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Part VI

Federal Election Commission

11 CFR Part 9003 et al.

Public Financing of Presidential Primary and General Election Candidates; Proposed Rule

FEDERAL ELECTION COMMISSION

11 CFR Parts 9003, 9004, 9007, 9008, 9032, 9033, 9034, 9035, 9036 and 9038

[Notice 1998–18]

Public Financing of Presidential Primary and General Election Candidates

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission requests comments on proposed changes to its rules governing publicly financed Presidential primary and general election candidates. These regulations implement the provisions of the Presidential Election Campaign Fund Act (''Fund Act'') and the Presidential Primary Matching Payment Account Act (''Matching Payment Act''), which establish eligibility requirements for Presidential candidates seeking public financing, and indicate how funds received under the public financing system may be spent. They also require the Commission to audit publicly financed campaigns and seek repayment where appropriate. The proposed rules reflect the Commission's experience in administering this program during the 1996 election cycle and also seek to anticipate some questions that may arise during the 2000 Presidential election cycle. No final decisions have been made by the Commission on any of the proposed revisions in this Notice. Further information is provided in the supplementary information which follows.

DATES: Comments must be received on or before February 1, 1999.

ADDRESSES: All comments should be addressed to Ms. Susan E. Propper, Assistant General Counsel, and must be submitted in either written or electronic form. Written comments should be sent to the Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463. Faxed comments should be sent to (202) 219–3923, with printed copy follow up. Electronic mail comments should be sent to publicfund@fec.gov. Commenters sending comments by electronic mail should include their full name and postal service address within the text of their comments. Electronic comments that do not contain the full name, electronic mail address and postal service address of the commenter will not be considered.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, or Ms. Rosemary C. Smith, Senior Attorney, at (202) 694–1650 or toll free (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission is considering revising parts of its regulations governing the public financing of Presidential campaigns, 11 CFR parts 9001 through 9039, to more effectively administer the public financing program during the year 2000 election cycle. These rules implement 26 U.S.C. 9001 *et seq.* and 26 U.S.C. 9031 *et seq.* The Commission is publishing this Notice of Proposed Rulemaking to invite comments on the amendments proposed.

Please note that some revisions would affect only primary elections or only general elections, while other changes would affect both. The discussion of these proposals which follows is arranged by topic. However, the draft rules, themselves, are set out in numerical order.

A. Coordination Between Publicly Funded Presidential Candidates and Their Political Parties

The 1996 election cycle gave rise to a number of instances in which national party committees conducted advertising campaigns and other activities focused on the party's presumptive Presidential nominee. The acceleration of the primary schedule makes it quite likely that parties will again face a situation in 2000 in which the likely nominees are known well in advance of the nominating conventions, and in which those likely nominees may have reached or nearly reached their pre-nomination spending limits under 2 U.S.C. 441a(b)(1)(A). In 1996, the national committees of the two major political parties are alleged to have made impermissible contributions to their Presidential candidates by coordinating extensive advertising campaigns, sharing polling data, and bearing expenses for advertising, staff, consultants, travel, polling and other services intended to benefit their presumptive nominees. Section 441a(d) of the FECA limits the amount party committees may spend on the general election campaigns of their Presidential nominees regardless of whether those nominees accept federal funds for either their primary or general election campaigns. In the past, the Commission has permitted coordinated expenditures to be made before the date of the primary election. While not prejudging decisions related to those 1996 allegations, the Commission wishes to solicit comments on rules to provide clearer guidance on political party activities coordinated with or related to their presumptive presidential nominees, and on proposals to provide some relief to presidential candidates who may have both secured the nomination and reached their spending limit for the primary well in advance of the party convention. Please note, however, that specific proposals are not reflected in the attached rules which follow. The effect of party committee coordinated activities on their publicly funded candidates' repayment obligations is discussed in part E, below.

On May 5, 1997, the Commission issued a Notice of Proposed Rulemaking to address a wide variety of issues involving coordinated expenditures and independent expenditures, including those made on behalf of Congressional candidates. *See* Notice of Proposed Rulemaking, 62 F.R. 24367 (May 5, 1997). That rulemaking, which was initiated in response to a petition for rulemaking, is still pending.

1. Relief for Presumptive Nominees Who Have Reached Their Spending Limits

The Commission is without authority to relax or expand pre-nomination spending limits applicable to Presidential candidates receiving primary or general election funding. The Commission does, however, offer for comment a proposal to permit national committees of political parties to raise and spend funds on behalf of a presumptive nominee when, in the party's determination, the identity of the nominee is clear. However, any such expenditures would count against the party's general election coordinated spending limit, and funds would have to be raised and spent in compliance with rules otherwise applicable to such coordinated party spending. *E.g.* 2 U.S.C. 441a(d) and 11 CFR 110.7. Even in the event that a party nominates a person other than a presumptive nominee in whose behalf coordinated expenditures were made, any pre-convention party spending in behalf of any presidential candidate will be counted against that party's coordinated expenditure limit for the general election.

2. Standards for Allocating Spending by Political Parties Related to the Party's Publicly-Funded Presidential Candidates

In *Colorado Republican Federal Campaign Committee* v. *Federal Election Commission,* 518 U.S. 604 (1996), the Supreme Court ruled that party expenditures which are not coordinated with candidates cannot be construed to be contributions to a candidate. The plurality opinion noted explicitly, however, ''Since this case involves only the provision [limiting party expenditures] concerning congressional races, we do not address

issues that might grow out of the public funding of Presidential campaigns.'' *Id.* at 612. Furthermore, the most significant controversies over 1996 party activities involve activities which were alleged to be coordinated with Presidential candidates or campaigns, but which, the political parties argue, may be exempt from the definition of expenditure under section 431(9) of the FECA.

The public funding provisions of Title 26, United States Code, were intended to limit spending by publicly funded Presidential candidates, and by their party committees. Those provisions also provide for, and indeed presuppose coordination between parties and their nominees. As a result, the Commission wishes to obtain comment on the proposals described below, which are intended to clarify what activities of political parties will be considered expenditures on behalf of Presidential nominees or candidates for nomination.

3. Advertising Which Clearly Identifies a Presidential Candidate

Under the proposal, expenses by a political party for ''general public political advertising'' (*see* 11 CFR 110.11) which clearly identifies a Presidential candidate who has accepted public funding pursuant to 11 CFR Part 9004 or Part 9034 will be considered to be expenditures in behalf of that candidate unless the following three conditions are met: (1) The advertisement is focused on a legislative or public policy issue; (2) The advertisement is addressed to an audience that would normally be affected by the legislation or proposal (e.g. ads on proposals in a particular state would not normally be addressed to residents of a different state); and (3) Mention of a candidate in the advertisement is incidental and related to the candidate's role as sponsor, proponent, or leading opponent to the proposal (e.g. ''the President's plan'' or ''the Smith bill''). Costs for advertisements which identify multiple candidates would continue to be allocated pursuant to 11 CFR 106.1.

Costs for general public political advertising by a political party which clearly identify a Presidential candidate of another party (except under the incidental mention/legislative or public policy exemption above) would be considered to be expenditures in behalf of the sponsoring party's nominee or eventual nominee, whether or not such nominee accepts public funds for either the primary or the general election or both.

The Commission also solicits comments on whether a standard other than ''clearly identified candidate,'' such as express advocacy or electioneering message, should be applied to determine when advertising by a political party should be treated as an expenditure in behalf of a publicly funded Presidential candidate.

4. Polling, Media Production and Consulting Services

Comments are also sought as to whether the Commission should issue new regulations to provide that spending by a political party for polling, media production or consulting services shall be considered to be coordinated expenditures in behalf of a publicly funded Presidential candidate under either of the following two conditions: (1) Such activities are carried on jointly and/or costs are shared between the party and a candidate under a single contract or arrangement; or (2) Polling, scripts or other contract deliverables relate to a clearly identified candidate, and *either:* (a) The results of the polling or other services are provided to the Presidential campaign, its employees or agents (except for polling in which questions about a Presidential candidate(s) are only one of numerous issues and for which the Presidential candidate is not the principal focus); or,

(b) The candidate, campaign, employees or agents are consulted in advance about the contract or services, including polling questions, scripts or other deliverables.

5. Transfer or Sharing of Employees

In addition, the Commission requests comments on whether to promulgate rules providing that spending by a political party for salary, travel and expenses of employees who, during the same election cycle have been employees of a publicly funded Presidential campaign, shall be considered to be expenditures in behalf of the Presidential candidate. However, any such rules would contain two exceptions to cover situations where either the Presidential candidate is no longer an active candidate under 11 CFR 9033.5 or the employee's duties are substantially different than those performed for the Presidential candidate.

B. Qualified Campaign Expenses

1. ''Bright Line'' Distinction Between Primary and General Election Expenses

The Fund Act, the Matching Payment Act, and the Commission's regulations require that publicly financed Presidential candidates use primary election funds only for expenses incurred in connection with primary elections, and that they use general election funds only for general election expenses. 26 U.S.C. 9002(11), 9032(9); 11 C.F.R. 9002.11 and 9032.9. These requirements are necessary to effectuate the spending limits for both the primary and the general election, as set forth at 2 U.S.C. 441a(b) and 26 U.S.C. 9035(a). *See also* 11 CFR 110.8(a) and 9035.1(a)(1).

