FEDERAL ELECTION COMMISSION

[Notice 1995–9]

11 CFR Parts 106, 9002, 9003, 9004, 9006, 9007, 9008, 9032, 9033, 9034, 9036, 9037, 9038, and 9039

Public Financing of Presidential Primary and General Election Candidates

AGENCY: Federal Election Commission.

ACTION: Final rule and transmittal of regulations to Congress.

SUMMARY: The Commission has revised its regulations governing public financing of presidential primary and general election candidates. These regulations implement provisions of the Presidential Election Campaign Fund Act [''Fund Act''] and the Presidential Primary Matching Payment Account Act [''Matching Payment Act'']. The revised rules reflect the Commission's experience in administering these programs during the 1992 election cycle, and are intended to anticipate questions that may arise during the 1996 presidential election cycle.

DATES: Further action, including the publication of a document in the **Federal Register** announcing the 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).

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SUPPLEMENTARY INFORMATION: The Commission is publishing today the final text of revisions to its regulations at 11 CFR Parts 106, 9002, 9003, 9004, 9006, 9007, 9008, 9032, 9033, 9034, 9036, 9037, 9038 and 9039 governing public financing of presidential campaigns. On October 6, 1994, the Commission issued a Notice of Proposed Rulemaking [''NPRM''] in which it sought comments on proposed revisions to the public financing regulations. 59 FR 51006 (October 6, 1994). Subsequently, the Commission extended the comment period to provide the regulated community with additional time to comment on the proposed rules. 59 FR 64351 (December 14, 1994). The Commission received written comments from Hervey W. Herron, Common Cause, the Center for Responsive Politics, Public Citizen, the White House Counsel's office, the Republican National Committee, Huckaby and Associates, the Democratic National Committee and Lyn Utrecht of Oldaker, Ryan & Leonard in response to the Notice. The Commission held a public hearing on February 15, 1995, at which four witnesses presented testimony on the issues raised in the NPRM.

The Commission also received two Petitions for Rulemaking that addressed related issues. *See* Notice of Availability on Petition for Rulemaking filed by the Center for Responsive Politics [''CRP''], 59 FR 14795 (March 30, 1994); Notice of Availability on Petition for Rulemaking filed by Anthony F. Essaye and William Josephson, 59 FR 63274 (December 8, 1994). In addition to the comments noted above, the Commission received comments from the Internal Revenue Service, Public Citizen, Common Cause and a joint comment from the Republican National Committee and the Democratic National Committee in response to the CRP Rulemaking Petition. The Commission received comments from the Internal Revenue Service and the Republican National Committee in response to the Essaye/Josephson Petition.

The CRP Petition for Rulemaking sought the abolishment of the general election legal and accounting compliance fund [''GELAC''] and is discussed in connection with 11 CFR 9003.3, below. The Essaye/Josephson petition asked the Commission whether expenses incurred in connection with the meeting of the Electoral College are covered by the Fund Act or the Federal Election Campaign Act [''FECA''], 2 U.S.C. 431 *et seq.* This is a complex question that the Commission believes deserves further consideration. Therefore, the issue has been dropped from this rulemaking and will be addressed in a separate rulemaking document.

Sections 9009(c) and 9039(c) of Title 26, United States Code, and 2 U.S.C. 438(d) require that any rules or regulations prescribed by the Commission to carry out the provisions of Title 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 June 12, 1995.

Explanation and Justification

The Commission has revised several aspects of its regulations governing publicly-financed presidential primary and general election candidates. A detailed, section by section analysis of these changes appears below. The document then discusses some additional proposals that were considered in the course of this rulemaking that were not ultimately incorporated into the final rules.

Part 106—Allocations of Candidate and Committee Activities

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

The Commission is adding a sentence to paragraph (a)(1) of this section to reflect the new attribution of certain expenditures between the primary and the general election limits. See discussion of 11 CFR 9034.4(e), below. The new sentence states that expenditures required to be allocated to the primary election under these new requirements shall also be allocated to particular states in accordance with 11 CFR 106.2.

Part 9002—Definitions

Section 9002.11 Qualified Campaign Expense

The Commission is adding a conforming amendment to paragraph (c) of this section to reflect the new attribution of certain expenditures between the primary and the general election limits. The amendment notes that certain expenditures formerly covered by this paragraph will now be attributed under these new guidelines. See discussion of 11 CFR 9034.4(e), below.

Part 9003—Eligibility for Payments

Section 9003.1 Candidate and Committee Agreements

The new rules contain a number of changes in section 9003.1. In the interests of clarity, the Commission is adding a comma in the last sentence of paragraph (b)(4), which relates to candidate and committee agreements to furnish certain documentation to the Commission. The rules also slightly reword paragraph (b)(9) to more clearly indicate that candidates must agree to pay any civil penalties arising from violations of the FECA, whether provided for in a conciliation agreement or imposed in a judicial proceeding.

Paragraph (b)(10) has been added to require that, as a precondition of their receiving public funds, presidential candidates agree that they will prepare all of their television commercials with closed captioning or so that they are otherwise capable of being viewed by deaf and hearing impaired individuals. Congress added this requirement to 26 U.S.C. § 9003(e) when it enacted section 354 of the Legislative Branch

Appropriations Act of 1992, Pub. L. No. 102–393, 106 Stat. 1764 (1992).

One commenter requested that committees be allowed to pay the costs of closed captioning with funds from their general election legal and accounting compliance fund. However, the Commission views this not as a compliance cost, but rather as a means for committees to get their message out to those who otherwise would not hear it. Thus it is a qualified campaign expense.

Section 9003.3 Allowable Contributions

On March 1, 1994, the Commission received a Petition for Rulemaking from the Center for Responsive Politics requesting that the Commission repeal its rules providing for the use of privately-financed general election legal and accounting compliance funds in presidential campaigns. Specifically, the petitioner sought repeal of 11 CFR 100.8(b)(15) (last two sentences), 106.2(b)(2)(iii)(last sentence), 9002.11(b)(5), 9003.3(a), and 9035.1(c)(1).

The Commission published a Notice of Availability on March 30, 1994, seeking statements in support of or in opposition to the Petition. 59 FR 14794 (March 30, 1994). The Commission received four comments in response to the Petition. Two comments were supportive, while one opposed the reversal of the Commission's longstanding policies regarding legal and accounting costs. The Commission subsequently incorporated the Petition into this rulemaking, and sought further comment on a number of options. The Commission received seven additional comments on the issues raised in the Petition.

The petitioner argued that the Commission's rules allowing private contributions of up to $1,000 for the GELAC undermine the ability of the public financing laws to achieve the objective of eliminating the corrupting influence of large contributions in presidential elections. The Commission's reasons for establishing the GELAC are explained below and in the 1980 Explanation and Justification, 45 FR 43371 (June 27, 1980). The decision to allow the GELAC to accept contributions up to $1,000 is based on the structure of the FECA. As the Supreme Court recognized in *Buckley* v. *Valeo,* 424 U.S. 1, 58 (1976), Congress created contribution limits to combat the reality or appearance of improper influence. Nevertheless, through the NPRM, the Commission sought evidence either supporting or refuting the petitioner's claim that the privately-funded GELAC undermines the public financing regime by allowing the actuality and the appearance of improper influence in presidential elections. No evidence was presented.

As explained more fully below, the Commission has decided not to eliminate the GELAC. The Commission agrees with the commenters who felt that the separate fund for compliance has worked well since the GELAC rules were promulgated in 1980. To repeal them would force presidential campaigns to devote some of their public funds for compliance expenses, instead of using public monies for campaign expenses. One commenter noted that in the absence of a GELAC, committees would face extraordinary pressure to minimize the amount spent on compliance so as to devote as much money as possible to campaigning. Reducing compliance funds may very well reduce committees' abilities to keep good records, thereby increasing the difficulty and duration of post-election audits. Section 431(9)(B)(vii) of the FECA recognizes an exception for the cost of certain legal and accounting compliance services that is not recognized for other types of costs. The elimination of monetary contributions of $1,000 or less for compliance purposes could force some committees to turn to much larger in-kind donations of legal and accounting services to ensure that their compliance obligations are satisfied. *See* 2. U.S.C. § 431 (8)(B)(ix) and (9)(B)(vii). The GELAC is also used to make repayments, which would still need to be funded from private sources if the campaign had no public funds remaining to pay those amounts.

The Petition for Rulemaking also charged that these regulations permit evasion of the prohibition on accepting contributions to defray qualified campaign expenses established by the Fund Act. 26 U.S.C. § 9003(b). Furthermore, the Petition claims that the Commission's regulations violate the spending limits established by the FECA. 2 U.S.C. § 441a.

The Commission is not persuaded that the creation and operation of the GELAC is beyond its statutory authority or inconsistent with the public funding regime established by the Fund Act and the FECA. The regulations first establishing a separate GELAC were duly promulgated pursuant to 2 U.S.C. § 437d(a)(8) and 26 U.S.C. § 9009(b) for the practical reasons explained above. They were transmitted to Congress on June 13, 1980, together with the Explanation and Justification, for the required legislative review period. They became effective on September 5, 1980, after neither House of Congress disapproved them under 26 U.S.C. § 9009(c)(2). This is, as the Supreme Court has noted, an ''indication that Congress does not look unfavorably'' upon the Commission's construction of the Act. *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 34 (1981). *See also, e.g., Sibbach* v. *Wilson,* 312 U.S. 1, 16 (1941) (''That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found''). Subsequently, in legislative recommendations to Congress, the Commission has identified funding for compliance activities as an area Congress may wish to clarify, but Congress has not done so to date.

Consequently, the revised rules follow the previous provisions by retaining sections 100.8(b)(15) (last two sentences), 106.2(b)(2)(iii) (last sentence), 9002.11(b)(5), 9003.3, and 9035.1(c)(1). For the reasons set forth, the Petition for Rulemaking filed by the Center for Responsive Politics is denied.

Comments were also requested on several alternative revisions to the GELAC. For example, the NPRM raised the possibility of limiting the amount raised and spent for compliance to a fixed percentage of the general election spending limit. Although one commenter supported limiting the GELAC to 10% of the general election spending limit, or less, several others believed a limit would be artificial, unworkable and unfair, particularly since several factors make compliance costs unpredictable. Hence, to some extent, these costs cannot be controlled by the committee or known in advance. Other commenters opposed limiting the GELAC because they believed limits would not overcome fundamental defects in the current GELAC rules, and that the rules should be repealed.

The Commission agrees that compliance costs can be unpredictable, and therefore concludes that limiting the amount or percentage of the GELAC is not advisable.

The NPRM also expressed concern that fundraising activities for the GELAC could be used to generate electoral support for the candidate's campaign. Accordingly, the NPRM sought comments on whether to continue to permit the GELAC to pay the entire amount of these costs, or whether a fixed percentage of GELAC fundraising costs should be paid by the general election campaign committee.

In response, the petitioner and two commenters questioned the appropriateness of allowing fundraising costs for the GELAC to be paid for by the GELAC on the grounds these

expenses are campaign expenses that should be paid by the general election campaign and subject to the spending limits. On the other hand, several witnesses and commenters pointed out that effective fundraising necessarily involves setting forth what the candidate stands for. Some felt it is not appropriate to use public funds to raise private contributions that are used solely for legal and accounting compliance purposes.

The Commission has concluded that the rules regarding fundraising for the GELAC should remain largely unchanged. The Commission's audit and enforcement processes provide the appropriate mechanisms for ensuring that GELAC fundraising activities (or any other type of expenses paid from GELAC funds) do not involve campaigning for the candidate's election.

However, changes are being made regarding the information to be disclosed in solicitations to prospective contributors. Former section 9003.3(a)(1)(i)(A) required solicitations to clearly state that the contributions are solicited for the GELAC. The NPRM proposed adding language to let contributors know that their money would be used solely for legal and accounting costs. Those supporting the Petition for Rulemaking did not believe the proposed change would resolve the problems they perceived. Others noted that if the required language is lengthy enough, nobody will read it. Hence, the final rules have been modified to require committees to tell contributors that federal law prohibits the use of private contributions to pay a publicly-funded general election candidate's campaign expenses. This new language more clearly conveys to contributors that their contributions to the GELAC will only be used to ensure compliance with the law. The GELAC solicitation must also indicate how contributors should make out their checks, so as to avoid potential confusion regarding the contributor's intent.

Please note that the provisions regarding redesignations and transfers of primary funds to the GELAC in paragraphs (a)(1)(ii)–(iv) have been reorganized for clarity. In addition, new language has been added to resolve questions regarding depositing designated and undesignated contributions in the GELAC. Paragraph (a)(1)(i)(C) states that contributions must be designated in writing for the GELAC to be deposited directly into the GELAC. All contributions not designated in writing for the GELAC must be deposited initially in a primary election account and reported as such. An explanation of the term ''designated in writing'' for the GELAC is being added as new paragraph (a)(1)(vi). Please note that 11 CFR 110.1(b)(4) covers designations for a presidential primary election. Contributions made out to the candidate's name or the primary committee, unless properly designated in writing for the compliance fund, cannot be deposited in it, and can be transferred to it only if they are properly redesignated by the contributor for the GELAC. Undesignated contributions cannot be deposited in the GELAC, regardless of when they are made or received, and can be transferred to it only if the committee receives a proper GELAC redesignation from the contributor. An exception to the redesignation requirement exists for leftover primary contributions made during the matching payment period; they may be transferred to the GELAC without securing redesignations if they exceed the amount needed to pay remaining net outstanding campaign obligations for the primary and any repayments. In addition, the revised rules permit contributions made after the date of nomination, but not designated in writing for the GELAC, to be redesignated for the GELAC only if they are not needed to pay remaining net outstanding campaign obligations from the primary campaign. The rules also specify that contributions designated in writing or redesignated for the GELAC cannot be matched.

Current paragraphs (a)(2)(i) (A) through (H) of section 9003.3 set forth the permissible uses of GELAC funds. The Petition for Rulemaking, and several commenters, urged the Commission to delete current paragraph (H) allowing GELAC funds to be used to pay unreimbursed costs of providing transportation for the Secret Service and national security staff. Other commenters and one witness urged the Commission to retain this provision, given the alternative of requiring campaigns to pay these costs from their limited campaign funds, even though transporting Secret Service and National Security staff does little to further the campaign.

This provision has been retained in the final rules because the limits on the amounts that can be reimbursed for transporting the Secret Service and National Security staff may be less than the actual cost to the campaign, and because the campaign must transport security personnel who do not provide a campaign-related benefit. However, GELAC funds may not be used to pay transition costs (costs incurred by the President-elect in preparation for the assumption of his or her official duties which are not provided for under the Presidential Transition Act of 1963) (cf. AO 1980–97); legal defense fund expenses (expenses incurred in a judicial, civil, criminal, administrative, state, federal, or Congressional investigation, inquiry or proceeding not related to the Presidential campaign) (cf. AO 1979–37); or legal expenses not related to ensuring compliance with the FECA and the Fund Act, such as contract litigation.

In addition, the Commission has reduced from 70% to 50% the standard amount that the GELAC may pay for computer-related costs, and the corresponding exclusion from the spending limits. See 11 CFR 9003.3(a)(2)(ii)(A), (b)(6) and (c)(6). Some expressed concern that this allocation demonstrated the impossibility of separating compliance expenses from campaign expenses, thereby necessitating repeal of the GELAC rules. One commenter argued that the allowance should be reduced to 10%. On the other hand, others urged the Commission to increase the allowance to 80% or 90% to more accurately reflect the burden of compliance.

The Commission believes that a reduction from 70% to 50% accurately reflects the increased usage of computers for non-compliance campaign-related activities such as scheduling of campaign-related events, electronic communications, word processing, office automation, maintaining political databases, etc. Moreover, campaign committees must incur computer costs to perform basic accounting purposes irrespective of the need to comply with the campaign financing laws. Please note, however, that committees may still deduct a higher amount if they can show that their computer-related compliance costs are higher.

Section 9003.3(a)(2)(iv) has been modified slightly to clarify that funds remaining in the GELAC may only be used to pay debts remaining from the primary or for other lawful purposes pursuant to 2 U.S.C. § 439a if all GELAC expenses have been paid. Two commenters argued that this allows wealthy donors to evade the primary contribution limits and results in corruption of the public financing system. As explained above, the Commission believes that this provision is in keeping with the purpose and structure of the public funding statutes and notes that Congress did not disapprove of the Commission's regulations on transfers of surplus GELAC funds.

Finally, two citations contained in 11 CFR 9003.3(a)(2)(iii) are being revised. The first sentence of this paragraph referred to paragraphs 9003.3(a)(2)(i) (A) through (E). This is being updated to read, ''11 CFR 9003.3(a)(2)(i) (A) through (F) and (H).'' Also, the previous citation to paragraph 9003.3(a)(2)(i)(F) in the second sentence has been changed to refer to paragraph 9003.3(a)(2)(i)(G). Portions of paragraphs (b) and (c) of section 9003.3 have been replaced with language indicating that certain provisions in paragraph (a) apply to minor party candidates and situations where major party candidates do not receive full public funding.

Finally, the Commission is deleting the reference to final repayment determinations contained in former paragraph (a)(2)(ii)(B), now paragraph (a)(2)(ii)(G), as that term does not appear in the revised repayment process. *See* discussion of 11 CFR 9007.2, below.

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

Former paragraph (a) of this section stated that certain expenditures for polling could be considered qualified campaign expenses for the general election, regardless of when the results of the polling were received. However, the Commission has now decided that polling expenditures should be attributed to the primary or the general election limits based on when the results are received. See discussion of 11 CFR 9034.4(e)(2), above.

The reference to polling in this paragraph has therefore been deleted. The Commission is adding new language referring readers to the new provisions at 11 CFR 9034.4(e)(2), to better alert them to this change.

Section 9003.5 Documentation of Disbursements

Section 9003.5(b)(1)(i) sets forth the documentation required for disbursements in excess of $200. Under the previous rules, a canceled check, negotiated by the payee, was required in most situations, but not when the committee presented a receipted bill from the payee stating the purpose of the disbursement. The revised rules in this section require committees to provide canceled checks negotiated by the payees for all disbursements over $200. One witness opposed these changes, and urged more flexibility in the requirements for documentation. However, this change will assist the Commission's audit staff in verifying that public funds are spent on qualified campaign expenses. Committees should already have canceled checks in their possession, so production would not be burdensome. New paragraph (b)(1)(iv) indicates that the purpose of the disbursement must be noted on the check if it is not included in the accompanying documentation. Please note that, as in the past, the revised rules require that documentation in addition to the committee's check be provided for disbursements exceeding $200.

Paragraph (b)(3) of this section has also been changed to include individuals who are advanced $1000 or less for travel and subsistence in the definition of payee. The $500 limit in the previous rules was raised to reflect current prices.

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

Section 9004.4 Use of Payments

Winding Down Costs; Gifts and Bonuses

New paragraph (a)(5) of section 9004.4 addresses the use of public funds to pay for gifts and bonuses for campaign staff and consultants. It generally follows new language in section 9034.4, which is discussed below. New language is being added to section 9004.4(a) to allow the GELAC to pay 100% of salary and overhead expenses incurred after the end of the expenditure report period. These expenses are presumed to be solely to ensure compliance with the FECA and the Fund Act.

One commenter questioned why computer expenses were not included in the proposed language when they were included in the corresponding primary regulations. The rules have been revised to recognize that the GELAC may pay 100% of computer expenses incurred after the end of the expenditure report period.

Responsibility for Lost or Damaged Equipment

Accounting procedures employed by the Commission make allowance for reasonable loss and normal damage of equipment leased or purchased by a campaign. However, the Commission has at times encountered incidents involving lost or damaged equipment that do not fall into these categories. The Notice of Proposed Rulemaking therefore sought to clarify how such situations should be handled in the audit process.

The Commission first sought comment on whether, as a precondition for the receipt of public funds, the candidate should agree to meet certain standards in handling public monies as well as in overseeing the use of and accounting for public funds. Such standards would have been specified at 11 CFR 9003.1(b). However, the Commission now believes the question of liability for lost or damaged equipment is best handled by amending 11 CFR 9004.4(b) to clarify that the cost of lost or misplaced items may be considered a nonqualified campaign expense for purposes of these rules.

The Commission recognizes that there are varying degrees of responsibility in this area. The new rules therefore state that certain factors should be considered prior to any determination that a repayment is required. In particular, whether the committee demonstrates that it made careful efforts to safeguard the missing equipment would be of primary importance in this regard. Whether the committee sought or obtained insurance, the type of equipment involved and the number and value of items that were lost will also be among the factors considered in making this determination. However, the Commission has dropped as a stated factor the value of the lost equipment as a percentage of the total value of the equipment leased or owned by the committee, as the loss of even a small percentage of a committee's equipment can involve a sizeable amount of public funding.

