
FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 106, 110, 140, 141, 142, 143, 144, 145, 146, 9001, 9002, 9003, 9004, 9005, 9006, 9007

Public Financing of Presidential General Election Campaigns

AGENCY: Federal Election Commission.

ACTION: Final Rule: Transmittal of Regulations to Congress.

SUMMARY: FEC Regulations implementing the provisions of the Presidential Election Campaign Fund Act (26 U.S.C. 9001, et seq.) relating to the public financing of Presidential General Election Campaigns have been

147a

revised and transmitted to Congress pursuant to 26 U.S.C. 9009(c). The regulations have been renumbered according to the section of the U.S. Code upon which each is based and are a substitute for regulations currently appearing in 11 CFR Parts 140 through 146. Technical conforming amendments have also been made to 11 CFR Parts 100, 106 and 110.

EFFECTIVE DATE: Further action, including the announcement of an effective date, and deletion of existing regulations in 11 CFR Parts 140 through 146, will be taken after these regulations have been reviewed by Congress in accordance with 26 U.S.C. 9009(c).

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Ann Fiori, Assistant General Counsel, 1325 K Street, N.W., Washington, D.C. 20463, (202) 523-4143.

SUPPLEMENTARY INFORMATION: 26 U.S.C. 9009(c) requires that any rule or regulation prescribed by the Commission under Chapter 95 of Title 26, United States Code, be transmitted to the Speaker of the House of Representatives and the President of the Senate for legislative review prior to final promulgation. The following regulations were transmitted to Congress on June 13, 1980.

By Notice of Proposed Rulemaking published on May 31, 1978 (43 FR 23587), the Commission invited oral and written public comments on revisions to its regulations governing the public financing of Presidential election campaigns. Public hearings were held on June 20, 1978. A second Notice of Proposed Rulemaking containing the text of proposed regulations to govern the public financing of Presidential General Election Campaigns was published for comment on May 15, 1980 (45 FR 32203). The following regulations are based on the comments received in response to these two NPRM's as well as the experience the Commission has gained in administering the public financing provisions since 1978.

A section by section analysis of the new regulation is contained in the following Explanation and Justification.

Explanation and Justification

PART 9001 Scope

§ 9001.1 Scope

This subchapter is issued by the Federal Election Commission to govern the entitlement to and use of the Presidential Election Campaign Fund.

PART 9002 Definitions

§ 9002.1 Authorized Committee

This definition derives from 26 U.S.C. 9002(1). While the procedures for

authorizing a committee under this subchapter follow the procedures outlined in Title 2 regulations, the \$5,000 threshold established under Title 2 (11 CFR 100.5(d)) does not apply. In addition, a candidate of a political party may designate the party's national committee as the candidate's authorized committee.

§ 9002.2 Candidate

This definition generally follows 26 U.S.C. 9002(2)(A) and (B) and as such does not incorporate the \$5,000 candidate threshold requirement found in 2 U.S.C. 431(2). The \$5,000 threshold in the Title 2 definition of candidate does not apply to this subchapter because major party candidates are generally prohibited from receiving contributions (unless they choose to establish a legal and accounting compliance fund). The threshold is also not applicable to minor or new party candidates as the definition of candidate in Title 26 is premised on placing one's name on the general election ballot as the candidate of that party and on "qualifying" for public funds by receiving a percentage of the popular vote.

§ 9002.3 Commission

This definition generally follows 26 U.S.C. 9002(3).

§ 9002.4 Eligible Candidates

This definition follows 26 U.S.C. 9002(4).

§ 9002.5 Fund

This definition follows 26 U.S.C. 9002(5).

§ 9002.6 Major Party

This definition follows 26 U.S.C. 9002(6). A provision has been added which includes within the definition of "candidate" for the purposes of this section those individuals who received popular votes for the office of President in the preceding election. This provision was formerly included in the definition of "candidate" at 11 CFR 140.2(b).

§ 9002.7 Minor Party

This definition follows 26 U.S.C. 9002(7). A provision has been added which includes within the definition of "candidate" for the purposes of this section those individuals who received popular votes for the office of President in the preceding election. This provision was formerly included in the definition of "candidate" at 11 CFR 140.2(b).

§ 9002.8 New Party

This definition follows 26 U.S.C. 9002(8).

