



FEDERAL ELECTION COMMISSION
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May 22, 2007

AGENDA ITEM

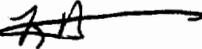
For Meeting of: 05-31-07

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan 
General Counsel

Lawrence Calvert 
Acting Associate General Counsel

Lorenzo Holloway 
Assistant General Counsel
For Public Finance and Audit Advice

Danita C. Lee 
Attorney

SUBJECT: Report of the Audit Division on Gephardt for President, Inc. (LRA #637)
Supplemental Memorandum

I. INTRODUCTION

The purpose of this memorandum is to address the issues raised by the Audit Division's conclusion in the Report of the Audit Division ("Proposed Report") on Gephardt for President, Inc. ("Committee") that the Committee must repay \$378,408 to the United States Treasury. The repayment finding was not included in the Preliminary Report of the Audit Division on Gephardt for President, Inc. ("PAR"). The Committee responded to the PAR, but it requests that the Commission consider its supplemental submissions on the Proposed Report prior to making a repayment determination. Attachments 1 and 2. In this memorandum, we: 1) address whether the Commission may consider the Committee's responses and 2) analyze how the Commission should calculate the Committee's net outstanding campaign obligations in light of the fact that the Committee had incurred but had not paid expenses in excess of the Iowa expenditure

limitation at the time it submitted its statement of Net Outstanding Campaign Obligations (“NOCO Statement”).

II. THE COMMISSION MAY CONSIDER THE SUPPLEMENTAL SUBMISSIONS TO THE EXTENT THEY CONCERN THE NOCO CALCULATION FOR AMOUNTS IN EXCESS OF THE EXPENDITURE LIMITATION

The Committee asked the Commission to consider its supplemental submissions prior to making a repayment determination because the Committee did not have the opportunity to submit legal and factual materials disputing the proposed finding since the finding was not included in the PAR. *See* 11 C.F.R. § 9038.1(c)(2). We agree with the Committee, but we believe that the Commission’s consideration should be limited to addressing the issue of how the amount incurred in excess of the Iowa limitation impacts the NOCO Statement and the resulting portion of the \$378,408 repayment finding that was not a part of the PAR. The PAR included a finding that the Committee must repay \$27,746 for exceeding the Iowa expenditure limitation. The Committee’s supplemental submissions address the \$27,746 repayment finding. The Committee, however, already submitted an analysis of this finding in its response to the PAR. The 60-day period for responding to the PAR has expired. 11 C.F.R. § 9038.1(c)(2). There is no need, therefore, to give the Committee another opportunity to present new or different arguments on the finding that the Committee must repay \$27,746.

The situation is different for the issue of how the amount incurred in excess of the Iowa limitation impacts the NOCO Statement. We recommend that the Commission consider the Committee’s response on this issue. The Committee did not have an opportunity to respond to this issue because it was not raised in the PAR. A candidate and his authorized committee may submit in writing within 60 calendar days after receipt of the preliminary audit report, legal and factual materials disputing or commenting on the proposed findings. 11 C.F.R. § 9038.1(c)(2). Generally, the Commission will not consider any arguments that are raised after 60 days. *See Americans for Robertson v. Federal Election Commission*, 45 F.3d 486 (D.D.C. 1995). If 60 days has expired and the arguments relate to a repayment finding, then a committee may raise the issue by seeking an administrative review of the repayment determination. 11 C.F.R. § 9038.2(c)(2). In this case, however, the Committee could not have raised the issue within 60 days because it was not aware of the issue. We, therefore, recommend that the Commission consider the Committee’s supplemental submissions on the issue of how to calculate the NOCO Statement.

III. THE COMMISSION SHOULD CALCULATE THE COMMITTEE'S NET OUTSTANDING CAMPAIGN OBLIGATIONS TO EXCLUDE STATE EXPENDITURES INCURRED AFTER THE CANDIDATE'S DATE OF INELIGIBILITY

We now examine the question that involves the calculation of the NOCO Statement and the resulting repayment for receiving funds in excess of entitlement.¹ A repayment for receiving funds in excess of entitlement is rooted in the basic premise that the government has paid a committee too much after the candidate's date of ineligibility. The payments from the government after the candidate's date of ineligibility are based on outstanding obligations that a committee shows on its NOCO Statement. 11 C.F.R. § 9034.5. A committee computes its outstanding obligations by adding its assets (a positive number) to its debt (a negative number). *Id.* Since the government is paying for the outstanding obligations on the NOCO Statement, only certain debt is eligible to be placed on the NOCO. The debt must represent a qualified campaign expense. A debt that is a nonqualified campaign expense cannot be placed on the NOCO. 11 C.F.R. § 9034.5(b)(1).

Generally, the amount in excess of the expenditure limitation is a nonqualified campaign expense. 11 C.F.R. § 9034.4(b)(2); *John Glenn Presidential Committee v. FEC*, 822 F.2d 1097 (D.C. Cir. 1987). The regulations do not recognize these nonqualified campaign expenses as a special category of nonqualified campaign expenses that can be used as a basis to be entitled to public funds after the candidate's date of ineligibility. Therefore, we concur with the Audit Division's decision not to include on the Committee's NOCO Statement liabilities totaling \$128,105 attributable to nonqualified Iowa allocable expenditures and also concur with the Audit Division's recommendation that the Commission determine that the Committee repay \$378,408 to the United States Treasury pursuant to 11 C.F.R. § 9038.2(b)(1)(i).

