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FEDERAL ELECTION COMMISSION

11 CFR Parts 9007 and 9038

[Notice 1985-1]

Repayments by Publicly Financed Presidential Candidates

AGENCY: Federal Election Commission.

ACTION: Final rule; Second Transmittal to Congress.

SUMMARY: The Commission announces the resubmission to Congress of revised regulations governing certain repayments by publicly financed Presidential candidates. 11 CFR Parts 9007 and 9038. These regulations were first transmitted to Congress on August 17, 1984. *See* 49 FR 33225 (August 22, 1984). However, thirty legislative days had not expired when Congress adjourned on October 12, 1984. The Commission is retransmitting these regulations prior to final promulgation. Further information is provided in the supplementary information that follows.

EFFECTIVE DATES: Further action, including the announcement of an effective date, will be taken by the Commission after these regulations have been before the Congress 30 legislative days.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel (202) 523-4143 or Toll Free (800) 424-9530.

SUPPLEMENTARY INFORMATION: On August 17, 1984, the Commission transmitted to Congress revised rules governing the formula used to determine repayments by Presidential candidates receiving public financing under Title 26. *See* 49 FR 33225 (August 22, 1984). These regulations had not been before Congress for 30 legislative days prior to its adjournment on October 12, 1984. Accordingly, the Commission resubmitted these rules and their explanation and justification to Congress on March 5, 1985.

Explanation and Justification

On May 15, 1984, the U.S. Court of Appeals for the D.C. Circuit held that repayments by publicly-financed Presidential primary candidates for non-qualified campaign expenses should be "limited to the amount of federal funds that the Commission reasonably determined were spent" by the candidates for such purposes. *Kennedy for President Committee et al.* v. *Federal Election Commission*, 734 F.2d 1558 (D.C. Cir. 1984); *Reagan for President Committee* v. *Federal Election Commission*, 734 F.2d 1569, 1570 (D.C. Cir. 1984). In accordance with the court's order, the Commission has revised its regulations, which currently require repayment of the total amount spent on non-qualified campaign expenses. *See*, 11 CFR 9007.2(b)(2) and 9038.2(b)(2) (1983). The revised regulations implement a pro-rata formula based on the proportion of federal funds to total funds received by the candidate. The amount of any repayment sought would then be a similar proportion of the total amount spent on non-qualified campaign expenses. In the case of Presidential primary candidates, the proportion of federal funds certified will be determined as of the candidate's date of ineligibility. In the general election, a pro-rata formula will only be used for major party candidates who had received private contributions to make up a deficiency in the Fund and for minor or new party candidates receiving partial Federal funding. The use of such formulas is consistent with the court's opinion, which does not require a mathematically precise determination of the amount of the Federal funds spent improperly but only a reasonable determination of the amount of Federal matching funds so used. *Kennedy supra* at 1562. Moreover, the revisions are limited to repayment determinations under 26 U.S.C. 9007(b)(4) and 9038(b)(2), as those were the only types of repayment determinations addressed in the *Kennedy* and *Reagan* decisions.

To demonstrate how these formulas will operate, the Commission has prepared two examples of hypothetical repayment determinations under 26 U.S.C. 9038(b)(2). Although the examples deal with repayments by Presidential primary candidates, they may be analogized to repayments by general election candidates as the issues presented in both cases are similar. The examples cover hypothetical repayments by candidates in a surplus and in a deficit position.

Illustration No. 1: Surplus Candidate

Assumptions

Date of ineligibility (DOI): 7/19/84
Surplus on DOI: $1,000,000
Matching funds received through DOI: $8,000,000 (net)
Total deposits through DOI: $20,000,000
Non-qualified campaign expenses incurred pre-DOI: $100,000 (in excess of New Hampshire limit)
Non-qualified campaign expenses incurred post-DOI: $25,000 (purchase of 1984 Corvette)

1. Calculate 26 U.S.C. 9038(b)(3) ratio and determine amount of 26 U.S.C. 9038(b)(3) surplus repayment.

The Audit staff verified the Candidate's NOCO statement (as of 7/19/84) and reached agreement with the Treasurer as to the amount of the surplus at DOI (i.e., $1,000,000). The Audit staff then calculated the 26 U.S.C. 9038(b)(3) ratio using figures developed by reviewing reports and records of the Committee. The ratio calculated was (40%)

$$\frac{\$8,000,000}{\$20,000,000}$$

Applying this ratio (40%) to the verified surplus ($1,000,000),[1] the 26 U.S.C. 9038(b)(3) repayment amount becomes $400,000. Since some estimates (for winding down costs) were used to calculate the surplus, adjustments to the amount repayable may be appropriate as a result of audit fieldwork updates.

