

§ 9037.4

principal campaign committee in the depository designated by the candidate. The account(s) shall be maintained at a State bank, federally chartered depository institution or other depository institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

[56 FR 35944, July 29, 1991]

§ 9037.4 Alphabetized schedules.

If the authorized committee(s) of a candidate file a schedule of itemized receipts, disbursements, or debts and obligations pursuant to 11 CFR 104.3 that was generated directly or indirectly from computerized files or records, the schedule shall list in alphabetical order the sources of the receipts, the payees or the creditors, as appropriate. In the case of individuals, such schedule shall list all contributors, payees, and creditors in alphabetical order by surname.

[60 FR 31885, June 16, 1995]

PART 9038—EXAMINATIONS AND AUDITS

Sec.

9038.1 Audit.

9038.2 Repayments.

9038.3 Liquidation of obligations; repayment.

9038.4 Extensions of time.

9038.5 Petitions for rehearing; stays of repayment determinations.

9038.6 Stale-dated committee checks.

9038.7 Administrative record.

AUTHORITY: 26 U.S.C. 9038 and 9039(b).

SOURCE: 56 FR 35945, July 29, 1991, unless otherwise noted.

§ 9038.1 Audit.

(a) *General.* (1) The Commission will conduct an audit of the qualified campaign expenses of every candidate and his or her authorized committee(s) who received Presidential primary matching funds. The audit may be conducted at any time after the date of the candidate's ineligibility.

(2) In addition, the Commission may conduct other examinations and audits from time to time as it deems necessary to carry out the provisions of this subchapter.

11 CFR Ch. I (1–1–22 Edition)

(3) Information obtained pursuant to any audit and examination conducted under 11 CFR 9038.1(a) (1) and (2) may be used by the Commission as the basis, or partial basis, for its repayment determinations under 11 CFR 9038.2.

(b) *Conduct of fieldwork.* (1) If the candidate or the candidate's authorized committee does not maintain or use any computerized information containing the data listed in 11 CFR 9033.12, the Commission will give the candidate's authorized committee at least two weeks' notice of the Commission's intention to commence fieldwork on the audit and examination. The fieldwork shall be conducted at a site provided by the committee. If the candidate or the candidate's authorized committee maintains or uses computerized information containing any of the data listed in 11 CFR 9033.12, the Commission generally will request such information prior to commencement of audit fieldwork. Such request will be made in writing. The committee shall produce the computerized information no later than 15 calendar days after service of such request. Upon receipt of the computerized information requested and compliance with the technical specifications of 11 CFR 9033.12(b), the Commission will give the candidate's authorized committee at least two weeks' notice of the Commission's intention to commence fieldwork on the audit and examination. The fieldwork shall be conducted at a site provided by the committee. During or after audit fieldwork, the Commission may request additional or updated computerized information which expands the coverage dates of computerized information previously provided, and which may be used for purposes including, but not limited to, updating a statement of net outstanding campaign obligations, or updating the amount chargeable to a state expenditure limit. During or after audit fieldwork, the Commission may also request additional computerized information which was created by or becomes available to the committee and that is of assistance in the Commission's audit. The committee shall produce the additional or updated computerized information no later than 15

calendar days after service of the Commission's request.

(i) *Office space and records.* On the date scheduled for the commencement of fieldwork, the candidate or his or her authorized committee(s) shall provide Commission staff with office space and committee records in accordance with the candidate and committee agreement under 11 CFR 9033.1(b)(6).

(ii) *Availability of committee personnel.* On the date scheduled for the commencement of fieldwork, the candidate or his or her authorized committee(s) shall have committee personnel present at the site of the fieldwork. Such personnel shall be familiar with the committee's records and operation and shall be available to Commission staff to answer questions and to aid in locating records.