The Committee states that a portion of the amount in excess of the Iowa expenditure limitation should be included on its NOCO Statement. Attachment 1 at 4. Specifically, the Committee asks the Commission to treat only a small percentage of *all* its Iowa expenditures as nonqualified campaign expenses, rather than treat the Iowa expenditures up to the limit as qualified and its Iowa expenditures after that point as nonqualified. *Id.* at 3. The Committee states that applying its alternative formula would correct a "fluke in timing" associated with determining a Committee's net outstanding campaign obligations and would provide a disincentive for presidential primary candidates to "linger in the race past their viability." *Id.* The Committee argues that if the candidate had remained in the race the government would have paid the amount the candidate spent in excess of the limitation. *Id.*

¹ We will address only \$128,105 of the Proposed Report's finding that the Committee must repay a total of \$378,408 to the U.S. Treasury because the Committee does not claim that the \$250,803 remainder (\$378,408 minus \$128,105 = \$250,803) was calculated in error or were not funds received in excess of entitlement.

If the candidate had remained in the race and remained eligible for public funds, the Committee would have been legally entitled to public funds to pay these expenses because there is no requirement that a committee demonstrate the purpose of its expenditures to determine its entitlement to public funds prior to the candidate's date of ineligibility.² See 11 C.F.R. § 9034.1(a). But those are not these facts. Here, we are examining the committee's entitlement to public funds *after* the candidate's date of ineligibility. After the candidate's date of ineligibility, the committee's entitlement is based on the purpose of disbursements because we exclude nonqualified campaign expenses from the NOCO Statement. 11 C.F.R. § 9034.5(b)(1).

The Committee asserts that the Proposed Report is really seeking a repayment for a state expenditure limit violation through just such a funds-in-excess-of entitlement theory, and claims that the Commission considered and rejected this approach in its 1998-2000 proposed rulemaking regarding repayments for exceeding the state expenditure limits. Attachment 2 at 2, 5 (citing Notice of Disposition, "Public Funding of Presidential Primary Candidates – Repayments," 65 *Fed. Reg.*, 15,274 (March 22, 2000)).³ The Committee's argument, however, does not address the context in which the Commission considered that approach during the proposed rulemaking. The proposed rulemaking was about whether to seek repayments for exceeding the state expenditure limits *at all*, no matter whether the committee exceeded the limits before or after its date of ineligibility. The Commission has always sought full repayment of funds in excess of entitlement and has always excluded nonqualified campaign expenses, including those that happen to be nonqualified because they exceeded state expenditure limits, from NOCO Statements; it did at the time of the 1998-2000 rulemaking, and the Audit Division proposes in the Proposed Report that it do so now.

Attachments

1. Letter to Mary Dove from Brian G. Svoboda, dated April 17, 2007
2. Letter to Joseph F. Stoltz from Brian G. Svoboda, dated May 1, 2007

² Requiring a committee to demonstrate the purpose of its expenditures to determine a committee's entitlement would be impractical because this would happen during the campaign. The Commission may, however, seek repayment on the basis that public funds were used to defray nonqualified campaign expenses. 11 C.F.R. § 9038.2(b)(2)(i)(A).

³ As we noted in our original comments regarding Finding 3 of the Proposed Report, the Commission considered in this rulemaking whether to amend its regulations to state explicitly whether it would seek repayments for primary expenditures in excess of state limitations. In the portion of the Notice of Disposition cited by the Committee, the Commission stated it had considered an "alternative approach" under which it would continue to seek repayments for violations of state spending limits but would do so based on 26 U.S.C. § 9038(b)(1), which addresses the repayment of funds received in excess of entitlement. 65 *Fed. Reg.*, 15,274. The Commission stated that the rationale for requiring repayments under that approach would have been that "since presidential primary candidates and their committees do not receive matching funds until after they meet or exceed either the state-by-state or overall spending limits, the campaigns were not entitled to receive the funds in the first place, and must therefore repay these amounts to the United States Treasury." *Id.*

3. Proposed Rules, "Public Funding of Presidential Primary Candidates – Repayments," 65 *Fed. Reg.*, 15,273 (March 22, 2000)
4. Explanation and Justification, "Repayments Based on Expenditures in Excess of the Expenditure Limitations," 68 *Fed. Reg.*, 47,413 (August 8, 2003).



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April 17, 2007

BY FACSIMILE

Ms. Mary Dove
Secretary
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RECEIVED
FEDERAL ELECTION
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OFFICE OF GENERAL
COUNSEL

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Re: Gephardt for President, Inc.

Dear Ms. Dove:

I write on behalf of my client, Gephardt for President, Inc. On Friday, April 13, the Committee received the draft Final Audit Report that the Commission is to consider at its April 19 meeting. The draft report seeks \$378,408 in additional repayments through a new finding, on which the Committee has had no opportunity to submit written legal or factual materials. See 11 C.F.R. § 9038.1(c)(2). We submit this letter for the public record and ask the Commission to reject this finding.

The Preliminary Audit Report (PAR) found that Congressman Gephardt "did not receive matching fund payments in excess of his entitlement." Preliminary Audit Report at 4. However, the draft Final Audit Report now contends that he did. Because of *this finding alone*, the draft report asks for \$378,908 in new repayments – almost 80% of the total now sought from the Committee.

Moreover, \$128,105 of these new repayments result from the auditors' decision to drop certain Iowa expenditures from the Committee's Statement of Net Qualified Campaign Expenses – a decision made *after* the PAR was issued.¹ These were bills had been

¹ There is no evident reason why the auditors chose only after the release of the PAR to exclude the \$128,105. When the PAR was released, the auditors were already contending that the Committee had exceeded the Iowa cap. See PAR at 12-13.

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incurred, but not yet paid on the date of ineligibility, January 20, 2004 – the day after the Iowa caucuses, when Congressman Gephardt withdrew from the race. The staff contends that the Committee broke the Iowa cap on a date certain, and that every Iowa-allocable bill paid afterwards was a non-qualified campaign expense, regardless of its purpose or when it was initially incurred.

