. The Commission seeks comments on what, if any, additional features on the FEC or FCC websites should be made available. Proposed 11 CFR 100.29(b)(5) would list the types of information the FCC may determine it will provide on its website.

[4] This section of BCRA has not been codified.

The Commission anticipates that the information on the FCC website will also allow interested parties to determine easily whether a given communication is capable of reaching 50,000 persons. Thus, the information on the FCC website is intended to serve as *definitive* evidence of whether a communication could have been received by 50,000 or more persons. For example, if the information on the FCC website indicated that a certain radio station can reach fewer than 50,000 persons in a certain congressional district, and an ad was run only on that station 45 days before the general election that referred to a House candidate in that district, then the persons paying for that communication would not have to disclose the communication under the proposed reporting rules and would have a complete defense against any charge that they violated that portion of BCRA. For a discussion of the determination of whether a communication reaches 50,000 or more persons, see above. Comments are sought as to whether this approach is correct.

E. Presidential Primary Candidates

With respect to Presidential primary candidates, one plausible reading of 2 U.S.C. 434(f)(3)(C) is that a communication that refers to a Presidential candidate does not need to be ''targeted to the relevant electorate'' to qualify as an ''electioneering communication.'' Thus, under this interpretation, a communication referring to a clearly identified primary candidate for President that meets BCRA's timing and medium requirements, and that does not fall within any of the statutory exceptions, might be considered an electioneering communication, regardless of the number or geographic location of persons receiving the communication. For example, an ad referring to a primary candidate for President that is run anywhere in the United States could be considered an ''electioneering communication'' if the ad aired on a television or radio station within 30 days of a primary election taking place *anywhere* in the United States, even if the primary election were months away or had already taken place in the State or States in which the ad actually aired.

However, the Commission is concerned that such a sweeping impact on communications would be insufficiently linked to pending primary elections, may not have been contemplated by Congress and could raise constitutional concerns. It would result in a nationwide blackout on ads mentioning a Presidential candidate for more than 240 day between mid-December of the year preceding the election and the election itself. So interpreted, the restrictions on electioneering communications would take effect even if an ad were aired only in a State that has already held its primary, and thus would restrict ads more than 60 days before a general election, an apparent contravention of BCRA. Therefore, the Commission is proposing a definition of ''publicly distributed within 30 days of a primary election'' to make clear that an ad mentioning a candidate for President or Vice-President is not deemed to have been transmitted within 30 days before a primary election unless the ad is transmitted to an audience of 50,000 or more persons in an area in which a primary election is scheduled within 30 days. (This definition is listed as Alternative 1–B in proposed 11 CFR 100.29.) Such a definition, which would be placed within 11 CFR 100.29(b), would state that a communication that refers to a clearly identified candidate for President or Vice President would be ''publicly distributed'' within 30 days before a primary election, preference election, or convention or caucus of a political party only where and when the communication can be received by 50,000 or more persons within the State holding such election, convention or caucus. No such clarification is necessary for Presidential and Vice-Presidential nominees in the 60 days preceding the general election, as the date of the general election does not vary from State to State.

As an alternative means of addressing this concern, the Commission could adopt a provision stating that an advertisement be considered an electioneering communication only if the advertisement can be received by 50,000 or more persons in either a State in which a Presidential primary will occur within 30 days, or nationwide if within 30 days of the national nominating convention of that candidate's party. If adopted, this provision would appear at new 11 CFR 100.29(a)(1)(iv), rather than 11 CFR 100.29(b)(4), and appears in the proposed rules as Alternative 1–A.

Comments are sought on the alternative approaches, which are consistent with a requirement that the communication occur within a fixed number of days before a primary election, and would involve a far lesser impact on fundamental First Amendment rights. The Commission especially seeks comment on whether either alternative is allowed under BCRA.

Separately, comments are sought on whether BCRA's electioneering communications restrictions apply at all to communications depicting Presidential or Vice-Presidential candidates, other than 30 days before a party's national convention and 60 days before the general election, given that candidates can only be nominated for President or Vice-President at their parties' national convention.

What is Not an Electioneering Communication?

I. Specific Types of Communications

Consistent with 2 U.S.C. 434(f)(3)(B), proposed 11 CFR 100.29(c) would list examples of communications that are *not* ''electioneering communications.''

It appears clear from the legislative history of BCRA that the term ''electioneering communications'' only applies to communications that are publicly distributed by television or radio, and not through other media. For this reason the definition of ''electioneering communications'' is narrowly tailored, listing only three types of communications: broadcast, cable, and satellite communications.

The electioneering communication provisions were originally offered as an amendment to the predecessor of BCRA by Senators Snowe and Jeffords in 1998. That amendment, and all versions of that amendment prior to the 107th Congress, defined an electioneering communication to include ''any broadcast from a television or radio broadcast station.'' *See* 144 Cong. Record S938 (daily ed. Feb. 24, 1998); *see also* S.26 (106th Congress), 145 Cong. Rec. S425 (daily ed. Jan. 19, 1999). Likewise, the floor debates on the electioneering communications provision during the 107th Congress frequently referred to ''television and radio ads.'' During a final explanation of these provisions, Senator Snowe again stated that they would apply to ''so-called issue ads run on television and radio only.'' 148 Cong. Rec. S2135 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe).

Consistent with this legislative history, proposed 11 CFR 100.29(c)(1) provides examples of communications that are *not* included in the definition of ''electioneering communication.'' The proposed list of exemptions includes communications appearing in print media, including a newspaper or magazine, handbills, brochures, yard signs, posters, billboards, and other written materials, including mailings; communications over the Internet, including electronic mail; and telephone communications.

The Internet is included in the above list of exceptions because, in most instances, it is not a broadcast, cable, or satellite communication, and it is not sufficiently akin to television and radio. During an early debate on the amendment, Senator Snowe was asked whether the definition of electioneering communication would ''apply to the Internet.'' She replied, ''No. Television and radio.'' *See* 144 Cong. Rec. S973 and S974 (daily ed. Feb. 25, 1998) (statement of Sen. Snowe). The Commission seeks comment confirming that this is a correct interpretation of BCRA.

II. The News Story, Commentary, or Editorial Exception

Proposed 11 CFR 100.29(c)(2) tracks the language in BCRA at 2 U.S.C. 434(f)(3)(B)(i) by excluding communications that appear in a ''news story, commentary, or editorial'' distributed from a broadcasting station, unless the broadcasting station is owned or controlled by any political party or committee, or candidate. The proposed rule, however, would add that the exception would apply to broadcasting stations owned or controlled by a party, committee, or candidate if the communication meets the requirements of 11 CFR 100.132(a) and (b). Please note that this portion of BCRA refers only to ''broadcasting stations.'' While this is consistent with the use of the term throughout 2 U.S.C. 431, which sets out general definitions under the FECA, it is narrower than the term ''broadcast, cable or satellite communication'' found in the general definition of ''electioneering communication'' at 2 U.S.C. 434(f)(3)(A). The Commission is proposing to use the broader term in section 100.29(c)(2), as the legislative history gives no reason for this disparate treatment. However, it welcomes comments on whether the narrower term would be appropriate. In the alternative, the Commission could decline to create a new media exemption for electioneering communications, but instead rely on its existing media exemption at 11 CFR 100.132. The Commission seeks comment on which is the appropriate course of action.

III. Exception for Expenditures and Independent Expenditures

Proposed 11 CFR 100.29(c)(3) implements the language in BCRA at 2 U.S.C. 434(f)(3)(B)(ii) excluding communications that are ''expenditures'' or ''independent expenditures'' from the definition of ''electioneering communications.'' Senator Feingold explained that independent expenditures were excluded because they contain express advocacy, apparently in contrast to electioneering communications, which do not contain express advocacy. *See* 148 Cong. Rec. S1993 (daily ed. Mar. 18, 2002) (statement and section-by-section analysis of BCRA by Sen. Feingold).

In this regard, the Commission is proposing two alternatives. One interpretation put forward by the Commission would be that any disbursement of funds for a communication that constitutes an expenditure or an independent expenditure under FECA is not an electioneering communication. *See* Alternative 2–A, below. In addition, any expenditure of a Federal political committee would remain subject to FECA's reporting requirements. 2 U.S.C. 434(b)(4)(A). Thus, Federal political committees would not be required to file an additional electioneering communication report for expenditures for communications that otherwise meet the definition of electioneering communication. Consequently, the segregated bank account provisions of 2 U.S.C. 434(f)(2)(E) would not apply to expenditures either.

It can be argued that FECA adequately addresses expenditures, independent expenditures and Federal political committee outlays, and BCRA's Title II was intended to address disbursements that are not subject to FECA's treatment of such expenditures. Similarly, the exclusion may represent an effort to avoid duplicative reporting requirements. To include communications that are expenditures and independent expenditures would subject such communications to duplicative and often conflicting reporting requirements.

