FEDERAL ELECTION COMMISSION

11 CFR Parts 106, 9001 Through 9007, 9012, and 9031 Through 9039

[Notice 1987-7]

Public Financing of Presidential Primary and General Election Candidates

AGENCY: Federal Election Commission.

ACTION: Final rule and announcement of transmittal of regulations to Congress.

SUMMARY: The Commission has revised its regulations governing publicly financed Presidential candidates. These regulations will be effective for the 1988 elections. Major areas of change include new provisions on the use of candidate credit cards, settled debts, sources of funds for making repayments, and winding down costs. The new rules specify certain categories of committee obligations that may not serve as the basis for receiving additional matching funds. They also provide procedures for seeking rehearing of Commission final determinations and stays of repayment determinations pending an appeal. Further information on these and other revisions is provided in the supplementary information which follows.

DATE: Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d) and 26 U.S.C. 9009(c) and 9039(c).

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 376-5690 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is publishing today the final text of revised rules to govern the public financing process for Presidential primary and general election candidates. A Notice of Proposed Rulemaking was published by the Commission on August 5, 1986 to seek comment on proposed revisions to these regulations. 51 FR 28154. Of the comments received, five addressed the public financing proposals.[1] In addition, the Commission held a public hearing on December 3, 1986 on the proposed rules at which one witness appeared.

Section 438(d) of Title 2, United States Code, and 26 U.S.C. 9009(c) and 9039(c), require that any rule or regulation prescribed by the Commission to carry out the provisions of Titles 2 and 26 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on May 26, 1987.

Explanation and Justification

In the course of this rulemaking, the Commission considered several proposals for change that it did not ultimately incorporate into the revised rules. The most extensive of these involved a re-examination of the current entitlement and repayment processes for Presidential primary candidates. This inquiry was largely initiated by certain comments received in response to the Notice of Proposed Rulemaking. Questions were raised regarding the Commission's authority to limit post-ineligibility entitlement, particularly for primary candidates who remain eligible through the date of nomination. Other issues included the Commission's method of calculating repayments for non-qualified campaign expenses that remain unpaid after the candidate's date of ineligibility and whether certain committee obligations such as repayments should increase the candidate's entitlement to matching funds. These issues received detailed consideration during this rulemaking. Their impact was contrasted with the Commission's present practice and analyzed under the current statute and case law. Following this analysis, the Commission determined to retain its current entitlement and repayment systems. Although the Commission remains open to suggestions that will improve its administration of the matching fund program and ease the burden of compliance for candidates, the Commission found the present practice to be more consistent with the spirit of the law and, in some cases, more streamlined in its application than the recommendations offered.

Two other issues that were raised for comment in the Notice of Proposed Rulemaking did not result in new regulations. One of these areas concerned expenditures made during the primary election period that benefit the candidate's general election campaign. The Commission determined not to add new regulations on this point, because the existing law and regulations are sufficient to support Commission action in an appropriate case.

The second point involved the potential impact of changes in primary dates in the 1988 election cycle on the application of the 10% and 20% rules. See 11 CFR 9033.5 and 9033.8. While these date changes could affect the continued funding of certain primary candidates, the Commission felt that a new rule may require legislative action. Therefore, the Commission will continue to apply the 10% and 20% rules in their current form.

One general change was made throughout these regulations. All time periods within which a candidate must act or respond to a Commission notification now run from the date of service of the Commission notice instead of the date it is received by the candidate. If the notice is mailed, 3 days will be added to the response time in accordance with 11 CFR 111.2(c).

It should be noted that the regulations appear here in numerical order rather than the order in which they will be used by the candidates, due to the numbering of the corresponding statutory provisions. Thus, § 106.2 and Parts 9031 through 9039 govern the public financing program for Presidential primary candidates while Parts 9001 through 9007 and 9012 apply to publicly funded general election candidates.

Section 106.2 State Allocation of Expenditures Incurred by Authorized Committees of Presidential Primary Candidates Receiving Matching Funds

Paragraph (a)(1) contains a new sentence that requires a candidate to produce supporting documentation to show that a particular allocation method or claim of exemption was reasonable if the Commission disputes it. As proposed in the August 5 Notice, the focus of this provision was on proving or disproving the appropriateness of a particular expenditure allocation. Under the revised standard, the candidate's response will be acceptable if he or she can demonstrate that a reasonable allocation method was applied to the expenditure in question.

When evaluating whether or not an office is a bona fide regional office, the Commission will consider factors such as the geographic proximity of the states covered, the timing of the primaries involved, and the amount of effort directly focussed on seeking the nomination in each state. The Commission also will consider these factors in determining whether the allocation method used for that office, such as the voting age population of each state, was reasonable under the circumstances.

In paragraph (b)(2)(i)(A), the last sentence has been modified to provide a clearer statement of when the cost of an

[1] These and other comments also addressed a set of proposals in the August 5 Notice concerning bank loans to candidates and political committees. The bank loan questions have now been made the subject of a separate rulemaking project. See 52 FR 2416 (January 22, 1987).

advertisement does not have to be allocated to a particular state.

Paragraph (b)(2)(iii) has been amended to specify the meaning of the term "subsistence." Thus, the exemption for expenses of an individual who remains in a state less than five consecutive days does not apply to expenses incurred by that individual which do not qualify as "subsistence." For example, if the individual makes expenditures for holding a meeting, those costs will be allocable to the state because they do not meet the definition of subsistence.

There are several changes in paragraph (b)(2)(iv), defining overhead expenditures of State and regional offices. First, the revisions state that only overhead expenditures of committee offices may be included in this figure, which is significant for calculating compliance and fundraising exemptions. Thus, if a program is conducted from a vendor's office, such as a phone bank, the overhead costs of that office may not be included in the computation under this section. In addition, the term "telephone service base charges" has been broadened in these rules to include intra-state phone calls as overhead expenditures unless the charges relate to a special program or activity such as voter registration or get out the vote efforts. Inter-state calls remain exempt from allocation under paragraph (b)(2)(v).

Several changes also appear in paragraph (c)(5), on compliance costs and fundraising expenditures. First, the regulations now include cross-references to the alternative allocation methods in the Commission's Financial Control and Compliance Manual. These references have been reworded from the language in the August 5 Notice to make clear that the allocation methods in the Manual are not the exclusive alternatives available to candidates. Second, this section now offers illustrative definitions of exempt compliance and fundraising costs. Of particular interest is the inclusion of matching fund submission preparation costs as exempt compliance costs. Initially, one-half of these costs were proposed as exempt fundraising expenses. The comments received in response to this proposal in the Notice of Proposed Rulemaking urged the Commission to treat the full amount of these preparation costs as a compliance expense because these costs are incurred to comply with the statutory and regulatory requirements for matchable contributions. In making this change, the Commission sought to limit the scope of this exemption to those costs directly related to compliance with the format and matchability requirements. This exemption does not cover costs associated with general contribution processing. While a portion of general contribution processing costs will also be exempt, the amount that is exempt will vary from campaign to campaign. In contrast, the full amount of submission preparation costs are exempted under this provision for all campaigns.

