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# AGENDA ITEM

For Meeting of: 11-21-02


## SUBMITTED LATE


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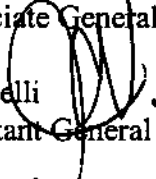
### MEMORANDUM


**TO:** The Commission

**THROUGH:** James A. Pehrkon  
Staff Director 

**FROM:** Lawrence H. Norton  
General Counsel 

Rosemary C. Smith,   
Acting Associate General Counsel

John C. Vergalli,   
Acting Assistant General Counsel

Ruth Heilizer   
Attorney

**SUBJECT:** BCRA "Other Provisions": Draft Final Rules and Explanation and  
Justification—Personal Use—Alternative Deleting the Terms "Excess  
Campaign Funds" and "Any Other Lawful Purpose"

After discussions with the Regulations Committee, the Office of General Counsel understands that some Commissioners are interested in considering a rule that would delete the terms "excess campaign funds" and "other lawful purpose" from 11 CFR part 113 and reorganize the part accordingly. Accordingly, OGC presents the following alternative version of 11 CFR part 113 and the Explanation and Justification. The changes indicated below are keyed to the page and line numbers of Agenda Doc. No. 02-82.

For the reasons explained in the E & J on pages 32 through 36 of Agenda Doc. No. 02-82, the Office of General Counsel continues to recommend that the final rules continue the current approach regarding "excess campaign funds" and "any other lawful purpose."

1 **Amendments to the Explanation and Justification**

2  
3 1. On page 31, strike lines 10 and 11 and replace with the following:

4 **PART 113 –USE OF CAMPAIGN ACCOUNTS FOR NON-CAMPAIGN PURPOSES**

5 **(2 U.S.C. 439a)**

6 2. On page 32, strike line 23 through p. 36, line 2.

7 3. On page 36, line 3, change “3” to “1”.

8 4. On page 37, line 3, change “4” to “2”.

9 5. On page 37, line 19, insert the following and renumber the remaining sections

10 accordingly:

11 1. **11 CFR 113.1(b) and (e) – Excess campaign funds**

12 In BCRA, Congress deleted the phrase “in excess of any amount necessary to defray”  
13 campaign expenses from section 439a. Former section 113.1(e) defined “excess campaign  
14 funds” to mean “amounts received by a candidate as contributions which he or she determines  
15 are in excess of any amount necessary to defray his or her campaign expenditures.” In the  
16 NPRM, the Commission proposed not to change section 113.1(e), but raised the issue of whether  
17 Congress intended to eliminate the discretion of candidates and Federal officeholders to use these  
18 excess campaign funds “for ordinary and necessary expenses incurred in connection with duties  
19 of the individual as a holder of Federal office.” 2 U.S.C. 439a(a)(2). No commenters opposed  
20 the Commission’s proposal to leave section 113.1(e) unchanged, and one commenter supported  
21 leaving the “excess campaign funds” phrase intact.

22 To ensure that 11 CFR part 113 is consistent with the plain language of BCRA, the  
23 Commission has decided that the term “excess campaign funds” should be dropped.  
24 Accordingly, the title of part 113, (formerly “Excess Campaign Funds and Funds Donated to

1 Support Federal Officeholder Activities”) now reads “Campaign Funds and Funds Donated to  
2 Support Federal Officeholder Activities.” In addition, the references to the term “excess  
3 campaign funds” throughout part 113 are being deleted.

4 The Commission is also deleting 11 CFR 113.1(e), which previously defined “excess  
5 campaign funds” as “amounts received by a candidate as contributions which he or she  
6 determines are in excess of any amount necessary to defray his or her campaign expenditures.”

7 The Commission is also making the following conforming amendments. In paragraphs  
8 (e)(1)(i), (e)(5), and (f), the term “campaign funds” is being substituted for “excess campaign  
9 funds.” Lastly, the Commission is also changing “excess campaign funds” to “campaign funds”  
10 in paragraph (b), which defines “office accounts.”

11

12 6. On page 46 after line 21, insert the following:

13 Amended Provisions of 11 CFR 113.2

14 Given the amendments BCRA made to 2 U.S.C. 439a described above regarding the  
15 deletion of the phrase “excess campaign funds” and the amendments being made to 11 CFR  
16 113.1, the Commission is revising section 113.2 in several respects. First, the title and the  
17 introductory portion of this section are being changed to more clearly convey that this section  
18 sets forth the permissible non-campaign uses of funds in a campaign account, rather than uses of  
19 what were previously called “excess campaign funds.”