The Commission also seeks comment on whether to limit the exclusion to candidate-specific expenditures reportable as independent expenditures, in-kind contributions or a party coordinated expenditure by non-authorized Federal political committees. *See* Alternative 2–B, below. This would subject non-authorized Federal political committees making non-coordinated non-express advocacy communications to duplicative reporting requirements. In addition, the Commission notes that all expenditures of authorized committees are, by definition, for the purpose of influencing the candidate's election to Federal office. For this reason, the Commission is seeking comment on excepting from the definition of electioneering communication expenditures for any public communication made by a

Federal candidate or officeholder's authorized campaign committee.

The Commission seeks comment on the approach and issues raised above and on any other interpretation of the exemption of 2 U.S.C. 434(f)(3)(B)(ii) that reconciles the exclusion of expenditures and independent expenditures from the definition of electioneering communication with FECA's treatment of expenditures and independent expenditures.

IV. Exception for Candidate Debates or Forums

Proposed 11 CFR 100.29(c)(4) tracks the language in BCRA at 2 U.S.C. 434(f)(3)(B)(iii) excluding communications that constitute ''a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum.''

The Commission's regulations at 11 CFR 110.13(a)(2) and 114.4(f) authorize incorporated broadcasters and other media organizations to stage and cover candidate debates without making impermissible contributions or expenditures. Section 110.13(c) requires those organizations staging debates to use pre-established objective criteria in determining which candidates may participate in a debate. It further prohibits staging organizations from using nomination by a major party as the sole objective criterion for choosing candidates to participate in a general election debate.[5]

V. Other Exceptions

New 2 U.S.C. 434(f)(3)(B)(iv) provides that ''to ensure the appropriate implementation'' of the electioneering communication provisions, the Commission may promulgate regulations exempting other communications from the ''electioneering communications'' definition, provided that the exemption otherwise complies with the new electioneering communication provision and is not described in 2 U.S.C. 431(20)(A)(iii) (''public communications'' that refer to a clearly identified candidate for Federal office that promote or support a candidate for that office, or attack or oppose a candidate for that office). The Commission is interested in receiving specific suggestions on whether there should be exemptions for communications that refer to a clearly identified candidate but that promote local tourism, or a ballot initiative, or a referendum. The Commission is also interested in receiving suggestions on whether there should be exemptions for communications that refer to a clearly identified candidate but that are public service announcements or that promote a candidate's business or professional practice. Absent such exemptions, such communications could be electioneering communications even if they contain only a glimpse of a Federal candidate. Proposed 11 CFR 100.29(c)(1), (c)(5), (c)(6) (including four alternatives) and (c)(7) would set forth such exemptions. Proposed paragraph (c)(1) was discussed above.

Proposed paragraph (c)(5) would exempt a communication that refers to a bill or law by its popular name where that name happens to include the name of a Federal candidate, if the popular name is the sole reference made to a Federal candidate.

Four alternatives (Alternatives 3–A, 3–B, 3–C, and 3–D) for proposed paragraph (c)(6) would exempt communications that are devoted to urging support for or opposition to particular pending legislation or other matters, where the communications request recipients to contact various categories of public officials regarding the issue. The Commission seeks comment as to which, if any, alternative is most consonant with the language and purposes of BCRA.

Proposed paragraph (c)(7) would exempt communications by State or local candidates or officeholders that refer to a clearly identified federal candidate, provided that such mention of a federal candidate was merely incidental to the candidacy of one or more individuals for State or local office. For example, under this approach an ad for a State or local candidate that featured such candidate's views on education would not be rendered an electioneering communication if the ad were to indicate whether the State or local candidate supported or opposed the President's education policy.

The Commission seeks comments as to whether any other communications should be exempt from the ''electioneering communication'' definition, as well as whether the proposed exemptions are too broadly or narrowly crafted. For example, the Brennan Center report cited by Senator McCain states that so-called ''genuine'' issue ads discuss public policy issues and usually contain a toll-free number, whereas so-called ''sham'' issue ads do not. *Buying Time 2000,* p. 31–32. In light of this study, and to avoid overbreadth, should the Commission exempt ads that: (1) Do not include express advocacy; and (2) include both a telephone number and a reference to a specific piece of legislation either by formal name (for example, the ''Bipartisan Campaign Reform Act of 2002''), popular name (for example, ''Shays-Meehan''), or bill number (for example, ''H.R. 2356'')?

If the Commission creates an exemption like any of the proposed alternatives at paragraph (c)(6), because most Congressional offices do not maintain toll free numbers, should it be sufficient to list a non-toll free number? Must the number be to a Congressional or district office? Is it acceptable to provide the number for a campaign office? Alternatively, to what extent should these distinctions turn on whether the ad refers to a general issue, such as Medicare, without mentioning specific legislation? *See Buying Time 2000, p. 103.*

Another possible exemption might be for entertainment shows, such as television talk shows, which may fall outside of the news exemption, which feature a candidate as a guest, or a television drama or comedy in which a picture of a candidate appears. The Commission seeks comments on the appropriateness of all of the above-mentioned possible exemptions from the ''electioneering communication'' definition, and whether additional exemptions should be considered. Should the definition of electioneering communication be limited to paid advertisements? Should the Commission create an exemption for communications publicly distributed exclusively over public access channels? Should the Commission limit any of the exemptions to ads that do not promote, support, attack, or oppose any clearly identified candidate?

[5] The Commission received a Petition for Rulemaking from a number of corporations owning and operating news organizations, television stations, newspapers, cable channels, and other media ventures, as well as media trade associations. The petition asked the Commission to amend its regulation on sponsorship of candidate debates to ''make clear that it does not apply to the sponsorship of a candidate debate by a news organization or a trade organization composed of, or representing, members of the press.'' The petition asserts that any regulation of the sponsorship of debates by news organizations or related trade associations is contrary to the clear intent of the U.S. Congress, irreconcilable with other FEC decisions, in conflict with the regulatory decisions of the Federal Communications Commission, and unconstitutional. A Notice of Availability for the petition was published on May 9, 2002 (65 Fed. Reg. 31164). Two comments were received by the end of the public comment period, on June 10, 2002. However, the Commission intends to defer consideration of whether to issue a Notice of Proposed Rulemaking until after the statutorily required BCRA rulemakings are completed by the end of the year. In the meantime, the Commission's debate regulations remain in effect.

Who May Make or Fund Electioneering Communications?

BCRA allows the following persons to make electioneering communications: (1) Individuals; (2) ''political committees'' as defined under FECA, including authorized committees, party committees, separate segregated funds, and nonconnected committees; (3) unincorporated organizations, including partnerships, limited liability companies (LLCs) that do not qualify as corporations, unincorporated trade associations or membership organizations, unincorporated 501(c)(3) or (4)'s, and unincorporated 527's, as long as they do not use funds received from corporations or labor organizations to pay for the electioneering communications; and (4) incorporated 501(c)(4)'s and 527's, as long as they meet certain requirements discussed more fully below. The Commission seeks comment on whether there is any section in BCRA that would prevent an entity prohibited from making an electioneering communication from being affiliated with an entity that is permitted to make electioneering communications, provided that the permissible entity received no prohibited funds from the prohibited entity. In addition, the Commission seeks comment on whether a 501(c)(4) or a 527 organization that was previously incorporated and that changes its status to become a limited liability company or similar type of entity under State law would be permitted to pay for electioneering communications with funds that had been donated from individuals to the 501(c)(4) or 527 organization during the time it was incorporated.

Who May Not Make or Fund Electioneering Communications?

I. Effect of the Snowe-Jeffords and Wellstone Amendments on 501(c)(4) and 527 Organizations

The BCRA provisions popularly known as the Snowe-Jeffords amendment expanded the prohibitions on corporations and labor organizations to prohibit use of general treasury funds to make electioneering communications. 2 U.S.C. 441b(b)(2). BCRA treats an electioneering communication as being made by a corporation or labor organization if that corporation or labor organization directly or indirectly disburses any amount for any of the costs of the electioneering communication. 2 U.S.C. 441b(c)(3)(A). The Snowe-Jeffords provisions included an exception, however, allowing corporations organized under 26 U.S.C. 501(c)(4) or 26 U.S.C. 527(e)(1) to make electioneering communications, as long as they use funds that do not come from prohibited sources.[6] As noted by Senator Snowe, these same section 501(c)(4) and 527 organizations must comply with BCRA's newly-enacted disclosure provisions. See 2 U.S.C. 434(f); see also proposed 11 CFR 104.19. Under Snowe-Jeffords, organizations that engaged in business activities or accepted corporate or labor organization funds would have been permitted to establish a segregated bank account to which only individuals (U.S. citizens, U.S. nationals, and green card holders) could contribute to pay for all electioneering communications. 2 U.S.C. 441b(c)(3)(B). It is important to note that the account required by Snowe-Jeffords is not a separate segregated fund or a political committee within the meaning of 2 U.S.C. 431(4)(B), and does not have the same registration, reporting and recordkeeping obligations of such a fund or committee.

