

**FEDERAL ELECTION COMMISSION****11 CFR Parts 104, 107, 110, 9003, 9004, 9008, 9032 through 9036, and 9038****[Notice 2003-8]****Public Financing of Presidential Candidates and Nominating Conventions****AGENCY:** Federal Election Commission.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Election Commission requests comments on proposed changes to its rules governing publicly financed presidential candidates, in both the primary and general elections, and national nominating conventions. These regulations implement the provisions of the Presidential Election Campaign Fund Act and the Presidential Matching Payment Account Act, which establish eligibility requirements for presidential candidates and convention committees seeking public financing and indicate how funds received under the public financing system may be spent. They also require the Commission to audit publicly financed committees and seek repayment where appropriate. The proposed rules implement the Bipartisan Campaign Reform Act of 2002, as it applies particularly to the Presidential Election Campaign Fund Act and the Presidential Matching Payment Account Act. The proposed rules also reflect the Commission's experience in administering this program during the 2000 election cycle and seek to anticipate some questions that may arise during the 2004 presidential election cycle. No final decisions have been made by the Commission on any of the proposed revisions in this document. Further information is provided in the supplementary information that follows.

**DATES:** Comments must be received on or before May 9, 2003. If the Commission receives sufficient requests to testify, it will hold a hearing on these proposed rules on May 19, 2003, at 10 a.m. Commenters wishing to testify at the hearing must so indicate in their written or electronic comments.

**ADDRESSES:** All comments should be addressed to Ms. Mai T. Dinh, Acting Assistant General Counsel, and must be submitted in either electronic or written form. Electronic mail comments should be sent to *pubfund2004@fec.gov* and must include the full name, electronic mail address and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address and

postal service address of the commenter will not be considered. If the electronic mail comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219-3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463.

Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. The Commission will make every effort to post public comments on its Web site within ten business days of the close of the comment period. The hearing will be held in the Commission's ninth floor meeting room, 999 E Street NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mai T. Dinh, Acting Assistant General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, or Mr. Robert M. Knop, or Ms. Delanie DeWitt Painter, Attorneys, 999 E Street NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is considering revising parts of its regulations governing the public financing of presidential campaigns, 11 CFR parts 9001 through 9039, to more effectively administer the public financing program during the 2004 election cycle. These rules implement the provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 to 9013 ['Fund Act'], and the Presidential Matching Payment Account Act, 26 U.S.C. 9031 to 9042 ['Matching Payment Act']. In addition, the Commission is considering how the Bipartisan Campaign Reform Act of 2002 ['BCRA'], Public Law 107-155, 116 Stat. 81 (Mar. 27, 2002), in its amendments to the Federal Election Campaign Act of 1971, 2 U.S.C. 431 to 455 ['FECA'], along with the Commission's implementing regulations related to BCRA, may affect the public funding rules. The Commission publishes this Notice of Proposed Rulemaking ['NPRM'] to invite comments on the proposed amendments.

Please note that the proposed revisions would affect primary elections, general elections, and national nominating conventions. The Commission plans to seek comment at a later date on issues that affect only minor and new party candidates. The Commission also plans a separate rulemaking on selected issues related to all Federal candidates, which may include issues related to publicly

funded candidates, including questions concerning candidate travel, mailing lists (including list exchanges and list rentals), and allocation of expenses between candidates.

**Presidential Candidates****I. Winding Down Costs**

The Commission is considering several changes to its rules governing winding down costs for both primary and general election candidates. Many issues that have arisen in the Commission's audits of publicly funded presidential candidates have involved winding down costs.

**A. Restrictions on Winding Down Costs**

The Commission is revisiting the issue of limiting winding down expenses. The current regulations at 11 CFR 9034.4(a)(3) permit primary candidates to make disbursements for winding down costs, and to receive and use matching funds to make those disbursements, over an indefinite period of time after the candidate's Date of Ineligibility ['DOI']. Similarly, under 11 CFR 9004.4(a)(4), general election candidates may use public funds after the end of the expenditure report period to pay for the costs of winding down the general election campaign. The rules treat both primary and general election winding down costs as qualified campaign expenses.

The Commission has permitted publicly financed candidates to use Federal funds to pay for certain winding down expenses since 1976. *See Informational Letter Re: Advisory Opinion Request 1976-54*. In 1979, the Commission stated that winding down costs "although perhaps incurred after a candidate's date of ineligibility may nevertheless be considered qualified campaign expenses if they are associated with the termination of the candidate's campaign." *Explanation and Justification for the Rules Governing Presidential Election Campaign Fund and Presidential Primary Matching Fund*, 44 FR 20336, 20340 (Apr. 4, 1979). In 1983, the Commission considered a time limitation for winding down costs, but ultimately did not include it in the final rules because of concerns raised by comments opposing the change. *Explanation and Justification for the Rules Governing Presidential Primary Matching Fund*, 48 FR 5224, 5228 (Feb. 4, 1983).

The Commission again contemplated restrictions on the amount of winding down costs in 1995. *Explanation and Justification for the Rules Governing Public Financing of Presidential Primary*

*and General Election Candidates*, 60 FR 31854, 31865–31866 (June 16, 1995). The Commission stated that winding down costs “can result in additional audit fieldwork and preparation of addenda to audit reports” and that as part of an “effort to streamline and shorten the audit process,” the Commission sought comment on ways to reduce winding down time for campaigns. *Id.* The Commission considered limiting winding down expenses to a dollar amount or a fixed percentage of the candidate’s total expenditures during the campaign or matching funds certified to a primary candidate. *Id.* at 31866. Alternatively, the Commission considered “a cutoff date after which winding down expenses would no longer be considered qualified campaign expenses.” *Id.* Commenters objected that campaigns need resources to respond during the audit process, to defend themselves in enforcement actions and to verify the proper payment of the campaign’s remaining bills. *Id.* Ultimately, the Commission did not add new restrictions to the rules governing winding down costs, stating that it would be “quite difficult to select an amount or time frame sufficient to meet reasonable expenses incurred in winding down the campaign.” *Id.*

In recent election cycles, the winding down period for some candidates has extended over several years, and the amount of winding down costs has increased. During the audit and repayment process, presidential committees and the Commission’s auditors estimate future winding down costs, and may sometimes reach substantially disparate winding down estimates. Issues have arisen as to the appropriate amounts and types of winding down expenses and as to the length of time committees need to wind down. These disputes lengthen the audit and repayment process and can provide a basis for judicial challenges to the Commission’s repayment determinations. Both actual and estimated future winding down costs are included in a primary election candidate’s Statement of Net Outstanding Campaign Obligations (“NOCO”) or a general election candidate’s Statement of Net Outstanding Qualified Campaign Expenses (“NOQCE”). Consequently, if the Commission auditors’ figures are lower than the committee’s estimates, a dispute may arise in determining the candidate’s NOCO or NOQCE and any remaining entitlement, surplus funds, or resulting repayment. Disallowed winding down expenses can increase

the amount of any surplus funds and the resulting repayment determination, or they can reduce or eliminate a deficit and the corresponding amount of a primary candidate’s entitlement to matching funds. Therefore, the Commission is again considering ways to limit winding down expenses in order to establish a fair and readily determined amount to ensure public funds are used in accordance with statutory purposes, campaigns are treated consistently with respect to winding down costs, and to provide for more expeditious completion of these matters. Thus, the proposed rules establish both an ending date and maximum amount for winding down costs.

The Commission proposes new sections governing winding down expenses at 11 CFR 9004.11 and 11 CFR 9034.11 that would delineate new restrictions on both the amount and timing of winding down costs. Publicly funded campaign committees should wind down in as quick and efficient manner as possible. The proposed restrictions are intended to contain winding down costs and periods, but allow campaigns a reasonable amount of winding down costs and a long enough winding down period to respond during the audit and repayment process and verify the payment of bills to terminate the campaign. The proposed restrictions would work in concert. Thus, candidates would be unable to continue to use public funds to pay for winding down costs if they reach the monetary limit prior to the end of their winding down period or if their winding down period ends before they reach the monetary limit.

The proposed rules at 11 CFR 9004.11 and 9034.11 include both a temporal restriction and a limitation of the total amount of winding down expenses. The proposed time restriction would permit a candidate to use public funds to pay for winding down expenses only until the end of the “winding down period.” The winding down period would begin on the day after the candidate’s date of ineligibility, for primary candidates who do not participate in the general election, or the day after the end of the expenditure report period for publicly funded general election candidates, or the day following the date 30 days after the general election for candidates who participate in the general election but do not receive public funds for the general election. The winding down period would end no earlier than the latest of: (1) 30 days after the candidate’s receipt of an audit report that does not contain any repayment determinations; (2) 60 days after service of notice to the

candidate of the Commission’s repayment determination, if the committee does not dispute the repayment determination; or (3) 30 days after service of notice of the Commission’s repayment determination following an administrative review.

The proposed winding down period would allow sufficient time for campaigns to seek administrative review of repayment determinations. The 30-day period following a candidate’s receipt of an audit report that does not contain a repayment determination would allow sufficient time to complete winding down because the audit and repayment process would have concluded. The 60-day period allowed for winding down after service to a candidate of a repayment determination that the candidate does not dispute reflects the amount of time permitted for candidates to respond to repayment determinations at 11 CFR 9007.2(c)(2) and 9038.2(c)(2). If a candidate disputes any repayment determination by responding and seeking administrative review, the winding down period would extend to 30 days after service of notice of the Commission’s repayment determination following administrative review. This is consistent with 11 CFR 9007.2(d)(2) and 9038.2(d)(2), which require candidates to make a post-administrative review repayment within 30 days after service of the Commission’s post-administrative review repayment determination. The Commission notes that if it is unable by an affirmative vote of at least 4 of its members to make a repayment determination after an administrative review, the 30-day period would run from the date of service of notice of the Commission’s final action concerning the administrative review.

The proposed rules would accommodate repayment determinations related to Commission audit reports, addenda to audit reports and 11 CFR 9039.3 inquiries. Thus, if a candidate did not dispute a repayment determination in an audit report but did subsequently dispute a repayment determination arising from an inquiry pursuant to 11 CFR 9039.3, the candidate’s winding down period would extend until 30 days after service of notice of the Commission’s repayment determination upon administrative review related to the 11 CFR 9039.3 investigation. In addition, the time restriction’s terms are “no earlier than” the expiration of the specified time period to permit the Commission the administrative flexibility of choosing a convenient end point, like the end of a month, and to allow for staff to estimate time for

Commission approval and transmittal to the committee of the audit report or repayment determination.

To reflect this new time restriction, the Commission also proposes revising 11 CFR 9004.9(a)(4) and 9034.5(b)(2) to require candidates' NOCO or NOQCE Statements to break down estimated winding down costs through the end of the winding down period, rather than the expected termination of the committee's political activity.

In addition to the temporal restriction, the proposed rules at 11 CFR 9004.4(a)(4) and 9034.4(a)(3) would limit the total amount of winding down expenses that may be paid for, in whole or part, with public funds. This "winding down limitation" would limit the total amount of publicly funded winding down expenses for primary candidates to the lesser of either: (1) 5% of the overall expenditure limitation; or (2) 5% of the total of the candidate's expenditures subject to the overall expenditure limitation as of the candidate's DOI, plus the candidate's expenses exempt from the overall expenditure limitation as of DOI, such as fundraising, legal and accounting compliance expenses and other expenses. For general election candidates, the winding down limitation would be the lesser of: (1) 2.5% of the expenditure limitation; or (2) 2.5% of the total of the candidate's expenditures subject to the expenditure limitation as of the end of the expenditure report period, plus the candidate's expenses exempt from the expenditure limitation, such as fundraising expenses, as of the end of the expenditure report period.

The Commission notes that the fundraising exemption for general election candidates is applicable only to those candidates who may accept contributions to defray qualified campaign expenses pursuant to 26 U.S.C. 9003(b)(2) or 9003(c)(2); minor party candidates and major party candidates who may solicit contributions to make up a deficiency in public funds received. *See* 11 CFR 100.152, 9003.3(b) and (c). Those general election candidates who may solicit contributions may also exempt legal and accounting compliance expenses from their expenditure limitations. *See* 11 CFR 100.146, 9003.3(b) and (c). Thus, the proposed rule would address the calculation of the winding down limitation for those general election candidates who may solicit contributions by calculating the total of their expenditures subject to the limit and their exempt expenses. The winding down limitation for fully funded major party general election

candidates would generally be 2.5% of the expenditure limitation. For both primary and general candidates, expenses for transportation of Secret Service and national security staff and media transportation expenses that are reimbursed by the media do not count against the expenditure limitations. *See* 11 CFR 9004.6(a), 9034.6(a). In addition, taxes on non-exempt function income such as interest, dividends and sale of property are exempt from a primary candidate's overall expenditure limitation. *See* 11 CFR 9034.4(a)(4).

Notwithstanding the amount determined based on these calculations, the proposed rule would permit all primary and general election candidates to spend a minimum of \$100,000 on winding down costs. The \$100,000 minimum winding down limitation is proposed to recognize that publicly funded committees face winding down expenses related to the requirements of the audit and repayment process that do not vary with the size of the committees. The Commission seeks comment on whether \$100,000 is the appropriate minimum amount and whether it should be adjusted for inflation or replaced with a percentage of the expenditure limitation.

In practice, the winding down limitation for primary candidates with large campaigns and for fully funded major party general election candidates would be the maximum winding down limitation: 5% of the overall expenditure limitation for primary candidates or 2.5% of the expenditure limitation for general election candidates. For primary candidates with smaller campaigns, the winding down limitation would equal 5% of their expenses prior to DOI. The winding down limitation for most minor party general election candidates and major party candidates who must solicit contributions to make up a deficiency in public funds would equal 2.5% of their expenses during the expenditure report period. For purposes of calculating the amount of the winding down limitation based on a primary or general candidate's expenses, a candidate's expenses would include both disbursements and accounts payable as of the DOI or the end of the expenditure report period for the following categories of expenses (as listed on page 2 of FEC Form 3P): operating expenses (line 23), fundraising (line 25), exempt legal and accounting (line 26), and other disbursements (line 29). The following payments would not be included in the expenses used to calculate the winding down limitation: Transfers to other authorized committees (line 24), loan repayments (line 27), or contribution

refunds (line 28). The winding down limitation would not include any expenditures in excess of the general election candidate's expenditure limitation or the primary candidate's overall expenditure limitation; thus, making expenditures or accepting in-kind contributions that exceed the expenditure limits would not provide a basis for an increased winding down limitation. The maximum winding down limitation would be calculated based upon a percentage of the primary candidate's overall expenditure limitation or the general election candidate's expenditure limitation pursuant to 26 U.S.C. 441a(b), similar to the calculation of the 20% fundraising exemption or the 15% compliance exemption. *See* 11 CFR 100.146, 100.152, 9002.11(b)(5) and 9035.1(c)(1) and (2).

All expenses incurred and paid by a candidate during the winding down period, including fundraising costs, would be subject to the winding down limitation. Expenses for legal and accounting compliance costs paid for with public funds would count against the winding down limitation, but compliance costs paid by a General Election Legal and Accounting Compliance Fund [“GELAC”] would not count against the winding down limitation.

The Commission reviewed the amounts spent for winding down costs by all publicly funded candidates during the 2000 election cycle. It compared their approximate winding down costs to the proposed winding down limitation. Of three publicly funded general election candidates, one would have spent less than 1% of the expenditure limitation, the second would have spent less than 2% of his expenditures, while the third would have spent only slightly more than the 2.5% winding down limitation. The last committee paid some of its winding down expenses with GELAC funds, which reduced its percentage to less than 2%. Ten primary candidates received matching funds in 2000. Three of these primary candidates' winding down limitations would have been calculated based on the maximum winding down limitation of 5% of the overall expenditure limitation. Of these, one would have exceeded the winding down limitation, spending more than approximately 8% of the expenditure limitation. Six primary candidates' winding down limitations would have been calculated based on their expenditures. Of these, four candidates would have exceeded the 5% winding down limitation, with winding down costs ranging between approximately

13% and 42% of their expenditures. One candidate that would have been subject to the minimum winding down limitation of \$100,000 spent substantially less than that amount. Of all 13 publicly funded committees in the 2000 presidential elections, five primary committees had winding down expenses that would have exceeded the proposed amount limitation. One of these committees had sufficient funds in its related GELAC that could have paid the excessive winding down expenses. The other four committees would have received fewer matching funds after their DOIs.<sup>1</sup>

The proposal puts forth a lower percentage for general election campaign committees than for primary campaigns for several reasons. General election candidates may pay for winding down costs with funds from the candidates' GELAC, an option not currently available for primary election campaigns. General election campaigns are also shorter in length than most primary campaigns and thus, may have fewer transactions and vendors to deal with while terminating the campaign. The Commission also notes that the total amount of public funds and expenditure limitations are larger for major party candidates who receive public funds; thus, a smaller percentage of their expenditures would result in a larger dollar figure.

Under the proposed rules, the use of public funds to pay for winding down expenses in excess of these restrictions would constitute a non-qualified campaign expense that may be subject to repayment. However, these restrictions would apply to the use of public funds or a mixture of public and private funds for winding down costs. The proposed rules would not limit the payment of winding down expenses from a candidate's GELAC. The proposed rules would also allow a primary candidate who is in a deficit position at the DOI to pay for winding down costs in excess of the restrictions after the committee's accounts no longer contain any matching funds. See 11 CFR 9038.2(b)(2)(iii)(B) and (iv). Primary candidates who have a surplus at the DOI would be required to make a surplus repayment to the United States Treasury before they could use private funds for winding down costs in excess of the restrictions. See 11 CFR 9038.3(c).