One commenter argued that the phrase ''used for any purpose other than * * * to defray [ ] qualified campaign expenses'' in 26 U.S.C. §§ 9007(b)(4) and 9038(b)(2), stating the reasons for which the Commission can require a repayment, connotes intentional conduct, so the Commission is barred from ever requiring a repayment for lost or misplaced items. While the word ''purpose'' can connote ''intent,'' the Commission does not believe the two are synonymous in this context.

The Commission routinely determines that funds have been ''used for the purpose'' of nonqualified campaign expenses, regardless of the specific intent behind particular disbursements. Barring the Commission from inquiring into such situations would run counter to its long-standing practice in this area, and would also be inconsistent with the responsibility to ensure that public funds are properly used.

One commenter proposed a number of safeguards a committee could adopt to help ensure that losses are kept to a minimum. These include (1) maintaining a written inventory of equipment, (2) establishing and disseminating written procedures for handling of equipment by the staff, (3) maintaining and implementing security

procedures that limit access to the premises on which equipment is used and ensuring that equipment cannot be removed from the premises without appropriate written authorizations, (4) limiting use of vehicles to designated individuals, (5) maintaining a check-out system for portable equipment such as cellular telephones, and making individuals personally liable for return of the equipment, (6) obtaining insurance where economically prudent in accordance with the standards of the insurance industry, (7) establishing a procedure for reconciling inventory of equipment, in accordance with recognized accounting standards, when offices are closed, and (8) establishing procedures for handling of funds, including the handling of cash and writing of checks, that generally conform to recognized standards for internal controls established by the American Institute of Certified Public Accountants.

These are sound business practices that, if followed, should greatly reduce the possibility of loss. The Commission plans to recommend in the Financial Control and Compliance Manuals prepared in connection with the 1996 Presidential election that committees implement these or comparable standards.

This commenter further argued that, if a committee could demonstrate ''substantial compliance'' with these guidelines, the Commission should avoid an ''item by item'' examination of lost or misplaced items. While committees that follow these standards should have little problem with loss, the fact that they have done so should not preclude the Commission from ever challenging a loss, especially where costly items are involved.

The Notice sought comment on another approach, that of limiting the dollar amount of lost property that could be considered a qualified campaign expense. If a committee lost goods worth more than the specified amount, any amount over that figure would be a nonqualified campaign expense. This would have the advantage of focusing the Commission's resources on only the more serious instances, while recognizing that some loss is inevitable in large, lengthy campaigns.

The Commission believes this approach has merit, but feels it is inappropriate to include an actual dollar figure in the text of the rules. Rather, the Commission may address this matter in the context of the confidential materiality thresholds established in connection with each audit cycle.

Conforming Amendment

The Commission is moving paragraph (c) of 11 CFR 9004.4 to new 11 CFR 9007.2(a)(4). This paragraph, which deals with permissible sources of repayments, is more properly located in the section dealing with repayments.

Section 9004.5 Investment of Public Funds

Section 9004.5 of the existing regulations allows a committee to invest public funds or use them in other ways to generate income, provided that an amount equal to the net income derived from those investments, minus any taxes paid, is paid to the Treasury. Section 9007.2(b)(4) also lists the receipt of any income as a result of investment or other use of payments from the Fund pursuant to 11 CFR 9004.5 as one of the bases for requiring committees to make payments to the Treasury.

The final rules revise section 9004.5 to clarify that the payment requirement applies to any use of public funds that results in income to the committee, regardless of whether the committee engaged in that use with the intention of generating income. The final rules also contain a conforming amendment to the introductory language of section 9007.2(b)(4), clarifying that the receipt of income from any use of payments from the Fund is a basis for requiring payment to the Treasury. The Commission received no comments on these provisions.

These revisions ensure that any income received through the use of pubic funds benefits the pubic financing system. If a committee loses an item that is insured, and the insurance proceeds exceed the cost of replacing the item, such excess will be considered income under sections 9004.5 and 9007.2(b)(4). However, these rules are not meant to require payment of income that qualifies as exempt function income under section 527(c)(3) of the Internal Revenue Code, 26 U.S.C. 527(c)(3), such as receipts from fundraising activities permitted under 11 CFR 9003.3.

Section 9004.6 Expenditures for Transportation Made Available to Media Personnel; Reimbursements

Section 9004.6 of the existing rules has been reorganized for clarification purposes with only minor substantive changes. The revised version operates largely the same as the existing rule. Generally, expenditures for transportation and other services provided to media representatives, Secret Service personnel, and national security staff will be qualified campaign expenses and, with the exception of costs related to Secret Service and national security personnel, will count toward the overall expenditure limits in section 9003.2. However, committees may seek reimbursement for these expenses, and may deduct reimbursements received from media representatives from the amount subject to the spending limit, in accordance with paragraph (c) of the revised rule.

Paragraph (b) limits the amount of reimbursement a committee can seek from a media representative to 110% of that representative's pro rata share of the actual costs of the transportation and services made available. Any reimbursement received in excess of that amount must be returned to the media representative under paragraph (d)(1). Paragraph (b)(2) sets out the formula for determining a media representative's pro rata share of the costs of transportation and services made available.

Paragraph (c) states that the committee may deduct the reimbursements received from media representatives from the amount of expenditures subject to the overall limitation. The rule limits the amount of this deduction to the actual cost of the transportation and services provided to media representatives. However, the rule also allows the committee to deduct an additional amount of the reimbursements received from media representatives, representing the administrative costs of providing these services and seeking reimbursement for them. Generally, this deduction is limited to 3% of the actual cost of the transportation and services provided to the media representatives. However, the committee may deduct an amount in excess of 3% if it can document the total amount of administrative costs actually incurred.

Paragraph (c)(2) clarifies that ''administrative costs'' includes all costs incurred by the committee in providing these services and seeking reimbursement for them. Thus, any costs that are not part of the actual cost of the transportation and services made available are administrative costs, regardless of whether they are incurred directly by the committee or by an independent contractor hired to make travel arrangements and/or seek reimbursements. If the committee uses a contractor, and the contractor charges the committee a fee for providing these services, the fee charged is part of administrative costs. The contractor's expenses and fees are not part of the actual costs for which the committee may seek reimbursement under paragraph (b)(1). Likewise, if the committee accepts credit card payments

from media representatives, any credit card fee, commission or discount is an administrative cost.

Paragraph (d) requires the committee to return any reimbursement received in excess of 110% of the actual pro rata cost of the transportation and services made available to the media representative providing the reimbursement. In addition, any amount in excess of the amount deductible under paragraph (c) that has not been returned to a media representative must be paid to the Treasury. For example, if a representative's pro rata cost is $1,000, the committee can bill the representative for $1,100. Assuming the committee claims the standard 3% to cover its administrative costs, it can deduct up to $1,030 from the amount of expenditures subject to the limit. Any reimbursement received in excess of $1,100 must be returned to the media representative. Any portion of the remaining amount that exceeds the $1,030 that can be deducted from the spending limit must be paid to the Treasury.

Paragraph (e) requires the committee to report disbursements made in providing these services as expenditures under 11 CFR 104.3(b)(2), and to report any reimbursements received as offsets to operating expenditures under 11 CFR 104.3(a)(3)(ix).

The final rule contains two changes to the existing rule that reflect current practice. Generally, a media representative's pro rata share of the actual cost of transportation and services made available is determined by dividing the total costs of the services provided by the total number of persons to whom the services are made available. However, the new rule contains a special formula for determining the pro rata cost of transportation on a government conveyance to a city not served by regularly scheduled commercial airline service. See 11 CFR 9004.7(b)(5)(i)(C). Committees should not include national security staff in the total number of persons to whom the services were made available when determining pro rata cost in this situation. This formula places incumbent candidates on an equal footing with challengers, who are not required to transport national security personnel. *See* discussion of section 9004.7, below.

The new rule also clarifies that the administrative costs incurred by the committee in providing these services and seeking reimbursement for them must be included in the amount reported as an expenditure under paragraph (e).

Two commenters expressed general support for the Commission's efforts to reorganize this section. However, they also urged the Commission to treat billed out unreimbursed media transportation expenses the same as unreimbursed expenses associated with transporting Secret Service and national security personnel, by excluding these expenses from the spending limit and allowing the use of GELAC funds to reimburse the committee for these expenses.

The Commission has not adopted these recommendations because committees are now better able to recover the full cost of providing these services to media representatives than they were in the past. Committees can require media representatives to provide advance payment through the use of a credit card. If a representative fails to pay, the committee may, if it chooses, deny the representative access to the services being provided.

A review of one 1992 general election committee, and its associated primary committee, clearly demonstrates that this policy does not impose a financial burden. The two committees sought reimbursement from media representatives for a combined total of about $7 million in transportation expenses. Both committees collected more than 99% of the amount they billed. Since the rules allow the committees to bill the representatives for 110% of actual cost, they received about $7.5 million in reimbursements. Each committee received more than 109% of the cost of the services they provided. Thus, notwithstanding the failure of some representatives to provide reimbursement, the committees received payments substantially in excess of the costs they incurred.

In contrast, the amount of reimbursement received from Secret Service and national security personnel is limited by the rules of other federal agencies, not the FEC, and in some cases is not enough to cover the costs of transporting these persons. Allowing committees to use GELAC funds to cover the unreimbursed amounts ensures that transporting these persons does not deplete the public fund.

Consequently, the Commission has decided to continue its current policy of including unreimbursed media transportation expenses in the amount subject to the spending limit. It has also decided not to allow committees to pay these unreimbursed expenses with GELAC funds.

Section 9004.7 Allocation of Travel Expenditures

The NPRM sought comments on modifying 11 CFR 9004.7 to address several issues regarding the cost of campaign-related travel using government airplanes, helicopters and other vehicles. Please note that these rules apply to travel on federal government conveyances, and state or other government conveyances. The rules contemplate that for plane flights between cites served by a regularly scheduled commercial airline service, the campaign must reimburse the appropriate governmental entity for the first class airfare, and that this amount is treated as a qualified campaign expense. New language in section 9004.7(b)(5)(i) specifies that, for travel by airplane, the amount of the lowest unrestricted non-discounted first class commercial airfare available for the time traveled is to be used. Discounted fares that are subject to restrictions on the dates and times of travel, or restrictions on changing flights, are not comparable to the service provided when the campaign uses a government conveyance. Several commenters and witnesses supported this new language.

Under section 9004.7(b)(5)(v), campaign committees are responsible for determining the first class fare at the time of the flight to ensure that the right amount is paid to the appropriate government entity, and to ensure that they maintain documentation supporting these amounts. The lowest unrestricted non-discounted first class airfare is available from several sources including travel agents, and on-line services. Unfortunately, it is not possible to specify a single source for this information.

Questions also arose regarding cities that are served by regular air service, but first class flights are not available. In this case, the revised rules specify that committees should use the lowest unrestricted non-discounted coach fare available for the time traveled. This approach is consistent with the valuation method established by the Select Committee on Ethics of the United States Senate for the use of private aircraft. *See* Interpretive Ruling No. 412, Select Committee on Ethics, United States Senate, 101st Cong., 1st Sess., S. Prt. 101–18 at 251–52 (1989). It is also consistent with the valuation methods used by the House of Representatives' Committee on Standards of Official Conduct with respect to gifts of private transportation not associated with official travel. *See*, Valuation of Gifts of Transportation on Private Aircraft, Committee on

Standards of Official Conduct, Letter dated June 11, 1987. Several witnesses and commenters supported this approach.

For cities not served by regularly scheduled commercial service, the rules continue to specify that the amount to be reimbursed is the charter rate. The NPRM had proposed using the charter rate for a comparable airplane of similar make, model and size. Although that would be consistent with the approaches used by the Congressional Ethics Committees, several commenters and witnesses noted that there are no aircraft comparable to Air Force I and Air Force II, which are specially designed in terms of communications equipment and security. It was also pointed out that the Commission's proposals diverged from the approach taken in AO 1984–48 and the rules in 11 CFR 106.3(e).

It is not feasible to follow precisely the same approach as 11 CFR 106.3(e) because that rule governs non-presidential candidates who are not accompanied by the Secret Service. Accordingly, the final rules have been revised to indicate that the charter rate may be used for an aircraft sufficient in size to accommodate the campaign-related travelers, including the candidate, plus the news media and the Secret Service. Under this approach, campaigns having the use of government aircraft will incur approximately the same cost as campaigns that must charter a plane sufficient to hold campaign staff, media and Secret Service personnel.

The revised regulations address several questions that have arisen regarding the costs of ''positioning'' flights needed to bring the government aircraft from one stop where it dropped off the candidate and campaign staff to another stop where it will pick them up to continue the trip or return to the point of origin. New language in section 9004.7(b)(5)(ii) incorporates the Commission's previous practice regarding positioning flights. Thus, committees must pay the appropriate government entity for the greater of the amount billed by the government entity or the applicable fare for one passenger. This approach recognizes that positioning flights are campaign-related, and therefore these costs are properly treated as qualified campaign expenses. Several commenters and witnesses argued there should be no charge for positioning flights because commercial airlines do not charge to bring their planes to the city of departure. However, this argument fails to reflect the fact that charter services do build these costs into their price structures.

Several commenters also noted that the Commission has not previously required committees to pay the costs of fuel and crew time for positioning flight. The proposed language regarding the payment for fuel and crew costs has been deleted from the final rules because it would be burdensome for committees to absorb these costs.

Paragraph (b)(5)(iii) in section 9004.7 contains provisions regarding travel on federal or state government conveyances other than airplanes. For travel by helicopter or ground conveyance, the commercial rental rate should be paid for a conveyance sufficient in size to hold those traveling on behalf of the campaign, plus media representatives plus Secret Service personnel. This paragraph has been modified from the language previously included in the NPRM because there is no conveyance comparable in terms of security and communications to those used by the President and Vice President. Additional guidance on this area can be found in Advisory Opinion 1992–34. Please note that in the case of a presidential candidate who is also a state official, the equivalent rental conveyance does not need to be able to hold state police or other state security officers.

Section 9004.7(b)(5)(iv) continues to require payment for the use of accommodations paid for by a government entity. Under 11 CFR 100.7(a)(1)(iii)(B), the committee should use the usual and normal charge in the market from which it ordinarily would have purchased the accommodations. The term ''accommodations'' includes both lodging and meeting rooms.

New paragraph (b)(8) of section 9004.7 explicitly reflects Commission policy that travel on corporate conveyances is governed by 11 CFR 114.9(e). One witness suggested changing section 114.9(e) to include the lowest unrestricted nondiscounted coach fare for travel on corporate aircraft between cities where there is no first class service. Such a change is beyond the scope of this rulemaking.

Finally, new language in paragraph (b)(2) provides additional guidance as to when a stop will be considered campaign-related. It follows the Commission's previous decisions in AOs 1994–15 and 1992–6 that campaign activity includes soliciting, making or accepting contributions, and expressly advocating the nomination, election or defeat of the candidate. *See, e.g.,* AOs 1994–15, 1992–6, and opinions cited therein. In these opinions, the Commission also indicated that the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a determination that an activity is campaign related. Hence, the revised rules include other factors the Commission has considered in determining whether a stop is campaign-related. Please note that this section continues to provide that incidental campaign-related contacts during an otherwise noncampaign-related stop do not cause the stop to be considered campaign-related.

While several witnesses and commenters favored inclusion of express advocacy and contribution solicitations as tests of whether a stop is campaign-related, some felt that the additional factors were subjective, workable, failed to provide sufficient guidance, and exceeded the Commission's authority given the language in *Buckley,* 424 U.S. at 79–80, equating ''expenditure'' with express advocacy, not mere issue advocacy. Several suggested creating a rebuttable presumption that a stop is not campaign-related in the absence of express advocacy or the solicitation, making or acceptance of contributions. The difficulty with this type of narrow interpretation of *Buckley* is that if a stop is not campaign-related because there is no express advocacy of the candidate's selection or defeat, then the costs of the stop cannot be considered qualified campaign expenses, and cannot be paid for from public funds.

Please note that paragraphs (b)(2) and (b)(3) of this section have been revised to indicate what should be shown on the itinerary, and to indicate what the official manifest created by the government or charter company must be made available for Commission inspection.

Section 9004.9 Net Outstanding Qualified Campaign Expenses

The NPRM sought comments on a proposal to require primary committees to include a categorical breakdown of their estimated winding down costs when submitting a NOCO statement. The Commission proposed this change in order to obtain more useful information about the committee's remaining obligations.

The Commission has decided to require this breakdown, and has incorporated it into paragraph 9034.5(b) of the primary regulations, which are discussed in detail below. In addition, the Commission has decided to require general election candidates to submit this information with the statements of net outstanding qualified campaign expenses [''NOQCE''] they submit after the general election. Under paragraph 9004.9(a) of the final rules, a general

election committee must include a breakdown of the estimated winding down costs listed on the NOQCE statement by category and time period. The committee must provide estimates of quarterly or monthly expenses from the date of the NOQCE statement until the expected termination of the committee's political activity. These estimates must be broken down into amounts for office space rental, staff salaries, legal expenses, accounting expenses, office supplies, equipment rental, telephone expenses, postage and other mailing costs, printing, and storage.

Requiring this breakdown will assist the Commission in ensuring that public funds are used only for qualified campaign expenses. It will also ensure that candidates who are eligible for post-election funding receive the amount to which they are entitled.

The Commission is also amending paragraph (d)(1) of this section to provide for a straight 40% depreciation of capital assets that committees include on their post-election statements of net outstanding qualified campaign expenses. Previously, committees could claim a higher depreciation under certain circumstances. This amendment conforms to the Commission's policy of adopting ''bright line'' rules where feasible throughout the public funding process. The changes to this section generally follow those to 11 CFR 9034.5(c)(1), discussed below.

Part 9006—Reports and Recordkeeping

Section 9006.3 Alphabetized Schedules

The final rules include new section 9006.3, which requires that presidential campaign committee reports containing schedules generated from computerized files list in alphabetical order the sources of the receipts, the payees and creditors. For individuals, including contributors, the list must be in alphabetical order by surname. However, presidential campaign committees are not required to computerize their records if they do not wish to do so. The new provision is intended to remedy situations in which, for example, committees maintain computerized records of contributors in alphabetical order, but file schedules with the order of the names scrambled. That practice makes it very difficult, if not impossible, to locate particular names on the committee's reports if the schedules are voluminous, thereby thwarting the public disclosure purposes of the FECA and making it more difficult to monitor compliance. Alphabetization of lists of contributors is required for contributions to minor and new party candidates. Lists of contributors to the GELAC must also be alphabetized. In the event of a deficiency in the Presidential Election Campaign Fund, where private contributions may be accepted by major party candidates, alphabetical lists of contributors are also required. Unless there is a deficiency in the Fund, major party candidate who accept public funding for the general election may not accept private contributions.

There was no consensus among the witnesses and commenters on this proposal. While some supported it because it furthers full public disclosure, others opposed it on the grounds that it could increase computer costs and increase reliance on computer-driven accounting systems. The Commission notes that committees able to demonstrate such increased computer costs may claim a higher exemption for compliance expenses. One witness stated that accounting software does not currently alphabetize disbursements, debts or obligations, and suggested that committees indicate on their reports whether disbursements are listed by date of invoice, check number or date of payment. However, Commission inquiries indicate that commercial spreadsheet packages sort data in many different ways, including alphabetically. Given that most presidential campaigns use a variation of commercially available software, it should not be difficult for them to use standard database management software to alphabetize the information included on disclosure reports.

Part 9007—Examinations and Audits; Repayments

Section 9007.1 Audits

Further Streamlining the Audit Process

As noted in the NPRM, the Commission took several actions in the 1990–91 review of the public funding rules that have substantially shortened the audit process. These included easing compliance with the state-by-state allocation rules set forth at 11 CFR 106.2, and clarifying the use of subpoenas in presidential audits. *See* 56 FR 35899–900, 35903–04 (July 29, 1991).

The NPRM sought comments on other changes that might further streamline this process. These included publicly releasing the Interim Audit Report (''IAR''), moving up the committee's oral presentation to some earlier point in the process, and compressing or eliminating some stages of the process.

Most of the commenters who addressed this issue opposed further changes to the audit process at this time. They noted that, in part because of changes in the last cycle, the Commission was able to approve all Final Audit Reports for the 1992 presidential elections substantially faster than in earlier cycles. They also noted that issues tend to fall away as the process continues, and argued that the size of the audits and the number of issues involved justify the length of the current process.

