

**FEDERAL ELECTION COMMISSION****(Notice 1991-11)****11 CFR Parts 100, 102, 106, 110, 116, 9001-9007, 9012, and 9031-9039****Public Financing of Presidential Primary and General Election Candidates****AGENCY:** Federal Election Commission.**ACTION:** Final rule; transmittal of regulations to Congress.

**SUMMARY:** The Commission has revised its regulations governing publicly financed Presidential primary and general election candidates. These regulations implement the provisions of 28 U.S.C. chapters 95 and 96, the "Presidential Election Campaign Fund Act" and the "Presidential Primary Matching Payment Account Act." The principal changes involve allocation of expenses to the state-by-state spending limits. Other areas in which changes are being made include candidate agreements, the matching fund process, media travel costs, joint fundraising, transfers to compliance funds, and repayment determinations. Further information on these revisions is provided in the supplementary information which follows.

**DATES:** 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). A document announcing the effective date will be published in the Federal Register.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 376-5890 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing today the final text of revisions to its regulations at 11 CFR 106.2, and Parts 9001-9007, 9012, and 9031-9039, which concern the public financing process for Presidential primary and general election candidates. The Commission is also publishing conforming amendments to §§ 100.8(b), 102.17, 110.1, 110.8, and 116.5. On January 2, 1991, the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations. 56 FR 106. Written comments were received from the Internal Revenue Service, the Democratic National Committee, and the Gephardt for President Committee in response to the Notice.

Section 438(d) of title 2, United States Code, and 26 U.S.C. 9009(c) and 9039(c) require that any rules or regulations 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 July 19, 1991.

**Explanation and Justification**

The Commission has revised its regulations governing publicly financed Presidential primary and general election candidates in several respects. The principal changes involve the allocation of expenses to the state-by-state spending limits, and the exclusion of certain costs from state allocation. Other areas in which changes are made include candidate agreements, media travel costs, joint fundraising, transfers to compliance funds, and repayment determinations.

The Commission has initiated a separate rulemaking to consider possible changes to its matching fund submission and certification procedures set forth at 11 CFR 9034.1, 9034.5, 9036.2, 9036.4, 9036.5, 9036.6, 9037.1 and 9037.2. See notice of proposed rulemaking, 56 FR 29372 (June 26, 1991). A new rulemaking is necessitated by the Department of the Treasury's recent promulgation of new rules regarding payments to candidates, which it adopted to address the possible shortage in the Presidential Election Campaign Fund. See 26 CFR parts 701 and 702, 56 FR 21596 (May 10, 1991).

In the course of this rulemaking, the Commission considered proposals for change that it did not ultimately incorporate into the revised rules. For example, the Commission sought comments on ways to streamline the audit and repayment processes and to encourage quicker termination of committee activity. One possibility considered was to set winding down costs as a fixed percentage of a candidate's total expenditures during the campaign, or as a percentage of total matching funds certified for that candidate. However, the Commission has decided not to change the current approach to winding down costs at this time because other changes in the primary election regulations, such as the revisions to the state allocation rules, should result in quicker completion of the audit and repayment processes.

In addition, two changes have been made throughout these regulations. First, the term "committee assets" is used instead of "campaign assets." Secondly,

the cross-references to the convention regulations at 11 CFR part 9008 have been changed back to the current citations, since the reorganization and revision of the convention rules has been suspended until after the 1992 conventions. See 56 FR 14319 (April 9, 1991).

**Part 100—Scope and Definitions (2 U.S.C. 431)****Section 100.8 Expenditure (2 U.S.C. 431(9))**

The Commission is now revising and simplifying the way in which the 20% fundraising exemption from the overall spending limit for primary candidates is determined. Under the new method set out in § 100.8(b)(21), the amounts excluded at the state level are added to an amount excluded at the national level to permit committees to claim the full benefit of the 20% fundraising exemption established by the FECA. These changes correspond with changes in the method set out in § 110.8(c)(2) for determining the amount of fundraising costs exempt from the state spending limits.

**Part 102—Registration, Organization, and Recordkeeping by Political Committees (2 U.S.C. 433)****Section 102.17 Joint Fundraising by Committees Other Than Separate Segregated Funds**

The Commission is revising the joint fundraising rules set out at 11 CFR 102.17 in several respects. First, paragraph (a)(1) now specifies that if committees participating in a joint fundraiser elect to form a separate committee to serve as the fundraising representative, the separate committee cannot be a participant in any other joint fundraising efforts but may conduct more than one joint fundraising effort for the participating committees. This change corrects two problems. First, in cases where this has occurred, there was no explicit allocation formula for determining the amounts to be distributed to each of the participating original committees. Secondly, there has been confusion as to the amount that may be contributed to the fundraising representative for distribution among the participating committees. Under new paragraph (c)(7)(i)(C) the expenses for a series of fundraising events or activities must be allocated on a per event basis. This provision parallels language in current § 9034.8(c)(8)(i)(C).

New language is also being added to paragraph (c)(1) to require the allocation formula to indicate the amount or percentage of each contribution that will

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be allocated to each participant. Thus, the formula may not state that a fixed amount of the proceeds will be allocated to a specific participant, or that contributions will be allocated to one participant because the contributions are matchable. Section 9034.8(c)(7)(i) does not permit the committee to use a joint fundraiser to maximize the matchability of contributions. However, the formula may state, for example, that the first \$250 of each contribution will be allocated to a particular candidate. The new rules also delete the previous language in paragraph (c)(1) indicating that the joint fundraising participants must use the formula to allocate fundraising expenses. This change was necessary because paragraph (c)(7) indicates that the joint fundraising representative allocates expenses based on the percentage of total receipts allocated to each participant. Please note that corresponding changes are included in the joint fundraising rules applicable to presidential candidates. See 11 CFR 9034.8.

#### **Part 106—Allocation of Candidate and Committee Activities**

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

As in the past, many of the issues arising in the 1988 election cycle involved the allocation of expenses to particular states for purposes of the statutory state-by-state spending limitations for Presidential primary candidates receiving matching funds. 2 U.S.C. 441a(b)(1) and 441a(g). In practice, the state limits have the greatest impact in the states holding the first primaries because the spending limits are based on voting age population and do not recognize that the national importance of these primaries extends well beyond the relatively small numbers of delegates at stake. The national significance of the first primary campaigns is shown by their focus on national issues, their coverage by the national and international press, the candidates' appeals to voters nationwide, and the effect these primaries have in winnowing the field of candidates able to continue to campaign in subsequent primaries. The importance of the early primaries has resulted in creative attempts to reduce the amounts allocated to these states for various activities. This, in turn, has necessitated extensive review of committees' allocation practices during the post-primary audits.

For these reasons, the Commission has now decided to make substantial

changes in its regulations to try to resolve some of the current problems and to simplify state allocation. One of the two comments received stated that proposals designed to simplify allocation and to treat these as national primaries "makes eminent sense in the light of experience." As discussed below, the other commenter urged the Commission to take several additional steps in this direction.