In 1995, the Commission promulgated 11 CFR 9034.4(e) to provide more specific guidance as to which expenses should be attributed to a candidate's primary campaign and which ones should be considered general election expenses. This provision specifies that the costs of goods or services used exclusively for the primary must be attributed to the primary. Similarly, any expenditures for goods or services used exclusively for the general election must be attributed to the general election. The revisions to the regulations also established a number of specific attribution rules for expenses such as polling, travel, media production and distribution costs, etc., which are largely based on the timing of the expenditure. One of the primary purposes of these rules was to eliminate much of the time- and labor-intensive work of examining thousands of individual expenditures, thereby helping to streamline the audit process. While there may be situations in which the bright line approach may not accurately reflect the relative impact of specific expenditures, these differences should balance themselves out over the course of a lengthy campaign. During the last Presidential election cycle, several questions were raised regarding the application of these ''bright line'' rules. Accordingly, the Commission seeks comments on the following proposed modifications to and clarifications of these provisions.

First, a sentence would be added to paragraph (e)(1) of section 9034.4 to clarify which provisions apply to expenditures for goods and services that are used in both a candidate's primary and general election campaigns. With some exceptions, expenditures for goods or services that may benefit both the primary and the general election campaigns must be attributed on the basis of whether they were used before or after the candidate received the nomination.

Second, paragraph (e)(3) of section 9034.4 would be modified to resolve questions that have come up regarding the cost of the use of campaign offices prior to the candidate's nomination. Currently, such expenses must be attributed to the primary election unless the office is used by persons working exclusively on general election

preparations. ''Exclusive use'' is not defined in the rules, and questions have been raised as to whether the term means several hours, or days, or weeks. The draft rules which follow would change this exception so that it would apply to periods when the campaign office is used only by persons working ''full time'' on general election campaign preparation. In the alternative, comments are sought on dropping this exclusive use exception with regard to overhead and salary expenses. The general rule regarding overhead and payroll expenses would also be reworded for purposes of clarification.

Please note that other issues involving the transfer or sale of assets from a federally financed candidate's primary election committee to the general election committee are discussed below.

2. Winding Down Costs

The regulations at 11 CFR 9034.4(a)(3) permit candidates to receive contributions and matching funds, and to make disbursements, for the purpose of defraying winding down costs over an extended period after the candidate's date of ineligibility (''DOI''). However, after the implementation of the ''bright line'' rules in 1995, questions have arisen as to whether all salary and overhead incurred after the date of the candidate's nomination must be attributed to the general election, including those associated with winding down the primary campaign. *See* 11 CFR 9034.4(d)(3). Accordingly, the Commission seeks comments on revising section 9034.4(a)(3)(i) and (iii) to clarify that for candidates who win their parties' nominations, no salary and overhead expenses may be treated as winding down costs until after the end of the expenditure report period, which is thirty days after the general election takes place. This clarification would recognize that under the ''bright line rules,'' the costs incurred for winding down the primary campaign during the general election period will be offset by pre-convention general election expenses.

C. Compliance and Fundraising Costs

1. Legal and Accounting Costs for the Primary Election

The rules at 11 CFR 9035.1(c)(1) currently set forth an exemption from the overall spending limit for legal and accounting compliance costs incurred by federally financed Presidential primary committees. To claim this exemption, campaign committees must keep detailed records of salary and overhead expenses, including records indicating which duties are considered compliance and the percentage of time each person spends on such activities. The Commission is considering amending this regulation to provide a simpler and easier method of calculating the compliance exemption. Proposed paragraph (c)(1) of section 9035.1 would state that an amount equal to 10% of all operating expenditures for each report period may be treated as compliance expenses not subject to the candidate's spending limit. This ''standard deduction'' could be readily derived from line 23, Operating Expenses, on the committee's reports. Note that the proposed rule would not permit committees to demonstrate that they have actually incurred a higher amount. The change in the regulations is intended to decrease the time it takes for the Commission to verify compliance costs during the audit process. It should also reduce the resources campaign committees must devote to tracking compliance costs.

Please note that the Commission is also proposing to modify the title of section 9035.1 and to add subheadings for each paragraph to assist readers in locating the material in this section more easily.

2. Pre-nomination Formation of a General Election Legal and Accounting Compliance Fund (GELAC)

Currently, section 9003.3 contemplates that a nominee of a major political party who accepts public financing may establish a privately funded General Election Legal and Accounting Compliance Fund (''GELAC'') for certain limited purposes. A GELAC may be set up before the candidate is actually nominated for the office of President or Vice President. The Commission is seeking comments on several changes to this section to address problems that have arisen when primary candidates have formed GELACs relatively early in the primary campaign but subsequently failed to win their party's nomination. One difficulty is that candidates who do not receive their party's nomination must return all private contributions received by the GELAC. However, if some of those funds have been used to defray overhead expenses or to solicit additional contributions for the GELAC, a total refund has presented difficulties. Another difficulty is that the GELAC could be improperly used to make primary election expenditures. This problem may also affect candidates who win their parties' nominations, particularly when those candidates have almost exhausted their spending limits for the primary.

To avoid a recurrence of these situations, the Commission is considering several alternatives. Please note, however, that these proposals are not reflected in the attached rules which follow. One alternative is to amend paragraph (a)(1)(i) of section 9003.3 to specify that contributions shall not be solicited for a GELAC prior to the candidate's nomination at the party's national nominating convention. Under this approach, a committee could establish a GELAC before the date of nomination, but only for the limited purpose of receiving correctly redesignated contributions that would otherwise have to be refunded as excessive primary contributions. The Commission anticipates that overhead and reporting expenses incurred by the GELAC could be defrayed from interest received on the account.

A second alternative is to bar GELAC fundraising before a specified date, such as April 15 of the Presidential election year. Under this alternative, starting on April 15 of the Presidential election year, candidates could begin soliciting contributions for the GELAC. However, if the candidate does not become the nominee, all contributions accepted for the GELAC, including redesignated contributions, would have to be refunded within sixty (60) days of the candidate's date of ineligibility. Such refunds would be consistent with the Commission's decision in the last Presidential election cycle to require refunds within 60 days of the date on which the political party of the unsuccessful primary candidate selects its nominee. These refunds would also be consistent with the policies applicable to non-publicly funded Congressional candidates who accept designated general election contributions, but who thereafter lose their parties' primaries. *See* 11 CFR 102.9(e)(2), and Advisory Opinions 1992–15 and 1986–17.

The third alternative under consideration is to allow GELAC fundraising beginning 90 days before each candidate's date of nomination. This approach would mean that the nominees of the two major parties would begin GELAC fundraising on different dates.

The fourth alternative is to bar Presidential candidates from establishing a GELAC until the date of the last Presidential primary before the national nominating convention. A variation on this approach would be to allow the eventual nominee to form a GELAC at an earlier point, but to prohibit GELAC fundraising before the last Presidential primary.

The fifth alternative is to allow any Presidential primary candidate to establish and to raise funds for a GELAC at any time. Under this approach, those who do not win their party's nomination would not have to return all the funds they raise. Instead, they could offset their fundraising and administrative expenses, and would only need to refund the amount remaining in their account as of the date their party selects a nominee. Comments are sought as to whether all contributors should receive a proportional refund or whether a first-in-first-out method should be used to determine which contributions have been spent, with refunds going to the most recent contributors. Please note that this alternative would be a significant departure from the treatment of general election contributions received by losing primary candidates in Congressional races.

3. Joint Primary/GELAC Solicitations

Paragraph (e)(6)(i) of section 9034.4 addresses situations where a candidate's GELAC and his or her primary committee issue joint solicitations for contributions. Currently, the costs of such solicitations are divided equally between the two committees, regardless of how much money is actually raised for each. One difficulty with the current approach is that in some situations it enables the GELAC to absorb a relatively high portion of fundraising costs while receiving a relatively low proportion of the funds raised. Thus, this provision is at odds with the joint fundraising rules applicable to other types of joint fundraising conducted by publicly funded Presidential primary committees under 9034.8. In effect, section 9034.4(e)(6)(i) could permit the GELAC to subsidize fundraising expenses that would otherwise be paid by the primary committee and subject to spending limits. Another difficulty is that under the current rules, questions have been raised as to whether the cost of a solicitation, or the cost of a fundraiser, should include staff salaries, consulting fees, catering, facilities rental, and the candidate's travel to the event site.

Consequently, the Commission is considering several alternatives to paragraph (e)(6)(i). One possibility is to state that the allocation of solicitation expenses and the distribution of net proceeds from the fundraiser would be made in the same manner as described in 11 CFR 9034.8(c)(8)(i) and (iii). These are the provisions that apply to unaffiliated committees. When these committees conduct a joint fundraiser, they apportion their costs using the percentage of contributions each committee receives from the event. Given the unique relationship between the primary campaign and the GELAC, and the fact that the candidate's primary committee receives public financing in exchange for voluntary compliance with spending limits, it is important to ensure that costs are correctly apportioned and net proceeds are properly distributed. Under this alternative, for example, if the GELAC receives 25% of the net proceeds, it may only pay 25% of the fundraising expenses, and no more than that amount.