PART 9001—SCOPE

There is no change in Part 9001.

PART 9002—DEFINITIONS

There is no change in §§ 9002.1 through 9002.10.

Section 9002.11 Qualified Campaign Expense

Paragraph (b)(3) has been revised to explain how expenditures made by a general election candidate that further the election of other candidates for public office will be treated. It provides a mechanism for determining the extent to which such expenditures will be considered qualified campaign expenses. The language now found in paragraph (b)(3) was proposed for comment as new paragraph (d) in the Notice of Proposed Rulemaking.

There is no change in §§ 9002.12 through 9002.15.

PART 9003—ELIGIBILITY FOR PAYMENTS

Section 9003.1 Candidate and Committee Agreements

A new requirement has been added to paragraph (b)(4) of this section, which expands the definition of records to be produced at the audit. If the committee maintains its records of receipts and disbursements on computer, it must produce a computer tape containing that information upon request. If necessary, the committee will also be asked to explain the software capabilities of the system but will not be expected to produce the software itself.

Section 9003.2 Candidate Certifications

Paragraph (c) of this section, governing the use of the candidate's personal funds, contains two new subsections. Subsection (c)(7) states that repayments will not be subject to the $50,000 limit on expenditures from a candidate's personal funds. To ensure that the candidate's ability to make unlimited repayments does not lead to a disregard for the restrictions imposed on publicly funded campaigns, this subsection also provides that a knowing violation of the expenditure limits may cause the Commission to seek civil penalties in addition to any repayment determinations.

New subsection (c)(8) addresses the application of the $50,000 limit to disbursements made on a credit card for which the candidate is jointly or solely liable. Charges on the candidate's credit card will count against the $50,000 limit unless they are paid in full by the committee, including any finance charge billed, no later than 60 days after the closing date on the billing statement. The "closing date" is defined by this section as the date after which no further charges are included on that particular billing statement. In drafting this provision, the Commission considered several different dates from which the window for payment could start. One option was the payment due date, which was rejected because certain credit cards are due "upon receipt" and, therefore, not all credit cards set a definite date for payment on the billing statement. Other dates that were considered and rejected were the posting date or transaction date for a particular disbursement. Since there would be so many of these dates, they were considered to be too difficult for committees to track. Moreover, sometimes charges are not included on the next billing statement, which could interfere with the committee's efforts to comply with the limits. The closing date appeared to be the most ascertainable of the dates that could be used, and will allow both committees and the Commission to determine when payment must be made.

It should be noted that the committee must pay the credit card bill within 60 days after the closing date to avoid having the charges applied against the candidate's $50,000 limit. Even if the candidate initially pays the amount due, the time within which the committee must reimburse the candidate still runs from the closing date on the billing statement. To facilitate the treasurer's review of the disbursements and to ensure that the time limits are met, the committee may want to obtain a credit card specifically for the candidate's campaign charges, for which the bill is sent directly to the committee.

Section 9003.3 Allowable Contributions

In the Notice of Proposed Rulemaking, the Commission proposed a revision of paragraph (a)(1)(iii) of this section limiting the ability of candidates to transfer contributions designated for a primary election to the legal and accounting compliance fund for the

general election campaign. Under the proposed rule, candidates could transfer these contributions only after receiving a redesignation from the contributor or a reattribution to another contributor in combination with a redesignation for the general election. The comments on this proposed rule urged that the Commission permit a negative confirmation approach, under which a candidate would simply inform contributors of the impending transfer and would be permitted to redeposit the funds unless the contributor objected.

After considering the comments and testimony received on this point, the Commission determined to retain the proposed rule. This section requires publicly funded candidates to follow the procedures recently promulgated in §§ 110.1 and 110.2 for redesignation and reattribution of contributions. See 52 FR 760. Publicly funded candidates are required to comply with all regulations applicable to Title 2 candidates. Moreover, to permit a negative confirmation in this case would conflict with the Commission's efforts to make clear in the new regulations that only the contributor, and not the candidate, may make contribution designations.

Other changes in § 9003.3 are consistent with the revisions to § 106.2. Thus, overhead expenditures now include all telephone charges except for those related to a special program, such as a voter registration effort. (Note that there is no distinction in the general election provisions between intra- and inter-state calls, because there are no state expenditure limits in the general election.) See paragraphs (a)(2)(ii)(A), (b)(6)(i) and (c)(6)(i). In addition, this section now contains cross-references to the alternative allocation methods in the Financial Control and Compliance Manual for exempting compliance and fundraising costs. See paragraphs (a)(2)(ii)(A), (b)(9) and (c)(10).

Section 9003.4 Expenses Incurred Prior to the Beginning of the Expenditure Report Period or Prior to Receipt of Federal Funds

There are no changes in this section.

Section 9003.5 Documentation of Disbursements

A new paragraph (d) has been added to this section, setting forth the recordkeeping requirements for capital assets and other assets. The lists maintained under paragraph (d) will assist the candidate and the Commission in determining which assets must be included on the statement of net outstanding qualified campaign expenses and how to assess their value. See § 9004.9.

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

There are no changes in §§ 9004.1 through 9004.3.

Section 9004.4 Use of Payments

Paragraph (b)(2) has been broadened to state that the Commission will charge the full amount of debts incurred by a candidate against the expenditure limit, regardless of the amount for which the debts may have been settled.[8] Under this rule, a candidate may not reduce the amount of expenditures counting against the limit by settling debts. The only exception is for debt settlements that reasonably resolve a bona fide dispute with the creditor. Such disputes would include questions regarding the value of the goods or services received, compliance with the contract between the candidate and the vendor or whether the vendor had been authorized to provide goods or services to the committee, but do not include settlements reached due to the candidate's inability to pay. Bona fide disputes must be documented through correspondence, memoranda and any agreements entered into by the parties detailing the original amount of the obligation, the basis for the dispute and how the resolution was reached.

Paragraph (b)(4) has been revised to cross-reference the provision in § 9003.3 that allows candidates to use funds in their legal and accounting compliance fund to pay civil and criminal penalties. Candidates may also raise additional funds, not subject to the contribution limits, to pay such penalties.

New paragraph (b)(6) provides that no payments may be made to the candidate from accounts containing public funds except to reimburse the candidate for legitimate campaign expenses. Candidates may not receive a salary for services performed for the campaign nor may a candidate receive compensation for lost income while campaigning. This new provision also would prohibit payments to a candidate for personal expenses such as mortgage payments or a child's educational expenses. Thus, the candidate may only receive funds for expenses directly related to the campaign, such as his or her travel and subsistence costs.