The proposal includes both temporal and amount restrictions rather than just one or the other so that these restrictions would work together to

reinforce each other. The proposed rules would not permit the use of public funds for winding down costs after either: (1) The total amount of winding down expenses reach the winding down dollar limitation or (2) the end of the winding down period, whichever event occurs first. The proposed restrictions would prevent the pre-payment of large amounts for speculative future winding down goods and services prior to the end of the winding down period. They would also prevent a prolonged winding down period from extending and complicating the audit process. In addition, the proposed rules are intended to reflect factors that could affect the amount of winding down costs needed to terminate the campaign. The proposed winding down limitation is based on a percentage of a campaign's expenses to reflect that larger campaigns generally incur more expenses as they terminate their activities. The calculation includes exempt expenses such as fundraising and legal and accounting compliance costs to reflect the actual size of the campaign that is winding down. In addition, the proposed rule would restrict the expenses used to calculate the winding down limitation to the period prior to a primary candidate's DOI or the end of a general election candidate's expenditure report period to prevent candidates from increasing their winding down limitation by spending more for winding down expenses.

One factor under consideration, but not included in the proposed rules that follow, is the number of complaints and other compliance actions filed against a presidential candidate or campaign committee. Winding down costs include, *inter alia*, the costs of "complying with the post-election requirements of the Act," such as the audit and repayment process, reporting and recordkeeping. 11 CFR 9004.4(a)(4) and 9034.4(a)(3). The compliance process is separate from the required audit and repayment process and its requirements are not election dependent, which raises the issue of whether such compliance costs should be considered "post-election requirements of the Act." Compliance matters, unlike compulsory audits and repayment determinations, are not unique to candidates who receive public funds. Consequently, the proposed rule would allow a publicly funded candidate to pay initial expenses for compliance matters arising from the campaign with public funds as winding down costs, but the winding down period would not be prolonged until enforcement matters related to the

campaign have closed, if the audit and repayment process has concluded. Private funds would be available to general election candidates through their GELAC and to primary candidates after their accounts no longer contain public funds. As discussed below, however, the proposed rules would also permit a GELAC to pay the primary committee's winding down expenses under certain conditions. The Commission seeks comment on whether the existence of compliance matters should be considered as a factor in determining a candidate's winding down period or winding down limitation.

The proposed new sections at 11 CFR 9004.11 (general election) and 9034.11 (primary election) governing winding down costs are intended to simplify and clarify the rules governing winding down costs. Proposed new 11 CFR 9004.11 and 9034.11 contain the definition of winding down costs, moved from current sections 9004.4(a)(4) and 9034.4(a)(3)(i), the proposed temporal and monetary restrictions, and proposed rules governing the allocation of winding down costs between a candidate's primary election and general election campaigns. In addition, the Commission proposes revisions to 11 CFR 9004.4(a)(4) and 9034.4(a)(3)(i) and (ii) to move provisions from those sections to the new sections and to otherwise conform these sections to the proposed new rules. Proposed 11 CFR 9004.4(a)(4) would state that payments may be used to defray winding down costs subject to the restrictions of new 11 CFR 9004.11. Current section 9004.4(a)(4)(ii) would be renumbered as 9004.4(a)(5). Proposed 11 CFR 9034.4(a)(3)(i) would state that winding down costs subject to the restrictions in proposed 11 CFR 9034.11 are qualified campaign expenses. Proposed 11 CFR 9034.4(a)(3)(ii) would include a reference to proposed 11 CFR 9034.11.

The Commission seeks comment on the proposed winding down restrictions. Are the restrictions fair to publicly funded committees? Should winding down expenses be limited to a fixed dollar amount or a combination of a dollar amount and a percentage rather than the proposed percentage? If so, what dollar amount would be appropriate? Would it be preferable to apply a percentage or dollar cap to specific categories of winding down expenses rather than the total of winding down costs? Would a shorter or longer winding down period be preferable to the proposed time period? Should there be a minimum winding

<sup>1</sup> Of course, this comparison is hypothetical because the committees may have behaved differently had the proposed rules been in effect.

down period, and if so, how long should the minimum winding down period be?

Specifically, the Commission seeks comment on whether the winding down period should include an additional time period or dollar allowance for candidates who seek judicial review of a Commission repayment determination and if so, how long that period should be. Should candidates who accept public funds for both the primary and general elections be allowed to combine their primary and general election winding down limitations into a joint monetary limit for the total winding down expenses of both committees, with the temporal limit based on the last repayment determination received by either committee? Would the proposed rule encourage candidates to attempt to extend the audit process to lengthen the winding down period?

The Commission is also considering two alternatives to the proposed temporal and monetary restrictions on winding down expenses. The first alternative would, in effect, disallow the use of public funds to pay for winding down costs. Under this alternative, a primary election candidate would not be permitted to use public funds to pay for either: (1) All expenses incurred after the candidate's DOI or (2) all expenses for goods or services to be used after the DOI even if the expenses are incurred prior to the DOI. A general election candidate would not be permitted to use public funds to pay for either: (1) All expenses incurred after the end of the expenditure report period or (2) all expenses for goods or services to be used after the end of the expenditure report period even if they are incurred during the expenditure report period.

This alternative would end the Commission's treatment of winding down costs as qualified campaign expenses. Winding down costs are a category of qualified campaign expenses recognized by the Commission that is not specifically identified in the Fund Act or the Matching Payment Act. This category of qualified campaign expenses is an exception to the rules requiring qualified campaign expenses to be incurred during the expenditure report period, for general election candidates, 26 U.S.C. 9002(11)(B), or prior to a primary candidate's DOI, 11 CFR 9032.9(a)(1); *see also* 26 U.S.C. 9032(6) and 9033(c)(2). Since winding down costs are incurred after the end of a candidate's active campaign, the question arises whether they are incurred "to further" a general election candidate's election to the office of President or Vice President, 26 U.S.C. 9002(11), or "in connection with" a

primary candidate's campaign for the nomination, 26 U.S.C. 9032(9). Comments are sought on whether permitting public funds to be used for winding down costs may be inconsistent with these provisions or with 26 U.S.C. 9038(b)(3), which requires candidates to retain matching funds "for the liquidation of all obligations to pay qualified campaign expenses for a period not exceeding 6 months after the end of the matching payment period" and to "promptly" repay a ratio of any surplus funds.

Disallowing the use of public funds for winding down expenses would ensure that public funds are used for expenses that further a candidate's active campaign. Under this alternative, general election candidates would be able to pay for their winding down expenses with GELAC funds. Primary candidates would not pay for winding down costs with matching funds, but could use contributions or other private funds to pay these costs. Under this approach, a primary candidate's winding down costs would not count as liabilities in determining the candidate's net outstanding campaign obligations; thus, winding down costs could not increase a primary candidate's entitlement to Federal funds or decrease a surplus.

Please note that this alternative is not set forth in the draft rules that follow. This alternative would require the deletion of the rules governing winding down costs as well as changes to other rules to delete references to winding down costs. Specifically, this alternative would require deletion or revisions to: 11 CFR 9002.11(c) (expenses after the last day of the candidate's eligibility may be qualified campaign expenses if they meet the provisions of 11 CFR 9004.4(a)); 9004.4(a)(4) (winding down costs as qualified campaign expenses); 9004.4(b)(3) (non-qualified campaign expenses do not include winding down expenses permitted by 11 CFR 9004.4(a)(4)); 9004.9(a)(1) and (4) (inclusion of estimated winding down expenses in the NOCQE statement); 9032.9(c) (expenses after the last day of candidate's eligibility may be qualified campaign expenses if they meet the provisions of 11 CFR 9034.4(a)); 9034.4(a)(3) (winding down costs as qualified campaign expenses); 9034.4(a)(5) (bonuses are permitted until 30 days after DOI); 9034.4(b)(3) (non-qualified campaign expenses do not include winding down expenses permitted by 11 CFR 9034.4(a)(3)); and 9034.5(b)(1) and (2) (inclusion of estimated winding down expenses in the NOCO statement). Please also note that this alternative is inconsistent with

some of the other proposals in this rulemaking, such as dividing winding down expenses between a candidate's primary and general campaigns or treating certain convention expenses of ineligible candidates as qualified campaign expenses, as discussed below. The Commission seeks comment on this alternative approach. Would disallowing the use of public funds for winding down costs hinder candidates from responding adequately during the audit and repayment process? Would this alternative serve as a disincentive for candidates to seek public funds? Is this approach nonetheless required by the Fund Act and the Matching Payment Act? Should primary candidates be permitted to establish a separate account of solely private funds, with separate contribution limits for contributors, to be used for winding down expenses? If so, may the Commission permit contributors to make more than one contribution of the amount specified in 2 U.S.C. 441a(a)(1)(A) or 2 U.S.C. 441a(a)(2)(A) to the same candidate or authorized committee? May the Commission permit such candidates and authorized committees to accept such contributions consistent with 2 U.S.C. 441a(f) and 441i(e)(1)(A)?

The Commission is also considering a second alternative approach to winding down costs. This alternative, which is also not set forth in the draft rules that follow, would not place restrictions on the amount or timing of winding down costs but would more precisely delineate the types of winding down costs that are permissible. The Commission is considering various categories of permissible winding down costs including staff salaries, legal and accounting services, office space rental, utilities, computer services, other overhead expenses, consultants, storage, insurance, office supplies and fundraising expenses.

The Commission seeks comment on this alternative. Disputes over winding down expenses often concern the appropriate amounts spent for particular expenses, the appropriate length of time a campaign should continue to need certain goods or services, and whether the campaign committee has provided sufficient documentation of expenses. Should a list of permissible winding down expenses provide guidance as to the appropriate amounts, duration, or documentation required to support such expenses? Should there be any dollar limits on any of the expenses? Would this alternative reduce the amount of winding down expenses? The Commission also seeks comment on any

other alternative proposals for limiting winding down expenses.

The Commission proposes another change to clarify the rules on winding down costs at 11 CFR 9034.4(b)(3). Current paragraph (a) of 11 CFR 9034.4 lists qualified campaign expenses, while paragraph (b) sets forth certain non-qualified campaign expenses. Paragraph (a)(1) states that, except as provided in paragraph (b)(3), 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. Paragraph (b)(3) states that general election and post-ineligibility expenditures are not qualified campaign expenses, except to the extent permitted under paragraph (a)(3), which concerns winding down and continuing-to-campaign expenses. For clarity, the Commission is proposing to add a provision to paragraph (b)(3) to specifically state that the winding down and continuing-to-campaign costs addressed in paragraph (a)(3) and 11 CFR 9034.11 are considered qualified campaign expenses. Corresponding changes would be made to the similar provision for the general election, 11 CFR 9004.4(b)(3).

Please note that the Commission is not proposing any changes at this time to 11 CFR 9008.10(g)(7), governing winding down costs of convention committees. The Commission nonetheless welcomes comments as to whether similar restrictions should apply to winding down expenses for convention committees.

#### B. Candidates Who Run in Both Primary and General Elections

The Commission seeks comment on proposed revisions to its rules to clarify which costs constitute primary winding down costs for candidates who participate in both the primary and general elections. The Commission's current regulations allow only candidates who do not run in the general election to begin to incur winding down costs and to treat winding down expenses for salary, overhead and computer costs as 100% compliance costs beginning immediately after their DOI. *See* 11 CFR 9034.4(a)(3)(i) and (iii). Candidates who run in the general election, whether or not they receive public funds for that election, must wait until the day following the date 30 days after the general election, which is the end of the expenditure report period for publicly financed general election candidates, 11 CFR 9002.12, before they may begin to incur and pay winding down expenses or allocate them as 100% compliance

expenses. In 1999, the Commission revised 11 CFR 9034.4(a)(3)(iii) to allow primary candidates who do not run in the general election to begin to treat 100% of winding down expenses for salary, overhead and computer costs as 100% compliance costs beginning immediately after their DOI.

*Explanation and Justification for the Rules Governing Public Financing of Presidential Primary and General Election Candidates*, 64 FR 49355, 49358-59 (Sept. 13, 1999). The wording of 11 CFR 9034.4(a)(3)(iii), however, refers to "candidates who receive public funding for the general election" but does not expressly address the situation of a candidate who runs in both the primary and general elections and does not receive public funding for the general election. In the 2000 election, questions arose about how to treat administrative expenses incurred during the general election expenditure report period by a publicly funded primary election candidate who also ran in the general election but did not receive public funds for the general election.

The Commission's approach in 11 CFR 9034.4(a)(3)(iii) reflects its belief that candidates who are actively campaigning in the general election should not be considered to be terminating political activity and winding down their primary campaigns. The proposal seeks to extend this concept to apply without regard to whether their general election campaigns are publicly funded. Expenses incurred by such candidates during the expenditure report period, for publicly funded general election candidates, or the equivalent time period ending 30 days after the general election, for other general election candidates, should be considered general election expenses, rather than primary winding down costs. This approach prevents the use of primary matching funds for non-qualified expenses related to the general election. *See* 11 CFR 9032.9(a) and 9034.4(b). Although this approach may result in general election campaigns incurring some administrative costs related to terminating the primary campaign during the general election period, identifying those costs would consume resources of audited committees and the Commission. This approach is also consistent with the Commission's bright line rules for allocating expenses between primary and general campaigns at 11 CFR 9034.4(e), which in effect allow some primary related expenses to be paid by the general election committee and *vice versa*.

The Commission proposes a new paragraph at 11 CFR 9034.11(e), which

is based on current 11 CFR 9034.4(a)(3)(i), with revisions to clarify this rule and to prevent any future confusion. The proposed rule at 11 CFR 9034.11(e) would provide that a candidate who runs in the general election must wait until the day following the date 30 days after the general election before using matching funds for primary winding down costs, regardless of whether the candidate receives public funds for the general election. This rule would also clarify that no expenses incurred prior to 31 days after the general election by candidates who run in the general election may be considered primary winding down costs or paid with matching funds.

The Commission also proposes revisions to 11 CFR 9035.1(c)(1) that would include a revised version of current 11 CFR 9034.4(a)(3)(iii) to provide that only candidates who do not run in the general election may treat 100% of salary, overhead and computer expenses as compliance expenses immediately after their date of ineligibility. Candidates who run in the general election must wait until the day following the date 30 days after the general election to treat these expenses as exempt compliance costs. The Commission proposes, for greater clarity, to move this revised version of 11 CFR 9034.4(a)(3)(iii) into current 11 CFR 9035.1(c)(1), which concerns the legal and compliance exemption to the expenditure limitations, because this paragraph concerns the treatment of certain winding down expenses as 100% compliance costs.

The Commission seeks comment on these proposals. Should there be an exception for expenses incurred during the time period prior to 31 days after the general election that are solely related to winding down the primary campaign, and if so, what requirements should there be to ensure that such costs are solely related to winding down the primary campaign? For example, should there be an exception for fundraising expenses incurred during this period to retire a primary committee's NOCO? Would primary-related fundraising activities during this period also have the effect of promoting the candidate's general election campaign? Would a fundraising exception encourage candidates to add a solicitation to general election related events or communications during this period in order to treat expenses for those activities as primary winding down expenses?

In addition, the definition of "winding down costs" in new section 9034.11(a) would include a revised

version of the first sentence of current 11 CFR 9034.4(a)(3)(i) to clarify that winding down costs are limited to costs associated with the termination of political activity related to seeking that candidate's nomination for election. This would clarify that primary election campaign winding down expenses are legally distinct from general election campaign winding down expenses.

A related issue is how to allocate winding down expenses for candidates who run in both the primary and general elections. Allocating winding down expenses between the primary and general election campaigns during the period following the date 30 days after the general election, can be complicated because both campaigns are winding down simultaneously, often using the same staff, offices, equipment, vendors and legal representatives. The Commission proposes new sections 11 CFR 9004.11(d) and 9034.11(d) allowing a candidate who runs in both the primary and general election to divide winding down costs between the primary and general campaigns using any allocation method, including allowing either the primary or the general campaign to pay 100% of winding down expenses.

This proposal would give candidates the flexibility to allocate their winding down expenses based on the particular circumstances of their campaigns. Winding down activity for some candidates may be largely or entirely focused on one election. For example, candidates who do not receive public funds for the general election might concentrate winding down activity on their publicly funded primary committee. In addition, candidates might concentrate winding down efforts and expenses on the committee that must address more difficult and complex issues in the audit and repayment process or that has a larger potential repayment.

An alternative proposal for dividing winding down expenses between the primary and general campaigns, which was used in some 2000 election cycle audits, would be to divide expenses equally but allow committees to use an alternative allocation method if they provide sufficient documentation to support that allocation. Because the documentation of the primary and general election committees' allocation must be reviewed and disputes may arise about whether committees have provided sufficient documentation to support their proposed allocation, this alternative could prolong the audit process and use the resources of the Commission and audited committees. The draft rules that follow do not

incorporate this alternative. The Commission seeks comment as to what amount or type of documentation should be considered sufficient to support allocations proposed by committees. What standard would be appropriate for evaluating alternative allocations proposed by committees?

The Commission seeks comment on any other method of allocating winding down expenses between the primary and general election committees. Specifically, would either of these alternative proposals result in the primary or general election campaign using public funds to pay for non-qualified expenses related to the other election? Should campaigns be permitted to allocate their costs to effectually reduce potential repayments? Would a default allocation of 50% for each committee be equitable to differently situated candidates? Finally, are these alternative approaches inconsistent with the Fund Act or the Matching Payment Act?

#### *C. Use of GELAC Funds To Pay Winding Down Costs*

The Commission's rules at 11 CFR 9003.3(a) permit publicly funded major party presidential candidates to establish and solicit private contributions to GELAC funds, if certain conditions are met. Payments from these accounts for exempt legal and accounting services are not counted against the candidate's overall expenditure limits under 2 U.S.C. 441a(b) and 11 CFR 110.8. See 11 CFR 100.8(b)(15).