2. Calculate 26 U.S.C. 9038(b)(2) ratio and determine amount of 26 U.S.C. 9038(b)(2) repayment for non-qualified campaign expenses.

In order to determine the repayment for $100,000 in expenditures in excess of the New Hampshire state limit, several calculations and adjustments were

[1] The Treasurer included $25,000 in accounts payable for expenses chargeable in the New Hampshire limit and arrived at a calculated surplus of $975,000. The Audit staff excluded the $25,000 in accounts payable for non-qualified campaign expenses, thus making the surplus $1,000,000.

performed by the Audit staff. First, the ratio had to be calculated. In this case, the Treasurer had workpapers supporting his calculation of the 26 U.S.C. 9038(b)(2) ratio and the Audit staff verified his figures. The Treasurer's ratio was 38.7755%

$$\frac{\$7,600,000}{\$19,600,000}$$

The Treasurer reasoned that since $400,000 was to be repaid via the 26 U.S.C. 9038(b)(3) repayment, actual matching funds certified (NET) was equal to matching funds certified through DOI ($8,000,000) less the $400,000 to be repaid. A similar adjustment was made to the denominator. The Audit staff explained that for purposes of calculating the 26 U.S.C. 9038(b)(2) ratio, repayments pursuant to 26 U.S.C. 9038(b)(1) and (b)(3) did not come into consideration.[2] The 26 U.S.C. 9038(B)(2) ratio was calculated to be 40%

$$\frac{\$8,000,000}{\$20,000,000}$$

Since the $100,000 ($75,000 paid and $25,000 yet to be paid) were the only non-qualified expenses incurred prior to date of ineligibility, the Audit staff simply multiplied 40% times $100,000 to arrive at the amount ($40,000) repayable pursuant to 26 U.S.C. 9038(b)(2).

With respect to the review of post-DOI disbursements, the Audit staff noted a $25,000 payment for purchase of an automobile made on 8/2/84. It was also noted that the Treasurer had properly: (1) Not included this amount for purposes of inclusion in the NOCO statement and (2) considered this expense to have been defrayed with excess campaign funds pursuant to 2 U.S.C. 439a. (The Committee's calculated residual funds after all repayments and qualified expenses were satisfied, amounted to approximately $560,000).

In summary, the total repayment requested would have been as follows:

26 U.S.C. 9038(b)(3):

$$\frac{\$8,000,000}{\$20,000,000} \times \$1,000,000 = \$400,000$$

26 U.S.C. 9038(b)(2):

$$\frac{\$8,000,000}{\$20,000,000} \times \$100,000 = \$40,000$$

Total Repayment—$440,000

Illustration No. 2: Deficit Candidate

Assumptions

Date of ineligibility (DOI): 3/20/84

Matching Funds Certified Through DOI: $3,000,000[3]

Total Contributions Deposited Through DOI: $6,000,000

Amount of Non-Qualified Expenses incurred Pre-DOI:

Undocumented	$50,000
Excess Iowa	25,000
Total 26 U.S.C. 9038(b)(2) incurred Pre-DOI	75,000

Amount of Non-Qualified Expenses incurred Post-DOI:

Non-qualified type	Date incurred	Date paid	Amount paid
Non-campaign related (Convention expenses)	June 1, 1984	July 1, 1984	$20,000
Transfer to National Party	May 4, 1985	May 4, 1985	5,000
Total Post-DOI Non-Qualified			25,000

Amount of Last Matching Fund Payment: $1,750 on 2/5/85

1. Calculate 26 U.S.C. 9038(b)(2) ratio and resultant repayment amount.

During initial fieldwork, the Audit staff reviewed workpapers prepared by the Treasurer concerning the Committee's NOCO position and 26 U.S.C. 9038(b)(2) repayment situation. The Audit staff verified the Committee's NOCO position (entitlement). Several differences were noted between the Committee Treasurer's calculations and those performed by the Audit staff.