The Snowe-Jeffords amendment was substantially modified in this regard by the Wellstone amendment. 2 U.S.C. 441b(c)(6). Where Snowe-Jeffords exempted section 501(c)(4) and section 527 corporations from the prohibition on using treasury funds to make electioneering communications under certain circumstances, the Wellstone amendment withdraws that exemption in the case of what are called ''targeted communications.'' 2 U.S.C. 441b(c)(6)(A). The Wellstone amendment then defines ''targeted communication'' to encompass all electioneering communications. Specifically, it defines ''targeted communication'' to mean ''an electioneering communication (as defined in section 304(f)(3)) [2 U.S.C. 434(f)(3)] that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice-President, is targeted to the relevant electorate.'' 2 U.S.C. 441b(c)(6)(B). The Wellstone amendment then defines ''targeted to the relevant electorate'' by referencing the definition in the Snowe-Jeffords amendment. 2 U.S.C. 441b(c)(6)(C). Under the interpretation of the Wellstone amendment in the proposed rules, ''targeted communication'' would not be limited to communications referring only to candidates for the U.S. House of Representatives and the U.S. Senate directed to the relevant electorate, but would also include communications that refer to Presidential and Vice-Presidential candidates, with all of the relevant restrictions being applicable. Further, it appears that Senator Wellstone intended his amendment to be applicable to Presidential and Vice-Presidential elections. During the Senate debate, one of the examples of the communications his amendment was intended to reach were ads run by an organization during a presidential primary campaign. *See* 147 Cong. Rec. S2848 (daily ed. Mar. 26, 2001).

An alternative interpretation of BCRA would remove communications that refer to a candidate for the office of President or Vice-President from the definition of ''targeted communication.'' This interpretation of 2 U.S.C. 441b(c)(6)(B) is based on the reading that because the second condition in the section does not apply to candidates for President or Vice-President, the Wellstone amendment does not apply to these candidates. Under this interpretation, incorporated section 501(c)(4) organizations and section 527 organizations that accept corporate and labor organization funds would be able to make electioneering communications with respect to Presidential and Vice-Presidential elections, as described above, using funds that do not come from corporations, labor organizations or foreign nationals. Although this alternative is not set out in the proposed rules that follow, the Commission seeks comment on it.

Because the Wellstone amendment defines ''targeted communication'' to include all electioneering communications, *see* 2 U.S.C. 441b(c)(6)(B), the result of the Wellstone amendment is that any corporations whatever, including incorporated 501(c)(4) and 527 organizations, are prohibited from making electioneering communications. Because the restrictions exist within the ambit of section 441b, the Wellstone amendment does not restrict unincorporated 501(c)(4) and 527 organizations from making electioneering communications.

An initial reading of the Wellstone amendment suggests that it may go further than allowed by *MCFL,* in that it bans electioneering communications from all section 501(c)(4) corporations. In order to interpret the Wellstone amendment consistent with *MCFL,* an exception to the ban on corporations making electioneering communications should apply to section 501(c)(4) corporations that meet the conditions

[6] During the Senate debate, Senator McCain described these provisions as intended to be consistent with *FEC* v. *Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986) (''*MCFL*''). 148 Cong. Rec. S2141 (daily ed. mar. 20, 2002).

for *MCFL* groups at 11 CFR 114.10. Proposed 11 CFR 114.2(b)(2) would ban only electioneering communications by incorporated section 501(c)(4) organizations that do not meet the 11 CFR 114.10 conditions.

Alternatively, in the absence of the Wellstone amendment, the Snowe-Jeffords provision by itself would have allowed all incorporated tax-exempt organizations that are described in 26 U.S.C. 501(c)(4), and political organizations described in 26 U.S.C. 527, to make electioneering communications, provided their funds do not come from corporations or labor organizations. 2 U.S.C. 441b(c).

II. Proposed Rules at 11 CFR 114.2, 114.10, and 114.14

To implement the new restrictions on corporate and labor organization activity, current 11 CFR 114.2(b) would be revised to reflect the restrictions found in the Snowe-Jeffords provision and the Wellstone amendment. For purposes of clarity, current paragraph 114.2(b) would be restructured. The general prohibition on corporations and labor organizations making contributions would be placed in proposed paragraph 114.2(b)(1). The corresponding prohibitions on corporate and labor organization expenditures would be located in paragraph (b)(2)(i). The restriction on express advocacy by corporations and labor organizations to those outside the restricted class would be moved to proposed paragraph 114.2(b)(2)(ii). Proposed paragraph 114.2(b)(2)(iii) would contain the new prohibition on electioneering communications by corporations and labor organizations.

Current paragraph 114.2(b) references the exception at 11 CFR 114.10 for qualified nonprofit corporations that wish to make independent expenditures. As redrafted, the reference to section 114.10 would also apply to electioneering communications.

Section 114.10 itself would be redrafted to incorporate references to electioneering communications. Thus, the title of section 114.10 would be redrafted to reflect its application to electioneering communications, as would the discussion of the scope of section 114.10 found at paragraph 114.10(a). Current paragraph 114.10(d) would be redesignated as ''Permitted corporate independent expenditures and electioneering communications.'' Current paragraph 114.10(d)(2) would be redesignated as proposed paragraph 114.10(d)(3). Proposed paragraph 114.10(d)(2) would track the language of current paragraph 114.10(d)(1), except that it would substitute ''electioneering communication'' for ''independent expenditure,'' and it would reference the definition of ''electioneering communication'' at 11 CFR 100.29.

The procedures for certification of qualified nonprofit corporation status would be revised to provide separate procedures for those making electioneering communications. Thus, the procedures for corporations making independent expenditures, which are currently found at 11 CFR 114.10(e)(1)(i), and (ii), would be redesignated as 11 CFR 114.10(e)(1)(i)(A) and (B). Proposed 11 CFR 114.10(e)(1)(ii)(A) and (B) would be added to describe the procedures for demonstrating qualified nonprofit corporation status when making electioneering communications. In all respects this provision is similar to the one for qualified nonprofit corporations making independent expenditures, except that the threshold for certification would be $10,000. The amount would be set at $10,000 because that is the amount that first triggers the reporting requirement for electioneering communications.

Further, 11 CFR 114.10(g) would be revised to require qualified nonprofit corporations to comply with the requirements of 11 CFR 110.11 regarding non-authorization notices (''disclaimers'') when making electioneering communications. BCRA amended 2 U.S.C. 441d to require disclaimers for electioneering communications. Section 110.11 will be amended in a separate rulemaking.

Proposed paragraph 114.10(h) would serve as a notification to qualified nonprofit corporations that they may establish a segregated bank account for the purpose of depositing funds to be used to pay for electioneering communications, as identified in 11 CFR 104.19(b)(6) and (7).

Proposed paragraph 114.10(i) would track the language in 2 U.S.C. 441b(c)(5), which states that nothing in 2 U.S.C. 441b(c) shall be construed to authorize an organization exempt from taxation under section 501(a) of the Internal Revenue Code of 1986 to carry out any activity that is prohibited under the Internal Revenue Code. For the reasons explained above, the proposed rule would clarify that this statutory prohibition specifically applies to any qualified nonprofit corporation.

Certain courts have interpreted *MCFL* to allow an incorporated 501(c)(4) organization to accept a *de minimis* amount of corporate or labor organization funds and still be able to make independent expenditures without violating 2 U.S.C. 441b. *See, e.g., Minnesota Citizens Concerned for Life, Inc.* v. *FEC,* 936 F.Supp. 633 (D.Minn. 1996), *aff'd,* 113 F.3d 129 (8th Cir. 1997).[7] Regarding BCRA, the Commission understands that the phrase ''paid for exclusively by funds provided by individuals'' at 2 U.S.C. 441b(c)(2), when read in conjunction with the Wellstone amendment at 2 U.S.C. 441b(c)(6)(A), is intended to establish a bright-line rule that, even if an organization accepted only a *de minimis* amount of corporate or labor organization funds, it is nevertheless barred under 2 U.S.C. 441b from making an electioneering communication. The Commission seeks comment as to whether the conclusion regarding acceptance of *de minimis* amounts of corporate or labor organization general treasury funds is appropriate and likely to survive constitutional scrutiny and, if so, whether it should be stated in the rule. Comment is sought, however, as to whether the certification of its status under 11 CFR 114.10(e) as a qualified nonprofit corporation should be revised for purposes of making either independent expenditures or electioneering communication so that a corporation could certify its status on the basis of a court decision rather than the criteria in the Commission's regulations.