Under the new state allocation rules, the detailed list of allocable expenditures and exemptions set out in previous 11 CFR 106.2 is replaced with a more limited set of allocable expenditures that are directly related to the campaigns in particular states. All other expenditures are exempted from state allocation, but not from the overall spending limits. The following expenditures are subject to state allocation:

(1) Expenses for campaign advertising distributed through the broadcast media and print media in a particular state, but excluding production costs, national advertising costs and commissions for media purchases. For broadcast and print media buys distributed to more than one state, allocation is based on the proportion of viewers or readers in each state.

(2) Expenditures for mass mailings where more than 500 pieces are sent to a given state and expenditures for shipping other campaign materials to the state.

(3) Expenditures for special telephone programs targeted at a particular state, such as voter registration, get out the vote, fundraising or telemarketing programs.

(4) Expenditures for public opinion polls, except those conducted on a nationwide basis. Allocable costs are based on the number of people interviewed in each state.

(5) Overhead expenses for state offices, but not for national campaign headquarters. Overhead expenses for regional offices are allocated to the next primary state in the region.

Under the new approach, presidential primary candidates are not required to allocate the following categories of expenditures to specific states:

(1) Interstate and intrastate travel and subsistence expenses for the candidate and his or her campaign staff;

(2) Salaries of campaign staff working in a given state; and

(3) Consulting fees for those consulting on national campaign strategy.

Finally, the new rules simplify the application of the fundraising exemption by allowing committees to treat up to

50% of expenditures allocable to each state as exempt fundraising costs, except that 100% of the costs of mass mailings may be treated as fundraising if the materials were mailed more than 28 days before the primary. This approach revises the 28 day rule previously set forth at 11 CFR 110.8(c)(2) so that the timing of fundraising activities is only significant for mass mailings. In addition, the new rules supersede AO 1988-6 in which the Commission concluded that 50% of the costs of broadcasting a particular advertisement may be excluded from state allocation under the fundraising exemption.

These changes also involve reorganizing § 106.2 in the following respects. Paragraph (a) now sets out the general rule that only the expenditures indicated in this section must be allocated to particular states. Previous paragraphs (b) and (c) have been combined into new paragraph (b) describing allocable expenses. The reporting provisions of former paragraph (d) are now located in paragraph (c). The recordkeeping requirements of previous paragraph (e) have been amended and placed in paragraph (d). The revised state allocation rules in § 106.2 address the following types of expenses:

1. *Media expenditures.* The new rules continue the previous approach requiring allocation of print and broadcast advertising, but excluding national advertising and media production costs from state allocation. However, one modification has been made regarding commissions. Under the old rules, § 106.2(b)(2)(i)(B) provided for state-by-state allocation of any commission charged for the purchase of broadcast media, using industry market data. The new rules specify that commissions, fees, and other compensation for the purchase of broadcast or print media need not be allocated to any State.

The NPRM indicated that the Commission has encountered situations in recent audits in which committees have sought to claim very low amounts as media commissions in comparison to the amounts claimed as production costs, and in comparison to the amounts of commissions in previous presidential election cycles. Consequently, comments were sought on how to determine whether the amount paid to the advertising firm or media consultant represents the usual and normal charge for the services provided. Questions may also arise as to whether media commissions are national or state expenditures. One commenter suggested that because of these difficulties, the

Commission should not allocate media commissions against the state spending ceilings. The Commission has decided to take the approach of not allocating media commissions to the state spending limits. The final rules also include new language to clarify that if industry market data is not available to support state allocation of media advertising costs, market data must be obtained from the media carrier.

**2. Mass mailings and shipping other campaign materials.** New § 106.2(b)(2)(ii) specifically requires the allocation of the costs associated with mass mailings of over 500 pieces to a state and the costs of shipping campaign materials to a state. Such costs were allocable under previous § 106.2, unless they could qualify as fundraising expenses. The new language parallels the concept of mass mailings used in the franked mail statute applicable to members of Congress. 39 U.S.C. 3210(a)(6). In contrast to the previous rules, the new language does not require allocation of the costs of producing materials that are subsequently shipped to a state for distribution. The new mass mailing provision operates in conjunction with the Commission's simplified approach to the fundraising exemptions from the state and overall spending limits set out in § 100.8(b)(21) and 110.8(c)(2). Under the new approach, a committee may treat 100% of mass mail expenses and 50% of campaign material shipping costs as counting against the state or overall fundraising exemptions.

**3. Overhead expenditures for state offices and regional offices.** The Commission is now revising § 106.2(b)(2)(iii) to provide further guidance as to how to allocate overhead expenses of regional offices. Overhead expenses will be allocated to the next primary state in the region. If two or more states in the region hold primaries on the same day, overhead expenses should be apportioned equally between these states.

As under the previous rules, allocation is required for state offices, but with certain exceptions, it is not required for national campaign headquarters. These provisions are also reorganized so that the definition of "overhead expenditure" only appears once. Please note that the State office overhead provision has been revised to clarify that the location of the State office is not controlling, and to clarify that allocable expenses include the costs of facilities used for campaign events in a State. Overhead also includes the cost of temporary offices established while the candidate is

traveling in the State or in the final weeks before the primary election, as well as expenses paid by campaign staff and subsequently reimbursed by the campaign, such as miscellaneous supplies, copying, printing, and telephone expenses. See 11 CFR 116.5. However, overhead does not include the cost of vehicles leased for extended periods and used in a particular State, unless these costs are allocable for another reason, such as the use of vehicles for polling purposes.

One comment urged the Commission to exclude from allocation overhead expenses related to dealing with the press and organizing campaign trips and events for the candidate. This suggestion was not adopted because drawing distinctions for different categories of overhead is contrary to the Commission's new approach of creating broad categories of allocable expenses and exempt expenses. The newly created exemptions for travel and salary expenses will result in the exclusion of a substantial amount of expenses. In addition, the final rules concerning overhead permit committees to treat 10 percent of State office overhead expenditures as exempt compliance costs which are therefore excludable from the state spending limits.

**4. Expenditures for special telephone programs.** The Commission is now replacing its previous allocation rules for interstate and intrastate telephone calls with new language at § 106.2(b)(2)(iv) requiring allocation only if the intrastate or interstate telephone calls part of a special telephone program targeted at a particular state. This includes special programs such as voter registration, get out the vote efforts, fundraising, or telemarketing calls designed to increase candidate recognition and support among voters in the state. These costs are allocable irrespective of whether the calls originated inside or outside the state called. The final rules indicate that "targeted at a particular state" means that 10 percent or more of the total telephone calls made in each month are made to that state. The final rules have been modified from the previous proposals to clarify that the allocable expenses for special telephone programs include consultants' fees, related travel costs, and the costs of office rental. This covers both the costs of renting office space for a limited period specifically for the purpose of conducting the program, as well as a *pro rata* portion of the campaign committee's state office or national headquarters if used to conduct the program. As explained below, consultants' fees are allocable if they

relate to conducting special telephone programs or polling activity, but they are not allocable if they are charged for consulting on national campaign strategy.

**5. Public opinion polls.** Paragraph (b)(2)(v) of revised § 106.2 continues the previous approach regarding the allocation of polling expenses. Thus, expenditures incurred for public opinion polls covering one state are allocable to that state. Polls covering two or more states continue to be allocable to those states based on the number of people interviewed in each state, but polls conducted on a nationwide basis are not allocable. The revised rules also specify that allocable expenses include the costs of designing and conducting a poll, such as consultants' fees and travel costs.