In 1995, the Commission adopted 11 CFR 9004.4(a)(4)(iii) to address the use of the GELAC to pay certain winding down costs of general election candidates. This paragraph states that 100% of salary, overhead and computer expenses incurred by a campaign after the end of the expenditure report period may be paid from a GELAC, and that such expenditures will be presumed to be solely to ensure compliance with the FECA and the Fund Act. 60 FR 31875 (June 16, 1995). This paragraph was included in the 1996 through 1999 editions of the Code of Federal Regulations, but was inadvertently omitted from the 2000, 2001 and 2002 editions. The Commission intends to reinstate this important provision, with certain revisions discussed below, but move it to the regulation that governs GELAC funds, proposed 11 CFR 9003.3(a)(2)(i)(I).

The Commission is also considering whether, and to what extent, GELAC funds may be used to pay for primary winding down expenses incurred after the end of the expenditure report

period. As noted above, the primary and general election campaigns are simultaneously winding down during this period and often share salary, overhead and computer expenses. The current regulations at 11 CFR 9034.4(a)(3)(iii) recognize that a significant amount of winding down activity during this period is related to compliance and allow primary campaigns to treat 100% of salary, overhead and computer costs during this period as legal and accounting compliance expenses exempt from the expenditure limitations. Permitting the GELAC to pay salary, overhead, and computer costs after the end of the expenditure report period for both the primary and general campaigns would allow candidates who run in both the primary and general elections to choose to pay these costs from the GELAC without having to allocate them between the primary and general campaign committees. In addition, the primary and general election committees often share winding down expenses related to legal and accounting compliance such as attorneys and accountants. Further, primary campaign committees may lack sufficient funds to complete winding down activity.

The Commission proposes to revise the language of former 11 CFR 9004.4(a)(4)(iii), at proposed 11 CFR 9003.3(a)(2)(i)(I), to allow contributions to the GELAC to be used for winding down expenses for legal and accounting compliance activities incurred after the end of the expenditure report period by either the primary or general election committee or by both committees. All salary, overhead, and computer expenses after the end of the expenditure report period would be considered winding down expenses for legal and accounting compliance activities payable by the GELAC.

The Commission seeks comments on the proposed rule. Should the GELAC be allowed to pay for the primary committee's legal and accounting compliance expenses during the winding down period or must the primary committee pay all primary winding down expenses? The Commission also seeks comment on whether, and to what extent, GELAC funds may be used to pay for primary winding down expenses other than legal and accounting compliance expenses, salary, overhead and computer costs. Should the rule list in more detail the types of primary winding down expenses that may be paid with GELAC funds?

#### D. Convention Expenses of Ineligible Candidates

The Commission proposes to add a new provision to the rules to reflect its decision in AO 2000-12 permitting certain convention expenses incurred by presidential primary candidates after their dates of ineligibility to be considered qualified campaign expenses. In AO 2000-12, the Commission determined that certain expenses related to meetings and events at the national nominating conventions could be treated as qualified campaign expenses by ineligible candidates. First, the Commission determined that expenses for certain meetings and receptions to thank delegates and supporters could be treated as qualified campaign expenses under 11 CFR 9034.4(a)(5), which specifically includes gifts to "committee employees, consultants and volunteers" for "campaign-related activities or services." The current rule limits this to \$150 per individual and \$20,000 total for all gifts. The Commission noted that such meetings should be restricted to attendees who served the campaign in the capacity of a committee employee, consultant or volunteer to be considered qualified campaign expenses, and that the current regulation does not allow the payment of travel expenses to attend or organize the events to be considered qualified campaign expenses.

Second, the Commission permitted the ineligible candidates to incur qualified campaign expenses related to fundraising events at the conventions. The Commission stated that as long as the candidates' primary committees had remaining net outstanding campaign obligations, they may continue to receive matching funds, and may use matching funds to pay for fundraising expenses to retire those campaign obligations as qualified campaign expenses. *See* 11 CFR 9034.1(b). The Commission concluded that the candidates may incur qualified campaign expenses for expenses related to specific fundraising events held at the nominating conventions. It stated that the candidates could also use matching funds to pay the travel expenses for candidates to attend the fundraising events and for campaign staff who participate in the organizing and administration of the fundraising events. The Commission emphasized that the fundraising expenses must be for specific fundraising events at the convention. In addition, expenses allocable to participation by the candidates or their staff members in any other part of the conventions would constitute non-qualified campaign

expenses. Finally, such expenses would be qualified campaign expenses only if, at the time of the convention, the candidates had net outstanding campaign obligations. *See* 11 CFR 9034.1(b).

Consequently, the Commission proposes adding new 11 CFR 9034.4(a)(6) to reflect its decision in AO 2000-12. The proposed rules at paragraph (a)(6)(i) provide that expenses directly related to a specific fundraising event at a national nominating convention to retire an ineligible candidate's debt owed by the candidate's primary committee, including travel expenses for the candidate to attend the fundraising event and for those campaign staff who organize and administer the fundraising event, may be considered qualified campaign expenses. This paragraph provides that covered travel expenses would consist of transportation, hotel or other lodging, and *per diem* subsistence for the candidates, their spouses, campaign staff, and volunteers who organize or administer the event. The proposed rule provides that expenses allocable to participation by the candidate or staff in the national nominating convention itself, or in any activities related to the convention, other than the fundraising event, would constitute non-qualified campaign expenses. The proposed rule also states that expenses for a fundraising event at the convention may be considered qualified campaign expenses only to the extent that, on the date of the fundraising event, the candidate has net outstanding campaign obligations pursuant to 11 CFR 9034.1(b). Proposed paragraph (a)(6)(ii) would also permit expenses for events to thank campaign employees, consultants and volunteers to be considered qualified campaign expenses, but would provide that travel expenses to such events would not constitute qualified campaign expenses.

The Commission's decision in AO 2000-12 delineates a carefully circumscribed exception to the Commission's general past practice that convention expenses of ineligible candidates are non-qualified campaign expenses. As AO 2000-12 states, the Commission has generally concluded in its audits of presidential primary campaign committees that expenses associated with attending national nominating conventions incurred by losing primary candidates are non-qualified campaign expenses. The opinion discusses a number of audits of presidential campaigns in which the Commission determined that expenses of ineligible candidates related to the national nominating convention such as

preparatory staff work, hotel, and airline tickets were non-qualified campaign expenses. For example, the U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's determination that convention-related expenses incurred by an unsuccessful presidential campaign committee to attend the convention and for activities to bolster the support and enthusiasm of the candidate's delegates were non-qualified campaign expenses where the committee claimed that the expenses were fundraising activities because the video and audio record of the candidate's attendance at the convention would be used for later fundraising efforts. *Robertson v. FEC*, 45 F.3d 486, 492 (D.C. Cir. 1995). AO 2000-12 explains that while the Commission's general practice is that expenses for ineligible candidates, such as travel costs, related to the convention are non-qualified campaign expenses, matching funds may be used for such expenses in certain limited circumstances.

Prior to the 1996 election cycle, the Commission sought comment on whether to expand the definition of "qualified campaign expense" in 11 CFR 9032.9 to include losing candidates' convention expenses. *See Explanation and Justification to the Rules Governing Public Financing of Presidential Primary and General Election Candidates*, 60 FR 31854, 31871 (June 16, 1995). In declining to do so, however, the Commission noted that the statutory definition of qualified campaign expense is limited to expenses "incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination for election." *Id.*; *see 26 U.S.C. 9032(9)(A)*. This definition arguably does not apply to those no longer seeking the presidential nomination. However, the 1995 *Explanation and Justification* cited above noted that candidates are permitted to count fundraising expenses incurred after DOI, including those incurred at a national nominating convention, as qualified campaign expenses as part of their winding down costs, but only those expenses directly related to fundraising are qualified campaign expenses. *Id.*

The Commission seeks comment on this proposed rule and on its previous treatment of these expenses. Should the Commission incorporate the exception described in AO 2000-12 into its regulations? Are there any possible adverse consequences of allowing ineligible candidates to treat these expenses as qualified campaign expenses? Should the Commission

retain its general practice that convention expenses of ineligible candidates are non-qualified campaign expenses? Should the definition of “qualified campaign expense” in 11 CFR 9032.9 or the rules governing the use of funds for qualified campaign expenses in 11 CFR 9034.4 be expanded to include as qualified campaign expenses the convention expenses of ineligible primary candidates who speak, appear, serve as a delegate or retain delegates, or who are nominated as the party’s vice presidential candidate, or who otherwise participate in the party’s national nominating convention? How would such a change be reconciled with the requirement that qualified campaign expenses must be made “in connection with [a candidate’s] campaign for nomination for election?” See 26 U.S.C. 9032(9). Should expenses of ineligible presidential primary candidates at the national convention be considered permissible winding down costs or some other type of qualified campaign expense?

## II. Primary Expenditure Limitations and Repayments

### A. In-Kind Contributions Count Toward the Expenditure Limits (11 CFR 9035.1 and 9038.2)

The Commission proposes to clarify its rules at 11 CFR 9035.1 and 9038.2(b)(2)(ii)(A) concerning attribution of expenses to the expenditure limitations for presidential primary candidates and repayments based upon expenditures in excess of those limitations. The Commission’s recent rulemaking on coordinated and independent expenditures implementing the requirements of BCRA delineates the rules governing coordinated expenditures, coordinated communications, party expenditures, coordinated party communications and the dissemination, distribution or republication of campaign materials prepared by a candidate. See *Explanation and Justification for the Rules Governing Coordinated and Independent Expenditures*, 68 FR 421 (Jan. 3, 2002). In that rulemaking, the Commission generally defined “coordinated” for the purpose of coordinated expenditures. 11 CFR 109.20. The final rules also establish particular criteria for a communication to be considered a “coordinated communication.” See, e.g., 11 CFR 109.21(c) (content standards) and (d) (conduct standards). In addition to these general rules, the particular circumstances of political party committees are addressed, and “party

coordinated communications” are defined. See 11 CFR 109.37 and 11 CFR part 109, subpart D.

In establishing new rules governing coordinated expenditures, the Commission recognized that some in-kind contributions arising from coordinated communications made by party committees or other persons may not necessarily be received or accepted by the candidate. See 11 CFR 109.21(b)(2) and 11 CFR 109.37(a)(3). The Commission believes guidance would be helpful regarding the application of the coordinated and independent expenditures final rules to situations involving the expenditure limitations applicable to publicly funded presidential candidates. Specifically, the Commission proposes to address the extent to which in-kind contributions, coordinated expenditures, coordinated communications, coordinated party expenditures, and coordinated party communications will count against expenditure limitations and will be included in the total amount of a publicly funded candidate’s expenditures subject to the limits for purposes of repayment determinations.

The current rules at 11 CFR 9035.1(a) and 11 CFR 110.8(a) set forth the state-by-state and overall expenditure limitations for candidates receiving public funds for the primary election. See 2 U.S.C. 441a(b), (c), and 26 U.S.C. 9035(a). The Commission has generally treated the receipt of in-kind contributions by presidential primary candidates as expenditures made by those candidates and has included in-kind contributions in the amount of the candidate’s expenditures subject to the expenditure limitations and in the calculation of repayments based on amounts in excess of the candidate’s expenditure limitations. For example, in a repayment determination arising from an audit of a 1988 candidate, the Commission concluded that in-kind contributions for testing-the-waters expenses from a multicandidate political committee “leadership PAC” associated with a presidential candidate to that candidate were subject to the candidate’s state-by-state expenditure limitation and part of the total of the candidate’s expenditures subject to *pro rata* repayment. In addition, the Commission concluded, in making that repayment determination, that Federal matching funds and private contributions were commingled in a committee’s accounts. The Commission considered in-kind contributions to be part of this commingled pool of available funds, and thus, these expenditures were included in

calculating the amount in excess of the limitations subject to *pro rata* repayment.

During certain audits from the 1996 and 2000 cycles, the Commission considered whether some of the costs of producing and airing television advertisements during the presidential primary and general election campaigns, which were paid by the national party committees, should be treated as coordinated in-kind contributions to presidential primary candidates, and if so, whether such costs should count against presidential candidates’ expenditure limitations and be included in the amount of expenditures in excess of the limitations that would be subject to *pro rata* repayment. After considering this issue, the Commission declined to make repayment determinations on this basis in these audits.

A related issue is whether current 11 CFR 9038.2(b)(2)(ii)(A) represents a permissible interpretation of the Matching Payment Act. Section 9038.2(b)(2)(ii)(A) provides that one example of a Commission repayment determination for the use of funds for non-qualified campaign expenses is a determination that a candidate, a candidate’s authorized committee(s), or agents have made expenditures in excess of the expenditure limitations set out at 11 CFR part 9035. The Commission considered this issue in a rulemaking proceeding prior to the 2000 election cycle, but made no changes to the regulation at that time. *Notice of Disposition for the Rules Governing Public Funding of Presidential Primary Candidates-Repayments*, 65 FR 15273 (Mar. 22, 2000). The Notice of Disposition sets forth alternative arguments concerning whether this rule has a statutory basis and states that the Commission did not change the rule because there was no consensus in favor of changing the regulation. *Id.* at 15275. Although the Commission recommended that Congress revise 26 U.S.C. 9038(b) to specifically state whether repayments must be made by publicly funded primary candidates who have made expenditures that exceed the spending limits, to date Congress has not acted to clarify this issue. See *FEC, Legislative Recommendations 2002* (May 14, 2002). At this point, the Commission is considering whether to clarify that under section 9038.2(b)(2)(ii)(A), it will continue to seek repayments from primary candidates who exceed the expenditure limitations, including candidates who have received in-kind contributions.

## 1. Revisions to 11 CFR 9035.1

The Commission believes that additional guidance concerning the attribution of in-kind contributions to the expenditure limitations would be beneficial. The Commission proposes to revise its rules by adding a new paragraph at 11 CFR 9035.1(a)(3) to provide that guidance and to apply the Commission's recently promulgated final rules on Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003), to publicly funded presidential candidates. The proposed rules that follow are intended to clarify that certain in-kind contributions will count against the presidential candidate's state-by-state and overall expenditure limitations under certain conditions, as explained below.

Included are certain in-kind contributions received or accepted in the form of coordinated expenditures pursuant to 11 CFR 109.20, coordinated communications pursuant to 11 CFR 109.21, and coordinated party expenditures in excess of the coordinated party expenditure limitations at 2 U.S.C. 441a(d) and 11 CFR 109.32(a), which would include party coordinated communications pursuant to 11 CFR 109.37.

The Commission notes that the rules treat some coordinated expenditures as made by a person or party committee, but not as received or accepted by a candidate. See 11 CFR 109.21(b)(2) and 109.37(a)(3). Specifically, expenditures that meet the conduct standards for a common vendor at 11 CFR 109.21(d)(4) or a former employee or independent contractor at 11 CFR 109.21(d)(5) are not treated as received or accepted by a candidate unless the candidate, authorized committee, or their agent engages in the conduct described in 11 CFR 109.21(d)(1) (request or suggestion), (d)(2) (material involvement), or (d)(3) (substantial discussion). Thus, only certain, specific actions taken by the candidate or the candidate's authorized committee or agents, as set forth in 11 CFR 109.21 and 109.37, result in the receipt or acceptance of an in-kind contribution arising from coordinated communication or a party coordinated communication. Only these received or accepted in-kind contributions are treated as expenditures made by the candidate. See 11 CFR 109.20(b) (requiring a candidate to report coordinated expenditures as expenditures); 109.21(b)(1) (requiring a candidate to report received or accepted coordinated communications as expenditures); 109.37(a)(3) (stating that candidates are not required to report as expenditures party coordinated

communications that do not constitute received or accepted in-kind contributions). Coordinated communications or party coordinated communications that are *not* in-kind contributions received or accepted by the candidate, the candidate's authorized committee, or agents under 11 CFR 109.21(b)(2) or 109.37(a)(3) would *not* be subject to the candidate's expenditure limitation. The proposed rule also provides that the value of in-kind contributions would be the usual and normal charge for the goods and services provided.

Although coordinated party expenditures are made in connection with the general election campaign of a presidential candidate, they may be made prior to the date of the candidate's nomination, pursuant to 11 CFR 109.34. The Commission notes that to the extent coordinated expenditures are in excess of the coordinated party expenditure limitation at 11 CFR 109.32(a), they may be attributable to a presidential primary candidate's expenditure limitations based on the "bright line" rules at 11 CFR 9034.4(e) for attributing expenditures between the primary and general election spending limitations. For example, party coordinated communications broadcast prior to the date of the candidate's nomination may count against the presidential candidate's primary expenditure limitations. See 11 CFR 9034.4(e)(6). The Commission seeks comment on whether this is an appropriate conclusion.

The Commission is not specifically listing in the proposed rule the dissemination, distribution or republication of campaign material prepared by a candidate, which is governed by 11 CFR 109.23. Section 109.23(a) provides that the candidate who prepared the campaign materials does not receive or accept an in-kind contribution, and need not report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37. Thus, the cost of such campaign materials would not count against the candidate's expenditure limitations unless the candidate receives or accepts them as in-kind contributions in the form of coordinated communications or party coordinated communications. Since the proposed rules in 11 CFR 9035.1(a)(3) would specifically include received or accepted coordinated communications and party coordinated communications, a reference to the republication of campaign materials is unnecessary.

The Commission also notes that 11 CFR 109.32(a)(4) provides that any coordinated party expenditures made under section 109.32(a), which specifies the limitations for coordinated party expenditures in presidential elections, shall not count against the candidate's expenditure limitations; however, any coordinated expenditures by a political party in excess of the limitations at section 109.32(a) would count against the candidate's expenditure limitations. Thus, the proposed rule in 11 CFR 9035.1(a)(3) would not adversely affect the coordinated party expenditure limitations at 2 U.S.C. 441a(d)(2) because the proposed rule would only apply to amounts in excess of those limitations. The Commission seeks comment on whether this is an appropriate approach.

