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Part IX

Federal Election Commission

**Presidential Election Campaign Fund;
Presidential Primary Matching Fund**

FEDERAL ELECTION COMMISSION

11 CFR Parts 9032, 9033, 9034, and 9035

[Notice 1979-20]

Presidential Election Campaign Fund; Presidential Primary Matching Fund

AGENCY: Federal Election Commission.

ACTION: Transmittal of Regulations to Congress.

SUMMARY: FEC regulations governing the administration of the Presidential Primary Matching Payment Account provided for in Chapter 96 of Title 26, United States Code have been revised. The revised regulations at 11 CFR Chapter I have been transmitted to Congress pursuant to 26 USC 9039(c). The following revisions to the Presidential Primary Matching Fund regulations require a candidate to certify prior to receiving public funds that he or she *has not exceeded and will not exceed* the expenditure limitations at 11 CFR Part 9035. Moreover, under these revisions, a candidate who has knowingly, willfully and substantially exceeded the expenditure limitations at 11 CFR Part 9035 prior to requesting certification for matching funds will be ineligible to receive public funds. In addition, a number of technical amendments are made to 11 CFR Parts 9033 and 9034 to conform to the new regulations. Further information on the effect of the revised regulations is contained in the supplementary information below. 26 USC 9039(c) requires that any rule or regulation prescribed by the Commission to implement Chapter 96 of Title 26, United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate prior to final promulgation. If neither House of Congress disapproves the regulations within 30 legislative days of their transmittal, the Commission may prescribe the regulations in question. The following regulations were transmitted to Congress on October 31, 1979.

EFFECTIVE DATE: Further action, including the announcement of an effective date, will be taken by the Commission after these regulations have been before Congress 30 legislative days in accordance with 26 U.S.C. 9039(c).

FOR FURTHER INFORMATION CONTACT: Patricia Ann Fiori, Assistant General Counsel, 1325 K Street N.W., Washington, D.C. 20510 (202) 523-4143.

SUPPLEMENTARY INFORMATION: The Commission received two comments in

response to its September 27, 1979 Notice of Proposed Rulemaking (44 FR 5594). These comments recommended that the proposed regulations be modified by removing any option for a candidate who has knowingly and willfully exceeded expenditure limitations to become eligible for public funds. This recommendation has been incorporated into the revised regulations.

Explanation and Justification of Revised Regulations Governing Presidential Primary Matching Fund Eligibility

The following revisions to the Presidential Primary Matching Fund regulations require a candidate to certify prior to receiving public funds that he or she *has not exceeded and will not exceed* the expenditure limitations at 11 CFR Part 9035. Moreover, under these revisions, a candidate who has knowingly, willfully and substantially exceeded the expenditure limitations at 11 CFR Part 9035 prior to requesting certification for matching funds will be ineligible to receive public funds.

Statutory provisions at 26 U.S.C. 9033(b)(1) state that in order to receive matching funds, a candidate must certify that the candidate and his or her authorized committees "will not incur qualified campaign expenses in excess of the limitations on such expenses under [26 U.S.C.] section 9035." While eligibility requirements of Section 9033(b)(1) may be interpreted as having only prospective application, the expenditure limitation provisions, as well as the legislative history and underlying purpose of the public financing statute indicate that the certification requirements with regard to candidate expenditures should have retrospective, as well as prospective, application.

Expenditure limitation provisions at 26 U.S.C. 9035 state that "No candidate shall knowingly incur qualified campaign expenses in excess of" certain specified amounts. The term "candidate" is defined very broadly to mean any "individual who seeks nomination for election to be President of the United States" (26 U.S.C. 9032(2)). Consequently, under 26 U.S.C. 9035, the expenditure limitations may be viewed as applying to a presidential candidate from the time his candidacy begins, not only from the time of certification. Hence, 26 U.S.C. 9035 strongly indicates that expenditure limitations applicable to presidential primary candidates who seek public funds are to be given retrospective, as well as prospective, application.

Further indication that the expenditure limitations are to be given

retrospective application can also be found in the legislative history of the statute which established the Primary Matching Fund system.¹ The certification requirements of 26 U.S.C. 9033(b) were enacted as part of the Federal Election Campaign Act Amendments of 1974 (Pub. L. 93-443, 88 Stat. 1263, 1974). That law, as originally adopted, imposed expenditure limitations on all federal candidates, regardless of whether those candidates accepted public funding. Thus, when Congress enacted the expenditure limitations and certification requirements for publicly financed candidates, it did so on the assumption that expenditures by *all* candidates, not only publicly financed candidates, would be limited.² In that context, the use of the future tense at 26 U.S.C. 9033(b)(1) does not necessarily indicate that Congress intended to give only prospective application to the expenditure limitations and certification requirements. Rather, it is more consistent with the legislative history of the public financing statute to interpret the expenditure limitation and certification requirements as having both retrospective and prospective application.

