

the candidate's authorized committee owes to the candidate.

The introductory text in paragraph (b) makes clear that if a candidate makes several personal loans over the course of an election, those loans will not be treated separately for purposes of this section but will, instead, be considered in the aggregate. Paragraphs (b) and (d) treat a primary election as a separate election from a general election. If a candidate makes several personal loans to the authorized committee, all the loans will be added together to determine whether they exceed \$250,000 and are, therefore, subject to the provisions of this section.

Under paragraph (b)(1), authorized committees may repay the entire amount of any personal loans from contributions that are made *on the date of the election or before that date*. Repayment of the entire loan amount is permitted under BCRA and FECA even if the total loan amount exceeds \$250,000 and as long as these contributions were made on or before the date of the election.

In contrast, paragraphs (b)(2) and (3) both address repayments using contributions made after the election. Paragraph (b)(2) allows authorized committees to use only \$250,000 of contributions that are made after the election to repay the candidate's personal loans to his or her campaign committee. Consequently, paragraph (b)(3) prohibits authorized committees from using more than \$250,000 of contributions that are made after the election to repay the candidate for personal loans.

It is important to note that 11 CFR 116.11(b)(1), (b)(2), and (b)(3) are not mutually exclusive. Under the interim final rules, authorized committees may use contributions that are made *before* the election to repay candidate loans in any amount, and contributions made *after* the election to repay candidate loans up to \$250,000. For example, Candidate A loans \$600,000 to her authorized committee. The authorized committee receives \$350,000 in contributions by election day and receives an additional \$400,000 in contributions after the election. Candidate A's authorized committee may use \$250,000 of the \$400,000 received after the election and \$350,000 received before the election to repay the entire amount of the candidate's personal loan.

Paragraph (c) of new 11 CFR 116.11 outlines certain conditions regarding the repayment of candidates' personal loans after the election. Paragraph (c)(1) establishes a post-election time limit for the use of remaining cash on hand for

the repayment of personal loans. If a candidate's authorized committee wishes to use the cash on hand as of the day after the election to repay any portion of the candidate's personal loan(s), it must repay the personal loan(s) within 20 days of the election, which is the close of books for the post-general election report. After the 20-day post-election time period has elapsed, paragraph (c)(2) requires a candidate's authorized committee to treat the remaining balance of the candidate's personal loan that exceeds \$250,000 as a contribution from the candidate to the authorized committee, given that this amount could never be repaid, and given that the amount must be accounted for on the authorized committee's next report.

Further, paragraph (c)(3) requires the candidate's authorized committee to report both the amount of cash on hand used to repay the candidate's personal loan(s) (under paragraph (c)(1)) and the treatment of the remaining loan amount as a contribution from the candidate (under paragraph (c)(2)) in the authorized committee's next scheduled report.

Example: Candidate X loans \$500,000 to her campaign on October 1 for the general election. As of the day after the general election, Candidate X's authorized committee has cash on hand from the general election in the amount of \$100,000. Candidate X's authorized committee decides to use \$50,000 of the cash on hand to repay part of the candidate's personal loan, leaving an outstanding balance of \$450,000. Candidate X's authorized committee must repay \$50,000 of the personal loan and must treat \$200,000 as a contribution from the candidate within 20 days of the general election because that is the amount that exceeds \$250,000 of the remaining balance. Candidate X's authorized committee must report the repayment of \$50,000 of the personal loan and the treatment of \$200,000 of the personal loan's outstanding balance as a contribution on the next regularly scheduled report, the post-general election report.

BCRA specifically states that 2 U.S.C. 441a(j) applies only to personal loans that are made after November 6, 2002. Thus, the limitations on repayment of personal loans from contributions made after the respective election do not apply to personal loans made before this date. Consequently, any outstanding loan balances of candidate loans that were made before November 6, 2002, may be repaid with contributions made after this date subject to the provisions concerning net debts outstanding in 11 CFR 110.1(b)(3).

B. Alternative Interpretation of 2 U.S.C. 441a(j)

The definition of "personal loans" in new 11 CFR 116.11(a) is based on a broad interpretation of the opening phrase "[a]ny candidate who incurs personal loans" in 2 U.S.C. 441a(j) to mean loans made by candidates to their authorized committees. This interpretation is based on the legislative history of the Senate debates on this provision.³

The Commission, however, seeks comments on its interpretation of "incurs" in 2 U.S.C. 441a(j). "Incur" means "[t]o become liable or subject to * * * and to become through one's own action liable or subject to."⁴ In the opening phrase of 2 U.S.C. 441a(j), it is the candidate who is "incurring" the personal loans. Thus, arguably, the use of "incurs" could refer to the candidate's liability and not the authorized committee's liability to the candidate. The interim final rules reject this interpretation of 2 U.S.C. 441a(j) to mean loans that are made *to* candidates rather than loans made *by* candidates for two reasons. First, the legislative history supports a different interpretation. Second, the practical consequence of interpreting 2 U.S.C. 441a(j) to apply to loans made *to* candidates rather than loans made *by* candidates to their authorized committee would be that similarly situated candidates may be treated differently. Under this interpretation, a candidate who takes out a loan from a lending institution and then lends the loan proceeds to his or her authorized committee would be subject to the restrictions of 2 U.S.C. 441a(j) and 11 CFR 116.11. Conversely, a candidate who liquidates an asset and loans the proceeds from the sale to his or her authorized committee would not be subject to these sections and the candidate's authorized committee would be able to raise funds after the election to repay him or her. For these two reasons, the Commission rejects this possible interpretation of 2 U.S.C. 441a(j) at this time.

³ "If you incur debt from a personal loan and then you get elected as Senator, and then you go around and say, now I am Senator, I want you to get my money so I can pay back what I used of my own money to run for election. It is clear in this amendment that you cannot do that in the future." 147 CR S2537 (daily ed. Mar. 20, 2001) (statement of Sen. Domenici); "[The] language [of 2 U.S.C. 441a(j)] makes it clear there will not be any effort after the election to raise money to repay those loans; * * * *Id.* at S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Durbin); see also footnote 2, above.

⁴ *Black's Law Dictionary* 108 (6th ed. 1990).