## 2. Revisions to 11 CFR 9038.2

The Commission also proposes to amend 11 CFR 9038.2(b)(2)(ii)(A) to clarify that repayment determinations for candidates who exceed the expenditure limitations will be based on expenditures made by a candidate, the candidate's authorized committees, or agents, either directly by disbursing campaign funds for expenditures, or indirectly by receiving or accepting in-kind contributions that are subject to the expenditure limitations pursuant to 11 CFR 9035.1(a)(3). The wording "receive or accept" in this section and in proposed section 9035.1(a)(3) is consistent with the terminology used in 11 CFR 109.21(b)(2), 11 CFR 109.23(a) and 11 CFR 109.37(a)(3) to ensure that any coordinated expenditures or republished campaign materials that are not considered "received or accepted" by a candidate would not count against the expenditure limitations or be subject to repayment.

### B. In-Kind Contributions in the Repayment Ratio (11 CFR 9038.2(b)(2)(iii))

A related issue is the calculation of the repayment ratio. The current regulations at 11 CFR 9038.2(b)(2)(iii) provide for a ratio repayment of amounts used for nonqualified campaign expenses, which includes expenditures in excess of the spending limitations. See 11 CFR 9038.2(b)(2)(ii)(A). Paragraph (b)(2)(iii) currently states that the amount of a repayment 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. "Total deposits" is defined

as all deposits to all candidate accounts minus transfers between accounts, refunds, rebates, reimbursements, checks returned for insufficient funds, proceeds of loans and other similar amounts. 11 CFR 9038.3(c)(2). However, the current rules do not specifically include the value of in-kind contributions received or accepted in the calculation of the repayment ratio. Including in-kind contributions received or accepted in the calculation of the repayment ratio would reduce the resulting ratio to more accurately reflect the amount of public funds that are spent in excess of the expenditure limitations or used for other non-qualified campaign expenses.

The Commission proposes to revise 11 CFR 9038.2(b)(2)(iii) to include both total deposits and in-kind contributions received or accepted by the candidate or the candidate's authorized committee or agents in the calculation of the repayment ratio for non-qualified campaign expenses. In-kind contributions would be valued at the usual and normal charge for the goods and services provided to the candidate. The Commission requests comment on this proposed change.

*C. Parallel Changes to General Election Rules (11 CFR 9004.4(b)(2) and 9007.2(b)(2))*

The Commission is considering certain parallel changes to the rules governing the expenditure limitations and repayments for general election committees at 11 CFR 9004.4(b)(2) and 9007.2(b)(2), but is not including specific changes in the proposed rules at this time. The Commission notes that expenditures in excess of the coordinated party expenditure limitations at 2 U.S.C. 441a(d) and 11 CFR 109.32(a) may be in connection with the general election and attributable to a candidate's general election expenditure limitation under the "bright line" rules at 11 CFR 9034.4(e). The Commission also notes that general election candidates who receive the full public grant may not accept any contributions, including in-kind contributions, and must repay the entire amount of any in-kind contribution received. *See* 26 U.S.C. 9007(b)(3). The Commission seeks comment on whether changes similar to those proposed for primary candidates would be appropriate for general election candidates and on any other issues related to including in-kind contributions in a general election candidate's total expenditures.

**III. GELAC Funds (11 CFR 9003.3(a))**

*A. Funds Remaining in the GELAC*

The Commission proposes to revise its rules concerning the use of GELAC funds to update the permissible uses of GELAC funds consistent with BCRA. Currently, the rules at 11 CFR 9003.3(a)(2)(iv) state that if there are "excess campaign funds" after payment of all expenses set out in section 9003.3(a)(2)(i), 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.

BCRA amended 2 U.S.C. 439a to eliminate its reference to "excess campaign funds." The Commission revised 11 CFR part 113 accordingly. *See Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds*, 67 FR 76962, 76978-79 (Dec. 13, 2002). The Commission proposes to replace the reference to "excess campaign funds" in 11 CFR 9003.3(a)(2)(iv) with "funds remaining in the GELAC" in order to clarify that only funds that are not needed for GELAC expenses may be used for the purposes permitted under 2 U.S.C. 439a and 11 CFR part 113.

The Commission also proposes revisions to 11 CFR 9003.3(a)(2)(iv) to more clearly state that GELAC funds must be not be used for the purposes permitted under 2 U.S.C. 439a and 11 CFR part 113 until the completion of the audit and repayment process, which includes making any repayments owed. The Commission requests comments on these proposed changes.

*B. Primary Repayments*

The Commission is also considering whether candidates should be required to use GELAC funds to make any repayments arising from their primary campaigns, if the primary committee is unable to make the repayment, before the remaining funds in the GELAC could be used for the purposes permitted under 2 U.S.C. 439a and 11 CFR part 113. Currently, GELAC funds may be used to make general election repayments. 11 CFR 9003.3(a)(2)(i)(D). Therefore, the Commission proposes revisions to 11 CFR 9003.3(a)(2)(i)(D) to specify that the GELAC may make repayments owed by the candidate's primary campaign committee pursuant to 11 CFR 9038.2 and 9038.3. Under this proposal, if a candidate's primary or general election committees do not have sufficient funds to make a repayment, the GELAC funds must be used to make the repayment before funds remaining in the GELAC may be used for the purposes permitted under 2 U.S.C. 439a

and 11 CFR part 113. However, the proposed rule would not require that repayments must be made before other permissible uses of GELAC funds under paragraphs (a)(2)(i)(A) through (H). These proposed amendments to the GELAC rules are based on the Commission's interpretation of 2 U.S.C. 439a(a)(1), which permits contributions to be used "for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual." This provision is sufficiently broad to encompass both primary repayments and the other limited purposes specified in 11 CFR 9003.3(a)(2)(i).

*C. Solicitation of GELAC Funds*

The Commission is also considering whether to revisit its rules regarding the solicitation and deposit of GELAC contributions prior to June 1 of the calendar year in which a presidential general election is held. The Commission is considering changing the June 1 date to an earlier date or abolishing the June 1 restriction. Under current 11 CFR 9003.3(a)(1)(i), prior to June 1 of the presidential election year, contributions may only be deposited in a GELAC if they are made for the primary election, exceed the contributor's contribution limit for the primary and are redesignated by the contributor for the GELAC pursuant to 11 CFR 110.1. In addition, contributions shall not be solicited for the GELAC before June 1 of the calendar year in which a presidential general election is held. 11 CFR 9003.3(a)(1)(i)(A). As a result of this regulation, although candidates are permitted to establish GELAC accounts at any time, they are barred from soliciting or accepting any direct contributions to the GELAC until five months before the general election.

The Commission revised this section in 1999 to establish the June 1 time limit. *See Explanation and Justification to the Rules Governing Public Financing of Presidential Primary and General Election Candidates*, 64 FR 49355, 49356-57 (Sept. 13, 1999). In the 1999 rulemaking, the Commission considered changes to "address problems that have arisen when primary candidates established GELACs relatively early in the primary campaign but subsequently failed to win their party's nomination." *Id.* at 49356. One problem was that candidates who do not receive their party's nomination must refund contributions received by the GELAC, but difficulties arose if GELAC funds had been used to defray overhead or GELAC fundraising expenses. *Id.* Another problem was ensuring that the GELAC is not improperly used to make

primary election expenditures. *Id.* After considering several alternative approaches, the Commission decided to continue to permit GELACs to be established at any time but added the June 1 starting date for deposits other than excessive primary contributions and solicitations of contributions to the GELAC. *Id.* The Commission explained that it selected the June 1 date because “barring unforeseen circumstances, this is the point when a party’s prospective nominee can be reasonably assured that he or she will need to raise funds for a GELAC” and the date gives prospective nominees “sufficient time to raise the funds that will be needed.” *Id.* The effective date of these regulatory amendments was June 1, 2000, which meant that the pre-June 1 solicitation prohibition was not operative for the 2000 election cycle.

The Commission seeks comment on whether it should delete this restriction or continue to use June 1 of the presidential election year as the starting date for GELAC solicitations and most deposits to a GELAC. Would an earlier date in the election year such as May 1 or April 1 be preferable, given that many presidential primaries have been moved to earlier dates? Should an earlier date be used for presidential candidates who run unopposed in the primaries or who have a reasonable certainty prior to June 1 of the election year that they will become their party’s nominee? Should the starting date be eliminated? Are these restrictions required by, or consistent with, the FECA and the Fund Act?

#### D. Redesignation of Excessive Contributions and GELACs

In addition, the Commission proposes to revise the rules at 11 CFR 9003.3(a)(1) governing the sources of GELAC funds to reflect the Commission’s recent changes to its rules at 11 CFR 110.1(b)(5)(ii)(B) concerning the redesignation of excessive contributions. *See Explanation and Justification for the Rules Governing Contribution Limitations and Prohibitions*, 67 FR 69928, 69930–32 (Nov. 19, 2002). The Commission revised 11 CFR 110.1(a)(5)(ii)(B) to allow authorized committees to redesignate primary contributions that would otherwise be excessive to the general election without obtaining a signed written document under certain circumstances. *Id.* at 69930. Specifically, the Commission simplified the redesignation of certain excessive contributions to a candidate’s authorized committee made before a primary election, but not designated in writing for a particular election. *Id.* The

Commission allowed the candidate’s committee to presume that the contributor of such excessive contributions intended to contribute any excessive amount to that candidate’s general election, without obtaining written permission from the contributor for the redesignation. *Id.* The Commission set forth several requirements for a committee to designate contributions by this presumption, including that the candidate’s committee must be permitted to accept general election contributions. *Id.* The Commission explained that “if a presidential candidate’s authorized committee accepts public funding in the general election, the presumption is available to any such committees only to the extent they are permitted to accept contributions to a general election legal and accounting compliance fund.” *Id.* at 69930–31.

Thus, 11 CFR 110.1(b)(5)(ii)(B) now allows the treasurer of the recipient candidate committee to treat all or part of an excessive primary contribution as made with respect to the general election, as long as it meets the following requirements: (1) The contribution was made before the primary election; (2) the contribution was not designated for a particular election; (3) the contribution would exceed the primary election contribution limitations if it were treated as a primary contribution; (4) the redesignation would not cause the contributor to exceed the contribution limitations; and (5) the treasurer provides a written notification to the contributor within 60 days of receipt of the contribution of the amount that was redesignated and that the contributor may request a refund.

Therefore, the Commission proposes to revise 11 CFR 9003.3(a)(1)(i), (a)(1)(i)(C) and (a)(1)(v) to permit publicly funded presidential candidates to presume that excessive contributors to primary campaigns would consent to the redesignation of their contributions to the candidate’s GELAC. The proposed changes provide that excessive contributions may be placed in the GELAC if they are lawfully redesignated for the GELAC pursuant to 11 CFR 110.1. The rule at 11 CFR 9003.3(a)(1)(i)(C) would provide that a contribution that meets the requirements of 11 CFR 110.1(b)(5)(ii)(B) would be considered designated for the GELAC. The proposed reference to 11 CFR 110.1(b)(5)(ii)(B) would incorporate the requirements of that section. The Commission notes that presumptively redesignated contributions to the

GELAC, like all other contributions accepted for the GELAC, must be refunded within 60 days of a candidate’s DOI if the candidate does not become the nominee. *See* 11 CFR 9003.3(a)(1)(i)(A). The recordkeeping requirements in 11 CFR 110.1(l) are separately addressed in section 9003.3(a)(1)(ii)(A)(4).

A related proposal, which is not included in the proposed rules that follow, would be to revise 11 CFR 9003.3 to expressly allow excessive contributions to a GELAC to be presumptively redesignated to a presidential candidate’s authorized committee for the primary election, based on the conditions delineated at 11 CFR 110.1(b)(5)(ii)(C) for redesignation of excessive general contributions to a candidate’s primary election. The Commission’s rules at 11 CFR 110.1(b)(5)(ii)(C), like the rule for presumptive redesignations for a general election, allow authorized committees to redesignate general election contributions that would otherwise be excessive for the primary election without obtaining a signed written document under certain circumstances. *See* 67 FR 69931. Such presumptively redesignated contributions would be included in the calculation of a presidential primary candidate’s NOCO but could not be submitted for matching because they are redesignated for a different election and the contributor lacked the donative intent to influence the primary election. *See* 11 CFR 9034.3(e) and (k).

The Commission seeks comment on these proposals. Should a different rule apply for redesignation of excessive contributions to or from a GELAC than for redesignations to or from the general election of candidates who do not accept public funds? Should such presumptive redesignations be subject to additional restrictions than those delineated at 11 CFR 110.1(b)(5)(ii)?

#### IV. Other Presidential Candidate Issues

##### A. Quarterly and Monthly Reporting Requirements (11 CFR 104.5(b)(2))

The Commission made a number of changes to its rules governing reporting when implementing BCRA’s new reporting requirements. *Explanation and Justification for the Rules Governing Bipartisan Campaign Reform Act of 2002 Reporting*, 68 FR 404 (Jan. 3, 2003). One of these changes was revising 11 CFR 104.5(a) to set forth a new reporting schedule for principal campaign committees of House of Representatives and Senate candidates following BCRA’s requirements that such candidates must file quarterly

reports in non-election years. *Id.* at 408 and 418. BCRA did not change the reporting schedule for the principal campaign committees or other authorized committees of presidential candidates; thus, 11 CFR 104.5(b)(2) was not changed. *Id.* Currently, principal campaign committees of presidential candidates may file campaign reports in non-election years on either a monthly or a quarterly basis. 2 U.S.C. 434(a)(3)(B); 11 CFR 104.5(b)(2) and 9006.2. However, the current rules do not explain how presidential candidates may change their reporting frequency during a non-election year from monthly to quarterly or *vice versa*. The rules governing unauthorized committees at 11 CFR 104.5(c) set forth requirements for such committees to change their reporting frequency, such as notifying the Commission of the change. The Commission is considering similar requirements for principal campaign committees of presidential candidates.

The Commission proposes to revise the rules at section 104.5(b)(2) to allow a principal campaign committee (“PCC”) of a presidential candidate to change its filing schedule in a non-election year only after notifying the Commission in writing of its intention at the time it files a required report under its current filing frequency. The PCC would then be required to file the next required report under its new filing frequency. In addition, a PCC could change its filing frequency no more than once in a calendar year. This approach is consistent with the requirements for unauthorized committees at 11 CFR 104.5(c). The Commission notes that presidential PCCs are not permitted to change their filing frequency during election years under 2 U.S.C. 434(a)(3)(A), except that a PCC that files quarterly reports shall begin filing monthly reports at the next reporting period after it receives contributions or makes expenditures in excess of \$100,000. The Commission requests comments on this proposal.

*B. Election Cycle Reporting—Matching Fund Submissions (11 CFR 9036.1(b)(1)(ii) and 9036.2(b)(1)(v))*

In 2000, the Commission revised its rules at 11 CFR 104.3 to require authorized committees to aggregate, itemize, and report all receipts and disbursements on an election-cycle basis rather than on a calendar-year-to-date basis. 65 FR 42619 (July 11, 2000). The new rules, which reflect a 1999 amendment to 2 U.S.C. 434(b) (Pub. L. No. 106-58, 641, 113 Stat. 430, 477 (1999)), apply to reporting periods beginning on or after January 1, 2001. 65

FR 70644 (Nov. 27, 2000). Under these regulations, an election cycle begins on the first day after the date of the previous general election for the office the candidate seeks and ends on the date of the next general election for that office. The election cycle is thus four years for presidential candidates.

The Commission’s rules regarding threshold submissions for matching funds currently require candidates to submit a contributor list including occupation and name of employer information for contributions from individuals aggregating in excess of \$200 per calendar year. 11 CFR 9036.1(b)(1)(ii). Similarly, the rules for subsequent submissions at 11 CFR 9036.2(b)(1)(v) provide that the occupation and employer information need not be disclosed on the contributor list for contributions made by individuals aggregating in excess of \$200 per calendar year, but such information is subject to the recordkeeping and reporting requirements. The Commission is proposing to revise 11 CFR 9036.1(b)(1)(ii) and 9036.2(b)(1)(v) to specify that the matching fund submission and recordkeeping requirements include occupation and employer information for those individuals who contribute more than \$200 in an election cycle, rather than in a calendar year, to reflect the statutory change.

*C. Billing the Press for the Costs of Reconfiguring an Aircraft (11 CFR 9004.6(a)(3) and 9034.6(a)(3))*

The Commission’s rules at 11 CFR 9004.6 and 9034.6 establish procedures for authorized committees to obtain reimbursement for transportation and other services that are provided to the media and the Secret Service over the course of a campaign. The current rules contain a non-exhaustive listing of such services, and state at 11 CFR 9004.6(a)(3) and 9034.6(a)(3) that presidential campaign committees may seek reimbursement from the media only for the billable items specified in the White House Press Corps Travel Policies and Procedures issued by the White House Travel Office, in conjunction with the White House Correspondents’ Association [“White House Manual”]. The reference to the White House Manual has been in the rule since 1999. *See Explanation and Justification for the Rules Governing Party Committee Coordinated Expenditures; Costs of Media Travel with Publicly Financed Presidential Candidates*, 64 FR 42579, 42581-82 (Aug. 5, 1999). Expenses for which a committee receives no reimbursement

are considered qualified campaign expenses, and, with the exception of those expenses relating to Secret Service personnel and national security staff, are subject to the overall expenditure limitation. 11 CFR 9004.6(a)(2) and 9034.6(a)(2).