Moreover, retrospective application of the expenditure limitations to candidates who seek matching funds is consistent with the manifest purpose of the statute establishing the public financing system for presidential candidates.³ The legislative history of the matching fund system indicates that the primary purpose of that legislation was to curb "abuses by special interest groups and big money . . . in connection with campaigns to the office of President."⁴ Congress sought to further this purpose by "drastically reducing the amounts which may be expended by the candidate."⁵ It would thus run counter to the very purpose of the public financing statute to allow candidates who knowingly, willfully and substantially exceed expenditure

¹Note that in *Train v. Colorado Public Interest Research Group, Inc.* 426 U.S. 1, 9-10 (1976), the Court stated that however clear a statute may appear on its face, "there certainly is no rule of law forbidding a court from resorting to legislative history to determine the intent of Congress."

²Note that in *Buckley v. Valeo*, 424 U.S. 1 (1976), those provisions imposing limitations on campaign expenditures by candidates who had not accepted public funding were found unconstitutional.

³In considering statutory language, the court, in *Carlledge v. Miller*, 457 F. Supp. 1146, 1154 (1978), noted that "a literal interpretation of the words of a statute is not always a safe guide to its meaning" and should be "disregarded when it defeats the manifest purpose of the statute as a whole."

⁴H.R. Rep. No. 93-1239, 94th Cong., 2nd Sess. 13 (1974).

⁵S. Rep. No. 93-689, 94th Cong., 2nd Sess. 5 (1974).

limitations prior to seeking certification to subsequently receive public funds. Such an outcome would permit a candidate to make vast amounts of campaign expenditures, and nevertheless receive matching payments, thereby defeating the basic purpose underlying the enactment of public financing.

An explanation of each revision to 11 CFR Chapter I follows.

11 CFR 9032.9:

§ 9032.9 *Qualified campaign expense.*

The only revision in the definition of qualified campaign expense is to specify that if the incurrence or payment of an expenditure violates any regulation prescribed under federal or appropriate State law, that expenditure will not be considered a qualified campaign expense. Regulations promulgated on May 7, 1979, follow the statutory language of 26 U.S.C. 9032(9)(B) and provide only that an expenditure which violates any law of the United States or of the State in which the expense is incurred or paid is not a qualified campaign expense. Extending the exclusion to expenditures which violate regulations prescribed under such federal or State law furthers the intent of 26 U.S.C. 9032(9)(B) and is sound public policy.

With this revision, it will be clear that any expenditure made by a candidate in excess of the expenditure limitations under 11 CFR Part 9035 will not be considered a qualified campaign expense. Regulations at 11 CFR Part 9035 provide that no candidate, from the time he or she becomes a candidate, may exceed specified limitations on campaign expenditures. Thus, any expenditures made by a candidate prior to certification in excess of those limitations will not be considered qualified campaign expenses and hence are subject to repayment under 11 CFR 9038.2

11 CFR 9033.2(b):

§ 9033.2 *Candidate certification; threshold amount.*

Subsection (b) is revised to require a candidate and that candidate's authorized committees to certify prior to receiving matching funds that they *have not exceeded and will not exceed* expenditure limitations at 11 CFR Part 9035. Regulations promulgated on May 7, 1979 required only that the candidate and his or her committees certify that they *will not exceed* expenditure limitations at 11 CFR Part 9035. As discussed above, this revision is consistent with the basic underlying purposes of the public financing statute.

[See also explanation and justification of 11 CFR Part 9035.]

11 CFR 9033.3:

§ 9033.3 *Expenditure limitation certification.*

A new section dealing with the expenditure limitation certification is created. Under this section, if the Commission determines that a candidate has knowingly, willfully and substantially exceeded the expenditure limitations at 11 CFR Part 9035 prior to applying for certification, that candidate is ineligible to receive matching funds. As discussed above, it would be inconsistent with the basic underlying purposes of the public financing statute to permit such candidates to receive public funds.