§ 9002.9 Political Committee

This definition narrows the scope of 26 U.S.C. 9002(9), which extends to groups influencing state or local elections as well as federal elections. This definition covers only those entities over which the Commission has jurisdiction, that is, those groups accepting contributions or making expenditures for the purpose of influencing federal elections. This definition is thus in concert with the definition of political committee in Title 2 in that it reaches only groups influencing federal elections.

§ 9002.10 Presidential Election

This definition follows 26 U.S.C. 9002(10).

§ 9002.11 Qualified Campaign Expense

This section explains and adds to the statutory definition of qualified campaign expense.

Subsection (a) generally follows 26 U.S.C. 9002(11). Subsection (a)(3) provides that while expenses which constitute a violation of state or federal law are not qualified campaign expenses, such expenses do count against the candidate's expenditure limitation. Since such expenses are made to further the candidate's campaign, they should count against the expenditure limitation.

Subsections (b) (1) and (2) follow 2 U.S.C. 441a(b)(2).

Subsection (b)(3) derives from the last sentence of 26 U.S.C. 9002(11). It permits a Presidential or Vice Presidential candidate to pay for expenditures which further the election of another individual to the extent that the expenditure furthers the Presidential or Vice Presidential candidate's election.

Subsections (b) (4) and (5) specifically include as qualified campaign expenses unreimbursed travel costs paid by a candidate's committee for media, Secret Service or similar personnel and payments for legal and accounting services provided solely to ensure compliance with Title 2 and Chapter 95 of Title 26.

Subsection (c) sets forth those expenses which are not considered qualified campaign expenses. Expenses incurred after the expenditure report period are by definition not qualified. An exception is made for "winding down" costs. Because these costs are necessary to the orderly termination of a campaign, they are considered qualified campaign expenses.

Primary campaign expenditures are not considered qualified campaign expenses. Since federal funds are provided under Chapter 95 for the

general election campaign, those funds are not to be used in connection with the primary election.

Civil or criminal penalties which must be paid pursuant to the Act or Chapter 95 of Title 26 are not qualified campaign expenses. If such penalties were considered qualified, the result would be that federal funds would be used to pay penalties imposed for violations of the campaign law. Such penalties may, however, be paid from the legal and accounting compliance fund.

§ 9002.12 Expenditure Report Period

This definition follows 26 U.S.C. 9002(12).

§ 9002.13 Contribution

While the term "contribution" is used, it is not defined in Title 26. Section 9002.13 gives the term "contribution" the same meaning under Title 26 as it is given under Title 2.

§ 9002.14 Secretary

The term "Secretary" means the Secretary of the Treasury.

§ 9002.15 Political Party

While the term "political party" is not defined in Title 26, it is used throughout that Title. To make clear that this term has the same meaning as under Title 2, the Title 2 definition has been added here. Thus, this definition follows 2 U.S.C. 431(16):

PART 9003 Eligibility for Payments

§ 9003.1 Candidate and Committee Agreements

Subsection (a) generally follows 26 U.S.C. 9003(a), and adds two requirements to that section: each candidate must agree to comply with the provisions of the Commission's regulations implementing the Presidential Election Campaign Fund Act and must provide certain information regarding the depository account to which payments from the fund will be initially deposited. The latter requirement is included to facilitate prompt payment of amounts certified by the Commission.

Subsection (b) sets the time limitations within which the candidate agreement must be submitted to the Commission, but allows for some flexibility in this deadline with respect to minor and new party candidates. Since major party candidates will be entitled to full funding, and are only eligible for federal funds if they have not received private contributions, no extension provisions have been made for such candidates.

§ 9003.2 Candidate Certification

In subsection (a), pursuant to 26 U.S.C. 9003(b), each major party candidate is required to certify to the Commission that the candidate and his or her authorized committee(s) have not incurred and will not incur qualified campaign expenses in excess of his or her entitlement under 11 CFR Part 9004. The candidate shall also certify that no contribution has been or will be accepted, except those solicited for and deposited to the candidate's legal and accounting fund and to the extent necessary to make up any deficiency in payments from the Fund.

Subsection (b) generally follows 26 U.S.C. 9003(c) and provides that minor and new party candidates shall certify to the Commission that the candidate and his or her authorized committee(s) have not and will not incur qualified campaign expenses in excess of the major party candidate's entitlement under 11 CFR Part 9004 and that no contributions have been or will be accepted, except where qualified campaign expenses exceed aggregate payments received by the candidate.

