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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 29, 2002

AGENDA ITEM
For Meeting of: 10-31-02
SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Scott E. Thomas
Commissioner

SUBJECT: Proposed amendment re draft final rules on contribution limitations and prohibitions

I continue to disagree with the approach set forth in OGC's draft (*see, e.g.*, pp. 38-43; 94) that would apply the new two-year aggregate contribution limit on an election cycle basis, rather than a calendar year basis. The statute is explicit that the limit is to apply on a calendar year basis:

> During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—
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> (A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;
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> (B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

2 U.S.C. § 441a(a)(3) (effective Nov. 6, 2002).

The inflation adjustment at 2 U.S.C. § 441a(c)(1)(C) provides that increases for the limit on giving to candidates, the limit on giving to national party committees, the limit on national party giving to candidates, and the two-year limit at issue "shall only be made in odd-numbered years and . . . shall remain in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the amount is increased and ending on the date of the next general election." The inflation adjustment merely changes the dollar amounts and specifies when the change will take place. It should not be read to be in "conflict" with

(*see* OGC draft at p. 39, lines 4 and 19) the provision that clearly sets out the two-year calendar-based period for aggregating individual contributions.

It makes sense to read the statutory provisions to work in concert. A donor should be able to apply contributions toward the limit based on whether they were made during the 'January 1 of odd year through December 31 of even year' timeframe. The inflation adjustment should have only a minor impact during the period after the general election but before January 1. For contributions made through the date of the general election, the existing limit should be enforced. In the rare situation where a donor makes a contribution during the short post-general election period that would have been excessive under the former aggregate limit, but that is not excessive under the new inflation-adjusted limit, no violation could be pursued. Presumably, though, most donors would adhere to the aggregate limit in effect prior to the general election because there would be no way of knowing whether there will be a new higher limit until after December 31. For donors who foolishly gamble and make post-election contributions that exceed even the adjusted limit, the Commission could react with more severity if the circumstances warranted. In sum, the inflation adjustment provision is not an impediment to interpreting the two-year aggregate limit in a fashion that will track the plain language of the statute and be much more understandable by the regulated community.

As I understand it, the OGC approach for the $25,000 per calendar year limit on giving to national parties (§ 441a(a)(1)(B)) will work the same way I am suggesting for the two-year aggregate limit. Donors will aggregate contributions according to whether they were made during the January 1 through December 31 timeframe, and the inflation adjustment will simply mean that those made during the short post-election period will enjoy the benefit of the new inflation-adjusted limit. (Again, few issues should arise as most donors will adhere to the pre-adjusted limit because the new limit won't be known until the short post-election period is over.) I don't understand why we would want to adopt the confusing approach OGC suggests for the two-year limit while adopting the more intuitive calendar year approach for the § 441a(a)(1)(B) limit.

OGC's approach does not avoid the inevitable complication caused by retroactive inflation adjustments. Under any interpretation, donors will face a time period after the general election and before the new limit is known, where there will be uncertainty about what the new limit will be. Starting the aggregation of contributions on the day after the general election does not avoid this problem any better than starting the aggregation on January 1. On the other hand, as I see it, the illogical interpretation of an explicit calendar year-based aggregation rule would engender problems for donors and the FEC. A lawyer of medium intelligence would be quick to argue the FEC's regulation is contrary to the statute if it made an unfavorable difference for a client in the calculation of aggregate contributions. We are particularly vulnerable, in my view, if we have applied the calendar year approach one way when dealing with the two calendar year aggregate limit, but another way when dealing with the $25,000 annual limit of § 441a(a)(1)(B). [1]

[1] Contrary to OGC's argument that the 'last in order' rule of statutory construction is most appropriate given the language of § 441a(a)(3) and § 441a(c)(1)(C), I would argue that the 'plain meaning' rule ought

The Commission has suffered for years with a confusing rule (statutorily based) whereby a contribution to a candidate counts toward the year of the applicable election for purposes of the calendar year-based $25,000 annual aggregate limit, even if the contribution was in fact made in a different year. *See* current 2 U.S.C. § 441a(a)(3). In changing the law in BCRA, Congress has presented the Commission with a chance to provide some clarity for donors. Those contribution limits based on a calendar year timeframe (whether a one-year or two-year period) can be interpreted so that donors only have to worry about whether the contribution is made between the January 1 and December 31 dates. We should embrace such simplicity.