**6. Costs excluded from allocation.** As indicated above, the revised allocation rules are intended to eliminate several problems encountered by the Commission and by committees under the previous rules. For example, the previous regulations required the allocation of intrastate travel and subsistence expenses, as well as salary expenses, for persons working in a particular state for five consecutive days or more. 11 CFR 106.2(b)(2)(ii) and (iii). The original purpose of these provisions was to simplify the allocation of travel and salary expenses. However, in administering these requirements, the Commission has found that the rule forced committees to create and maintain travel itineraries for many trips by candidates and campaign staff so that the Commission could determine the length of their stays in particular states. In addition, questions arose as to whether travel expenses of independent consultants, as well as travel and salary costs for a committee's vendors' employees, were also subject to this five day rule. Other questions involved the application of the exemption for interstate travel set out at 11 CFR 106.2(c)(4) in situations where campaign staff commuted on a regular basis to and from airports or hotels located across the border in a neighboring state. Consequently, the effects of the five day rule for salaries and intrastate travel, and the interstate travel exemption were to complicate, not to simplify, allocation.

To alleviate these difficulties, the Commission is now excluding all interstate and intrastate travel and salary expenses from state allocation. This will allow the Commission to devote its limited resources to monitoring other aspects of the Matching Fund Program. Moreover, now that salaries are excluded from state

allocation, § 106.2 is being further simplified by eliminating the language that had permitted committees to exclude 10 percent or more of campaign workers' salaries from state allocation as exempt compliance costs. See previous 11 CFR 106.2(c)(5). Please note, however, that salaries continue to be counted against the overall spending limit for primary candidates, and campaigns may continue to deduct 10 percent of salary costs from the overall limits for compliance activities under 11 CFR 9035.1(c).

The Commission has also decided to expressly exclude national consulting fees from allocation. See 11 CFR 106.2(b)(3). This exemption applies to charges for consulting on national campaign strategy, but does not include consulting fees charged for conducting special telephone programs or public opinion polls in a particular state.

**7. Recordkeeping and Allocation to the Next Primary State.** Specific recordkeeping requirements have been included in several sections to indicate particular kinds of records committees must maintain regarding allocable expenses such as direct mail, shipping costs, regional overhead expenses, special telephone programs and polling. See § 106.2(b)(2)(ii), (iii)(B), (iv), and (v). In addition, the final rules add new language at § 106.2(d) generally requiring the retention of all documents supporting allocations of expenditures to particular states and claims of exemption from allocation under this section. If a presidential campaign committee does not maintain these records, the regulations indicate that the expenditures will be considered to be allocable, and shall be allocated to the state holding the next primary election, caucus or convention after the expenditure is incurred. In an appropriate case, the Commission may also wish to pursue the failure to maintain records under 11 CFR 104.14. One commenter indicated that the purposes served by this provision could be accomplished in a less burdensome way, but did not indicate specifically how this could be accomplished.

#### Part 110—Contribution and Expenditure Limitations and Prohibitions

##### *Section 110.1 Contributions by Persons Other Than Multicandidate Political Committees (2 U.S.C. 441a)(1))*

The Commission's administration of the public financing laws has highlighted the need for modifications in the documentation requirements for reattributed and redesignated contributions, which are set forth in paragraph (1) of this section. For

example, during the audits of several 1988 presidential campaign committees, problems were encountered in verifying that excessive contributions were reattributed to joint contributors or redesignated for compliance funds within the time periods established by 11 CFR 110.1(b)(5) and (k)(3).

To monitor compliance with the time periods established for obtaining reattributions and redesignations, § 110.1(1) is being revised to require committees to retain documentation demonstrating that redesignations and reattributions are received within 60 days. The new language gives committees a fair amount of flexibility as to the type of evidence they may choose to rely upon to demonstrate timely receipt.

##### *Section 110.8 Presidential Candidate Expenditure Limitations*

There are two changes in this section. First, in paragraph (f)(2), the citation to former § 141.2(c) has now been changed to current § 9003.2(c).

The other change involves the operation of the fundraising exemption from the state spending limits, which is set out at § 110.8(c)(2). This exemption has been the focus of a number of recent questions. For example, in Advisory Opinion 1988-6 the Commission was presented with the question of whether part of the costs of broadcasting a candidate's political advertisement in a particular state could be treated as an exempt fundraising expense if the advertisement concluded with a brief message urging the viewers to contribute to the candidate's campaign. On the basis of a previous decision made in one of the 1984 presidential audits, the Commission concluded that it would be reasonable for the candidate to allocate 50 percent of the costs of this advertisement to exempt fundraising, provided the advertisement was not broadcast within 28 days before the state's primary election. See previous 11 CFR 110.8(c)(2).

Since that time, presidential campaigns have tried to broaden the application of the fundraising exemption set forth in previous 11 CFR 106.2(c)(5)(ii) and 110.8(c)(2) in a variety of ways. For example, committees have sought to deduct 50 percent or more of the costs associated with candidate appearances at various political events designed to attract voters on the theory that the incidental distribution of solicitation materials is sufficient to qualify for the fundraising exemption. In other situations, committees have sought to apply the fundraising exemption to the costs of a telemarketing program targeted at voters in a key primary state.

However, these telephone calls have tended to focus on voter education and garnering support, and have not always included a fundraising appeal. One committee claimed the fundraising exemption for such telephone calls because follow-up letters requesting contributions were sent to some of the voters contacted. Finally, some committees have sought to exclude part of their broadcast media costs from state allocation as exempt compliance costs incurred for including the disclaimer notice required by 2 U.S.C. 441d(a). They have based this allocation on an analogy to the principle set out in AO 1988-6.

To simplify the application of the fundraising exemption, 11 CFR 110.8(c)(2) is being revised to allow committees to treat up to 50 percent of their expenditures allocable to each state as exempt fundraising costs, and to permit these amounts to be excluded from the committees' total expenditures attributable to the spending limit for each state. The total amount excluded may not exceed 20 percent of the overall spending limit under 11 CFR 9035.1. This new approach revises the previous 28 day rule set forth in this section so that the timing of specific fundraising activities is only significant for mass mailings. The new rules implementing this method of calculating the fundraising exemption supersede AO 1988-6.

One reason for establishing a fundraising deduction of up to 50 percent of the state expenditures is that, as the commenters point out, there may be a fundraising component to many of the committee's campaign activities. Moreover, by adopting this change, the Commission will no longer need to examine disbursements claimed under the exemption to determine whether they are related to fundraising efforts.

The Commission decided to allow 100 percent of the cost of mass mailings to be treated as fundraising, unless the materials were mailed within 28 days before the election. Based on previous practice and experience, the Commission concluded that the primary purpose of mass mailings can be presumed to be fundraising until that point.