Subsection (c) generally follows 26 U.S.C. 9004(d). Subsections (c) (1) and (2) incorporate former 11 CFR 141.2(c) (1) and (3). Subsection (c)(3) defines the term "personal funds" as it is defined at 11 CFR 110.10(b). Subsection (c)(4) follows 26 U.S.C. 9004(d). Subsection (c)(5) clarifies that contributions by family members from funds over which the candidate, at the time he or she became a candidate, had no control or access to are subject to the \$1,000 limitation under 2 U.S.C. 441a, but do not count against the \$50,000 limitation under 26 U.S.C. 9004(d). Subsection (c)(6) requires personal funds to be deposited in a committee account established to receive private contributions before such funds may be spent to further the candidate's campaign. This requirement has been included to ensure that the disbursement of such funds is properly documented and reported.

Subsection (d) revises former 11 CFR 141.2(d) and is consistent with the requirements for filing candidate agreements.

§ 9003.3 Allowable Contributions

Subsection (a) permits a candidate to establish a separate account known as a legal and accounting compliance fund. This provision has been added to follow past Commission practice, which allowed candidates receiving public funding to solicit private contributions to pay for the costs of services necessary to comply with the

requirements of the Act and Chapter 95 of Title 26. The services covered parallel those described in 11 CFR 100.8(b)(15).

It should be noted that the establishment of a compliance fund is recommended only for candidates receiving full federal funding for their general election campaigns. Other candidates will be soliciting private contributions to pay for qualified campaign expenses and should therefore make payments for their legal and accounting compliance services from their private contribution account established under 11 CFR 9003.3(b). Payments made from a private contribution account for exempted legal and accounting services will not be counted against the candidate's overall expenditure limits under 2 U.S.C. 441a(b) and 11 CFR 110.8. (See 11 CFR 100.8(b)(15).)

Subsection (a)(1) sets forth the requirements regarding funds deposited in this account.

Subsection (a)(1)(i) permits candidates to establish such an account prior to being chosen as the nominees of their political party. Early establishment of this account could be used to solicit contributions to defray start-up expenses for the candidate's general election campaign under 11 CFR 9003.4. Subsection (a)(1)(i)(A) requires that all solicitations for contributions to the separate legal and accounting compliance fund must clearly state that they will become part of this fund. This notification is necessary to inform contributors of the intended use of their contributions.

Subsection (a)(1)(i)(B) makes it clear that contributions to the legal and accounting compliance fund are subject to the limitations and prohibitions of Title 2.

Subsection (a)(1)(ii) permits a candidate to transfer to the separate legal and accounting compliance fund any amounts projected to remain in the candidate's primary election account after all required repayments have been made to the U.S. Treasury under 11 CFR 9038.2. This projected balance essentially represents the amount of private contributions which are projected to remain in the candidate's primary account after all federal matching funds have been extracted and all repayments made.

Subsection (a)(1)(iii) permits a candidate to deposit in the compliance fund contributions designated for the primary election but received after the general election expenditure report period has begun. These contributions may be so deposited only if the candidate's primary campaign is solvent. In addition, the contributor

must be given the same notice required for solicitations to the compliance fund; if he or she does not object, the contribution may then be deposited in the compliance account. Otherwise, the contribution must be refunded. All such contributions which are deposited in the compliance fund will be counted against the donor's general election contribution limits rather than his or her primary limit.

Subsections (a)(2)(i) (A) through (E) establish the permissible uses of contributions to the legal and accounting compliance fund.

Subsection (a)(2)(i)(A) permits the use of such contributions to defray the costs of legal and accounting services provided solely to ensure compliance with the requirements of Title 2 and of Chapter 95 of Title 26. Legal and accounting services which are not related to compliance must be paid for from the account maintained for federal funds. As set forth in 11 CFR 100.8(b)(15), payments for compliance-related services made from this fund or other accounts containing private contributions will not count against the candidate's expenditure limitation under 2 U.S.C. 441a(b). Payments made from the federal fund account for either compliance related or non-compliance related services will count against the expenditure limitation.

Subsection (a)(2)(i)(B) permits the use of contributions to the separate legal and accounting compliance fund to defray civil or criminal penalties imposed pursuant to Title 2 or Chapter 95 of Title 26. The payment of civil or criminal penalties is not considered a qualified campaign expense and may not be paid from the federal funds account. Therefore it is necessary that an acceptable source for such penalty payments be provided. (See 11 CFR 9002.11(c)(4).)