(iii) *Failure to provide staff, records or office space.* If the candidate or his or her authorized committee(s) fail to provide adequate office space, personnel or committee records, the Commission may seek judicial intervention under 52 U.S.C. 30107 or 26 U.S.C. 9040(c) to enforce the candidate and committee agreement made under 11 CFR 9033.1(b). Before seeking judicial intervention, the Commission will notify the candidate of his or her failure to comply with the agreement and will recommend corrective action to bring the candidate into compliance. Upon receipt of the Commission's notification, the candidate will have 10 calendar days in which to take the corrective action indicated or to otherwise demonstrate to the Commission in writing that he or she is complying with the candidate and committee agreement.

(iv) If, in the course of the audit process, a dispute arises over the documentation sought or other requirements of the candidate agreement, the candidate may seek review by the Commission of the issues raised. To seek review, the candidate shall submit a written statement, within 10 calendar days after the disputed Commission staff request is made, describing the dispute and indicating the candidate's proposed alternative(s).

(v) If the candidate or his or her authorized committee fails to produce particular records, materials, evidence

or other information requested by the Commission, the Commission may issue an order pursuant to 52 U.S.C. 30107(a)(1) or a subpoena or subpoena duces tecum pursuant to 52 U.S.C. 30107(a)(3). The procedures set forth in 11 CFR 111.11 through 111.15, as appropriate, shall apply to the production of such records, materials, evidence or other information as specified in the order, subpoena or subpoena duces tecum.

(2) Fieldwork will include the following steps designed to keep the candidate and committee informed as to the progress of the audit and to expedite the process:

(i) *Entrance conference.* At the outset of the fieldwork, Commission staff will hold an entrance conference, at which the candidate's representatives will be advised of the purpose of the audit and the general procedures to be followed. Future requirements of the candidate and his or her authorized committee, such as possible repayments to the United States Treasury, will also be discussed. Committee representatives shall provide information and records necessary to conduct the audit, and Commission staff will be available to answer committee questions.

(ii) *Review of records.* During the fieldwork, Commission staff will review committee records and may conduct interviews of committee personnel. Commission staff will be available to explain aspects of the audit and examination as it progresses. Additional meetings between Commission staff and committee personnel may be held from time to time during the fieldwork to discuss possible audit findings and to resolve issues arising during the course of the audit.

(iii) *Exit conference.* At the conclusion of the fieldwork, Commission staff will hold an exit conference to discuss with committee representatives the staff's preliminary findings and recommendations that the staff anticipates it will present to the Commission for approval. Commission staff will advise committee representatives at this conference of the committee's opportunity to respond to these preliminary findings; the projected timetables regarding the issuance of the Preliminary Audit Report, the Audit Report, and

§ 9038.1

11 CFR Ch. I (1–1–22 Edition)

any repayment determination; the committee's opportunity for an administrative review of any repayment determination; and the procedures involved in Commission repayment determinations under 11 CFR 9038.2.

(3) Commission staff may conduct additional fieldwork after the completion of the fieldwork conducted pursuant to 11 CFR 9038.1(b) (1) and (2). Factors that may necessitate such follow-up fieldwork include, but are not limited to, the following:

(i) Committee responses to audit findings;

(ii) Financial activity of the committee subsequent to the fieldwork conducted pursuant to 11 CFR 9038.1(b)(1);

(iii) Committee responses to Commission repayment determinations made under 11 CFR 9038.2.

(4) The Commission will notify the candidate and his or her authorized committee if follow-up fieldwork is necessary. The provisions of 11 CFR 9038.1(b) (1) and (2) shall apply to any additional fieldwork conducted.

(c) *Preliminary Audit Report: Issuance by Commission and committee response.*

(1) Commission staff will prepare a written Preliminary Audit Report, which will be provided to the committee after it is approved by an affirmative vote of four (4) members of the Commission. The Preliminary Audit Report may include—

(i) An evaluation of procedures and systems employed by the candidate and committee to comply with applicable provisions of the Federal Election Campaign Act, the Presidential Election Campaign Fund Act and Commission regulations;

(ii) The accuracy of statements and reports filed with the Commission by the candidate and committee; and

(iii) Preliminary calculations regarding future repayments to the United States Treasury.