In the 1996 campaign, some committees incurred significant expenses to reconfigure campaign aircraft. The expenses included both interior work, such as equipment installation, and exterior work such as campaign logos. However, these expenses were not included in the White House Manual for 1996, which was not changed in 2000. The Commission is accordingly seeking comment on whether it is appropriate for campaign committees to obtain reimbursement for all or part of aircraft reconfiguration expenses from the media, and whether the rules should be revised accordingly. If so, which of these expenditures should be billed to the press? Are there other specific expenditures not included in the White House Manual for which reimbursement might also be appropriate? Given that the numbers of members of the press on each flight, or segment of each flight, will likely vary, comments are sought on the feasibility of determining the *pro rata* share for each person, where the reconfigured plane will make numerous flights, and that precise number is not known in advance. More broadly, the Commission seeks comment on whether the ability of committees to seek reimbursement from the media should be governed solely by what billable items are specified in the White House Manual, as current 11 CFR 9004.6(a)(3) and 9034.4(a)(3) require, or whether the Commission should consider other criteria, or enumerate the criteria in the regulations, or both. Please note that the draft rules that follow do not contain specific changes to 11 CFR 9004.6 or 9034.6.

*D. Candidate Salary (11 CFR 9004.4(b)(6), 9034.4(b)(5))*

The Commission recently revised its rules governing personal use of campaign funds at 11 CFR part 113 to implement BCRA’s changes to 2 U.S.C. 439a. In that rulemaking, the Commission addressed the use of contributions to pay salaries to candidates and decided to allow campaign funds to be used for candidate salaries, including privately funded presidential candidates, under certain conditions delineated at 11 CFR 113.1(g)(1)(i)(I). *See Explanation and Justification for the Rules Governing Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of*

*Campaign Funds*, 67 FR 76962, 76971–73 (Dec. 13, 2002). The Explanation and Justification for 11 CFR 113.1(g) stated that a salary payment to a candidate from campaign funds would be considered personal use if the salary payment is “in excess of the salary paid to a Federal officeholder—U.S. House, U.S. Senate, or the Presidency.” *Id.* The new rules, however, do not specifically state whether or not publicly funded presidential candidates may receive salaries from their campaigns. The Commission noted that a candidate’s salary is a non-qualified campaign expense under 11 CFR 9004.4(b) and 9034.4(b), *see also* 11 CFR 9002.11 and 9032.9. *Id.* at 76972.

Currently, the rules at 11 CFR 9004.4(b)(6) and 9034.4(b)(5) state that payments made to a candidate by the candidate’s committee, other than to reimburse funds advanced by the candidate, are non-qualified campaign expenses. In promulgating these rules in 1987, the Commission explained that “no payments may be made to the candidate from accounts containing public funds” except for reimbursements, and candidates “may not receive a salary for services performed for the campaign nor may a candidate receive compensation for lost income while campaigning.” *See Explanation and Justification for the Rules on Public Financing of Presidential Primary and General Election Candidates*, 52 FR 20864, 20866 and 20870 (June 3, 1987).

The Commission is considering whether to revise its rules to allow publicly funded general election and primary presidential candidates to receive salary payments paid for, in whole or part, with public funds. Thus, salary payments to candidates would be considered qualified campaign expenses. The Commission is considering allowing salary payments to be paid to publicly funded candidates under similar conditions to those for salary payments to other Federal candidates at 11 CFR 113.1(g)(1)(i)(I). Thus, the candidate’s publicly funded principal campaign committee would be permitted to make salary payments to the candidate. Salary payments to publicly funded candidates would be permissible beginning on January 1 of the calendar year prior to the presidential election year or the filing of the candidate’s statement of candidacy, whichever is later. This earlier starting date than the time restrictions for other Federal candidates would recognize that the presidential primary campaign begins before the presidential election year. Salary payments paid by the candidate’s primary committee would

be permitted through the candidate’s date of ineligibility and salary payments from a candidate’s general election committee would begin on the date of nomination and end on the date of the general election. Only non-incumbent presidential candidates who are not currently Federal officeholders would be able to receive a salary paid with public funds.

Candidates who hold office in a State would be able to receive salary payments only to the extent they are permitted to do so under the laws of that State. Salary payments would be limited to the lesser of the annual salary paid to the President or the earned income that the candidate received during the year prior to becoming a candidate. Any earned income the candidate would receive from salaries or wages from any other source would count against the salary limitation. In addition, the candidate would be required to provide income tax records for the relevant year and other evidence of earned income upon request by the Commission. Finally, salary payments could be made only on a pro rata basis.

The Commission seeks comment on this approach, but no specific provision is proposed in the draft rules that follow. Should candidate salary be considered a qualified campaign expense payable with public funds or should candidate salaries for publicly funded candidates continue to be considered non-qualified campaign expenses? Would candidates avail themselves of a salary paid with public funds? Would the proposed change encourage candidates of modest means who depend on their earned income to run for the Presidency? Is this an appropriate use for public funds, and is there a potential for abuse? Should any additional restrictions on candidate salaries apply to publicly funded candidates?

Should payments of salary to candidates who receive public funds be prohibited so that in addition to the committee being required to repay the public funds involved, the candidate would violate 2 U.S.C. 439a by accepting the salary payments? Should the candidate and committee agreements described in 11 CFR 9003.1 and 9033.1 contain a provision agreeing that no salary would be paid to the candidate?

#### *E. Gifts and Bonuses (11 CFR 9004.4(a)(5) and 9034.4(a)(5))*

The Commission is considering revisiting its rules governing payment of gifts and bonuses by primary and general election candidates at current 11 CFR 9004.4(a)(5) and 9034.4(a)(5). The

current rules allow gifts and bonuses to be treated as qualified campaign expenses if they meet certain restrictions. Gifts for committee employees, consultants and volunteers in recognition of campaign-related activities or services are limited to \$150 per individual recipient and a total of \$20,000 for all gifts. 11 CFR 9004.4(a)(5) and 9034.4(a)(5). Monetary bonuses for employees and consultants in recognition for campaign-related activities or services must be provided for pursuant to a written contract made prior to the general election for general election candidates or the DOI for primary candidates and must be paid no later than 30 days after the DOI for primary candidates or the end of the expenditure report period for general election candidates. *Id.*

The Commission has not proposed any changes to these rules in the draft rules that follow, but seeks comment on the current rules. Should the Commission maintain its current rules on gifts and bonuses? Should the current restrictions on gifts and bonuses be strengthened, reduced, or eliminated? Should the permissible dollar amounts for gifts to individuals or the total amounts of gifts be lowered, or raised? Should the requirement of a written contract be clarified to delineate what constitutes an acceptable written agreement? Is the requirement of a written contract for monetary bonuses too restrictive, since written contracts are not required for salary payments? Should additional restrictions be added, such as limiting the amount of bonuses or requiring committees to provide other documentation of the reasons for the bonus such as the type and amount of work performed? What additional, or different, controls should be used for gifts and bonuses? Should candidates be required to sign any contracts that include employment bonus provisions? This would ensure that high-level campaign officials do not engage in self-dealing. If the current restrictions are deleted from the rules, how should the Commission ensure that gifts and bonuses comply with the restrictions on personal use of campaign funds at 2 U.S.C. 439a and 11 CFR part 113?

In addition, should changes also be made to current 11 CFR 9008.7(a)(4)(xii) to make the rule for convention committees more similar to the rules for candidates by including the same requirements for bonuses? Currently 11 CFR 9008.7(a)(4)(xii) limits all gifts and monetary bonuses to national committee or convention committee employees, volunteers and convention officials to \$150 per individual or a total of \$20,000 for all gifts.

*F. Shortfall Exemption (11 CFR 9035.1(c))*

During recent election cycles, the Presidential Primary Matching Payment Account has occasionally experienced a shortfall in that it contained insufficient funds to fully pay all of the matching funds to which primary candidates were entitled on the dates payments were due. *See* 26 U.S.C. 9037; 11 CFR 9036.4(c)(2), 9037.1, 9037.2. The delay or deficiency in matching fund payments has resulted in inconvenience and additional costs for candidates such as the costs of obtaining bridge loans from banks to pay for their expenses until they received their full entitlement of matching funds several months later. Such expenses currently count against a candidate's overall expenditure limitation, reducing the amount the candidate may spend on other campaign activities.

In order to mitigate the effect of a potential shortfall on candidates, the Commission proposes a new "shortfall exemption" from a primary candidate's overall expenditure limitation at new paragraph 11 CFR 9035.1(c)(3). This new exemption would equal 5% of the amount of any delayed or deficient payment of matching funds to which the candidate is entitled.

The Commission seeks comment on this proposal. To what extent would the proposed exemption ameliorate the negative impact of delayed or deficient payments of matching funds on a primary candidate's campaign? Should a different percentage be used? Would this exemption be workable for candidates? Is this exemption a permissible interpretation of the statutory spending limit?

*G. Expenditures by a Multicandidate Political Committee for Qualified Campaign Expenses of a Candidate (Proposed 11 CFR 110.2(l) and 9034.10)*

In December 2002, the Commission published an NPRM entitled "Leadership PACs" seeking comment on its proposal to promulgate new regulations addressing this specific type of multicandidate political committee. The Commission conducted a public hearing on February 26, 2003, to discuss the NPRM. During the public hearing, the issue of leadership PACs paying for qualified campaign expenses of potential Presidential candidates during the "testing the waters" stage was raised and discussed. Because this issue implicates the regulations addressing Presidential campaigns and elections, the Commission has decided to seek comment on the relationship, if any, between multicandidate political

committees and Presidential candidates in this NPRM. The Commission is continuing to review the Leadership PACs NPRM as it applies outside Presidential campaigns and elections, and the comments received in connection with the NPRM, and the Commission intends to conclude that rulemaking at a later date.

The proposed rules herein would create a new paragraph in 11 CFR 110.2 and a new section in 11 CFR part 9034 that would address the payment by a multicandidate political committee of a qualified campaign expense of a Presidential candidate. Proposed section 110.2(l) would apply to candidates who are not accepting public funding from the Presidential Election Campaign Fund for the primary or general election. Proposed 11 CFR 9034.10 would apply to Presidential candidates who are accepting public funding for the primary election. Because Presidential candidates who accept public funding for the general election may not accept contributions from multicandidate political committees, the proposed rules would not include a parallel provision in 11 CFR subchapter E.

**1. Scope of the Proposed Rules**

Proposed 11 CFR 110.2(l) and 9034.10 would be applicable to all multicandidate political committees, not just those commonly known as Leadership PACs. The rationale for this approach is that leadership PACs are not defined or specifically addressed in FECA or in the current Commission regulations. Rather, leadership PACs are formed as multicandidate political committees that are defined and addressed in FECA and current Commission regulations. In the Commission's experience, other types of multicandidate political committees do not make expenditures for qualified campaign expenses of potential Presidential candidates. Thus, including all multicandidate political committees within the proposed rules would not have unintended consequences of encompassing other types of activity.

Nevertheless, the Commission seeks comment on whether the proposed rules should be limited to leadership PACs. If the Commission were to adopt such an approach, it would also become necessary for the Commission to adopt a definition for "leadership PACs." Consequently, the Commission seeks comment as to what that definition should be.

**2. Definition of "Qualified Campaign Expense"**

Proposed 11 CFR 9034.10(a) would include a definition of "qualified campaign expense" that would vary from the current definition in 11 CFR 9032.9 but would limit the scope of the proposed definition to proposed 11 CFR 9034.10. The definition in proposed paragraph (a) would adopt language similar to that of 11 CFR 9032.9(a) but would not include the timing element of section 9032.9(a)(1). The timing element of current section 9032.9(a)(1), which limits qualified campaign expenses to expenses incurred between the date a person becomes a candidate and the last day of the candidate's eligibility, should not be applied here because a major goal of the proposed rules is to treat qualified campaign expenses that are paid by multi-candidate committees as in-kind contributions to Presidential candidates whenever such qualified campaign expenses are incurred, even if they are incurred prior to the date a person becomes a candidate.

Additionally, the proposed definition would not include the provisions in section 9032.9(a)(3) requiring that a qualified campaign expense comply with all Federal, state, and local laws. The purpose of this provision in section 9032.9(a)(3) is to prevent the authorized committees from paying for items such as parking tickets. Because the purpose of proposed section 9034.10 is to treat the payment of qualified campaign expenses of a Presidential candidate by multicandidate political committees as in-kind contributions, it would be inconsistent with this purpose to exclude these items.

Proposed 11 CFR 9034.10(a)(1) and (2) would be the operative definition of "qualified campaign expense" as it would be applied to proposed 11 CFR 110.2(l) and 9034.10. Under the proposed definition, "qualified campaign expense" would mean purchase, payment, etc., that is incurred by, on behalf of, or for the benefit of a candidate or the candidate's authorized committee and is made in connection with that candidate's campaign for nomination. Proposed paragraph (a)(3) would provide a non-exhaustive list of examples of expenses that would be considered as a qualified campaign expense, such as polling expenses, staff salary, travel, and office space expenses. The Commission seeks comment on whether polling expenses in proposed paragraph (a)(3)(i) should be limited to polls that reference a Presidential candidate. The Commission notes that none of the foregoing expenses would be qualified campaign expenses under

the proposed rule unless they were made in connection with a Presidential candidate's campaign for nomination. The Commission seeks comment on whether more specific examples of qualified campaign expenses should be provided and whether there are other expenses that should be included in proposed paragraph (a)(3). The Commission also seeks comments on whether it should use a terminology other than "qualified campaign expenses" in this proposed section to avoid confusion with the current definition of "qualified campaign expenses."

### 3. Qualified Campaign Expenses as In-Kind Contributions

The NPRM would set forth the consequences of a multicandidate committee paying for qualified campaign expenses for a Presidential candidate in proposed 11 CFR 9034.10(b)(1) through (4). The introductory language of proposed paragraph (b) would limit the "look back" period of the proposed rules to January 1 of the year immediately following the last Presidential election year. Thus, if an expenditure made by a multi-candidate committee for a qualified campaign expense were made prior to that date, it would not be subject to the provisions of proposed section 9034.10. The Commission seeks comments on whether the "look back" period should start at a different date, such as the day after the last Presidential election or some other date. Additionally, the proposed rule would only apply to qualified campaign expenses paid by multi-candidate committees for individuals who actually become Presidential candidates.

Under the proposed rule, an expenditure by a multicandidate political committee for a qualified campaign expense of a Presidential candidate would have four effects. First, the expenditure would be deemed as an in-kind contribution from the multicandidate political committee to the Presidential candidate under proposed 11 CFR 9034.10(b)(1). Second, proposed paragraph (b)(2) would subject the expenditure/contribution to the contribution limitations for multicandidate political committees to Presidential candidates, *i.e.* \$5000 per election. Third, under proposed paragraph (b)(3), the expenditure would count towards the expenditure limitations for Presidential candidates accepting public funding under 11 CFR part 9035. Finally, proposed paragraph (b)(4) would subject the expenditure to the audit provision of 11 CFR 9038.1. The proposed rules would also amend

current 11 CFR 9038.1(a)(2) to make clear that multicandidate political committees that make expenditures for qualified campaign expenses would be subject to examinations and audits as deemed necessary. The Commission seeks comments on whether changes to the audit provision of 11 CFR 9038.1 is appropriate or necessary to effectuate any new rule it may promulgate in this area. It is important to note that, under this proposed rule, coordination would not be relevant in determining that a multicandidate political committee has made an in-kind contribution when it pays for a qualified campaign expense of a Presidential candidate.

As stated above, proposed 11 CFR 9034.10(b)(2) would subject a multicandidate political committee's expenditure for qualified campaign expenses to the contribution limitations that apply to Presidential campaign committees. Under proposed paragraph (c), any amount of the expenditure that exceeds the contribution limit for multicandidate political committees to Presidential candidate committees would be deemed an excessive contribution and liability would attach to both the multicandidate political committee for making the excessive contribution and the authorized committee of the Presidential candidate for accepting an excessive contribution. The Commission seeks comment on whether the proposed rules should include a provision that would allow the authorized committee to "cure" the excessive contribution and, therefore, avoid liability. For instance, if the authorized committee of the Presidential candidate reimburses the multicandidate political committee for any expenditure for qualified campaign expenses that exceed the contribution limit within thirty days of the date of the person becoming a candidate, should these expenditures not be considered as excessive contributions? The Commission seeks comment on this approach or suggestions on alternative ways excessive contributions may be "cured."

While proposed 11 CFR 9034.10 would apply to Presidential candidates who accept public funding for their primary election campaigns, the proposed rules would add a new paragraph (l) to current section 110.2 that would apply to Presidential candidates who do not accept any public funds. Proposed 11 CFR 110.2(l)(1) would incorporate by reference the definition of "qualified campaign expense" in proposed section 9034.10(a) for purposes of proposed paragraph (l). Proposed paragraph (l)(2)

would include the same "look back" period as proposed section 9034.10(b).

Similar to proposed section 9034.10(b)(1) and (2), an expenditure by a multicandidate political committee for a qualified campaign expense of a Presidential candidate who is not receiving public funds would be deemed to be an in-kind contribution from the multicandidate political committee to the Presidential candidate and that contribution would be subject to the relevant contribution limitations. Proposed 11 CFR 110.2(l)(1) and (2). Proposed section 110.2(l) would not have provisions that parallel proposed section 9034.10(b)(3) and (4) because Presidential candidates who do not receive public funding for their campaigns are not subject to the expenditure limitations in 11 CFR part 9035 or the audit provisions of 11 CFR 9038.1. Proposed 11 CFR 110.2(l)(3) would include similar language as proposed section 9034.10(c) stating that expenditures exceeding the contribution limits for multicandidate political committees to Presidential candidates would be deemed as excessive contributions.