This section also sets forth a procedure under which a candidate may challenge the Commission's initial determination that he or she is ineligible. This procedure includes the following elements: Notice to the candidate of the legal and factual reasons for the Commission's determination; opportunity for the candidate to present, in writing, legal and factual materials to demonstrate that he or she has not knowingly and willfully exceeded expenditure limitations; a final determination by the Commission on the basis of all evidence presented; and a statement of reasons underlying the Commission's determination.

The procedure set forth in this section comports with due process requirements. The Federal Election Campaign Act does not provide that Administrative Procedure Act (APA) requirements for adjudicative hearings (5 U.S.C. 554-557) apply to determinations by the Commission, while APA requirements for a full trial type hearing may not be applicable, procedural due process requirements mandate that prior to denial of eligibility a candidate be afforded some type of opportunity to demonstrate to the Commission that such denial is not warranted. (See K. Davis, Administrative Law of the Seventies, section 7.00-1-3 (Supp. 1977); *Mathews v. Eldridge*, 424 U.S. 319 (1976).) (It should be noted that even if the APA requirements were applicable to determinations by the Commission, the APA itself contains a significant exception to the requirement for a full trial type hearing by providing for the submission of evidence in written form under 5 U.S.C. 556(d).)

11 CFR Part 9035:

Part 9035 *Campaign expenditure limitations.*

This section is revised to provide that no "candidate" shall exceed certain specified limitations. The term "candidate" is very broadly defined at 11 CFR 9032.2 to include all candidates who seek nomination for election to the office of President. Regulations promulgated on May 7, 1979, made the expenditure limitations applicable to only those candidates who had accepted matching funds. With this revision, it is clear that the expenditure limitations apply to a candidate from the time the individual becomes a candidate, rather than from the time of certification for matching funds.

This section is also revised to broaden the reference to expenditures which are subject to limitation. Regulations promulgated on May 7, 1979 provided that a candidate was limited in the amount of "qualified campaign expenses" he or she could incur. The revised regulation provides that a candidate and his or her authorized committees will not incur "expenditures in connection with the candidate's campaign for nomination" in excess of the specified limitation. Any expenditure which is in excess of the specified limitations is by definition not a "qualified campaign expense" because the incurring or payment of that expenditure constitutes a violation of federal law and regulation prescribed thereunder. Nevertheless, expenditures in excess of the limitations should obviously be considered expenditures which count against the candidate's limitation.

11 CFR 9032.9 (a) and (a)(1) through (a)(3) are revised to read as follows:

§ 9032.9 *Qualified campaign expense.*

(a) "Qualified campaign expense" means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value:

(1) Incurred by a candidate or his or her authorized committees from the date the individual becomes a candidate through the last day of the candidate's eligibility as determined under 11 CFR 9033.4;

(2) Made in connection with his or her campaign for nomination; and

(3) Neither the incurrence nor payment of which constitutes a violation of any law of the United States or of any law of any State in which the expense is incurred or paid, or of any regulation prescribed under such law of the United States or of any State, except that any State law which has been preempted by the Federal Election Campaign Act of 1971, as amended, shall not be

considered a State law for purposes of this Subchapter.

11 CFR 9033.2(b) is revised to read as follows:

§ 9033.2 Candidate certifications; threshold amount.

(b) The candidate and his or her authorized committee(s) shall certify that they have not incurred and will not incur expenditures in connection with the candidate's campaign for nomination, which expenditures are in excess of the limitations under 11 CFR Part 9035.

Present §§ 9033.3 through 9033.8 are redesignated as §§ 9033.4 through 9033.9 respectively. A new § 9033.3 is added to read as follows:

§ 9033.3 Expenditure limitation certification.

(a) If the Commission makes an initial determination that a candidate or the candidate's authorized committee(s) have knowingly, willfully, and substantially exceeded the expenditure limitations at 11 CFR Part 9035 prior to that candidate's application for certification, the Commission may make an initial determination that the candidate is ineligible to receive matching funds.

(b) The Commission shall notify the candidate of its initial determination, provide the legal and factual reasons for its initial determination and advise the candidate of the evidence upon which its initial determination is based. The candidate will be given an opportunity, within 20 days of the Commission's notice, to submit written legal or factual materials to demonstrate that he or she has not knowingly, willfully and substantially exceeded the expenditure limitations at 11 CFR Part 9035.

(c) The Commission will consider all written legal or factual materials submitted by the candidate under 11 CFR 9033.3(b) in making its final determination. These materials may be submitted by counsel on the candidate's behalf.