20 In the NPRM, the Commission noted that former 2 U.S.C. 439a included the phrase “for  
21 any other lawful purpose” in addition to enumerating permissible uses of excess campaign funds.  
22 BCRA amended section 439a by deleting “any other lawful purpose” from the list of permitted  
23 uses. Nonetheless, in the NPRM, the Commission proposed retaining that term in pre-BCRA 11

1 CFR 113.2(d). One commenter disagreed with the Commission's proposed rule and  
2 recommended that the "any other lawful purpose" language be deleted from the regulation. This  
3 commenter noted that pre-BCRA 11 CFR 113.2(d), which closely tracks the wording of section  
4 439a, provides for four broad permissible uses of campaign funds: (1) ordinary and necessary  
5 expenses incurred in connection with the duties of a holder of Federal office; (2) contributions to  
6 an organization described in 26 U.S.C. 170(c); (3) transfers to a national, state or local party  
7 committee; and (4) any other lawful purpose, except that such funds may not be converted to  
8 personal use, other than to defray officeholder expenses or repay loans made by the candidate for  
9 campaign purposes. Pointing out that BCRA deletes "any other lawful purpose" as an expressly  
10 permissible use of campaign funds, the commenter argued that BCRA reduces the categories of  
11 permissible uses of campaign funds from four to three. Thus, the commenter concluded that the  
12 "any other lawful purpose" language in 11 CFR 113.2(d) should be deleted and that the  
13 regulation should be revised accordingly.

14 The Commission concludes that the commenter's reasoning is correct, and therefore is  
15 deleting the term "any other lawful purpose," from paragraph (d) of section 113.2. The  
16 Commission is also rewording and simplifying paragraph (d) to more clearly state that campaign  
17 funds may be used to repay loans made by candidates from their personal funds if the loans were  
18 used in connection with the candidate's campaign. The repayment of such loans constitutes  
19 authorized expenditures in connection with the campaign for Federal office of the candidate or  
20 individual, and is therefore permissible under BCRA. 2 U.S.C. 439a(a)(1); see also 11 CFR  
21 110.10(a) and (b).

22 Although the Commission is not amending section 113.2(e)(1), which refers to "excess  
23 funds," it is changing section 113.2(e)(1)(i), which refers to "any excess campaign or donated

1 funds.” These rules permit qualified Members of Congress who served in the 102d Congress or  
2 an earlier Congress to convert to personal use the unobligated balance of their excess funds as of  
3 Nov. 30, 1989. Paragraph (e)(1) addresses “excess funds,” rather than “excess campaign funds,”  
4 and sets forth detailed instructions to determine this amount. Revised paragraph (e)(1)(i) now  
5 refers simply to “campaign funds.”

6  
7

8 **Amendments to the Regulations in 11 CFR Part 113**

9

10 1. On p. 63, strike lines 1 and 2 and replace with the following:

11 **~~PART 113 – EXCESS CAMPAIGN FUNDS AND FUNDS DONATED TO SUPPORT~~**  
12 **~~FEDERAL OFFICEHOLDER ACTIVITIES~~ USE OF CAMPAIGN ACCOUNTS FOR**  
13 **NON-CAMPAIGN PURPOSES (2 U.S.C. 439a)**

14

15 2. On p. 63, strike line 6 and replace it with the following:

16 In section 113.1, paragraphs (b), (e), and (g) are revised to read as follows:

17

18 3. On p. 63, insert the following between lines 8 and 9:

19 (b) Office account. Office account means an account established for the purposes of  
20 supporting the activities of a Federal or State officeholder which contains ~~excess~~ campaign funds  
21 and funds donated, but does not include an account used exclusively for funds appropriated by  
22 Congress, a State legislature, or another similar public appropriating body, or an account of the  
23 officeholder which contains only the personal funds of the officeholder.

1 \* \* \* \* \*

2 (e) ~~Excess campaign funds. Excess campaign funds~~ means amounts received by a candidate  
3 as contributions which he or she determines are in excess of any amount necessary to defray his  
4 or her campaign expenditures. [Removed and reserved]

5

6 4. On p. 68, on line 18, insert the following:

7 In section 113.2, the section heading, the introductory language, paragraphs (d), (e)(1)(i), (e)(5),  
8 and (f) are revised to read as follows:

9 **§ 113.2 Permissible non-campaign uses of funds (2 U.S.C. 439a).**

10 ~~Excess campaign funds and funds donated:~~ Funds in a campaign account or an account  
11 described in 11 CFR 113.3:

12 \* \* \* \* \*

13 (d) ~~May be used for any other lawful purpose, except that, other than as set forth in paragraph~~  
14 ~~(e) of this section, no such amounts may be converted by any person to personal use, other than:~~  
15 ~~To defray any ordinary and necessary expenses incurred in connection with his or her duties as a~~  
16 ~~holder of Federal office, or to repay to a candidate any loan the proceeds of which were used in~~  
17 ~~connection with his or her campaign to~~ repay a loan from the candidate where the proceeds of the  
18 loan were used in connection with the candidate's campaign.

19 (e) (1) \* \* \*

20 (i) Cash assets the Member may convert any excess campaign or donated  
21 funds in an amount up to the Member's authorized committee(s)' cash on  
22 hand, determined under 11 CFR 104.3(a)(1), as of November 30, 1989,  
23 less the committee(s)' total outstanding debts as of that date.

1 \* \* \* \* \*

2 (5) 103d Congress or later Congress: A qualified Member who serves in the  
3 103d Congress or a later Congress may not convert to personal use any  
4 ~~excess~~ campaign or donated funds, as of the first day of such service.

5 (f) Nothing in this section modifies or supersedes other Federal statutory restrictions or  
6 relevant State laws ~~which~~ that may apply to the use of ~~excess~~ campaign or donated funds by  
7 candidates or Federal officeholders.