The effective result of this new finding is to multiply the Committee's repayment on the Iowa cap by more than four times. There are several reasons why the Commission should not accept it:

First, as both the Office of General Counsel and the Audit Division seem to acknowledge, there is genuine doubt as to whether the Commission can seek any repayments on the Iowa cap issue – even the \$27,746 that the final report seeks directly. After the 1996 election, the Commission declined to seek any repayment from Senator Bob Dole's campaign when he broke the Iowa cap. See Memorandum from James A. Kahl to Joseph F. Stoltz, at 5 (Jan. 26, 2007). Afterwards, the Commission refused to change its rules to commit to seeking such repayments. See *id.* It is not evident why the Commission would seek no repayment at all from Senator Dole, and yet seek more than \$150,000 in cumulative repayments from Congressman Gephardt on the exact same issue.

Second, the new finding results from a fluke in timing. To see why this is so, the Commission must look to the mathematics of the NOCO statement. A NOCO statement is a snapshot of a campaign's financial position on the date of ineligibility. A campaign's Net Outstanding Campaign Obligations equal its "Total Assets" on the date of ineligibility, less its "Total Obligations." By excluding \$128,105 in unpaid Iowa bills from the Committee's "Total Obligations," the draft report lowers the Net Outstanding Campaign Obligations by \$128,105, and thus increases the funds received in excess of entitlement by the same amount.²

Yet imagine Mr. Gephardt had stayed in the race for a few more weeks. The Committee would have paid these very same Iowa bills with the funds that were among its "Total Assets" on January 20. Thus, its "Total Assets" would be \$128,105 lower than on the draft report's NOCO statement. Its "Total Obligations" would stay the same. Its "Net

² For this same reason, the Commission's decision to allow the campaign to seek belated reattributions for \$114,000 in excessive contributions – while welcome – does not affect the Committee's total repayment *at all*. The Committee's repayment for excessive contributions went down by \$114,000. But its expenditures in excess of entitlement went up by the same amount. Because \$114,000 in refunds became unnecessary, the "Total Obligations" on the NOCO statement shrank, the "Net Outstanding Campaign Obligations" shrank, and the funds received in excess of entitlement increased. Thus, the total repayment stayed the same. ATTACHMENT 1

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Outstanding Campaign Obligations" would increase by \$128,105, the funds received in excess of entitlement would shrink by the same amount, and the total repayment would shrink by the same amount.

Thus, the new finding creates a perverse incentive for campaigns to game the system and linger in the race past their viability. When the Presidential public funding system is under unprecedented stress, this is hardly the sort of policy that the Commission would want to promote. The Commission has consistently sought to provide relief from the state caps within the boundaries provided by the statute, even while urging Congress to repeal the caps. Moreover, the Commission has faced the challenges posed by candidates who assert continued eligibility for purely self-serving reasons. It need not create yet another reason for people to stay in the race and accept public funds longer than they really should.

The Commission can avoid this outcome. Instead of excluding all of the Committee's Iowa expenditures from the NOCO statement on a temporal basis, the Commission could instead treat a percentage of all the Committee's Iowa expenditures as non-qualified campaign expenses. As the auditors suggest in their memo to the Commission, this would reduce the amount of over-repayment by \$112,732. See Memorandum from Joseph F. Stoltz and Tom Hintermister (Apr. 12, 2007).³ A committee with \$434,722 cash-on-hand as of March 31, 2007, would have a total repayment of \$366,220, instead of \$478,952. Yet the auditors urge rejection of this approach, saying that their calculation "follows long standing Commission practice." *Id.* This comment is ironic, given how the Commission treated Senator Bob Dole when he broke the Iowa cap in 1996.

Third, the Committee ought to have the chance to provide legal and factual materials to the Commission before adoption of a new finding that involves hundreds of thousands of dollars in new liability. See 11 C.F.R. § 9038.1(c)(2). While the rules allow a Final Audit Report to "address issues other than those contained in the Preliminary Audit Report," see 11 C.F.R. § 9038.1(d)(1), they were still written to give candidates "the earliest possible opportunity to respond to the Commission's thinking with respect to its future repayment determination." Presidential Primary Matching Fund, 48 Fed. Reg. 5,224, 5,232 (1983).

For example, were the Commission to adopt this Final Audit Report, and then to issue an addendum, it would be required to submit the addendum to the Committee for 60 days of

³ The Committee verbally presented this solution to the auditors, albeit without the opportunity to submit written factual and legal materials to the full Commission, as the rules would seem to provide. See 11 C.F.R. § 9038.1(c)(2)

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review and comment. See 11 C.F.R. § 9038.1(d)(3) (requiring the Commission to follow the procedures set forth in § 9038.1(c)(2)). It is illogical that the rules would allow the Commission to add a major new finding without formal notice or comment *before* adopting the Final Audit Report, but would require notice and comment to make the very same finding *after* adoption.

The availability of the administrative review process does not eliminate the need to follow § 9038.1's notice and comment procedures. That a Committee can assert its rights later does not address the question of what its rights are *now*. It is also inefficient to wait to resolve an issue that can be resolved today. Finally, the Committee is not automatically entitled to an oral hearing. Four Commissioners would have to vote to grant one. See 11 C.F.R. § 9038.2(c)(2)(ii).

The Committee would like this letter placed on the public record. It wishes the letter were unnecessary. Yet the vast financial significance of this issue, coupled with the lack of opportunity for formal comment, make it impossible for the Committee to stand by silently. We respectfully request the Commission to reject the new finding.

We appreciate your attention to this matter.