The NPRM sought comments regarding other ways to accommodate the special needs of candidates who must devote more time and effort to fundraising during the first two primaries to obtain enough money to be perceived as viable candidates for their party's nomination. One commenter urged the Commission to create an additional 20 percent across the board

exemption from the spending limits for expenditures made in the early primary states on the grounds that a good portion of the campaign activities in the early primary states is directed at a national audience. The Commission believes that treating 50 percent of state expenditures as exempt fundraising costs will alleviate the commenter's concerns. In addition, the Commission expects that the revised state allocation categories will help to offset the amount of expenses previously allocable to the early primary states.

#### **Part 116—Debts Owed by Candidates and Political Committees**

##### *Section 116.5 Advances by Committee Staff and Other Individuals*

The definition of subsistence expenses, which was previously located in § 106.2(b)(2)(iii), has been moved to paragraph (b)(2) of § 116.5. Section 106.2 has been revised so that subsistence expenses are no longer allocable.

#### **Part 9001—Scope**

##### *Section 9001.1 Scope*

The references to the title 2 rules have been revised to reflect the addition of new 11 CFR part 116.

#### **Part 9002—Definitions**

There are no changes in §§ 9002.1 through 9002.8, § 9002.10, and § 9002.11.

##### *Section 9002.9 Political Committee*

The definition of "political committee" is revised by deleting the reference to former § 9012.6, which no longer exists.

#### **Part 9003—Eligibility for Payments**

There are no changes in §§ 9003.2 and 9003.6.

##### *Section 9003.1 Candidate and Committee Agreements*

Presidential candidates seeking federal funds for their general election campaigns must agree to comply with all of the conditions set forth in paragraph (b) of this section to be eligible to receive these funds. The Commission is now revising these conditions in two respects. First, the candidate agreement provisions are being revised to conform to the new magnetic media rules regarding the production of computerized information on magnetic diskettes or magnetic tapes in accordance with the new technical standards. See 11 CFR 9003.6, 55 FR 26392 (June 27, 1990).

The Commission also sought comments on requiring presidential candidates and their authorized committees to obtain and provide upon the Commission's request records

regarding funds received and disbursements made on the candidate's behalf by other committees and organizations associated with the candidate. One commenter believed this requirement was unnecessary because the Commission already has authority to request and, if necessary, subpoena these records. Nevertheless, the Commission has concluded that inclusion of this requirement in the candidate agreements will ensure a more timely production of pertinent records that the Commission needs to audit the candidate's Presidential campaign committee or to make repayment determinations.

The Commission's proposed rules had included a requirement that candidates agree to file alphabetized schedules if their reports are generated from computerized files. One comment objected to the placement of such a requirement in the candidate agreements. The Commission has now decided not to require the filing of alphabetized schedules. Similarly, the Commission considered and rejected a proposal to add new language to the candidate agreement provisions to require committees to verify that they are not spending possibly illegal contributions while they are making inquiries as to the permissibility of these contributions. One commenter indicated that such a requirement would not add anything to existing law.

##### *Section 9003.3 Allowable Contributions*

Paragraphs (a)(1)(ii) and (iii) of § 9003.3 are being revised to resolve questions concerning the ability of campaign committees to seek redesignations to legal and accounting compliance funds of contributions properly received during the primary election campaign. The previous rules at 11 CFR 9003.3(a)(1)(iii) permit committees to seek redesignations to the compliance fund if they receive contributions that either exceed the primary election limits or that are made after the party's presidential nominee is chosen. Campaign committees may also transfer to the compliance fund amounts remaining in the primary election account that exceed the amount that must be reimbursed to the U.S. Treasury under 11 CFR 9038.2. See 11 CFR 9003.3(a)(1)(ii). The question presented was whether a campaign committee could obtain redesignations of contributions properly received during the primary election period. This situation only arises if a primary candidate becomes the nominee in the general election, since other rules apply to unsuccessful primary candidates.

Accordingly, the Commission sought comments on revising paragraphs (ii) and (iii) of § 9003.3(a)(1) in the following respects. First, language was proposed to permit transfers to legal and accounting compliance funds only if such amounts are not needed to pay remaining primary obligations. In addition, the changes would have prevented committees from having nonexcessive primary contributions redesignated for the general election compliance fund if these primary contributions represent funds that are otherwise repayable to the Presidential Primary Matching Payment Account as surplus funds under 11 CFR 9038.2. The proposed revisions would also have clarified that redesignated contributions will be subject to the contribution limits for the general election, not the primary.

One comment opposed the redesignation restrictions on the grounds that contributions received late in the primary election season were probably intended for general election compliance purposes and should be so used. The Commission has now modified the proposed rule to permit redesignations for the compliance fund provided that the redesignations are received within 60 days of the Treasurer's receipt of the original contribution, and the committee follows the redesignation procedures set forth at 11 CFR 110.1(b)(5) and (1). In addition, the contributions redesignated must represent funds in excess of any amount needed to pay remaining primary expenses. If this requirement is not met, the committee would have to make a transfer back to the primary account to cover such expenses. Finally, contributions may not be redesignated if they have been submitted for matching.

Paragraph (a)(2) of this section is also being revised to permit contributions to a legal and accounting compliance fund to be used to defray the committee's unreimbursed costs incurred in providing transportation and services for the Secret Service and national security staff.

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

This section generally follows previous § 9003.4.

##### *Section 9003.5 Documentation of Disbursements*

Section 9003.5(b)(1)(iv) is being revised to indicate that collateral evidence documenting qualified campaign expenses may include evidence that the disbursement is

covered by a preestablished written campaign committee policy, such as a daily travel expense policy. The previous rules had indicated that collateral evidence of a per diem policy would be acceptable. The new, more specific wording is intended to resolve the difficulties surrounding broad per diem policies that do not always provide adequate evidence that the expenses claimed are qualified campaign expenses. The final wording of § 9003.5(b)(1)(iv) represents an improvement over the proposed rules in the NPRM which would simply have required committees to submit collateral evidence showing that "the expenditure is part of an identifiable program or project which is otherwise sufficiently documented." This proposal did not clearly specify what types of documentation would be acceptable. The Commission is also making corresponding revisions to the documentation requirements for primary election committees at 11 CFR 9033.11(b)(1)(iv).

**Part 9004—Entitlement of Eligible Candidates to Payments; Use of Payments**

There are no changes in §§ 9004.1 through 9004.3, § 9004.5, § 9004.7, or § 9004.8.

**Section 9004.4 Use of Payments**

In AO 1988-5 questions were raised as to whether a current publicly-funded presidential campaign committee may contribute or loan or transfer funds to another federally funded committee of the same candidate for a previous election cycle for the purpose of paying debts from the earlier campaign. The opinion concluded that such payments are not qualified campaign expenses under 11 CFR 9034.4 and are not includable in the candidate's NOCO statement under 11 CFR 9034.5. However, such payments could be made from excess campaign funds once the audit process is concluded and any repayment or possible penalty obligations have been satisfied.

The attached final rules include new language in § 9004.4(b)(7) applying the conclusion reached in AO 1988-5 to general election candidates. Thus, similar payments from general election funds are nonqualified campaign expenses under § 9004.4(b). Accordingly, they could serve as a basis for a repayment determination under 11 CFR 9007.2. Please note that even though the question presented in AO 1988-5 was framed in terms of treating such payments as contributions, the Commission would regard such a flow of funds as a transfer, not a

contribution. See H. Rept. No. 96-422, 96th Cong., 1st Sess. 7 (1979).