(2) The candidate and his or her authorized committee may submit in writing within 60 calendar days after receipt of the Preliminary Audit Report, legal and factual materials disputing or commenting on the proposed findings contained in the Preliminary Audit Report. In addition, the committee shall submit any additional

documentation requested by the Commission. Such materials may be submitted by counsel if the candidate so desires.

(d) *Approval and issuance of audit report.* (1) Before voting on whether to issue and approve an audit report, the Commission will consider any written legal and factual materials timely submitted by the candidate or his or her authorized committee in accordance with paragraph (c) of this section. The Commission-approved audit report may address issues other than those contained in the Preliminary Audit Report. In addition, this report will contain a repayment determination made by the Commission pursuant to 11 CFR 9038.2(c)(1).

(2) The audit report may contain issues that warrant referral to the Office of General Counsel for possible enforcement proceedings under 52 U.S.C. 30109 and 11 CFR part 111.

(3) Addenda to the audit report may be approved and issued by the Commission from time to time as circumstances warrant and as additional information becomes available. Such addenda may be based on follow-up fieldwork conducted under paragraph (b)(3) of this section, and/or information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. The procedures set forth in paragraphs (c) and (d) (1) and (2) of this section will be followed in preparing such addenda. The addenda will be placed on the public record as set forth in paragraph (e) of this section. Such addenda may also include additional repayment determination(s).

(e) *Public release of audit report.* (1) The Commission will consider the audit report in an open session agenda document. The Commission will provide the candidate and the committee with copies of any agenda document to be considered in an open session 24 hours prior to releasing the agenda document to the public.

(2) Following Commission approval of the audit report, the report will be forwarded to the committee and released to the public. The Commission will provide the candidate and committee

with copies of the audit report approved by the Commission 24 hours before releasing the report to the public.

(f)(1) *Sampling.* In conducting an audit of contributions pursuant to this section, the Commission may utilize generally accepted statistical sampling techniques to quantify, in whole or in part, the dollar value of related audit findings. A projection of the total amount of violations based on apparent violations identified in such a sample may become the basis, in whole or in part, of any audit finding.

(2) A committee in responding to a sample-based finding concerning excessive or prohibited contributions shall respond only to the specific sample items used to make the projection. If the committee demonstrates that any apparent errors found among the sample items were not errors, the Commission shall make a new projection based on the reduced number of errors in the sample.

(3) Within 30 days of service of the Final Audit Report, the committee shall submit a check to the United States Treasury for the total amount of any excessive or prohibited contributions not refunded, reattributed or redesignated in a timely manner in accordance with 11 CFR 103.3(b) (1), (2) or (3); or take any other action required by the Commission with respect to sample-based findings.

[56 FR 35945, July 29, 1991; 56 FR 42380, Aug. 27, 1991; 60 FR 31885, June 16, 1995; 64 FR 61781, Nov. 15, 1999; 79 FR 77852, Dec. 29, 2014]

§ 9038.2 Repayments.

(a) *General.* (1) A candidate who has received payments from the matching payment account shall pay the United States Treasury any amounts which the Commission determines to be repayable under this section. In making repayment determinations under this section, the Commission may utilize information obtained from audits and examinations conducted pursuant to 11 CFR 9038.1 and part 9039 or otherwise obtained by the Commission in carrying out its responsibilities under this subchapter.

(2) The Commission will notify the candidate of any repayment determinations made under this section as soon as possible, but not later than 3 years

after the close of the matching payment period. The Commission's issuance of the audit report to the candidate under 11 CFR 9038.1(d) will constitute notification for purposes of this section.

(3) Once the candidate receives notice of the Commission's repayment determination under this section, the candidate should give preference to the repayment over all other outstanding obligations of his or her committee, except for any federal taxes owned by the committee.

(4) Repayments may be made only from the following sources: personal funds of the candidate (without regard to the limitations of 11 CFR 9035.2), contributions and federal funds in the committee's account(s), and any additional funds raised subject to the limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended.