The second approach would be to prohibit joint fundraising between the primary and the GELAC. If each committee performed its own fundraising, the difficulties inherent in apportioning expenses would not arise. This approach would also recognize that there may be some situations in which the recipient committees do not know which of several solicitation letters or fundraising events generated a given contribution.

The third alternative is to treat all expenses incurred by the GELAC prior to the candidate's date of ineligibility or date of nomination as qualified campaign expenses for the primary election. This approach would avoid GELAC subsidization of the primary campaign. It may also be easier for campaigns and for the Commission to work with than the current system.

The fourth alternative would be to provide greater specificity in section 9003.3(a)(2)(i)(E) as to what types of costs may be paid for by the GELAC when it solicits GELAC contributions. Comments are sought as to whether the list of solicitation expenses should be relatively narrow to avoid funding campaign events. Under this approach, solicitation costs would cover printing invitations and solicitations, as well as mailing, postage and telemarketing expenses. However, solicitation costs would not include items such as catering, facilities rental, fundraising consultants, employee salaries, and travel to the event site.

Please note that the draft rules which follow do not incorporate any of the alternative approaches to the fundraising rules discussed above.

4. Transfers from the Primary to the GELAC

The regulations at 9003.3(a)(1)(i) through (v) place certain restrictions on transferring funds from a Presidential candidate's primary committee to a GELAC. These limitations have been promulgated to ensure that the GELAC is not used as a way to increase a candidate's entitlement to matching funds or to decrease a candidate's repayment obligations. The Commission is seeking suggestions as to how these provisions could be strengthened, and whether it is advisable to do so.

D. Modifying the Audit and Repayment Processes

In 1995, the Commission revised sections 9007.2 and 9038.2 to reduce the amount of time it takes to audit publicly funded Presidential committees, to make repayment determinations and to complete the enforcement process for these committees. These steps were taken to ensure adherence to the three year time period specified in 26 U.S.C. 9007(c) and 9038(c) for notifying publicly funded committees of repayment determinations. Having operated under the streamlined procedures during the 1996 election cycle, the Commission is examining further changes to ensure these processes are completed as fairly and expeditiously as possible.

1. Audit Procedures

The Commission is considering two alternatives to the current audit procedures. Please note that neither of these is reflected in the draft rules which follow. One alternative would be to return to the audit procedures used for the 1992 Presidential candidates who received primary or general election funding. Under the previous system, the Commission's Audit Division conducted an exit conference at the close of audit fieldwork to discuss its preliminary findings and recommendations. However, no written exit conference memorandum was prepared or presented to the committee during the exit conference. Instead, an interim audit report containing a preliminary calculation of future repayment obligations was subsequently prepared for approval by the Commission. After that, the committee had an opportunity to submit materials disputing or commenting on matters contained in the initial audit report. Next, the Audit Division prepared a final audit report containing initial repayment determinations. The final audit report was considered by the Commission in an open session. Twenty four hours before the final audit report was released to the public, copies were provided to the candidate and the committee.

The previous system had the advantage of enabling committees to see what matters were of concern to the Commission before responding to the interim audit report prepared by the Commission's staff. It also enabled committees to resolve these disputes

early in the process before they became public. However, one disadvantage of the previous procedure was that campaign committees did not have an opportunity to rebut the interim audit report until after the Commission approved the report. Another problem was that sometimes it could be difficult for the Commission to meet the statutory requirement that any notification of a repayment be made no later than three years after the end of the matching payment period or after the date of the general election. 26 U.S.C. 9007(c) and 9038(c). In *Dukakis* v. *Federal Election Commission*, 53 F.3d 361 (D.C. Cir. 1995) and *Simon* v. *Federal Election Commission*, 53 F.3d 356 (D.C. Cir. 1995), the court determined that the preliminary calculation contained in the interim audit report did not constitute sufficient notification of repayment obligations. Thus, the court concluded that the Commission's previous regulation at 11 CFR 9038.2(a)(2), which stated that the interim audit report constitutes notification, was inconsistent with the statute. *Simon* at 360.

The second alternative would be to retain many of the current audit procedures, with the exception that the exit conference memorandum would incorporate a legal analysis and would be approved by a majority vote of four Commissioners in executive session before it is presented to the candidate's committee during the exit conference. This approach would have the advantage of enabling committees to see what matters are of concern to the Commission before responding to the exit conference memorandum prepared by the Commission's staff. However, the disadvantage is that the Commission would not have the benefit of considering the committee's views on the factual and legal issues at hand before approving the exit conference memorandum. Moreover, this approach may slow the audit process down, thereby jeopardizing the Commission's ability to notify candidates and their committees of repayment obligations within the three year period mandated by the law.

In addition to these alternatives, the Commission seeks comments on retaining its current audit procedures. One advantage of the present system is that, in comparison to the above alternatives, the current rules may result in faster resolution of the audits, as well as more efficient use of Commission and committee resources. Thus, it is not as difficult to meet the statutory deadline for notifying candidates of repayment determinations as it was under the prior rules. However, one disadvantage of the current procedures is that committees do not have an opportunity to address all issues raised in the audit report until after the Commission has made its determination and released the report to the public. Another difficulty is that by publicly releasing the audit report before the Commission's consideration of it, the public and the press may mistakenly conclude that the report represents the views of a majority of the members of the Commission. It may be possible to correct this misperception through public education and by including in each audit report a statement that the report is a staff document and does not necessarily reflect the Commission's views or determinations before it is approved by majority vote.

2. Repayment Determination Procedures

The current regulations in paragraphs (c) and (d) of sections 9007.2 and 9038.2 contemplate a two step repayment process. First, the Commission provides the candidate with a written notice of the repayment determination, which has been approved by an affirmative vote of four of its members, and which is included in the audit report. The candidate has the option of making the repayment or requesting an administrative review. In the latter case, the candidate must submit legal and factual materials supporting no repayment or a lesser repayment. The candidate may also request an oral hearing. At the conclusion of the administrative review, the current rules in paragraphs (c)(3) of these sections indicate that the Commission may decide whether to revise the repayment determination.

The question has arisen regarding the consequences of a failure to approve a repayment determination after the administrative review. The current rule could be interpreted to mean that the prior repayment determination remains in effect. However, that result would undermine the candidate's opportunity for a meaningful review of any new facts or arguments raised. The Commission is obligated to issue a written statement of reasons to justify its repayment determination. One purpose of the statement of reasons is to respond to the significant points raised by the candidate during the administrative review. If the Commission's repayment determination is challenged in court, the statement of reasons is also needed to provide a reasoned basis for the Commission's actions. *See, Robertson* v. *FEC*, 45 F.3d 486, 493 (D.C. Cir. 1995). Consequently, the Commission has recently concluded that no post-administrative review repayment determination may be issued absent an affirmative vote of four of its members following the consideration of the candidate's written materials and oral presentation. *See* Agenda Document #97–84–C (March 27, 1998).

Consistent with this practice, the attached rules would amend paragraphs (c)(3) and (d)(2) of sections 9007.2 and 9038.2 to clearly indicate that post-administrative review repayment determinations must be approved by an affirmative vote of four members of the Commission. In addition, draft paragraphs (c)(3) of these sections would be changed to indicate that the Commission is not voting on whether to revise a repayment determination, but rather is deciding whether to issue a repayment determination.

Also, please note that in paragraph (c)(2)(ii) of both sections, the references to paragraph (c)(2)(ii) would be changed to paragraph (c)(2)(i) to clarify the subject matter of oral hearings.

E. Bases for Repayment Determinations

The Commission is considering whether to delete paragraph (b)(2)(ii)(A) of section 9038.2 from its regulations. This is the provision which permits the Commission to order a repayment of primary matching funds based on a determination that the candidate or authorized committee has made expenditures in excess of the primary spending limits. The argument has been raised that this provision is without statutory basis, and that the reading implied in the current regulation is effectively prohibited by the statute. This argument is discussed below, as well as several countervailing considerations. As noted above in part A, this issue has arisen in the context of whether certain coordinated expenditures made by party committees should be treated as in-kind contributions to the party's presumptive nominee, and thus count against that publicly funded primary candidate's spending limits.

Section 9038 of the Matching Payment Act (26 U.S.C. 9038) provides three bases for determining repayments of primary matching funds: (1) Payments in excess of entitlement; (2) payments used for other than qualified campaign expenses; and (3) excess funds remaining six months after the end of the matching payment period. In contrast, section 9007 of the Fund Act (26 U.S.C 9007) provides four bases for determining repayments of general election funds: (1) Payments in excess of entitlement; (2) an amount equal to any excess qualified campaign expenses; (3) an amount equal to any contributions

accepted; and (4) payments used for other than qualified campaign expenses.