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

Under this section, candidates may seek reimbursement from media personnel for the costs of providing transportation and services to media representatives accompanying the candidate on campaign trips. These provisions also establish the method to be used in determining how much committees may receive from media personnel for such costs. The Commission is now making several changes to these rules. First, paragraph (a) is being revised to clarify that expenditures incurred for transportation or services made available to Secret Service and national security staff, less any reimbursements received, are qualified campaign expenses but not subject to the overall spending limit. This language allows the campaign to pay unreimbursed Secret Service expenses without having to count such payments toward the spending ceiling. Because such payments would otherwise deplete the public fund, and because such payments might otherwise cause a campaign to exceed the spending limit, legal compliance funds may be used. This approach addresses concerns expressed by one commenter who opposed treating the unreimbursed costs incurred by the campaign as subject to the spending limits. The new wording does not affect the amount that the Secret Service and national security staff pay for such transportation and services, since that is established by other federal agencies.

The second change in § 9004.6 pertains to the method for calculating each media representative's *pro rata* share of the actual cost of the transportation and services made available. Language is being added in paragraph (b) to explain that the total number of individuals to whom such transportation or services were made available includes committee staff, media personnel, Secret Service, national security staff and any other individuals traveling with the candidate.

Section 9004.6(b) permits campaign committees to bill the media 110 percent of the actual *pro rata* cost of providing transportation and services to media personnel. These provisions recognize the difficulties of administering a major transportation program in the midst of a campaign. However, under paragraph (d), committees may not deduct from the overall expenditure limitation amounts received that exceed the actual costs of providing transportation and services to

the media plus an additional 3 percent for administrative costs. Paragraph (d) is now being revised to clarify that the amount deducted for the actual costs of providing the transportation and services may not exceed the amount the committee actually expended for such costs.

Another area in which questions have arisen concerns reimbursements from the media exceeding the committee's actual costs plus 3 percent for administrative costs. As noted above, the current rules permit billing the media for up to 110 percent of the actual *pro rata* cost, while allowing a deduction from the expenditure limit of no more than 103 percent of the actual cost. Previously, paragraph (d)(1) indicated that general election campaign committees were required to repay to the United States Treasury all amounts over 103 percent. This provision is now being revised to indicate that the amount to be repaid to the Treasury is the amount between 103 percent and 110 percent. Amounts received that exceed 110 percent will have to be returned to the media, since those amounts exceed the total that can permissibly be billed.

**Section 9004.9 Net Outstanding Qualified Campaign Expenses**

This section generally follows previous § 9004.9.

**Section 9004.10 Sale of Assets Acquired for Fundraising Purposes**

This section generally follows previous section 9004.10.

**Part 9005—Certification by Commission**

There are no changes in section 9005.1.

**Section 9005.2 Payments to Eligible Candidates From the Fund**

In paragraph (c), the previous references to accounts insured by the Federal Savings and Loan Insurance Corporation have been deleted because these accounts are now insured by the Federal Deposit Insurance Corporation.

**Part 9006—Reports and Recordkeeping**

There are no changes to § 9006.1 or § 9006.2.

**Part 9007—Examination and Audits; Repayments**

There are no changes in §§ 9007.3 through 9007.6.

**Section 9007.1 Audits**

During the course of the audits of certain 1988 campaign committees, the Commission issued subpoenas, and also sought information informally from

committees and third parties.

Accordingly, new language is now being added to 11 CFR 9007.1(b)(1)(v) to inform candidates that the investigative procedures set forth at 11 CFR 111.11 through 111.15, including the issuance of subpoenas, may be invoked in appropriate cases. Please note that the final rules have been modified to refer to the Commission's general authority to issue subpoenas and orders under 2 U.S.C. 437d(a)(1) and (3).

#### **Section 9007.2 Repayments**

The Commission's rules at 11 CFR 9007.2(a)(2) indicate that candidates will be notified of repayment determinations as soon as possible, but not later than three years after the end of the expenditure report period. New language is now included in the final rules to explain that the Commission considers the issuance of its interim audit report to constitute notification for purposes of the three year period.

Paragraph (b)(2)(iii) has been revised to clarify the amount representing total deposits under this section which is used to determine the repayment specified in 11 CFR 9007.2(b)(2). A similar clarification is included in 11 CFR 9038.2.

#### **Part 9012—Unauthorized Expenditures and Contributions**

There are no changes in part 9012.

#### **Part 9031—Scope**

##### **Section 9031.1 Scope**

The references to the title 2 rules have been revised to reflect the addition of new 11 CFR part 116.

#### **Part 9032—Definitions**

There are no changes in part 9032.

#### **Part 9033—Eligibility for Payments**

There are no changes in §§ 9033.2 through 9033.4, §§ 9033.6 through 9033.9 and § 9033.12.

##### **Section 9033.1 Candidate and Committee Agreements**

Presidential candidates seeking federal funds for their primary election campaigns must agree to comply with all of the conditions set forth in paragraph (b) of this section to be eligible to receive these funds. The Commission is now revising these conditions in several respects. First, the candidate agreement provisions are being revised to conform to the new magnetic media rules regarding the production of computerized information on magnetic diskettes or magnetic tapes in accordance with the new technical standards. See 11 CFR 9033.12; 55 FR 26392 (June 27, 1990).

The Commission also sought comments on requiring presidential candidates and their authorized committees to obtain and provide upon the Commission's request records regarding funds received and disbursements made on the candidate's behalf by other committees and organizations associated with the candidate. One commenter believed this requirement was unnecessary because the Commission already has authority to request and, if necessary, subpoena these records. Nevertheless, the Commission has concluded that inclusion of this requirement in the candidate agreements will ensure a more timely production of pertinent records that the Commission needs to audit the candidate's Presidential campaign committee or to make repayment determinations.

The Commission's proposed rules had included a requirement that candidates agree to file alphabetized schedules if their reports are generated from computerized files. One comment objected to the placement of such a requirement in the candidate agreements. The Commission has now decided not to require the filing of alphabetized schedules. Similarly, the Commission considered and rejected a proposal to add new language to the candidate agreement provisions to require committees to verify that they are not spending possibly illegal contributions while they are making inquiries as to the permissibility of these contributions. One commenter indicated that such a requirement would not add anything to existing law.

##### **Section 9033.5 Determination of Ineligibility Date**

Under the Matching Payment Account Act, a candidate's continued eligibility to receive matching funds is based upon receipt of at least 10 percent of the popular vote cast in the party's primary elections if the candidate has permitted or authorized his or her name to appear on the ballot, unless the candidate certifies to the Commission that he or she will not be an active candidate in a particular primary. 28 U.S.C. 9033(c). During the 1988 primary election cycle, a question arose regarding the effect of a candidate's certification that he or she will not be an active candidate in a primary if the candidate subsequently receives 10 percent or more of the popular votes cast in that primary. Consequently, the Commission is now revising 11 CFR 9033.5(b) to clarify that if a candidate certifies his or her nonparticipation in a particular election, that election will not be counted in determining the candidate's date of

ineligibility regardless of whether he or she receives more or less than 10 percent of the popular vote. Thus the election will not be used to disqualify such candidates receiving less than 10 percent, and it will not count to the advantage of candidates exceeding the 10 percent cutoff.