(b) *Bases for repayment*—(1) *Payments in excess of candidate's entitlement.* The Commission may determine that certain portions of the payments made to a candidate from the matching payment account were in excess of the aggregate amount of payments to which such candidate was entitled. Examples of such excessive payments include, but are not limited to, the following:

(i) Payments made to the candidate after the candidate's date of ineligibility where it is later determined that the candidate had no net outstanding campaign obligations as defined in 11 CFR 9034.5;

(ii) Payments or portions of payments made to the candidate which are later determined to have been excessive due to the operation of the Commission's expedited payment procedures as set forth in the Federal Election Commission's Guideline for Presentation in Good Order;

(iii) Payments or portions of payments made on the basis of matched contributions later determined to have been non-matchable;

(iv) Payments or portions of payments made to the candidate which are later determined to have been excessive due to the candidate's failure to include funds received by a fundraising representative committee under 11

§ 9038.2

11 CFR Ch. I (1–1–22 Edition)

CFR 9034.8 on the candidate's statement of net outstanding campaign obligations under 11 CFR 9034.5; and

(v) Payments or portions of payments made to the candidate on the basis of the debts reflected in the candidate's statement of net outstanding campaign obligations, which debts are later settled for an amount less than that stated in the statement of net outstanding campaign obligations.

(2) *Use of funds for non-qualified campaign expenses.* (i) The Commission may determine that amount(s) of any payments made to a candidate from the matching payment account were used for purposes other than those set forth in paragraphs (b)(2)(i) (A)–(C) of this section:

(A) Defrayment of qualified campaign expenses;

(B) Repayment of loans which were used to defray qualified campaign expenses; and

(C) Restoration of funds (other than contributions which were received and expended to defray qualified campaign expenses) which were used to defray qualified campaign expenses.

(ii) Examples of Commission repayment determinations under 11 CFR 9038.2(b)(2) include, but are not limited to, the following:

(A) Determinations that a candidate, a candidate's authorized committee(s) or agents have made expenditures in excess of the limitations set forth in 11 CFR part 9035;

(B) Determinations that funds described in 11 CFR 9038.2(b)(2)(i) were expended in violation of State or Federal law;

(C) Determinations that funds described in 11 CFR 9038.2(b)(2)(i) were expended for expenses resulting from a violation of State or Federal law, such as the payment of fines or penalties; and

(D) Determinations that funds described in 11 CFR 9038.2(b)(2)(i) were expended for costs associated with continuing to campaign after the candidate's date of ineligibility.

(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 candidate's total deposits, as of 90 days after the candidate's date of ineligibility. For the purposes of this paragraph (b)(2)(iii)—

(A) Total deposits is defined in accordance with 11 CFR 9038.3(c)(2); and

(B) In seeking repayment for non-qualified campaign expenses from committees that have received matching fund payments after the candidate's date of ineligibility, the Commission will review committee expenditures to determine at what point committee accounts no longer contain matching funds. In doing this, the Commission will review committee expenditures from the date of the last matching fund payment to which the candidate was entitled, using the assumption that the last payment has been expended on a last-in, first-out basis.

(iv) Repayment determinations under 11 CFR 9038.2(b)(2) will include all non-qualified campaign expenses paid before the point when committee accounts no longer contain matching funds, including non-qualified campaign expenses listed on the candidate's statement of net outstanding campaign obligations that may result in a separate repayment determination under 11 CFR 9038.2(b)(1).

(v) If a candidate or a candidate's authorized committee(s) exceeds both the overall expenditure limitation and one or more State expenditure limitations, as set forth at 11 CFR 9035.1(a), the repayment determination under 11 CFR 9038.2(b)(2)(ii)(A) shall be based on only the larger of either the amount exceeding the State expenditure limitation(s) or the amount exceeding the overall expenditure limitation.

(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).

(4) The Commission may determine that the candidate's net outstanding campaign obligations, as defined in 11

CFR 9034.5, reflect a surplus. The Commission may determine that the net income derived from an investment or other use of surplus public funds after the candidate's date of ineligibility, less Federal, State and local taxes paid on such income, shall be paid to the Treasury.

(c) *Repayment determination procedures.* The Commission's repayment determination will be made in accordance with the procedures set forth at paragraphs (c)(1) through (c)(4) of this section.