New paragraph (c) specifies the sources of funds from which repayments may be made. There is no limit on the amount of a candidate's personal funds that may be used for this purpose, as provided in 11 CFR 9003.2(c). Funds raised to make repayments will be subject to the limitations and prohibitions of the Act and must be aggregated with any contributions previously received from a contributor.

Section 9004.6 Reimbursements for Transportation and Services Made Available to Media Personnel

Candidates may continue to bill the media under these rules for the costs of transportation and services provided to media personnel. The amount billed may equal 110% of the actual direct cost of providing such transportation and services. Although the full amount spent by the campaign for media services is a qualified campaign expense that counts against the overall expenditure limit, candidates may deduct the media reimbursements received from that overall limit up to 100% of the direct cost of providing the services. Thus, if the direct cost of a reporter's plane ride is $200, the campaign may bill the reporter $220 for the flight. If the campaign receives $150 from the reporter in return, it may only deduct $150 from expenses applied against the limit because the deduction is dependent upon the amount of reimbursements received. Conversely, if the campaign receives the full $220 from the reporter, it may only deduct $200 from the limit because the deduction may not exceed the direct cost to the campaign under the rules that were applicable to the 1984 election cycle.

There are two reasons why the 1984 rules allow campaigns to bill 110% of their direct costs to the media even though only 100% may be offset against the limit. First, the 110% figure eases the burden of accounting precisely for such costs in the heat of the campaign. In addition, this allowance permits reimbursements received from some media organizations to compensate for those that do not pay in full.

The revised rules expand the ability of campaigns to deduct media reimbursements from the overall limit if the reimbursements exceed the actual direct cost of providing the services. Paragraph (d)(1) now provides that committees may deduct an additional 3% of the direct cost of providing services to the media if reimbursements in that amount are received. The additional 3% is intended to cover the administrative cost to the campaign of making media travel arrangements, tracking which media personnel are accompanying the candidate on each leg of the campaign, and billing the media organizations for their share of the expenses. These administrative costs are not part of the direct cost of

[8] Note that all debts must be settled in accordance with the procedures of 11 CFR 114.10.

providing media transportation and services and may not be included in the calculation of direct costs for billing purposes, whether the committee uses its own staff to perform these tasks or hires a travel consultant and collection agency.

In practical terms, this new provision would continue to limit the amount billed to 110% of the direct cost of the services but would allow committees to deduct 103% rather than 100% of the direct costs from the expenditure limit if sufficient reimbursements are received. Thus, if a reporter is billed $220 for a $200 plane flight, and the reporter remitted the full $220, the committee could offset $206 rather than $200 against the limit. If the reporter pays less than the actual cost, such as $150, the offset is limited to the amount of the reporter's reimbursement. Note that this new provision does not increase the amount a campaign may bill for providing services, and only increases the size of the offset against the expenditure limit if the reimbursements exceed 100% of the direct cost to the campaign.

There are no changes in §§ 9004.7 and 9004.8.

Section 9004.9 Net Outstanding Qualified Campaign Expenses

In the August 5 Notice, it was proposed to add a requirement that statements filed under this section be signed by the treasurer. After further consideration, the Commission decided it was unnecessary to include this requirement as it is already set forth in § 104.14. Thus, all statements should be signed in accordance with § 104.14.

The definition of "cash on hand" in paragraph (a)(2) has been revised to follow the explanation of that term in the recent revision of § 110.1(b)(3)(ii)(A). See 52 FR 769, 770 (January 9, 1987).

A new subsection (a)(3) has been added to provide that the outstanding obligations included on the NOQCE statement may not include debts for non-qualified campaign expenses, repayment obligations, or amounts paid to secure a surety bond pending an appeal of a Commission repayment determination. These amounts may not serve as a basis for retaining federal funds that would otherwise be repaid to the U.S. Treasury under 11 CFR 9007.2(b)(3).

In paragraph (d)(1), the Commission has revised the concept of capital assets that must be included on the NOQCE statement. Under the new rule, the basic threshold for determining whether an item must be included on the NOQCE statement is the item's original purchase price, rather than its value at the end of the campaign. The regulations then permit campaigns to deduct a standard 40% depreciation percentage from the purchase price to ascertain the value of the item for the NOQCE statement. Campaigns may, however, provide documentation showing that a higher depreciation allowance should be given for a particular item. The documentation provided may include an independent appraisal of the item's value at the end of the campaign.

In the case of items purchased during the candidate's primary campaign, some commenters urged that the Commission permit committees to deduct 40% for the primary and another 40% for depreciation during the general election campaign. However, the Commission has decided, given the short duration of the general election campaign, that only one 40% deduction may be taken for items used in both campaigns. The value of items transferred from the primary to the general election campaign should be calculated based on the cost of the items less the 40% depreciation percentage.

Paragraphs (d) (1) and (2) also cross reference the new recordkeeping requirements for capital assets and other assets at § 9003.5(d).

Finally, new paragraph (e) establishes a requirement that committees demonstrate the commercial reasonableness of a determination that a debt of $500 or more owed to the committee is wholly or partially uncollectible. Accounts receivable of less than $500 may be written off as uncollectible without any showing that the decision not to pursue payment was commercially reasonable.

Former paragraph (e) has been redesignated as paragraph (f).

Section 9004.10 Sale of Assets Acquired for Fundraising Purposes

There is no change in this section.

PART 9005—CERTIFICATION BY COMMISSION

There are no changes in this Part.

PART 9006—REPORTS AND RECORDKEEPING

There are no changes in this Part.

PART 9007—EXAMINATIONS AND AUDITS; REPAYMENTS

Section 9007.1 Audits

Paragraph (e)(3) has been modified to reflect the Commission's revised Sunshine Act regulations. See 11 CFR Part 2. Since portions of final audit reports are considered by the Commission in open session, this subsection has been revised to indicate that the Commission will provide the candidate with a copy of the open session agenda document 24 hours before that document is released to the public.

Section 9007.2 Repayments

Throughout this section, the time periods within which the candidate must take action now run from the date of service instead of the date of the candidate's receipt of a Commission notice or determination. As indicated in paragraph (e) of this section, the time period for service by mail will be calculated in accordance with 11 CFR 111.2(c).

In paragraph (d)(2), the time within which the candidate must make repayment after the Commission's final determination has been extended from 20 to 30 days. This time period is now co-extensive with the time for filing a notice of appeal under 26 U.S.C. 9011(a), or for filing a petition for rehearing or a stay of the final repayment determination under 11 CFR 9007.5.

Section 9007.3 Extensions of Time

There are no changes in this section.

Section 9007.4 Additional Audits

There are no changes in this section.