Accordingly, I would make the following revisions to OGC's document:

1. On p. 34, line 23, beginning with "New paragraph . . ." through p. 35, line 6, ending with ". . .clarity" substitute the following:

> The issues relating to the relationship of the statutory timeframe for aggregating contributions and the inflation adjustment timeframe are discussed below.

2. On p. 35, lines 6 and 9, and anywhere else applicable, change "(b)(5)" to "(b)(4)". This would be necessitated by the deletion of OGC's proposed (b)(4) on p. 94 (see below).

3. On p. 39, line 16, beginning with "Thus, these . . ." and ending on p. 43, line 4, with ". . . provisions." substitute the following:

> Thus, the statute seems to contemplate different aggregate contribution limits applying for the period from November 3, 2004, to January 1, 2005.
>
> The Commission proposed in the NPRM to interpret the statute in a way that required donors instead to aggregate contributions using the two-year period set forth for the inflation adjustments at § 441a(c)(1)(C). Proposed 11 CFR 110.5(b)(3). This would have meant that rather than using the two year period running from January 1 of an odd year to January 1 of an even year for aggregating contributions under § 441a(a)(3), a donor would have used the period

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to apply. Singer, *Statutes and Statutory Construction* (West Group 2000), § 46:01 ("When the intention of the legislature is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction," *citing, inter alia, Overseas Education Ass'n, Inc. v. FLRA*, 876 F.2d 960 (D.C. Cir. 1989)). In my view, the language of § 441a(a)(3) is crystal clear, and the language of § 441a(c)(1)(C) plainly affects only the date and amount of any increase in such limit. Alternatively, I would invoke the 'whole statute' rule whereby a statute passed as a whole is animated by one general purpose, and each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. *Id.* at § 46:05. In my view, OGC's approach produces one result for one calendar year-based limit (§ 441a(a)(3)), and a different result for another calendar year-based limit (§ 441a(a)(1)(B)). As a final argument, I would invoke the 'each word given effect' rule of statutory construction whereby a statute should be construed so that effect is given to all its provisions so that no part will be inoperative or superfluous. *Id.* at § 46:06. OGC's approach seems to read out of the statute the timeframe set forth at § 441a(a)(3).

beginning the day after the general election and running through the next general election date.

Several commenters, including the Congressional sponsors of BCRA, urged that the Commission not adopt the proposed approach and instead apply the 'January 1 of odd year to January 1 of even year' approach set forth at 2 U.S.C. 441a(a)(3). They argued that the statutory provision setting out the limit itself should prevail over the provision that merely provides for the inflation adjustment of such limit.

The Commission agrees with these commenters. The statutory language at § 441a(a)(3) is explicit regarding use of a 'January 1 of odd year to January 1 of even year' approach for aggregating contributions. The indexing provision merely changes the amount of the limit as of a specified date. Accordingly, the Commission is adopting final rules at 11 CFR 110.5(b) that delete the language of proposed 11 CFR 110.5(b)(3). Similar to the treatment afforded contributions subject to the $25,000 per calendar year limit of 2 U.S.C. § 441a(a)(1)(B), contributions made within the specified calendar year timeframe will be aggregated, and the inflation adjustment will simply modify the amount of the limit as of the date following a general election.

The Commission expects that any potential complications stemming from a retroactive inflation adjustment should be minimal. The determination of any indexing increase will be made after the new calendar year begins. Donors will not know if there is to be an increase until the period running from the day after the general election to January 1 has expired. The Commission expects that donors therefore will adhere to the limits in place prior to the retroactive effective date for new calendar year-based limits.

4. On. pp. 94-95, delete paragraph (4), renumber paragraph (5) as paragraph (4), and add at the end of paragraph (3) the following: "For example, the increase in the contribution limitations made in January 2005 is effective from November 3, 2004 to November 7, 2006." This will make the inflation adjustment language regarding the two-year aggregate limit correspond to the language used for other calendar year-based limits. See draft § 110.1(c)(1)(ii) on p. 88 and § 110.2(e)(2) on pp. 92-93.