The provisions on ''payments in excess of entitlement'' and ''other than qualified campaign expenses'' are nearly identical between the two chapters. Inasmuch as Congress specified ''excess expenses'' as a repayment basis separate from ''other than qualified campaign expenditures'' in the general election statute, an argument exists that the nearly identical provision on ''other than qualified campaign expenses'' in the primary statute cannot reasonably be read to include excess expenses.

The argument against treating ''excess'' campaign expenditures as ''non qualified'' is buttressed by the text of the ''Qualified campaign expense limitation'' (Sec. 9035) itself, which prohibits candidates from ''knowingly incur[ing] qualified campaign expenses in excess of the expenditure limitation applicable under section 441a(b)(1)(A) of title 2.'' First, one can argue that it is impossible to read this section other than as treating ''excess'' spending as ''qualified.'' Second, this provision states clearly that violation of the primary spending limits is a Title 2 violation, which would be addressed in the FEC's enforcement process, rather than a Title 26 violation, which could be addressed in the audit/repayment process.

Alternatively, it can be argued that there is statutory support for 11 CFR 9038.2(b)(2)(ii)(A) and that this provision should not be deleted. While section 9007(b)(2) of the Fund Act clearly states that repayments can be sought from general election candidates who incur expenses in excess of the aggregate payments to which they are entitled, the Matching Payment Act can be interpreted to set forth repayment requirements for primary candidates that are the equivalent of that general election provision.

A qualified campaign expense of a primary election committee is an expense where ''neither the incurring nor payment * * * constitutes a violation of any law of the United States * * *.'' 26 U.S.C. 9032(9). A Presidential primary candidate who exceeds the expenditure limitations violates two laws, 26 U.S.C. 9035 and 2 U.S.C. 441a(b)(1)(A). Section 9035 of the Matching Payment Act states that ''no candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitations applicable under section 441a(b)(1)(A) of title 2 * * *.'' Section 441a(b)(1) of the FECA states that ''no candidate for the Office of President who is eligible'' to receive public funds may make expenditures in excess of the statutorily prescribed limitations. 2 U.S.C. 441a(b)(1). Thus, one reading of this language is that expenses in excess of expenditure limitations for publicly funded primary candidates are non-qualified because they violate the law. Consequently, it can be argued that they are repayable under 26 U.S.C. 9038(b)(2). On the other hand, the counter-argument is that this interpretation of 26 U.S.C. 9035 must be incorrect because the language of this provision specifically contemplates that amounts spent in excess of the expenditure limitations can constitute qualified campaign expenses. However, in attempting to read the two statutes together, section 9035 may mean that candidates shall not incur expenses that would otherwise be qualified except for the fact that they exceed the section 441a expenditure limitations.

Additionally, it can be argued that the Fund Act and the Matching Payment Act mandate identical results—namely, the repayment of expenditures exceeding the spending limits—albeit in slightly different ways. Arguably, there is no provision in the general election Fund Act corresponding to section 9035 of the Matching Payment Act. Consequently, it can be argued that this may be the reason why 26 U.S.C. 9007(b)(2) specifically mandates repayments from general election committees for spending amounts that exceed their entitlements. Under this interpretation, language corresponding to section 9007(b)(2) is not needed in the Matching Payment Act because repayments are already required when primary election committees make non-qualified campaign expenses by violating the law, which they do whenever they exceed the spending limits set forth in 2 U.S.C. 441a(b)(1) and 26 U.S.C. 9035.

This argument is supported by the court decision in *John Glenn Presidential Committee* v. *FEC*, 822 F.2d 1097 (D.C. Cir. 1987) (upholding the Commission's repayment determination against a publicly funded primary election candidate for exceeding the state-by-state expenditure limitations in the face of a constitutional challenge). The *Glenn* opinion stated that ''campaign expenses are not ''qualified'' if they exceed the limits Congress set, including the limits on spending in each state. 26 U.S.C. 9035(a).'' *Id.* at 1099. *See also, Kennedy for President Committee* v. *FEC*, 734 F.2d 1558, 1560 n. 1 (D.C. Cir. 1984) (holding that ''[u]nder 26 U.S.C. 9035, campaign expenditures are not ''qualified'' if they exceed certain spending limits, including limitations on spending in each state during the presidential primaries''). The state-by-state spending limits at issue in these two cases are in section 441a(b)(1)(A) and (g) of the FECA. As discussed below, these court decisions arguably require the Commission to order repayments of matching funds used for unqualified purposes. *Glenn* at 1099, *Kennedy* at 1561.

The counter-argument is that the *Glenn* and *Kennedy* cases are not dispositive because they did not involve alleged in-kind contributions by third parties such as political party committees, and that such contributions are not necessarily in the same pool of funds from which a publicly funded campaign makes expenditures. The *Glenn* court indicated that it was not ruling on a repayment determination involving private funds. *Glenn* at 1098. However, on the other hand, in-kind contributions to candidates are simultaneously treated as expenditures by those candidates under section 431(8)(A)(i) and (9)(A)(i) of the FECA, and must be reported as both contributions and expenditures under 11 CFR 104.13. In the past, the Commission has considered in-kind contributions to be commingled with a publicly financed candidate's other expenditures and subject to the candidate's expenditure limitations.

F. Net Outstanding Campaign Obligations—Capital Assets

In determining a Presidential primary committee's net outstanding campaign obligations (''NOCO''), section 9034.5(c)(1) permits candidates to deduct 40% of the original cost of capital assets for depreciation. Similarly, section 9004.9(d)(1) provides for a straight 40% depreciation figure for capital assets purchased by general election campaign committees for purposes of the general election committee's statement of net outstanding qualified campaign expenses (''NOQCE''). At one time, the Commission had permitted all Presidential candidates to demonstrate that a higher depreciation was appropriate for capital assets. In 1995, as part of an effort to streamline the audit process and to establish ''bright lines'' between primary expenses and general election expenses, the Commission adopted the straight 40% depreciation figure for all assets purchased after the change in the regulations took effect. It was believed that situations where the 40% figure was too low would be counterbalanced by situations where the figure was too high. Experience during the 1996 Presidential audits has shown that the 40% depreciation figure is

unrealistically low for capital assets such as vehicles, computer systems, telephone systems, and other equipment that is heavily used during a Presidential primary campaign.

Accordingly, the Commission seeks comments on the attached changes to section 9034.5(c)(1), which would allow primary candidates to demonstrate a higher depreciation figure through documentation of the fair market value. However, the proposed amendment to this rule would not permit a fair market value below 60% of the purchase price to be claimed by the primary committee of a candidate that transfers or sells capital assets to his or her publicly financed general-election committee. This proposal recognizes that capital assets such as computer systems or telecommunications systems are customized or configured specifically to meet the needs of that particular campaign organization. It also takes into account the added value to the campaign staff of continuing to work with familiar equipment, and avoiding the disruption that would occur if new equipment were obtained, instead.

Under a parallel change proposed for 11 CFR 9004.9(d), when the general election campaign is over, the general election committee may demonstrate that its capital assets have depreciated by more than 40% of the original cost. However, in the case of assets transferred or sold to it by the candidate's primary committee, the proposed rules indicate that the purchase price must be 60% of the original cost of such assets to the candidate's primary committee. Once the campaign is over, the draft regulations would indicate that the fair market value listed on the NOQCE statement must be 20% of the original cost to the primary committee. Under this approach, campaigns would not have the option of demonstrating that an amount less than 20% is appropriate. Based on past experience, the Commission believes that a 20% residual value is a realistic figure for equipment that has been used throughout both the primary and general election campaigns.

The second change included in these sections is a clarification of the term ''capital asset.'' A new sentence would be added to sections 9004.9(d) and 9034.5(c)(1) to indicate that when the components of a system such as a computer system or a telecommunications system are used together and the total cost of the components exceeds $2000, the entire system will be considered a capital asset. This proposal conforms with the Commission's previous interpretation of its rules. *See* Explanation and Justification for 11 CFR 9034.5, 60 F.R. 31868 (June 16, 1995). In addition, comments are sought on whether computer software should be treated as a capital asset. In this regard, a primary committee may lawfully transfer its computer programs to its general election counterpart, but software licensing agreements may restrict the resale of the software to third parties.

G. Transportation and Services Provided to the Media

Sections 9004.6 and 9034.6 contain provisions governing expenditures by federally financed committees for transportation and other services provided to representatives of the news media covering the Presidential primary and general election campaigns. These rules indicate that expenditures for these purposes will, in most cases, be treated as qualified campaign expenses subject to the overall spending limitations of sections 9003.2 and 9035.1.

However, sections 9004.6 and 9034.6 also allow committees to accept limited reimbursement for these expenses from the media, and to deduct any reimbursements received from the amount of expenditures subject to the overall expenditure limitation. These rules set limits on the amount of reimbursement that a committee can accept, and require committees to repay a portion of any reimbursement that exceeds those limits to the U.S. Treasury. Paragraphs (b) of these sections limit the reimbursements to 110% of the media representative's *pro rata* share of the actual cost of the transportation and services made available. The regulations specify that the *pro rata* share is calculated by dividing the total actual cost of the transportation and services provided by the total number of individuals to whom such transportation and services are made available. Under these provisions, the total number of individuals includes committee staff, media personnel, Secret Service and others.