Very truly yours,



Brian G. Svoboda

cc: Thomasenia Duncan, Esq.
Joseph F. Stoltz
Tom Hintermister
Chairman Lenhard
Vice Chairman Mason
Commissioner Von Spakofsky
Commissioner Walther
Commissioner Weintraub



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May 1, 2007

Mr. Joseph F. Stoltz
 Assistant Staff Director
 Audit Division
 Federal Election Commission
 999 E Street, N.W.
 Washington, DC 20463

Re: Gephardt for President, Inc.

Dear Mr. Stoltz:

On behalf of my client, Gephardt for President, Inc. ("the Committee"), and in response to Tom Hintermister's e-mail and voice mail of last week, I write to provide additional information to the Commission on the auditors' proposed findings in their review of the Committee.

INTRODUCTION

The principal question before the Commission in this audit is whether a committee must repay the federal treasury for exceeding a state expenditure limit under 2 U.S.C. § 441a(b)(1)(A) (2007) – directly or indirectly.

The last time the Commission addressed these questions decisively was after the 1996 elections, when Senator Bob Dole's campaign was found to have exceeded the Iowa expenditure limit by \$53,094. See Report of the Audit Division on the Dole for President Committee, Inc. (Primary), Agenda Doc. No. 98-87, at 101 (Nov. 19, 1998). A deadlocked Commission did not adopt the auditors' recommendation to seek a repayment; none was made by Dole on the state expenditure limit finding.

The draft Gephardt Final Audit Report not only seeks a \$27,746 repayment for exceeding the Iowa expenditure limit, in contrast with the Dole audit. It also seeks an additional

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\$128,105 in repayments for exceeding the Iowa limit, under the guise of a finding that the campaign received funds in excess of entitlement.

This letter examines this finding and explains why it would require the Committee to pay an additional \$128,105 for exceeding the Iowa expenditure limit. It then explains why the law does not support the finding.

DISCUSSION

A. If the Commission Adopts the Auditors' Proposed Finding, the Campaign Would Have to Pay an Additional \$128,105 for Exceeding the Iowa Limit

Section 9038.2(b)(1) of the regulations allows the Commission to seek a repayment when the funds provided to a candidate from the matching payment account exceeded the amount to which the candidate was entitled. See 11 C.F.R. § 9038.2(b)(1) (2007). For example, when an audit shows that a campaign had no net outstanding campaign obligations on the date of ineligibility, even though it continued to seek and accept public funds, the Commission may seek repayment of those funds. See *id.* § 9038.2(b)(1)(i). By this same logic, if a campaign's net outstanding campaign obligations prove smaller than originally thought – for example, because it had fewer winding-down expenses than anticipated – the Commission can seek the public funds that were paid to meet the unrealized obligations.

Normally, such a finding should not adversely affect a committee's financial position. The Commission is simply asking the committee to return public funds that it otherwise would have used to pay bills. Thus, the Gephardt campaign would accomplish no financial advantage by increasing its winding-down expenses. It would simply be taking money that it would have repaid the Treasury, and paying it to vendors instead. Similarly, when the Commission allowed the Gephardt campaign to reattribute \$14,000 in excessive contributions, the campaign enjoyed no financial benefit. Its repayment for excessive contributions went down. But its repayment for funds-in-excess-of-entitlement went up by the same amount. This is because the reattributions left the campaign with fewer refunds to make, and thus with fewer bills to pay.

Here, the funds-in-excess-of-entitlement finding would not simply reclaim unspent public funds. Rather, it would extract a second – and much larger – repayment from the Gephardt campaign for exceeding the Iowa expenditure limit, even after the Commission sought no repayment from the Dole campaign on the same issue. When preparing the

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Committee's Statement of Net Outstanding Campaign Obligations (NOCO), the auditors excluded from liabilities \$128,105 in expenditures that were unpaid on the date of ineligibility, and that were allocable towards the Iowa limit. Because the expenditures exceeded the Iowa limit, the auditors concluded that they were not qualified campaign expenses, and thus could not be included on the NOCO statement. See 11 C.F.R. § 9034.4(b)(2).

The auditors' reasoning would make the Committee's repayment depend entirely on the timing of Congressman Gephardt's withdrawal. He dropped out on the day after the Iowa caucuses. Had he stayed in the race, and had the Committee paid its outstanding Iowa bills before he withdrew, there would be no second repayment on the Iowa expenditure limit. The Committee's Net Outstanding Campaign Obligations would have been larger, and its repayment would have been smaller. This is because the Committee would have paid the \$128,105 in Iowa bills with assets that were on hand on January 20, 2004. Congressman Gephardt would have dropped out with fewer assets, the same total liabilities, and thus a smaller repayment.

Excluding these Iowa expenditures would also place the Committee and Congressman Gephardt himself into a debt situation. On March 31, 2007, the Committee's cash-on-hand was \$434,722. If the Commission excludes the expenditures, then the Committee's total repayment would be \$478,952. If the Commission includes the expenditures among the Committee's liabilities, then the Committee's repayment would be \$350,847.

B. The Law Does Not Support Imposing a Second Repayment for the Iowa Expenditure Limit

Were the Commission to adopt the auditors' proposed finding, it would be disregarding the law and Commission precedent. The Commission not only failed to seek repayment from the Dole campaign on the state cap issue. It has since refused to commit to seeking such repayments in the future, while repeatedly manifesting doubt as to whether the statute allows them.

Significantly, the Commission even considered whether to seek repayments for exceeding state expenditure limits through a funds-in-excess-of-entitlement finding, like the one offered here. Yet it did not take that step. It failed to reach consensus and suggested that further notice and comment would be necessary. See Public Funding of Presidential Primary Candidates – Repayments, 65 Fed. Reg. 15,237, 15,274 (2000).