Further, proposed 11 CFR 114.14 would be added to the regulations to implement the provisions in 2 U.S.C. 441b(b)(2), (c)(1) and (c)(3) prohibiting corporations and labor organizations from directly or indirectly disbursing any amount from general treasury funds for any of the costs of an electioneering communication.[8] Proposed 11 CFR 114.14(a) would contain the prohibition that applies to corporations and labor organizations generally, and is meant to eliminate any instance of a corporation or labor organization providing funds out of their general treasury funds for the purpose of paying for an electioneering communication, including through a non-Federal account. The Commission does not view

[7] Prior to enactment of BCRA, the *MCFL* status of incorporated 501(c)(4) organizations could change from year to year depending on the absolute total amount of corporate contributions received by these organizations. *FEC* v. *National Rifle Association,* 254 F.3d 173 (D.C. Cir 2001). In *FEC* v. *NRA,* the court held that $1000 in corporate contributions that the NRA received in 1980 was *de minimis* and did not affect in *MCFL* status for that year; however, the corporate contributions of $7,000 and $39,786 that it received in 1978 and 1982, respectively, were substantial and rendered the NRA ineligible for the *MCFL* exemption in 1978 and 1982. *Id.* at 192.

[8] The prohibition on direct disbursements of corporate or labor organization funds is contained at proposed new 11 CFR 114.2(b)(2). National banks would also be subject to proposed 11 CFR 114.14 through the operation of current 11 CFR 114.2(a)(2).

BCRA as in any way prohibiting or restricting corporations and labor organizations from paying for electioneering communications out of funds raised and spent by the Federal accounts of their separate segregated funds. The Commission seeks comment on what factors should be used to determine that the purpose element of this prohibition has been met.

Proposed paragraph (b) of new 11 CFR 114.14 would prohibit any person who accepts corporate or labor organization funds from using those funds to pay for an electioneering communication, or to provide those funds to any other person who would subsequently use those funds to pay for all or part of the costs of an electioneering communication. This proposed rule would be similar to the ban on contributions made in the name of another. *See* 2 U.S.C. 441f; 11 CFR 110.4(b). The rule would be intended to effectuate BCRA's treatment of an electioneering communication as being made by a corporation or labor organization if such an entity indirectly disburses any amount for the cost of the communication out of their general treasury funds. 2 U.S.C. 441b(c)(3)(A).

The Commission also seeks comments on contributor liability. Should contributors be held liable in instances where their contributions were not intended to be used for electioneering communications but the recipient used them for that purpose regardless of the contributors' intent?

Proposed paragraph (c) of 11 CFR 114.14 would provide certain limited exceptions to allow corporations or labor organizations to provide funds that might subsequently be used for electioneering communications. The first exception would cover salary, royalties, or any other income earned from *bona fide* employment or other contractual arrangements, including a pension or other retirement income. The second exception would cover interest earnings, stock or other dividends, or proceeds from the sale of stock or other investments. These exceptions are drawn from 11 CFR 110.10, which applies only to candidates' funds, by recognizing that such amounts constitute personal funds. The third proposed exception covers a corporation or labor organization payment of the fair market value for goods provided or services rendered to the corporation or labor organization.

Proposed paragraph 11 CFR 114.14(d) would require persons who receive funds from a corporation or a labor organization that do not meet the exceptions of proposed paragraph 11 CFR 114.14(c) to be able to demonstrate through a reasonable accounting method that no such funds were used to pay for any portion of an electioneering communication. The Commission seeks comment on whether a specific accounting method should be required, such as first-in-first-out (FIFO), last-in-first-out (LIFO), or any other method.

The Commission seeks comment on whether proposed 11 CFR 114.14 covers all instances where corporate or labor organization general treasury funds might indirectly be used to pay for electioneering communications, without going beyond the bounds of BCRA.

Are Amounts Given to Persons Making Electioneering Communications Contributions? When Are These Amounts Subject to the Contribution Limits? Would They Trigger Political Committee Status?

In the new reporting provisions of BCRA, monies provided for electioneering communications are characterized as ''funds contributed,'' and the persons providing the monies as ''contributors.'' 2 U.S.C. 434(f)(2)(E) and (F). BCRA amends the FECA's prohibitions against corporate and labor organization contributions and expenditures at 2 U.S.C. 441b(b)(2) by defining ''contribution or expenditure'' to include ''any direct or indirect payment * * * for any applicable electioneering communication.'' It also amends the ban on contributions and donations by foreign nationals at 2 U.S.C. 441e to include electioneering communications. BCRA, however, does not amend the definition of contribution at 2 U.S.C. 431(8) to include monies given for electioneering communications. The Commission would interpret this statutory language to mean that such monies would be ''contributions'' when provided by any person to the Federal account of a political organization and, therefore, would be subject to the contribution limits and prohibitions of the FECA, as amended by BCRA. However, funds provided to persons that are *not* political committees would not be ''contributions'' and hence would not be subject to the contribution limits or prohibitions. Nor would these amounts trigger political committee status when given to an organization that is not already a political committee. Please note that amounts donated by an entity covered by 2 U.S.C. 441b or by a foreign national covered by 2 U.S.C. 441e nonetheless are subject to the bans on electioneering communications contained in those provisions. The Commission requests comments on this approach.

BCRA also prohibits the national party committees from donating non-Federal funds for any purpose, including electioneering communications. 2 U.S.C. 441i(a). BCRA prohibits a State, district, or local committee of a political party from donating non-Federal funds for ads that refer to a clearly identified candidate for Federal office and promote, support, attack or oppose that candidate. 2 U.S.C. 431(20)(A)(iii) and 441i(b). Such ads, with rare exception, encompass electioneering communications. For these reasons, the Commission would interpret monies provided by any person for electioneering communications to political committees that are the national, State, district or local committee of a political party (''party committees'') to be contributions subject to the limitations or prohibitions of the FECA, as amended by BCRA. However, comments are sought as to whether funds provided for electioneering communications to a non-Federal account of a separate segregated fund or a non-connected committee should or should not be contributions subject to limitations or prohibitions, if the funds are not provided by a corporation, labor organization, foreign national or party committee, and if they are not coordinated with any candidate.

Funds provided by persons other than corporations, unions, foreign nationals or party committees to persons that are not political committees are not contributions. Thus, these amounts would not trigger political committee status when given to an organization that is not already a political committee. Persons that are not party committees or political committees, including individuals, would be able to raise and spend funds for electioneering communications without limitation as to amount, unless the funds are provided by corporations, unions, foreign nationals or party committees. The Commission requests comments on this approach.

Who Must Report Electioneering Communications?

I. Who Is Included in ''Persons''?

BCRA, as codified at 2 U.S.C. 434(f)(1), requires all *persons* making electioneering communications to file statements when the disbursements for the electioneering communications exceed $10,000 in a calendar year. Under 2 U.S.C. 431(11) and 11 CFR 100.10, ''persons'' includes ''an individual, partnership, committee, association, corporation, labor organization, and any other organization or group of persons.'' This definition of

''person'' would apply to proposed 11 CFR 104.19(a).

While all political committees are included as ''persons'' who would be required to report electioneering communications under proposed section 104.19(a), BCRA excludes communications that constitute an expenditure or an independent expenditure under FECA from the definition of electioneering communications. 2 U.S.C. 434(f)(3)(B)(ii). Thus, political committees will not be required to report their expenditures as electioneering communications.

The Commission seeks comments on eliminating this exemption when the authorized committee of a candidate makes an expenditure for a communication that refers to that candidate or that candidate's opponent. Under this approach, which is not included in the proposed rules that follow, if a candidate committee makes an expenditure for a communication that refers to that candidate or that candidate's opponent and that meets the definition of electioneering communication (other than the exclusion of expenditures in 2 U.S.C. 434(f)(3)(B)(ii)), then the candidate committee would have to report the cost as an electioneering communication within the 24-hour time requirement, if the costs of such ads exceed $10,000. The Commission recognizes that these amounts would be reported a second time on the authorized committee's regular report as expenditures. Comment is sought as to whether this limitation on the exemption for authorized committees would be consistent with BCRA.

The Commission requests comments on whether State and local party committees should be exempt from ''persons'' who must file reports of electioneering communications. State and local party committees' candidate-specific expenditures and independent expenditures that are otherwise reportable as such are not subject to the definition of electioneering communications under the Commission's construction of 2 U.S.C. 434(f)(3)(B)(ii). *See* above. However, certain other disbursements by a State party committee that include a reference to a clearly identified Federal candidate would be subject to the definition of electioneering communication, such as issue ads that do not require candidate-specific reporting. Exempting State and local party committees from 11 CFR 104.19 would mean that they would report such disbursements on their regular reporting schedule, as current law allows, rather than under the electioneering communications reporting requirements. Comments are requested.

II. Who Is Responsible for Filing Reports by Organizations That Are Not Political Committees?

Under the Commission's regulations at 11 CFR 104.1 and the FECA at 2 U.S.C. 432(i) and 434(a)(1), the treasurer is the individual responsible for the accuracy, and the filing, of a political committee's reports. BCRA requires organizations that are not political committees to report their electioneering communications. 2 U.S.C. 434(f)(2)(E). However, such organizations are not required by BCRA or the FECA to have a treasurer who is responsible for the filing. The Commission requests comments on whether to require that the individual responsible for filing the statement of electioneering communications on behalf of an organization that is not a political committee have actual knowledge of the receipts and disbursements for, and the contents and timing of, the electioneering communications.

