

FEDERAL ELECTION COMMISSION

11 CFR Parts 107, 114, 9008

Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions**AGENCY:** Federal Election Commission.**ACTION:** Final rule; transmittal of Regulations to Congress.

SUMMARY: FEC Regulations relating to Federal Financing of Presidential Nominating Conventions have been revised and transmitted to Congress pursuant to 26 U.S.C. 9009(c). The revisions have been renumbered according to the U.S. Code section upon which each regulation is based. The Commission's experience in administering the provisions relating to federal financing of conventions at Chapter 95 of Title 26, U.S. Code, as well as comments solicited from the public at hearings held on June 20, 1978 (43 FR 23587, May 31, 1978), indicated the need for greater clarity in the regulations, especially with regard to the activities of and reporting by host committees. Further information on the intended effect of the revised regulations is contained in the supplementary information below.

26 U.S.C. 9009(c) requires that any rule or regulation prescribed by the Commission to implement Chapter 95 of Title 26, U.S. Code, be transmitted to the Speaker of the House of Representatives and the President of the Senate prior to final promulgation. If neither House of Congress disapproves of the regulations within 30 legislative days of their transmittal, the Commission may finally prescribe the regulations in question. The following regulations were transmitted to Congress on October 26, 1979.

DATE: Further action, including the announcement of an effective date and deletion of existing regulations in Subchapter B of 11 CFR Chapter I, will be taken by the Commission after these regulations have been before the Congress 30 legislative days in accordance with 26 U.S.C. 9009(c).

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SUPPLEMENTARY INFORMATION:

Explanation and Justification of Regulations Concerning Federal Financing of Presidential Nominating Conventions, Part 9008

§ 9008.1 Scope.

This section sets forth the scope of 11 CFR Part 9008 which interprets 2 U.S.C. § 437 and 26 U.S.C. § 9008.

§ 9008.2 Definitions

Subsection (a) follows the definition at 26 U.S.C. 9002(3).

Subsection (b) follows the definition at 26 U.S.C. 9002(5).

Subsection (c) follows the definition at 26 U.S.C. 9002(6).

Subsection (d) follows the definition at 26 U.S.C. 9002(7).

Subsection (e) follows the definition at 2 U.S.C. 431(k).

Subsection (f) follows the definition at 26 U.S.C. 9008(8).

Subsection (g) provides a definition of the term "nominating convention," which means any meeting, including a convention or caucus, held by a political party at the national level to choose that party's presidential nominee.

Subsection (h) defines the term "Secretary" to mean the Secretary of the Treasury of the United States.

§ 9008.3 Entitlement to Payments from the Fund

Subsection (a) follows 26 U.S.C. 9008(b)(1) which entitles major parties to receive with respect to any presidential nominating convention payments which shall not in the aggregate exceed \$2,000,000 (as adjusted by the Consumer Price Index under 26 U.S.C. 9008(b)(5) and 11 CFR 9008.4(a)).

Subsection (b) follows 26 U.S.C. 9008(b)(2) which entitles minor parties to receive an amount equal to a portion of a major party's entitlement on the basis of the number of votes received by the minor party in the preceding presidential election.

§ 9008.4 Adjustment of Entitlement

Subsection (a) follows 26 U.S.C. 9008(b)(5).

Subsection (b) provides for an adjustment to a national committee's entitlement on the basis of income earned through the investment of public funds. In calculating the amount of the adjustment, a deduction will be made for tax paid on such income.

Subsection (c) provides for an adjustment to a national committee's entitlement on the basis of private contributions received by the national committee to defray convention expenses.

§ 9008.5 Limitation on Payments

This section follows 26 U.S.C. 9008(b)(4).

§ 9008.6 Use of Funds

Subsection (a) sets forth the permissible uses for public funds received by the national committee.

Subsection (a)(1) follows 26 U.S.C. 9008(c)(1).

Subsection (a)(2) follows 26 U.S.C. 9008(c)(2), which permits the use of public funds to repay loans, the proceeds of which were used to defray convention expenses. Subsection (a)(2) adds the requirement that where public funds are used to pay the interest on such loans, the interest must be at a commercially reasonable rate.

Subsection (a)(3) follows 26 U.S.C. 9008(c)(2), which permits the use of public funds to restore funds which were used to defray convention expenses. Restoration of advances from the national committee are specifically permitted where those advances are used to defray convention expenses.

Subsection (a)(4) sets forth a list of expenses which are convention related and which may be defrayed with public funds. The list of expenses does not, however, include all convention expenses. The national committee is thus not limited to using its public funds only for the expenses listed but may also use public funds to defray any other expenses with respect to the convention.