(1) *Repayment determination.* The Commission will provide the candidate with a written notice of its repayment determination(s). This notice will be included in the Commission's audit report prepared pursuant to 11 CFR 9038.1(d), or inquiry report pursuant to 11 CFR 9039.3, and will set forth the legal and factual reasons for such determination(s), as well as the evidence upon which any such determination is based. The candidate shall repay to the United States Treasury in accordance with paragraph (d) of this section, the amount which the Commission has determined to be repayable.

(2) *Administrative review of repayment determination.* If a candidate disputes the Commission's repayment determination(s), he or she may request an administrative review of the determination(s) as set forth in paragraph (c)(2)(i) of this section.

(i) *Submission of written materials.* A candidate who disputes the Commission's repayment determination(s) shall submit in writing, within 60 calendar days after service of the Commission's notice, legal and factual materials demonstrating that no repayment, or a lesser repayment, is required. Such materials may be submitted by counsel if the candidate so desires. The candidate's failure to timely raise an issue in written materials presented pursuant to this paragraph will be deemed a waiver of the candidate's right to raise the issue at any future stage of proceedings including any petition for review filed under 26 U.S.C. 9041(a).

(ii) *Oral hearing.* A candidate who submits written materials pursuant to paragraph (c)(2)(i) of this section may at the same time request in writing

that the Commission provide such candidate with an opportunity to address the Commission in open session to demonstrate that no repayment, or a lesser repayment, is required. The candidate should identify in this request the repayment issues he or she wants to address at the oral hearing. If the Commission decides by an affirmative vote of four (4) of its members to grant the candidate's request, it will inform the candidate of the date and time set for the oral hearing. At the date and time set by the Commission, the candidate or candidate's designated representative will be allotted an amount of time in which to make an oral presentation to the Commission based upon the legal and factual materials submitted under paragraph (c)(2)(ii) of this section. The candidate or representative will also have the opportunity to answer any questions from individual members of the Commission.

(3) *Repayment determination upon review.* In deciding whether to revise any repayment determination(s) following an administrative review pursuant to paragraph (c)(2) of this section, the Commission will consider any submission made under paragraph (c)(2)(i) and any oral hearing conducted under paragraph (c)(2)(ii), and may also consider any new or additional information from other sources. A determination following an administrative review that a candidate must repay a certain amount will be accompanied by a written statement of reasons supporting the Commission's determination(s). This statement will explain the legal and factual reasons underlying the Commission's determination(s) and will summarize the results of any investigation(s) upon which the determination(s) are based.

(d) *Repayment period.* (1) Within 90 calendar days of service of the notice of the Commission's repayment determination(s), the candidate shall repay to the United States Treasury the amounts which the Commission has determined to be repayable. Upon application by the candidate, the Commission may grant an extension of up to 90 calendar days in which to make repayment.

§ 9038.3

11 CFR Ch. I (1–1–22 Edition)

(2) If the candidate requests an administrative review of the Commission's repayment determination(s) under paragraph (c)(2) of this section, the time for repayment will be suspended until the Commission has concluded its administrative review of the repayment determination(s). Within 30 calendar days after service of the notice of the Commission's post-administrative review repayment determination(s), the candidate shall repay to the United States Treasury the amounts which the Commission has determined to be repayable. Upon application by the candidate, the Commission may grant an extension of up to 90 calendar days in which to make repayment.

(3) Interest shall be assessed on all repayments made after the initial 90-day repayment period established at paragraph (d)(1) of this section or the 30-day repayment period established at paragraph (d)(2) of this section. The amount of interest due shall be the greater of:

- (i) An amount calculated in accordance with 28 U.S.C. 1961 (a) and (b); or
- (ii) The amount actually earned on the funds set aside under this section.

(e) *Computation of time.* The time periods established by this section shall be computed in accordance with 11 CFR 111.2.