##### **Section 9033.10 Procedures for Initial and Final Determinations**

This section generally follows previous § 9033.10.

##### **Section 9033.11 Documentation of Disbursements**

Section 9033.11(b)(1)(iv) is being revised to indicate that collateral evidence documenting qualified campaign expenses may include evidence that the disbursement is covered by a preestablished written campaign committee policy, such as a daily travel expense policy. The previous rules had indicated that collateral evidence of a per diem policy would be acceptable. The new, more specific wording is intended to resolve two difficulties. First, a canceled check in combination with a broad per diem policy does not always provide adequate evidence that the expenses claimed are qualified campaign expenses. In addition, a per diem policy does not always provide sufficient information to ascertain whether the committee allocated the expenses correctly for purposes of the state spending limits. By specifying a "daily travel expense policy," the new rules distinguish travel expenses from other campaign costs paid for by individuals that are allocable to a particular state. The second concern should no longer be problematic because the changes to § 106.2 no longer require state allocation of travel costs. The final wording of § 9033.11(b)(1)(iv) represents an improvement over the proposed rules in the NPRM which would simply have required committees to submit collateral evidence showing that "the expenditure is part of an identifiable program or project which is otherwise sufficiently documented to permit (state) allocation." One commenter expressed the concern that this proposal did not specify what types of documentation would be acceptable. The Commission is also making corresponding revisions to the documentation requirements for general election committees at 11 CFR 9003.5(b)(1)(iv).

#### **Part 9034—Entitlements**

##### **Section 9034.1 Candidate Entitlements**

The Commission has previously notified both the President and Congress

of a projected shortage in the Presidential Election Campaign Fund for the 1992 presidential election cycle. The priorities established by the public financing statutes indicate that a shortfall would affect the availability of matching funds for primary candidates before it would affect general election or convention financing. See 26 U.S.C. 9006(c), 9008(a) and 9037. Accordingly, the Commission is adding to § 9034.1(a) of its regulations a cross-reference to 26 U.S.C. 9037 and 11 CFR part 9037 to alert candidates that their receipt of matching funds could be affected by the amount of funds available in the matching payment account. In addition, the Commission has been working with the Treasury Department on implementing the Secretary of the Treasury's statutory obligation to achieve an equitable distribution of the funds available. Now that the Treasury Department has promulgated final rules in this area, the Commission has initiated another rulemaking to make necessary conforming changes to its existing procedures. See Notice of Proposed Rulemaking, 56 FR 29372 (June 28, 1991).

#### *Section 9034.2 Matchable Contributions*

New paragraph (c)(1)(iii) has been added to clarify that contributions reattributed to a joint contributor must meet the reattribution requirements of 11 CFR 110.1(k), and must be accompanied by the documentation described in 11 CFR 110.1(l).

#### *Section 9034.3 Non-Matchable Contributions*

New paragraph (k) states that contributions redesignated for a different election or redesignated for a legal and accounting compliance fund are not matchable. See 11 CFR 9003.3(a).

#### *Section 9034.4 Use of Contributions and Matching Payments*

A candidate's eligibility to receive federal matching funds is predicated upon his or her ability to receive at least 10 percent of the vote in each primary election. The Presidential Primary Matching Payment Account Act specifically recognizes that a candidate who has fallen below this level of support may reestablish eligibility by obtaining at least 20 percent of the votes cast in a subsequent primary. 26 U.S.C. 9033(c)(4)(B). However, the previous regulations did not provide a method for a candidate to use private funds to continue to campaign beyond the date of ineligibility without this affecting the candidate's entitlement to matching funds, since all funds in a publicly funded committee's accounts are

considered to be commingled. See, *Kennedy for President Committee v. FEC*, 734 F.2d 1558, 1565 at n.11 (D.C. Cir. 1984); See, also *Reagan for President Committee v. FEC*, 734 F.2d 1569 (D.C. Cir. 1984). Moreover, under the previous rules, in calculating a candidate's statement of net outstanding campaign obligations ("NOCO"), a candidate's private contributions were applied to eliminate the pre-date of ineligibility debt before they were used to pay debts incurred in continuing to campaign. Thus, a candidate could not separate out private funds to be used to continue to campaign. As a result, a candidate who continued to raise private funds after the date of ineligibility may have been required to make a repayment based on matching funds received in excess of his or her entitlement or based on nonqualified campaign expenses associated with continuing to campaign.

The Commission has now revised § 9034.4(a)(3)(ii) to allow a candidate to use post-ineligibility contributions to continue campaigning after the date of ineligibility without such activity resulting in a repayment of funds in excess of entitlement or a repayment of funds used for nonqualified campaign expenses. Compare new 11 CFR 9038.2(b)(2)(ii)(D). Under the new approach, the candidate's NOCO is "frozen" as of the candidate's date of ineligibility. Contributions received after the date of ineligibility that are used to continue to campaign may be submitted for matching. The candidate may continue to receive the same proportion of matching funds to defray NOCO as the candidate received before the date of ineligibility. The amount of matching funds received will be added to the post-ineligibility contributions to determine the amount of the candidate's remaining entitlement. Post-ineligibility matching fund payments may be used to defray the candidate's NOCO, but may not be used to defray the costs of continuing to campaign unless the candidate is able to reestablish eligibility under 11 CFR 9033.8. Post-ineligibility contributions are subject to the limitations, prohibitions, recordkeeping and reporting requirements. As under the previous rules, the candidate is not eligible to receive matching funds for winding down costs until the candidate is no longer continuing to campaign. Expenditures made for purposes of continuing to campaign are still counted against the spending limits, since the candidate's previous acceptance of matching funds was based on his or her agreement to comply with the spending limits. One comment supported efforts

to allow for the raising and spending of private funds to continue to campaign following a determination of ineligibility. The new provisions reflect the Commission's intention to treat candidates who continue to campaign as fairly as those who withdraw as of the date of ineligibility.

In AO 1988-5 questions were raised as to whether a current publicly-funded presidential campaign committee may contribute or loan or transfer funds to another federally funded committee of the same candidate for a previous election cycle for the purpose of paying debts from the earlier campaign. The opinion concluded that such payments are not qualified campaign expenses under 11 CFR 9034.4 and are not includable in the candidate's NOCO statement under 11 CFR 9034.5. However, such payments could be made from excess campaign funds once the audit process is concluded and any repayment or possible penalty obligations have been satisfied. The attached final rules include new language in section 9034.4(b)(6) reaffirming the conclusion reached in AO 1988-5 that these payments are not qualified campaign expenses. Accordingly, they could serve as a basis for a repayment determination under 11 CFR 9038.2. Please note that even though the question presented in AO 1988-5 was framed in terms of treating such payments as contributions, the Commission would regard such a flow of funds as a transfer, not a contribution. See H. Rept. No. 96-422, 96th Cong., 1st Sess. 7 (1979).

