

4. 11 CFR 400.53 Disposal of Excess Contributions

As stated above, BCRA (2 U.S.C. 441a(i)(3) and 441a-1(a)(4)) requires candidates and their authorized committees to refund excess contributions to the original contributors within 50 days of the election. New 11 CFR 400.53 implements this requirement.

Paragraph (a) states that the candidate's authorized committee must refund the excess contributions to individuals who made contributions to the candidate or the candidate's authorized committee under 11 CFR part 400. This ensures that only those contributors who actually made contributions to the candidate under the increased individual contribution limit provided for by the Millionaires' Amendment may receive refunds. Paragraph (a) also states that the refund to each individual must not exceed that individual's aggregate contributions to the candidate or the candidate's authorized committee for the relevant election cycle. This restriction prohibits authorized committees from refunding more money to an individual than that individual actually contributed.

Paragraph (b) of 11 CFR 400.53 addresses the situation where contributors do not cash, deposit, or otherwise negotiate the refund checks sent to them under 11 CFR 400.53(a). Authorized committees will be required to disgorge to the United States Treasury an amount equal to the aggregate amount of any refund checks not cashed, deposited, or otherwise negotiated within six months of the date of the refund checks. Authorized committees will be required to disgorge this amount within nine months of the election. This would allow for 50 days after the election to make the refunds and for six months for contributors to cash, deposit, or otherwise negotiate the refund checks with an additional 40 days to determine the disgorgement amount and send the check to the United States Treasury.

5. 11 CFR 400.54 Notification of Disposal of Excess Contributions

BCRA requires that candidates dispose of excess contributions within 50 days of the election. 2 U.S.C. 441a(i)(3) and 441a-1(a)(4) (*See* Explanation and Justification for new 11 CFR 400.50, above.) BCRA also requires that, in the first regular report after the election, the candidate or the authorized committee report the source and amount of each excess contribution and the manner in which the candidate or the authorized committee used such funds.

2 U.S.C. 441a(i)(3) and 441a-1(a)(4). New 11 CFR 400.54 largely tracks the wording of the statute with two modifications. First, rather than requiring that the "source" of excess contributions be reported, the new rule requires the "identification," as defined in 11 CFR 100.12, of the contributor of each excess contribution.

The second modification addresses an inconsistency in the statute. While 2 U.S.C. 441a(i)(3) (Senate) and 2 U.S.C. 441a-1(a)(4) (House of Representatives) require that excess contributions be disposed of within 50 days of the election, 2 U.S.C. 434(a)(6)(C) (Senate) and 2 U.S.C. 441a-1(b)(2) (House of Representatives) require that candidates or their authorized committees report the source of each excess contribution and the manner in which it was used. Note that the first regular report after a primary election would be the quarterly report for the quarter in which the primary was held, and the first regular report after the general election would be the post-general election report. In the case of a primary election, the next quarterly report may be due *before* the expiration of the 50 day post-election time period for the election in which the candidate who must dispose of excess contributions has run, depending on the date the primary election is held. In the case of a general election, the next regular report after the election, the post-general election report, would most definitely be due *before* the expiration of the 50 day post-election time period for the election in which the candidate who must dispose of excess contributions has run.

To reconcile these two provisions of BCRA, 11 CFR 400.54 requires principal campaign committees to report the identification of the contributors of excess contributions and the manner in which such funds were refunded in the first regular report due *after* the 50 day time for disposing of such funds has expired. For example, in the case of a primary election, the principal campaign committee would have to report the excess contributions and the manner in which they were refunded in the first report that quarterly filers are required to file after the 50-day post-primary time period has elapsed. For example, for a primary on May 31, the principal campaign committee would report the excess funds and the manner in which they were refunded in its third quarterly report rather than its second quarterly report because the 50-day post-primary time period would elapse on July 20, five days after the second quarterly report was due. Thus, the principal campaign committee would report this information with its third

quarterly report, due on October 15. Similarly, for the general election, the principal campaign committee would report the excess funds and the manner in which they were refunded not in the post-general report, but rather in the year-end report.

The Commission requests comments on this inconsistency and the Commission's reconciliation, as well as an alternative interpretation. To avoid reading an inconsistency in BCRA, the requirement that authorized committees report the source and amount of excess campaign funds and the manner in which they were "used", 2 U.S.C. 434(a)(6)(C) (Senate) and 2 U.S.C. 441a-1(b)(2) (House of Representatives), could be read as requiring the reporting of whether and, if so, to what extent funds raised under the increased contribution limits were spent. Consequently, the Commission seeks comment on a reading of the foregoing statutory provisions that would require an authorized committee taking advantage of the increased contribution limits to identify in the first report following each election the identity of each contributor of a contribution in excess of the normal limits, the aggregate amount raised and how much of that was spent in connection with the election. It is plausible that Congress intended to capture in a single report the identity of all "excess" contributors and the extent to which campaign spending was affected by the increased contribution limits. This reading would resolve the conflict between the requirement to dispose of excess contributions within 50 days under 2 U.S.C. 441a(i)(3) (Senate) and 2 U.S.C. 441a-1(a)(4) (House of Representatives) and the reporting of excess contributions, prior to that deadline.

Part 9035—Expenditure Limitations

11 CFR 9035.2 Limitation on Expenditures From Personal or Family Funds

The Commission is changing a cross-reference in 11 CFR 9035.2(c) to the definition of "personal funds." As explained in greater detail above, the Commission is changing the definition of "personal funds" in former 11 CFR 110.10 and moving it to 11 CFR 100.33 (*see* Explanation and Justification for former 11 CFR 110.10, above). The new definition of "personal funds" in 11 CFR 100.33 applies only to the Commission's rules implementing Title 2 of the U.S. Code, however, and not to the Commission's rules implementing Title 26 of the U.S. Code.

Current 11 CFR 9003.2 includes a definition of "personal funds" that is