Subsection (a)(2)(i)(C) permits the use of contributions to the separate legal and accounting compliance fund to make repayments to the U.S. Treasury required under 11 CFR 9007.2.

Subsection (a)(2)(i)(D) permits the use of contributions to the separate legal and accounting compliance fund for soliciting additional contributions to that account. Solicitation costs may not be paid from payments received from the Fund.

Subsection (a)(2)(i)(E) permits contributions to the separate legal and accounting compliance fund to be borrowed from that fund and used to defray qualified campaign expenses incurred prior to the beginning of the expenditure report period or prior to the receipt of funds from the Presidential Election Campaign Fund. The use of

contributions for this purpose is permissible because only a temporary borrowing is involved; the contributions must be restored in accordance with 11 CFR 9003.4. Ultimately, these contributions will be used only for non-qualified campaign expenses.

Subsection (a)(2)(ii)(A) outlines the related costs which may be paid from this account as part of the cost of exempted compliance services. This subsection also permits committees to allocate a portion of their overhead costs to compliance-related services. If the amount of overhead so allocated is equal to or less than 10% of the cost of all other compliance-related services, no proof will be required to demonstrate that such costs were in fact compliance-related. If this amount exceeds 10%, the entire amount claimed must be justified as compliance costs. This formula follows past Commission practice.

Subsection (a)(2)(ii)(B) allows committees to pay all legal and accounting costs from their federal funds account and then reimburse their federal account for the compliance-related portion of such costs. This provision allows committees some flexibility in deciding what portion, if any, of the cost of compliance services, they may wish to pay from federal funds. However, the reimbursement must occur before the Commission makes a final repayment determination for that committee. Further, once funds have been transferred to the federal account for such reimbursement, they may not be transferred back to the compliance fund if it is later found that such reimbursement was in excess of the amount the committee wanted to reimburse.

Subsection (a)(2)(iii) provides that disbursements made from the separate legal and accounting compliance fund will not be subject to the expenditure limitations of 2 U.S.C. 441a(b) and 11 CFR 110.8 so long as they are used for the purposes outlined in 11 CFR 9003.3(a)(2)(i) (A) through (D). This section also makes it clear that if a candidate borrows from this fund, pursuant to 11 CFR 9003.3(a)(2)(i)(E), to pay qualified campaign expenses incurred before the beginning of the expenditure report period or prior to the receipt of payments from the Fund, such qualified campaign expenses will count against the expenditure limitations.

Subsection (a)(2)(iv) prohibits the use of contributions to the compliance fund for the payment of outstanding debts remaining from the candidate's primary campaign. This prohibition continues until all obligations and repayments have been paid for the general election; at that point, such funds become excess

campaign funds and may be used for any purpose permitted under Title 2 or Part 113 of the Commission's regulations.

Subsection (a)(3) establishes the reporting, recordkeeping and documentation requirements for the separate legal and accounting compliance fund.

Subsection (b) sets forth the guidelines for candidates who may accept private contributions to pay for qualified campaign expenses.

Subsection (b)(1) defines the circumstances under which major, minor and new party candidates may accept such contributions. Subsection (b)(1)(i) follows 2 U.S.C. 9003(b)(2); subsection (b)(1)(ii) follows 2 U.S.C. 9003(c)(2).

Subsection (b)(2) requires that all contributions received under this section be deposited into a separate account, and limits their use to the payment of qualified campaign expenses and the costs of soliciting contributions to this account. It also establishes recordkeeping and reporting requirements for this separate account.

Inasmuch as the compliance fund contains private contributions, subsection (b)(3) permits candidates to make transfers to this separate account from the legal and accounting compliance fund.

Subsection (b)(4) parallels the exemption allowed for fundraising costs during the Presidential primaries for candidates receiving matching funds. See 11 CFR 100.8(b)(21). Candidates may spend, as solicitation costs, up to 20% of the amount they are permitted to raise for qualified campaign expenses without such costs being counted against the expenditure limits. Disbursements for such solicitation costs must, however, be reported and documented in the same manner as all other disbursements, whether or not they are counted against the expenditure limits. This fundraising exemption is intended to make the system function more equitably with respect to candidates who receive only partial federal funding. While candidates receiving full federal funding will not incur fundraising costs, candidates who receive only partial federal funding will be forced to make expenditures to raise private contributions. Therefore, a fundraising exemption similar to that provided for in the Primary Matching Fund Act is incorporated into these regulations.