Section 9007.5 Petitions for Rehearing; Stays of Repayment Determinations

This new section establishes procedures under which candidates may request reconsideration of Commission determinations. It also sets forth for the first time in the regulations the procedures the Commission will follow in considering stays of repayment determinations pending the candidate's appeal.

Paragraph (a) sets the standards a candidate must meet to file a petition for rehearing. The intent of these provisions is to ensure that such petitions are not filed as a dilatory tactic. Rather, this section provides a mechanism under which a candidate may respond to Commission arguments he or she did not previously have an opportunity to respond to. Candidates may also raise new information that could not have been brought to the Commission's attention earlier.

Under paragraph (b), candidates must raise all issues and arguments in support of their case at the appropriate stage of the Commission proceeding. By doing so, the Commission will have the opportunity to decide all issues before a matter goes to litigation. The Commission thereby hopes to narrow the issues that may otherwise result in litigation and ensure that it has

addressed all of the issues in a matter before a court is asked to rule on them.

Paragraph (c) establishes three avenues for seeking a stay of a Commission repayment determination pending the candidate's appeal of that determination. Candidates may place the amount at issue in an interest-bearing escrow account, may secure a surety bond guaranteeing payment of the amount in question plus interest, or may seek to qualify under the criteria set forth in paragraph (c)(2)(iii).

Stays are not automatic; rather, the candidate must demonstrate that he or she has met the conditions for granting a stay under one of the three options provided. If the candidate fails to do so, repayment must be made, notwithstanding the pending appeal. If the candidate is only contesting a portion of the Commission's repayment determination, the amount not at issue on appeal must be repaid within the time specified in 11 CFR 9007.2.

One goal of these stay procedures is to protect the public treasury in the event the Commission's repayment determination is upheld on appeal. Thus, for example, if the candidate chooses to establish an escrow account for the funds, all withdrawals from the account must be contingent on the joint signatures of the candidate or his or her agent and a representative of the Commission. Further, all amounts stayed must be repaid with interest if the Commission's determination is upheld.

Interest begins to accrue under these rules 30 days after the Commission's final repayment determination. This is the date by which repayment would have been due if the candidate had not appealed the final determination and sought a stay.

The criteria in paragraph (c)(2)(iii) follow the standards used by the Commission to date. They are augmented, however, in paragraph (c)(3) to provide further guidance on when an applicant has shown a strong likelihood of success on the merits of the appeal. This paragraph incorporates the approach taken by the United States Court of Appeals for the District of Columbia in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

Section 9007.8 Stale-dated Committee Checks

In past election cycles, questions have arisen regarding the appropriate disposition of checks written to creditors or to contributors that remain outstanding after the campaign is over. Sometimes the payee cannot be located, other times the payee declines to cash the check. This new section makes clear that committees should bring these checks to the Commission's attention in a timely fashion.

If the committee has made attempts to pay the funds as intended, and has been unsuccessful, the committee must remit a check payable to the U.S. Treasury for the amount outstanding. The amount so paid will not reduce or increase the committee's repayment obligation. Moreover, the committee may not use these funds for other purposes, such as to pay other obligations, because to do so could result in the receipt of a prohibited or excessive contribution from the original payee.

The Commission considered and rejected other possible dispositions of such funds, including a donation to a charitable organization, because these alternatives could be subject to varying interpretations, not all of which would be appropriate recipients of funds from a federally-funded campaign. Thus, the Commission determined to require that all such funds be paid to the Treasury.

PART 9012—UNAUTHORIZED EXPENDITURES AND CONTRIBUTIONS

Section 9012.8 has been deleted from this Part following the Supreme Court's decision in *NCPAC v. FEC*, 470 U.S. 480 (1985).

PART 9031—SCOPE

There are no changes in this Part.

PART 9032—DEFINITIONS

There are no changes in this Part.

PART 9033—ELIGIBILITY FOR PAYMENTS

Section 9033.1 Candidate and Committee Agreements

Paragraph (b)(5) has been amended to expand the definition of records that must be produced at the audit. If the committee maintains its records of receipts and disbursements on computer, it must produce a computer tape containing that information upon request. If necessary, the committee will also be asked to explain the software capabilities of the system but will not be expected to produce the software itself. Committees may also choose to submit computer tapes with their matching fund submissions but are not required to do so under this provision.

During the 1984 election cycle, the Commission received several requests from committees to change the person or the bank depository named as the recipient for committee matching funds. Paragraph (b)(7) now provides that these requests must be made in writing and must be signed by the candidate or committee treasurer before they will be effective.

There are no changes in §§ 9033.2 and 9033.3.

Section 9033.4 Matching Payment Eligibility Threshold Requirements

Two points were proposed for inclusion in this section in the August 5 Notice, both of which were removed from the final version of the regulations. First, the Notice proposed to extend the time within which the Commission would make threshold certifications during the Presidential election year from 15 to 30 business days. One commenter raised concerns that 30 business days could intrude significantly on the primary election schedule and that a delay of that duration could have a substantial impact on the candidates affected. The Commission agreed with this comment and returned to the original 15 day period, noting however that this target date for certifying eligibility has some flexibility under the regulations.

A second point the Commission considered was whether to provide opportunities to cure deficiencies in a threshold submission before the Commission initiates more formal proceedings to find the candidate ineligible or to find that particular contributions are non-matchable. As proposed in the Notice of Proposed Rulemaking, the Commission would provide a maximum of two opportunities to cure deficiencies in the submission. One commenter asked that the Commission make this provision mandatory, so that candidates would always have up to two opportunities to cure.

The Commission decided it was unnecessary to include this provision in the regulations. It is reflected, however, in the Commission's Guideline for Presentation in Good Order as an opportunity that the staff will provide in an appropriate case. The time for making a certification under the regulations will be tolled pending the Commission's receipt of the corrected submission items.

The final rule has been reorganized so that the time frames for Commission examination of threshold submissions are more clearly stated. In addition, the Commission has added a new paragraph (b) as a result of an issue raised in the Notice of Proposed Rulemaking. This issue concerned the potential effect of a candidate's past actions in an earlier publicly funded campaign on the Commission's eligibility certification for that candidate in a new election cycle.

New paragraph (b) provides notice that the Commission may consider relevant information in its possession, including the candidate's past actions, when determining the candidate's eligibility for matching funds.

Examples of factors the Commission may consider under this provision include a candidate's repudiation of an earlier candidate agreement in which he or she promised to pay any necessary repayments and civil penalties, or the appearance of patent irregularities suggesting the possibility of fraud in earlier matching fund submissions that seem to be recurring in the new request for certification. In some cases, the Commission may delay certification in the new election cycle until the earlier problem is resolved. The most egregious situations could result in a Commission denial of eligibility.

Section 9033.5 Determination of Ineligibility

There are no changes in this section.