When Must Electioneering Communications Be Reported?

The question of when electioneering communications must be reported presents several subsidiary issues. First, does the $10,000 threshold include the costs for producing electioneering communications, or for airing electioneering communications, or both? Second, must the electioneering communications be reported at the time the disbursements exceed $10,000 in a calendar year, or not until the disbursements exceed $10,000 *and* the communications have been aired? Third, when does the 24-hour period begin and end, and what would serve as proof of timely filing? These issues are discussed below.

I. Does the $10,000 Reporting Threshold Include the Direct Costs of Both Producing and Airing Electioneering Communications, or Does It Include Only One or the Other?

BCRA requires disbursements, and contracts to make disbursements, for the direct costs of producing *and* airing electioneering communications to be reported within 24 hours of the ''disclosure date.'' 2 U.S.C. 434(f)(1). However, BCRA defines ''disclosure date'' as the date on which the direct costs of producing *or* airing exceed $10,000. 2 U.S.C. 434(f)(4). Thus, the proposed rules would require that when the direct costs of either producing or airing electioneering communications exceed $10,000, the person making the electioneering communications must report the direct costs of both producing and airing the electioneering communications within 24 hours. Specifically, proposed 11 CFR 104.19(a) would require every person who makes disbursements, or who executes contracts to disburse funds for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000, to report certain information regarding the sources of the funds used for producing *and* airing the electioneering communications.

The Commission requests comments on this interpretation. Does BCRA intend for persons to report only if the aggregate production costs or the aggregate airing costs exceed $10,000? For example, if Person K pays $7,000 to produce an electioneering communication and $7,000 to air the communication, would Person K have any reporting requirements at all because neither the cost of production nor the cost of airing the communication when treated separately exceeded $10,000? Alternatively, does the statute intend for persons to report when the aggregate of all direct production costs *and* all direct airing costs exceed $10,000? For example, if Person J pays $7,000 to produce an electioneering communication and pays $7,000 to air it, would Person J be required to report all $14,000 because the aggregate costs of producing and airing exceed $10,000?

Proposed paragraph (a)(2) would provide guidance with regard to what are considered to be direct costs of producing or airing an electioneering communication. The proposed regulation would provide a list of costs that would be considered ''direct.'' The list would not be exhaustive. As proposed, the direct costs of producing a communication would include any costs charged by a production company, such as studio rental time, staff salaries, costs of video or audio recording media, hired talent, and any other cost involved in producing the video or audio communication. Direct costs of airtime would include the cost of airtime on broadcast, cable or satellite radio and television stations, and the charges for a broker to purchase the airtime. The Commission seeks comments on other examples of direct costs of producing or airing electioneering communications.

Direct costs for producing or airing electioneering communications would not include the cost of polling to determine the contents of a communication or whether to create or air the communication. Additionally,

such costs would not include the cost of a focus group or other polling to determine the effectiveness of the communication. The Commission seeks comment on whether these exceptions should be specifically included in the rules and what other types of costs should be excluded from ''direct costs.'' Further, the Commission seeks comment on whether these lists should be exhaustive, thereby including everything that would be considered a direct cost.

II. Must Reports Be Filed When the Disbursements Exceed the Threshold, or When the Electioneering Communication Is Aired?

As noted above, BCRA requires persons making electioneering communications to report the disbursements for such communications within 24 hours of the ''disclosure date.'' 2 U.S.C. 434(f)(1). ''Disclosure date'' is defined at 2 U.S.C. 434(f)(4) as the date ''during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000.'' Therefore, proposed 11 CFR 104.19(a) would track the statutory language to require that statements of electioneering communications be filed within 24 hours of the time the $10,000 threshold is exceeded. Following the statutory language, proposed paragraph (a) would require that persons begin aggregating the direct costs of producing or airing electioneering communications anew after each disclosure date. Each time the aggregation of disbursements for electioneering communications exceeds $10,000 (since the most recent disclosure date), an additional statement of electioneering communications would be required.

Alternatively, the Commission could determine that a person makes disbursements for electioneering communications only when a communication is aired, and require reporting of disbursements that meet the statute's monetary thresholds at that time. One policy reason supporting such an interpretation is the practical difficulty or impossibility of determining whether a given communication has met BCRA's targeting requirements before a communication is actually aired. Another reason is that until a person or entity actually airs an electioneering communication, it is impossible to know with certainty that the person or entity ever will air a communication that constitutes an electioneering communication under BCRA; accordingly, to require reporting beforehand could lead to speculative and even inaccurate reporting through no fault of the reporting person or entity. Finally, there could be constitutional issues with compelling disclosure of potential electioneering communications before they are finalized and aired, particularly when such disclosure could force reporting entities to divulge confidential strategic and political information, and could force them to report information, under the penalty of perjury, that later turns out to be misleading or inaccurate if the reporting entity does not subsequently air any electioneering communications. The Commission seeks comments on these issues and specifically whether, in light of these constitutional and policy concerns, it should consider construing BCRA's electioneering communication reporting requirements to apply only when an electioneering communication is actually aired. The Commission further requests comments on whether it should limit reporting of electioneering communications to only the 30 days before a primary election or the 60 days before a general election.

The current rules at 11 CFR 104.5 set forth filing dates for each type of filer (*e.g.,* authorized committees, unauthorized committees, party committees) and for other required reports that are not part of the regular filing schedule (*e.g.,* certain reports of independent expenditures). Proposed new paragraph (i) of section 104.5 would state the filing deadlines for 24-hour statements of electioneering communications and would cross-reference proposed section 104.19.

BCRA at 2 U.S.C. 434(f)(2) requires, as do the proposed regulations at 11 CFR 104.5(i), that statements of electioneering communications be filed under penalty of perjury. Note that 24-hour reports of independent expenditures are also required to be filed under penalty of perjury.[9] Perjury consists of a false statement as to material fact willfully made under an oath authorized by a law of the United States taken before a competent tribunal, officer, or person. 28 U.S.C. 1621. In addition, 18 U.S.C. 1001(a)(3) establishes criminal penalties for ''knowingly and willfully making or using false writings or documents'' in connection with matters within the jurisdiction and before a government agency. Lastly, such violations may be subject to the FECA at 2 U.S.C. 437g, which establishes civil penalties of specified amounts for violations of the FECA. The Commission seeks comment on how 2 U.S.C. 437g would apply to violations of the requirements for electioneering communications, given that the defined terms in 2 U.S.C. 437g are different than the terms used in 2 U.S.C. 434(f).

III. Filed Within 24 Hours vs. Received Within 24 Hours

Under 2 U.S.C. 434(f)(1), electioneering communications must be reported within 24 hours of the time the $10,000 threshold is exceeded (i.e., on the ''disclosure date'', *see* below). The Commission proposes to add new paragraph (f) to 11 CFR 100.19 to require these 24-hour statements to be *received* by the Commission within 24 hours of the disclosure date, rather than *filed* within 24 hours of the disclosure date. In addition, to assist filers with meeting this deadline, the proposed rule would allow them to file their 24-hour statements by facsimile machine or e-mail. This proposed paragraph would follow the timing and filing methods of 24-hour reports for independent expenditures. The Commission proposes this interpretation to achieve the kind of disclosure contemplated by the 24-hour requirement. Under the proposed rules, a 24-hour statement of electioneering communications would be available to the public no later than 48 hours after its receipt by the Commission. Further, since these statements are required within 24-hours of the disclosure date, they are similar to 24-hour reports of independent expenditures and, thus, should be treated similarly. The Commission requests comments on this interpretation of ''filed'' in 2 U.S.C. 434(f).

The Commission recently concluded that sending 24-hour reports of independent expenditures by mail is not a viable option because it is unlikely that these reports will be received by the Commission within 24 hours of the making of the independent expenditure. (See Explanation and Justification for Independent Expenditure Reporting Rules, 65 FR 12834, March 20, 2002.) Thus, current paragraph (b) of 11 CFR 100.19 does not allow 24-hour reports of independent expenditures to be considered filed when postmarked, even if sent by registered or certified mail. These reports are only considered

[9] Like independent expenditure reporting, one concern regarding reporting expenditures for communications before the communications are publicly disseminated, is the possibility that the report will be erroneous if the communication is never publicly disseminated. Thus, if a person pays more than $10,000 for the production or airing of an electioneering comunication and properly reports those payments within 24 hours, but later decides not to air the ad, that person would not have committed perjury as long as the report reflected what the person knew to be true at the time it was filed.

timely filed if they are received by the Commission or Secretary of the Senate within 24 hours of the time the independent expenditure was made. For the same reasons, the Commission is also proposing to amend paragraph (b) to preclude filing 24-hour statements of electioneering communications by certified or registered mail. However, as explained above, these statements could be filed by facsimile machine or electronic mail, except by those persons who are required to file electronically under 11 CFR 104.18.

In addition to the substantive revisions noted above, all paragraphs in section 100.19 would be given titles to assist the reader in finding the appropriate information, and technical changes would be made to paragraph (d).