Subsection (b)(5) requires that all contributions received under this section must be aggregated with any contributions made by the same person to the candidate's separate legal and accounting compliance fund for purposes of the Title 2 contribution

limitations. The prohibitions of 11 CFR Parts 114 and 115 shall also apply to contributions received under this section.

§ 9003.4 Expenses Incurred Before the Beginning of the Expenditure Report Period or Prior to Receipt of Federal Funds.

Subsection (a)(1) defines the qualified campaign expenses which a candidate is permitted to incur in connection with his or her general election campaign prior to the beginning of the expenditure report period as defined at 11 CFR 9002.12. This provision is designed to permit a candidate to set up a basic campaign organization before the expenditure report period begins.

Subsection (a)(2) allows candidates to continue to use the funding sources permitted under this section until they receive federal funds.

Subsection (b) establishes the permissible sources from which a candidate may obtain funds for making such expenditures in connection with the general election. These sources are bank loans obtained pursuant to the requirements of 11 CFR 100.7(b)(11), loans obtained from the candidate's separate legal and accounting compliance fund, contributions received by minor or new party candidates under 11 CFR 9003.3(b), loans obtained from the candidate's primary election campaign, and personal funds up to the \$50,000 limit. Major party candidates receiving federal funds equal to the expenditure limitation must repay all loans within 15 days after receipt of payment of the public funds to which the candidate is entitled. Expenditures made by a candidate in accordance with this section will be counted against the candidate's expenditure limitation under 11 CFR 110.8 and 2 U.S.C. 441 (a) (b).

Subsection (c) requires the establishment of separate accounts for such expenditures. It also sets forth the documentation and reporting requirements for such expenditures.

§ 9003.5 Documentation of Disbursements

This section generally parallels the documentation requirements set forth in the Presidential Primary Matching Fund regulations and also incorporates current recordkeeping requirements at 2 U.S.C. 432.

Under subsection (a), the candidate has the burden of proving that all disbursements made by the candidate, his or her authorized committee(s) or any agents of either the candidate or such committee(s) are qualified campaign expenses. The statutory requirement that the candidate "agree

(in writing) to obtain and furnish to the Commission such evidence as it may request of the qualified campaign expenses" clearly indicates that the candidate who accepts public funding has the burden of proving that all expenditures made on his or her behalf were made to defray qualified campaign expenses.

The candidate's burden of proof with regard to qualified campaign expenses consists of two elements—the candidate must show (1) that the expenditure was made, and (2) that the goods or services purchased were in connection with the campaign. These two elements are derived from the statutory definition of the term qualified campaign expense—an expense "incurred by [a] candidate * * * or by (the candidate's) authorized committee[s] to further the election of * * * such candidate [] * * *" 26 U.S.C. 9002(11).

The first element of the candidate's burden of proof—showing that the expenditure was made—is directed at proving that the expenditure was actually incurred. The second element of proof—that the goods or services purchased were in connection with the campaign—is directed at showing that the expenditure was made to further the candidate's election.

Subsections (a)(1) through (4) set forth the minimum documentation necessary to show that the expenditure was incurred. For disbursements in excess of \$200, the preferred documentation is by receipted bill from the payee. If there is no receipted bill, documentation may be by cancelled check to the payee plus a bill, invoice, voucher or memorandum from either the payee or the candidate. If such documentation is not available, the minimum documentation permissible is a cancelled check. Disbursements of \$200 or less, must be documented by a cancelled check to the payee, unless such disbursements are from the petty cash fund. Subsection (a)(3) defines the term "payee" to mean the ultimate payee, that is the person who provides the goods or services to the campaign. Except for travel advances, a cancelled check to a campaign staffer who then pays other individuals for goods and services provided to the campaign would not be sufficient documentation.

To demonstrate that the disbursement was made to further the candidate's campaign, the "purpose" of each disbursement must be documented. Subsection (a)(5) defines the term "purpose" to mean a brief statement or description of why the disbursement was made. If this statement or description does not suffice to show that the disbursement was campaign related, the Commission, under subsection (b),

may request that the candidate explain the connection between the disbursement and the campaign.