Section 9033.6 Determination of Inactive Candidacy

There are no substantive changes in this section; however, the time within which a candidate may respond to a Commission notification has been changed to run from the date of service of the Commission's notice.

Section 9033.7 Determination of Active Candidacy

Paragraph (b) of this section has been amended to provide that the Commission may make a finding that a candidate is actively campaigning in a state more than 10 days after the candidate's certification under § 9033.5 that he or she will not be an active candidate in that primary. This provision will cover situations in which the candidate's certification is made earlier than the regulations require. If the candidate later appears to be pursuing the nomination in that state, and that activity occurs too late for the Commission to take action within the normal 10 day period, the Commission will act as soon as practicable to determine whether the candidate is actively campaigning in that state. No comments were received on this proposal in the August 5 notice.

Section 9033.8 Reestablishment of Eligibility

In response to one of the comments on the Notice of Proposed Rulemaking, the Commission has added a new sentence to paragraph (c) of this section. This new sentence provides that expenses incurred during the period a candidate was ineligible as a result of the 10% rule may be defrayed with matching funds as qualified campaign expenses if the candidate later re-establishes eligibility under this section. This approach is consistent with the Commission's treatment of contributions received during an ineligible period as being matchable after eligibility is reestablished.

Section 9033.9 Failure To Comply With Disclosure Requirements or Expenditure Limitations

There are no substantive changes in this section; however, the time within which a candidate may respond to a Commission notification now runs from date of service instead of date of receipt of the Commission's notice.

Section 9033.10 Procedures for Initial and Final Determinations

Two cross-references have been added to this section. Paragraph (a)(6) provides that these procedures apply to Commission inquiries regarding a candidate's statement of net outstanding campaign obligations. In addition, new paragraph (e) alerts candidates to the new procedures for filing a petition for rehearing of a final determination.

One commenter suggested that the Commission revise this section to include the relevant time periods for candidate responses to a Commission initial determination. This section contains the procedures for Commission determinations under six different substantive provisions. The response times vary under each of these provisions. For this reason, the Commission has determined that it would be less confusing to have the response times included in the substantive provisions rather than in this procedural section, to reduce the chance that a candidate would follow the wrong timetable.

Another point raised by that commenter was a suggestion to limit the time for making a Commission determination under this section. The Commission did not find that a self-imposed time limit would be appropriate for these determinations. In all cases, the Commission will continue to consider these issues as quickly as possible while allowing for full consideration of the circumstances of each case.

Section 9033.11 Documentation of Disbursements

A new paragraph (d) has been added to this section, setting forth the recordkeeping requirements for capital assets and other assets. The lists maintained under this paragraph will assist the candidate and the Commission in determining which assets must be included on the statement of net outstanding campaign obligations and how to assess their value. See section 9034.5.

PART 9034—ENTITLEMENTS

Section 9034.1 Candidate Entitlements

There are no changes in this section.

Section 9034.2 Matchable Contributions

The Notice of Proposed Rulemaking contained three proposed changes in this section. None of these proposals was retained in the final regulations.

First, the Commission deleted proposed paragraph (c)(3)(iii), which would have expressly prohibited the attribution of a partnership contribution to any non-partner, including a partner's spouse. This provision was deemed unnecessary in light of the Commission's recently promulgated revision of 11 CFR 110.1, under which partnership contributions may only be attributed to individual partners. Publicly financed candidates are subject to that regulation, as they are to all Title 2 regulations.

Second, in paragraph (c)(4), the Commission deleted the reference to traveller's checks, on the theory that such checks are an example of "similar negotiable instruments" already covered in that provision. Thus, traveller's checks submitted for matching must be accompanied by all required documentation at the time of their initial submission.

Paragraph (c)(4)(ii) does include, however, a new requirement to include the "name of the issuer of the negotiable instrument" for contributions covered by this paragraph. "Name of the issuer" means the name of the company, bank or agency that issued the negotiable instrument, such as the Postal Service or American Express, and not the name of the contributor. Since these contributions are not written on the contributor's bank account, the Commission needs additional information to help identify the negotiable instrument during the submission review process.

Finally, the Commission deleted proposed paragraph (c)(8), which would have required that written instruments made payable for more than $1,000 be accompanied by documentation showing that the excessive portion was either reattributed to another contributor or refunded to the original contributor. Upon further consideration of this proposal, the Commission decided to continue to match the legal

portion of such contributions and to take appropriate action through the enforcement process, if necessary, concerning any excessive amount.

Section 9034.3 Non-matchable Contributions

There are no changes in this section.

Section 9034.4 Use of Contributions and Matching Payments

The Commission received three comments in response to its proposal to limit winding down costs to qualified campaign expenses incurred before the candidate's date of ineligibility for goods and services received before that date. The main objective of that proposal was to ensure that candidates did not use matching funds for obligations incurred before their ineligibility date that are used to continue the candidates' campaign after that date.

One concern of the comments was that the proposal would force candidates to choose termination over continuing to campaign in order to receive winding down costs. To avoid this result, the Commission revised paragraph (a)(3) to allow for delayed payment of winding down costs if the candidate continues his or her campaign after the date of ineligibility. Only those winding down costs that relate to the period after the candidate has withdrawn or after the date of the nomination will be qualified campaign expenses.

Paragraph (a)(4), regarding payment of federal income taxes, has also been revised from the version that appeared in the August 5 notice. The final rule provides that payment of federal income taxes is a qualified campaign expense but does not count against either the state or overall expenditure limits. This result recognizes that federal taxes are payments to the U.S. Treasury and therefore may be exempted from any repayment consequences.

Paragraph (b)(2) has been amended to alert candidates to the new provision on debt settlements, which states that such settlements generally will not reduce the amount of expenditures counting against the limits.

Paragraph (b)(3) has been revised to include a parallel provision to the new section on winding down costs in paragraph (a)(3) of this section. Thus, paragraph (b)(3) now states that expenses incurred before the candidate's date of ineligibility for items or services to be provided after that date, such as expenses for continuing the candidate's campaign when he or she is no longer eligible for public funding, are not qualified campaign expenses. Expenses that meet the definition of winding down costs are exempted if they are incurred in accordance with paragraph (a)(3).

New paragraph (b)(5) treats any payment made to a candidate as a non-qualified campaign expense unless the payment is a reimbursement for legitimate campaign expenses. Candidates may not receive a salary for services performed for the campaign nor may a candidate receive compensation for lost income while campaigning. This new provision also would prohibit payments to a candidate for personal expenses such as mortgage payments or a child's educational expenses. Thus, the candidate may only receive funds for expenses directly related to the campaign, such as his or her travel and subsistence costs.