The Commission seeks comment on this proposal to treat expenditures by multicandidate committees for qualified campaign expenses of Presidential candidates as in-kind contributions. The Commission also welcomes comments on the ramifications of such treatment as well as on the issues raised above.

### H. Technical Amendments

#### 1. Word Omitted From 11 CFR 9038.2(b)(4)

Under 11 CFR 9038.2(b)(4), the Commission may determine that the net income derived from an investment or other use of surplus public funds after a candidate's DOI, less Federal, State and local taxes paid on that income, shall be paid to the Federal Treasury. However, the word "taxes" was inadvertently dropped from that paragraph and needs to be included.

#### 2. Correcting Citations in 11 CFR 104.5(b)(1)

The Commission proposes to correct several citations in 11 CFR 104.5(b)(1) to reflect changes to 11 CFR 104.5(a) promulgated in the implementation of BCRA. Specifically, the Commission proposes in 11 CFR 104.5(b)(1)(i)(C) to change the reference to 11 CFR 104.5(a)(1)(i) to "paragraph (a)(2)(i) of this section" and to change the reference to 11 CFR 104.5(a)(1)(ii) to "paragraph (a)(2)(ii) of this section." In 11 CFR 104.5(b)(1)(ii), the Commission proposes to change the reference to 11

CFR 104.5(a)(1) to “paragraphs (a)(1) and (2) of this section”.

### 3. Private Contributions Received After DOI (11 CFR 9034.4(a)(3)(ii))

The Commission proposes to revise 11 CFR 9034.4(a)(3)(ii) to clarify the rules governing ineligible primary election presidential candidates who continue to campaign after their dates of ineligibility. Currently, paragraph (a)(3)(ii) provides that these candidates may use contributions received after the DOI to campaign. However, current 11 CFR 9034.5(a)(2)(i) provides that a candidate’s cash on hand on the NOCO Statement should include “all contributions dated on or before” the DOI, whether or not submitted for matching. Thus, the current rules do not make clear how contributions should be treated that are made or dated before the DOI but received after the DOI by a candidate who continues to campaign. The proposed rules would clarify that each contribution made, dated, and received after a candidate’s DOI may be used to continue to campaign.

In addition, the Commission proposes to delete the next sentence in section 9034.4(a)(3)(ii), which states: “The candidate shall be entitled to receive the same proportion of matching funds to defray net outstanding campaign obligations as the candidate received before his or her date of ineligibility.” In practice, each submission for matching funds is reviewed individually; thus, a candidate receives a different proportion of matching funds for each submission. The Commission proposes deleting the sentence to make clear that candidates would continue to receive matching funds based on the Commission’s review of each matching fund submission, rather than on the proportion of matching funds the candidate received for any previous submission.

### 4. Clarification of 11 CFR 9032.9(c)

Current 11 CFR 9032.9(c) states that expenditures incurred “before the beginning of the expenditure report period” are qualified campaign expenses if they meet the requirements of 11 CFR 9034.4(a), which addresses, *inter alia*, testing the waters expenses prior to the date an individual becomes a candidate. This wording is the same as the equivalent rule for general election candidates at 11 CFR 9002.11(c), and appears to be an error because the term “expenditure report period” applies to general election candidates. See 11 CFR 9002.12. To clarify this section, the Commission proposes changing this wording to “prior to the date the individual

becomes a candidate,” the same wording used in 11 CFR 9034.4(a)(2), governing testing the waters expenses.

### 5. Documentation of Disbursements

The current rules describe the requirements for the documentation of disbursements applicable to all committees in 11 CFR 102.9(b) and provide additional documentation requirements for publicly funded committees at 11 CFR 9003.5 (general election candidates), 9008.10 (convention committees) and 9033.11 (primary candidates). The Commission proposes to revise 11 CFR 9003.5, 9008.10 and 9033.11 to clarify that publicly funded candidates must comply with both the general rules at section 102.9(b) and the particular rules applicable to publicly funded primary or general election candidates governing the documentation of disbursements. The proposed rules would add new paragraphs 11 CFR 9003.5(b)(4) and 9033.11(b)(4) stating that the requirements of section 102.9(b) also apply to disbursements, and would revise the introductory language in section 9008.10 to state that the requirements in that section are in addition to the requirements of 11 CFR 102.9(b). Adding these proposed references to 11 CFR 102.9(b) would improve the ease of use of the rules for publicly funded committees.

### National Nominating Conventions

The Commission is proposing a number of changes to its regulations concerning national nominating conventions, 11 CFR part 9008. Some of these proposed changes are necessary in order to give effect to BCRA’s ban on the use of non-Federal funds by national party committees. The rest of the proposed changes are designed to clarify certain requirements in light of the Commission’s experience in administering the public financing of national nominating conventions over the past several presidential election cycles.

### I. Current Legal Structure of Convention Financing

Under 26 U.S.C. 9008(b), the national committees of both major and minor political parties are entitled to public funds to defray expenses incurred in connection with a presidential nominating convention. Major party committees receive an inflation-adjusted payment from the Presidential Election Campaign Fund for their national nominating conventions. 26 U.S.C. 9008(b)(1). Minor party committees receive a proportional amount of that payment based on the number of votes

the party’s candidate received in the last presidential election compared to the average number of votes received by the major party candidates. 26 U.S.C. 9008(b)(2). For the 2004 conventions, the major party committees will be entitled to receive \$14,880,000 in July 2003 and an additional payment in 2004 for an inflation adjustment, subject to all applicable requirements.<sup>2</sup> A national committee of a major or minor party may not make expenditures related to the convention that exceed the expenditure limitations, which are equal to the full amount of the payment to major parties. 26 U.S.C. 9008(d). Thus, the major party convention committees may not receive *any* contributions, as defined in 2 U.S.C. 431(8), that would count towards their expenditure limit if they accepted the full payment. Any such contributions would combine with the public funds to make total expenditures exceed the limit.

In addition to the public funds provided to the national committees of both major and minor political parties in connection with a presidential nominating convention, “host committees” and “municipal funds” may defray certain expenses incurred in connection with hosting these conventions. A host committee is defined as any local organization, such as a local civic association, business league, chamber of commerce, real estate board, board of trade, or convention bureau (1) which is not organized for profit; (2) whose net earnings do not inure to the benefit of any private shareholder or individual; and (3) whose principal objective is the encouragement of commerce in the convention city, as well as the projection of a favorable image of the city to convention attendees. 11 CFR 9008.52(a). Host committees may provide the convention committees with certain services and facilities, as specified in 11 CFR 9008.52(c). Any host committee expenditures that comply with 11 CFR 9008.52 do not constitute convention committee expenditures and do not count toward the convention committee’s expenditure limit. 11 CFR 9008.8(b)(1).

“Municipal fund” is the term that has come to apply to local government agencies and the separate funds or accounts established by them to receive and disburse funds in order to defray

<sup>2</sup> In 2000, the Democratic and Republican National Committees each received \$13,512,000 for their national nominating convention, while the Reform Party received \$2,522,690. No candidate received a sufficient number of votes in the 2000 presidential general election to provide his or her party with minor party status in 2004.

certain expenses for a convention in that locality. Municipal funds may make expenditures for the same purposes as host committees. 11 CFR 9008.53. As with host committees, expenditures by a municipal fund that are in compliance with 11 CFR 9008.53 do not constitute convention committee expenditures and do not count toward the convention committee's expenditure limit. 11 CFR 9008.8(b)(2).

Under current regulations, host committees and municipal funds are allowed to accept monetary and in-kind donations from the same sources: local businesses, including corporations; local banks; local labor organizations; and local individuals. 11 CFR 9008.52 and 9008.53. Municipal funds, however, face more limitations on their fundraising than host committees. *See* 11 CFR 9008.53(b)(1)(i) and (ii). Municipal funds may not accept donations "restricted" for use in connection with a particular convention; they may not engage in fundraising restricted to a particular convention; and they may not themselves be restricted to a particular convention. 11 CFR 9008.53(b)(1)(i) and (ii). Host committees are not subject to any of these limitations. Once raised, funds received by a host committee or municipal fund may be used for the same purposes. *See* 11 CFR 9008.52(c)(1) and 9008.53. If the funds are raised and spent in compliance with 11 CFR 9008.52 or 9008.53, then they are exempt from the definition of "contribution and expenditure" in the Commission's regulations concerning corporate and labor organization funds, 11 CFR part 114. *See* 11 CFR 114.1(a)(2)(viii). On this basis, host committees and municipal funds accept and spend such funds, which constitute non-Federal funds.

## II. Historical Basis for Current Legal Structure

In 1977, the Commission explained the basis for permitting in-kind contributions to host committees from corporations and labor organizations, stating: "Such in-kind contributions are presumably not politically motivated but are undertaken chiefly to promote economic activity and good will of the host city." *Explanation and Justification for 1977 Amendments to the Federal Election Campaign Act of 1971*, H.R. Doc. No. 95-44, 136 (1977). Similarly, donations of money were described as "presumably commercially motivated rather than politically, and thus will not be considered an unlawful contribution." *Id.* at 137. Host committee funds were "to be used for purposes designed to promote a good

image of the host city to the convention attendees." *Id.* at 136-37.

The Commission acknowledged that the host committee exception to the convention committee's expenditure limit could be considered a means of avoiding the expenditure limit. *Id.* at 137. The Commission explained that "it appears from the testimony of the major parties before the Commission that the Congress in deciding upon a dollar figure for expenditure limitations, took into consideration only those expenses actually paid by the national party for the 1972 convention and ignored in its computation the value of services provided by host cities and committees." *Id.* The Commission described its regulation on the use of funds by host committees as "represent[ing] an interpretation of 26 U.S.C. 9008(1) that the [expenditure] limit applies only to expenditures made by the national party, and that expenditures made by private host committees under certain restrictions will not be counted toward the ceiling." *Id.* (emphasis in original).

In 1979, the Commission recodified some of its regulations, including those related to corporate donations to host committees. The Commission described again the basis for this exception to the prohibition on corporate and labor organization funds in 2 U.S.C. 441b, stating: "While incorporated businesses are prohibited by 2 U.S.C. 441b from making contributions or expenditures in connection with a Federal election, donations by such corporations to a host committee in accordance with restrictions set forth in [11 CFR 9008.7(d) (1979)] are sufficiently akin to commercial transactions to fall outside the scope of that prohibition."

*Explanation and Justification of Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions*, 44 FR 63036, 63038 (Nov. 1, 1979).

The basis for the municipal fund exception to the expenditure limit was also discussed, and the Commission explained that the expenditure limit would be "unrealistically low" if the value of "certain facilities and services" provided by the city "as part of an overall package to attract the convention to that city" counted toward the convention committee's expenditure limit. *Id.* at 63037. With regard to host committees, the Commission justified the restriction on who may donate funds as "necessary to insure that such donations are commercially, rather than

politically motivated." *Id.* at 63038.<sup>3</sup> The Commission also observed that "Defrayment of convention expenses by a host committee is intended to be a very narrow exception to the statutory limitation on convention expenses." *See id.* at 63038. The 1979 document made the same point about the apparent Congressional intent as presented in the 1977 *Explanation and Justification*. *Id.* at 63037.

In 1994, the Commission again revised its regulations governing publicly financed presidential nominating conventions. Incorporating the conclusions reached in *Advisory Opinions* 1982-27 and 1983-29, the Commission promulgated its municipal fund regulation, 11 CFR 9008.53. *Explanation and Justification of Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions*, 59 FR 33606, 33614 (June 29, 1994). Like donations to host committees, the Commission explained that "the new rules recognize that local businesses and organizations that donate to municipal funds are motivated by commercial and civic reasons, rather than election-influencing purposes." *Id.* at 33615.

Five years later, in 1999, the Commission reiterated the presumed motivation of donors to host committees and municipal funds. In lifting the prohibition on bank donations to host committees, the Commission agreed with the observation that "local branches of national banks have the same interest in promoting the city and supporting commerce" as local corporations. *Explanation and Justification for Public Financing of Presidential Primary and General Election Candidates*, 64 FR 49355, 49357 (Sept. 13, 1999).

## III. Petition for Rulemaking

A petition for rulemaking jointly filed by three organizations seeks the repeal or revision of the Commission's regulations that permit host committees to accept corporate and labor organization funds and to use these funds for expenses incurred in conducting a nominating convention. The petition argues that the host committee regulation, 11 CFR 9008.52, and the exemption from the part 114 definition of "contribution and expenditure" of activity permitted by the host committee regulation, 11 CFR 114.1(a)(2)(viii), are contrary to FECA and BCRA. According to the petition, 2 U.S.C. 441b of FECA is violated by the

<sup>3</sup> At that time, the amount of donations to host committees was also limited. *See* 11 CFR 9008.7(d)(3)(ii) (1980).

cited regulations because corporations and labor organizations are permitted to contribute funds and in-kind contributions in connection with a nominating convention. Similarly, according to the petition, 2 U.S.C. 441i of BCRA is violated by 11 CFR 9008.52(c) because it allows national party committees to receive in-kind contributions paid for with corporate and labor organization funds. In support of its position, the petition puts forth a statutory and regulatory analysis, and it cites and attaches many articles from various media outlets that purport to describe convention financing practices. The petition is available on the Commission's website.

The petition's conclusion that the cited host committee regulations violate FECA and BCRA obviously contradicts the Commission's treatment of host committees since 1977. The proposed rules that follow are consistent with the Commission's historical treatment of host committees and do not reflect the position advanced by the petitioners. Nonetheless, the Commission seeks comment on whether corporate or labor organization donations to host committees under the conditions prescribed in current 11 CFR 9008.52(c) are contrary to FECA or BCRA. If the approach sought by the petition were adopted, the Commission also seeks comment on whether the exemption from the convention committee expenditure limit for host committee expenses, 11 CFR 9008.8(b)(1), should also be repealed. Similarly, the Commission also seeks comment on whether corresponding changes would be required for the municipal fund regulations, 11 CFR 9008.8(b)(2) and 9008.53.

#### IV. Application of BCRA's Non-Federal Funds Provisions to Convention Committees, Host Committees and Municipal Funds

Under BCRA, “[a] national committee of a political party \*\*\* may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of [FECA].” 2 U.S.C. 441i(a)(1). BCRA also prohibits officers and agents of the national party committees and entities that are “directly or indirectly established, financed, maintained, or controlled” by national party committees from soliciting, receiving, directing, or spending such non-Federal funds. 2 U.S.C. 441i(a)(2); *see also* 11 CFR 300.10(c)(1) and 300.10(c)(2). BCRA also prohibits Federal candidates and

officeholders, their agents, and entities directly or indirectly established, financed, maintained, or controlled by or acting on behalf of one or more Federal candidate or officeholder from soliciting, receiving, directing, transferring, or spending non-Federal funds in connection with an election for Federal office. 2 U.S.C. 441i(e)(1)(A); *see also* 11 CFR 300.61.<sup>4</sup>

The Commission has promulgated rules implementing BCRA's new restrictions and prohibitions on the receipt, solicitation, direction, and use of certain types of non-Federal funds by political party committees, candidates, and officeholders. *See Explanation and Justification for Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 FR 49064 (July 29, 2002) (hereinafter “Non-Federal Funds Final Rules”). In this rulemaking, the Commission considers the impact of these new restrictions and prohibitions in BCRA and the Non-Federal Funds Final Rules on national nominating conventions. Specifically, the Commission considers the roles filled by national political party committees, their convention committees, host committees, and municipal funds, as well as the involvement of Federal candidates and officeholders.

##### A. Are Host Committees and Municipal Funds “Agents” of National Party Committees Under 2 U.S.C. 441i(a) and (e) and 11 CFR 300.2(b)?

One issue that arises from BCRA's ban on national parties soliciting, receiving, directing, and using non-Federal funds is whether host committees and municipal funds are “agents” of national party committees. In the Non-Federal Funds Final Rules, the Commission defined an “agent,” for purposes of 11 CFR part 300, as “any person who has actual authority, either express or implied \*\*\* to solicit, direct, or receive any contribution, donation, or transfer of funds” on behalf of a national committee of a political party. 11 CFR 300.2(b). The Commission seeks comment on whether host committees and municipal funds satisfy the definition of “agents” in 11 CFR 300.2(b) with respect to the national political party committees or their convention committees. If host committees and municipal funds are “agents” of national party committees, then they, like the national party

committees themselves, would be prohibited from soliciting, receiving, directing, or spending non-Federal funds by operation of 2 U.S.C. 441i(a)(1) and (2) and 11 CFR 300.10(a) and (c)(1).

The Commission does not propose regulatory text that would presume that host committees or municipal funds would necessarily qualify as “agents” of the national political parties. This approach, if adopted, would not preclude the Commission from determining that in a particular case a host committee or municipal fund does, in fact, meet the definition of “agent” in 11 CFR 300.2(b) with respect to the pertinent national party committee. The Commission also seeks comment on whether host committees and municipal funds should be treated *per se* as not agents of national party committees and, therefore, as not subject as a matter of law to 2 U.S.C. 441i(a)(2) or 11 CFR 300.10(c)(1) as agents acting on behalf of a national party committee, no matter how such host committees and municipal funds operate or interact with the national party committees.

The Commission is also considering an alternative approach, whereby host committees and municipal funds would be treated as *per se* agents of national party committees. Such an approach would limit permissible funds for a host committee or municipal fund to funds subject to FECA's limitations, prohibitions, and reporting requirements, regardless of how the host committees and municipal funds functioned and related to the national party committees. If the Commission were to consider host committees and municipal funds as *per se* agents of convention committees, how should it restructure the rules relating to national nominating conventions in 11 CFR part 9008? Would host committees or municipal funds be Federal political committees? Would all their transactions with convention committees amount to in-kind contributions? If host committees and municipal funds are limited to funds subject to FECA's limitations, prohibitions, and reporting requirements, should any uses of such funds be exempt from the convention committee's expenditure limit? The Commission recognizes that host committees and municipal funds supplement the funds that are otherwise capped by the expenditure limit and therefore removing the exemption from the expenditure limit for host committees and municipal funds would have a profound impact on convention financing. The Commission seeks comment on whether such a result is mandated by BCRA.