§ 9003.6 Books and Records

This subsection deals with the statutorily prescribed area of the candidate agreement to produce books and records (See 26 U.S.C. 9003(a)(2)).

§ 9003.7 Audit and Examination

This section deals with the portion of the candidate agreement which requires the candidate to submit to a post-election audit and examination. (See 26 U.S.C. 9003(a)(3)). The additional requirements of this section are intended to facilitate this audit and examination.

§ 9003.8 Compliance with Law and Regulations

Under subsection (a), the candidate and his or her authorized committee(s) must comply with the requirements of Title 2 and Chapter 95 of Title 26. This section is intended to encourage prompt disclosure and adequate recordkeeping, and puts the candidate on notice of all statutory and regulatory provisions to which he or she is subject.

Subsection (b) requires the candidate to pay any penalties included in a conciliation agreement or imposed by a court against either the candidate or his or her authorized committee(s). This section would include the situation in which a penalty is imposed against an authorized committee after it has disposed of its excess campaign funds. As agreed by the candidate under 11 CFR 9003.1, the candidate is personally liable for such penalties.

PART 9004—Entitlement of Eligible Candidates to Payments; Use of Payments

§ 9004.1 Major parties.

This section sets forth the amount which an eligible major party candidate is entitled to receive by statute (2 U.S.C. 441a(b)(1)(B)).

§ 9004.2 Pre-election payments; minor and new parties.

Subsection (a) sets forth the entitlement formula for eligible minor party candidates who received 5 percent or more, but less than 25 percent, of the popular vote received by all candidates in the prior election. It generally follows 26 U.S.C. 9004(a)(2) and former 11 CFR 142.2(a). Subsection (b) generally follows former 11 CFR 142.2(b).

§ 9004.3 Post-election payments; minor and new parties.

Subsection (a) sets forth the entitlement formula for eligible minor

and new party candidates who receive 5 percent or more of the total number of popular votes cast in the election. It generally follows 26 U.S.C. 9004(a)(3) and former 11 CFR 142.3(a).

Subsection (b) limits allowable payments from the Fund to candidates qualifying under 11 CFR 9004.2 to an amount equal to the amount by which such candidate's entitlement, as calculated under 11 CFR 9004.3, would exceed his or her entitlement under 11 CFR 9004.2. It generally follows former 11 CFR 142.3(b).

Subsection (c) generally follows 26 U.S.C. 9004(b) (1) and (2).

The formula used for determining the amount to which a minor or new party candidate is entitled after the election is demonstrated by the following example:

Assuming that the amount to which a major party candidate is entitled equals \$20 million and that Candidate X, a minor party candidate, incurs qualified campaign expenses of \$20 million. If Candidate X raises \$15 million in private contributions and, after the election, Candidate X is entitled (based on his or her vote percentage) to receive \$10 million in federal funds, Candidate X will receive only \$5 million since \$5 million represents the difference between the amount of qualified campaign expenses incurred and the amount of contributions received (\$20 million minus \$15 million). If Candidate X had received \$2 million in federal funds prior to the election, he or she would only receive \$3 million after the election. If, based on the vote percentage, Candidate X was entitled to receive only \$3 million even though the total of qualified campaign expenses incurred which were not covered by private contributions equalled \$5 million, Candidate X would still only receive the amount to which he or she was entitled.

§ 9004.4 Use of Payments

Subsection (a) generally follows 26 U.S.C. 9004(c) and specifies the purposes for which eligible candidates may use monies received from the Fund, that is, to defray qualified campaign expenses. In addition to expenses incurred during the expenditure report period, payments may be used to defray winding down costs, which are considered qualified campaign expenses if connected with the termination of the candidate's campaign (See AOR 1976-54), and to restore funds expended for qualified campaign expenses incurred before the beginning of the expenditure report period. Subsection (a)(4) also sets forth examples of those winding down costs which would be considered by the

Commission to be qualified campaign expenses.

Subsection (b) prohibits the use of federal funds to solicit contributions to the candidate's legal and accounting compliance fund. Since excess funds from the compliance fund may be used after the campaign for any purpose permissible under 2 U.S.C. 439a, the use of federal funds to solicit contributions to that account was felt to be inappropriate.

§ 9004.5 Investment of public funds.