Nevertheless, the Commission believes that it is appropriate to further condense the audit process. This will result in more timely audits and a more efficient use of Commission and committee resources.

Accordingly, the Commission is compressing the audit process by eliminating the current IAR. Briefly, the revised process entails an expanded exit conference, including a written Exit Conference Memorandum (''ECM'') prepared by Commission staff and presented to the committee at the exit conference; an opportunity for the committee to respond to the ECM; an audit report that contains the Commission's repayment determination; the opportunity for an administrative review of that determination, including the opportunity to request an oral hearing; and a post-review repayment determination and accompanying statement of reasons. These stages are discussed in greater detail below.

Former 11 CFR 9007.1(b)(2)(iii) provided for an exit conference at which Commission staff discussed preliminary findings and recommendations with committee representatives. The revised paragraph states that Commission staff will in addition prepare a written ECM that discusses these findings and recommendations, and provide a copy of the ECM to committee representatives at the exit conference. The listing of potential subjects to be addressed at the exit conference includes those formerly listed with regard to the IAR, but deletes references to Commission findings and enforcement actions, as the Commission will not have made any findings or instituted any enforcement actions at this point of the process.

Revised paragraph (c) gives the candidate and his or her authorized committee 60 calendar days following the exit conference to submit in writing legal and factual materials disputing or commenting on the findings presented in the ECM. The candidate should also provide any additional documentation requested by Commission staff during this period. The language in former 11 CFR 9007.1(c) regarding preparation of an IAR has been deleted, as the IAR is not longer part of the audit process.

Revised paragraph (d) contains many of the procedural provisions formerly found in 11 CFR 9007.1(c), which discussed preparation of the IAR. This paragraph has been renamed ''Preparation of audit report,'' and refers to the report prepared following consideration of written materials submitted in response to the ECM. Revised paragraph (d)(1) notes that this report may address issues other than those discussed at the exit conference. This report also contains the repayment determination made by the Commission pursuant to 11 CFR 9007.2(c)(1).

In addition, former 11 CFR 9007.1(e)(2) has been moved to new paragraph (d)(2). The language has been revised to conform with the Commission's practice of issuing audit reports in their entirety, including all matters noted in the audit process. Former 11 CFR 9007.1(e)(4) has been moved to new paragraph (d)(3), and the language revised to clarify that addenda to the audit report may include additional repayment determination(s).

Revised paragraph (e), which discusses the public release of the audit report, corresponds to former 11 CFR 9007.1(e) (1) and (3), and has been slightly reworded to conform to the new procedures.

Sampling

The Commission is also adding new paragraph (f) to 11 CFR 9007.1 to incorporate sampling and disgorgement procedures that were adopted for use during the 1992 presidential election cycle.

The Commission has a statutory obligation to complete the audits of publicly-funded committees in a thorough and timely manner. In the past, the resources required to conduct reviews of the contributions received by presidential committees contributed to the Commission's difficulty in fulfilling that obligation.

Beginning with the 1992 election cycle, the Commission began to make more extensive use of statistical sampling for audits of contributions received by publicly-financed presidential primary election committees, and to use the sample results to quantify, in whole or in part, the dollar value of any related audit findings. While the Commission continues to conduct a limited non-sample review of contributions received by these committees, most audit testing of contributions and supporting documentation is now done on a sample basis.

The Commission notes that this approach will apply in a general election only to contributions that need to be raised due to a deficiency in the Presidential Election Campaign Fund, to the GELAC, or to contributions raised by new or minor party candidates. See 26 U.S.C. §§ 9003(c)(2), 9006(c); 11 CFR 9003.2 (a)(2) and (b)(2), 9003.3 (b) and (c).

Some commenters argued that the Commission does not have the statutory authority to use statistical sampling in conducting its audits. However, the Commission has been given broad authority to audit publicly-funded presidential and vice presidential campaigns, *see* 26 U.S.C. § 9007(a), which authority includes the right to utilize generally accepted auditing standards in conducting these audits.

The use of statistical sampling is legally acceptable for projecting certain components of a large universe, such as excessive and prohibited contributions. *See, e.g. Chavez County Home Health Service* v. *Sullivan*, 931 F.2d 904 (D.C. Cir. 1991) (sampling audit used to recoup Medicaid overpayments to health care providers); *Michigan Dep't of Education* v. *U.S. Dep't of Education*, 875 F.2d 1196 (6th Cir. 1989) (sampling of 259 out of 66,368 total payment authorizations upheld as proper basis for determining amount of misexpended federal funds in vocational-rehabilitative program); *Georgia* v. *Califano*, 446 F. Supp. 404 (N.D. Ga. 1977) (Medicaid overpayments).

Most of these cases require the agency to demonstrate that it is infeasible to conduct a 100% review. *See, e.g., Chavez*, 931 F.2d at 916. While the Commission was able to conduct a more extensive review in the past, the increasing volume of records to be checked has now made this impossible. An accountant who testified at the Commission's public hearing stated that the Commission had no option but to use sampling, because of the large number of records involved in presidential campaign audits—a recent campaign with which he had been worked had involved over 200,000 contributions and tens of thousands of disbursements. These figures are not unusual in presidential campaign audits.

One commenter argued that these cases, which involve recoupment of government overpaid funds, should not be used to justify the use of sampling to determine excessive and illegal contributions which come from private sources. However, for statistical purposes there is no distinction between these two situations.

Some commenters also questioned the validity of the statistical sampling technique currently employed in this process. However, the fact that the technique may be used in dissimilar programs, or programs seeking other types of information, does not mean that it is not appropriate for use in this context.

There is substantial judicial precedent to the effect that, when considering a challenge to individual accounting rules, the reviewing court must defer to agency expertise. In *A.T.&T. Co.* v. *United States*, 299 U.S. 232 (1936), the Supreme Court stated that before it would overrule an agency's decision to use a certain accounting system, that system ''must appear to be so entirely at odds with fundamental principles of correct accounting as to be the expression of whim rather than an exercise of judgment.'' *Id.* at 236–37. *See also Transcontinental Gas Pipe Line Corp.* v. *Federal Power Commission*, 518 F.2d 459, 465 (D.C. Cir. 1975).

The statistical sampling method used for the Commission's matching fund submission process was designed and recommended by Ernst and Whinney (now Ernst and Young), one of the world's largest accounting firms. The Commission believes that this method works equally well in evaluating excessive and illegal contributions. In addition, in 1979 the Commission's Audit Division wrote to Arthur Andersen & Company, asking whether it would be appropriate to use statistical sampling to determine both matching fund eligibility and nonqualified campaign expenses. They responded that this would be appropriate in both situations. The Commission soon afterwards began to use statistical sampling in making matching fund determinations, but has not yet done so to determine nonqualified campaign expenses. However, if statistical sampling can be used to extrapolate the amount of nonqualified campaign expenses, it would seem equally capable of extrapolating the number of excessive and illegal contributions.

One commenter who supported this approach requested that the Commission advise committees in advance what records will be reviewed on a full 100% basis. The Commission believes it is inappropriate to divulge this kind of information in advance. Also, this can vary from committee to committee.

In its letter endorsing the use of statistical sampling to determine the amount of nonqualified campaign expenses, Arthur Andersen & Company recommended ''that the resulting repayment determination [the repayment determination based on the sample] not be deemed as final until the committee being audited has been provided with the opportunity to

furnish additional support that might indicate that a modification of the sample results would be appropriate.'' The Commission follows this recommendation in projecting excessive and illegal contributions.

The Commission's projection of the total amount of excessive or prohibited contributions based on apparent excessive or prohibited contributions identified in a sample of a committee's contributions is only a preliminary finding. The Commission informs the committee which items served as the basis for the sample projection, and the committee responds to the specific sample items used to make the projection. If the committee shows that any errors found among the sample items were not excessive or prohibited contributions; were timely refunded, reattributed or redesignated; or for some other reason were not errors, a new projection is made, based on the reduced number of errors in the sample. A witness at the Commission's hearing on these rules endorsed the use of sampling in this context in part because of this opportunity to work with Commission auditors and obtain a lower projection if the committee provides additional information to reduce the number of errors found in the sample.

Disgorgement

The Commission is further clarifying at new paragraph 9007.1(f)(3) that the amount of any excessive or prohibited contributions that are not refunded, reattributed or redesignated in a timely manner shall be paid to the United States Treasury. Committees have 30 days from the date of receipt in which to refund prohibited contributions, and 60 days in which to obtain the reattribution, redesignation or refund of excessive contributions. 11 CFR 103.3(b) (1), (2) and (3). A committee's failure to take action on these contributions is a failure to cure contributions that are in violation of the FECA. The same is true of attempts to cure them outside of the specified time periods.

Courts have upheld the use of disgorgement in cases involving securities violations ''as a method of forcing a defendant to give up the amount by which he was unjustly enriched.'' *SEC* v. *Tome,* 833 F.2d 1086, 1096 (2d Cir. 1987), citing *SEC* v. *Commonwealth Chemical Securities, Inc.,* 574 F.2d 90, 102 (2nd Cir. 1978). Requiring repayment to the Treasury for contributions that have been accepted in violation of 2 U.S.C. §§ 441a and 441b is consistent with this reasoning.

Disgorgement eliminates the need for the Commission to monitor a committee's refunds of excessive or prohibited contributions. In addition, it is easier for a committee to make one payment to the Treasury, as opposed to refunding multiple contributions. Finally, although the Commission has used disgorgement in instances where a 100% review is conducted, this is a practical approach in those situations where it is difficult to discern the original contributors, e.g., where a 100% review is not done.

Some commenters questioned the Commission's authority to require repayment to the Treasury because this is not specifically provided for in the public funding Acts. However, the equitable doctrine of disgorgement supports the payment to the Treasury under these circumstances. The purpose of statistical sampling would be defeated if a 100% review of contributions was required to determine which particular contributions must be refunded, reattributed or redesignated. On the other hand, allowing committees to refund only those excessive or illegal contributions uncovered in the sample could result in a committee's retention of substantial funds to which it was not legally entitled.

Disgorgement is also consistent with past Commission practice. *See* Matter Under Review (''MUR'') 1704, where, based upon preliminary estimates, Commission directed respondents to pay $350,000 to the United States Treasury for contributions that would have exceeded section 441a limits; Plaintiff's Motion to Effectuate Judgment, *FEC* v. *Populist Party,* No. 92–0674(HHG) (D.D.C. filed May 4, 1993).

Moreover, this proposed payment is analogous to, and consistent with, the requirement at 11 CFR 9038.6 that stale-dated checks (those to creditors or contributors that remain outstanding after the campaign is over) be paid to the Treasury. This issue arose after the 1984 election cycle, and the rule was promulgated as a means to codify the Commission practice of requiring disgorgement, which was implemented during that cycle. *See* 52 FR 20864, 20874 (June 3, 1987).

One commenter argued that the stale-dated check situation should be distinguished from that involving excessive and illegal contributions, because the former involves the return of public funds to the Treasury, while the latter involves private contributions. Once again, however, the same accounting principles apply to both situations.

Section 9007.2 Repayments

Further Streamlining the Audit Process

Section 9007.2 has been revised to reflect amendments made to section 9007.1. Revised paragraph (a)(2) states that the audit report provided to the candidate under 11 CFR 9007.1(d), which contains the Commission's repayment determination, will constitute notification for purposes of the three-year notification requirement of 26 U.S.C. 9007(c). This approach is consistent with two recent decisions by the United States Court of Appeals for the District of Columbia Circuit, *Dukakis* v. *Federal Election Commission,* No. 93–1219 (D.C. Cir. May 5, 1995) and *Simon* v. *Federal Election Commission,* No. 93–1252 (D.C. Cir. May 5, 1995).

Paragraph (a)(2) has also been revised to conform to the statutory requirement that the 26 U.S.C. 9007(c) notification period ends 3 years after the day of the presidential election.

Paragraph (a)(3) has been reworded to state that once the candidate receives notice of the Commission's repayment determination contained in the audit report, the candidate should give preference to the repayment over all other outstanding obligations of the committee, except for any federal taxes owed by the committee.

The Commission is moving former 11 CFR 9004.4(c) to new paragraph (a)(4). This paragraph, which deals with permissible sources of repayments, is more properly located in the section dealing with repayments.

New repayment determination procedures are set forth in revised paragraph (c). Revised paragraph (c)(1) largely follows the former language, but refers to the audit report as the source of the repayment determination. The last sentence of that paragraph has also been revised to clarify that the candidate shall repay to the United States Treasury the amount which the Commission has determined to be repayable, using procedures set forth in 11 CFR 9007.2(d).

Revised paragraph (c)(2) sets forth the procedures necessary for a committee to obtain an administrative review of the repayment determination. Please note that this review is limited to repayment issues. It does not cover other issues, such as disgorgement, that will if necessary be handled through the enforcement process.

Paragraph (c)(2)(i) corresponds to former 11 CFR 9007.2(c)(2) and addresses the submission of written materials as part of this process. Paragraph (c)(2)(ii) corresponds to former 11 CFR 9007.2(c)(3), discussing

the oral hearing. The language in these paragraphs for the most part follows the former rules, with the following additions. The deadline for filing written materials seeking an administrative review of the repayment determination has been lengthened from 30 to 60 days. Also, the candidate's failure to timely raise an issue in the written materials presented pursuant to paragraph (c)(2)(i) will be deemed a waiver of the candidate's right to raise the issue at any future stage of the proceedings. *See Robertson* v. *FEC,* 45 F.3d 486 (D.C. Cir. 1995). Further, under paragraph (c)(2)(ii), a candidate who desires an oral hearing must, at the same time he or she presents written materials pursuant to paragraph (c)(2)(i), request such a hearing in writing, and identify in that request the repayment issues the candidate wishes to address at the oral hearing.

Revised paragraph (c)(3) corresponds to former 11 CFR 9007.2(c)(4), and now deals with repayment determinations made after an administrative review. Please note that the statement regarding the Commission's possible consideration of new or additional information from other sources does not provide a means for the candidate or anyone acting on the candidate's behalf to make untimely submissions. Former 11 CFR 9007.2(c)(4) has been repealed.

Paragraphs (d), (f), (g) and (i) have been revised to conform with the new terminology used elsewhere in this section.

Gains On the Use of Public Funds

As indicated in the discussion of section 9004.5, above, the final rules contain a conforming amendment to the introductory language of section 9007.2(b)(4). This amendment clarifies that receiving income from investment or any other use of payments from the Fund is a basis for requiring payment to the Treasury. The Commission will require the committee to pay any such income received, less taxes paid, to the Treasury. The revisions to sections 9004.5 and 9007.2 ensure that any income received through the use of public funds benefits the public financing system. However, as indicated above, this provision does not apply to income that is exempt function income under 26 U.S.C. § 527(c)(3), such as amounts received from fundraising activities.

Interest

The Commission sought comment in the NPRM on whether interest should be assessed in certain situations. Although some commenters opposed this idea, the Commission believes it is appropriate to assess interest on late repayments, and is therefore amending 11 CFR 9007.2(d) to provide that interest will be assessed on repayments made after the initial 90-day repayment period established at 11 CFR 9007.2(d)(1) or after the 30-day repayment period established at 11 CFR 9007.2(d)(2).

In the absence of interest charges for late repayments, debtors have little or no incentive to make timely repayments. Without this requirement, debtors may be more likely to pay their private sector debts first, as these generally accrue interest, and their government debts last.

While the presidential fund Acts contain no language on interest assessment, federal common law holds that interest may be assessed on debts owed the government, even without a statutory provision granting that power. *Robinson* v. *Watts Detective Agency,* 685 F.2d 729, 741 (1st Cir. 1982), *cert. denied,* 459 U.S. 1204 (1983). In particular, a statute is not necessary to compel payment of interest where equitable principles allow this. *Young* v. *Godbe,* 82 U.S.. 562, 565 (1872).

The Commission has already established the precedent that it may assess interest when a presidential committee seeks a stay of a repayment determination pending appeal. 11 CFR 9007.5(c)(4), 9038.5(c)(4). One reason cited by the Commission for taking this action was to protect the Treasury ''by helping to ensure that the repayment challenge is a serious one and not a dilatory tactic.'' Agenda Document 86–118, Proposed Revision of Title 26 Regulations (Nov. 26, 1986). Another was that, if the candidate is earning interest on the disputed repayment amount, the Treasury and not the candidate should receive the benefit if the Commission's repayment determination is upheld. *Id.* Both reasons are equally applicable in this situation.

By agreeing to certain conditions, including an audit and appropriate repayment, the presidential committees have established a contractual relationship with the Commission under which interest assessment becomes appropriate. *See West Virginia* v. *United States,* 479 U.S. 305, 310 (1987). Also, if a debtor-creditor relationship is established, ''interest is allowed as a means of compensating a creditor for loss of use of his money.'' *United States* v. *United Drill and Tool Corporation,* 183 F.2d 998, 999 (D.C. Cir. 1950). Such a relationship exists in this context in that, prior to the receipt of public funds, the candidate must agree to repay unexpended funds, money determined to be spent in an unqualified manner, and amounts received in excess of entitlement. 11 CFR 9003.1(b)(6), 9033.1(b)(7).

The interest currently assessed under 11 CFR 9007.5(c)(4) and 9038.5(c)(4) is the greater of that calculated using the formula set forth at 28 U.S.C. § 1961 (a) and (b) for computing interest on money judgments in federal civil cases, or the amount actually earned on the funds set aside under those sections. The Commission believes it is appropriate to utilize a similar approach in this situation. The Commission is therefore adding new paragraph 9007.2(d)(3) to provide that a comparable formula shall be used in assessing interest on late repayments under section 9007.2.

Section 9007.3 Extensions of Time

The Commission is amending paragraph (c) to include in that paragraph the policy that, whenever 11 CFR Part 9007 establishes a 60-day response period, the Commission may grant no more than one extension of time, which extension shall not exceed 15 days. The rules formerly provided for a 30 day response period. Materials provided to the committees prior to the audit process explained that extensions of time were limited to a single, 45 day extension. The rules thus continue the former 75-day total response period, and the initial 60-day response period may result in fewer extension of time requests.

Section 9007.5 Petitions for Rehearings; Stays of Repayment Determinations

The Commission is making conforming amendments to paragraphs (a), (b), (c)(1)(ii) and (c)(4), to reflect changes in terminology for the audit and repayment process. *See* discussion of 11 CFR 9007.1 and 9007.2, above.

Section 9007.7 Administrative Record

New section 9007.7 explains which documents constitute the administrative record for purposes of judicial review of final determinations regarding candidate certification and eligibility, and repayment determinations. The NPRM had included a lengthy list of documents that usually form the basis of the administrative record. It also indicated that certain items are not part of the Commission's decisionmaking process, and thus not part of the record on review.

One commenter expressed concern that the Commission was trying to impermissibly restrict documents to be included in the administrative record. The comment noted that judicial review is based on the whole record before the

agency. Similarly, another commenter stated that the administrative record should include all materials that form the basis of the Commission's decisions. Two comments suggested including workpapers on which the auditors relied in making their calculations and recommendations. During the course of the audit and repayment processes, it has been the Commission's practice to provide committees with the audit work papers they need to formulate their responses.

The Commission agrees that the administrative record includes all materials it considered in making its decision, and the final rules have been modified to reflect this. Thus, it will generally include all documents circulated to the Commission (including attachments) and materials referenced in those documents. However, documents in the files of individual Commissioners, or documents in FEC employees' files which do not constitute a basis for the Commission's decisions, are not included in the record. The administrative record also does not include transcripts or tapes of Commission discussions of audit or repayment matters. *See, Common Cause* v. *Federal Election Commission*, 676 F. Supp. 286, 289 and n.3 (D.D.C. 1986). Although these materials may sometimes be made available under the Freedom of Information and Government in the Sunshine Acts, they do not provide an adequate explanation of the reasons for the Commission's decisions because they represent pre-decisional discussions. Documents properly subject to privileges such as an attorney-client privilege, or items constituting attorney work product, are also excluded from the administrative record.

The new rules indicate that documents and materials timely submitted by publicly-funded committees for Commission consideration are a part of the administrative record. Materials will also be considered timely submitted if they are received within an extension of time granted by the Commission. It is important that committees avail themselves of the opportunity to submit documents and other materials in a timely fashion, as they will be deemed to have admitted all specific findings and conclusions contained in an audit report or a repayment determination unless they specifically contest those findings and conclusions and provide supporting evidence and legal arguments at the appropriate time. When submitting evidentiary materials, committees should keep in mind that statements of counsel that are not supported by personal knowledge do not constitute evidence. Committees may include in their submissions the audit work papers with which they have been provided. They need not include transcripts or tapes of their oral presentation to the Commission regarding repayment determinations, as those materials are already a part of the record.