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When Senator Dole exceeded the Iowa expenditure limit in 1996, and when the Commission sought no repayment, the Commission opened a rulemaking to determine whether it could continue to seek repayments under Title 26 from publicly funded committees that exceeded state limits. See *Public Financing of Presidential Primary and General Election Candidates*, 63 Fed. Reg. 69,524 (1998). The Commission expressed concern that the statute did not allow it to seek such repayments, and that its rules might be contrary to the statute. See *id.* at 69,528-29.

The Commission was concerned that, while section 9007 of the Presidential Election Campaign Fund Act contained a provision requiring repayment in "an amount equal to any excess qualified campaign expenses", section 9038 of the Presidential Primary Matching Payment Account Act contained no such language – even though the two statutes were otherwise "nearly identical." 63 Fed. Reg. at 69,528-29.

The Commission was also concerned that the Matching Payment Act uses the phrase "qualified campaign expense" in a way that precludes the automatic treatment of excess expenditures as non-qualified campaign expenses. See *id.* at 69,529. Observing that the Matching Payment Act prohibits candidates and committees from incurring "qualified campaign expenses in excess of the limitations on such expenses under section 9035," see 26 U.S.C. § 9033(b)(1), the Commission said: "[O]ne can argue that it is impossible to read this section other than as treating 'excess' spending as 'qualified.'" 63 Fed. Reg. at 69,529.¹

As an alternative way of addressing the repayment issue, the Commission explored the very same question that lies at the heart of this audit – "whether repayments can be required under paragraph (b)(1) of 26 U.S.C. § 9038, which addresses the repayment of funds received in excess of the aggregate amount of payments to which the candidate is entitled." 65 Fed. Reg. at 15,274. The proffered basis for this approach was "that, since presidential primary candidates and their committees do not receive these matching funds until after they meet or exceed either the state-by-state or the overall spending limits, the campaigns were not entitled to receive these funds in the first place, and therefore must repay these amounts to the Treasury." *Id.*

¹ The Commission also explored some arguments in defense of the regulations. It noted that § 9032(9) defined qualified campaign expenses to exclude payments that constituted a violation of law. It also cited *John Glenn Presidential Committee v. FEC*, 822 F.2d 1097 (D.C. Cir. 1987), and *Kennedy for President Committee v. FEC*, 734 F.2d 1558 (D.C. Cir. 1984) as "arguably requir[ing] the Commission to order repayments of matching funds used for unqualified purposes." 63 Fed. Reg. at 69,529.

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Here, in a Commission rulemaking, was a specific proposal to seek repayments for state expenditure limit violations through a funds-in-excess-of-entitlement finding – the very same sort of finding now tendered against Congressman Gephardt. Yet the Commission did not adopt it. The Commission suggested that further notice and comment were necessary, observing that "this approach was not specifically included in the December 1998 NPRM." *Id.* at 15,274. It left the rules as they were during the Dole campaign, when no repayment was sought for exceeding the Iowa expenditure limit. The Commission said simply that "there is no consensus in favor of changing the regulation." *Id.* at 15,275.²

Later, the Commission asked Congress to amend "26 U.S.C. 9038(b) to specifically state whether repayments must be made by publicly funded primary candidates who have made expenditures that exceed the spending limits ..." See *Public Financing of Presidential Candidates and Nominating Conventions*, 68 Fed. Reg. 18,484, 18,492 (2003) (citing FEC, *Legislative Recommendations 2002* (May 14, 2002)). It acknowledged that "an argument has been made that the Commission is not authorized to require publicly financed primary candidates to make repayments based on expenditures made in excess of the primary spending limits," while noting its past practice of seeking such repayments on the grounds that "excess" spending is "non-qualified" under 26 U.S.C. § 9032(9). FEC, *Legislative Recommendations 2002*. Congress did not act on the Commission's recommendation. See 68 Fed. Reg. at 18,492.

Thus, the law remains where it was in 1996, when the Commission sought no repayment from the Dole campaign for exceeding the Iowa expenditure limit. Since then, the Commission found it advisable – if not necessary – to ask Congress to change the law to allow such repayments. Yet Congress has not acted. The Commission has repeatedly asked through rulemaking whether it should seek future repayments. Yet it has not acted. It even raised the specific question of whether to seek repayments through funds-in-excess-of-entitlement findings. Yet it took no action.

Now, however, the Commission would seek the very same sort of repayment for exceeding the Iowa limit that it declined to seek in the Dole audit, even after it questioned

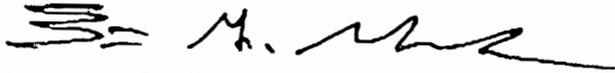
² At the beginning of the 2004 cycle, after Congressman Gephardt had become a candidate, the Commission asked yet again whether it should "clarify that under section 9038.2(b)(2)(ii)(A), it will continue to seek repayments from primary candidates who exceed the expenditure limitations ..." *Public Financing of Presidential Candidates and Nominating Conventions*, 68 Fed. Reg. 18,484, 18,493 (2003). The Commission took no action, saying again that "there is no consensus in favor of changing the regulation." See *Public Financing of Presidential Candidates and Nominating Conventions*, 68 Fed. Reg. 47,386, 47,413 (2003).

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its authority to seek such repayments through rulemaking and asked Congress unsuccessfully to change the statute. It would go further and seek a second repayment for nearly the entire amount of the excessive spending, even after it seemingly rejected that very same option through rulemaking. The end result would be to leave the Committee in a deficit situation, while facing the threat of enforcement under Title 2.

This is neither a sound nor fair basis on which to seek repayments from a publicly funded Committee. We appreciate the opportunity to provide additional information to the Commission on this matter. Yet we must again respectfully request the Commission to decline to adopt the newly proposed finding in this matter.