During the last Presidential election cycle, questions arose regarding both the types of ground services that could be charged to the press and the reasonableness of the amounts billed to them. Consequently, comments are sought as to whether these rules should be revised to include lists of allowable and nonallowable expenses for ground costs. Disputed items have included security services for the press, sound and lighting equipment, press risers and camera platforms, carpeting, bunting, skirts, railings, flags, and electrical service for the press platforms. Also, comments are sought as to whether further clarifications are needed to convey that Presidential campaign committees may only charge a media representative for his or her own *pro rata* share for meals, chairs on the press platform, seats on buses and vans, and telephone lines in filing centers, and that media representatives must not be expected to pay for services made available to other members of the press or to campaign staff, volunteers, local elected officials or others. The Commission recognizes that it may not be as easy for campaigns to charge members of the press who do not travel on the press plane because a local reporter, or other media representative who is not traveling with the campaign, would not have provided the campaign committee with a credit card number for billing purposes. Please note that specific changes are not included in the proposed rules which follow.

H. Documentation of Disbursements

Sections 9003.5(b)(1) and 9033.11(b)(1) set forth the documentation publicly financed committees must provide for disbursements in excess of $200. The documentation includes a canceled check that has been negotiated by the payee. However, paragraphs (b)(1)(iv) of these sections refer back to this canceled check without specifically restating that it must be negotiated by the payee. To avoid possible confusion, the attached rules which follow would change sections 9003.5(b)(1)(iv) and 9033.11(b)(1)(iv) by adding the words ''negotiated by the payee.'' This change is consistent with the recent judicial decision in *Fulani* v. *Federal Election Commission*, 147 F.3d 924 (D.C. Cir. 1998).

Comments are also sought on revising sections 9003.5(b)(3)(ii) and 9033.11(b)(3(ii) to include a cross reference to the reporting provisions that list examples of acceptable and unacceptable descriptions of ''purpose.'' *See* 11 CFR 104.3(b)(3)(i)(B).

I. Matching Fund Documentation

During the 1996 Presidential election cycle, the Commission instituted a new program whereby primary campaign committees may submit contributions for matching fund payments through the use of digital imaging technology such as computer CD ROMs, instead of submitting paper photocopies of checks and deposit slips. The Commission is considering expanding this program in several respects. First, new language would be added to section 9036.1(b)(3) permitting the use of digital imaging for committees' threshold submissions.

Second, proposed changes to section 9036.2(b)(1)(vi) would enable primary committees to submit digital images of contributor redesignations, reattributions and supporting statements and materials to establish the matchability of contributions.

A corresponding change to 11 CFR 9038.1(b)(1) would add a requirement that the primary committees maintain the original documentation for possible Commission inspection during either the matching fund stage or the subsequent audit. Campaign committees should already have this documentation on hand. Consequently, maintaining and producing this documentation upon request should not be burdensome.

J. Pre-Nomination Vice Presidential Committees

The Commission is seeking comments on a possible new rule to clarify the status of expenditures made by political committees formed by Vice Presidential candidates prior to their official nomination at their parties' conventions. It has been the Commission's policy in the past to permit such committees to make expenditures for the purpose of defraying the travel, lodging and subsistence expenses of the eventual Vice Presidential nominee and his or her entourage during the nominating convention. However, in the most recent Presidential election cycle, concerns have been raised that such committees have raised substantially more money than what is needed for those purposes. The Commission is concerned that Vice Presidential committees could be used prior to the date of their nomination to supplement the limited amounts that publicly funded Presidential candidates may spend on their primary campaigns. Another concern is that some of those who have made the maximum contribution permitted by the FECA to a Presidential primary candidate may seek to evade these statutory limits by making additional contributions to the campaign committee of the person chosen to be that candidate's Vice Presidential running mate.

For this reason, the Commission is proposing to add new section 9035.3 to specify when the expenditures of Vice Presidential committees should be treated as expenditures by the primary campaign of their party's eventual nominee. Paragraph (a) of this new section would provide that the payment of expenses incurred in connection with seeking the nomination of a political party for the office of Vice President of the United States shall be considered expenditures by the candidate who obtains that political party's nomination for the office of President of the United States. This new rule would apply only to the campaign expenditures made by a candidate who becomes the Vice Presidential nominee of his or her party, and not to others who lose the Vice Presidential nomination. Comments are sought as to whether the proposed regulation should be further restricted only to those situations where the Vice Presidential candidate or that candidate's campaign committee has acted in concert with the eventual Presidential nominee or the Presidential nominee's primary committee.

Paragraph (b) of the new section would contain an exception to permit a Vice Presidential candidate and his or her family and staff to attend their party's nominating convention without having the cost of their transportation, lodging, and subsistence attributed to the party's Presidential candidate. The costs of raising funds for these limited travel and subsistence expenses would also be excluded from the definition of expenditure. Please note, if a Vice Presidential committee has excess funds after the nomination, 11 CFR 113.2 would govern the use of these funds.

Comments on alternative approaches are also sought. The Commission notes that 2 U.S.C. 441a(b)(2) treats expenditures made on behalf of Vice Presidential candidates as expenditures on behalf of their party's Presidential nominee. *See, also* 11 CFR 110.8(f). However, this provision is not applicable prior to the nomination of the Vice Presidential candidate. At the time the FECA was enacted, Congress may not have anticipated that both the Presidential candidates and their running mates may be known well before the actual date of nomination. In recent years the primaries in many states have been moved to earlier dates in the election year. This means that Presidential candidates may reach their primary spending limits earlier in the election year, which may encourage the creation of Vice Presidential campaign committees at an earlier stage of the process.

K. Nominating Conventions and Host Committees

1. Lost or Misplaced Items

Comments are sought on adding new paragraph (c) to section 9008.7 to address situations where equipment in the possession of convention committees is lost or damaged. The proposed rule indicates that as a general matter, the cost of lost or misplaced items may not be defrayed with public funds. However, the Commission recognizes that there are varying degrees of responsibility in this area. Accordingly, the proposed rules would also provide that certain factors should be considered, such as whether the committee demonstrates that it made conscientious efforts to safeguard the missing equipment; whether the committee sought or obtained insurance on the items; whether the committee filed a police report; the type of equipment involved; and the number and value of items that were lost. This approach is consistent with the Commission's treatment of items lost or misplaced by publicly funded candidates. See 11 CFR 9004.4(b)(8) and 9034.4(b)(8). Consequently, these provisions applicable to candidate committees for the primary and general elections also contain similar language to take into consideration whether a police report was filed.

2. Donations to Host Committees, Government Agencies, and Municipalities

The Commission seeks comments on parallel amendments to section 9008.52(c)(1), which addresses the receipt of donations by host committees, and section 9008.53(b)(1), which addresses the receipt of donations by government agencies and municipal corporations. One change would be to specifically allow local banks to donate funds and make in-kind donations for the limited purposes described in these rules. These amendments would supersede, in part, Advisory Opinions 1995–31 and 1995–32.

The second set of parallel changes to sections 9008.52(c)(1) and 9008.53(b)(1) would be to add the word ''local'' prior to ''individual,'' to clarify that only those who reside in the metropolitan area of the convention city may donate funds or make in-kind donations to host committees, government agencies and municipal corporations. Please note that the new language is consistent with AO 1995–32 with respect to donations by individuals.

3. Permissible Host Committee Expenses

During the audits of the 1996 convention and host committees, questions have been raised as to the scope of expenses that may be paid by a host committee instead of a convention committee. Section 9008.52(c)(1) enumerates the types of expenses that host committees may defray with donated funds. Section 9008.7(a) lists the types of convention expenses that may be paid for using public funds. These two sections of the regulations are not mutually exclusive. Nor do they cover every conceivable type of expense that may arise.

Consequently, comments are sought as to whether one or both of these provisions should be revised to provide greater specificity as to allowable or nonallowable expenses for convention or host committees. Disputed items have included: (1) Badges, passes or other types of credentials used to gain entry to the convention hall or specific locations within the hall; (2) electronic vote tabulation systems; and (3) lighting and rigging costs, including paying stagehands, riggers, projectionists, electricians, and producers. With respect to lighting and rigging expenses, in particular, it can be difficult to distinguish between the costs associated with improving the infrastructure of the convention hall and the costs of producing and broadcasting the convention proceedings to the general public or to those within the convention hall.

The Commission is aware that the major political parties are currently in the process of selecting the locations for their next presidential nominating conventions, and that the party committees are expected to enter into contractual agreements with the sites selected before this rulemaking is completed. Thus, comments are sought as to whether it would be preferable to defer consideration of this topic until after the 2000 Presidential elections. Please note that specific changes are not included in the proposed rules which follow.

L. Technical and Conforming Amendments

Three technical changes are also proposed. First, the definition of ''State'' in section 9032.11 would be updated by deleting the Canal Zone and by adding American Samoa, which holds Presidential primaries consisting of caucuses. Please note there is no corresponding provision in the general election rules.