This section concerns the investment of public funds. While the statute does not specifically provide for such activity, this section is consistent with the Commission's past practice of permitting eligible candidates to invest public funds. An amount equal to the income derived, minus investment expenses or any taxes paid on such income, must be repaid to the Treasury. It should be noted that if, as a result of such an investment, there is a loss in federal funds, the candidate will be required to repay any amount lost.

§ 9004.6 Reimbursements for transportation and services made available to media, Secret Service and similar personnel.

Subsections (a) and (b) establish rules to govern the use of candidate supplied transportation and ground services by members of the media, Secret Service, or similar personnel. Candidates are not required to seek reimbursement for such transportation or ground services, but may consider the costs involved to be qualified campaign expenses subject to the candidate's overall expenditure limitation pursuant to 2 U.S.C. 441a(b). If, however, reimbursement is sought, such reimbursement may not exceed the amounts established in this section.

Any reimbursement sought for transportation made available to media, Secret Service or similar personnel may not exceed the individuals' pro rata share of the actual cost of the transportation made available. Any reimbursement sought for ground services made available to members of the media, Secret Service, or similar personnel shall not exceed either: the individual's pro rata share of the actual cost of the services made available; or a reasonable estimate of such cost. If reimbursements related to a trip exceed by 10% or more the actual cost of the services and facilities made available, the excessive amount shall be deemed income to the committee. The purpose of this provision is to eliminate the possibility for the subsidizing of a campaign by the media or other individuals through the charging of

higher than pro rata shares for the use of candidate-supplied transportation.

Example of Ground Cost Reimbursement for a Media Personnel on a Campaign Trip

Assume a trip from Washington to Chicago to Los Angeles to Washington. On this trip were 50 press representatives.

Further assume:

At Washington—before departure	
Press bus to airport	\$650.00
At Chicago	
Press bus to and from airport	1,100.00
Hotel accommodation	4,387.00
Baggage handling	843.00
Buffet	787.00
At Los Angeles	
Press bus to and from airport and hotel to event site	1,385.00
Baggage	643.00
Hotel and food provided	7,459.00
Arrive at Washington	
No service provided	0
Trip cost for ground services	17,254.00
5% for Misc. costs (typewriter rental, phone installation)	862.70
Total Costs	\$18,116.70

It is noted that though 50 press representatives were among the party at departure, three left the party at Chicago and two joined in Los Angeles. The pro rata share will be calculated on the basis of 52 persons. Also in both cities a number of press representatives did not take advantage of the transportation and accommodations provided.

The billing will be calculated as follows:

\$18,116.70 divided by 52 persons = \$348.39.

If it is determined that the total reimbursements for this trip exceeded \$19,928.37, the excessive amount shall be deemed income to the Committee and repayable.

Subsection (c) outlines the reporting requirements pursuant to 11 CFR Part 104 relating to expenditures and reimbursements for such transportation or ground services. The total expenditures for transportation and ground services will be reported by the committee. Reimbursements will also be reported, separately from expenditures. Pursuant to Part 104, the reimbursements will be subtracted from the committee's total expenditures to produce the committee's net expenditures. It is the net expenditures which will count against the candidate's expenditure limit.

§ 9004.7 Allocation of travel expenses.

This section is concerned with allocation of expenses incurred for travel relating to the campaign of a candidate who receives funding under Chapter 95 of Title 26. If a trip by a candidate or any other individuals includes only campaign stops, the total cost of the trip is a qualified campaign

expense, payable by the committee. If a trip by a candidate or any other individual includes campaign and non campaign stops, the portion of the cost allocable to campaign activity is calculated on a campaign stop to campaign stop basis. For example, assume that to a candidate's itinerary were Washington, D.C. to Detroit to San Francisco to Fort Worth and return to Washington, D.C. If the stops in San Francisco and Fort Worth were campaign-related while that in Detroit was not, the cost allocable to campaign activity would be determined by calculating what the trip would have cost if the candidate had travelled from Washington, D.C. to San Francisco, from San Francisco to Fort Worth, and from Fort Worth to Washington, D.C.