Subsection (a)(5) permits a national committee to invest public funds; *Provided*, That the income generated from the investment is used to defray convention expenses.

Subsection (b) sets forth certain prohibitions in the use of public funds by a national committee.

Subsection (b)(1) follows 26 U.S.C. 9008(c), which prohibits the use of public funds to defray the expenses of any candidate or delegate participating in the convention. An exception is made for individuals who are participating in the convention as official party personnel, but who are simultaneously participating as delegates or alternate delegates. Since such individuals are participating in the convention as official personnel, there should be no prohibition against using public funds to defray their expenses. It does not appear that in prohibiting the use of public funds to defray the expenses of delegates, Congress intended to also bar the use of public funds to defray expenses of official convention personnel who happen to be serving as delegates or alternate delegates.

Subsection (b)(1) also specifically provides that candidates, delegates and

alternative delegates may attend official party convention activities such as receptions and dinners, which are paid for from public funds without violating 26 U.S.C. 9008(c). Attendance at such activities by a candidate or delegate does not amount to the prohibited use of public funds to defray expenses of that candidate or delegate.

Subsection (b)(2) prohibits the use of public funds to defray expenditures that violate federal or State law or any regulation prescribed thereunder.

Subsection (b)(3) prohibits the use of public funds to pay civil or criminal penalties imposed pursuant to the Act. This prohibition is necessary to prevent the use of federal funds to pay penalties imposed under federal law. In order to permit the payment of such penalties, subsection (b)(3) provides that amounts received or expended to pay such penalties will not be considered contributions or expenditures for certain purposes. Such amounts will not be subject to the contribution and expenditure limitations under U.S.C. 441a, and 26 U.S.C. 9008(d), nor will they be considered private contributions which diminish the amount of public funds the committee may receive under 11 CFR 9008.8(a)(2). However, amounts received or expended to pay criminal or civil penalties are subject to the prohibitions of 2 U.S.C. 441b, 441c, 441e, 441f, and 441g; and well as 11 CFR 110.4 and Parts 114 and 115.

§ 9008.7 Limitation of expenditures.

Subsections (a)(1) and (a)(2) follow 2 U.S.C. 9008(d) which provides that major and minor parties may not incur expenditures with respect to a presidential nominating convention in excess of the amount of a major party's entitlement under 26 U.S.C. 9008(b).

Subsection (a)(3) interprets 26 U.S.C. 9008(d) which authorizes the Commission to permit a national committee to exceed the expenditure limitations with regard to its convention if, due to extraordinary and unforeseen circumstances, the excessive expenditures are necessary to assure the effective operation of the convention. Subsection (a)(3) clarifies the phrase "extraordinary and unforeseen circumstances" by giving two specific examples of such circumstances—a natural disaster or a catastrophic occurrence at the convention site. The legislative history of the statute which established public financing for national nominating conventions indicates that the phrase "extraordinary and unforeseen circumstances" was intended to include "events of a catastrophic nature [which] overwhelmingly imperil the operation of

a presidential nominating convention" (S. Rep. No. 93-1237, 93rd Cong., 2nd Sess., 107 (1974)). The excessive expenditures must be defrayed with private contributions which are subject to all prohibitions, limitations and requirements of the Act.

Subsection (b) permits government agencies to make certain expenditures for facilities or services with respect to a convention without the value of the facilities or services counting toward the party's expenditure limitation. For example, under this section, a city may contract with the national committee to provide certain facilities and services as part of an overall package to attract the convention to that city. If such expenses were counted against the party's limit, that limit would be unrealistically low. Further, it appears that Congress in deciding upon a dollar figure for expenditure limitations, took into consideration only those expenses which were actually paid by the national committee and ignored the value of facilities and services provided by the convention city and the host committee in that city. Also, under Subsection (b), the agency which provides facilities or services to the convention may not obtain goods or services from other persons at less than fair market value, except for reductions or discounts made in the ordinary course of business. This restriction is imposed in order to prevent the government agency from acting as a conduit for prohibited contributions. (See generally AO 1975-1)

Subsection (c)(1) makes it clear that retail businesses may give normal discounts to a national committee with respect to the convention. In order to prevent illegal contributions, it is required that such discounts be in the ordinary course of business. In enforcing this standard, the Commission would examine whether such discounts were in accordance with standard practice based on the quantity of similar goods or services sold or provided in similar transactions. Banks are, however, prohibited from providing such discounts. Under 2 U.S.C. 441b all banks are prohibited from making contributions or expenditures in connection with a federal election, and national banks are prohibited from making contributions or expenditures in connection with any election whether federal, state or local. In view of this broad prohibition, particularly with regard to national banks, the Commission has decided that banks should not be permitted to give discounts to the national committee with respect to its convention.