IV. When Does the 24 Hour Period Begin and End?

The Commission currently considers the term ''24 hours'' with regard to certain reports of independent expenditures to mean 24 contiguous hours even if the time period begins or ends on a weekend or holiday. The proposed rules would interpret the 24-hour reporting requirement for statements of electioneering communications the same way, since neither FECA nor BCRA appear to contemplate a different result. Both facsimile and electronic mail transmissions may be filed at any time and have a date and time stamp embedded for purposes of proof. However, the Commission requests comments on whether to use a different interpretation of ''24 hours'' for electioneering communications than is currently used for 24-hour reports of independent expenditures. For example, if the $10,000 threshold is exceeded on a Saturday at 5 p.m., should the statement be filed by Sunday at 5 p.m. or Monday at 5 p.m.? Would it be confusing to filers if this rule were different for electioneering communication statements than for other notices, statements or reports?

The Commission also requests comments on how a person should prove that he or she timely sent these 24-hour statements. For example, if reports were sent by fax, would a copy of the sender's fax cover page containing the date and time of the transmission be sufficient to prove timely receipt?

What Information Must Be Reported About Electioneering Communications?

BCRA at 2 U.S.C. 434(f)(2) requires that all persons making electioneering communications report the funds spent on those communications. This new statute is very specific regarding the types of information that must be reported. Consequently, the proposed rules at 11 CFR 104.19 would closely follow the statutory reporting requirements for ''electioneering communications.'' These new 24-hour statements will require the Commission to create a new form for reporting electioneering communications. The Commission intends to create FEC Form 9 for persons other than political committees and to create Schedule J as part of FEC Form 3, 3X, or, 3P, as appropriate, for political committees. These forms would be available on the Commission's website and by Faxline.

Proposed 11 CFR 104.19(a) is discussed above. (*See* Who must report electioneering communications? When must electioneering communications be reported?)

Proposed 11 CFR 104.19(b) would specify the contents of the statement required under BCRA and the proposed rules. Because BCRA quite specifically addresses the contents of these statements, the proposed rules closely follow the statutory language. *See* 2 U.S.C. 434(f)(2). As discussed above, both BCRA and the proposed rules would require that these 24-hour reports be filed under the penalties for perjury.

Proposed paragraph (b)(1) would require the identification[10] of the person making the disbursement(s) for electioneering communications. If the person making the disbursement is not an individual, proposed paragraph (b)(1) would also require the person's principal place of business.

Proposed paragraph (b)(2) would require the identification of any person sharing or exercising direction or control over the activities of the person making the disbursement. The Commission requests comments as to whether ''direction or control over the activities'' should be further defined, and if so, what types of actions would constitute ''direction or control over the activities?''

The Commission also seeks comment on whether it should draw upon in whole or in part its existing earmarking regulations, 11 CFR 110.6(d), in determining the scope of the statutory phrase ''direction or control.'' These rules provide that if a conduit exercises any direction or control over the choice of the recipient candidate, the earmarked contribution shall be considered a contribution by both the original contributor and the conduit for both limitation and reporting purposes. The Commission determined that a conduit exercised direction over a contribution when it determined whether a contribution should be made, and, if so, the recipient, the amount, and the timing of any contribution. *See* Advisory Opinion (''AO'') 1986–4. In two other AOs, the Commission determined that conduits did not exercise direction or control over a contribution when the original contributor made the same choices. *See* AO 1981–57 and AO 1980–46. The Commission seeks comment on whether a similar analysis should be used to define ''direction and control'' in this rulemaking.

The recently promulgated regulations on non-Federal funds (67 FR 49063 (July 29, 2002)) contained a definition of ''direct'' with regard to the making of contributions. That regulation defines ''to direct'' as ''to ask a person who has expressed an intent to make a contribution, donation, or transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer of funds, or to provide that thing of value, including through a conduit or intermediary.'' 11 CFR 300.2(n). The Commission requests comments as to whether this definition of ''to direct'' could be adopted for purposes of this rulemaking as the definition of ''direction.'' The Commission further requests comments on whether ''direction'' and ''control'' should have the same meaning and, if not, what the distinction is.

Another issue that might be addressed is whether direction or control should be limited to influence over certain aspects of the electioneering communications (*e.g.,* the contents, timing, frequency, duration or intended audience of the communication, or the specific media outlet used). In the alternative, should these terms encompass all activities of the person making the electioneering communication, even when those activities are not related to the electioneering communication? This approach is reflected in Alternative 4–B of the proposed rule at 11 CFR 104.19(b)(2).

The Commission requests comments on these issues as well as any other issues relevant to this point.

Proposed paragraph (b)(3) would require the identification of the custodian of the books and accounts of the person or persons making the disbursements.

Proposed paragraph (b)(4) would require the amount of each

[10] 11 CFR 100.12 defines ''identification'' as: ''in the case of an individual, his or her full name, including: First name, middle name or initial, if available, and last name; mailing address; occupation; and the name of his or her employer; and, in the case of any other person full name and address.''

disbursement of more than $200 during the period covered by the statement, the date the disbursement was made, and the identification of the person to whom the disbursement was made.

Alternative 5–A of proposed paragraph (b)(5) would closely track the wording of BCRA by requiring the identification of all elections to which the electioneering communications pertain and the names (if known) of the candidates clearly identified or to be clearly identified in the communication. Alternative 5–B of proposed paragraph (b)(5) would require disclosure of all clearly identified candidates referred to in the communication and the elections in which they are candidates. The Commission seeks comment on whether Alternative 5–B is preferable to the statutory language, in that it is easier to follow and takes into consideration 2 U.S.C. 434(f)(3), which makes reference to a clearly identified candidate a threshold requirement for a communication to be deemed an electioneering communication.

Proposed paragraph (b)(6) would apply only to qualified nonprofit corporations under 11 CFR 104.10 that pay for electioneering communications only from a segregated bank account under 11 CFR 114.10(h). This proposed paragraph follows 2 U.S.C. 434(f)(2)(E) by providing that if a qualified nonprofit corporation pays for its electioneering communications only from its segregated bank account, it must report the name and address of only those individuals who provided $1,000 or more to the account, aggregating from January 1 of the preceding calendar year. If a qualified nonprofit corporation pays for its electioneering communications from any account other than its segregated bank account, it would be required to report *all* contributors who contributed $1,000 or more to the organization in general (as opposed to the segregated bank account for electioneering communications) under proposed paragraph (b)(7). Proposed paragraph (b)(7) would apply to qualified nonprofit corporations that pay for electioneering communications from an account other than that described in 11 CFR 114.10(h), and to all other persons who make electioneering communications.

Proposed paragraph (b)(7) would follow 2 U.S.C 434(f)(2)(F) by requiring the name and address of any contributor who contributed an amount aggregating $1,000 or more since the first day of the preceding calendar year to the person making the disbursement. Note that BCRA also requires the name and addresses of every U.S. citizen, U.S. national, or permanent resident contributing $1,000 or more to ''a segregated bank account.'' *See* 2 U.S.C. 434(f)(2)(E). Sections 434(f)(2)(E) and 441b(c)(3)(B) of FECA, when read together, appear to contemplate that this segregated bank account is required only for section 501(c)(4) corporations. However, as explained above, section 501(c)(4) corporations (with the possible exception of qualified nonprofit corporations under *MCFL*) are prohibited from making electioneering communications. Therefore, the Commission proposes to omit this information from the required contents of reports, for all persons except qualified nonprofit corporations. Comments are sought on this approach.

In following 2 U.S.C. 434(f)(2)(E) and (F), proposed 11 CFR 104.19(b)(6) and (7) would require the identification of those persons who have contributed in excess of $1,000 since January 1 of the preceding calendar year. The Commission requests comments on whether to require all donations from these donors to be itemized every time the person making the electioneering communication files reports even if some of them were previously reported. An alternative would be to require the itemization of these funds in the same way that contributions are currently itemized under 11 CFR 104.8 on Schedule A. Thus, each time a person provides funds to the person making the electioneering communications, the filer would report the receipts but would not be required to itemize them until they aggregate in excess of $1,000. However, for each contribution/donation thereafter, the filer would be required to report the ''to-date'' total along with the itemization of any *new* funds provided by that donor since the last report, but the filer would not be required to re-report previous contribution/donations in each subsequent report. The Commission envisions that this alternative would require FEC Form 9 and Schedule J to contain space for reporting donations that would be similar to the current Schedule A. Comments are requested on this approach and on other possible methods of implementation of 2 U.S.C. 434(f)(2)(E) and (F) to avoid duplicative reporting.

Proposed paragraph (b)(8) would require the reporting of the disclosure date, as defined in proposed 11 CFR 104.19(a)(1). While BCRA does not specifically require the disclosure date to be reported, the Commission notes the necessity of this information as the triggering mechanism for filing the statement. This is similar to requiring the date an independent expenditure aggregating in excess of $1,000 is made during the 24-hour reporting period. The Commission requests comments on whether or not to require persons making electioneering communications to report the disclosure date.