New paragraph (c) specifies the sources of funds from which repayments may be made. There is no limit on the amount of a candidate's personal funds that may be used for this purpose, as provided in 11 CFR 9035.2(a). Funds raised to make repayments will be subject to the limitations and prohibitions of the Act and must be aggregated with any contributions previously received from a contributor.

Former paragraph (c) of this section has been re-designated as paragraph (d).

Section 9034.5 Net Outstanding Campaign Obligations

The August 5 notice included a sentence in paragraph (a) of this section requiring treasurers to sign all statements of net outstanding campaign obligations ("NOCO Statements"). This sentence was removed from the final regulations as unnecessary since treasurers are required to sign all reports and statements filed with the Commission under 11 CFR 104.14.

The definition of "cash on hand" in paragraph (a)(2) has been revised to follow the explanation of that term in the recent revision of § 110.1(b)(3)(ii)(A). See 52 FR 760, 770 (January 9, 1987).

A new paragraph (b) has been added to provide that the outstanding obligations included on the NOCO statement may not include debts for non-qualified campaign expenses, repayment obligations, or amounts paid to secure a surety bond pending an appeal of a Commission repayment determination. These amounts will not serve as the basis for the candidate's additional entitlement to matching funds.

In paragraph (c)(1), the Commission has revised the concept of capital assets that must be included on the NOCO statement. Under the new rule, the basic threshold for determining whether an item must be included on the NOCO statement is the item's original purchase price, rather than its value at the end of the campaign. The regulations then permit campaigns to deduct a standard 40% depreciation percentage from the purchase price to ascertain the value of the item for the NOCO statement. Campaigns may, however, provide documentation showing that a higher depreciation allowance should be given for a particular item. The documentation provided may include an independent appraisal of the item's value at the end of the campaign.

Paragraphs (d) (1) and (2) also cross-reference the new recordkeeping requirements for capital assets and other assets at § 9033.11(d).

Finally, new paragraph (e) establishes a requirement that committees demonstrate the commercial reasonableness of a determination that a debt of $500 or more owed to the committee is wholly or partially uncollectible. Accounts receivable of less than $500 may be written off as uncollectible without any showing that the decision not to pursue payment was commercially reasonable.

Former paragraphs (c), (d) and (e) have been redesignated as paragraphs (e), (f) and (g). Paragraph (f) also now requires committees to include a brief explanation of changes in a NOCO statement from the one filed previously. This will help the Commission to track the committee's financial status more accurately.

Section 9034.6 Reimbursements for Transportation and Services Made Available to Media Personnel

Candidates may continue to bill the media under these rules for transportation and services provided to media personnel while they are travelling with the candidate. The amount billed may equal 110% of the actual direct cost of providing such transportation and services. Although the full amount spent by the campaign for media services is a qualified campaign expense that counts against the overall expenditure limit, candidates may deduct the media reimbursements received from that overall limit up to 100% of the direct cost of providing the services. Thus, if the direct cost of a reporter's plane ride is $200, the campaign may bill the reporter $220 for the flight. If the campaign receives $150 from the reporter in return, it may only deduct $150 from expenses applied against the limit because the deduction is dependent upon the amount of reimbursements received. Conversely, if the campaign receives the full $220 from

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the reporter, it may only deduct $200 from the limit because the deduction may not exceed the direct cost to the campaign under the current rules.

There are two reasons why the current rules allow campaigns to bill 110% of their direct costs to the media even though only 100% may be offset against the limit. First, the 110% figure eases the burden of accounting precisely for such costs in the heat of the campaign. In addition, this allowance permits reimbursements received from some media organizations to compensate for those that do not pay in full.

The revised rules expand the ability of campaigns to deduct media reimbursements from the overall limit if the reimbursements exceed the actual direct cost of providing the service. Paragraph (d)(1) now provides that committees may deduct an additional 3% of the direct cost of providing services to the media if reimbursements in that amount are received. The additional 3% is intended to cover the administrative cost to the campaign of making media travel arrangements, tracking which media personnel are accompanying the candidate on each leg of the campaign, and billing the media organizations for their share of the expenses. These administrative costs are not part of the direct cost of providing media transportation and services and may not be included in the calculation of direct costs for billing purposes, whether the committee uses its own staff to perform these tasks or hires a travel consultant and collection agency.

In practical terms, this new provision would continue to limit the amount billed to 110% of the direct cost of the services but would allow committees to deduct 103% rather than 100% of the direct costs from the expenditure limit if sufficient reimbursements are received. Thus, if a reporter is billed $220 for a $200 plane flight, and the reporter remitted the full $220, the committee could offset $206 rather than $200 against the limit. If the reporter pays less than the actual cost, such as $150, the offset is limited to the amount of the reporter's reimbursement. Note that this new provision does not increase the amount a campaign may bill for providing services, and it only increases the size of the offset against the expenditure limit if the reimbursements exceed 100% of the direct cost to the campaign.

Section 9034.7 Allocation of Travel Expenditures

There are no changes in this section.

Section 9034.8 Joint Fundraising

Paragraph (c)(7)(i) has been amended to make clear that each contribution must be allocated according to the agreed upon formula rather than dividing the proceeds as a whole. This requirement is intended to ensure that committees do not "trade" contributions in order to maximize the matchability of their receipts. It also re-emphasizes that the only three exceptions to this allocation are those set forth in paragraphs (c)(7) (ii), (iii) and (iv).

A new sentence has been added to paragraph (c)(7)(iv) to clarify when a contribution is considered earmarked. Contributions should be made payable to the joint fundraising committee to avoid possible earmarking problems. However, committees may contact contributors for a written statement indicating that their contribution was intended as part of the general proceeds if it is made payable to one of the participants.

New paragraph (c)(8)(i)(C) requires that participants allocate the cost of a series of events on a per-event basis even if the participants remain the same throughout the series of joint fundraising activities.

Finally, paragraph (c)(9)(ii) has been revised to make clear that candidates must report their allocated share of joint fundraising expenses paid by the fundraising representative. These expenditures will count against the overall expenditure limit and may also, in appropriate cases, be allocated to a particular state.

Section 9034.9 Sale of Assets Acquired for Fundraising Purposes

There are no changes in this section.

PART 9035—EXPENDITURE LIMITATIONS

Section 9035.1 Campaign Expenditure Limitation

Paragraph (a)(2) has been added to state that the Commission will charge the full amount of debts incurred by a candidate against the expenditure limits, regardless of the amount for which the debts may have been settled.[3] Under this rule, a candidate may not reduce the amount of expenditures counting against the limits by settling debts. The only exception is for debt settlements that reasonably resolve a bona fide dispute with the creditor. Such disputes would include questions regarding the value of the goods or services received, compliance with the contract between the candidate and the vendor, or whether the vendor had been authorized to provide goods or services to the committee, but do not include settlements reached due to the candidate's inability to pay. Bona fide disputes must be documented through correspondence, memoranda and any agreements entered into by the parties, detailing the original amount of the obligation, the basis for the dispute and how the resolution was reached.