New paragraph (b)(7) indicates that payments for expenses subject to the state spending limits will not be treated as qualified campaign expenses if the committee's records do not provide sufficient information to accurately allocate the expenses to particular states. This new provision may apply, for example, if the records do not show when an allocable expense was incurred.

Finally, paragraph (d) of this section has been reorganized and a new sentence has been added to assist the reader in locating the provisions regarding transfers to a legal and accounting compliance fund. 11 CFR 9003.3(a)(1).

#### *Section 9034.5 Net Outstanding Campaign Obligations*

This section generally follows previous § 9034.5.

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

Under this section, candidates may seek reimbursement from media personnel for the costs of providing transportation and services to media representatives accompanying the candidate on campaign trips. These provisions also establish the method to be used in determining how much committees may receive from media personnel for such costs. The Commission is now making several changes to these rules. First, paragraph (a) is being revised to clarify that expenditures incurred for transportation or services made available to Secret Service and national security staff, less any reimbursements received, are qualified campaign expenses but not subject to the overall spending limits. This language allows the campaign to pay unreimbursed Secret Service expenses without having to count such payments toward the spending ceiling. This approach addresses concerns expressed by one commenter who opposed treating the unreimbursed costs incurred by the campaign as subject to the spending limits. The new wording does not affect the amount that the Secret Service and national security staff pay for such transportation and services, since that is established by other federal agencies.

The second change in § 9034.6 pertains to the method for calculating each media representative's *pro rata* share of the actual cost of the transportation and services made available. Language is being added in paragraph (b) to explain that the total number of individuals to whom such transportation or services were made available includes committee staff, media personnel, Secret Service, national security staff and any other individuals traveling with the candidate.

Section 9034.6(b) permits campaign committees to bill the media 110 percent of the actual *pro rata* cost of providing transportation and services to media personnel. These provisions recognize the difficulties of administering a major transportation program in the midst of a campaign. However, under paragraph (d), committees may not deduct from the overall expenditure limitation amounts received that exceed the actual costs of providing transportation and services to the media plus an additional 3 percent for administrative costs. Paragraph (d) is now being revised to clarify that the amount deducted for the actual costs of providing the transportation and services may not exceed the amount the

committee actually expended for such costs.

Another area in which questions have arisen concerns reimbursements from the media exceeding the committee's actual costs plus 3 percent for administrative costs. As noted above, the current rules permit billing the media for up to 110 percent of the actual *pro rata* cost, while allowing a deduction from the expenditure limit of no more than 103 percent of the actual cost. New language is now being added to paragraph (d) to indicate that the amount between 103 percent and 110 percent of the actual cost must be repaid to the Treasury, and that amounts received that exceed 110 percent will have to be returned to the media on a *pro rata* basis. This approach is consistent with the media reimbursement rules for general election candidates, as set out at 11 CFR 9004.6(d). It recognizes that reimbursements from the media may cover actual transportation costs and the costs of administering the program, but should not result in a primary candidate's committee making a profit.

**Section 9034.7 Allocation of Travel Expenditures**

There are no changes in this section.

**Section 9034.8 Joint Fundraising**

The Commission is revising the joint fundraising rules set out at 11 CFR 9034.8 in several respects. First, paragraph (b)(1) now specifies that if committees participating in a joint fundraiser elect to form a separate committee to serve as the fundraising representative, the separate committee cannot be a participant in any other joint fundraising efforts but may conduct more than one joint fundraising effort for the participating committees. This change corrects two problems. First, in cases where this has occurred, there was no explicit allocation formula for determining the amounts to be distributed to each of the original participating committees. Secondly, there has been confusion as to the amount that may be contributed to the fundraising representative for distribution among the participating committees. If a series of fundraising events or activities is held, the expenses must be allocated on a per event basis under paragraph (c)(8)(i)(C) of this section.

New language is also being added to paragraph (c)(1) to require the allocation formula to indicate the amount or percentage of each contribution that will be allocated to each participant. Thus, the formula may not state that a fixed amount of the proceeds will be allocated

to a specific participant, or that contributions will be allocated to one participant because the contributions are matchable. Section 9034.8(c)(7)(i) does not permit the committee to use a joint fundraiser to maximize the matchability of contributions. However, the formula may state, for example, that the first \$250 of each contribution will be allocated to a particular candidate. The new rules also delete the previous language in paragraph (c)(1) indicating that the joint fundraising participants must use the formula to allocate fundraising expenses. This change was necessary because paragraph (c)(8) indicates that the joint fundraising representative allocates expenses based on the percentage of total receipts allocated to each participant. Similarly, paragraph (c)(7)(ii) is being amended to indicate that reallocation of contributions is the responsibility of the joint fundraising representative, not the participating candidates. Please note that corresponding changes are included in the joint fundraising rules applicable to nonpresidential candidates. See 11 CFR 102.17.

**Part 9035—Expenditure Limitations**

**Section 9035.1 Campaign Expenditure Limitation**

The compliance and fundraising exemptions set out in § 9035.1(c) are being revised to reflect the changes in §§ 100.8(b)(21) and 110.8(c)(2) in determining the amount excluded from the overall spending limit for exempt fundraising activity.

**Section 9035.2 Limitation on Expenditures From Personal or Family Funds**

There are no changes in § 9035.2.

**Part 9036—Review of Submission and Certification of Payments by Commission**

There are no changes in §§ 9036.3 through 9036.6.

**Section 9036.1 Threshold Submission**

New paragraph (b)(2) has been added to this provision to require all committees that have computerized their contributor lists to submit computerized magnetic media at the time they make their threshold submission for matching fund payments. See the Commission's Computerized Magnetic Media Requirements for Title 28 Candidates/Committees Receiving Federal Funding. Please note that these requirements also apply to additional submissions governed by § 9036.2. Previously, the submission of computerized information

at the matching fund stage was optional. Now that the Commission has prepared new technical standards for the submission of computer tapes and diskettes, the Commission may be able to process all matching fund submissions more efficiently. See 11 CFR 9033.12. Please note that this change does not require presidential campaign committees to computerize part or all of their financial records if they do not wish to do so.

New paragraph (b)(6) requires all threshold submissions to include a list of refunded contributions, regardless of whether they were submitted for matching. One commenter expressed concerns regarding the burdensomeness of such a rule. This requirement is included in the final rules because the relevant information is needed to ensure that refunded contributions are not submitted for matching, and are properly reported.

#### *Section 9036.2 Additional Submissions for Matching Fund Payments*

New paragraph (b)(1)(iv) has been added to require nonthreshold submissions to include a list of refunded contributions, regardless of whether they were submitted for matching. Although one commenter expressed concerns regarding the burdensomeness of such a rule, the requirement is included in the final rules to ensure that refunded contributions are not submitted for matching, and are properly reported.

