

or more candidates. *See* 11 CFR 100.5(e)(3). Thus, a State party committee could be negatively impacted to the same extent as other multicandidate committees by Congress's conspicuous choice to index one set of contribution limits to inflation but not the limits of multicandidate committees. The commenter urged the Commission to permit State party committees to opt out of multicandidate committee status for the same reasons set forth above. The Commission declines to do so for the reasons explained above.

11 CFR 110.5(c) Application of the Aggregate Biennial Contribution Limitation for Individuals

Prior to BCRA, total contributions by an individual were limited to \$25,000 in any calendar year. Also, any contribution made to a candidate with respect to an election in a year other than the calendar year in which the election is held was considered to be made during the calendar year in which the election is held. 2 U.S.C. 441a(a)(3) (2001). Thus, when individuals made contributions to candidates for elections to be held in years after the calendar year the contribution was made, those contributions counted against the contributor's \$25,000 annual contribution limit for the year of the future election, instead of the year the contribution was actually made. The Commission implemented this statutory provision in 11 CFR 110.5(c).

After BCRA, section 441a(a)(3) provides that contributions made in a specified two-year period (*i.e.*, "the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year") may not exceed \$37,500, in the case of contributions to candidates and the authorized committees of candidates, and \$57,500 in the case of other contributions. Also, in BCRA, Congress removed the language of former section 441a(a)(3) that treated some contributions as made in a year other than the year in which actually made (*i.e.*, the year the election is held).

In the NPRM, the Commission noted that, despite these statutory changes, it had retained 11 CFR 110.5(c) when it revised section 110.5 in 2002 after passage of BCRA. *See* Contribution Limitations and Prohibitions; Final Rules, 67 FR 69,928 (November 19, 2002). The NPRM proposed to amend section 110.5(c) to state that, for purposes of the biennial contribution limits in section 441a(a)(3) and 11 CFR 110.5(b), a contribution to a candidate will be attributed to the two-year period in which the contribution is actually

made, regardless of when the election with respect to which it is made is held. 68 FR 50,488, 50,490.

In the final rules, the Commission has bifurcated 11 CFR 110.5(c) into two paragraphs. New paragraph (c)(1) of section 110.5 applies to contributions made on or after January 1, 2004. The Commission chose this date for two reasons. First, beginning the operation of the new rule with the new year will minimize confusion. Second, it will insure that the change will occur at the beginning of a reporting period for most filers. The final rule is otherwise the same as the proposed rule in the NPRM. New paragraph (c)(2) applies to contributions made before January 1, 2004. It otherwise is the same as the rule in previous 11 CFR 110.5(c). New paragraph (c)(2) is included in the final rules to preclude any question of the retroactive application of paragraph (c)(1) to contributions made before the effective date of the regulation in reliance on the Commission's previous interpretation of post-BCRA section 441a(a)(3).

For example, under new paragraph (c)(1) of section 110.5, a contribution made in 2004 to a candidate in a 2006 Senate race is attributed to the individual's biennial limit for the 2003–2004 period. Similarly, a contribution made in 2005 to a candidate in the 2008 presidential race is attributed to the individual's biennial limit for the 2005–2006 period. In addition, a contribution made during 2007 to retire debt from a 2006 House election is attributed to the individual's biennial limit for the 2007–2008 period. Under new paragraph (c)(2), as under the previous language of 11 CFR 110.5(c), a contribution made in 2003 to a candidate in a 2006 Senate race would be attributed to the individual's biennial limit for the 2005–2006 period.

There was no consensus among the commenters in response to the NPRM. One commenter supported the Commission's proposals, stating that the language of section 441a(a)(3) as amended "plainly attributes candidate contributions by individuals to the aggregate limit for the two-year period in which such contributions are actually made." This commenter opined that "conforming the FEC's regulation [at section 110.5(c)] to the revised statute's clear requirement that individuals' hard money contributions to candidates tally against their aggregate limit for the two-year period in which such contributions are actually made would eliminate the confusion (and inadvertent donor violations) that prevailed under the previous approach." As such, this commenter asserts that the NPRM's

proposed change would lessen, not increase confusion.

On the other hand, several commenters were opposed to the NPRM's proposed changes. Some commenters asserted that confusion will ensue for both contributors and recipient candidates. A commenter observed that if the proposed changes were made, contributors may have multiple contributions to the same candidate that would count toward different biennial limits and this may be very confusing to contributors. To mitigate any confusion, the Commission has decided to continue to apply the previous rule prior to January 1, 2004, and to apply the new rule on and after that date. This approach ensures that the new rules will not have retroactive application.

Some comments asserted that the Commission should not penalize donors who may have inadvertently exceeded the \$37,500 limit for the 2003–04 two-year period, to the extent that the donor exceeded the limit as a result of contributions made before the effective date of the Commission's proposed new rule to candidates that are not running in the 2003–04 two-year period. Because the Commission's final rule does not change the treatment of contributions made prior to the effective date of the new rule, contributors will not have inadvertently exceeded the \$37,500 limit for the 2003–04 two-year period based on the Commission's new rules.

Several commenters focused on the reliance interest that contributors, candidates and political committees have in the current language of section 110.5(c), and suggested either a deferred effective date for the new rule (*e.g.*, January 1, 2005), or adoption of a transition rule that fairly treats those who have reasonably relied upon the existing regulation. Commenters asserted that a deferred effective date is needed because changing the rule in the middle of an election cycle could cause inadvertent violations. In its final rule for § 110.5(c), the Commission accommodates contributors' reliance interest by preserving the previous language of section 110.5(c) for contributions made prior to January 1, 2004. However, the Commission does not interpret section 441a(a)(3), as amended by BCRA, to permit a transition period. The Commission is also concerned that any transition period is likely to engender additional confusion.

Some comments suggested that current section 110.5(c) is primarily related to candidates for the U.S. Senate, and that changing the provision would have an adverse impact on Senate