Very truly yours,



Brian G. Svoboda
Counsel to Gephardt for President, Inc.

cc: Chairman Lenhard
Vice Chairman Mason
Commissioner von Spakovsky
Commissioner Walther
Commissioner Weintraub
✓ Thomasenia Duncan, Esq.
Mr. Tom Hintermister

BGS:dcw

Proposed Rules

Federal Register

Vol. 65, No. 56

Wednesday, March 22, 2000

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL ELECTION COMMISSION

11 CFR Part 9038

[Notice 2000-5]

Public Funding of Presidential Primary Candidates—Repayments

AGENCY: Federal Election Commission.

ACTION: Notice of disposition; Termination of rulemaking.

SUMMARY: On December 16, 1998, the Commission issued a Notice of Proposed Rulemaking in which it sought public comments on deleting one section of its regulations governing the public financing of presidential primary election campaigns. These rules implement the Presidential Primary Matching Payment Account Act ("Matching Payment Act"), which indicates how funds received under the public financing system may be spent. In addition, the Matching Payment Act requires the Commission to seek repayment from publicly financed campaigns under certain conditions. The rule in question addresses the repayment of federal funds when candidates exceed the limits on either state-by-state or overall spending. The Commission is making no changes to this regulation at this time. Further information is provided in the supplementary information that follows.

FOR FURTHER INFORMATION CONTACT: Ms. Rosemary C. Smith, Assistant General Counsel, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or toll free (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission has been considering whether to revise its regulations at 11 CFR 9038.2(b) governing repayments of matching funds in situations where primary candidates exceed the spending limits set forth in section 441a(b) of the Federal Election Campaign Act, 2 U.S.C. 441a(b) ("FECA"). These regulations implement 26 U.S.C. 9038. For the reasons explained below, the Commission is making no changes at this time to 11 CFR 9038.2(b).

On December 16, 1998, the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations, as well as on a number of other aspects of the Commission's public funding regulations. 63 FR 69524 (Dec. 16, 1998). In response to the NPRM, written comments addressing the repayment issue were received from Common Cause and Democracy 21 (joint comment); and Lyn Utrecht, Eric Kleinfeld, and Patricia Fiori (joint comment). The Internal Revenue Service stated that it has reviewed the NPRM and finds no conflict with the Internal Revenue Code or regulations thereunder. Subsequently, the Commission reopened the comment period and held a public hearing on March 24, 1999, at which the following witnesses presented testimony on the Commission's ability to seek repayments: Lyn Utrecht (Ryan, Phillips, Utrecht & MacKinnon), Joseph E. Sandler (Democratic National Committee), and Thomas J. Josefiak (Republican National Committee).

Please note that the Commission has already published separately several sets of final rules regarding other aspects of the public funding system. For a summary of these other provisions, see Explanation and Justification, 64 FR 49355 (Sept. 13, 1999), and Explanation and Justification, 64 FR 61777 (Nov. 15, 1999).

1. Alternatives Presented in the NPRM

The NPRM raised the issue of whether to delete paragraph (b)(2)(ii)(A) of section 9038.2 from the Commission's regulations. Under this provision, the Commission has in the past required the repayment of primary matching funds based on a determination that a candidate or authorized committee has made expenditures in excess of the primary spending limits. The NPRM raised the argument that this provision is without statutory basis, and that the reading implied in the current regulation is effectively prohibited by the statute. The NPRM noted that this issue has ramifications for excessive expenditures made directly by the candidate's campaign committee from its own funds, as well as excessive expenditures stemming from the campaign committee's acceptance of in-

kind contributions, and excessive expenditures arising from primary campaign activities coordinated with the candidate's party committee.

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 Presidential Election Campaign Fund Act (26 U.S.C. 9007) ("Fund Act") 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 "nonqualified" is buttressed by the text of the "qualified campaign expense limitation" (26 U.S.C. 9035) itself, which prohibits candidates from "knowingly incur[ring] 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 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.

The NPRM also set out countervailing arguments in support of retaining 11 CFR 9038.2(b)(2)(ii)(A). While section 9007(b)(2) of the Fund Act clearly states that repayments can be sought from general election candidates who incur

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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). The answer to the argument that the language of section 9035 specifically contemplates that amounts spent in excess of the expenditure limitations can constitute qualified campaign expenses is that the two statutes must be read together, and 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, there is a countervailing argument 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 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 reading of the two statutes avoids the anomalous situation that would result if spending limit violations involving candidates who accepted public funding for their primary elections were treated entirely differently than spending limit violations involving the very same candidates during their general election campaigns.

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. These court decisions arguably require the Commission to order repayments of matching funds used for unqualified purposes. *Glenn* at 1099, *Kennedy* at 1561.

With regard to alleged in-kind contributions by third parties such as political party committees, it can be argued that the *Glenn* and *Kennedy* cases are not dispositive because they did not involve third party expenditures, and that these amounts 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.

2. Public Comments

Two written comments addressing the Commission's statutory authority to seek repayment from Presidential primary committees that exceed the spending limits were received from Common Cause and Democracy 21 (joint comment); and Lyn Utrecht, Eric Kleinfeld, and Patricia Fiori (joint comment). The witnesses who presented testimony on this issue were Lyn Utrecht (Ryan, Phillips, Utrecht & MacKinnon), Joseph E. Sandler (DNC), and Thomas J. Josefiak (RNC).