<sup>4</sup> In connection with any election other than an election for Federal office, BCRA also prohibits the same persons from soliciting, receiving, directing, transferring, spending, or disbursing funds in excess of the amounts permitted under 2 U.S.C. 441a(a) or funds from sources prohibited by FECA. 2 U.S.C. 441i(e)(1)(B).

The legislative debates of BCRA suggest that BCRA would entail significant changes in convention financing. During the Senate's consideration of BCRA, Senator Mitch McConnell said the bill "will end national party conventions as we have known them." 148 CR S2122 (daily ed. Mar. 20, 2002). Senator McConnell went on to state that "[t]he soft money ban covers the committees that are created to host these grand events" and to say that post-BCRA conventions would have to be put on with "80 percent less funding." *Id.* Senator McConnell's conclusion that passage of BCRA would mean: "All the soft money that you used to put on the convention the last time is now gone." *Id.* Senator Fred Thompson earlier that day described "the nature of the problem" addressed by BCRA and noted in regard to what he called the "big outfits" that donate non-Federal funds "the same entities pick up our expenses for the convention." 148 CR S2110 (daily ed. Mar. 20, 2002). During Senate consideration of an earlier version of BCRA, Senator Robert Bennett stated: "One very practical example that we can expect is the scaling down, if not the elimination, of party conventions because party conventions now are financed entirely with soft money which, under this bill, would become illegal. So we may see party conventions disappear altogether, or we may see them become very truncated affairs, which the media may decide is not worth covering." 147 CR S3092 (daily ed. Mar. 29, 2001). Senator McConnell raised the issue during this earlier consideration as well. He stated: "Host committees for national conventions are abolished. Last year it took each party \$80 million to put on their national conventions. They got \$15 million from the Treasury. All the rest of it was this odious soft money which is going to be abolished. In order to continue to put on the national conventions in hard dollars, the two committees will have to come up with about \$60 million each in hard dollars to put on the national conventions." 147 CR S3234 (Apr. 2, 2001). The Commission seeks comment on how these debates or any other legislative history on this issue should be interpreted.

What effect does BCRA's non-Federal funds ban have on the rules relating to convention financing? Can the Commission simply retain the pre-BCRA rules? Is there legal justification for retaining the pre-BCRA rules? Does BCRA have any impact on the convention committee expenditure limit? Would limiting host committees

and municipal funds to Federal funds have as significant an impact on convention financing as eliminating the expenditure limit exemption for host committees and municipal funds? If so, is such a result required by BCRA?

*B. Are Host Committees and Municipal Funds Entities "Established, Financed, Maintained, or Controlled" by National Party Committees Under 2 U.S.C. 441i(a) and 11 CFR 300.2(c)?*

Another issue that arises under BCRA is whether host committees and municipal funds are "directly or indirectly established, financed, maintained, or controlled" by a national party committee. If host committees and municipal funds are considered entities directly or indirectly established, financed, maintained, or controlled by the national party committees, then they, like the national party committees themselves, are prohibited from soliciting, receiving, directing, or spending non-Federal funds. 2 U.S.C. 441i(a)(2); 11 CFR 300.10(c)(2). In the Non-Federal Funds Final Rules, the Commission provided a non-exhaustive list of factors that may be considered in determining whether an entity is directly or indirectly established, financed, maintained, or controlled by a national party committee. 11 CFR 300.2(c). *See* Non-Federal Funds Final Rules, 67 FR at 49084 ("The Commission has concluded that the affiliation factors laid out in 11 CFR 100.5(g) properly define 'directly or indirectly established, financed, maintained, or controlled' for purposes of BCRA.") The Commission seeks comment on whether host committees and municipal funds satisfy the factors listed in 11 CFR 300.2(c) and should, therefore, be considered *per se* entities that are directly or indirectly established, financed, maintained, or controlled by the national party committees holding conventions in the relevant cities. Alternatively, the Commission seeks comment on whether host committees and municipal funds do not meet the criteria listed in 11 CFR 300.2(c) and, therefore, should be considered *per se* as a matter of law as entities that are not directly or indirectly established, financed, maintained, or controlled by the national party committees. Or should this question be resolved on a case-by-case basis by applying section 300.2(c)?

The Commission notes that the regulatory text relating to host committees and municipal funds proposed in this NPRM does not presume that host committees or municipal funds satisfy any of the criteria listed in 11 CFR 300.2(c) for

determining whether entities are directly or indirectly established, financed, maintained, or controlled by national party committees. This approach, if adopted, would not preclude a Commission finding that a particular host committee or municipal fund does, in fact, satisfy one or more of the specified factors in 11 CFR 300.2(c) with respect to a particular national party committee. If the Commission were to conclude that host committees or municipal funds are, as a matter of law, "directly or indirectly established, financed, maintained, or controlled" by national political parties, many of the same questions raised in the context of the discussion of "agency," above, would need to be addressed. Accordingly, the Commission seeks comments on the same issues raised above in connection with the agency discussion.

*C. Impact of BCRA on Convention Committees*

In contrast to host committees and municipal funds, convention committees are, as a matter of law, entities directly established, financed, maintained, or controlled by national party committees. The Commission's regulations require national party committees to "establish a convention committee which shall be responsible for conducting the day to day arrangements and operations of that party's presidential nominating convention." 11 CFR 9008.3(a)(2). In addition, under 11 CFR 9008.3(a)(2), convention committees are required to receive the national party's entitlement to public funds and are responsible for making "[a]ll expenditures on behalf of the national committee for convention expenses;" as such, they clearly are "agents" of the national party committees as well as "entities directly or indirectly established, financed, maintained, or controlled" by the national party committees, as those terms are defined in 11 CFR 300.2(b) and (c). Therefore, for purposes of this NPRM, the Commission proposes that BCRA's ban in 2 U.S.C. 441i(a)(1) on national parties soliciting, receiving, directing, and using non-Federal funds shall apply to convention committees by operation of 2 U.S.C. 441i(a)(2) and 11 CFR 300.10(c). *See also* 11 CFR 300.2(b) and (c).

The Commission seeks comment on whether this prohibition extends to bar convention committees from accepting many of the in-kind donations typically provided by host committees and municipal funds. Commission regulations permit certain local businesses and organizations to donate

funds or make in-kind donations to a host committee to be used for the purposes listed in 11 CFR 9008.52(c)(1). A review of this list reveals that many of the contemplated transactions could not be characterized as in-kind donations to the convention committee, but instead relate to the provision of services primarily used by convention attendees. For example, the permitted expenses' purposes include: Welcoming convention attendees; facilitating commerce by distributing guides to attendees; providing bus transportation; and providing law enforcement services. See 11 CFR 9008.52(c)(1). In order to conclude that the convention committee received "a contribution, donation, or transfer of funds or any other thing of value \* \* \* that are not subject to the limitations, prohibitions, and reporting requirements of [FECA]," the Commission would need to determine that the convention committee itself received something of value. In many of the transactions contemplated by 11 CFR 9008.52(c)(1), host committees are providing something of value to convention delegates, other attendees, press, local businesses, and the local community; in these transactions the convention committee is a bystander, not a recipient of something of value. When a host committee provides, for example, a shopping/dining guide, to convention attendees, it is difficult to conclude that the convention committee received anything of value. The Commission seeks comment on whether BCRA requires that permissible host committee and municipal fund expenses must be limited to such activities.

Other permissible host committee and municipal fund expenses certainly provide something of value to the convention committee. For example, host committees and municipal funds are permitted to provide an auditorium or convention center and construction services for that location. 11 CFR 9008.52(c)(1)(v). The Commission seeks comment on whether BCRA permits host committees and municipal funds to provide things of value to convention committees. Assuming that it does, in order to ensure that non-Federal funds raised by host committees and municipal funds are not spent on behalf of convention expenses beyond the "very narrow" host committee/municipal fund exception to the convention committee's expenditure limit, however, the Commission is also considering revising its regulations to more precisely circumscribe the permitted purposes for host committee and municipal fund expenses as

discussed below. *See Explanation and Justification for Regulations on Federal Financing of Presidential Nominating Conventions and the Presidential Election Campaign Fund*, 44 FR 63036, 63038 (Nov. 1, 1979) (stating: "Defrayment of convention expenses by a host committee is intended to be a very narrow exception to the statutory limitation on convention expenses.").

*D. Solicitation of Funds for Host Committees and Municipal Funds Under BCRA*

1. 2 U.S.C. 441i(a) and (e)(1)

As explained above, BCRA prohibits national party committees, as well as their agents and entities they directly or indirectly establish, finance, maintain, or control from soliciting or directing non-Federal funds on behalf of, or to, others. 2 U.S.C. 441i(a). BCRA also prohibits Federal candidates and individuals holding Federal office from soliciting, receiving, directing, transferring, or spending funds in connection with an election for Federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. 441i(e)(1)(A). BCRA extends these prohibitions to the agents of Federal candidates acting on their behalf and individuals holding Federal office and entities directly or indirectly established, financed, maintained, or controlled by either. 2 U.S.C. 441i(e)(1).

The foregoing restrictions on Federal candidates and officeholders under 2 U.S.C. 441i(e)(1), in contrast to the restrictions on national party committees under 2 U.S.C. 441i(a), only apply to funds "in connection with an election for Federal office" or any other election. 2 U.S.C. 441i(e)(1)(A) and (B). The Commission seeks comment on what impact this statutory distinction has on any of the issues addressed in this rulemaking.

Are *all* host committee and municipal fund activities "in connection with an election for Federal office" or any other election within the meaning of 2 U.S.C. 441i(e)? If not, are *any* such activities "in connection with an election for Federal office"? If none satisfy that statutory phrase, do the prohibitions and limitations of section 441i(e) not apply as a matter of law to the funds solicited, raised, and spent by host committees and municipal funds on that basis alone? In the alternative, are host committee and municipal fund activities subject to this provision of 2 U.S.C. 441i(e) only if they are *not* for the purpose of promoting the convention city and its commerce? As described above, the Commission's past treatment

of host committee and municipal fund expenses viewed those expenses as a permissible exception to the prohibition on corporate or labor organization funds because they lacked an election-influencing purpose. FECA's definitions of "contribution" and "expenditure" both require that such be made "for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i) and 431(9)(A)(i). Does the Commission's determination that certain permissible host committee and municipal fund expenses are not "contributions" or "expenditures" also require that the Commission determine those expenses are not "in connection with an election for Federal office" under 2 U.S.C. 441i(e)(1)(A)?

Are any of the costs of conducting a convention "in connection with an election for Federal office"? FECA clearly defines "election" to include "a convention or caucus of a political party which has the authority to nominate a candidate." 2 U.S.C. 431(1)(B). However, other election administering expenses, whether incurred by States or privately funded in those States that require political parties to pay the costs of certain primary elections, are not considered FECA-regulated expenses. See, e.g., AO 1991-33 (noting that the parties act as agents of the State in performing the ministerial functions of administering the primaries). Are the costs of conducting a convention, whether incurred by a convention committee, host committee, or municipal fund, regulated by FECA, other than those provisions that expressly mention convention activities? Although the Fund Act provides for grants of public funds to pay these expenses and imposes an expenditure limitation in exchange for accepting such a grant, should the Commission conclude that some or all of the expenses of conducting a nominating convention are not subject to FECA as amended by BCRA? If the Commission determines that these expenses are *not* in connection with a Federal election, what changes should it make to its regulations?

The Commission carefully considered the scope of BCRA's prohibition on solicitation and direction of non-Federal funds by national party committees, Federal candidates, Federal officeholders, and their agents in the Non-Federal Funds Final Rules. *See* 67 FR at 49087-93, 49106-09, 49122-23, and 49131-32. The Commission seeks comment on whether the new rules implementing BCRA's ban on the solicitation of non-Federal funds are sufficient to resolve the question of whether national party committees,

Federal candidates, Federal officeholders, or their agents may solicit funds for host committees and municipal funds. *See* 11 CFR part 300, subparts A and D. Alternatively, should the Commission promulgate an additional regulation in its Federal Financing of Presidential Nominating Conventions regulations (11 CFR part 9008) that would specifically apply BCRA and the Non-Federal Funds Final Rules to the financing of national nominating conventions and explain how the Commission's regulations in 11 CFR part 300 work in this context?

## 2. 2 U.S.C. 441i(d)

BCRA prohibits national party committees, their officers and agents acting on their behalf, and entities directly or indirectly established, financed, maintained, or controlled by them from soliciting any funds for, or making or directing any donations to, certain tax-exempt organizations. 2 U.S.C. 441i(d). BCRA's prohibition on this type of donor and fundraising activity extends only to tax-exempt organizations with a political purpose or that conduct activities in connection with a Federal election. Specifically, this prohibition extends to tax-exempt organizations described in 26 U.S.C. 501(c) that make "expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)" and organizations described in 26 U.S.C. 527. *Id.* In considering how to implement these BCRA provisions, the Commission concluded that a safe harbor is an appropriate way to help ensure that party committees, and others to whom 11 CFR 300.11 and 300.37 apply, comply with the Act.

Commission regulations at 11 CFR 300.11 and 300.50 implement this safe harbor and set forth a process by which a section 501(c) organization can certify that it does not make expenditures or disbursements in connection with an election for Federal office. Under 11 CFR 300.11(c) and 300.50(c), national party committees, their agents, and entities they directly or indirectly establish, finance, maintain, or control may obtain and rely upon a certification that the organization has not and does not intend to make expenditures or disbursements in connection with an election for Federal office as specified in 11 CFR 300.11(d).

The Commission seeks comment on whether, as a matter of law, host committees and municipal funds make "disbursements" in connection with an election for Federal office, even as they adhere to the requirements in current 11

CFR 9008.52, which arguably would leave host committees and municipal funds outside the certification safe harbor set out in 11 CFR 300.11. A "disbursement" is defined, in 11 CFR 300.2(d), as "any purchase or payment made by: (1) a political committee; or (2) any other person, including an organization that is not a political committee, that is subject to [FECA]." The Commission has historically treated host committees and municipal funds as organizations that are subject to FECA that make purchases or payments in connection with a Federal election because FECA defines presidential nominating conventions as Federal elections. 2 U.S.C. 431(B). As is noted above, the Commission is seeking comment on whether this historical treatment of host committees and municipal funds is appropriate. The Commission's past treatment of permissible host committee and municipal fund disbursements has been that they are not expenditures for the purpose of influencing an election and, therefore, are not subject to the corporate and labor organization prohibition in 2 U.S.C. 441b. However, BCRA reaches far beyond expenditures and requires only "disbursements in connection with an election" to make a 501(c) organization subject to the prohibition in 2 U.S.C. 441i(d)(1). The Commission seeks comment on what impact this BCRA statutory provision has, if any, on the Commission's treatment of host committees and municipal funds.

The Commission proposes a new regulation, 11 CFR 9008.55, in order to apply 11 CFR part 300 to the solicitation of funds for those host committees or municipal funds that have 26 U.S.C. 501(c) status. Paragraph (a) would state the general proposition that all host committee and municipal fund payments in compliance with 11 CFR part 9008 are disbursements in connection with a Federal election for purposes of 11 CFR part 300. Paragraph (b) would state that host committees and municipal funds would not be eligible to make the certification pursuant to 11 CFR 300.11(d). The Commission seeks comment on the proposed new regulation and the approach embodied in it.

In the alternative, the Commission seeks comment on whether host committees and municipal funds should be eligible to make the certification pursuant to 11 CFR 300.11(d) and, if so, under what circumstances? The Commission also seeks comment on whether Congress, in enacting BCRA, in any way intended to restrict convention financing practices that were legal

before BCRA became law, including the activities of host committees and municipal funds (and any involvement therein by national party committees, Federal candidates, Federal officeholders, and their agents.) Specifically, comment is sought on whether permissible host committee and municipal fund expenses do not constitute disbursements in connection with an election.

## 3. 2 U.S.C. 441i(e)(4)

In 2 U.S.C. 441i(e)(1), BCRA prohibits Federal candidates and officeholders<sup>5</sup> from soliciting, receiving, directing, transferring, or spending funds in connection with an election for Federal or non-Federal office unless the funds meet the source and amount restrictions of the Act. *See also* 11 CFR 300.61 and 11 CFR 300.62. BCRA creates two exceptions from that general rule in 2 U.S.C. 441i(e)(4). First, BCRA allows Federal candidates, individuals holding Federal office, and individuals who are agents acting on behalf of either to make general solicitations, without source or amount restrictions, for a 501(c) organization, other than organizations whose "principal purpose" is to conduct certain Federal election activity, specifically voter registration, voter identification, GOTV activities, or generic campaign activity, so long as the solicitation does not specify how the funds will be spent. Second, BCRA permits Federal candidates and Federal officeholders, and individuals who are agents acting on their behalf, to make a solicitation explicitly to obtain funds for a 501(c) organization whose principal purpose is to conduct Federal election activity as described above or for a 501(c) organization to conduct these activities, provided that only individuals are solicited for no more than \$20,000 per calendar year. The final rule at 11 CFR 300.65 implements these exceptions for Federal candidate and officeholder solicitations for 501(c) organizations.