(f) *Additional repayments.* Nothing in this section will prevent the Commission from making additional repayment determinations on one or more of the bases set forth at 11 CFR 9038.2(b) after it has made a repayment determination on any such basis. The Commission may make additional repayment determinations where there exist facts not used as the basis for any previous determination. Any such additional repayment determination will be made in accordance with the provisions of this section.

(g) *Newly-discovered assets.* If, after any repayment determination made under this section, a candidate or his or her authorized committee(s) receives or becomes aware of assets not previously included in any statement of net outstanding campaign obligations submitted pursuant to 11 CFR 9034.5, the candidate or his or her authorized committee(s) shall promptly

notify the Commission of such newly-discovered assets. Newly-discovered assets may include refunds, rebates, late-arriving receivables, and actual receipts for capital assets in excess of the value specified in any previously-submitted statement of net outstanding campaign obligations. Newly-discovered assets may serve as a basis for additional repayment determinations under 11 CFR 9038.2(f).

(h) *Petitions for rehearing; stays pending appeal.* The candidate may file a petition for rehearing of a repayment determination in accordance with 11 CFR 9038.5(a). The candidate may request a stay of a repayment determination in accordance with 11 CFR 9038.5(c) pending the candidate's appeal of that repayment determination.

[56 FR 35945, July 29, 1991, as amended at 60 FR 31886, June 16, 1995; 60 FR 57538, 57539, Nov. 16, 1995; 61 FR 69020, Dec. 31, 1996; 68 FR 47421, Aug. 8, 2003]

§ 9038.3 Liquidation of obligations; repayment.

(a) The candidate may retain amounts received from the matching payment account for a period not exceeding 6 months after the matching payment period to pay qualified campaign expenses incurred by the candidate.

(b) After all obligations have been liquidated, the candidate shall so inform the Commission in writing.

(c)(1) If on the last day of candidate eligibility the candidate's net outstanding campaign obligations, as defined in 11 CFR 9034.5, reflect a surplus, the candidate shall within 30 calendar days of the ineligibility date repay to the Secretary an amount which represents the amount of matching funds contained in the candidate's surplus. The amount shall be an amount equal to that portion of the surplus which bears the same ratio to the total surplus that the total amount received by the candidate from the matching payment account bears to the total deposits made to the candidate's accounts.

(2) For purposes of this subsection, total deposits means all deposits to all

Federal Election Commission

§ 9038.5

candidate accounts minus transfers between accounts, refunds, rebates, reimbursements, checks returned for insufficient funds, proceeds of loans and other similar amounts.

(3) Notwithstanding the payment of any amounts to the United States Treasury under this section, the Commission may make surplus repayment determination(s) which require repayment in accordance with 11 CFR 9038.2.

§ 9038.4 Extensions of time.

(a) It is the policy of the Commission that extensions of time under 11 CFR part 9038 shall not be routinely granted.

(b) Whenever a candidate has a right or is required to take action within a period of time prescribed by 11 CFR part 9038 or by notice given thereunder, the candidate may apply in writing to the Commission for an extension of time in which to exercise such right or take such action. The candidate shall demonstrate in the application for extension that good cause exists for his or her request.

(c) An application for extension of time shall be made at least 7 calendar days prior to the expiration of the time period for which the extension is sought. The Commission may, upon a showing of good cause, grant an extension of time to a candidate who has applied for such extension in a timely manner. The length of time of any extension granted hereunder will be decided by the Commission and may be less than the amount of time sought by the candidate in his or her application. If a candidate seeks an extension of any 60-day response period under 11 CFR part 9038, the Commission may grant no more than one extension to that candidate, which extension shall not exceed 15 days.

(d) If a candidate fails to seek an extension of time, exercise a right or take a required action prior to the expiration of a time period prescribed by 11 CFR part 9038 the Commission may, on the candidate's showing of excusable neglect:

(1) Permit such candidate to exercise his or her right(s), or take such required action(s) after the expiration of the prescribed time period; and

(2) Take into consideration any information obtained in connection with the exercise of any such right or taking of any such action before making decisions or determinations under 11 CFR part 9038.