Proposed paragraph (c) would require all persons (except qualified nonprofit corporations) making electioneering communications or accepting contributions for the purpose of making electioneering communications to comply with the Commission's current recordkeeping regulations at 11 CFR 104.14. Qualified nonprofit corporations would be exempt from the recordkeeping requirements in order to mirror the requirements for such entities that make independent expenditures. The Commission seeks comment on what records should be required to be maintained by persons who make electioneering communications. Should the recordkeeping requirements for electioneering communications and independent expenditures be the same? If so, what should those requirements be?

Where Must Electioneering Communications Statements Be Filed?

Currently, the FECA and 11 CFR 105.2 require that reports by, and solely regarding, candidates for the U.S. Senate be filed with the Secretary of the Senate as custodian for the Commission. BCRA requires that statements of electioneering communications that refer to Senate candidates must be filed with the Commission. 2 U.S.C. 434(f)(1). Therefore, proposed revisions to 11 CFR 105.2 would renumber the current section 105.2 as paragraph 105.2(a) under the heading of ''General rule.'' Proposed new paragraph (b) would contain the exceptions to that rule, *i.e.,* persons who make electioneering communications that refer to candidates for Senate would report to the Commission rather than to the Secretary of the Senate. BCRA also requires that all 24-hour and 48-hour reports of independent expenditures be filed with the Commission regardless of whether they support or oppose a candidate for Senate. 2 U.S.C. 434(g)(3)(A). These independent expenditure reports would be added to revised section 105.2 in a separate rulemaking at a later point.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that these proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities. The basis of this certification is that since all political committees already have reporting requirements,

these additional statements do not create a significant new burden. Persons other than political committees would not have to report until they exceed a $10,000 threshold, at which point their reporting obligations would be no more than what is strictly necessary to comply with the new statutory requirements. In addition, they would have considerable flexibility in the method of filing the requisite statement.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 105

Campaign funds, Political candidates, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 114

Business and industry, Elections, Labor.

For the reasons set out in the preamble, it is proposed to amend subchapter A of chapter I of title 11 of the *Code of Federal Regulations* as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for part 100 would continue to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

2. Paragraphs (b) and (d) of section 100.19 would be revised, titles would be added to paragraphs (a), (c), and (e), and paragraph (f) would be added to read as follows:

§ 100.19 File, filed or filing (2 U.S.C. 434(a)).

* * * * *

(a) *Where to deliver reports.* * * *

(b) *Timely filed. General rule.* A document, other than a report or statement covered by paragraphs (c) through (f) of this section, is timely filed upon deposit as registered or certified mail in an established U.S. Post Office and postmarked no later than midnight of the day of the filing date, except that pre-election reports so mailed must be postmarked no later than midnight of the fifteenth day before the date of the election. Documents sent by first class mail must be received by the close of business on the prescribed filing date to be timely filed.

(c) *Electronic filing.* * * *

(d) *24-hour reports of independent expenditures.* A 24-hour report of independent expenditures under 11 CFR 104.4(b) or 109.2(c) is timely filed when it is received by the appropriate filing officer as listed in 11 CFR 104.4(c) after a disbursement is made, or, in the case of a political committee, a debt reportable under 11 CFR 104.11(b) is incurred, for an independent expenditure, but no later than 24 hours from the time the independent expenditure was made. In addition to other permissible means of filing, a 24-hour report of independent expenditures may be filed using a facsimile machine or by electronic mail if the filer is not required to file electronically in accordance with 11 CFR 104.18.

(e) *48-hour statements of last-minute contributions.* * * *

(f) *24-hour statements of electioneering communications.* A 24-hour statement of electioneering communications under 11 CFR 104.19 is timely filed when it is received by the Commission within 24 hours of the disclosure date (*see* 11 CFR 104.19(a)(1)). In addition to other permissible means of filing, a 24-hour statement of electioneering communications may be filed using a facsimile machine or by electronic mail if the filer is not required to file electronically in accordance with 11 CFR 104.18.

3. New section 100.29 would be added to read as follows:

§ 100.29 Electioneering communication.

(a)(1) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(i) Refers to a clearly identified candidate for Federal office;

(ii) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate;

(iii) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives; and

Alternative 1–A

(iv) In the case of a candidate for nomination for President:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held if publicly distributed within 30 days before the election; or

(B) Can be received by 50,000 or more persons anywhere in the United States if publicly distributed within 30 days before the national nominating convention.

(2) For purposes of this section only, a special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(b) For purposes of this section—

(1) *Refers to a clearly identified candidate* means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as ''the President,'' ''your Congressman,'' or ''the incumbent,'' or through an unambiguous reference to his or her status as a candidate such as ''the Democratic presidential nominee'' or ''the Republican candidate for Senate in the State of Georgia.''

(2) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system, but does not include any communication publicly distributed exclusively by Low Power FM Radio, Low Power Television or Citizens Band Radio, as those terms are defined by the Federal Communications Commission.

(3) *Targeted to the relevant electorate* means the communication can be received by 50,000 or more persons—

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

Alternative 1–B

(4) A communication that refers to a clearly identified candidate for President or Vice-President is publicly distributed within 30 days before a primary election, preference election, or convention or caucus of a political party only where and when the communication can be received by 50,000 or more persons within the State holding such election, convention or caucus.

(5) For purposes of paragraph (b)(3) of this section, information on the number of persons in the congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, is available on the Federal Communications Commission's website, *http://www.fcc.gov.* A link to that site is available on the Federal Election

Commission's website, *http://www.fec.gov.* It shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of an electioneering communication relies on such information posted on the website of the Federal Communications Commission prior to the date the communication is publicly distributed.

(6) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system. This definition also applies to the term airing in 11 CFR 104.5 and 104.19.

(c) *Electioneering communication* does not include any communication that:

(1) Is publicly distributed through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

Alternative 2–A

(3) Constitutes an expenditure or an independent expenditure.

Alternative 2–B

(3) Constitutes a candidate-specific expenditure reportable as an in-kind contribution or party coordinated expenditure, or an independent expenditure;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(5) Refers to a bill or law by its popular name where that name includes the name of a Federal candidate, provided that the popular name is the sole reference made to a Federal candidate;

Alternative 3–A

(6) Is devoted exclusively to urging support for or opposition to particular pending legislative or executive matters, where the communication only requests recipients to contact a specific Member of Congress or public official, without promoting, supporting, attacking or opposing the candidate, or indicating the candidate's past or current position on the legislation;

Alternative 3–B

(6) Concerns only a pending legislative or executive matter, and the only reference to a Federal candidate is a brief suggestion that he or she be contacted and urged to take a particular position on the matter, and there is no reference to the candidate's record, position, statement, character, qualifications, or fitness for an office or to an election, candidacy, or voting;

Alternative 3–C

(6)(i) Does not include express advocacy;

(ii) Refers to a specific piece of legislation or legislative proposal, either by formal name, popular name or bill number; or refers to a general public policy issue capable of redress by legislation or executive action; and

(iii) Contains a phone number, toll free number, mail address, or electronic mail address, internet home page or other world wide web address for the person or entity that the ad urges the viewer or listener to contact;

Alternative 3–D

(6) Urges support of or opposition to any legislation, resolution, institutional action, or any policy proposal and only refers to contacting a clearly identified candidate who is an incumbent legislator to urge such legislator to support or oppose the matter, without referring to any of the legislator's past or present positions; or

(7) Refers to a clearly identified Federal candidate in a public communication by a candidate for State or local office, individual holding State or local office, or an association or similar group of candidates for State or local office or of individuals holding State or local office, if such mention of a Federal candidate is merely incidental to the candidacy of one or more individuals for State or local office.

PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

4. The authority citation for part 104 would continue to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b) and 439a.

5. In section 104.5, paragraph (j) would be added as follows:

§ 104.5 Filing dates (2 U.S.C. 434(a)(2)).

* * * * *

(j) *24-hour statements of electioneering communications.* Every person who makes a disbursement or executes a contract to make a disbursement for the direct costs of producing or airing electioneering communications as defined in 11 CFR 100.29 aggregating in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement under penalty of perjury in accordance with 11 CFR 104.19.

6. New section 104.19 would be added to read as follows:

§ 104.19 Reporting electioneering communications (2 U.S.C. 434(f)).

(a) *Who must report.* Every person who makes a disbursement or executes a contract to make a disbursement for the direct costs of producing or airing electioneering communications as defined in 11 CFR 100.29 aggregating in excess of $10,000 during any calendar year shall, within 24 hours of the disclosure date, file with the Commission a statement under penalty of perjury containing the information set forth in paragraph (b) of this section. Persons other than political committees must file these 24-hour statements on FEC Form 9. Political committees must file these 24-hour statements on Schedule J of FEC Forms 3, 3X, or 3P.

(1) *Disclosure date* means during a calendar year:

(i) 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; and

(ii) Any other date in a calendar year 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 since the most recent disclosure date during such calendar year.