Section 9008.12 Repayments

A conforming amendment has been added to paragraph (a)(2), to state that the audit report provided to the convention committee that contains the Commission's repayment determination will constitute notification for purposes of the three-year notification requirement of 26 U.S.C. 9008(h).

The Commission's rules governing public financing of national nominating conventions provide at 11 CFR 9008.11 that audits of convention committees follow the procedures for audits of presidential campaign committees set forth at 11 CFR 9007.1 and 9038.1. The former language contained a reference to the IAR, which is no longer a part of these procedures.

Part 9032—Definitions

Section 9032.9 Qualified Campaign Expenses

The Commission is adding a conforming amendment to paragraph (c) of this section to reflect the new attribution of certain expenditures between the primary and the general election limits. The amendment notes that certain expenditures formerly covered by this paragraph will not be attributed under these new guidelines. See discussion of 11 CFR 9034.4(e), below.

Part 9033—Eligibility for Payments

Section 9033.1 Candidate and Committee Agreements

In the interests of clarity, the Commission is adding a comma in the second sentence of 11 CFR 9033.1(b)(5). Paragraph (b)(5) concerns candidate and committee agreements to furnish certain documentation to the Commission.

A conforming amendment has been added to paragraph 9033.1(b)(7), clarifying that the same candidate and committee responsibilities that attach to an audit and examination made pursuant to 11 CFR part 9038 also attach to part 9039 investigations, under appropriate circumstances. See discussion of part 9039, below.

The final rules slightly reword paragraph (b)(11) of this section to more clearly indicate that candidates must agree to pay any civil penalties arising from violations of the FECA, whether provided for in a conciliation agreement or imposed in a judicial proceeding.

New paragraph 9033.1(b)(12) has been added to require presidential primary candidates to include closed captioning in the preparation of their television commercials, as a precondition of their receiving public funds. This amendment corresponds to new paragraph 9003.1(b)(10), discussed above. The Legislative Branch Appropriations Act of 1992 does not specifically amend 26 U.S.C. § 9033, which sets out the eligibility requirements for presidential primary candidates. However, the Appropriations Act does state that the closed captioning requirement inserted in 26 U.S.C. § 9003(e) applies both to general election candidates and to candidates who are eligible for funding ''under chapter 96'' of Title 26 of the United States Code, that is, the Matching Payment Act. The Commission is therefore amending 11 CFR 9033.1(b) to reflect this new requirement.

Section 9033.4 Matching Payment Eligibility Threshold Requirements

Former 11 CFR 9033.4(b) stated that, in evaluating a candidate's matching fund submission, the Commission could consider other relevant information in its possession, including but not limited to past actions of the candidate in an earlier campaign. This provision was held to exceed the Commission's statutory authority in *LaRouche v. FEC*, 996 F.2d 1263 (D.C. Cir. 1993), *cert. denied* 114 S. Ct. 550. The Commission is therefore deleting this paragraph from the rule.

Section 9033.11 Documentation of Disbursements

Revised section 9033.11 follows revised section 9003.5.

Part 9034—Entitlements

Section 9034.4 Use of Contributions and Matching Payments

Winding Down Costs

The regulations at 11 CFR 9034.4(a)(3)(i) permit candidates to receive contributions and matching funds, and make disbursements, for the purpose of defraying winding down costs over an extended period after the candidate's date of ineligibility (''DOI''). These amounts are treated as qualified campaign expenses, and can result in additional audit fieldwork and preparation of addenda to audit reports to focus on these receipts and disbursements.

As part of an effort to streamline and shorten the audit process, the

Commission sought comment on ways to reduce the winding down time for campaigns. The NPRM suggested limiting the amount that a candidate may receive for winding down costs to no more than a specified dollar amount, or a fixed percentage of the candidate's total expenditures during the campaign, or a fixed percentage of total matching funds certified for the candidate. The NPRM questioned whether campaigns that receive a pre-established dollar amount, but do not use the entire amount for winding down costs, should be permitted to retain the unspent amount. Alternatively, comments were sought on establishing a cutoff date after which winding down expenses would no longer be considered qualified campaign expenses.

Several commenters and witnesses opposed limiting wind down costs. They felt that basic fairness requires campaigns to have the resources necessary to respond during the audit process and to defend themselves against enforcement proceedings. It was also pointed out that during this period, campaigns need to be able to verify the proper payment of remaining bills, and that it would be a waste of federal funds if they were hampered in identifying incorrect bills.

The Commission agrees that it would be quite difficult to select an amount or time frame sufficient to meet reasonable expenses incurred in winding down the campaign. A limit on the amount of public funds available for winding down would provide the same difficulties as a restriction on the total funds to be used for wind down. Consequently, the final rules contain no new restrictions on the amount spent on winding down or the time taken. Thus, the Commission will continue to review the committee's wind down costs on a case by case basis.

Post-DOI Expenses as Exempt Compliance Expenses

New language in section 9034.4(a) incorporates the current practice of permitting publicly-funded primary committees to treat 100% of salary, overhead and computer expenses incurred after the candidate's DOI as exempt compliance expenses, beginning with the first full reporting period after DOI. *See, Financial Control and Compliance Manual for Presidential Primary Candidates Receiving Public Financing*, p. 25 (January 1992). Two witnesses and one commenter urged adoption of this provision. Please note that this regulation does not apply to expenses incurred during the period between DOI and the date on which a candidate either re-establishes eligibility or ceases to continue to campaign.

Gifts and Bonuses

New language in section 9034.4(a) and section 9004.4(a) permits campaign committees to use federal funds to defray the costs of gifts for committee staff, volunteers and consultants, as long as the gifts do not exceed $150 per individual and as long as all gifts do not exceed $20,000. This approach received a favorable response from one witness and one commenter. It is somewhat similar to a provision included in the public funding rules for convention committees at 11 CFR 9008.7(a)(4)(xii). See 59 FR 33618 (June 29, 1994).

With regard to bonus arrangements provided for in advance in a written contract, the NPRM sought comments on whether the amount of these bonuses should be restricted to a fixed percentage of the compensation paid as provided by the contract, or whether these bonuses should be subject to the overall $20,000 limit. A number of commenters and witnesses opposed these suggestions on the grounds that bonus decisions should remain within the discretion of the committees; primary campaigns may not know at the outset how much will be available for bonuses; and campaigns may choose not to enter into written employment contracts. Some felt these proposals were more feasible for general election committees than for primary campaigns because the party nominees know at the outset what their funding level will be for the general election. It was also suggested that all bonuses be paid within ten days of a committee's date of ineligibility.

The final rules have been revised to require that for general election campaigns, bonus arrangements must be provided for prior to the date of the general election in a written contract, and must be paid during the expenditure report period, which ends thirty days after the general election. Similarly, primary campaigns must make bonus arrangements in advance and must pay bonuses no later than thirty days after the candidate's DOI. These time frames allow ample time for campaigns to make decisions regarding bonuses.

Lost or Damaged Equipment

The Commission is adding new paragraph (b)(8) to section 9034.4 to clarify that the cost of lost or damaged items may be considered a nonqualified expense for purposes of these rules. This change parallels new paragraph 9004.4(b)(8), and is discussed in more detail in connection with section 9004.4, above.

Funding General Election Expenses With Primary Funds

The Presidential Election Campaign Fund Act, the Presidential Primary Matching Payment Account Act, and Commission regulations require that publicly funded presidential candidates use primary election funds only for expenses incurred in connection with primary elections, and that they use general election funds only for general election expenses. 26 U.S.C. 9002(11), 9032(9); 11 CFR 9002.11, 9032.9. These requirements are tied to the overall primary and general election expenditure limits set forth at 2 U.S.C. 441a (b) and (c), and at 26 U.S.C. 9035(a). *See also* 11 CFR 110.8(a), 9035.1(a)(1).

Questions have arisen in recent election cycles as to whether certain expenses charged to primary committees were in fact used to benefit the general election. Once a candidate has secured enough delegates to win the nomination, the focus of the campaign may turn in large part to the general election. However, it can be difficult to distinguish between primary campaign activity, such as that designed to lock up delegates or otherwise related to the outcome of the primary campaign, and convention preparation, from activity that is geared towards winning the general election.

The NPRM sought general suggestions on how best to address this situation. For example, it suggested that certain expenditures within a set time frame before the date of the candidate's nomination might be subject to higher scrutiny. In addition, the Notice contained specific proposals on how to treat capital assets, certain goods and services, and supplies and materials in this context; and sought comments on how other expenditures, such as those for campaign related travel and media expenses, should be attributed.

Most of the commenters who addressed this issue favored a "bright line" cut-off date between primary and general election expenses, which would give committees clear guidance as to which expenses will be attributed to the primary election and which to the general election. Some suggested that this date be set as the candidate's date of ineligibility. Moreover, most comments opposed any guidelines or presumptions that would require a "case-by-case" determination of how certain expenditures should be characterized.

The Commission recognizes that it can be difficult to select a single "bright

line'' date appropriate for all campaigns under all circumstances. Also, the adoption of ''bright line'' rules could in certain instances result in the primary committee's subsidizing the general election committee, or vice versa. Nevertheless, the Commission believes this approach is appropriate with regard to certain specific types of expenditures that may benefit both the primary and the general election. These include expenditures for polling; state or national offices; campaign materials; media production costs; campaign communications; and campaign-related travel costs (*see also* 11 CFR 9034.5, depreciation of capital assets, discussed below).

The Commission recognizes that there could be situations in which this approach does not accurately reflect the relative impact of particular expenditures. However, these differences should balance themselves out over the course of a lengthy campaign. In addition, a major factor in the Commission's decision is the desire to complete the audits more quickly and using fewer agency resources. It can be extremely time- and labor-intensive for both the Commission and the committees to examine thousands of individual expenditures, especially where, as here, both the timing and the purpose of each expenditure is at issue. Accordingly, the Commission is adding a new paragraph (e) to this section partially deal with this situation.

The introductory language to this paragraph notes that these rules apply only to campaigns of candidates who receive public funding in both the primary and the general election. Paragraph (e)(1) states the general rule that any expenditure for goods or services that are used exclusively for either the primary or the general election campaign shall be attributed to the limits applicable to that election.

Please note that primary expenditures are also attributable to the state allocation limits set forth in 11 CFR 106.2. Also, any expenditures that are attributed to the general election limits shall be paid for with general election funds.

Paragraph (e)(2) states that polling expenses shall be attributed according to when the results of the poll are received. If the results are received on or before the date of the candidate's nomination, the expenses will be considered primary election expenses. If partial results are received both before and after the date of the candidate's nomination, the costs shall be allocated between the primary and the general election limits based on the percentage of results received during each such period.

A conforming amendment is also being made to 11 CFR 9003.4(a) (see discussion above). That paragraph formerly stated that certain polling expenses could count against the general election limit regardless of when the results of the polling were received.

Paragraph (e)(3) addresses overhead expenditures and payroll costs incurred in connection with state or national campaign offices, and attributes these according to when usage of the office occurs. For usage on or before the date of the candidate's nomination, these expenses are attributed to the primary election, except for periods when the office is used only by persons working exclusively on general election campaign preparations. The definition of ''overhead expenditures'' set forth in 11 CFR 106.2(b)(2)(iii)(D) is incorporated by reference into this paragraph.

Paragraph (e)(4) addresses campaign materials, including bumper stickers, campaign brochures, buttons, pens and similar items, that are purchased by the primary campaign and later transferred to the general election campaign. Any such materials that are used in the general election shall be attributed to the general election limits. Materials transferred to the general election committee but not used in the general election shall be attributed to the primary election limits.

Paragraph (e)(5) states that 50% of production costs for media communications that are broadcast or published both before and after the date of the candidate's nomination shall be attributed to the primary election limits, and 50% to the general election limits. Please note that distribution costs, including such costs as air time and advertising space in newspapers, must be paid for 100% by the primary or general election campaign depending on when the communication is broadcast or distributed.

The Commission notes that the pre- and post-nomination communications need not be identical for this attribution ratio to apply. Obvious changes include such matters as stating that the communication was ''paid for by '' the candidate's general rather than primary election campaign committee; and references to the candidate as the party's actual, rather than potential, nominee. However, there are also situations where a communication is substantially unchanged, except for a portion targeted to, for example, specific constituent groups or different parts of the country. The Commission also intends to apply the 50/50 attribution ratio to these communications.

Paragraph (e)(6) addresses campaign communications, including solicitations, that are not used in both the primary and the general election. In the past questions have arisen as to whether a per-DOI communication was intended to influence the general election, or vice versa (e.g., thank you letters for primary contributions sent after the date of the candidate's nomination).

Paragraph (e)(6)(i) states that the costs of a solicitation shall be attributed to the primary election or to the General Election Legal and Accounting Compliance Fund, depending on for which purpose the solicitation is made.

While candidates may not accept private contributions to cover expenses incurred to benefit the general election campaign, they may solicit contributions for the GELAC. The rule states that, if a candidate solicits funds for both the primary election and for the GELAC in a single communication, 50% of the cost of the solicitation shall be attributed to the primary election, and 50% to the GELAC. Consequently, the primary committee must pay 50% of the solicitation costs, and the GELAC must pay 50%.

Occasionally a committee will solicit contributions to retire a primary election debt, and receive more money in response to the solicitation than is needed to pay off the debt. Under 11 CFR 9003.3(a)(1)(iv)(C), the committee may transfer such excess contributions to the GELAC if proper redesignations are obtained. If a committee chooses to seek redesignations, the cost of the solicitation shall be attributed to the primary limits, while any redesignation costs shall be paid by the GELAC.

Paragraph (e)(6)(ii) states that the costs of a communication that does not include a solicitation shall be attributed to the primary or general election limits based on the date on which the communication is broadcast, published or mailed.

Paragraph (e)(7) states that expenditures for campaign-related transportation, food and lodging by any individual, including a candidate, shall be attributed according to when the travel occurs. If the travel occurs on or before the date of the candidate's nomination, the cost is a primary election expense, except that the costs of travel by a person who is working exclusively on general election campaign preparations shall be considered a general election expense even if the travel occurs before the candidate's nomination. Travel both to

and from the convention shall be a primary expense.

Sources of Repayment

The rule set out in current paragraph 9034.4(c) has been moved to new paragraph 9038.2(a)(4). Paragraph 9034.4(c) has been removed and reserved for future use. This change generally follows the conforming amendment discussed in connection with section 9004.4, above.

Section 9034.5 Net Outstanding Campaign Obligations

NOCO Statements

The final rules make a number of changes in the requirements for submission of NOCO statements set out in section 9034.5. Paragraph (b) is amended to require committees submitting NOCO statements to include a breakdown of the estimated winding down costs listed on the statement by category and time period. The committee must provide estimates of quarterly or monthly expenses from the date of the NOCO statement until the expected termination of the committee's political activity. These estimates must be broken down into amounts for office space rental, staff salaries, legal expenses, accounting expenses, office supplies, equipment rental, telephone expenses, postage and other mailing costs, printing, and storage.

One commenter noted that it can be difficult to estimate winding down costs until well into the audit process, because the committee continues to receive bills, and also because it is not clear what issues will arise until the audit is underway.

The Commission recognizes that the winding down figures on a committee's NOCO statements are, by necessity, estimates of anticipated expenses. However the Commission has decided to require a breakdown of these expenses in order to obtain more meaningful information than is obtained under the existing rule. Currently, many NOCO statements list the candidate's estimated necessary winding down costs as a single lump sum. Requiring the breakdown will help the Commission determine whether the candidate is entitled to receive the entire estimated amount.

The final rules also revise the schedule for submission of revised NOCO statements. Under the current rules, candidates are required to submit a revised NOCO statement with each matching payment request submitted after DOI. The proposed rules would have required candidates to submit an additional revised NOCO statement just before the date when matching fund payments will be certified, on a date to be published by the Commission. The additional statement would be used to ensure that the amount of matching funds certified accurately reflects the committee's financial situation at the time of certification. One commenter thought this additional requirement would be burdensome and will not solve the problem identified in the NPRM.

The Commission believes that requiring two revised NOCO statements for each matching payment submission is unnecessary. Consequently, the final rules change the Commission's current policy of requiring candidates to submit a revised NOCO statement at the time of each post-DOI matching payment submission. Instead, the final rules require the candidate to submit a certification that his or her remaining net outstanding campaign obligations equal to or exceed the amount submitted for matching. If the candidate so certifies, the Commission will process the matching payment submission.

The candidate must then submit a revised NOCO statement just before the next regularly scheduled payment date, on a date to be determined and published by the Commission in the **Federal Register**. The statement must reflect the financial status of the campaign as of the close of business three business days before the due date, and must also contain a brief explanation of each change in the committee's assets and obligations from the most recent NOCO statement. This will allow the Commission to adjust the committee's certification to reflect any change in the committee's financial position that occurs after submission of the initial matching payment request. Thus, the amount certified will be closer to the committee's actual entitlement, reducing the need to seek subsequent repayment.

This revised schedule is set out in paragraphs 9034.5(f) (1) and (2) of the final rules. Paragraph 9034.5(f)(2) of the former rules has been renumbered as paragraph (f)(3), without revision.

The Commission notes that, while the additional information required should increase the accuracy of the matching fund certifications, as under the current practice, the Commission will not approve NOCO statements when they are submitted. Thus, although the new rules will often reduce the size of a committee's repayment, the Commission will continue to seek repayment under appropriate circumstances.

Capital Assets

The Commission is amending paragraph (c)(1) of this section to provide for a standard 40% depreciation of capital assets that are received by a primary campaign committee prior to the candidate's DOI and subsequently sold to the general campaign committee or to another entity.

The former rule set forth the 40% depreciation allowance, but allowed a higher depreciation for particular item if the committee demonstrated through documentation that the asset's fair market value was lower. However, there was no corresponding provision for the Commission to document a higher fair market value. The NPRM proposed that the 40% figure be subject to both increase and decrease, under appropriate circumstances. Most of those who commented on this issue opposed this change, which the Commission had proposed to more accurately reflect its experience in dealing with this situation.

Consistent with its approach to other expenditures that can be attributed to both the primary and the general election limits (see discussion of 11 CFR 9034.4(e), above), the Commission is adopting a ''bright line'' 40% depreciation figure for capital assets that are used in both the primary and the general election campaigns. While the Commission recognizes that there may be instances in which the 40% figure is too low, there are also situations in which that figure may be too high. The Commission believes that in many instances there differences will balance themselves out over the course of a lengthy campaign. Also, given the number of capital assets involved in a typical campaign, it can be time- and labor-intensive for both the Commission and the committee to handle these on a case-by-case basis.

Please note that the term ''capital asset'' includes components of a system used as a whole and purchased at the same time at a cost exceeding $2000, even if individual system components cost less than $2000.

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

Section 9034.6 has been reorganized with minor substantive changes. These revisions are the same as those made to section 9004.6, the parallel provision for general election committees. *See* the discussion of section 9004.6, above.

Section 9034.7 Allocation of Travel Expenditures

The changes in section 9034.7 follow the changes to section 9004.7

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

Section 9036.2 Additional Submissions for Matching Fund Payments

Complete Contributor Identification

Treasurers of political committees, including authorized committees of presidential candidates, are required by 2 U.S.C. §§ 432(i) and 434(b) to use their best efforts to obtain, maintain and report the name, address, occupation and employer of all contributors who give over $200 per calendar year. The Commission recently issued revised rules regarding this reporting obligation. *See* 58 FR 57725 (Oct. 27, 1993). During that rulemaking, two commenters suggested revising 11 CFR 9036.2 so that presidential primary candidates would only receive matching funds for contributions exceeding $200 that also contain complete contributor information. While full contributor identifications are required for such contributions in threshold submissions under 11 CFR 9036.1(b), they have not been required under 11 CFR 9036.2(b)(1)(v) for additional submissions for matching funds. Accordingly, the Commission sought comment on whether to delete section 9036.2(b)(1)(v), thereby requiring complete contributor information for all matchable contributions exceeding $200. In the alternative, comments were sought on only matching these contributions if committees can provide evidence demonstrating they made their best efforts to obtain the information.

There was no consensus among the commenters and witnesses who addressed this issue. Some felt that the public has a right to complete disclosure of this information when its money is given to presidential candidates, and that there is no rational basis for the distinction between threshold submissions and subsequent requests for matching funds. They cited figures from the 1992 election cycle to argue that some candidates did not take the disclosure statutes seriously. Others pointed out that the new best efforts rules are intended to resolve this issue, and that it would be onerous for committees to show during the matching submission process that they have satisfied the new best efforts rules. Some felt that contributors should not be forced to forego their privacy rights in order to have their contributions matched. Hence, they argued that vigorous enforcement of the new best efforts rules is the appropriate course of action.