In section 9008.14, the term ''final repayment determinations'' would be replaced by ''repayment determinations.'' In paragraph (f)(3) of section 9038.1, the phrase ''publicly released audit report'' would be used instead of ''final audit report.'' These amendments would conform with the changes in terminology made when the rules setting out audit and repayment procedures were last revised in 1995.

Please note that the Commission has also initiated a rulemaking to revise and reorganize the recordkeeping and reporting rules currently located in 11 CFR 102.9, 104.3, and part 108. *See* Notice of Proposed Rulemaking, 62 F.R. 50708 (Sept. 27, 1997). Accordingly, it may be necessary to amend the citations found throughout the public funding rules in subchapters E and F of Title 11, Code of Federal Regulations, that refer back to these recordkeeping and reporting regulations.

In addition, the Commission has published separately final rules modifying the candidate agreement provisions so that federally-financed Presidential committees must electronically file their reports. *See* Explanation and Justification, 63 F.R. 45679 (August 27, 1998). The effective date for those regulations is November 13, 1998.

The Commission welcomes comments on the foregoing proposed amendments to the public financing regulations, the issues raised in this notice, and other aspects of the public financing process that could be addressed in these regulations. No final decision has been made by the Commission concerning any of the proposals contained in this notice.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

These proposed rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that very few small entities will be affected by these proposed rules, and the cost is not expected to be significant. Further, any small entities affected have voluntarily chosen to receive public funding and to comply with the requirements of the Presidential Election Campaign Fund Act or the Presidential Primary Matching Payment Account Act in these areas.

List of Subjects

11 CFR part 9003

Campaign funds, Reporting and recordkeeping requirements.

11 CFR part 9004

Campaign funds.

11 CFR part 9007

Administrative practice and procedure, Campaign funds.

11 CFR part 9008

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR part 9032

Campaign funds.

11 CFR parts 9033, 9034 and 9035

Campaign funds, Reporting and recordkeeping requirements.

11 CFR part 9036

Administrative practice and procedure, Campaign funds, Reporting and recordkeeping requirements.

11 CFR part 9038

Administrative practice and procedure, Campaign funds.

For the reasons set out in the preamble, it is proposed to amend Subchapters E and F of Chapter I of Title 11 of the *Code of Federal Regulations* as follows:

PART 9003—ELIGIBILITY FOR PAYMENTS

1. The authority citation for Part 9003 would continue to read as follows:

Authority: 26 U.S.C. 9003 and 9009(b).

2. In § 9003.5, paragraphs (b)(1)(iv) and (b)(3)(ii) would be revised to read as follows:

§ 9003.5 Documentation of disbursements.

* * * * *

* * *

(1) * * *

(iv) If the purpose of the disbursement is not stated in the accompanying documentation, it must be indicated on the canceled check negotiated by the payee.

* * * * *

(3) * * *

(ii) *Purpose* means the full name and mailing address of the payee, the date and amount of the disbursement, and a brief description of the goods or services purchased. Examples of acceptable and unacceptable descriptions of goods and services purchased are listed at 11 CFR 104.3(b)(3)(i)(B).

* * * * *

PART 9004— ENTITLEMENT OF ELIGIBLE CANDIDATES TO PAYMENTS; USE OF PAYMENTS

3. The authority citation for Part 9004 would continue to read as follows:

Authority: 26 U.S.C. 9004 and 9009(b).

4. In § 9004.4, paragraph (b)(8) would be revised to read as follows:

§ 9004.4 Use of payments.

* * * * *

(b) * * *

(8) *Lost or misplaced items.* The cost of lost or misplaced items may be considered a nonqualified campaign expense. Factors considered by the Commission in making this determination shall include, but not be limited to, whether the committee demonstrates that it made conscientious efforts to safeguard the missing equipment; whether the committee

sought or obtained insurance on the items; whether the committee filed a police report; the type of equipment involved; and the number and value of items that were lost.

5. In § 9004.9, paragraph (d)(1) would be revised to read as follows:

§ 9004.9 Net outstanding qualified campaign expenses.

* * * * *

(d)(1) *Capital assets.*

(i) For purposes of this section, the term *capital asset* means any property used in the operation of the campaign whose purchase price exceeded $2000 when acquired by the committee. Property that must be valued as capital assets under this section includes, but is not limited to, office equipment, furniture, vehicles and fixtures acquired for use in the operation of the candidate's campaign, but does not include property defined as ''other assets'' under paragraph (d)(2) of this section. Capital assets include items such as computer systems and telecommunications systems, if the equipment is used together and if the total cost of all components that are used together exceeds $2000. A list of all capital assets shall be maintained by the committee in accordance with 11 CFR 9003.5(d)(1). The fair market value of capital assets shall be considered to be 60% of the total original cost of such items when acquired, except that items received after the date of ineligibility must be valued at their fair market value on the date acquired. A candidate may claim a lower fair market value for a capital asset by listing that capital asset on the statement separately and demonstrating, through documentation, the lower fair market value.

(ii) If capital assets are obtained from the candidate's primary election committee, the purchase price shall be 60% of the original cost of such assets to the candidate's primary election committee. For purposes of the statement of net outstanding campaign expenses filed after the end of the expenditure report period, the fair market value of capital assets obtained from the candidate's primary election committee shall be considered to be 20% of the original cost of such assets to the candidate's primary election committee.

* * * * *

PART 9007—EXAMINATIONS AND AUDITS; REPAYMENTS

6. The authority citation for Part 9007 would continue to read as follows:

Authority: 26 U.S.C. 9007 and 9009(b).

7. In § 9007.2, the introductory material to paragraph (c), and paragraphs (c)(1), (c)(2), (c)(2)(i), (d)(1) and (d)(3) would be republished, and paragraphs (c)(2)(ii), (c)(3) and (d)(2) would be revised to read as follows:

§ 9007.2 Repayments.

* * * * *

(c) *Repayment determination procedures.* The Commission's repayment determination will be made in accordance with the procedures set forth at paragraphs (c)(1) through (c)(4) of this section.

(1) *Repayment determination.* The Commission will provide the candidate with a written notice of its repayment determination(s). This notice will be included in the Commission's audit report prepared pursuant to 11 CFR 9007.1(d) and will set forth the legal and factual reasons for such determination(s), as well as the evidence upon which any such determination is based. The candidate shall repay to the United States Treasury in accordance with paragraph (d) of this section, the amount which the Commission has determined to be repayable.

(2) *Administrative review of repayment determination.* If a candidate disputes the Commission's repayment determination(s), he or she may request an administrative review of the determination(s) as set forth in paragraph (c)(2)(i) of this section.

(i) *Submission of written materials.* A candidate who disputes the Commission's repayment determination(s) shall submit in writing, within 60 calendar days after service of the Commission's notice, legal and factual materials demonstrating that no repayment, or a lesser repayment, is required. Such materials may be submitted by counsel if the candidate so desires. The candidate's failure to timely raise an issue in written materials presented pursuant to this paragraph will be deemed a waiver of the candidate's right to raise the issue at any future stage of proceedings including any petition for review filed under 26 U.S.C. 9011(a).

(ii) *Oral hearing.* A candidate who submits written materials pursuant to paragraph (c)(2)(i) of this section may at the same time request in writing that the Commission provide such candidate with an opportunity to address the Commission in open session to demonstrate that no repayment, or a lesser repayment, is required. The candidate should identify in this request the repayment issues he or she wants to address at the oral hearing. If the Commission decides by an affirmative vote of four (4) of its members to grant the candidate's request, it will inform the candidate of the date and time set for the oral hearing. At the date and time set by the Commission, the candidate or candidate's designated representative will be allotted an amount of time in which to make an oral presentation to the Commission based upon the legal and factual materials submitted under paragraph (c)(2)(i) of this section. The candidate or representative will also have the opportunity to answer any questions from individual members of the Commission.

(3) *Repayment determination upon review.* Before voting on whether to issue any repayment determination(s) following an administrative review pursuant to paragraph (c)(2) of this section, the Commission will consider any submission made under paragraph (c)(2)(i) of this section and any oral hearing conducted under paragraph (c)(2)(ii) of this section, and may also consider any new or additional information from other sources. A determination following an administrative review that a candidate must repay a certain amount must be approved by an affirmative vote of four (4) members of the Commission. The determination will be accompanied by a written statement of reasons supporting the Commission's determination(s). This statement will explain the legal and factual reasons underlying the Commission's determination(s) and will summarize the results of any investigation(s) upon which the determination(s) are based.

(d) *Repayment period.* (1) Within 90 calendar days of service of the notice of the Commission's repayment determination(s), the candidate shall repay to the United States Treasury the amounts which the Commission has determined to be repayable. Upon application by the candidate, the Commission may grant an extension of up to 90 calendar days in which to make repayment.

(2) If the candidate requests an administrative review of the Commission's repayment determination(s) under paragraph (c)(2) of this section, the time for repayment will be suspended until the Commission has concluded its administrative review of the repayment determination(s) and has approved by an affirmative vote of four (4) of its members a post-administrative review repayment determination. Within 30 calendar days after service of the notice of the Commission's post-administrative review repayment determination(s), the candidate shall repay to the United

States Treasury the amounts which the Commission has determined to be repayable. Upon application by the candidate, the Commission may grant an extension of up to 90 calendar days in which to make repayment.