(2) Direct costs of producing or airing electioneering communications include, but are not limited to, the following:

(i) Costs charged by a production company, such as studio rental time, staff salaries, costs of video or audio recording media, and talent; and

(ii) The cost of airtime on broadcast, cable or satellite radio and television stations, and the charges for a broker to purchase the airtime.

(b) *Contents of statement.* Every person described in paragraph (a) of this section shall disclose the following information:

(1) The identification (*see* 11 CFR 100.12) of the person making the disbursement and, if the person is not an individual, the person's principal place of business;

Alternative 4–A

(2) The identification (*see* 11 CFR 100.12) of any person sharing or exercising direction or control over the electioneering communication activities of the person making the disbursement;

Alternative 4–B

(2) The identification (*see* 11 CFR 100.12) of any person sharing or exercising direction or control over the contents, timing, duration, intended audience, frequency of placement of the electioneering communication or the specific media outlet used;

(3) The identification (*see* 11 CFR 100.12) of the custodian of the books and accounts from which the disbursements for electioneering communications were made;

(4) The amount of each disbursement of more than $200 during the period covered by the statement, the date the disbursement was made, and the identification (as defined in 11 CFR 100.12) of the person to whom that disbursement was made;

Alternative 5–A

(5) All elections to which the electioneering communication pertains and all names (if known) of clearly identified candidates referred to or to be referred to in the communication;

Alternative 5–B

(5) All clearly identified candidates referred to in the communication and the elections in which they are candidates;

(6) If the disbursements are paid out of a segregated bank account of a qualified nonprofit corporation under 11 CFR 114.10(h) consisting of funds provided solely by individuals who are U.S. citizens, U.S. nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), the name and address of each contributor who contributed an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year;

(7) If the disbursements are not paid out of the segregated bank account of a qualified nonprofit corporation under 11 CFR 114.10(h), the name and address of each contributor who contributed an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year; and

(8) The disclosure date as defined in this section.

(c) *Recordkeeping.* All persons, except qualified nonprofit corporations (see 11 CFR 114.10), who make electioneering communications or who accept contributions for the purpose of making electioneering communications, must maintain records in accordance with 11 CFR 104.14.

PART 105—DOCUMENT FILING (2 U.S.C. 432(g))

7. The authority citation for part 105 would be revised to read as follows:

Authority: 2 U.S.C. 432(g), 434, 438(a)(8).

8. Section 105.2 would be revised to read as follows:

§ 105.2 Place of filing; Senate candidates, their principal campaign committees, and committees supporting only Senate candidates (2 U.S.C. 432(g)(2)).

(a) *General rule.* Except as provided in paragraph (b) of this section all designations, statements, reports, and notices as well as any modification(s) or amendment(s) thereto, required to be filed under 11 CFR parts 101, 102, and 104 by a candidate for nomination or election to the office of United States Senator, by his or her principal campaign committee or by any other political committee(s) that supports only candidates for nomination for election or election to the Senate of the United States shall be filed in original form with, and received, by the Secretary of the Senate, as custodian for the Commission.

(b) *Exceptions.* Statements of electioneering communications filed in accordance with 11 CFR 104.19, regardless of whether the communication refers to a candidate for Senate, House of Representatives or President or Vice-President, must be filed in original form with, and received by the Commission.

PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY

9. The authority citation for part 114 would continue to read as follows:

Authority: 2 U.S.C. 431(8)(B), 431(9)(B), 432, 434(a)(11), 437d(a)(8), 438(a)(8), 441b.

10. In section 114.2, paragraph (b) would be revised to read as follows:

§ 114.2 Prohibitions on contributions and expenditures.

* * * * *

(b)(1) Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR part 100, subpart B. Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR 114.1(a) in connection with any Federal election.

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR part 100, subpart D;

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party; or

(iii) Making payments for an electioneering communication to those outside the restricted class.

* * * * *

11. In section 114.10, paragraphs (a), (d), (e) and (g) would be revised and paragraphs (h) and (i) would be added to read as follows:

§ 114.10 Nonprofit corporations exempt from the prohibition on independent expenditures and electioneering communications.

(a) *Scope.* This section describes those nonprofit corporations that qualify for an exemption in 11 CFR 114.2. It sets out the procedures for demonstrating qualified nonprofit corporation status, for reporting independent expenditures and electioneering communications, and for disclosing the potential use of donations for political purposes.

* * * * *

(d) *Permitted corporate independent expenditures and electioneering communications.*

(1) A qualified nonprofit corporation may make independent expenditures, as defined in 11 CFR part 109, without violating the prohibitions against corporate expenditures contained in 11 CFR part 114.

(2) A qualified nonprofit corporation may make electioneering communications, as defined in 11 CFR 100.29, without violating the prohibitions against corporate expenditures contained in 11 CFR part 114.

(3) Except as provided in paragraph (d)(1) and (2) of this section, qualified nonprofit corporations remain subject to the requirements and limitations of 11 CFR part 114, including those

provisions prohibiting corporate contributions, whether monetary or in-kind.

(e) *Qualified nonprofit corporations; reporting requirements.*

(1) *Procedures for demonstrating qualified nonprofit corporation status.*

(i) If a corporation makes independent expenditures under paragraph (d)(1) of this section that aggregate in excess of $250 in a calendar year, the corporation shall certify, in accordance with paragraph (e)(1)(i)(B) of this section, that it is eligible for an exemption from the prohibitions against corporate expenditures contained in 11 CFR part 114.

(A) This certification is due no later than the due date of the first independent expenditure report required under paragraph (e)(2)(i) of this section. However, the corporation is not required to submit this certification prior to making independent expenditures.

(B) This certification may be made either as part of filing FEC Form 5 (independent expenditure form) or, if the corporation is not required to file electronically under 11 CFR 104.18, by submitting a letter in lieu of the form. The letter shall contain the name and address of the corporation and the signature and printed name of the individual filing the qualifying statement. The letter shall also certify that the corporation has the characteristics set forth in paragraphs (c)(1) through (c)(5) of this section.

(ii) If a corporation makes electioneering communications under paragraph (d)(2) of this section that aggregate in excess of $10,000 in a calendar year, the corporation shall certify, in accordance with paragraph (e)(1)(ii)(B) of this section, that it is eligible for an exemption from the prohibitions against corporate expenditures contained in 11 CFR part 114.

(A) This certification is due no later than the due date of the first electioneering communication statement required under paragraph (e)(2)(ii) of this section. However, the corporation is not required to submit this certification prior to making electioneering communications.

(B) This certification must be made as part of filing FEC Form 9 (electioneering communication form).

(2) *Reporting independent expenditures and electioneering communications.*

(i) Qualified nonprofit corporations that make independent expenditures aggregating in excess of $250 in a calendar year shall file reports as required by 11 CFR 109.2.

(ii) Qualified nonprofit corporations that make electioneering communications aggregating in excess of $10,000 in a calendar year shall file statements as required by 11 CFR 104.19.

* * * * *

(g) *Non-authorization notice.* Qualified nonprofit corporations making independent expenditures or electioneering communications under this section shall comply with the requirements of 11 CFR 110.11.

(h) *Segregated bank account.* A qualified nonprofit corporation may, but is not required to, establish a segregated bank account into which it deposits only funds provided by individuals, as described in 11 CFR 104.19(b)(6).

(i) *Activities prohibited by the Internal Revenue Code.* Nothing in this section shall be construed to authorize any organization exempt from taxation under 26 U.S.C. 501(a), including any qualified nonprofit corporation, to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code, 26 U.S.C. 501, *et seq.*

12. Section 114.14 would be added to read as follows:

§ 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.

(a) No corporation or labor organization may give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication, to any other person.

(b) No person who accepts funds given, disbursed, donated or otherwise provided by a corporation or labor organization may use those funds to:

(1) Pay for any electioneering communication; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering communication.

(c) The prohibitions at paragraphs (a) and (b) of this section shall not apply to funds disbursed by a corporation or labor organization, or received by a person, that constitute—

(1) Salary, royalties, or other income earned from bona fide employment or other contractual arrangements, including pension or other retirement income;

(2) Interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or

(3) Receipt of payments representing fair market value for goods provided or services rendered to a corporation or labor organization.

(d) Persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) of this section must be able to demonstrate through a reasonable accounting method that no such funds were used to pay any portion of an electioneering communication.

Dated: August 2, 2002.

Karl J. Sandstrom,

Vice Chairman, Federal Election Commission.

[FR Doc. 02–19996 Filed 8–6–02; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–100–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2B19 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Bombardier Model CL–600–2B19 series airplanes. This proposal would require replacement of the overwing emergency exit placards, door weight placards, and no baggage placards with new placards. This action is necessary to prevent the inability of a passenger to open and dispose of the overwing emergency exit door during an emergency evacuation due to incorrect placards. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by September 6, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–100–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov.* Comments sent via fax or the Internet must contain ''Docket No. 2002–NM–100–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.