Individuals who use government conveyance or accommodations paid for by a government entity are required to reimburse the government entity for costs allocable to campaign activity. For example, the Department of Defense has developed a cost rate for use of aircraft owned by the federal government. If such aircraft were used for campaign related travel, the authorized committee would be required to reimburse the federal government on the basis of the Defense Department rate in accordance with the formula set forth in § 9004.7. This requirement is necessary to prevent the free use of government conveyance or accommodations for campaign related activity. Such free use would amount to government subsidization of a candidate's campaign and would totally defeat the purposes of the expenditure limitations. Similarly, if any person, other than a government entity incurs expenses for campaign related travel on behalf of a candidate, such expenses shall be qualified campaign expenses payable by the committee.

§ 9004.8 *Withdrawal by candidate.*

This section generally follows the statutory language in 26 U.S.C. 9003(d)(1) and (2). Subsection (b) additionally requires such individuals to submit a statement similar to that submitted by candidates who received primary matching funds. See 11 CFR Part 9034. Based on this statement, the amount, if any, of excess federal funds remaining in the individual's campaign account is required to be repaid to the Treasury under subsection (c). Subsection (d) provides for a final repayment to the Treasury if necessary, after the Commission has conducted its audit.

PART 9005—Certification by Commission

§ 9005.1 *Initial certification.*

This section follows 26 U.S.C. 9005(a).

§ 9005.2 *Finality of certification.*

Subsection (a) sets forth the procedure by which a candidate is notified of the Commission's initial decision on the amount which that candidate is entitled to receive from the Fund. A candidate who disputes the Commission's determination is given an opportunity to present written materials which would support and warrant a reconsideration of the matter by the Commission. The Commission will render a final determination of certification upon review of the materials submitted and will notify the candidate in writing of its decision and reasons in support thereof.

Subsection (b) generally follows 26 U.S.C. 9005(b).

§ 9005.3 *Payments to eligible candidates from the fund.*

Subsection (a) generally follows 26 U.S.C. 9006(b).

Subsection (b)(1) and (2) generally follow 26 U.S.C. 9006(c).

Subsection (c) and (d) require payments received from the Fund to be deposited to a separate account to facilitate accurate accounting of the use of public funds. Subsection (d) sets forth certain types of receipts by a candidate's committee which represent returns of federal funds to the campaign. These funds must also be deposited in the candidate's federal funds account.

PART 9006—Reports and Recordkeeping

§ 9006.1 *Separate reports.*

This section requires separate reporting of expenditures made by a candidate's authorized committee(s) to further his or her general election campaign. The provision is intended to facilitate accurate accounting of the use of public funds. Such authorized committee(s) shall comply with reporting requirements set forth at 11 CFR 104.3(a) and (b), or when applicable, the reporting requirements set forth at 11 CFR 104.17. Candidates reporting in accordance with 11 CFR 104.17 during the 1980 election cycle may, however, use the \$200 itemization threshold instead of itemizing all receipts and disbursements aggregating in excess of \$100.

The authorized committee(s) is also required to file separate reports to disclose different general election activities. One report must be filed to disclose all receipts and disbursements related to qualified campaign expenses.

A second report, which must be filed with the first one, should list all activity of the legal and accounting campaign fund.

§ 9006.2 *Filing dates.*

This section follows 2 U.S.C. 434(a)(3).

PART 9007—Examinations and Audits; Repayments

§ 9007.1 *Audits, records and investigations.*

This section follows 26 U.S.C. 9007(a) and sets forth examples of what will be included in this audit.

§ 9007.2 *Repayments.*

Subsections (a)(1), (2), (3) and (4) follow 26 U.S.C. 9007(b)(1), (2), (3) and (4).

Subsection (a)(5) requires repayment for expenditures which are not properly documented. (See Explanation and Justification of § 9003.5.)

Subsection (a)(6) requires repayment of any income received through investment of public funds, as provided in 11 CFR 9004.5.

Subsections (b), (c), (d), (e) and (f) set forth a procedure governing disputes over repayment determinations made 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. 319 (1976).)

The procedure set forth in these sections 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).)

Subsection (g) has been added to make it clear that the candidate may not retain public monies.

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

§ 9007.3 Additional audits.

This section follows 26 U.S.C. 9009(b), which authorizes the Commission to conduct examinations and audits, other than those required by 26 U.S.C. 9007(a), as it deems necessary to carry out its statutory responsibilities. Such audits may be conducted only upon an approval by four Commissioners in cases in which the Commission finds there is reason to believe that a violation of the Act or regulations has occurred or is about to occur. See 11 CFR 111.10 and 2 U.S.C. 437g.

Note

Part 146 has been transferred to 11 CFR 110.7.