(3) Interest shall be assessed on all repayments made after the initial 90-day repayment period established at paragraph (d)(1) of this section or the 30-day repayment period established at paragraph (d)(2) of this section. The amount of interest due shall be the greater of:

(i) An amount calculated in accordance with 28 U.S.C. 1961(a) and (b); or

(ii) The amount actually earned on the funds set aside or to be repaid under this section.

* * * * *

PART 9008—FEDERAL FINANCING OF PRESIDENTIAL NOMINATING CONVENTIONS

8. The authority citation for Part 9008 would continue to read as follows:

Authority: 2 U.S.C. 437, 438(a)(8); 26 U.S.C. 9008 and 9009(b).

9. In § 9008.7, new paragraph (c) would be added, to read as follows:

§ 9008.7 Use of funds.

* * * * *

(c) *Lost or misplaced items.* The cost of lost or misplaced items may not be defrayed with public funds under certain circumstances. Factors considered by the Commission in making this determination shall include, but not be limited to, whether the committee demonstrates that it made conscientious efforts to safeguard the missing equipment; whether the committee sought or obtained insurance on the items; whether the committee filed a police report; the type of equipment involved; and the number and value of items that were lost.

10. Section 9008.14 would be revised to read as follows:

§ 9008.14 Petitions for rehearing; stays of repayment determinations.

Petitions for rehearing following the Commission's repayment determination and requests for stays of repayment determinations will be governed by the procedures set forth at 11 CFR 9007.5 and 9038.5. The Commission will afford convention committees the same rights as are provided to publicly funded candidates under 11 CFR 9007.5 and 9038.5.

11. In § 9008.52, the heading of paragraph (c) would be republished and the introductory language of paragraph (c)(1) would be revised to read as follows:

§ 9008.52 Receipts and disbursements of host committees.

* * * * *

(c) *Receipt of donations from local businesses and organizations.*

(1) Local businesses (including banks), local labor organizations, and other local organizations or local individuals may donate funds or make in-kind donations to a host committee to be used for the following purposes:

* * * * *

12. In § 9008.53, the heading of paragraph (b) would be republished and the introductory language of paragraph (b)(1) would be revised to read as follows:

§ 9008.53 Receipts and disbursements of government agencies and municipal corporations.

* * * * *

(b) *Receipt of donations to a separate fund or account.*

(1) Local businesses (including banks), local labor organizations, and other local organizations or local individuals may donate funds or make in-kind donations to a separate fund or account of a government agency or municipality to pay for expenses listed in 11 CFR 9008.52(c), provided that:

* * * * *

PART 9032—DEFINITIONS

13. The authority citation for Part 9032 would continue to read as follows:

Authority: 26 U.S.C. 9032 and 9039(b).

14. Section 9032.11 would be revised to read as follows:

§ 9032.11 State.

State means each State of the United States, Puerto Rico, American Samoa, the Virgin Islands, the District of Columbia, and Guam.

PART 9033—ELIGIBILITY FOR PAYMENTS

15. The authority citation for Part 9033 would continue to read as follows:

Authority: 26 U.S.C. 9003(e), 9033 and 9039(b).

16. In § 9033.11, paragraphs (b)(1)(iv) and (b)(3)(ii) would be revised to read as follows:

§ 9033.11 Documentation of disbursements.

* * * * *

(b) * * *

(1) * * *

(iv) If the purpose of the disbursement is not stated in the accompanying documentation, it must be indicated on the canceled check negotiated by the payee.

* * * * *

(3) * * *

(ii) *Purpose* means the full name and mailing address of the payee, the date and amount of the disbursement, and a brief description of the goods or services purchased. Examples of acceptable and unacceptable descriptions of goods and services purchased are listed at 11 CFR 104.3(b)(3)(i)(B).

* * * * *

PART 9034—ENTITLEMENTS

17. The authority citation for Part 9034 would continue to read as follows:

Authority: 26 U.S.C. 9034 and 9039(b).

18. In § 9034.4, paragraphs (a)(3)(i), (a)(3)(iii), (b)(8), (e)(1), and (e)(3) would be revised to read as follows:

§ 9034.4 Use of contributions and matching payments.

(a) * * *

(3) * * *

(i) Costs associated with the termination of political activity, such as the costs of complying with the post election requirements of the Act and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies, shall be considered qualified campaign expenses. A candidate may receive and use matching funds for these purposes either after he or she has notified the Commission in writing of his or her withdrawal from the campaign for nomination, or after the date of the party's nominating convention, if he or she has not withdrawn before the convention, or after the end of the expenditure report period, if the candidate wins the nomination, whichever is later.

* * * * *

(iii) For purposes of the expenditure limitations set forth in 11 CFR 9035.1, 100% of salary, overhead and computer expenses incurred after a candidate's date of ineligibility, or after the end of the expenditure report period, if the candidate wins the nomination, whichever is later, may be treated as exempt legal and accounting compliance expenses beginning with the first full reporting period after the candidate's date of ineligibility or after the end of the expenditure report period, whichever is later. For candidates who continue to campaign or re-establish eligibility, this paragraph shall not apply to expenses incurred during the period between the date of

ineligibility and the date on which the candidate either re-establishes eligibility or ceases to continue to campaign.

* * * * *

(b) * * *

(8) *Lost or misplaced items.* The cost of lost or misplaced items may be considered a nonqualified campaign expense. Factors considered by the Commission in making this determination shall include, but not be limited to, whether the committee demonstrates that it made conscientious efforts to safeguard the missing equipment; whether the committee sought or obtained insurance on the items; whether the committee filed a police report; the type of equipment involved; and the number and value of items that were lost.

* * * * *

(e) * * *

(1) *General rule.* Any expenditure for goods or services that are used exclusively for the primary election campaign shall be attributed to the limits set forth at 11 CFR 9035.1. Any expenditure for goods or services that are used exclusively for the general election campaign shall be attributed to the limits set forth at 11 CFR 110.8(a)(2), as adjusted under 11 CFR 110.9(c). All expenditures for goods and services that are used for both the primary and the general election campaigns shall be attributed in accordance with paragraphs (e)(2) through (e)(7) of this section.

* * * * *

(3) *State or national campaign offices.* Overhead expenditures incurred in connection with state or national campaign offices shall be attributed according to when the usage of the office occurs. Payroll costs shall be attributed according to when the work is performed. For purposes of this section, overhead expenditures shall have the same meaning as set forth in 11 CFR 106.2(b)(2)(iii)(D). Expenses for usage of offices or work performed on or before the date of the candidate's nomination shall be attributed to the primary election, except for periods when the office is used only by persons working full time on general election campaign preparations.

* * * * *

19. In § 9034.5, paragraph (c)(1) would be revised to read as follows:

§ 9034.5 Net outstanding campaign obligations.

* * * * *

(c)(1) *Capital assets.* For purposes of this section, the term *capital asset* means any property used in the operation of the campaign whose purchase price exceeded $2000 when received by the committee. Property that must be valued as capital assets under this section includes, but is not limited to, office equipment, furniture, vehicles and fixtures acquired for use in the operation of the candidate's campaign, but does not include property defined as ''other assets'' under paragraph (c)(2) of this section. Capital assets include items such as computer systems and telecommunications systems, if the equipment is used together and if the total cost of all components that are used together exceeds $2000. A list of all capital assets shall be maintained by the committee in accordance with 11 CFR 9033.11(d). The fair market value of capital assets shall be considered to be 60% of the total original cost of such items when acquired, except that items received after the date of ineligibility must be valued at their fair market value on the date received. A candidate may claim a lower fair market value for a capital asset by listing that capital asset on the statement separately and demonstrating, through documentation, the lower fair market value. If the candidate receives public funding for the general election, a lower fair market value shall not be claimed under this section for any capital assets transferred or sold to the candidate's general election committee.

* * * * *

PART 9035—EXPENDITURE LIMITATIONS

20. The authority citation for Part 9035 would continue to read as follows:

Authority: 26 U.S.C. 9035 and 9039(b).

21. Section 9035.1, is revised to read as follows:

§ 9035.1 Campaign expenditure limitation; compliance and fundraising exemptions.

(a) *Spending limit.* (1) No candidate or his or her authorized committee(s) shall knowingly incur expenditures in connection with the candidate's campaign for nomination, which expenditures, in the aggregate, exceed $10,000,000 (as adjusted under 2 U.S.C. 441a(c)), except that the aggregate expenditures by a candidate in any one State shall not exceed the greater of: 16 cents (as adjusted under 2 U.S.C. 441a(c)) multiplied by the voting age population of the State (as certified under 2 U.S.C. 441a(e)); or $200,000 (as adjusted under 2 U.S.C. 441a(c)).

(2) The Commission will calculate the amount of expenditures attributable to the overall expenditure limit or to a particular state using the full amounts originally charged for goods and services rendered to the committee and not the amounts for which such obligations were settled and paid, unless the committee can demonstrate that the lower amount paid reflects a reasonable settlement of a bona fide dispute with the creditor.