The bipartisan comments and testimony supported the Commission's authority to obtain repayments for excessive spending by primary candidates' campaign committees using their own funds to exceed the limits. However, two witnesses indicated that they did not believe the Commission has the authority to require a repayment from a Presidential campaign committee based on expenditures made by a party committee, or based on contributors' in-kind contributions, where these expenses were not incurred or accepted by the candidate's campaign committee. One of these witnesses observed that both sections 9002(11) and 9032(9) of Title 26 define "qualified campaign expense" to mean an expense "incurred" by the candidate or the candidate's authorized committee. Thus, the witness' comment argued that expenditures made by other individuals or entities are not "qualified campaign expenses" and cannot form the basis for a repayment determination.

3. Additional Alternative—Repayment of Funds Exceeding Entitlement

After the close of the comment period and the hearing, the Commission considered whether repayments can be required under paragraph (b)(1) of 26 U.S.C. 9038, which addresses the repayment of funds received in excess of the aggregate amount of payments to which the candidate is entitled. The rationale for this approach would be that, since presidential primary candidates and their committees do not receive these matching funds until after they meet or exceed either the state-by-state or the overall spending limits, the campaigns were not entitled to receive these funds in the first place, and therefore must repay these amounts to the Treasury. None of the public comments or testimony addressed the payments-in-excess-of-entitlement theory for repayments under 26 U.S.C. 9038(b)(1) because this approach was not specifically included in the December 1998 NPRM.

4. Conclusion

The Commission has decided to make no changes to the regulation at 11 CFR 9038.2(b), which currently requires publicly funded Presidential primary campaigns to make repayments on the basis of exceeding the Congressionally-mandated spending limits. The current rule is not being changed at this time because there is no consensus in favor of changing the regulation.

Dated: March 17, 2000.

Darryl R. Wold,
Chairman, Federal Election Commission.
[FR Doc. 00-7108 Filed 3-21-00; 8:45 am]
BILLING CODE 6715-01-P

**NATIONAL CREDIT UNION
ADMINISTRATION**
12 CFR Part 742**Regulatory Flexibility and Exemption Program**

AGENCY: National Credit Union Administration (NCUA).

ACTION: Advance Notice of proposed rulemaking.

SUMMARY: NCUA is soliciting public comment on whether, and under what circumstances, NCUA should adopt a regulation that would permit credit unions with advanced levels of net worth and consistently strong CAMEL ratings to be exempt, in whole or in part, from certain NCUA regulations that are not specifically required by statute. Comments are also requested on whether the adoption of such a regulation would reduce regulatory burden without adversely affecting safety and soundness. Information from interested parties will assist NCUA in determining whether and in what form to issue a proposed rule on regulatory flexibility.

DATES: The NCUA must receive comments on or before May 22, 2000.

ADDRESSES: Direct comments to Becky Baker, Secretary of the Board. Mail or hand-deliver comments to: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, or you may fax comments to (703) 518-6319. *Please send comments by one method only.*

FOR FURTHER INFORMATION CONTACT: Michael J. McKenna, Senior Staff Attorney, Division of Operations, Office of General Counsel, at the above address or telephone: (703) 518-6540 or Herb Yolles, Deputy Director, Office of Examination and Insurance, at the above address or telephone: (703) 518-6360.

SUPPLEMENTARY INFORMATION:**A. Background**

NCUA is considering a policy for exempting qualifying credit unions from certain regulatory provisions. The regulatory provisions under consideration are those which are not specifically required by statute and the exemption from which would permit these credit unions greater flexibility in managing their operations. NCUA staff has reviewed agency regulations and has listed, in this advanced notice of proposed rulemaking (ANPR), those regulations which the NCUA Board believes may meet these criteria. The purpose of this ANPR is to elicit public comment on whether the proposed exemptions would in fact be of such benefit and to find out if there are any other regulations or NCUA requirements which credit unions believe should be considered in this proposal.

The NCUA Board believes that safe and sound credit unions with a proven record of effective risk management, as demonstrated by advanced levels of net worth and consistently high CAMEL ratings, may be reasonable candidates for greater regulatory flexibility from certain NCUA regulations which are not specifically required by statute and which have minimal safety and soundness ramifications when applied to federal credit unions with proven risk management records.

In considering this advance notice of proposed rulemaking, the NCUA Board did not include any current regulation which is statutorily imposed and therefore must continue to be implemented by NCUA in a form consistent with the manner specified for implementation when passed by Congress. Likewise, the NCUA Board did not consider a number of other regulations which, although not specifically required by statute, are nonetheless required in overriding concern for the overall safety and soundness of the credit union system and, therefore, would not be appropriate for inclusion in a formal regulatory flexibility proposal.

However, internal agency research and evaluation has produced examples of certain specified regulatory restrictions that are not specifically required by statute and may be unnecessary to apply equally to all credit unions based on their individual safety and soundness circumstances, because the regulations, although appropriate for some credit unions, have limited safety and soundness ramifications when applied to federal credit unions with advanced levels of net worth and ongoing strong

management performance verified through the examination process and resulting high CAMEL ratings.

The NCUA Board is interested in receiving comments on whether credit unions with a proven track record of favorable performance should be allowed additional regulatory flexibility since their demonstrated ability mitigates the predominance of what limited safety and soundness concerns, if any, might arise from a reduction of certain specified regulatory requirements. Examples of mitigating factors include, but are not limited to, additional capital, strong management and consistent earnings. It is believed that a healthy risk management infrastructure strengthens capital adequacy and diminishes risk to the National Credit Union Share Insurance Fund (NCUSIF).

The NCUA Board is also interested in receiving comment on whether a flexible regulatory approach which results in the removal of selected regulatory obstacles for those credit unions with strong records of safety and soundness and effective risk management will encourage them to strive to maintain and enhance those levels of financial performance as well as to better enable them to remain competitive in the financial marketplace, foster innovation in member service and extend credit to the underserved.