For several reasons, the Commission has decided not to change the current requirements regarding matchability of contributions from individuals. First, the Commission has seen a significant increase in the reporting of occupation and employer since the best efforts regulations were revised. For example, a comparison of authorized committee reports for April–September 1992 with reports for April–September 1994, shows the number of itemizable contributions from individuals which lacked information on the contributor's principal place of business decreased from 17% to 10%. Thus, it is premature to conclude that further measures are needed to enhance disclosure. Secondly, it is not a efficient use of Commission resources to verify this information during the matching fund submission process. Doing so would slow down an already time-constrained process. Moreover, the reasons for requiring occupation and employer in threshold submissions do not apply to additional submissions. Occupation and employer information are necessary for threshold submissions to ensure that candidates have met the eligibility requirements by having received matchable contributions of at least $5000 from contributors in at least 20 states.

Use of Digital Imaging for Matching Fund Submissions

Several questions were also raised regarding the possibility that committees may wish to submit contributions for matching through the use of digital imaging technology such as computer CD ROMs, instead of submitting paper photocopies of checks and deposit slips. One witness urged the Commission to allow committees to have this option. Accordingly, new language has been added to paragraph (a)(1)(vi) of section 9036.2 to let committees provide digital images of contributions, but not to require that they do so. If they choose this option, the Commission may require committees to supply the Commission with the equipment needed to read the digital data at no cost to the Commission. One witness stated that this was a reasonable condition. Given the variety of sources providing this technology, it is not feasible for the Commission to purchase all the equipment that different committees might wish to use. The new language also specifies that the digital information committees provide must include an image of each contribution received and imaged during the period covered by the matching fund submission, not just matchable contributions. As a practical matter, it may be simpler for committees to include all contributions on CD ROMs rather than separating out the nonmatchable ones. This approach will have the additional benefit of enabling the Commission's audit staff to begin examining contributions at an earlier point, which should speed up the audit process. The Commission may seek verification from the committee's bank or from contributors pursuant to 11 CFR 9039 if the Commission is unable to resolve questions regarding the digital images submitted.

While the Commission is approving the submission of contribution information using computerized digital imaging technology, it is not changing the requirements regarding the submission of disbursements documentation. Previously, the Commission has concluded that the retention of microfilm records satisfies the documentation requirements of 2 U.S.C. § 432(c), and that for electronic transfers, committees may keep records in the form of computerized magnetic media. AOs 1994–40 and 1993–4. However, these advisory opinions addressed fairly limited record retention issues, and did not address or resolve issues regarding the use of digital imaging technology to satisfy the requirements of 11 CFR 9003.5 or 9033.11.

Section 9036.5 Determination of Ineligibility Date

A conforming amendment has been added to paragraph 9036.5(a), clarifying that the procedures of section 9036.5 apply to matching fund resubmissions made pursuant to 11 CFR part 9036 and those prompted by an inquiry under 11 CFR part 9039, under appropriate circumstances. See discussion below.

Part 9037—Payments and Reporting

Section 9037.4 Alphabetized Schedules

The final rules include new section 9037.4, which follows new section 9006.3.

Part 9038—Examination and Audits

Section 9038.1 Audit

The amendments to this section follow those made to section 9007.1, above.

Section 9038.2 Repayments

Repayment Ratio

Section 9038.2(b)(2) of the current rules requires candidates to repay amounts received from the matching payment account that are used for non-qualified campaign expenses. The amount of the repayment is determined by multiplying the total amount of non-qualified campaign expenses by the candidate's repayment ratio. The repayment ratio is the ratio of matching funds received by a candidate to the candidate's total deposits. Under the current rules, the repayment ratio is determined as of the candidate's date of ineligibility.

The new rule changes the date for determining a candidate's repayment ratio from the date of ineligibility to 90 days after the date of ineligibility. Under the new rule, the Commission will multiply the amount of non-qualified campaign expenses by the ratio of matching funds to total deposits received as of 90 days after the candidate's date of ineligibility, in order to determine the amount the candidate must repay for using matching funds for non-qualified campaign expenses.

The new rule generates a repayment ratio that more accurately reflects the mix of public funds and private contributions received during the campaign, particularly for a candidate who receives significant amounts of private contributions after his or her date of ineligibility. By taking private contributions received within 90 days of DOI into account when determining a candidate's repayment ratio, the new rule will likely reduce the radio, thereby reducing the amount of the candidate's repayment.

This approach is also more consistent with the statute when applied to a candidate who does not receive matching payments until after his or her date of ineligibility. Section 9038(b)(2) of the Matching Payment Act requires a candidate who uses public funds for non-qualified campaign expenses to repay a portion of the public funds he or she received to the Treasury. However, when section 8038.2(b)(2) of the current regulations is applied to a candidate who does not receive matching payments until after his or her DOI, it arguably generates a repayment ratio of zero. Thus, it does not require the candidate to make a repayment, even if the candidate incurred numerous non-qualified campaign expenses.

The new rule takes these post-DOI matching payments into account, thereby generating a ratio that is greater than zero and more accurately reflects the mix is greater than zero and more accurately reflects the mix of matching payments and private contributions actually received. As a result, publicly-funded candidates that incur non-qualified campaign expenses will be required to make a repayment, even if they do not receive any public funds until after their date of ineligibility.

In approving this approach for the final rules, the Commission rejected an alternative approach set out in the NPRM. The alternative approach would treat all matching funds certified in response to matching payment submissions received before the candidate's DOI as if they were certified before the candidate's DOI. This would result in a repayment ratio of greater than zero that could be used to determine a repayment amount under section 9038(b)(2) of the statute. However, this approach would only address the zero repayment situation outlined above. Since determining the repayment ratio 90 days after DOI addresses both situations, the Commission has incorporated this approach into the final rules.

In an effort to improve clarity, the final rules break the last three sentences of this section into two separate paragraphs. The Commission received no comments on this provision.

Income Derived From the Use of Surplus Public Funds

Paragraph 9038.2(b)(4) has been revised to indicate that the Commission may determine that income resulting from any use of surplus public funds after the candidate's DOI, less taxes, paid, shall be paid to the Treasury. This change parallels the changes made to sections 9004.5 and 9007.2(b)(4), discussed above.

Further Streamlining the Audit Process

The amendments to the audit process contained in this section follow those made to section 9007.2(d), above.

Conforming Amendments

A conforming amendment has been added to paragraph 9038.2(c)(1), to clarify that the repayment procedures followed by the Commission in connection with an 11 CFR part 9038 examination or audit also apply to an 11 CFR part 9039 examination or audit. See discussion of Part 9039, below.

The amendments to paragraph (d) of this section are identical to those made to 11 CFR 9007.2, discussed above.

Section 9038.4 Extensions of Time

The amendment to this section follows that made to section 9007.3, above.

Section 9038.5 Petitions for Rehearing; Stays of Repayment Determinations

The amendments to this section follow those made to section 9007.5, above.

Section 9038.7 Administrative Record

This section generally follows new section 9007.7.

Part 9039—Review and Investigation Authority

Section 9039.3 Examinations and Audits; Investigations

The Commission's review and investigatory authority for administering the matching fund program is set forth at 26 U.S.C. § 9039(b). In carrying out these responsibilities, the Commission must perform a continuing review of candidate and committee reports and submissions, and other relevant information. Regulations implementing these requirements are found at 11 CFR part 9039.

For the most part the Commission's review is routine, carried out in accordance with the eligibility, audit and repayment procedures contained elsewhere in the regulations. Section 9039(b) and its implementing regulations provide authority to conduct audits and investigations in situations other than those addressed by 26 U.S.C. § 9038, 11 CFR part 9038, 2 U.S.C. § 437g and 11 CFR part 111. To date, most of these situations have involved issues relating to a candidate's continuing eligibility or the amount of his or her entitlement during the course of the campaign, although they can also involve a post-election inquiry.

Section 9039.3 of the regulations describes how examinations, audits and investments are conducted in these inquiries. However, the prior section did not address the actions that may be taken at the conclusion of any such action. The Commission is therefore adopting new paragraph 9039.3(b)(4) for that purpose.

This new paragraph states that, if the Commission decides to take no further action in a part 9039 case, the candidates(s) and committee(s) involved will be so notified. If the Commission decides to take further action, such action will follow as closely as possible the procedures already in place for comparable situations. Specifically, if the inquiry results in an adjustments to the amount of certified matching funds, the procedures set forth at 11 CFR 9036.5 shall be followed. If the inquiry coincides with an audit undertaken pursuant to 11 CFR 9038.1, the information obtained in the inquiry will be utilized as part of the repayment

determination. If the inquiry results in an initial or additional repayment determination, whether or not this coincides with a Commission audit, the procedures set forth at 11 CFR 9038.2, 9038.4 and 9038.5 shall be followed.

The new rules also include conforming amendments to 11 CFR 9033.1(b)(7), 9036.5(a), and 9038.2(c)(1).

Additional Issues

The Commission considered other proposals in the course of this rulemaking that it did not ultimately incorporate into the final rules. A summary of these proposals follows.

Convention Expenses of Ineligible Candidates

The Commission also sought comments in the NPRM on whether expenses incurred by losing primary election candidates in attending their party's national nominating convention should be considered a qualified campaign expense under 11 CFR 9032.9. Such attendance can provide a defeated candidate the opportunity to continue to fundraise and to maintain contact with his or her pledged convention delegates.

The Commission has decided for several reasons not to take this action. Qualified campaign expenses are defined in the Matching Payment Act at 26 U.S.C. § 9032(9)(A) as those ''incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination for election.'' This definition seemingly does not apply to those no longer seeking the presidential nomination.

Also, the purpose of the 10% rule set forth at 11 CFR 9033.5(b), under which a candidate becomes ineligible for additional funding on the 30th day following the date of the second consecutive primary election in which he or she receives less than 10% of the popular vote, is to discontinue funding of candidates who have not received substantial support following their initial establishment of eligibility. Allowing them to obtain additional funding at a later point in the process would undercut this purpose.

Under 11 CFR 9034.1(b), candidates can already count fundraising expenses incurred following their DOI, including those incurred at a national nominating convention, as qualified campaign expenses as part of their winding down costs. The Commission notes, however, that only those expenses directly related to fundraising qualify as qualified campaign expenses under this section. Creating an additional window of eligibility during the wind down period could substantially lengthen and complicate the audit process.

Treating Matching Payments as an Entitlement

One commenter urged the Commission to treat the matching payment program as more of an entitlement program. This commenter argued that the entitlement of a candidate who remains eligible for matching payments until the nominating convention should not be limited by the candidate's net outstanding campaign obligations. Instead, such a candidate should be entitled to receive matching funds for all matchable contributions received, up to fifty percent of the expenditure limitation. *See* 26 U.S.C. § 9034(b), 11 CFR 9034.1(d). The commenter said that the Commission should match all qualifying contributions submitted by such a candidate for matching, up to fifty percent of the limitation, and then seek a ratio surplus repayment once all campaign obligations have been satisfied.

However, this approach is inconsistent with the Matching Payment Act. Although the Act limits a candidate's overall entitlement to fifty percent of the expenditure limitation, the Act also further limits entitlement for candidates who become ineligible. Ineligible candidates are limited to matching payments for their net outstanding campaign obligations. 26 U.S.C. § 9033(c)(2). *See* 11 CFR 9034.1(b). All candidates for the nomination become ineligible when the party makes its nomination, because they can no longer be ''seeking'' a nomination that has already been awarded. *See* 26 U.S.C. § 9033(b)(2). Thus, a candidate's post-convention entitlement is limited to his or her NOCO, even if the candidate was eligible at the time the convention began.

If the commenter's suggestion were adopted, a candidate who was still eligible at the time of the convention could submit a large matching payment request after the nomination was awarded and have that request fully matched, even if the campaign had no debts outstanding at the time the funds were certified. The funds received would be treated as surplus funds rather than funds received in excess of entitlement. Thus, the committee would only be required to repay a portion of the funds under the surplus repayment rules. Such a result would frustrate the purposes of the Matching Payment Act, which requires a full repayment of any funds received by a candidate who has no further entitlement on the date of certification. 26 U.S.C. § 9038(b)(1). *See* 11 CFR 9038.2(b)(1).

The Commission also notes that this issue is the subject of ongoing litigation.

Certification of No Effect Pursuant to 5 U.S.C. § 605(b) (Regulatory Flexibility Act)

The attached final rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that few, if any, small entities will be affected by these final rules. Further, any small entities affected are already required to comply with the requirements of the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act in these areas.

List of Subjects

11 CFR Part 106

Campaign funds, Political candidate, Political committee and parties, Reporting and recordkeeping requirements.

11 CFR Parts 9002–9004

Campaign funds, Elections, Political candidates.

11 CFR Parts 9006–9007

Administrative practice and procedure, Campaign funds, Elections, Political candidates, Reporting requirements.

11 CFR Part 9008

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Parts 9032–9034

Campaign funds, Elections, Political candidate.

11 CFR Parts 9036–9039

Administrative practice and procedure, Campaign funds, Political candidates.

For the reasons set out in the preamble, subchapters A, E and F of chapter I of title 11 of the Code of Federal Regulations are amended as follows:

PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

1. The authority citation for part 106 continues to read as follows:

Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

2. Section 106.2 is amended by adding a sentence to the end of paragraph (a)(1), to read as follows:

§ 106.2 State allocation of expenditures incurred by authorized committees of presidential primary candidates receiving matching funds.

(a) * * *

(1) * * * Expenditures required to be allocated to the primary election under 11 CFR 9034.4(e) shall also be allocated to particular states in accordance with this section.

* * * * *

PART 9002—DEFINITIONS

3. The authority citation for part 9002 continues to read as follows:

Authority: 26 U.S.C. 9002 and 9009(b).

4. Paragraph (c) of § 9002.11 is amended by revising the first sentence to read as follows:

§ 9002.11 Qualified campaign expense.

* * * * *

(c) Except as provided in 11 CFR 9034.4(e), expenditures incurred either before the beginning of the expenditure report period or after the last day of a candidate's eligibility will be considered qualified campaign expenses if they meet the provisions of 11 CFR 9004.4(a). * * *

PART 9003—ELIGIBILITY FOR PAYMENTS

5. The authority citation for part 9003 continues to read as follows:

Authority: 26 U.S.C. 9003 and 9009(b).

6. In § 9003.1, the introductory text of paragraph (b) is republished, paragraphs (b)(4) and (b)(9) are revised, and new paragraph (b)(10) is added, to read as follows:

§ 9003.1 Candidate and committee agreements.

* * * * *

(b) *Conditions.* The candidates shall:

* * * * *

(4) Agree that they and their authorized committee(s) will keep and furnish to the Commission all documentation relating to receipts and disbursements including any books, records (including bank records for all accounts), all documentation required by this subchapter (including those required to be maintained under 11 CFR 9003.5), and other information that the Commission may request. If the candidate or the candidate's authorized committee maintains or uses computerized information containing any of the categories of data listed in 11 CFR 9003.6(a), the committee will provide computerized magnetic media, such as magnetic tapes or magnetic diskettes, containing the computerized information that meets the requirements of 11 CFR 9003.6(b) at the times specified in 11 CFR 9007.1(b)(1). Upon request, documentation explaining the computer system's software capabilities shall be provided, and such personnel as are necessary to explain the operation of the computer system's software and the computerized information prepared or maintained by the committee shall also be made available.

* * * * *

(9) Agree that they and their authorized committee(s) shall pay any civil penalties included in a conciliation agreement or otherwise imposed under 2 U.S.C. 437g against the candidates, any authorized committees of the candidates or any agent thereof.

(10) Agree that any television commercial prepared or distributed by the candidate or the candidate's authorized committee(s) will be prepared in a manner which ensures that the commercial contains or is accompanied by closed captioning of the oral content of the commercial to be broadcast in line 21 of the vertical blanking interval, or is capable of being viewed by deaf and hearing impaired individuals via any comparable successor technology to line 21 of the vertical blanking interval.

7. Section 9003.3 is revised to read as follows:

§ 9003.3 Allowable contributions.

(a) *Legal and accounting compliance fund—major party candidates.*

(1) *Sources.* (i) A major party candidate may accept contributions to a legal and accounting compliance fund if such contributions are received and disbursed in accordance with this section. A general election legal and accounting compliance fund (''GELAC'') may be established by such candidate prior to being nominated or selected as the candidate of a political party for the office of President or Vice President of the United States.

(A) All solicitations for contributions to the GELAC shall clearly state that Federal law prohibits private contributions from being used for the candidate's election and that contributions will be used solely for legal and accounting services to ensure compliance with Federal law, and shall clearly state how contribution checks should be made payable.

(B) Contributions to the GELAC shall be subject to the limitations and prohibitions of 11 CFR parts 110, 114, and 115.

(C) Contributions shall be deposited in the GELAC only if they are designated in writing for the GELAC, or transferred pursuant to paragraph (a)(1) (ii), (iii), (iv) or (v) of this section. Any contribution which otherwise could be matched pursuant to 11 CFR 9034.2 shall not be considered designated in writing for the GELAC unless the contributor specifically redesignates it for the GELAC or unless it is accompanied by a proper designation for the GELAC. Any contribution that is designated in writing or redesignated for the GELAC shall not be matched pursuant to 11 CFR 9034.2.

(ii)(A) Contributions made during the matching payment period that do not exceed the contributor's limit for the primary election may be redesignated for the GELAC and subsequently transferred to the GELAC before the nomination only if—

(*1*) The contributions represent funds in excess of any amount needed to pay remaining primary expenses;

(*2*) The contributions have not been submitted for matching;

(*3*) The redesignations are received within 60 days of the Treasurer's receipt of the contributions; and

(*4*) The requirements of 11 CFR 110.1(b) (5) and (l) regarding redesignation are satisfied.

(B) All contributions redesignated and deposited pursuant to paragraph (a)(1)(ii)(A) of this section shall be subject to the contribution limitations applicable for the general election pursuant to 11 CFR 110.1(b)(2)(i).

(iii) Funds received during the matching payment period that are remaining in a candidate's primary election account after the nomination may be transferred to the GELAC without regard to the contribution limitations of 11 CFR part 110 and used for any purpose permitted under this section, only if the funds are in excess of any amount needed to pay remaining net outstanding campaign obligations under 11 CFR 9034.1(b) and any amount required to be reimbursed to the Presidential Primary Matching Payment Account under 11 CFR 9038.2. The excess funds so transferred may include contributions made before the beginning of the expenditure report period, which contributions do not exceed the contributor's limit for the primary election. Such contributions need not be redesignated by the contributors for the GELAC.

(iv) Contributions that are made after the beginning of the expenditure report period but which are not designated in writing for the GELAC may be redesignated for the GELAC and transferred to the GELAC only if—

(A) The funds are in excess of any amount needed to pay remaining net outstanding campaign obligations under 11 CFR 9034.1(b) and any amount required to be reimbursed to the

Presidential Primary Matching Payment Account under 11 CFR 9038.2;

(B) The contributions have not been submitted for matching; and

(C) The candidate obtains the contributor's redesignation in accordance with 11 CFR 110.1.

(v) Contributions made with respect to the primary election that exceed the contributor's limit for the primary election may be redesignated for the GELAC and transferred to the GELAC if the candidate obtains the contributor's redesignation for the GELAC in accordance with 11 CFR 110.1.

(vi) For purposes of this section, a contribution shall be considered to be designated in writing for the GELAC if—

(A) The contribution is made by check, money order, or other negotiable instrument which clearly indicates that it is made with respect to the GELAC; or

(B) The contribution is accompanied by a writing, signed by the contributor, which clearly indicates that it is made with respect to the GELAC.

(2) *Uses.* (i) Contributions to the GELAC shall be used only for the following purposes:

(A) To defray the cost of legal and accounting services provided solely to ensure compliance with 2 U.S.C. 431 *et seq.* and 26 U.S.C. 9001 *et seq.* in accordance with paragraph (a)(2)(ii) of this section;

(B) To defray in accordance with paragraph (a)(2)(ii)(A) of this section, that portion of expenditures for payroll, overhead, and computer services related to ensuring compliance with 2 U.S.C. 431 *et seq.* and 26 U.S.C. 9001 *et seq.*;

(C) To defray any civil or criminal penalties imposed pursuant to 2 U.S.C. 437g or 26 U.S.C. 9012;

(D) To make repayments under 11 CFR 9007.2;

(E) To defray the cost of soliciting contributions to the GELAC;

(F) To defray the cost of producing, delivering and explaining the computerized information and materials provided pursuant to 11 CFR 9003.6 and explaining the operation of the computer system's software;

(G) To make a loan to an account established pursuant to 11 CFR 9003.4 to defray qualified campaign expenses incurred prior to the expenditure report period or prior to receipt of Federal funds, provided that the amounts so loaned are restored to the GELAC; and

(H) To defray unreimbursed costs incurred in providing transportation and services for the Secret Service and national security staff pursuant to 11 CFR 9004.6.