Subsection (c)(2) permits local businesses to give away samples and promotional items to convention attendees without such gifts being treated as illegal contributions or expenditures. A local business is defined as any business within the Standard Metropolitan Statistical Area (SMSA) of the convention city. The SMSA is used by agencies in administering a wide variety of federal loan and grant programs. It provides a uniform statistical standard for designating the economic and social unit which centers around a city. Local banks are also permitted to give away samples and promotional items. Inasmuch as the samples and items must be of nominal value and provided solely for bona fide advertising or promotional purposes, rather than for political purposes, the Commission did not consider this activity to be prohibited by 2 U.S.C. 441b.

Subsection (d) deals with host committees, which are defined as nonprofit organizations whose basic purpose is the promotion of its city's commerce and image. The host committee in the convention city permitted to receive and make two types of contributions and expenditures—those aimed at promoting the city and its commerce and those for the purpose of defraying convention expenses. Both types of contributions and expenditures by host committees do not count as contributions to the party or as expenditures subject to the party's limitation. (See Explanation and Justification of 11 CFR 9008.7(b).)

A wide variety of persons including individuals, local businesses, local government agencies, and union locals, are permitted to donate funds to the host committee for use in promoting the city and its commerce. No limitations are placed on the size of such donations. Far greater restrictions are, however, placed on funds received and expended to defray convention expenses. Only local retail businesses may donate funds for use by the host committee to defray convention expenses and these donations are limited to an amount proportionate to the commercial return reasonably expected during the life of the convention by the particular business. For purposes of this subsection, the life of the convention is deemed to begin seven days before the opening of the convention and to end three days after the close of the convention. This time period coincides with the dates on which the majority of convention attendees normally arrive and depart.

The restrictions concerning who may donate funds to defray convention expenses and the amounts which may be donated are necessary to insure that such donations are commercially, rather than politically motivated. Further, the national committee of a political party is entitled to receive public money to pay for its convention and is in turn limited in the amount which it may spend on that convention. Defrayment of convention expenses by a host committee is intended to be a very narrow exception to the statutory limitation on convention expenses.

Finally, under subsection (d), *all* local retail businesses, whether incorporated or unincorporated, may make donations to the host committee. While incorporated businesses are prohibited by 2 U.S.C. 441b from making contributions or expenditures in connection with a federal election, donations by such corporations to a host committee in accordance with the restrictions set forth in subsection (d) are sufficiently akin to a commercial transaction to fall outside the scope of that prohibition.

Subsection (e) provides that amounts paid by candidates from campaign funds or by delegates or others from personal funds to attend the convention do not count against the national committee's expenditure limitation. Since 26 U.S.C. 9008(c) prohibits the use of public funds to pay the expenses of any candidate or delegate to participate in the convention such amounts should not count against the national committee's expenditure limitation. Similarly, if the expenses are paid by a State or local party committee, such amounts do not count against the national committee's limitations.

Subsection (f) follows 26 U.S.C. 9008(d)(4).

§ 9008.8 *Payment and Certification*

Subsection (a) makes clear that the public financing of conventions is optional, and accordingly, the national committee of a political party may elect to receive all, part, or none of the amounts which it is entitled to receive. The committee is free to accept contributions for the convention so long as the amount of contributions when added to the amount of public funds requested, does not exceed the expenditure limitation of \$2 million.

Subsection (b) sets forth the eligibility requirements which a national committee must satisfy in order to receive public funds. The Commission's authority to establish such requirements derives from 26 U.S.C. 9008(g). Section 9008(g) provides that a party which requests funds shall file a statement containing such information as the

Commission may require and that the Commission shall process that request according to procedures which it establishes. Under subsection (b), the national committee is required to establish a convention committee which will receive all public funds to which the national committee is entitled and which will be responsible for conducting the arrangements for the convention. The establishment of a convention committee is a necessary requirement in order to enable the Commission to know who has initial responsibility for handling public funds and incurring expenditures. (Note however, that the national committee remains ultimately responsible for paying civil and criminal penalties under the Act and for making repayment 11 CFR 9008.8(b)(4)(viii) and 9008.10.) The convention committee is required to agree to certain conditions prior to receiving public funds and this agreement is also binding on the national committee. The conditions to which the convention committee must agree include compliance with expenditure limitations, filing convention reports, payment of civil and criminal penalties, documenting convention expenses, submitting to audits, etc.