The NCUA Board is interested in whether providing additional flexibility in selected regulatory requirements to credit unions that meet RegFlex triggers might result in a reduction in service within a credit union's field of membership for fear that with additional risk taking, delinquencies might increase and jeopardize the credit union maintaining their CAMEL 1 and 2 ratings.

Would establishing this special class of credit unions to receive different regulatory treatment provide a competitive advantage to RegFlex credit unions over non RegFlex eligible credit unions.

The proposal the NCUA Board is considering would involve an exemption process for qualifying federal credit unions, rather than a regulatory forbearance program available to all federal credit unions. Those federal credit unions that qualify must demonstrate, based on their CAMEL ratings and strong capital positions, that they are capable of managing the additional risks that these regulatory flexibilities may pose. NCUA believes that the proposed qualification and exemption process will effectively

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publicly funded candidates as non-qualified campaign expenses.

B. Media Travel Expenses

The Commission's rules at 11 CFR 9004.6 and 9034.6 establish procedures for authorized committees of Presidential primary and general election candidates to obtain reimbursement for transportation and other services that are provided to the news media and the Secret Service over the course of a campaign. These rules contain a non-exhaustive list of such services. Sections 9004.6(a)(3) and 9034.6(a)(3) state that Presidential campaign committees may seek reimbursement from the news media only for the billable items specified in the White House Press Corps Travel Policies and Procedures issued by the (White House Travel Office, in conjunction with the White House Correspondents' Association ("*White House Travel Manual*"). Expenses for which a publicly-funded committee receives no reimbursement are considered qualified campaign expenses, and, with the exception of those expenses relating to Secret Service personnel and national security staff, are subject to the overall expenditure limitation under 11 CFR 9004.6(a)(2) and 9034.6(a)(2).

In the 1996 campaign, some Presidential campaign committees incurred significant expenses to reconfigure campaign aircraft. The expenses included both interior work, such as equipment installation, and exterior work such as campaign logos. However, these expenses were not included in the *White House Travel Manual* for 1996, which has not changed to date. The NPRM in this rulemaking sought comment on whether the Commission should revise the rules to permit Presidential campaign committees to obtain reimbursement for aircraft reconfiguration expenses from the news media.

One joint comment submitted by 23 news organizations supported continued use of the *White House Travel Manual*. It also argued that most previous aircraft reconfigurations have been minor and for the convenience for the campaign, so that any cost sharing should be negotiated by the campaign and the press organizations. Another commenter stated that the *White House Travel Manual* does not address aircraft reconfiguration because the needs of the press have been taken into consideration when government aircraft are originally designed or reconfigured, but candidates who do not travel on government aircraft should be able to make the necessary changes to an

aircraft and seek press reimbursement. This commenter stated that the use of the *White House Travel Manual* to determine reimbursable expenses is generally a wise policy, but advocated a mechanism for candidates to seek exceptions to the general rule if the candidate can demonstrate that an expense was incurred at the request of and to accommodate the press.

The Commission has determined that the aircraft reconfiguration expenses are not suitable for a rule of general applicability particularly because any reconfiguration will likely involve an airplane to be used by many members of the press on many different flights over the life of the campaign. Accordingly, it would be quite difficult to determine the appropriate amount of any monetary payment at a point when neither the press corps nor the campaign staff can predict the number of flights or their costs. The advisory opinion process, however, might serve as the appropriate means for the Commission to consider any particular arrangement for the sharing of these one-time expenses. Consequently, 11 CFR 9004.6 and 9034.6 are not being revised.

C. In-Kind Contributions and Repayments

The NPRM proposed amending 11 CFR 9038.2(b)(2)(ii)(A), which concerns repayments based on expenditures in excess of a Presidential primary candidate's expenditure limitations. Section 9038.2(b) would have provided that in-kind contributions, coordinated expenditures, coordinated communications, coordinated party expenditures and party coordinated communications that count against a candidate's expenditure limitations must be included in the total amount of expenditures for purposes of calculating repayment determinations for expenditures in excess of the limitations.

One commenter urged the Commission to state whether it will seek repayment for primary expenditures in excess of the expenditure limitations.

On a related issue, the NPRM also proposed revisions to 11 CFR 9038.2(b)(2)(iii) that would have included both total deposits and in-kind contributions received or accepted by the candidate in the calculation of the repayment ratio for non-qualified campaign expenses. One commenter stated that this change is consistent with the statute and regulations and that the change would reduce repayment amounts.

The Commission has decided to make no changes to the regulation at 11 CFR

9038.2(b)(2), which currently requires publicly funded Presidential primary campaigns to make repayments on the basis of exceeding the Congressionally-mandated spending limits. The current rule is not being changed at this time because there is no consensus in favor of changing the regulation. See also *Notice of Disposition for the Rules Governing Public Funding of Presidential Primary Candidates—Repayments*, 65 FR 15273 (Mar. 22, 2000).

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

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that few small entities will be affected by these rules, which apply only to Presidential candidates, their campaign committees, national party committees, host committees, and municipal funds. Most of these are not small entities. Most of the Presidential campaigns and convention committees receive full or partial funding from the Federal Government, and are subsequently audited by the Commission. The Commission amends these rules every four years to reflect its experience in the previous Presidential campaign. These rules propose no sweeping changes, and are largely intended to simplify this process. Many expand committee options; several are technical; and others codify past Commission practice. Those few proposals that might increase the cost of compliance by small entities would not do so in such an amount as to cause a significant economic impact.

List of Subjects

11 CFR Part 104

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

11 CFR Part 107

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

11 CFR Part 110

Campaign funds, Political committees and parties.

11 CFR Part 9001

Campaign funds.

11 CFR Part 9003

Campaign funds, Reporting and recordkeeping requirements.

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