[56 FR 35945, July 29, 1991, as amended at 60 FR 31887, June 16, 1995]

§ 9038.5 Petitions for rehearing; stays of repayment determinations.

(a) *Petitions for rehearing.* (1) Following the Commission's final determination under 11 CFR 9033.10 or 9034.5(g) or the Commission's repayment determination under 11 CFR 9038.2(c), the candidate may file a petition for rehearing setting forth the relief desired and the legal and factual basis in support. To be considered by the Commission, petitions for rehearing must:

(i) Be filed within 20 calendar days after service of the Commission's final determination or repayment determination;

(ii) Raise new questions of law or fact that would materially alter the Commission's final determination or repayment determination; and

(iii) Set forth clear and convincing grounds why such questions were not and could not have been presented during the original determination process.

(2) If a candidate files a timely petition under this section challenging a Commission repayment determination, the time for repayment of the amount at issue will be suspended until the Commission serves notice on the candidate of its determination on the petition. The time periods for making repayment under 11 CFR 9038.2(d) shall apply to any amounts determined to be repayable following the Commission's consideration of a petition for rehearing under this section.

(b) *Effect of failure to raise issues.* The candidate's failure to raise an argument in a timely fashion during the original determination process or in a petition for rehearing under this section, as appropriate, shall be deemed a waiver of the candidate's right to present such arguments in any future stage of proceedings including any petition for review filed under 26 U.S.C. 9041(a). An issue is not timely raised in a petition for rehearing if it could have

§ 9038.6

been raised earlier in response to the Commission's original determination.

(c) *Stay of repayment determination pending appeal.* (1)(i) The candidate may apply to the Commission for a stay of all or a portion of the amount determined to be repayable under this section or under 11 CFR 9038.2 pending the candidate's appeal of that repayment determination pursuant to 26 U.S.C. 9041(a). The repayment amount requested to be stayed shall not exceed the amount at issue on appeal.

(ii) A request for a stay shall be made in writing and shall be filed within 30 calendar days after service of the Commission's decision on a petition for rehearing under paragraph (a) of this section, or, if no petition for rehearing is filed, within 30 calendar days after service of the Commission's repayment determination under 11 CFR 9038.2(c).

(2) The Commission's approval of a stay request will be conditioned upon the candidate's presentation of evidence in the stay request that he or she:

(i) Has placed the entire amount at issue in a separate interest-bearing account pending the outcome of the appeal and that withdrawals from the account may only be made with the joint signatures of the candidate or his or her agent and a Commission representative; or

(ii) Has posted a surety bond guaranteeing payment of the entire amount at issue plus interest; or

(iii) Has met the following criteria:

(A) He or she will suffer irreparable injury in the absence of a stay; and, if so, that

(B) He or she has made a strong showing of the likelihood of success on the merits of the judicial action.

(C) Such relief is consistent with the public interest; and

(D) No other party interested in the proceedings would be substantially harmed by the stay.

(3) In determining whether the candidate has made a strong showing of the likelihood of success on the merits under paragraph (c)(2)(iii)(B) of this section, the Commission may consider whether the issue on appeal presents a novel or admittedly difficult legal question and whether the equities of

11 CFR Ch. I (1-1-22 Edition)

the case suggest that the status quo should be maintained.

(4) All stays shall require the payment of interest on the amount at issue. The amount of interest due shall be calculated from the date 30 days after service of the Commission's repayment determination under 11 CFR 9038.2(c) and shall be the greater of:

(i) An amount calculated in accordance with 28 U.S.C. 1961 (a) and (b); or

(ii) The amount actually earned on the funds set aside under this section.

[56 FR 35945, July 29, 1991, as amended at 60 FR 31887, June 16, 1995]

§ 9038.6 Stale-dated committee checks.

If the committee has checks outstanding to creditors or contributors that have not been cashed, the committee shall notify the Commission. The committee shall inform the Commission of its efforts to locate the payees, if such efforts have been necessary, and its efforts to encourage the payees to cash the outstanding checks. The committee shall also submit a check for the total amount of such outstanding checks, payable to the United States Treasury.