The Treasurer did not include the $300,000 matching payment received on 3/23/84 in computing the 26 U.S.C. 9038(b)(2) ratio. This appeared to be an oversight on the Treasurer's part. The Audit staff pointed out that the 26 U.S.C. 9038(b)(2) ratio (both numerator and denominator) is to include the amount of matching funds *certified* through the date of ineligibility, whether or not received by that date. Hence, the correct ratio for 26 U.S.C. 9038(b)(2) repayment purposes was

$$\frac{\$3,000,000}{\$3,000,000 + \$6,000,000}$$

or 33.3333%;

not the 31.0345% or

$$\frac{\$2,700,000}{\$2,700,000 + \$6,000,000}$$

as originally calculated by the Treasurer. Applying the 33.3333% ratio to the amount of non-qualified campaign expenses incurred prior to the date of ineligibility ($75,000), the repayment amount was $25,000.

The Audit staff verified the figures contained on the Treasurer's NOCO workpapers. It was noted that the Treasurer has included $25,000 in non-qualified expenses as a payable on her NOCO statement. This amount represented expenses for materials and services used in February 1984 which had not been paid and are included in the pre-ineligibility non-qualified expenses included above. The Audit staff explained that, if permitted, inclusion of the $25,000 in non-qualified campaign expenses could result in an additional $25,000 in matching fund entitlement.

During the audit fieldwork update, the Audit staff reviewed expenses incurred after the date of ineligibility, the updated NOCO statements sumbitted, and the liquidation of matching fund payments received after the date of ineligibility. It was noted that the Treasurer included on her NOCO statement, $20,000 in expenses relating to the candidate's and his staff's travel, food and lodging costs at the nominating convention. The Audit staff pointed out two problems with the Treasurer's approach.

First, the $20,000 in convention-related expenses were not valid winding down costs and, therefore, could not be defrayed with matching funds. The

[2] There is no adjustment for repayments under 26 U.S.C. 9038(b)(1) or (b)(3) because the repayment formula for 9039(b)(2) is based on the amount of funds certified to the candidate and therefore available to defray non-qualified campaign expenses. This is so even if the Commission may later determine that the candidate was not entitled to a portion of the funds or that the candidate had a surplus.

[3] Actual matching funds received through DOI totaled $2,700,000; however, a certification for $300,000 was approved on 3/18/84, with the resulting payment not received until 3/23/84.

Audit staff informed the Treasurer that the $20,000 payment was a non-qualified campaign expense subject to repayment pursuant to 26 U.S.C. 9038(b)(2). The Treasurer agreed.

Second, for the same reasons that the $25,000 in pre-DOI non-qualified campaign expenses could not be included on the NOCO statement, the $20,000 in post-DOI non-qualified campaign expenses also could not be included.

Thus, the entitlement as calculated by the Treasurer was reduced by $20,000[4] and the 26 U.S.C. 9038(b)(2) ratio was applied to the $20,000 which resulted in a repayment amount of $6,666.67 for convention expenses. It should be noted that the $5,000 transfer (dated 5/4/85) was made after all matching funds received had been disposed of and thus, this transfer was considered to have been made using non-federal monies.

The total 26 U.S.C. 9038(b)(2) repayment is $31,666.67, comprised of the following:

Pre-DOI non-qualified campaign expenses ($75,000 × 33.3333%)	$25,000.00
Post-DOI non-qualified expenses ($20,000 × 33.3333%)	6,666.67
Total 26 U.S.C. 9038(b)(2) Repayment	31,666.67

At the close of follow-up fieldwork, the Treasurer inquired concerning the possible impact of settling a $500,000 debt for $50,000 in the near future. The Audit staff advised her of the Commission's debt settlement procedures and informed the Treasurer that all NOCO statements filed carried this debt at $500,000. Should the debt be settled for less, it was the Commission's policy to recalculate entitlement based on the $50,000 settlement amount, and seek a 26 U.S.C. 9038(b)(1) repayment, if appropriate.