As noted above in connection with national party committee solicitations of non-Federal funds, host committees and municipal funds operating in compliance with 11 CFR part 9008

<sup>5</sup> An "individual holding Federal office" is defined as "an individual elected to or serving in the office of President or Vice President of the United States; or a Senator or a Representative in, or Delegate or Resident Commissioner to, the Congress of the United States." 11 CFR 300.2(o). It does not include those "who are appointed to positions such as the secretaries of departments in the executive branch, or other positions that are not filled by election." Non-Federal Funds Final Rules, 67 FR at 49,087. This definition is identical to the definition of "Federal officeholder" in 11 CFR 113.2(c).

arguably make disbursements in connection with the national nominating convention, which is an election under FECA. Under 11 CFR 300.52(a)(1) and 300.65(a)(1), Federal candidates, individuals holding Federal office, and agents acting on their behalf are prohibited from making general solicitations of non-Federal funds for 501(c) organizations that “engage in activities in connection with an election.” Accordingly, the exception permitting Federal candidates, Federal officeholders, and their agents to make general solicitations on behalf of 501(c) organizations would arguably not, as a matter of law, apply to host committees and municipal funds. In addition, the exception permitting Federal candidates, Federal officeholders, and their agents to make specific solicitations for certain 501(c) organizations may not, as a matter of law, apply to host committees and municipal funds because it is not their principal purpose to engage in certain types of Federal election activity described in 2 U.S.C. 431(20)(A)(i) and (ii).

To make clear that the above-described exceptions to the general ban on solicitation do not apply to solicitation of non-Federal funds by Federal candidates, Federal officeholders, and their agents on behalf of host committees and municipal funds, the Commission is considering adding a new provision to part 9008. See new 11 CFR 9008.55. Paragraph (c) of this section would state that host committees and municipal funds are ineligible for the exceptions in 11 CFR 300.65. The Commission seeks comment on this approach.

#### *E. Effect of BCRA on Offsets*

The Commission has permitted convention committees to “offset” in-kind contributions received from host committees that are deemed impermissible in post-convention audits. Rather than require repayment of 100% of these receipts, the convention committee may offset them with convention committee expenditures that could have been paid by the host committee. The Commission seeks comment on whether BCRA requires any reevaluation of this practice.

#### *F. Effect of BCRA on Commercial Vendor Activities Related to Nominating Conventions*

The current rules at 11 CFR 9008.9 permit convention committees to receive goods and services from commercial vendors, including corporations, at reduced or discounted rates, or at no charge, under certain

circumstances. The prohibition in BCRA against the receipt of non-Federal funds, 2 U.S.C. 441a(a), may necessitate a change to this regulation.

Current 11 CFR 9008.9(a) permits commercial vendors, including businesses that are incorporated, to provide reductions or discounts in the ordinary course of business; that is, if the vendor has an established practice of providing the same reductions or discounts for the same amount of goods or services to non-political clients, or if the reduction or discount is consistent with established practice in the commercial vendor’s trade or industry. The Commission believes this provision is consistent with BCRA and therefore proposes to retain it in its current location. It would be revised to combine the introductory text and to make other conforming changes based on the other proposed changes to the rule described below.

Current provisions (b) and (c) of 11 CFR 9008.9, however, address items provided for promotional consideration (which are something of value), such as complimentary, temporary use of automobiles, and items of *de minimis* value, such as tote bags for convention attendees. The rationale for the promotional consideration exception was explained in Advisory Opinion 1988-25, where the Commission considered whether it was permissible, under FECA and the Fund Act, for General Motors to provide complimentary use of automobiles to convention committees for use during the 1988 Democratic and Republican conventions in exchange for GM’s ability to advertise the fact that its vehicles were the “official” vehicles of the respective conventions. The Commission concluded that GM’s provision of 500 automobiles to the Democratic and Republican convention committees in exchange for advertising rights did not violate the prohibition against corporate contributions in connection with a Federal election, in 2 U.S.C. 441b(a). The Commission based its conclusion primarily on evidence that GM had a practice of providing complimentary use of automobiles to other, non-political conventions of similar size and duration in exchange for such advertising authority and on evidence that the value of GM’s donation was proportionate to the commercial return GM expected to receive during the life of the convention.

The rationale for allowing commercial vendors to provide items of *de minimis* value at little or no charge to convention attendees was explained in Advisory Opinion 1980-53, where the

Commission considered whether it was permissible, under FECA and the Fund Act, for Kelly Services, Inc., to provide, at no charge, tote bags to persons attending the 1980 Democratic and Republican conventions. The Commission concluded that Kelly Services’ provision of 9,200 tote bags to the Democratic convention and 7,600 tote bags to the Republican convention did not violate the prohibition against corporate contributions in connection with a Federal election, in 2 U.S.C. 441b, and did not count toward the national parties’ expenditure limits, in 11 CFR 9008.7(a). The Commission based its conclusion on three factors: (1) The low cost of the tote bags (\$2.12 each); (2) evidence that the tote bags were being provided solely for bona fide advertising purposes of a local business; and (3) evidence that the tote bags were provided in the ordinary course of Kelly Services’ business.

While the provision of items for promotional consideration and items of *de minimis* value were permissible under FECA and the Fund Act, these provisions may contravene BCRA’s prohibition on national party committee acceptance of non-Federal funds, 2 U.S.C. 441i(a)(1), by authorizing national party committees to receive and accept something of value not paid for with Federal funds. The Commission seeks comment on whether these practices, which were legally permissible in the past, are barred by BCRA. However, as explained above, the rules proposed in this NPRM contemplate that it is still appropriate for host committees and municipal funds to accept these corporate in-kind donations, provided such donations are in accordance with 11 CFR 9008.52 and 9008.53. Accordingly, the Commission is proposing to move the provisions of current 11 CFR 9008.9(b) and (c) (convention committees) to 11 CFR 9008.52(a) (host committees), with a conforming amendment to 11 CFR 9008.53(a) (municipal funds). The introductory text would no longer reference the provision of goods or services at no charge as that reference pertained to paragraphs (b) and (c).

Under this reorganization, current paragraph (d) of 11 CFR 9008.9, which states that the value of goods or services provided under this section do not count towards the national party’s expenditure limit, would be retained as redesignated paragraph (b) of 11 CFR 9008.9, but would be limited to standard industry reductions and discounts provided pursuant to 11 CFR 9008.9(a). The definition of “commercial vendor” would continue to be that set out at 11 CFR 116.1(c):

Any person providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services.

*G. Effect of BCRA on Private Events in the Convention City*

Private events are often held in the city hosting a nominating convention during the convention. Corporations, labor organizations, and other groups can hold these events, which are frequently described as hospitality events, and often invite convention attendees including delegates, Federal candidates and officeholders, and party officials. These events are typically held in locations outside the convention venue, but often in close proximity to it. The temporal and geographic proximity of these events to nominating conventions has not previously subjected the events to regulation under FECA solely because of that proximity. Of course, FECA regulation could be triggered by such events if, for example, a Federal political committee holds a fundraising event. The Commission seeks comment on whether BCRA requires that private hospitality events held by corporations, labor unions, and other organizations in the convention city during the convention are subject to regulation and, if so, on what basis? Does it make any difference whether Federal candidates or officeholders or party officials or their agents (acting on their behalf) are invited to, appear, are recognized, or speak at such events?

**V. Definition of "Municipal Fund"**

Over time, host committees and municipal funds have come to play increasingly similar roles in convention funding. The Commission therefore seeks comment on whether these entities should be treated similarly under the Commission's rules. Under this approach, which is reflected in the proposed rules that follow, host committees and municipal funds would continue to be permitted to spend money for identical purposes. The rules would change, however, to make municipal funds subject to the same disclosure requirements that apply to host committees under 11 CFR 9008.51 and 9008.52. Current host committee disclosure rules would also be revised as described below and would apply to both host committees and municipal funds. More importantly, the Commission's description of "municipal funds" would be revised to remove provisions that operate as barriers to municipal funds raising money in conjunction with host committees.

While the Commission's rules define "host committee," see 11 CFR 9008.52(a), they do not currently define "municipal fund." The Commission is proposing to add the following definition, at new 11 CFR 9008.50(c): "A municipal fund is any separate fund or account of a government agency, municipality, or municipal corporation whose principal purpose is the encouragement of commerce in the municipality and whose receipt and use of funds is subject to control of officials of the State or local government." Under this definition, any organization operating under 11 CFR 9008.53 would be required to use a separate account for receipts and payments related to convention activities. Should the Commission adopt additional requirements for municipal fund status? Should municipal funds be limited to accounts subject to audit by State or local public agencies? Are there any other arrangements that would assure the funds received and disbursed by a municipal fund would be used for the promotion of the city and its commerce?

The proposed definition would eliminate the current provision in 11 CFR 9008.53(b)(1)(i) and (ii), requiring municipal funds to comply with two conditions: (1) The fund or account is not permitted to be restricted to use in connection with any particular convention; and (2) Donations to the fund or account must be unrestricted and shall not be solicited or designated for use in connection with any particular convention, event or activity. 11 CFR 9008.53(b)(1)(i) and (ii).

Host committees do not operate under similar limitations on fundraising. See 11 CFR 9008.52. These limitations complicate joint fundraising by a municipal fund and a host committee, and their utility has diminished as municipal funds have become functionally similar to host committees. Moreover, because hosting a national nominating convention is a significant undertaking even for large communities, organizations like municipal funds will necessarily devote substantial efforts toward their roles in hosting a convention. In these circumstances, little purpose is served by prohibiting municipal funds from engaging in fundraising devoted to a particular nominating convention or accepting donations accompanied by correspondence that refers to such a convention.

In the advisory opinions that formed the basis for this current rule, Advisory Opinions 1982-27 and 1983-29, the requesters assured the Commission that the undesignated nature of the donations received demonstrated the

civic, not political, motives of the municipal funds and their donors. Subsequently, the Commission promulgated the regulation with these same restrictions on municipal funds in an effort to ensure that both the donations and use of the donations arose from civic, not political, motives. The Commission seeks comment on whether this requirement is unnecessary. A municipal fund's references to the political party that intends to hold its national nominating convention in the host city may not necessarily betray a partisan political motivation, and insisting on no such reference in the solicitation materials and in the responses from donors may serve little or no purpose.

Consequently, the Commission proposes deleting from its definition of municipal funds the requirements that the fund itself, solicitations for donations to the fund, and the donations to the fund not be restricted to a particular convention. The Commission also proposes to restructure the municipal fund regulation, 11 CFR 9008.53, to follow the structure of the host committee regulation, 11 CFR 9008.52, and to use the name by which these funds have come to be known, "municipal funds." Alternatively, the Commission also seeks comment on whether it should retain the current distinction between municipal funds and host committees. Under the alternative approach, should the Commission clarify the prohibitions of 11 CFR 9008.53, namely that a municipal fund may not be restricted or accept or solicit restricted donations? What standard should the Commission adopt for when a municipal fund is "restricted to use in connection with any particular convention" contrary to 11 CFR 9008.53(b)(1)(i)? Under what circumstances is it appropriate to conclude that donations or solicitations restricted or designated for use in connection with a particular convention contrary to 11 CFR 9008.53(b)(1)(ii)?

The Commission seeks comment on whether the examination and audit authority of the Commission outlined in 11 CFR 9008.54, which mandates audits of convention host committees without cause, has an adequate statutory basis under FECA. In promulgating the predecessor to the current 11 CFR 9008.54, the Commission explained that: "This section provides for an examination and audit of each host committee. Such committees are permitted to receive donations to defray convention expenses. It is hence necessary for the Commission to audit them in order to insure that those donations were properly raised and

spent." *Explanation and Justification for Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions*, 44 FR 63036, 63038 (Nov. 1, 1979). The Fund Act specifically authorizes the Commission "to conduct such examinations and audits (in addition to the examinations and audits required by section 9007(a)), . . . as it deems necessary to carry out the functions and duties imposed on it by this chapter." 26 U.S.C. 9009(b). In addition, as authority for this requirement, the Commission currently cites 2 U.S.C. 437, which includes the statutory provisions requiring host committee reporting; 2 U.S.C. 438(a)(8), the Commission's general regulation authority; 26 U.S.C. 9008, which provides for payments for presidential nominating conventions; and 26 U.S.C. 9009, which includes further regulation authority in addition to the provision cited above concerning audits additional to those required by 26 U.S.C. 9007.

Host committees are the only non-publicly funded committees that are subject to an automatic audit by the Commission. Convention committees are also subject to automatic audits under 11 CFR 9008.11 no later than December 31 of the year the convention was held and may, at any time, be subject to other examinations and audits as the Commission deems necessary. However, convention committees receive millions of dollars of public funds and the Commission's audit authority helps insure that those public funds are lawfully spent. The audit authority provided to the Commission under 11 CFR 9008.11 is also statutorily based in 26 U.S.C. 9008 and 9009.

The Commission seeks comment on whether the host committees should be subject to automatic audits under 11 CFR 9008.54.

While the Commission is proposing to treat host committees and municipal funds the same in most respects (*i.e.*, permitted expenses, registration and reporting requirements), it does not propose to audit municipal funds as it currently audits host committees. Under the current rules, host committees are subject to a Commission audit pursuant to 11 CFR 9008.54, while municipal funds are not routinely subject to a Commission audit. The Commission, however, has conducted financial transaction examinations of municipal fund accounts, and it expects to continue to do so in the appropriate circumstances. The Commission believes that the governmental controls over municipal funds obviate the need to subject municipal funds to a routine audit like host committees are subject to

pursuant to 11 CFR 9008.54. Because municipal funds necessarily are separate accounts of a government agency or municipality, the municipal funds are subject to financial controls by the local authorities. Under these circumstances, the Commission does not believe routine audits are necessary. The Commission seeks comment on this approach and specifically whether the comity required between agencies of the Federal government and agencies at the State or local level counsels against routine audits of municipal funds.

The absence of routine audits should not be misconstrued to limit the Commission's authority to examine municipal fund transactions related to conventions. Because municipal funds provide substantial in-kind donations to publicly funded convention committees, the Commission's audit of convention committees under 11 CFR 9008.11 may require a detailed and thorough review of municipal fund transactions. Additionally, municipal funds are subject to Commission audit pursuant to 11 CFR 111.10.

Current 11 CFR 9008.50, entitled "Scope," sets out the scope of subpart B of part 9008, "Host Committees Representing a Convention City; Convention Expenditures by Government Agencies and Municipal Corporations." The Commission is proposing to change the title of this Subpart to "Host Committees and Municipal Funds Representing a Convention City." The title of 11 CFR 9008.50 would be changed to "Scope and Definitions," and the current provisions of this section would be revised with conforming changes and placed in new paragraph (a). The definition of "host committee" would be moved from 11 CFR 9008.52(a) to new 11 CFR 9008.50(b), and the new definition of "municipal fund" would appear at new 11 CFR 9008.50(c). Conforming changes using the newly defined term "municipal fund" would be made to 11 CFR 9008.8(b)(2) and 9008.12(b)(7).

#### VI. Permissible Expenditures by Convention Committees, Host Committees and Municipal Funds

Permissible expenditures by convention committees are currently set forth at 11 CFR 9008.7(a), while those by host committees and municipal funds are found at current 11 CFR 9008.52(c). *See also* 11 CFR 9008.53(b). As described above, these rules are intended to require convention committees to pay expenditures that are "political" in nature, while permitting host committees and municipal funds to pay commercially motivated expenses.

The intent of the existing rules is for the convention committee to pay expenses incurred in connection with nominating its party's candidates, while the host committee and the municipal fund pay expenses incurred to make the convention city attractive to potential visitors and those seeking a site to hold future conventions or similar events. Some expenditures fit into both categories, which has caused confusion. Furthermore, the current rules do not state the types of expenditures that a host committee or municipal fund may *not* incur on behalf of a convention committee.

After the last several election cycles, some observers have raised questions about whether host committees and municipal funds continue to operate in the manner contemplated by the regulations. The Commission has encountered host committees and municipal funds that paid for expenses that the Commission determined were not for permissible host committee or municipal fund purposes. In an effort to provide additional guidance on the scope of expenses that may be paid by a host committee or municipal fund, the Commission noted that its "decisions regarding the audits of the 1996 convention and host committees serve to provide additional guidance for the 2000 election cycle." *Explanation and Justification for Public Financing of Presidential Primary and General Election Candidates*, 64 FR 49355, 49358 (Sept. 13, 1999). The Commission therefore seeks comment on whether donations to host committees and municipal funds should be considered to stem from political motivations, at least in part. If so, what changes to the Commission's rules should be made? Comment is also sought on whether the Commission should seek to limit the exception for host committee and municipal fund expenses to ensure that impermissible funds are not used in connection with the national nominating convention. If so, what measures should the Commission adopt? Is the total amount of expenses the appropriate measure, or should the Commission continue to focus on the purpose of the expenses?

Given the evolution in the operation of host committees and municipal funds, as well as the need to ensure, in light of BCRA, that a host committee or municipal fund's non-Federal funds are not used to provide facilities or services that constitute an impermissible contribution to convention committees, the Commission is proposing to reorganize the types of permissible expenses listed in current 11 CFR 9008.7(a)(4) and 9008.52(c). The current

regulations provide a definition of "convention expenses" in 11 CFR 9008.7(a)(4), which explains that convention expenses "include all expenses incurred by or on behalf of a political party's national committee or convention committee with respect to and for the purpose of conducting a presidential nominating convention or convention-related activities." 11 CFR 9008.7(a)(4). The current regulation includes a non-exhaustive list of 13 examples of particular types of convention expenses. *See* 11 CFR 9008.7(a)(4)(i) to (xiii).

*A. Revisions to Convention Expenses, 11 CFR 9008.7(a)(4).*

The Commission is considering two alternatives for revising 11 CFR 9008.7(a)(4), both of which are set out in the regulatory text portion of this NPRM. The alternatives are intended to reach the same result as to what expenses may be paid by convention committees, host committees, and municipal funds. They differ as to the location of various provisions regarding permissible and impermissible expenses. