

Representatives). The Commission is interpreting these provisions to mean that the amount of the contribution that exceeds the individual contribution limit in 11 CFR 110.1 does not count when aggregating contributions for purposes of 11 CFR 110.5, taking into account previous contributions made during the election cycle. New 11 CFR 400.5 allows an individual to include only the first \$2,000 he or she contributes, regardless of whether it was a prior contribution or part of a contribution accepted under the increased limit, in the biannual aggregate contribution limit.

Example: In 2004, the contribution limit under 11 CFR 110.1 is \$2,000. Contributor X contributes \$1,500 to Candidate Y in April for the general election. Because Candidate Y is opposing a self-financed candidate, she can accept up to \$6,000 under the increased limit. After learning this, Contributor X contributes an additional \$3,000 to Candidate Y's campaign in May for the general election. Under 11 CFR 400.5, Contributor X should count the initial \$1,500 contribution and \$500 of the subsequent contribution towards the biannual aggregate limit. The remaining \$2,500 of the \$3,000 contribution accepted in May should not count towards that limit.

The Commission, however, seeks comment on whether 2 U.S.C. 441a(i)(1)(C) (i)(II) and (ii)(II) (Senate) and 2 U.S.C. 441a-1(a)(1)(B) (House of Representatives) should be interpreted in an alternative manner. Does the plain language of these statutory sections indicate that no part of a contribution accepted under the increased limits counts against the aggregate contribution limit in section 441a(a)(3), regardless of whether the contributor has made prior contributions to the candidate for that election? Under this alternative interpretation, Contributor X in the above example would not include any of the \$3,000 contribution accepted in May in the biannual aggregate limit.

Paragraph (c) addresses situations where an individual contributor has contributed the maximum permitted under the aggregate biannual contribution limitation for individuals in 11 CFR 110.5, but has not contributed the maximum under the increased limits of 11 CFR part 400. Under this circumstance, a contributor may make contributions that, in the aggregate, do not exceed the applicable increased limit under 11 CFR 400.40(b) or 400.41(b) minus the applicable limit as defined in 11 CFR 400.5.

Example: Between January 1, 2003 and June 30, 2004, Contributor X has already contributed \$37,500 to various candidates including \$1,000 to Candidate Y. On July 10, 2004, Candidate Y determined that she could accept up to \$6,000 under 11 CFR 400.40(b)(3) and solicited Contributor X for a

\$6,000 contribution. The applicable limit in 2004 is \$2,000. Because Contributor X has already reached his aggregate biannual contribution limit, he may contribute up to \$4,000 to Candidate Y (\$6,000 - \$2,000).

Disposal of Excess Contributions

BCRA added two identical provisions to FECA, one for the Senate and one for the House of Representatives, requiring candidates and their authorized committees to refund excess contributions that are not spent in connection with their elections. 2 U.S.C. 441a(i)(3) and 441a-1(a)(4). Subpart E of 11 CFR part 400, implements the requirements of these BCRA provisions.

1. 11 CFR 400.50 Definition of "Excess Contributions"

The first section in subpart E defines the term "excess contributions." BCRA describes the term "excess contributions" as "the aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the increased limit * * * and not otherwise expended in connection with the election with respect to which such contributions relate * * *." 2 U.S.C. 441a(i)(3) (Senate); 2 U.S.C. 441a-1(a)(4) (House of Representatives). By referencing back to the definition of "increased limit" in 11 CFR 400.6, the regulatory definition of "excess contribution" allows candidates and their authorized committees to exclude the amount of a contribution, when added to previous contributions made by a person, that is less than or equal to the regular contribution limitations of 11 CFR 110.1 from the computation of excess contributions. This allows the candidates and their authorized committees the benefit of contributions that they would have received regardless of whether the increased limit provisions of the Millionaires' Amendment were triggered.

2. 11 CFR 400.51 Relation of Excess Contributions to the Election in Which They Are Made

The purpose of new 11 CFR 400.51 is to make clear that contributions accepted under the increased limit, that are accepted during an election cycle, whether a primary election cycle or a general election cycle, can only be spent for that election. A primary election is treated as an election separate from the general election. Thus, paragraph (a) requires that any excess contributions made during the primary election cycle must be refunded to the original contributor within 50 days of the primary election. Paragraph (b) contains a similar provision for the general election.

Paragraph (c) creates an exception from paragraphs (a) and (b) for run-off elections. Run-off elections will be considered as extensions of the elections that resulted in the run-off elections. Thus, candidates and their authorized committees are able to use contributions made under the increased limit during the applicable election cycle for the run-off election. Refunds of all excess contributions must be made within 50 days of the run-off election.

The Commission seeks comments on whether treating run-off elections as extensions of the elections that resulted in the run-off elections is an appropriate approach. Should the Commission, instead, treat run-off elections as separate elections and require that excess contributions be refunded within 50 days of the applicable primary or general election? Conversely, should the Commission treat the primary, general, and any run-off elections as one election with the refund period being within 50 days of the general election? Under this approach, however, candidates who do not participate in the general election would be required to refund excess contributions within 50 days of the primary election.

3. 11 CFR 400.52 Prohibition Against Redesignation of Excess Contributions

New 11 CFR 400.52 prohibits candidates and their authorized committees from seeking redesignation of contributions made under the increased limits to another election. It also prohibits contributors from redesignating a contribution made under the increased limits once the contribution has been made. The focus of the Millionaires' Amendment is on the fundraising ability of the candidate facing an opposing candidate who is a self-financed. The Commission concludes that nothing in BCRA suggests that once the election is over, the candidate should be able to carry over the benefit of the increased contribution limits into the next election where he or she would be opposing an entirely different candidate. In addition, BCRA (2 U.S.C. 441a(i)(3) and 441a-1(a)(4)) provides for only one method of disposing of excess contributions and that is the refund of the excess contributions to the original contributors, which is incorporated into the interim final rules. Nevertheless, the Commission seeks comments on whether to amend the interim final rules by adding a similar prohibition against reattribution to a joint contributor of a contribution made under the increased limits in accordance with 11 CFR 110.1(k).