Paragraph (c) has been revised in several respects. First, a sentence has been added to cross-reference the alternative methods for calculating the compliance and fundraising exemptions found in the Commission's Financial Control and Compliance Manual. These references have been reworded from the language in the August 5 Notice to make clear that the allocation methods in the Manual are not the exclusive alternatives available to candidates. In addition, two new subparagraphs have been added to provide illustrative definitions of exempt compliance and fundraising costs. Of particular interest is the inclusion of matching fund submission preparation costs as exempt compliance costs. Initially, one-half of these costs were proposed as exempt fundraising expenses.

The comments received in response to this proposal in the Notice of Proposed Rulemaking urged the Commission to treat the full amount of these preparation costs as a compliance expense because these costs are incurred to comply with the statutory and regulatory requirements for matchable contributions. In making this change, the Commission sought to limit the scope of the exemption to those costs directly related to compliance with the format and matchability requirements. This exemption does not cover costs associated with general contribution processing. While a portion of general contribution processing costs will also be exempt, the amount that is exempt will vary from campaign to campaign. In contrast, the full amount of submission preparation costs are exempted under this provision for all campaigns.

Section 9035.2 Limitation on Expenditures from Personal or Family Funds

Paragraph (a)(1) has been revised to state that repayments will not be subject to the $50,000 limit on expenditures from a candidate's personal funds. To ensure that the candidate's ability to make unlimited repayments does not lead to a disregard for the restrictions imposed on publicly funded campaigns, this subsection also provides that a knowing

[3] Note that all debts must be settled in accordance with the procedures of 11 CFR 114.10.

violation of the expenditure limits may cause the Commission to seek civil penalties in addition to any repayment determinations.

New subsection (a)(2) addresses the application of the $50,000 limit to disbursements made on a credit card for which the candidate is jointly or solely liable. Charges on the candidate's credit card will count against the $50,000 limit unless they are paid in full by the committee, including any finance charge billed, no later than 60 days after the closing date on the billing statement. The "closing date" is defined by this section as the date after which no further charges are included on that particular billing statement. In drafting this provision, the Commission considered several different dates from which the window for payment could start. One option was the payment due date, which was rejected because certain credit cards are due "upon receipt" and, therefore, not all credit cards set a definite date for payment on the billing statement. Other dates that were considered and rejected were the posting date or transaction date for a particular disbursement. Since there would be so many of these dates, they were considered to be too difficult for committees to track. Moreover, sometimes charges are not included on the next billing statement, which could interfere with the committee's efforts to comply with the limits. The closing date appeared to be the most ascertainable of the dates that could be used, and will allow both committees and the Commission to determine when payment must be made.

It should be noted that the committee must pay the credit card bill within 60 days after the closing date to avoid having the charges applied against the candidate's $50,000 limit. Even if the candidate initially pays the amount due, the time within which the committee must reimburse the candidate still runs from the closing date on the billing statement. To facilitate the treasurer's review of the disbursements and to ensure that the time limits are met, the committee may want to obtain a credit card specifically for the candidate's campaign charges, for which the bill is sent directly to the committee.

PART 9036—REVIEW OF SUBMISSION AND CERTIFICATION OF PAYMENTS BY COMMISSION

Section 9036.1 Threshold Submission

The August 5 Notice included a sentence in paragraph (a) of this section requiring treasurers to sign all threshold submissions. This sentence was removed from the final regulations as unnecessary since treasurers are required to sign all reports and statements filed with the Commission under 11 CFR 104.14.

Three format requirements for threshold submissions that were proposed in the August 5 Notice were also deleted from the final rules as unnecessary. Proposed paragraph (b)(5) would have required a listing of refunded contributions regardless of whether they were submitted for matching. This proposed requirement was removed because the relevant information can be obtained either through the committee's reports or during the Commission's audit. Proposed paragraphs (b) (6) and (7) contained good order requirements for joint fundraising and entertainment event contributions. Since these requirements are already found in 11 CFR 9034.2(c) (5), (6) and (7), it was unnecessary to repeat them in this section.

Section 9036.2 Additional Submissions for Matching Fund Payments

In the August 5 Notice, the Commission proposed to revise paragraph (a) to be more explicit regarding the designation of dates for candidate submissions. Since this was not a substantive change, the Commission decided to retain the current language of this section and to continue to notify candidates of their designated submission dates when they are found eligible to receive matching funds.

The Notice of Proposed Rulemaking also included a proposed signature requirement for treasurers. As in § 9036.1, this sentence was removed as unnecessary since treasurers must sign all reports and statements in accordance with 11 CFR 104.14.

Paragraph (b)(1) has been amended to specify that only the matchable contributions from the threshold submission should be included in the candidate's first regular submission under this section. Since the Commission reviews all contributions submitted in the threshold submission, the nonmatchable contributions are identified for the committee's information. If the committee includes the nonmatchable contributions in its first submission, it will increase the error rate for the submission, which will in turn affect the committee's holdback percentage. See 11 CFR 9036.2(c)(1)(i).

Proposed subparagraph (b)(1)(iv), which would have required a listing of refunded contributions, was deleted from the final rules consistent with the deletion of that requirement from § 9036.1.

Paragraph (b)(2) has been revised slightly with respect to the procedures for letter requests. The changes make clear that a letter request must be fully documented on the next date on which the candidate is scheduled to make a regular submission, that is, two weeks after the letter request. This documentation must be submitted on that date even if the candidate has no new contributions to submit for matching at that time. The Commission will not accept future letter requests from the candidate until the last letter request has been documented. Moreover, a candidate's failure to document a letter request can lead to a Commission repayment determination under 11 CFR 9038.2 that the candidate has received matching funds in excess of his or her entitlement.

In paragraphs (c)(1)(ii) and (c)(2), the Commission has extended the time within which it will certify any additional amounts to which the candidate is entitled by an additional 5 business days. While many certifications will be completed in less time, this change will provide sufficient time for necessary data entry and other review tasks in large submissions. This change will have limited impact on candidates, however, since most of the funds requested in a submission will be certified shortly after receipt of the documentation. Only the amount not immediately paid under the "holdback" procedure will come under this extended time frame. See § 9036.2(c)(1)(i).

In addition, the Commission has lowered the error rate in paragraphs (c)(1)(ii) and (c)(2) that will lead to an expanded review. Under the revised rules, the Commission will review an expanded sample of submitted contributions for matchability when the projected dollar value of the non-matchable contributions contained in the submission exceeds 10% of the amount requested, instead of 15%.

Section 9036.3 Submission Errors and Insufficient Documentation

There are no changes in this section.