(ii)(A) Expenditures for payroll (including payroll taxes), overhead and computer services, a portion of which are related to ensuring compliance with Title 2 of the United States Code and Chapter 95 of Title 26 of the United States Code, shall be initially paid from the candidate's Federal fund account under 11 CFR 9005.2 and may be later reimbursed by the compliance fund. For purposes of paragraph (a)(2)(i)(B) of this section, a candidate may use contributions to the GELAC to reimburse his or her Federal fund account an amount equal to 10% of the payroll and overhead expenditures of his or her national campaign headquarters and state offices.

(B) Overhead expenditures include, but are not limited to rent, utilities, office equipment, furniture, supplies and all telephone charges except for telephone charges related to a special use such as voter registration and get out the vote efforts.

(C) If the candidate wishes to claim a larger compliance exemption for payroll or overhead expenditures, the candidate shall establish allocation percentages for each individual who spends all or a portion of his or her time to perform duties which are considered necessary to ensure compliance with title 2 of the United States Code or chapter 95 of title 26 of the United States Code. The candidate shall keep detailed records to support the derivation of each percentage. Such records shall indicate which duties are considered compliance and the percentage of time each person spends on such activity.

(D) In addition, a candidate may use contributions to the GELAC to reimburse his or her Federal fund account an amount equal to 50% of the costs (other than payroll) associated with computer services. Such costs include but are not limited to rental and maintenance of computer equipment, data entry services not performed by committee personnel, and related supplies.

(E) If the candidate wishes to claim a larger compliance exemption for costs associated with computer services, the candidate shall establish allocation percentages for each computer function that is considered necessary, in whole or in part, to ensure compliance with 2 U.S.C. 431 *et seq.*, and 26 U.S.C. 9001 *et seq.* The allocation shall be based on a reasonable estimate of the costs associated with each computer function, such as the costs for data entry services performed by persons other than committee personnel and processing time. The candidate shall keep detailed records to support such calculations. The records shall indicate which computer functions are considered compliance-related and shall reflect which costs are associated with each computer function.

(F) The Commission's Financial Control and Compliance Manual for General Election Candidates Receiving Public Funding contains some accepted alternative allocation methods for determining the amount of salaries and overhead expenditures that may be considered exempt compliance costs.

(G) Reimbursement from the GELAC may be made to the separate account maintained for federal funds under 11 CFR 9005.2 for legal and accounting compliance services disbursements that are initially paid from the separate federal funds account. Such reimbursement must be made prior to any repayment determination by the Commission pursuant to 11 CFR 9007.2. Any amounts so reimbursed to the Federal funds account may not subsequently be transferred back to the GELAC.

(iii) Amounts paid from the GELAC for the purposes permitted by paragraphs (a)(2)(i) (A) through (F) and (H) of this section shall not be subject to the expenditure limits of 2 U.S.C. 441a(b) and 11 CFR 110.8. (See also 11 CFR 100.8(b)(15).) When the proceeds of loans made in accordance with paragraph (a)(2)(i)(G) of this section are expended on qualified campaign expenses, such expenditures shall count against the candidate's expenditure limit.

(iv) Contributions to or funds deposited in the GELAC may not be used to retire debts remaining from the presidential primaries, except that, if after payment of all expenses set out in paragraph (a)(2)(i) of this section, there are excess campaign funds, such funds may be used for any purpose permitted under 2 U.S.C. 439a and 11 CFR part 113, including payment of primary election debts.

(3) *Deposit and disclosure.* (i) Amounts received pursuant to paragraph (a)(1) of this section shall be deposited and maintained in a GELAC account separate from the account described in 11 CFR 9005.2 and shall not be commingled with any money paid to the candidate by the Secretary pursuant to 11 CFR 9005.2.

(ii) The receipts to and disbursements from the GELAC account shall be reported in a separate report in accordance with 11 CFR 9006.1(b)(2). All contributions made to the GELAC account shall be recorded in accordance with 11 CFR 102.9. Disbursements made from the GELAC account shall be documented in the same manner provided in 11 CFR 9003.5.

(b) *Contributions to defray qualified campaign expenses—major party*

candidates. (1) A major party candidate or his or her authorized committee(s) may solicit contributions to defray qualified campaign expenses to the extent necessary to make up any deficiency in payments received from the Fund due to the application of 11 CFR 9005.2(b).

(2) Such contributions may be deposited in a separate account or may be deposited with federal funds received under 11 CFR 9005.2. Disbursements from this account shall be made only to defray qualified campaign expenses and to defray the cost of soliciting contributions to such account. All disbursements from this account shall be documented in accordance with 11 CFR 9003.5 and shall be reported in accordance with 11 CFR 9006.1.

(3) A candidate may make transfers to this account from his or her GELAC, or from the candidate's primary election account in accordance with paragraph (a)(1)(iii) of this section.

(4) The contributions received under this section shall be subject to the limitations and prohibitions of 11 CFR Parts 110, 114 and 115 and shall be aggregated with all contributions made by the same persons to the candidate's GELAC under paragraph (a) of this section for the purposes of such limitations.

(5) Any costs incurred for soliciting contributions to this account shall not be considered expenditures to the extent that the aggregate of such costs does not exceed 20 percent of the expenditure limitation under 11 CFR 9003.2(a)(1). These costs shall, however, be reported as disbursements in accordance with 11 CFR Part 104 and 11 CFR 9006.1. For purposes of this section, a candidate may exclude from the expendute limitation an amount equal to 10% of the payroll (including payroll taxes) and overhead expenditures of his or her national campaign headquarters and state offices as exempt fundraising costs. The candidate may claim a larger fundraising exemption by establishing allocation percentages for employees using the method described in paragraph (a)(2)(ii)(C) of this section.

(6) Any costs incurred for legal and accounting services which are provided solely to ensure compliance with 2 U.S.C. 431 *et seq.* and 26 U.S.C. 9001 *et seq.* shall not count against the candidate's expenditure limitation. A candidate may exclude from the expenditure limitation the amounts described in paragraphs (a)(2)(ii) (A) and (D) of this section for payroll, overhead or computer costs or a larger amount under paragraphs (a)(2)(ii) (C) and (E) of this section.

(7) The Commission's Financial Control and Compliance Manual for General Election Candidates Receiving Public Funding contains some accepted alternative allocation methods for determining the amount of salaries and overhead expenditures that may be considered exempt compliance costs or exempt fundraising costs.

(c) *Contributions to defray qualified campaign expenses—minor and new party candidates.* (1) A minor or new party candidate may solicit contributions to defray qualified campaign expenses which exceed the amount received by such candidate from the Fund, subject to the limits of 11 CFR 9003.2(b).

(2) The contributions received under this section shall be subject to the limitations and prohibitions of 11 CFR parts 110, 114 and 115.

(3) Such contributions may be deposited in a separate account or may be deposited with federal funds received under 11 CFR 9005.2. Disbursements from this account shall be made only for the following purposes:

(i) To defray qualified campaign expenses;

(ii) To make repayments under 11 CFR 9007.2;

(iii) To defray the cost of soliciting contributions to such account;

(iv) To defray the cost of legal and accounting services provided solely to ensure compliance with 2 U.S.C. 431 *et seq.* and 26 U.S.C. 9001 *et seq.*;

(v) To defray the cost of producing, delivering and explaining the computerized information and materials provided pursuant to 11 CFR 9003.6 and explaining the operation of the computer system's software.

(4) All disbursements from this account shall be documented in accordance with 11 CFR 9003.5 and shall be reported in accordance with 11 CFR part 104 and § 9006.1. The candidate shall keep and maintain a separate record of disbursements made to defray exempt legal and accounting costs under paragraphs (c) (6) and (7) of this section and shall report such disbursements in accordance with 11 CFR part 104 and 11 CFR 9006.1.

(5) Any costs incurred for soliciting contributions to this account shall not be considered expenditures to the extent that the aggregate of such costs does not exceed 20 percent of the expenditure limitation under 11 CFR 9003.2(a)(1). These costs shall, however, be reported as disbursements in accordance with 11 CFR Part 104 and 9006.1. For purposes of this section, a candidate may exclude from the expenditure limitation the amount of payroll costs described in paragraph (b)(5) of this section.

(6) Any costs incurred for legal and accounting services which are provided solely to ensure compliance with 2 U.S.C. 431 *et seq.* and 26 U.S.C. 9001 *et seq.* shall not count against the candidate's expenditure limitation. A candidate may exclude from the expenditure limitation the amounts described in paragraphs (a)(2)(ii) (A) and (D) of this section for payroll, overhead or computer costs or a larger amount under paragraphs (a)(2)(ii) (C) and (E) of this section.

(7) The Commission's Financial Control and Compliance Manual for General Election Candidates Receiving Public Funding contains some accepted alternative allocation methods for determining the amount of salaries and overhead expenditures that may be considered exempt compliance costs or exempt fundraising costs.

8. Section 9003.4 is amended by revising the last sentence of paragraph (a), and adding a new sentence to the end of the paragraph (a), to read as follows:

§ 9003.4 Expenses incurred prior to the beginning of the expenditure report period or prior to receipt of Federal funds.

(a) *Permissible expenditures.* (1) * * * Examples of such expenditures include but are not limited to: Expenditures for establishing financial accounting systems and expenditures for organizational planning. Expenditures for polling that are incurred before the start of the expenditure report period are attributed as provided in 11 CFR 9034.4(e)(2).

* * * * *

9. Section 9003.5 is revised to read as follows:

§ 9003.5 Documentation of disbursements.

(a) *Burden of proof.* Each candidate shall have the burden of providing that disbursements made by the candidate or his or her authorized committee(s) or persons authorized to make expenditures on behalf of the candidate or authorized committee(s) are qualified campaign expenses as defined in 11 CFR 9002.11. The candidate and his or her authorized committee(s) shall obtain and furnish to the Commission on request any evidence regarding qualified campaign expenses made by the candidate, his or her authorized committees and agents or persons authorized to make expenditures on behalf of the candidate or committee(s) as provided in paragraph (b) of this section.

(b) *Documentation required.*

(1) For disbursements in excess of $200 to a payee, the candidate shall present a canceled check negotiated by the payee and either:

(i) A receipted bill from the payee that states that purpose of the disbursement; or

(ii) If such a receipt is not available,

(A) One of the following documents generated by the payee: a bill, invoice, or voucher that states the purpose of the disbursement; or

(B) Where the documents specified in paragraph (b)(1)(ii)(A) of this section are not available, a voucher or contemporaneous memorandum from the candidate or the committee that states the purpose of the disbursement; or

(iii) Where the supporting documentation required in paragraphs (b)(1) (i) or (ii) of this section is not available, the candidate or committee may present collateral evidence to document the qualified campaign expense. Such collateral evidence may include, but is not limited to:

(A) Evidence demonstrating that the expenditure is part of an identifiable program or project which is otherwise sufficiently documented such as a disbursement which is one of a number of documented disbursements relating to a campaign mailing or to the operation of a campaign office; or

(B) Evidence that the disbursement is covered by a pre-established written campaign committee policy, such as a dairy travel expense policy.

(iv) If the purpose of the disbursement is not stated in the accompanying documentation, it must be indicated on the canceled check.

(2) For all other disbursements, the candidate shall present:

(i) A record disclosing the full name and mailing address of the payee, the amount, date and purpose of the disbursement, if made from a petty cash fund; or

(ii) A canceled check negotiated by the payee that states the full name and mailing address of the payee, and the amount, date and purpose of the disbursement.

(3) For purposes of this section:

(i) *Payee* means the person who provides the goods or services to the candidate or committee in return for the disbursement; except that an individual will be considered a payee under this section if he or she receives $1000 or less advanced for travel and/or subsistence and if the individual is the recipient of the goods or services purchased.

(ii) *Purpose* means the full name and mailing address of the payee, the date and amount of the disbursement, and a brief description of the goods or services purchased.

(c) *Retention of records.* The candidate shall retain records with respect to each disbursement and receipt, including bank records, vouchers, worksheets, receipts, bills and accounts, journals, ledgers, fundraising solicitation material, accounting systems documentation, and any related materials documenting campaign receipts and disbursements, for a period of three years pursuant to 11 CFR 102.9(c), and shall present these records to the Commission on request.

(d) *List of capital and other assets.* (1) *Capital assets* The candidate or committee shall maintain a list of all capital assets whose purchase price exceeded $2000 when acquired by the campaign. The list shall include a brief description of each capital asset, the purchase price, the date it was acquired, the method of disposition and the amount received in disposition. For purposes of this section, ''capital asset'' shall be defined in accordance with 11 CFR 9004.9(d)(1).

(2) *Other assets.* The candidate or committee shall maintain a list of other assets acquired for use in fundraising or as collateral for campaign loans, if the aggregate value of such assets exceeds $5000. The list shall include a brief description of each such asset, the fair market value of each asset, the method of disposition and the amount received in disposition. The fair market value of other assets shall be determined in accordance with 11 CFR 9004.9(d)(2).

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

10. The authority citation for part 9004 continues to read as follows:

Authority: 26 U.S.C. 9004 and 9009(b).

11. Section 9004.4 is amended by revising paragraph (a), by adding new paragraph (b)(8), and by removing paragraph (c), to read as follows:

§ 9004.4 Use of payments.

(a) *Qualified campaign expenses.* An eligible candidate shall use payments received under 11 CFR part 9005 only for the following purposes:

(1) to defray qualified campaign expenses;

(2) To repay loans that meet the requirements of 11 CFR 100.7 (a)(1) or (b)(11) or to otherwise restore funds (other than contributions received pursuant to 11 CFR 9003.3 (b) or (c) and expended to defray qualified campaign expenses) used to defray qualified campaign expenses;

(3) To restore funds expended in accordance with 11 CFR 9003.4 for qualified campaign expenses incurred by the candidate prior to the beginning of the expenditure report period.

(4) *Winding down costs.* The following costs shall be considered qualified campaign expenses:

(i) Costs associated with the termination of the candidate's general election campaign such as complying with the post-election requirements of the Act and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies; or

(ii) Costs incurred by the candidate prior to the end of the expenditure report period for which written arrangement or commitment was made on or before the close of the expenditure report period.

(iii) 100% of salary, overhead and computer expenses incurred after the end of the expenditure report period may be paid from a legal and accounting compliance fund established pursuant to 11 CFR 9003.3, and will be presumed to be solely to ensure compliance with 2 U.S.C. 431 *et seq.* and 26 U.S.C. 9001 *et seq.*

(5) *Gifts and monetary bonuses.* Gifts and monetary bonuses shall be considered qualified campaign expenses, provided that:

(i) Gifts for committee employees, consultants and volunteers in recognition for campaign-related activities or services do not exceed $150 total per individual and the total of all gifts does not exceed $20,000; and

(ii) All monetary bonuses for committee employees and consultants in recognition for campaign-related activities or services;

(A) Are provided for pursuant to a written contract made prior to the date of the election; and

(B) Are paid during the expenditure report period.

(b) * * *

(8) *Lost or Misplaced Items.* The cost of lost or misplaced items may be considered a nonqualified campaign expense. Factors considered by the commission in making this determination shall include, but not be limited to, whether the committee demonstrates that it made conscientious efforts to safeguard the missing equipment; whether the committee sought or obtained insurance; the type of equipment involved; and the number and value of items that were lost.

12. Section 9004.5 is revised to read as follows:

§ 9004.5 Investment of public funds; other uses resulting in income.

Investment of public funds or any other use of public funds that results in income is permissible, provided that an amount equal to all net income derived from such a use, less Federal, State and local taxes paid on such income, shall be paid to the Secretary. Any net loss from an investment or other use of public funds will be considered a non-qualified campaign expense and an amount equal to the amount of such loss shall be repaid to the United States Treasury as provided under 11 CFR 9007.2(b)(2)(i).

13. Section 9004.6 is revised to read as follows:

§ 9004.6 Expenditures for transportation and services made available to media personnel; reimbursements.

(a) *General.* (1) Expenditures by an authorized committee for transportation, ground services or facilities (including air travel, ground transportation, housing, meals, telephone service, and typewriters) made available to media personnel, Secret Service personnel or national security staff will be considered qualified campaign expenses, and, except for costs relating to Secret Service personnel or national security staff, will be subject to the overall expenditure limitations of 11 CFR 9003.2 (a)(1) and (b)(1).

(2) Subject to the limitation in paragraphs (b) and (c) of this section, committees may seek reimbursement for these expenses, and may deduct reimbursements received from media representatives from the amount of expenditures subject to the overall expenditure limitations of 11 CFR 9003.2 (a)(1) and (b)(1). Expenses for which the committee receives no reimbursement will be considered qualified campaign expenses, and, with the exception of those expenses relating to Secret Service personnel and national security staff, will be subject to the overall expenditure limitation.

(b) *Reimbursement limits.* (1) The amount of reimbursement sought from a media representative under paragraph (a)(2) of this section shall not exceed 110% of the media representative's pro rata share (or a reasonable estimate of the media representative's pro rata share) of the actual cost of the transportation and services made available. Any reimbursement received in excess of this amount shall be disposed of in accordance with paragraph (d)(1) of this section.

(2) For the purpose of this section, a media representative's pro rata share shall be calculated by dividing the total actual cost of the transportation and services provided by the total number of individuals to whom such transportation and services are made available. For purposes of this calculation, the total number of individuals shall include committee staff, media personnel, Secret Service personnel, national security staff and any other individuals to whom such transportation and services are made available, except that, when seeking reimbursement for transportation costs paid by the committee under 11 CFR 9004.7(b)(5)(i)(C), the total number of individuals shall not include national security staff.

(c) *Deducation of reimbursements from expenditures subject to the overall expenditure limitation.* (1) The committee may deduct from the amount of expenditures subject to the overall expenditure limitation:

(i) The amount of reimbursements received from media representatives in payment for the transportation and services described in paragraph (a) of this section, up to the actual cost of the transportation and services provided to media representatives; and

(ii) An additional amount of the reimbursements received from media representatives, representing the administrative costs incurred by the committee in providing these services to the media representative and seeking reimbursement for them, equal to:

(A) Three percent of the actual cost of transportation and services provided to the media representatives under this section; or

(B) An amount in excess of 3% representing the administrative costs actually incurred by the committee in providing services to the media representatives, provided that the committee is able to document the total amount of administrative costs actually incurred.

(2) For the purpose of this paragraph, ''administrative costs'' includes all costs incurred by the committee in making travel arrangements and seeking reimbursement, whether these services are performed by committee staff or by independent contractors.

(d) *Disposal of excess reimbursements.* If the committee receives reimbursements in excess of the amount deductible under paragraph (c) of this section, it shall dispose of the excess amount in the following manner:

(1) Any reimbursement received in excess of 110% of the actual pro rata cost of the transportation and services made available to a media representative shall be returned to the media representative.

(2) Any amount in excess of the amount deductible under paragraph (c) of this section that is not required to be returned to the media representative under paragraph (d)(1) of this section shall be paid to the Treasury.

(e) *Reporting.* The total amount paid by an authorized committee for the services and facilities described in paragraph (a)(1) of this section, plus the administrative costs incurred by the committee in providing these services and facilities and seeking reimbursement for them, shall be reported as an expenditure in accordance with 11 CFR 104.3(b)(2)(i). Any reimbursement received by such committee under paragraph (b)(1) of this section shall be reported in accordance with 11 CFR 104.3(a)(3)(ix).

14. Section 9004.7 is revised to read as follows:

§ 9004.7 Allocation of travel expenditures.

(a) Notwithstanding the provisions of 11 CFR 106.3, expenditures for travel relating to a Presidential or Vice Presidential candidate's campaign by any individual, including a candidate, shall, pursuant to the provisions of paragraph (b) of this section, be qualified campaign expenses and be reported by the candidate's authorized committee(s) as expenditures.

(b)(1) For a trip which is entirely campaign-related, the total cost of the trip shall be a qualified campaign expense and a reportable expenditure.