Statutory Authority

(26 U.S.C. 9007, 9038)

List of Subjects 11 CFR Parts 9007 and 9038

Campaign funds, Administrative practice and procedure, Political candidates.

PART 9007—[AMENDED]

11. CFR Part 9007 is amended by revising §§ 9007.2(b)(2)(i) introductory text, and (b)(2)(ii)(B), (C) and (D); and adding (b)(2)(iii) as follows:

[4] To the extent the candidate's entitlement was inflated by this amount, a repayment determination would also be made under 26 U.S.C. 9038(b)(1).

§ 9007.2 Repayments.

* * * * *

(b) * * *

(2) * * *

(i) If the Commission determines that any amount of any payment to an eligible candidate from the Fund was used for purposes other than those described in paragraphs (A) through (C) below, it will notify the candidate of the amount so used, and such candidate shall pay to the United States Treasury an amount equal to such amount.

* * * * *

(ii) * * *

(B) Determinations that amounts spent by a candidate, a candidate's authorized committee(s), or agent(s) from the Fund were not documented in accordance with 11 CFR 9003.5;

(C) Determinations that any portion of the payments made to a candidate from the Fund was expended in violation of State or Federal law; and

(D) Determinations that any portion of the payments made to a candidate from the Fund was used to defray expenses resulting from a violation of State or Federal Law, such as the payment of fines or penalties.

(iii) In the case of a candidate who has received contributions pursuant to 11 CFR 9003.3 (b) or (c), the amount of any repayment sought under this section shall bear the same ratio to the total amount determined to have been used for non-qualified campaign expenses as the amount of payments certified to the candidate from the Fund bears to the total amount of deposits of contributions and federal funds, as of December 31, of the Presidential election year.

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PART 9038—[AMENDED]

11 CFR Part 9038 is amended by revising § 9038.2(b)(2)(i) introductory text, adding (b)(2)(iii) and revising (b)(3) as follows:

§ 9038.2 Repayments.

* * * * *

(b) * * *

(2) * * *

(i) The Commission may determine that amounts of any payments made to a candidate from the matching payment account were used for purposes other than those set forth in (A)–(C) below:

* * * * *

(iii) The amount of any repayment sought under this section shall bear the same ratio to the total amount determined to have been used for non-qualified campaign expenses as the amount of matching funds certified to the candidate bears to the total amount of deposits of contributions and matching funds, as of the candidate's date of ineligibility.

(3) *Failure to Provide Adequate Documentation.* The Commission may determine that amount(s) spent by the candidate, the candidate's authorized committee(s), or agents were not documented in accordance with 11 CFR 9033.11. The amount of any repayment sought under this section shall be determined by using the formula set forth in 11 CFR 9038.2(b)(2)(iii).

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Dated: March 5, 1985.

John Warren McGarry,

Chairman.

[FR Doc. 85-5591 Filed 3-7-85; 8:45 am]

BILLING CODE 6715-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 5

Delegations of Authority and Organization; Director, Center for Devices and Radiological Health

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the regulations for delegations of authority on medical devices and electronic products to add new delegations to the Director and Deputy Director, Center for Devices and Radiological Health (CDRH).

EFFECTIVE DATE: March 8, 1985.

FOR FURTHER INFORMATION CONTACT: Robert L. Miller, Office of Management and Operations (HFA-340), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4976.

SUPPLEMENTARY INFORMATION: FDA is amending the delegations of authority to redelegate the authority to CDRH officials to issue notices relating to the approval, denial of approval, or withdrawal of approval of premarket approval applications (PMA's) or supplemental PMA's and to issue notices of the availability of approved variances, and amendments or extensions thereof, for electronic products. This document amends § 5.53 *Approval, disapproval, or withdrawal of approval of product development protocols and applications for premarket approval for medical devices* (21 CFR 5.53) and § 5.86 *Variances from performance standards for electronic products* (21 CFR 5.86) to delegate