Section 9036.4 Commission Review of Submissions

Paragraph (c) has been revised to include the requirement that candidates notify the Commission when a contribution that has been submitted for matching does not qualify as a matchable contribution because it has been refunded.

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Section 9036.5 Resubmissions

For the first time, the regulations now contain a cutoff date for resubmitting contributions. As provided in paragraph (b), no contributions may be resubmitted for matching later than the first Tuesday in September of the year following the Presidential election year. This date allows a substantial amount of time for committees to obtain any additional documentation but also puts committees on notice that all submission activity must be completed on time. It will also allow the Treasury Department to close out its public funding function before the end of that fiscal year. Note that the cutoff dates for initial submissions occur earlier in the year. See 11 CFR 9036.6.

Section 9036.6 Continuation of Certification

The revised rules extend the cutoff date by which all contributions must be initially submitted for matching and also set two cutoff dates rather than one. Instead of the fourth Monday in January, the final submission dates are the fourth Monday in February and the second Monday in March. These new dates reflect the Commission's experience in the 1984 election cycle, in which several committees requested a one month extension of the last submission date. By setting two dates, the Commission hopes to avoid the problem of having all campaigns make their last submission on the same date. Under the new rule, the last date for a committee will depend upon that committee's designated submission schedule.

PART 9037—PAYMENTS

There are no changes in this Part.

PART 9038—EXAMINATIONS AND AUDITS

Section 9038.1 Audit

The time periods for candidate responses in this section now run from the date of service rather than the date of receipt of the Commission's notice.

Paragraph (e)(3) has been modified to reflect the Commission's revised Sunshine Act regulations. See 11 CFR Part 2. Since portions of final audit reports are considered by the Commission in open session, this subsection has been revised to indicate that the Commission will provide the candidate with a copy of the open session agenda document 24 hours before that document is released to the public.

Section 9038.2 Repayments

A new basis for repayment has been added in paragraph (b)(1)(v). If matching funds have been paid to the candidate on the basis of debts included on the NOCO statement and the candidate settles the debts for less than the amount reflected on the NOCO statement, resulting in a matching fund entitlement of less than the amount paid, the Commission will seek a repayment of the excessive amount paid.

Paragraph (b)(2)(iii) has been revised to reflect the Commission's procedure for determining when a candidate no longer has matching funds in his or her account. After this point, the Commission will not examine committee expenditures to determine if federal funds were used for non-qualified campaign expenses. The approach adopted by the Commission for this purpose is to review the expenditures made after the committee has received its last matching fund payment, using the assumption that the federal funds are used on a 100% basis until they are spent.

Throughout this section, the time periods within which the candidate must take action now run from the date of service rather than the date of the candidate's receipt of a Commission notice or determination. As indicated in paragraph (e) of this section, the time period for service by mail will be calculated in accordance with 11 CFR 111.2(c).

In paragraph (d)(2), the time within which the candidate must make repayment after the Commission's final determination has been extended from 20 to 30 days. This time period is now coextensive with the time for filing a notice of appeal under 28 U.S.C. 9041(a), and for filing a petition for rehearing or a stay of the final repayment determination under 11 CFR 9038.5.

Section 9038.3 Liquidation of Obligations; Repayment

There are no changes in this section.

Section 9038.4 Extensions of Time

There are no changes in this section.

Section 9038.5 Petitions for Rehearing; Stays of Repayment Determinations

This new section establishes procedures under which candidates may request reconsideration of Commission determinations. It also sets forth for the first time in the regulations the procedures the Commission will follow in considering stays of repayment determinations pending the candidate's appeal.

Paragraph (a) sets the standards a candidate must meet to file a petition for rehearing. The intent of these provisions is to ensure that such petitions are not filed as a dilatory tactic. Rather, this section provides a mechanism under which a candidate may respond to Commission arguments he or she did not previously have an opportunity to respond to. Candidates may also raise new information that could not have been brought to the Commission's attention earlier.

Under paragraph (b), candidates must be sure to raise all issues and arguments in support of their case at the appropriate stage of the Commission proceeding. By doing so, the Commission will have the opportunity to respond to, and perhaps resolve, such arguments before a matter goes to litigation. The Commission thereby hopes to narrow the issues that may otherwise result in litigation and ensure that it has addressed all of the issues in a matter before a court is asked to rule on them.

Paragraph (c) establishes three avenues for seeking a stay of a Commission repayment determination pending the candidate's appeal of that determination. Candidates may place the amount at issue in an interest-bearing escrow account, may secure a surety bond guaranteeing payment of the amount in question plus interest, or may seek to qualify under the criteria set forth in paragraph (c)(2)(iii).

Stays are not automatic; rather, the candidate must demonstrate that he or she has met the conditions for granting a stay under one of the three options provided. If the candidate fails to do so, repayment must be made, notwithstanding the pending appeal. If the candidate is only contesting a portion of the Commission's repayment determination, the amount not at issue on appeal must be repaid within the time specified in 11 CFR 9038.2.

One goal of these stay procedures is to protect the public treasury in the event the Commission's repayment determination is upheld on appeal. Thus, for example, if the candidate chooses to establish an escrow account for the funds, all withdrawals from the account must be contingent on the joint signatures of the candidate or his or her agent and a representative of the Commission. Further, all amounts stayed must be repaid with interest if the Commission's determination is upheld. Interest begins to accrue under these rules 30 days after the Commission's final repayment determination. This is the date by which repayment would have been due if the candidate had not appealed the final determination and sought a stay.

The criteria in paragraph (c)(2)(iii) follow the standards used by the Commission to date. They are

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augmented, however, in paragraph (c)(1) to provide further guidance on when an applicant has shown a strong likelihood of success on the merits of the appeal. This paragraph incorporates the approach taken by the United States Court of Appeals for the District of Columbia in *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

Section 9038.6 Stale-dated Committee Checks

In past election cycles, questions have arisen regarding the appropriate disposition of checks written to creditors or to contributors that remain outstanding after the campaign is over. Sometimes the payee cannot be located, other times the payee declines to cash the check. This new section makes clear that committees should bring these checks to the Commission's attention in a timely fashion.

If the committee has made attempts to pay the funds as intended, and has been unsuccessful, the committee must remit a check payable to the U.S. Treasury for the amount outstanding. The amount so paid will not reduce or increase the committee's repayment obligation. Moreover, the committee may not use these funds for other purposes, such as to pay other obligations, because to do so could result in the receipt of a prohibited or excessive contribution from the original payee.

The Commission considered and rejected other possible dispositions of such funds, including a donation to a charitable organization, because these alternatives could be subject to varying interpretations, not all of which would be appropriate recipients of funds from a federally-funded campaign. Thus, the Commission determined to require that all such funds be paid to the Treasury.

PART 9039—REVIEW AND INVESTIGATION AUTHORITY

There are no changes in this Part.