(b) *Allocation.* Each candidate receiving or expecting to receive matching funds under this subchapter shall also allocate his or her expenditures in accordance with the provisions of 11 CFR 106.2.

(c) *Compliance and fundraising exemptions.* (1) A candidate may exclude from the overall expenditure limitation of this section an amount equal to 10% of all operating-expenditures for each report period as an exempt legal and accounting compliance cost under 11 CFR 100.8(b)(15).

(2) A candidate may exclude from the overall expenditure limitation of this section the amount of exempt fundraising costs specified in 11 CFR 100.8(b)(21)(iii).

(d) *Candidates not receiving matching funds.* The expenditure limitations of this section shall not apply to a candidate who does not receive matching funds at any time during the matching payment period.

22. Section 9035.3 would be added to read as follows:

§ 9035.3 Expenditures by Vice Presidential candidates.

(a) In the case of a candidate who obtains a political party's nomination for the office of Vice President of the United States, any expenditures made in connection with seeking that Vice Presidential nomination shall be considered expenditures by the publicly funded candidate who obtains that political party's nomination for the office of President of the United States, except as provided in paragraph (b) of this section.

(b) The payment of expenses incurred by a Vice Presidential candidate, the candidate's family, and the candidate's authorized committee's staff to attend a political party's national nominating convention, including the cost of transportation, lodging, and subsistence, and the costs of raising funds for these expenses, will not be considered an expenditure by the candidate who obtains that political party's nomination for the office of President of the United States.

23. The title of part 9036 would be revised to read as follows:

PART 9036—REVIEW OF MATCHING FUND SUBMISSIONS AND CERTIFICATION OF PAYMENTS BY COMMISSION

24. The authority citation for Part 9036 would continue to read as follows:

Authority: 26 U.S.C. 9036 and 9039(b).

25. In § 9036.1, paragraph (b)(3) would be revised to read as follows:

§ 9036.1 Threshold submission.

* * * * *

(b) * * *

(3) The candidate shall submit a full-size photocopy of each check or written instrument and of supporting documentation in accordance with 11 CFR 9034.2 for each contribution that the candidate submits to establish eligibility for matching funds. For purposes of the threshold submission, the photocopies shall be segregated alphabetically by contributor within each State, and shall be accompanied by and referenced to copies of the relevant deposit slips. In lieu of submitting photocopies, the candidate may submit digital images of checks and other materials in accordance with the procedures specified in 11 CFR 9036.2(b)(1)(vi). Digital images of contributions do not need to be segregated alphabetically by contributor within each State.

* * * * *

26. In § 9036.2, paragraph (b)(1)(vi) would be revised to read as follows:

§ 9036.2 Additional submissions for matching fund payments.

* * * * *

(b) * * *

(1) * * *

(vi) The photocopies of each check or written instrument and of supporting documentation shall either be alphabetized and referenced to copies of the relevant deposit slip, but not segregated by State as required in the threshold submission; or such photocopies may be batched in deposits of 50 contributions or less and cross-referenced by deposit number and sequence number within each deposit on the contributor list. In lieu of submitting photocopies, the candidate may submit digital images of checks, written instruments and deposit slips as specified in the Computerized Magnetic Media Requirements. The candidate may also submit digital images of contributor redesignations, reattributions and supporting statements and materials needed to verify the matchability of contributions. The candidate shall provide the computer equipment and software needed to retrieve and read the digital images, if necessary, at no cost to the Commission, and shall include digital images of every contribution received and imaged on or after the date of the previous matching fund request. Contributions and other documentation not imaged shall be submitted in photocopy form. The candidate shall maintain the originals of all contributor redesignations, reattributions and supporting statements and materials that are submitted for matching as digital images.

* * * * *

PART 9038—EXAMINATIONS AND AUDITS

27. The authority citation for Part 9038 would continue to read as follows:

Authority: 26 U.S.C. 9038 and 9039(b).

28. In § 9038.1, a new sentence would be added to the end of paragraph (b)(1) introductory text, and paragraph (f)(3) would be revised, to read as follows:

§ 9038.1 Audit.

* * * * *

(b) * * *

(1) * * * Upon request, the committee shall produce the originals of all contributor redesignations, reattributions and supporting statements and materials that were submitted for matching as digital images under 11 CFR 9036.2(b), in addition to the materials required under 11 CFR 110.1(l).

* * * * *

(f) * * *

(3) Within 30 days of service of the publicly released Audit Report, the committee shall submit a check to the United States Treasury for the total amount of any excessive or prohibited contributions not refunded, reattributed or redesignated in a timely manner in accordance with 11 CFR 103.3(b)(1), (2) or (3); or take any other action required by the Commission with respect to sample-based findings.

29. In § 9038.2, the introductory material to paragraph (c), and paragraphs (c)(1), (c)(2), (c)(2)(i), (d)(1), and (d)(3) would be republished, and paragraphs (c)(2)(ii), (c)(3) and (d)(2) would be revised, to read as follows:

§ 9038.2 Repayments.

* * * * *

(c) *Repayment determination procedures.* The Commission's repayment determination will be made in accordance with the procedures set forth at paragraphs (c)(1) through (c)(3) of this section.

(1) *Repayment determination.* The Commission will provide the candidate with a written notice of its repayment determination(s). This notice will be included in the Commission's audit report prepared pursuant to 11 CFR 9038.1(d), or inquiry report pursuant to 11 CFR 9039.3, and will set forth the legal and factual reasons for such determination(s), as well as the evidence upon which any such determination is based. The candidate shall repay to the United States Treasury in accordance with paragraph (d) of this section, the amount which the Commission has determined to be repayable.

(2) *Administrative review of repayment determination.* If a candidate disputes the Commission's repayment determination(s), he or she may request an administrative review of the determination(s) as set forth in paragraph (c)(2)(i) of this section.

(i) *Submission of written materials.* A candidate who disputes the Commission's repayment determination(s) shall submit in writing, within 60 calendar days after service of the Commission's notice, legal and factual materials demonstrating that no repayment, or a lesser repayment, is required. Such materials may be submitted by counsel if the candidate so desires. The candidate's failure to timely raise an issue in written materials presented pursuant to this paragraph will be deemed a waiver of the candidate's right to raise the issue at any future stage of proceedings including any petition for review filed under 26 U.S.C. 9041(a).

(ii) *Oral hearing.* A candidate who submits written materials pursuant to paragraph (c)(2)(i) of this section may at the same time request in writing that the Commission provide such candidate with an opportunity to address the Commission in open session to demonstrate that no repayment, or a lesser repayment, is required. The candidate should identify in this request the repayment issues he or she wants to address at the oral hearing. If the Commission decides by an affirmative vote of four (4) of its members to grant the candidate's request, it will inform the candidate of the date and time set for the oral hearing. At the date and time set by the Commission, the candidate or candidate's designated representative will be allotted an amount of time in which to make an oral presentation to the Commission based upon the legal and factual materials submitted under paragraph (c)(2)(i) of this section. The candidate or representative will also have the opportunity to answer any questions from individual members of the Commission.

(3) *Repayment determination upon review.* Before voting on whether to

issue any repayment determination(s) following an administrative review pursuant to paragraph (c)(2) of this section, the Commission will consider any submission made under paragraph (c)(2)(i) of this section and any oral hearing conducted under paragraph (c)(2)(ii), and may also consider any new or additional information from other sources. A determination following an administrative review that a candidate must repay a certain amount must be approved by an affirmative vote of four (4) members of the Commission. The determination will be accompanied by a written statement of reasons supporting the Commission's determination(s). This statement will explain the legal and factual reasons underlying the Commission's determination(s) and will summarize the results of any investigation(s) upon which the determination(s) are based.

(d) *Repayment period.* (1) Within 90 calendar days of service of the notice of the Commission's repayment determination(s), the candidate shall repay to the United States Treasury the amounts which the Commission has determined to be repayable. Upon application by the candidate, the Commission may grant an extension of up to 90 calendar days in which to make repayment.

(2) If the candidate requests an administrative review of the Commission's repayment determination(s) under paragraph (c)(2) of this section, the time for repayment will be suspended until the Commission has concluded its administrative review of the repayment determination(s) and has approved by an affirmative vote of four (4) of its members a post-administrative review repayment determination. Within 30 calendar days after service of the notice of the Commission's post-administrative review repayment determination(s), the candidate shall repay to the United States Treasury the amounts which the Commission has determined to be repayable. Upon application by the candidate, the Commission may grant an extension of up to 90 calendar days in which to make repayment.

(3) Interest shall be assessed on all repayments made after the initial 90-day repayment period established at paragraph (d)(1) of this section or the 30-day repayment period established at paragraph (d)(2) of this section. The amount of interest due shall be the greater of:

(i) An amount calculated in accordance with 28 U.S.C. 1961(a) and (b); or

(ii) The amount actually earned on the funds set aside under this section.

* * * * *

Dated: December 11, 1998.

Scott E. Thomas,

Acting Chairman, Federal Election Commission.

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