§ 9038.7 Administrative record.

(a) The Commission's administrative record for final determinations under 11 CFR part 9033, sections 9034.5, 9036.5 and part 9039, and for repayment determinations under 11 CFR 9038.2, consists of all documents or materials submitted to the Commission for its consideration in making those determinations. The administrative record will include the certification of the Commission's vote(s), the audit report that is sent to the committee (for repayment determinations), the statement(s) of reasons, and the candidate agreement. The committee may include documents or materials in the administrative record by submitting them within the time periods set forth at 11 CFR 9033.3(b), 9033.4(a)(2), 9033.6(c), 9033.7(b), 9033.9(b), 9034.5(g)(2), 9036.5(e), 9038.1(c) and 9038.2(c)(2), as appropriate.

(b) The Commission's administrative record for determinations under 11 CFR part 9033, sections 9034.5, 9036.5 and 9038.2 and part 9039 does not include:

(1) Documents and materials in the files of individual Commissioners or employees of the Commission that do not constitute a basis for the Commission's decisions because they were not circulated to the Commission and were not referenced in documents that were circulated to the Commission;

(2) Transcripts or audio tapes of Commission discussions other than transcripts or audio tapes of oral hearings pursuant to 11 CFR 9038.2(c)(2), although such transcripts or tapes may be made available under 11 CFR parts 4 or 5; or

(3) Documents properly subject to privileges such as an attorney-client privilege, or items constituting attorney work product.

(c) The administrative record identified in paragraph (a) of this section is the exclusive record for the Commission's determinations under 11 CFR part 9033, §§9034.5, 9036.5 and 9038.2 and part 9039.

[60 FR 31888, June 16, 1995]

PART 9039—REVIEW AND INVESTIGATION AUTHORITY

Sec.

9039.1 Retention of books and records.

9039.2 Continuing review.

9039.3 Examinations and audits; investigations.

AUTHORITY: 26 U.S.C. 9039.

SOURCE: 56 FR 35949, July 29, 1991, unless otherwise noted.

§ 9039.1 Retention of books and records.

The candidate and his or her authorized committee(s) shall keep all books, records and other information required under 11 CFR 9033.11, 9034.2 and part 9036 for a period of three years pursuant to 11 CFR 102.9(c) and shall furnish such books, records and information to the Commission on request.

§ 9039.2 Continuing review.

(a) In reviewing candidate submissions made under 11 CFR part 9036 and in otherwise carrying out its responsibilities under this subchapter, the Commission may routinely consider information from the following sources:

(1) Any and all materials and communications which the candidate and his or her authorized committee(s) submit or provide under 11 CFR part 9036 and in response to inquiries or requests of the Commission and its staff;

(2) Disclosure reports on file with the Commission; and

(3) Other publicly available documents.

(b) In carrying out the Commission's responsibilities under this subchapter, Commission staff may contact representatives of the candidate and his or her authorized committee(s) to discuss questions and to request documentation concerning committee activities and any submission made under 11 CFR part 9036.

§ 9039.3 Examination and audits; investigations.

(a) *General.* (1) The Commission will consider information obtained in its continuing review under 11 CFR 9039.2 in making any certification, determination or finding under this subchapter. If the Commission decides by an affirmative vote of four of its members that additional information must be obtained in connection with any such certification, determination or finding, it will conduct a further inquiry. A decision to conduct an inquiry under this section may be based on information that is obtained under 11 CFR 9039.2, received by the Commission from outside sources, or otherwise ascertained by the Commission in carrying out its supervisory responsibilities under the Presidential Primary Matching Payment Account Act and the Federal Election Campaign Act.

(2) An inquiry conducted under this section may be used to obtain information relevant to candidate eligibility, matchability of contributions and repayments to the United States Treasury. Information obtained during such an inquiry may be used as the basis, or partial basis, for Commission certifications, determinations and findings under 11 CFR parts 9033, 9034, 9036 and 9038. Information thus obtained may also be the basis of, or be considered in connection with, an investigation under 52 U.S.C. 30109 and 11 CFR part 111.