(2) For a trip which includes campaign-related and non-campaign related stops, that portion of the cost of the trip allocable to campaign activity shall be a qualified campaign expense and a reportable expenditure. Such portion shall be determined by calculating what the trip would have cost from the point of origin of the trip to the first campaign-related stop and from the stop through each subsequent campaign-related stop to the point of origin. If any campaign activity, other than incidental contacts, is conducted at a stop, that stop shall be considered campaign-related. Campaign activity includes soliciting, making, or accepting contributions, and expressly advocating the election or defeat of the candidate. Other factors, including the setting, timing and statements or expressions of the purpose of an event, and the substance of the remarks or speech made, will also be considered in determining whether a stop is campaign-related.

(3) For each trip, an itinerary shall be prepared and such itinerary shall be made available by the committee for Commission inspection. The itinerary shall show the time of arrival and departure and the type of events held.

(4) For trips by government conveyance or by charter, a list of all passengers on such trip, along with a designation of which passengers are and which are not campaign-related, shall be made available for Commission inspection. When required to be created, a copy of the government's or charter company's official manifest shall also be maintained and made available by the committee.

(5)(i) If any individual, including a candidate, uses a government airplane for campaign-related travel, the candidate's authorized committee shall pay the appropriate government entity an amount equal to:

(A) The lowest unrestricted and non-discounted first class commercial air fare available for the time traveled, in the case of travel to a city served by a regularly scheduled commercial airline service; or

(B) The lowest unrestricted and non-discounted coach commercial air fare available for the time traveled, in the case of travel to a city served by regularly scheduled coach airline service, but not regularly scheduled first class airline service; or

(C) In the case of travel to a city not served by a regularly scheduled commercial airline service, the commercial charter rate for an airplane sufficient in size to accommodate the campaign-related travelers, including the candidate, plus the news media and the Secret Service.

(ii) If a government airplane is flown to a campaign-related stop where it will pick up passengers, or from a campaign-related stop where it left off passengers, the candidate's authorized committee shall pay the appropriate government entity an amount equal to the greater of the amount billed or the amount required under paragraph (b)(5)(i) of this section for one passenger.

(iii) If any individual, including a candidate, uses a government conveyance, other than an airplane, for campaign-related travel, the candidate's authorized committee shall pay the appropriate government entity an amount equal to the commercial rental rate for a conveyance sufficient in size to accommodate the campaign-related travelers, including the candidate, plus the news media and the Secret Service.

(iv) If any individual, including a candidate, uses accommodations, including lodging and meeting rooms, during campaign-related travel, and the accommodations are paid for by a government entity, the candidate's authorized committee shall pay the appropriate government entity an amount equal to the usual and normal charge for the accommodations, and shall maintain documentation supporting the amount paid.

(v) For travel by airplane, the committee shall maintain documentation of the lowest unrestricted nondiscounted air fare available for the time traveled, including the airline, flight number and travel service providing that fare or the charter rate, as appropriate. For travel by other conveyances, the committee shall maintain documentation of the commercial rental rate for a conveyance of sufficient size, including the provider of the conveyance and the size, model and make of the conveyance.

(6) Travel expenses of a candidate's spouse and family when accompanying the candidate on campaign-related travel may be treated as qualified campaign expenses and reportable expenditures. If the spouse or family members conduct campaign-related activities, their travel expenses shall be qualified campaign expenses and reportable expenditures.

(7) If any individual, including a candidate, incurs expenses for campaign-related travel, other than by use of government conveyance or accommodations, an amount equal to that portion of the actual cost of the conveyance or accommodations which is allocable to all passengers, including the candidate, who are traveling for campaign purposes shall be a qualified campaign expense and shall be reported by the committee as an expenditure.

(i) If the trip is by charter, the actual cost for each passenger shall be determined by dividing the total operating cost for the charter by the total number of passengers transported. The amount which is a qualified campaign expense and a reportable expenditure shall be calculated in accordance with the formula set forth at 11 CFR 9004.7(b)(2) on the basis of the actual cost per passenger multiplied by the number of passengers traveling for campaign purposes.

(ii) If the trip is by non-charter commercial transportation, the actual cost shall be calculated in accordance with the formula set forth at 11 CFR 9004.7(b)(2) on the basis of the commercial fare. Such actual cost shall be a qualified campaign expense and a reportable expenditure.

(8) Travel on corporate airplanes and other corporate conveyances is governed by 11 CFR 114.9(e).

15. Section 9004.9 is amended by revising paragraph (a)(1)(iii), adding paragraph (a)(4) and revising paragraph (d)(1), to read as follows:

§ 9004.9 Net outstanding qualified campaign expenses.

(a) * * *

(1) * * *

(iii) An estimate of the necessary winding down costs, as defined under 11 CFR 9004.4(a)(4), submitted in the format required by paragraph (a)(4) of this section; less

* * * * *

(4) The amount submitted as an estimate of necessary winding down costs under paragraph (a)(1)(iii) of this section shall be broken down by expense category and quarterly or monthly time period. This breakdown shall include estimated costs for office space rental, staff salaries, legal expenses, accounting expenses, office supplies, equipment rental, telephone expenses, postage and other mailing costs, printing and storage. The breakdown shall estimate the costs that will be incurred in each category from the time the statement is submitted until the expected termination of the committee's political activity.

* * * * *

(d)(1) *Capital assets.* For purposes of this section, the term ''capital asset'' means any property used in the operation of the campaign whose purchase price exceeded $2000 when acquired by the committee. Property that must be valued as capital assets under this section includes, but is not limited to, office equipment, furniture, vehicles and fixtures acquired for use in the operation of the candidate's campaign, but does not include property defined as ''other assets'' under 11 CFR 9004.9(d)(2). A list of all capital assets shall be maintained by the committee in accordance with 11 CFR 9003.5(d)(1). The fair market value of capital assets may be considered to be the total original cost of such items when acquired less 40%, to account for depreciation, except that items acquired after the date of ineligibility must be valued at their fair market value on the date acquired.

* * * * *

PART 9006—REPORTS AND RECORDKEEPING

16. The authority citation for part 9006 continues to read as follows:

Authority: 2 U.S.C. 434 and 26 U.S.C. 9006(b).

17. Section 9006.3 is added to read as follows:

§ 9006.3 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.

PART 9007—EXAMINATIONS AND AUDITS; REPAYMENTS

18. The authority citation for part 9007 continues to read as follows:

Authority: 26 U.S.C. 9007 and 9009(b).

19. Section 9007.1 is amended by revising paragraphs (b)(2)(iii), (c), (d) and (e) and adding new paragraph (f) to read as follows:

§ 9007.1 Audits.

* * * * *

(b) * * *

(2) * * *

(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 which the staff anticipates it will present to the Commission for approval. Commission staff will prepare a written Exit Conference Memorandum that discusses these findings and recommendations. A copy of the Exit Conference Memorandum will be given to committee representatives at the exit conference. These preliminary staff findings may include 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; the accuracy of statements and reports filed with the Commission by the candidate and committee; and preliminary calculations regarding future repayments to the United States Treasury. Commission staff will advise committee representatives at this conference of the committee's opportunity to respond to these proposed findings, the projected timetable regarding the issuance of the audit report and 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 9007.2.

* * * * *

(c) *Committee response to the Exit Conference Memorandum.* The candidate and his or her authorized committee may submit in writing within 60 calendar days after the exit conference, legal and factual materials disputing or commenting on the proposed findings contained in the Exit Conference Memorandum. In addition, the committee shall submit any additional documentation requested by Commission staff. Such materials may be submitted by counsel if the candidate so desires.

(d) *Approval and issuance of the audit report.* (1) Before voting on whether to approve and issue 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 Exit Conference Memorandum. In addition, this report will contain a repayment determination made by the Commission pursuant to 11 CFR 9007.2(c)(1).

(2) The audit report may contain issues that warrant referral to the Office of General Counsel for possible enforcement proceedings under 2 U.S.C. 437g 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 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.

20. In § 9007.2, paragraphs (a) (2) and (3) are revised, paragraph (a)(4) added, the introductory text of paragraph (b) is republished, paragraph (b)(4) is revised, paragraphs (c) and (d) are revised, and the first two sentences of paragraph (f), the first sentence of paragraph (g), and paragraph (i) are revised to read as follows:

§ 9007.2 Repayments.

(a) * * *

(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 day of the presidential election. The Commission's issuance of the audit report to the candidate under 11 CFR 9007.1(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 owed 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 9003.2(c)), 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.* The Commission may determine that an eligible candidate of a political party who has received payments from the fund must repay the United States Treasury under any of the circumstances described in paragraphs (b) (1) through (5) of this section.

* * * * *

(4) *Income on investment or other use of payments from the Fund.* If the Commission determines that a candidate received any income as a result of an investment or other use of payments from the fund pursuant to 11 CFR 9004.5, it shall so notify the candidate, and such candidate shall pay to the United States Treasury an amount equal to the amount determined to be income, less any Federal, State or local taxes on such income.

* * * * *

(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 9007.1(d) 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. 9011(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) of this section and any oral hearing conducted under paragraph (c)(2)(ii) of this section, 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.

(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 or to be repaid under this section.

* * * * *

(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 9007.2(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. * * *

(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 qualified campaign expenses submitted pursuant to 11 CFR 9004.9, the candidate or his or her authorized committee(s) shall promptly notify the Commission of such newly-discovered assets. * * *

* * * * *

(i) *Petitions for rehearing; stays pending appeal.* The candidate may file a petition for rehearing of a repayment determination in accordance with 11 CFR 9007.5(a). The candidate may request a stay of a repayment determination in accordance with 11 CFR 9007.5(c) pending the candidate's appeal of that repayment determination.

21. Section 9007.3 is amended by adding a new sentence to the end of paragraph (c), to read as follows:

§ 9007.3 Extensions of time.

* * * * *

(c) * * * If a candidate seeks an extension of any 60-day response period under 11 CFR Part 9007, the Commission may grant no more than one extension to that candidate, which extension shall not exceed 15 days.

* * * * *

22. Section 9007.5 is amended by revising paragraphs (a), (b), (c)(1)(ii) and the introductory text of paragraph (c)(4) to read as follows:

§ 9007.5 Petitions for rehearing; stays of repayment determinations.

(a) *Petitions for rehearing.* (1) Following the Commission's repayment determination or a final determination that a candidate is not entitled to all or a portion of post-election funding under 11 CFR 9004.9(f), 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 following service of the Commission's repayment determination or final determination;

(ii) Raise new questions of law or fact that would materially alter the Commission's repayment determination or final 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 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 9007.2(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. 9011(a). An issue is not timely raised in a petition for rehearing if it could have been raised earlier in response to the Commission's original determination.

(c) * * *

(1) * * *

(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 9007.2(c).

* * * * *

(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 9007.2(c)(4) and shall be the greater of:

* * * * *

23. Section 9007.7 is added to read as follows:

§ 9007.7 Administrative record.

(a) The Commission's administrative record for final determinations under 11 CFR 9004.9 and 9005.1, and for repayment determinations under 11 CFR 9007.2, consists of all documents and 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 9004.9(f)(2)(ii), 9005.1(b)(2), 9005.1(c)(4), 9007.1(c) and 9007.2(c)(2), as appropriate.

(b) The Commission's administrative record for determinations under 11 CFR 9004.9, 9005.1 and 9007.2 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 9007.2(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 9004.9, 9005.1 and 9007.2

PART 9008—FEDERAL FINANCING OF PRESIDENTIAL NOMINATING CONVENTIONS

24. The authority citation for part 9008 continues to read as follows:

Authority: 2 U.S.C. 437, 438(a)(6), 26 U.S.C. 9008, 9009(b).

25. Section 9008.12 is amended by revising the last sentence of paragraph (a)(2) to read as follows:

§ 9008.12 Repayments.

(a) * * *

(2) * * * The Commission's issuance of an audit report to the committee will constitute notification for purposes of the three year period.

* * * * *

PART 9032—DEFINITIONS

26. The authority citation for part 9032 continues to read as follows:

Authority: 26 U.S.C. 9032 and 9039(b).

27. Section 9032.9 is amended by revising the first sentence of paragraph (c) to read as follows:

§ 9032.9 Qualified campaign expense.

* * * * *

(c) Except as provided in 11 CFR 9034.4(e), expenditures incurred either before the beginning of the expenditure report period or after the last day of a candidate's eligibility will be considered qualified campaign expenses if they meet the provisions of 11 CFR 9034.4(a). * * *

* * * * *

PART 9033—ELIGIBILITY FOR PAYMENTS

28. The authority citation for part 9033 is revised to read as follows:

Authority: 26 U.S.C. 9003(e), 9033 and 9039(b).

29. Section 9033.1 is amended by republishing the introductory text of paragraph (b), by revising paragraph (b)(5), by adding a new second sentence to paragraph (b)(7), by revising paragraph (b)(11), and by adding new paragraph (b)(12), to read as follows:

§ 9033.1 Candidate and committee agreements.

* * * * *

(b) *Conditions.* The candidate shall agree that:

* * * * *

(5) The candidate and the candidate's authorized committee(s) will keep and furnish to the Commission all

documentation relating to disbursements and receipts including any books, records (including bank records for all accounts), all documentation required by this section (including those required to be maintained under 11 CFR 9033.11), and other information that the Commission may request. If the candidate or the candidate's authorized committee maintains or uses computerized information containing any of the categories of data listed in 11 CFR 9033.12(a), the committee will provide computerized magnetic media, such as magnetic tapes or magnetic diskettes, containing the computerized information at the times specified in 11 CFR 9038.1(b)(1) that meet the requirements of 11 CFR 9033.12(b). Upon request, documentation explaining the computer system's software capabilities shall be provided, and such personnel as are necessary to explain the operation of the computer system's software and the computerized information prepared or maintained by the committee shall be made available.

* * * * *

(7) * * * The candidate and the candidate's authorized committee(s) shall also provide any material required in connection with an audit, investigation, or examination conducted pursuant to 11 CFR part 9039. * * *

* * * * *

(11) The candidate and the candidate's authorized committee(s) will pay an civil penalties included in a conciliation agreement or otherwise imposed under 2 U.S.C. 437g against the candidate, any authorized committees of the candidate or any agent thereof.

(12) Any television commercial prepared or distributed by the candidate or the candidate's authorized committee(s) will be prepared in a manner which ensures that the commercial contains or is accompanied by closed captioning of the oral content of the commercial to be broadcast in line 21 of the vertical blanking interval, or is capable of being viewed by deaf and hearing impaired individuals via any comparable successor technology to line 21 of the vertical blanking interval.

30. Section 9033.4 is amended by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

31. Section 9033.11 is revised to read as follows:

§ 9033.11 Documentation of disbursements.

(a) *Burden of proof.*Each candidate shall have the burden of proving that disbursements made by the candidate or his or her authorized committee(s) or persons authorized to make expenditures on behalf of the candidate or authorized committee(s) are qualified campaign expenses as defined in 11 CFR 9032.9. The candidate and his or her authorized committee(s) shall obtain and furnish to the Commission on request any evidence regarding qualified campaign expenses made by the candidate, his or her authorized committees and agents or persons authorized to make expenditures on behalf of the candidate or committee(s) as provided in paragraph (b) of this section.

(b) *Documentation required.*

(1) For disbursements in excess of $200 to a payee, the candidate shall present a canceled check negotiated by the payee and either:

(i) A receipted bill from the payee that states the purpose of the disbursement; or

(ii) If such a receipt is not available,

(A) One of the following documents generated by the payee: a bill, invoice, or voucher that states the purpose of the disbursement; or

(B) Where the documents specified in paragraph (b)(1)(ii)(A) of this section are not available, a voucher or contemporaneous memorandum from the candidate or the committee that states the purpose of the disbursement; or

(iii) Where the supporting documentation required in paragraphs (b)(1) (i) or (ii) of this section is not available, the candidate or committee may present collateral evidence to document the qualified campaign expense. Such collateral evidence may include, but is not limited to:

(A) Evidence demonstrating that the expenditure is part of an identifiable program or project which is otherwise sufficiently documented such as a disbursement which is one of a number of documented disbursements relating to a campaign mailing or to the operation of a campaign office; or

(B) Evidence that the disbursement is covered by a pre-established written campaign committee policy, such as a daily travel expense policy.

(iv) If the purpose of the disbursement is not stated in the accompanying documentation, it must be indicated on the canceled check.

(2) For all other disbursements, the candidate shall present:

(i) A record disclosing the full name and mailing address of the payee, the amount, date and purpose of the disbursement, if made from a petty cash fund; or

(ii) A canceled check negotiated by the payee that states the full name and mailing address of the payee, and the amount, date and purpose of the disbursement.

(3) For purposes of this section:

(i) *Payee* means the person who provides the goods or services to the candidate or committee in return for the disbursement; except that an individual will be considered a payee under this section if he or she receives $1000 or less advanced for travel and/or subsistence and if the individual is the recipient of the goods or services purchased.

(ii) *Purpose* means the full name and mailing address of the payee, the date and amount of the disbursement, and a brief description of the goods or services purchased.

(c) *Retention of records.* The candidate shall retain records with respect to each disbursement and receipt, including bank records, vouchers, worksheets, receipts, bills and accounts, journals, ledgers, fundraising solicitation material, accounting systems documentation, and any related materials documenting campaign receipts and disbursements, for a period of three years pursuant to 11 CFR 102.9(c), and shall present these records to the Commission on request.

(d) *List of capital and other assets.*

(1) *Capital assets.* The candidate or committee shall maintain a list of all capital assets whose purchase price exceeded $2000 when acquired by the campaign. The list shall include a brief description of each capital asset, the purchase price, the date it was acquired, the method of disposition and the amount received in disposition. For purposes of this section, ''capital asset'' shall be defined in accordance with 11 CFR 9034.5(c)(1).

(2) *Other assets.* The candidate or committee shall maintain a list of other assets acquired for use in fundraising or as collateral for campaign loans, if the aggregate value of such assets exceeds $5000. The list shall include a brief description of each such asset, the fair market value of each asset, the method of disposition and the amount received in disposition. The fair market value of other assets shall be determined in accordance with 11 CFR 9034.5(c)(2).

PART 9034—ENTITLEMENTS

32. The authority citation for part 9034 continues to read as follows:

Authority: 26 U.S.C. 9034 and 9039(b).

33. Section 9034.4 is amended by revising paragraphs (a) and (b)(3), by adding new paragraph (b)(8), by removing and reserving paragraph (c), by revising paragraph (d)(2), and by adding new paragraph (e), to read as follows:

§ 9034.4 Use of contributions and matching payments.

(a) *Qualified campaign expenses—*

(1) *General.* Except as provided in paragraph (b)(3) of this section, all contributions received by an individual from the date he or she becomes a candidate and all matching payments received by the candidate shall be used only to defray qualified campaign expenses or to repay loans or otherwise restore funds (other than contributions which were received and expended to defray qualified campaign expenses), which were used to defray qualified campaign expenses.

(2) *Testing the waters.* Even though incurred prior to the date an individual becomes a candidate, payments made in accordance with the 11 CFR 100.8(b)(1) for the purpose of determining whether an individual should become a candidate shall be considered qualified campaign expenses if the individual subsequently becomes a candidate and shall count against that candidate's limits under 2 U.S.C. 441a(b).

(3) *Winding down costs.*

(i) Costs associated with the termination of political activity, such as the costs of complying with the post election requirements of the Act and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies shall be considered qualified campaign expenses. A candidate may receive and use matching funds for these purposes either after he or she has notified the Commission in writing of his or her withdrawal from the campaign for nomination or after the date of the party's nominating convention, if he or she has not withdrawn before the convention.

(ii) If the candidate has become ineligible due to the operation of 11 CFR 9033.5(b), he or she may only receive matching funds to defray costs incurred before the candidate's date of ineligibility, for goods and services to be received before the date of ineligibility and for which written arrangement or commitment was made on or before the candidate's date of ineligibility, until the candidate is eligible to receive winding down costs under paragraph (a)(3)(i) of this section.

(iii) For purposes of the expenditure limitations set forth in 11 CFR 9035.1 100% of salary, overhead and computer expenses incurred after a candidate's date of ineligibility may be treated as exempt legal and accounting compliance expenses beginning with the first full reporting period after the candidate's date of ineligibility. For candidates who continue to campaign or re-establish eligibility, this paragraph shall not apply to expenses incurred during the period between the date of ineligibility and the date on which the candidate either re-establishes eligibility or ceases to continue to campaign.

(4) *Taxes.* Federal income taxes paid by the committee on non-exempt function income, such as interest, dividends and sale of property, shall be considered qualified campaign expenses. These expenses shall not, however, count against the state or overall expenditure limits of 11 CFR 9035.1(a).