(d) A final determination of the candidate's ineligibility by the Commission shall be accompanied by a written statement of reasons for the Commission's action. This statement shall explain the reasons underlying the Commission's determination and shall summarize the results of any investigation upon which the determination is based.

(e) A candidate who receives a final determination of ineligibility under 11 CFR 9033.3(d) shall be ineligible to

receive matching fund payments under 11 CFR 9034.1.

11 CFR 9035.1 is revised, including the caption to read as follows:

§ 9035.1 Campaign expenditures limitations.

(a) No candidate or his or her authorized committee(s) shall knowingly incur expenditures in connection with the candidate's campaign for nomination, which expenditures, in the aggregate, exceed \$10,000,000 (as adjusted under 2 USC 441a(c)), except that the aggregate expenditures by a candidate in any one State shall not exceed the greater of: 16 cents (as adjusted under 2 USC 441a(c)) multiplied by the voting age population of the State (as certified under 2 USC 441a(e)); or \$200,000 (as adjusted under 2 USC 441a(c)).

(b) The expenditure limitations of 11 CFR 9035.1 shall not apply to a candidate who at no time receives matching funds.

The following technical amendments are made to 11 CFR Parts 9033 and 9034:

1. 11 CFR 9033.1(c): Delete "§ 9033.8" and substitute "11 CFR 9033.9."
2. 11 CFR 9033.2(f): Delete "2 U.S.C. 441a(b)" and substitute "11 CFR 9035"; and delete "11 CFR 9033.8" and substitute "11 CFR 9033.9."
3. 11 CFR 9033.5, as redesignated: Delete "paragraph (a), (b) or (c) (11 CFR 9033.4(a), (b) (c))" and substitute "11 CFR 9033.5(a), (b) or (c)."
4. 11 CFR 9033.5(a)(3), as redesignated: Delete "§ 9033.5" and substitute "11 CFR 9033.6."
5. 11 CFR 9033.5(b)(1), as redesignated: Delete "11 CFR 9033.6" and substitute "11 CFR 9033.7."
6. 11 CFR 9033.6(a), as redesignated: Delete "subsection (e) (11 CFR 9033.5(e))" and substitute "11 CFR 9033.6(e)."
7. 11 CFR 9033.7(a), as redesignated: Delete "§ 9033.4(b)" and substitute "11 CFR 9033.5(b)"; and delete "11 CFR 9033.5(e)" and substitute "11 CFR 9033.6(e)."
8. 11 CFR 9033.7(c), as redesignated: Delete "11 CFR 9033.5(e)" and substitute "11 CFR 9033.6(e)."
9. 11 CFR 9033.7(d), as redesignated: Delete "this section (11 CFR 9033.6)" and substitute "11 CFR 9033.7."
10. 11 CFR 9033.8(a), as redesignated: Delete "§ 9033.4(a)" and substitute "11 CFR 9033.5(a)"; and delete "11 CFR 9033.5(e)" and substitute "11 CFR 9033.6(e)."
11. 11 CFR 9033.8(b), as redesignated: Delete "11 CFR 9033.4(b)" and substitute "11 CFR 9033.5(b)."

12. 11 CFR 9033.9(a), as redesignated: Delete "2 U.S.C. 441a(b)" and substitute "11 CFR 9035".

13. 11 CFR 9034.1(a): Delete "11 CFR 9033.4" and substitute "11 CFR 9033.5."

14. 11 CFR 9034.1(c): Delete "§ 9033.7" and substitute "11 CFR 9033.8;" and delete "11 CFR 9033.8(e)" and substitute "11 CFR 9033.9(e)."

15. 11 CFR 9034.1(d): Delete "2 U.S.C. 441a(b)(1)(A) as adjusted by 2 U.S.C. 441a(c)" and substitute "11 CFR 9035."

16. 11 CFR 9034.4(b): Delete "11 CFR 9033.4" and substitute "11 CFR 9033.5."

17. 11 CFR 9034.4(d): Delete "2 U.S.C. 441a(b)(1)(A)" and substitute "11 CFR 9035."

18. 11 CFR 9034.4(h): Delete "11 CFR 9033.7" and substitute "11 CFR 9033.8;" and delete "11 CFR 9033.8(e)" and substitute "11 CFR 9033.9(e)."

19. 11 CFR 9034.5(a)(1): Delete "11 CFR 9033.4" and substitute "11 CFR 9033.5."

Dated: October 30, 1979.

Robert O. Tiernan,
Chairman, Federal Election Commission.

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