With regard to documenting convention expenses, under subsection (b)(8)(V), the convention committee has the burden of proving that public funds were used to defray convention expenses. This burden consists of two elements—the committee must show (1) that an expenditure was actually made or incurred; and (2) that an expenditure was with respect to or in connection with the convention. The committee will be able to show an expenditure was actually made by retaining proper documentation for that expenditure. Generally, the minimum acceptable documentation for all expenditures, except petty cash fund expenditures, is a cancelled check to the person who provided the goods or services to the convention. In addition to proper documentation, the committee may be required to provide an explanation of the connection between the expenditure and the convention. This requirement is designed to insure that public funds are spent on convention related expenditures. Under 26 U.S.C. 9008(b)(1), a national committee is entitled to public funds "with respect to [a] presidential nominating convention." Those funds must hence be spent only on convention related expenditures. Repayment is required for expenditures which are not properly documented or are not in connection with the convention. (See 11 CFR 9008.10)

Subsection (c) follows 26 U.S.C. 9008(b)(5).

Subsection (d) follows 26 U.S.C. 9008(e).

Subsection (e) follows 26 U.S.C. 9008(g).

§ 9008.9 *Examination and Audits*

Section 9008.9 follows 26 U.S.C. 9008(g), which provides that certifications by the Commission shall be subject to an examination and audit conducted no later than December 31 of the year of the convention. Since the convention committee will be the recipient of public funds, this section provides for an audit of that committee.

This section also provides for an examination and audit of each host committee. Such committees are permitted to receive donations to defray convention expenses. It is hence necessary for the Commission to audit them in order to insure that those donations were properly raised and spent.

§ 9008.10

This section implements 26 U.S.C. 9008(h) which gives the Commission the same authority to require repayments as it has under 26 U.S.C. 9007(b). Accordingly, this section follows 9007(b) by requiring repayments under subsection (a), if the payments to the national committee exceed its entitlement, under subsection (b), if the national committee's convention expenses exceed its entitlement under subsection (c), if the national committee accepted private contributions which when added to the payments received exceed its expenditure limitation, or under subsection (d), if any public funds were used for unlawful purposes.

Subsection (d) also requires a repayment for expenditures which are not properly documented. (See Explanation and Justification of § 9008.8(b).)

Subsection (e) has been added to fill a void in the statutory repayment provisions by specifying that the committee may not retain public monies.

Subsection (f) follows 26 U.S.C. 9007(b)(5).

Subsection (g) follows 26 U.S.C. 9007(c).

§ 9008.11 *Resolution of Disputes Concerning Repayment*

This section sets forth a procedure concerning disputes with regard to repayments required by the Commission.

The Federal Election Campaign Act does not provide that Administrative Procedure Act (APA) requirements for adjudicative hearings (5 U.S.C. 554-557)

apply to determinations by the Commission. While APA requirements for a full trial type hearing may not be applicable, procedural due process requirements mandate that prior to repayment the committee be afforded some type of opportunity to demonstrate to the Commission that repayment is not warranted. (See K. Davis, *Administrative Law of the Seventies*, § 7.00-1-3 (Supp. 1977); *Mathews v. Eldridge*, 424 U.S.C. 319 (1976).)

The procedure set forth in this section fulfills due process requirements. It includes the following elements: Notice of the legal and factual matters upon which the Commission is relying; an opportunity for the committee to present in writing evidence and reasons why repayment is not warranted; a final determination by the Commission on the basis of all evidence presented; and a statement of reasons underlying the Commission's determination. (It should be noted even if the APA requirements were applicable to determinations by the Commission, the APA itself contains a significant exception to the requirement for a full trial type hearing by providing for the submission of evidence in written form under 5 U.S.C. 556(d).)

§ 9008.12 *Registration and Reports*

Section 9008.12 derives from the requirements of 2 U.S.C. 437. Subsection (a) provides for registration and reporting by host committees or other organizations or groups which deal with officials of a national political party with respect to matters involving a Presidential nominating convention. No registration or reporting is, however, required for host committees, organizations or groups which are unsuccessful in attracting the convention to a city.

Subsection (b) requires the convention committee of each party which receives public funds to register and file reports with the Commission. Committees of parties which do not receive public funds must also register and file reports with the Commission. Reports must be filed on a quarterly basis except that a post convention report is to be filed in lieu of any quarterly report due within 20 days before or after the convention. Under 2 U.S.C. 437, only a post convention report is explicitly required. Although there is no specific statutory requirement for any other report this section requires quarterly reporting prior to the convention in order to monitor the receipt and spending of private contributions and the disbursement of Federal funds by a national committee.