(5) *Gifts and monetary bonuses.* Gifts and monetary bonuses shall be considered qualified campaign expenses, provided that:

(i) Gifts for committee employees, consultants and volunteers in recognition for campaign-related activities or services do not exceed $150 total per individual and the total of all gifts does not exceed $20,000; and

(ii) All monetary bonuses for committee employees and consultants in recognition for campaign-related activities or services:

(A) Are provided for pursuant to a written contract made prior to the date of ineligibility; and

(B) Are paid no later than thirty days after the date of ineligibility.

(b) * * *

(3) *General election and post-ineligibility expenditures.* Any expenses incurred after a candidate's date of ineligibility, as determined under 11 CFR 9033.5, are not qualified campaign expenses except to the extent permitted under 11 CFR 9034.4(a)(3). In addition, any expenses incurred before the candidate's date of ineligibility for goods and services to be received after the candidate's date of ineligibility, or for property, services, or facilities used to benefit the candidate's general election campaign, are not qualified campaign expenses.

* * * * *

(8) *Lost or misplaced items.* The cost of lost or misplaced items may be considered a nonqualified campaign expense. Factors considered by the Commission in making this determination shall include, but not be limited to, whether the committee demonstrates that it made conscientious efforts to safeguard the missing equipment; whether the committee sought or obtained insurance; the type of equipment involved; and the number and value of items that were lost.

(c) [Reserved]

(d) * * *

(2) *General election.* If a candidate has received matching funds, all transfers from the candidate's primary election account to a legal and accounting compliance fund established for the general election must be made in accordance with 11 CFR 9003.3(a)(1).

(e) *Attribution of expenditures between the primary and the general election limits.* The following rules apply to candidates who receive public funding in both the primary and the general election.

(1) *General rule.* Any expenditure for goods or services that are used exclusively for the primary election campaign shall be attributed to the limits set forth at 11 CFR 9035.1. Any expenditure for goods or services that are used exclusively for the general election campaign shall be attributed to the limits set forth at 11 CFR 110.8(a)(2), as adjusted under 11 CFR 110.9(c).

(2) *Polling expenses.* Polling expenses shall be attributed according to when the results of the poll are received. If the results are received on or before the date of the candidate's nomination, the expenses shall be considered primary election expenses. If results are received from a single poll both before and after the date of the candidate's nomination, the costs shall be allocated between the primary and the general election limits based on the percentage of results received during each period.

(3) *State or national campaign offices.* Overhead expenditures and payroll costs incurred in connection with state or national campaign offices, shall be attributed according to when the usage occurs or the work is performed. For purposes of this section, overhead expenditures shall have the same meaning as set forth in 11 CFR 106.2(b)(2)(iii)(D). Expenses for usage of offices or work performed on or before the date of the candidate's nomination shall be attributed to the primary election, except for periods when the office is used only by persons working exclusively on general election campaign preparations.

(4) *Campaign materials.* Expenditures for campaign materials, including bumper stickers, campaign brochures, buttons, pens and similar items, that are purchased by the primary election campaign committee and later transferred to and used by the general election committee shall be attributed to the general election limits. Materials transferred to but not used by the general election committee shall be attributed to the primary election limits.

(5) *Media production costs.* For media communications that are broadcast or published both before and after the date of the candidate's nomination, 50% of the media production costs shall be attributed to the primary election limits,

and 50% to the general election limits. Distribution costs, including such costs as air time and advertising space in newspapers, shall be paid for 100% by the primary or general election campaign depending on when the communication is broadcast or distributed.

(6) *Campaign Communications.* (i) *Solicitations.* The costs of a solicitation shall be attributed to the primary election or to the GELAC, depending on the purpose of the solicitation. If a candidate solicits funds for both the primary election and for the GELAC in a single communication, 50% of the cost of the solicitation shall be attributed to the primary election, and 50% to the GELAC.

(ii) *Other communications.* Except as provided in paragraph (e)(5) of this section, the costs of a campaign communication that does not include a solicitation shall be attributed to the primary or general election limits based on the date on which the communication is broadcast, published or mailed. The cost of a communication that is broadcast, published or mailed before the date of the candidate's nomination shall be attributed to the primary election limits.

(7) *Travel costs.* Expenditures for campaign-related transportation, food, and lodging by any individual, including a candidate, shall be attributed according to when the travel occurs. If the travel occurs on or before the date of the candidate's nomination, the cost is a primary election expense. Travel to and from the convention shall be attributed to the primary election. Travel by a person who is working exclusively on general election campaign preparations shall be considered a general election expense even if the travel occurs before the candidate's nomination.

34. Section 9034.5 is amended by revising paragraphs (b), (c)(1) and (f) to read as follows:

§ 9034.5 Net outstanding campaign obligations.

*   *   *   *   *

(b) *Liabilities.* (1) The amount submitted as the total of outstanding campaign obligations under paragraph (a)(1) of this section shall not include any accounts payable for non-qualified campaign expenses nor any amounts determined or anticipated to be required as repayment under 11 CFR part 9038 or any amounts paid to secure a surety bond under 11 CFR 9038.5.

(2) The amount submitted as estimated necessary winding down costs under paragraph (a)(1) of this section shall be broken down by expense category and quarterly or monthly time period. This breakdown shall include estimated costs for office space rental, staff salaries, legal expenses, accounting expenses, office supplies, equipment rental, telephone expenses, postage and other mailing costs, printing and storage. The breakdown shall estimate the costs that will be incurred in each category from the time the statement is submitted until the expected termination of the committee's political activity.

(c)(1) *Capital assets.* For purposes of this section, the term *capital asset* means any property used in the operation of the campaign whose purchase price exceeded $2000 when received by the committee. Property that must be valued as capital assets under this section includes, but is not limited to, office equipment, furniture, vehicles and fixtures acquired for use in the operation of the candidate's campaign, but does not include property defined as ''other assets'' under 11 CFR 9034.5(c)(2). A list of all capital assets shall be maintained by the Committee in accordance with 11 CFR 9033.11(d). The fair market value of capital assets shall be considered to be the total original cost of such items when acquired less 40%, to account for depreciation, except that items received after the date of ineligibility must be valued at their fair market value on the date received.

*   *   *   *   *

(f)(1) With each submission for matching fund payments filed after the candidate's date of ineligibility, the candidate shall certify that, as of the close of business on the last business day preceding the date of submission for matching funds, his or her remaining net outstanding campaign obligations equal or exceed the amount submitted for matching.

(2) A candidate who makes a submission for matching fund payments after his or her date of ineligibility shall also submit a revised statement of net outstanding campaign obligations. This revised statement shall be due before the next regularly scheduled payment date, on a date to be determined and published by the Commission. This statement shall reflect the financial status of the campaign as of the close of business three business days before the due date of the statement. The revised statement shall also contain a brief explanation of each change in the committee's assets and obligations from the previous statement.

(3) After a candidate's date of ineligibility, if the candidate does not receive the entire amount of matching funds on a regularly scheduled payment date due to a shortfall in the matching payment account, the candidate shall also submit a revised statement of net outstanding campaign obligations. The revised statement shall be filed on a date to be determined and published by the commission, which will be before the next regularly scheduled payment date.

35. Section 9034.6 is revised to read as follows:

§ 9034.6 Expenditures for transportation and services made available to media personnel; reimbursements.

(a) *General.* (1) Expenditures by an authorized committee for transportation, ground services or facilities (including air travel, ground transportation, housing, meals, telephone service, and typewriters) made available to media personnel, Secret Service personnel or national security staff will be considered qualified campaign expenses, and, except for costs relating to Secret Service personnel or national security staff, will be subject to the overall expenditure limitations of 11 CFR 9035.1(a).

(2) Subject to the limitations in paragraphs (b) and (c) of this section, committees may seek reimbursement for these expenses, and may deduct reimbursements received from media representatives from the amount of expenditures subject to the overall expenditure limitation of 11 CFR 9035.1(a). Expenses for which the committee receives no reimbursement will be considered qualified campaign expenses, and, with the exception of those expenses relating to Secret Service personnel and national security staff, will be subject to the overall expenditure limitation.

(b) *Reimbursement limits.* (1) The amount of reimbursement sought from a media representative under paragraph (a)(2) of this section shall not exceed 110% of the media representative's pro rata share (or a reasonable estimate of the media representative's pro rata share) of the actual cost of the transportation and services made available. Any reimbursement received in excess of this amount shall be disposed of in accordance with paragraph (d)(1) of this section.

(2) For the purposes of this section, a media representative's pro rata share shall be calculated by dividing the total actual cost of the transportation and services provided by the total number of individuals to whom such transportation and services are made available. For purposes of this calculation, the total number of individuals shall include committee staff, media personnel, Secret Service

personnel, national security staff and any other individuals to whom such transportation and services are made available, except that, when seeking reimbursement for transportation costs paid by the committee under 11 CFR 9034.7(b)(5)(i)(C), the total number of individuals shall not include national security staff.

(c) *Deduction of reimbursements from expenditures subject to the overall expenditure limitations.*

(1) The Committee may deduct from the amount of expenditures subject to the overall expenditure limitation:

(i) The amount of reimbursements received from media representatives in payment for the transportation and services described in paragraph (a) of this section, up to the actual cost of the transportation and services provided to media representatives; and

(ii) An additional amount of the reimbursements received from media representatives, representing the administrative costs incurred by the committee in providing these services to the media representatives and seeking reimbursement for them, equal to:

(A) Three percent of the actual cost of transportation and services provided to the media representatives under this section; or

(B) An amount in excess of 3% representing the administrative costs actually incurred by the committee in providing services to the media representatives, provided that the committee is able to document the total amount of administrative costs actually incurred.

(2) For the purposes of this paragraph, ''administrative costs'' includes all costs incurred by the committee in making travel arrangements and seeking reimbursement, whether these services are performed by committee staff or by independent contractors.

(d) *Disposal of excess reimbursements.* If the committee receives reimbursements in excess of the amount deductible under paragraph (c) of this section, it shall dispose of the excess amount in the following manner:

(1) Any reimbursement received in excess of 110% of the actual pro rata cost of the transportation and services made available to a media representative shall be returned to the media representative.

(2) Any amount in excess of the amount deductible under paragraph (c) of this section that is not required to be returned to the media representative under paragraph (d)(1) of this section shall be paid to the Treasury.

(e) *Reporting.* The total amount paid by an authorized committee for the services and facilities described in paragraph (a)(1) of this section, plus the administrative costs incurred by the committee in providing these services and facilities and seeking reimbursement for them, shall be reported as an expenditure in accordance with 11 CFR 104.3(b)(2)(i). Any reimbursement received by such committee under paragraph (b)(1) of this section shall be reported in accordance with 11 CFR 104.3(a)(3)(ix).

36. Section 9034.7 is revised to read as follows:

§ 9034.7 Allocation of travel expenditures.

(a) Notwithstanding the provisions of 11 CFR 106.3, expenditures for travel relating to the campaign of a candidate seeking nomination for election to the office of President by any individual, including a candidate, shall, pursuant to the provisions of paragraph (b) of this section, be qualified campaign expenses and be reported by the candidate's authorized committee(s) as expenditures.

(b)(1) For a trip which is entirely campaign-related, the total cost of the trip shall be a qualified campaign expense and a reportable expenditure.

(2) For a trip which includes campaign-related and non-campaign related stops, that portion of the cost of the trip allocable to campaign activity shall be a qualified campaign expense and a reportable expenditure. Such portion shall be determined by calculating what the trip would have cost from the point of origin of the trip to the first campaign-related stop and from that stop through each subsequent campaign-related stop, back to the point of origin. If any campaign activity, other than incidental contacts, is conducted at a stop, that stop shall be considered campaign-related. Campaign activity includes soliciting, making, or accepting contributions, and expressly advocating the election or defeat of the candidate. Other factors, including the setting, timing and statements or expressions of the purpose of an event and the substance of the remarks or speech made, will also be considered in determining whether a stop is campaign-related.

(3) For each trip, an itinerary shall be prepared and such itinerary shall be made available by the committee for Commission inspection. The itinerary shall show the time of arrival and departure and the type of event held.

(4) For trips by government conveyance or by charter, a list of all passengers on such trip, along with a designation of which passengers are and which are not campaign-related, shall be made available for Commission inspection. When required to be created, a copy of the government's or the charter company's official manifest shall also be maintained and made available by the committee.

(5)(i) If any individual, including a candidate, uses a government airplane for campaign-related travel, the candidate's authorized committee shall pay the appropriate government entity an amount equal to:

(A) The lowest unrestricted and non-discounted first class commercial air fare available for the time traveled, in the case of travel to a city served by a regularly scheduled commercial airline service; or

(B) The lowest unrestricted and non-discounted coach commercial air fare available for the time traveled, in the case of travel to a city served by regularly scheduled coach airline service, but not regularly scheduled first class airline service; or

(C) In the case of travel to a city not served by a regularly scheduled commercial airline service, the commercial charter rate for an airplane sufficient in size to accommodate the campaign-related travelers, including the candidate, plus the news media and the Secret Service.

(ii) If a government airplane is flown to a campaign-related stop where it will pick up passengers, or from a campaign-related stop where it left off passengers, the candidate's authorized committee shall pay the appropriate government entity an amount equal to the greater of the amount billed or the amount required under paragraph (b)(5)(i) of this section for one passenger.

(iii) If any individual, including a candidate, uses a government conveyance, other than an airplane, for campaign-related travel, the candidate's authorized committee shall pay the appropriate government entity an amount equal to the commercial rental rate for a conveyance sufficient in size to accommodate the campaign-related travelers, including the candidate, plus the news media and the Secret Service.

(iv) If any individual, including a candidate, uses accommodations, including lodging and meeting rooms, during campaign-related travel, and the accommodations are paid for by a government entity, the candidate's authorized committee shall pay the appropriate government entity an amount equal to the usual and normal charge for the accommodations, and shall maintain documentation supporting the amount paid.

(v) For travel by airplane, the committee shall maintain documentation of the lowest unrestricted nondiscounted air fare available for the time traveled,

including the airline, the flight number and travel service providing that fare or the charter rate, as appropriate. For travel by other conveyances, the committee shall maintain documentation of the commercial rental rate for a conveyance of sufficient size, including the provider of the conveyance and the size, model and make of the conveyance.

(6) Travel expenses of a candidate's spouse and family when accompanying the candidate on campaign-related travel may be treated as qualified campaign expenses and reportable expenditures. If the spouse or family members conduct campaign-related activities, their travel expenses will be treated as qualified campaign expenses and reportable expenditures.

(7) If any individual, including a candidate, incurs expenses for campaign-related travel, other than by use of government conveyance or accommodations, an amount equal to that portion of the actual cost of the conveyance or accommodations which is allocable to all passengers, including the candidate, who are traveling for campaign purposes will be a qualified campaign expense and shall be reported by the committee as an expenditure.

(i) If the trip is by charter, the actual cost for each passenger shall be determined by dividing the total operating cost for the charter by the total number of passengers transported. The amount which is a qualified campaign expense and a reportable expenditure shall be calculated in accordance with the formula set forth at 11 CFR 9034.7(b)(2) on the basis of the actual cost per passenger multiplied by the number of passengers traveling for campaign purposes.

(ii) If the trips is by non-charter commercial transportation, the actual cost shall be calculated in accordance with the formula set forth at 11 CFR 9034.7(b)(2) on the basis of the commercial fare. Such actual cost shall be a qualified campaign expense and a reportable expenditure.

(8) Travel on corporate airplanes and other corporate conveyances is governed by 11 CFR 114.9(e).

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

37. The authority citation for part 9036 continues to read as follows:

Authority: 26 U.S.C. 9036 and 9039(b).

38. Section 9036.2 is amended by revising paragraph (b)(1)(ii) and adding a new sentence to the end of paragraph (b)(1)(vi), to read as follows:

§ 9036.2 Additional submissions for matching fund payments.

* * * * *

(b) * * *

(1) * * *

(ii) The candidate is required to submit an alphabetical list of contributors (either solely in magnetic media from or in both printed and magnetic media forms), but not segregated by State as required in the threshold submission;

* * * * *

(vi) * * * In lieu of submitting photocopies, the candidate may submit digital images of checks, written instruments and deposit slips as specified in the Computerized Magnetic Media Requirements. The candidate shall provide the computer equipment and software needed to retrieve and read the digital images, if necessary, at no cost to the Commission, and shall include digital images of every contribution received and imaged on or after the date of the previous matching fund request. Contributions and other documentation not imaged shall be submitted in photocopy form.

* * * * *

39. In section 9036.5, the introductory text of paragraph (a) is revised to read as follows:

§ 9036.5 Resubmissions.

(a) *Alternative resubmission methods.* Upon receipt of the Commission's notice of the results of the submission review pursuant to 11 CFR 9036.4(b), or of an inquiry pursuant to 11 CFR 9039.3 that results in a downward adjustment to the amount of certified matching funds, a candidate may choose to:

* * * * *

PART 9037—PAYMENTS AND REPORTING

40. The authority citation for part 9037 continues to read as follows:

Authority: 26 U.S.C. 9037 and 9039(b).

41. Section 9037.4 is added to read as follows:

§ 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.

PART 9038—EXAMINATIONS AND AUDITS

42. The authority citation for part 9038 continues to read as follows:

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

42A. The part heading is revised as set forth above.

43. Section 9038.1 is amended by revising paragraphs (b)(2)(iii), (c), (d) and (e) and adding new paragraph (f) to read as follows:

§ 9038.1 Audit.

* * * * *

(b) * * *

(2) * * *

(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 which the staff anticipates it will present to the Commission for approval. Commission staff will prepare a written Exit Conference Memorandum that discusses these findings and recommendations. A copy of the Exit Conference Memorandum will be given to committee representatives at the exit conference. These findings may include 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 Matching Payment Account Act and Commission regulations; the accuracy of statements and reports filed with the Commission by the candidate and committee; and preliminary calculations regarding future repayments to the United States Treasury. Commission staff will advise committee representatives at this conference of the committee's opportunity to respond to these proposed findings, the projected timetable regarding the issuance of the audit report and 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.

* * * * *

(c) *Committee Response to the Exit Conference Memorandum.* The candidate and his or her authorized committee may submit in writing within 60 calendar days after the exit conference, legal and factual materials disputing or commenting on the proposed findings contained in the Exit Conference Memorandum. In addition, the committee shall submit any additional documentation requested by

Commission staff. 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 Exit Conference Memorandum. 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 2 U.S.C. 437g 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.

44. Section 9038.2 is amended by revising paragraphs (a) (2) and (3), (b)(2)(iii), (b)(4), (c), (d), (f), and the first sentence of paragraph (g), and by adding paragraphs (a)(4) and (i), to read as follows:

§ 9038.2 Repayments.

(a) * * *

(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 purchases of this section.

(3) Once the candidate receives notice of the Commission's repayment determination under this section, the candidate should given 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) * * *

(2) * * *

(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 the candidate, using the assumption that the last payment has been expended on a last-in, first-out basis.

* * * * *

(4) *Surplus; income derived from the use of surplus public funds.* 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 candidates's date of ineligibility, less Federal, State and local 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.

(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.

* * * * *

(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. * * *

* * * * *

(i) *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.

45. Section 9038.4 is amended by adding a sentence to the end of paragraph (c), to read as follows:

§ 9038.4 Extensions of time.

* * * * *

(c) * * * 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.

* * * * *

46. Section 9038.5 is amended by revising paragraphs (a), (b), (c)(1)(ii), and the introductory text of (c)(4), to read as follows:

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

(c) *Stay of repayment determination pending appeal.*

(1) * * *

(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).

* * * * *

(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:

* * * * *

47. Section 9038.7 is added to read as follows:

§ 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.

PART 9039—REVIEW AND INVESTIGATION AUTHORITY

48. The authority citation for part 9039 continues to read as follows:

Authority: 26 U.S.C. 9039.

49. Section 9039.3 is amended by adding new paragraph (b)(4), to read as follows:

§ 9039.3 Examination and audits; investigations.

* * * * *

(b) * * *

(4) If, at the close of the inquiry, the Commission determines that no action or no further action is warranted, the Commission shall so notify the candidate. If the inquiry results in an adjustment to the amount of certified matching funds, the procedures set forth at 11 CFR 9036.5 or 9038.1 shall be followed, as appropriate. If the inquiry coincides with an audit undertaken pursuant to 11 CFR 9038.1, the information obtained in the inquiry will be utilized in making the repayment determination. If the inquiry results in an initial or additional repayment determination, the procedures set forth at 11 CFR 9038.2, 9038.4, and 9038.5 shall be followed.

Dated: June 12, 1995.

Danny L. McDonald,

Chairman.

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