The Commission has also decided that during limited periods of time, it will use a new procedure of rejecting matching fund submissions from review in cases where the projected dollar value of the nonmatchable contributions exceeded 15 percent of the amount required. Please note that the new rejection policy does not apply to submissions made on the last submission date in the year preceding the Presidential election year, or to submissions made during the Presidential election year before the candidate's date of ineligibility. At other times when the new policy is in operation, the entire submission will be returned to the committee for corrective action before any amount is certified for payment. If the committee is able to correct the submission and resubmit it within five business days, it will be reviewed before the next regularly scheduled submission date and an amount will be certified on the certification date for the original submission. However, if the resubmission is made after the five day period, it will be reviewed after the next regularly scheduled submission date, and an amount will be certified on the

next regularly scheduled certification date. Corrected submissions may not contain new or additional contributions that were not previously submitted for matching. Similarly, under 11 CFR 9036.5(c)(5), resubmissions may not contain new or additional contributions that were not previously submitted. Submissions would not be considered to be corrected until the projected dollar value of nonmatchable contributions has been reduced to 15 percent or less of the amount requested. The new policy is not reflected in the final version of 11 CFR 9036.2 (c) and (d), and 9036.4(a), which follows, but is included in a separate draft of those sections found in the Commission's Notice of Proposed Rulemaking, which proposes broader changes to the Commission's matching fund submission and certification procedures. See 56 FR 29372 (June 26, 1991).

#### *Part 9037—Payments*

There are no changes in §§ 9037.1 and 9037.2.

#### *Section 9037.3 Deposits of Presidential Primary Matching Funds*

This section has been slightly modified to update the language regarding campaign depositories. It now parallels the revised general election provisions at 11 CFR 9005.2(c).

#### *Part 9038—Examination and Audits*

There are no changes in §§ 9038.4 through 9038.6.

#### *Section 9038.1 Audit*

During the course of the audits of certain 1988 campaign committees, the Commission issued subpoenas, and also sought information informally from committees and third parties. Accordingly, new language is now being added to 11 CFR 9038.1(b)(1)(v) to inform candidates that the investigative procedures set forth at 11 CFR 111.11 through 111.15, including the issuance of subpoenas, may be invoked in appropriate cases. Please note that the final rules have been modified to refer to the Commission's general authority to issue subpoenas and orders under 2 U.S.C. 437d(a) (1) and (3).

#### *Section 9038.2 Repayments*

The Commission has decided to revise several aspects of the repayment process for presidential primary candidates set forth at 11 CFR 9038.2. First, the Commission's rules at 11 CFR 9038.2(a)(2) indicate that candidates will be notified of repayment determinations as soon as possible, but not later than three years after the end of the matching payment period. New language is now

included in the final rules to explain that the Commission considers the issuance of its interim audit report to constitute notification for purposes of the three year period.

The Commission's regulations at 11 CFR 9038.2(b)(1) require primary candidates to repay matching funds received which are in excess of the amount to which the candidates are entitled. A candidate's committee may receive matching funds in excess of the amount to which it is entitled if, for example, it receives matching funds after the candidate's date of ineligibility and the candidate had no net outstanding campaign obligations to justify the amount of a post-ineligibility payment. This can occur if the candidate includes on his or her NOCO statement accounts payable for nonqualified campaign expenses. In such a situation, the Commission's audit may result in the correction of the NOCO statement and a dollar for dollar repayment of the amount determined to exceed the candidate's entitlement.

In addition to the (b)(1) repayment, paragraph (b)(2) of § 9038.2 requires repayment of a portion of all nonqualified campaign expenses incurred and paid between the campaign's date of inception and the date on which the committee's accounts no longer contain any matching funds. Thus, concerns have been raised that if a candidate's entitlement was artificially increased as a result of nonqualified campaign expenses, and a 100 percent repayment is sought under (b)(1), these nonqualified campaign expenses should be excluded when calculating the amount repayable under (b)(2), to avoid seeking repayment twice for the same funds, or "double counting" them.

The Commission has now concluded that the public funding statutes establish separate bases for seeking repayments of payments in excess of a candidate's entitlement and repayments of amounts spent for nonqualified campaign expenses. Accordingly, new language has been added to the final rules to indicate that repayment determinations will be sought under § 9038.2(b)(2) for nonqualified campaign expenses paid before the point when the committee's accounts no longer contain matching funds, regardless of whether a separate repayment determination is sought under § 9038.2(b)(1).

The final rules also address situations in which primary candidates have exceeded both the spending limits for a particular state and the overall spending limit. 11 CFR 9038.2(b)(2)(v). Disbursements in excess of these

spending limits are considered nonqualified campaign expenses. The Commission sought comments on two possible methods for calculating the candidate's repayment obligations under 11 CFR 9038.2(b)(2) in this situation. The first approach treats the state expenditure limitations and the overall expenditure limitation as separate for repayment purposes, but avoids dual repayment for disbursements that exceed both limits. Thus, this method operates by assuming that expenditures should count against the spending limits in the order in which they are paid. This permits identification of those particular expenditures that exceed both limits. To avoid double counting, the total amount of disbursements exceeding both limits are then subtracted from the excessive amount repayable under one limit or the other. Although these disbursements are considered nonqualified campaign expenses for two reasons, they are subject to repayment only once.

In contrast, the second approach considered by the Commission simply calculates the repayment using only the larger of the two excessive amounts. The Commission has used the second method in an audit from the 1984 Presidential election cycle. This method assumes that the same disbursements cause both overages, since few, if any, committees that exceed the overall spending limit are able to stay within the state-by-state spending limits. For example, where the amount in excess of the overall limit is larger than the amount in excess of the state limits, the second approach operates by denoting the amount in excess of the state-by-state limitations as a subset of the overall expenditure limitation, regardless of when the expenditures were paid by the committee. To avoid the possibility of double counting, the expenditures that exceed the state-by-state limits are subsumed into the expenditures that exceed the overall limit. Conversely, if the amount of expenditures exceeding the overall limits is the lesser amount, it would be subsumed into the amount of expenditures exceeding the state limits.

The Commission has now concluded that the second method is the better approach. Accordingly, new § 9038.2(b)(2)(v) incorporates this method.

New paragraph (b)(2)(ii)(D) has also been added to indicate that the use of federal funds for continuing to campaign after a candidate's date of ineligibility will be considered nonqualified campaign expenses. See revised 11 CFR 9034.4(a)(3)(ii).

The Commission is now adding language to 11 CFR 9038.2(b)(4) to

specifically require the repayment of net income received from the investment of surplus public funds after the candidate's date of ineligibility. The Commission's rules at 11 CFR 9004.5, which pertain to general election candidates, already provide for the repayment of interest and other forms of income derived from the investment of public funds. Please note, however, that the receipt of such investment income before a primary candidate's date of ineligibility simply reduces the candidate's net outstanding campaign obligations and increases the amount of any surplus repayment.

The new rules also clarify that the amount representing total deposits under 11 CFR 9038.3(c)(2) is used to determine the repayment specified in 11 CFR 9038.2(b)(2)(iii): A similar clarification has been included in 11 CFR 9007.2(b)(2)(iii). Finally, § 9038.2(b)(2)(iii) is amended to clarify that the last-in, first-out method of determining when a committee's account no longer contains matching funds only applies to committees that received matching funds after the candidate's date of ineligibility.

#### *Section 9038.3 Liquidation of Obligations; Repayment*

This section generally follows previous § 9038.3.

#### **Part 9039—Review and Investigation Authority**

There are no changes in this part.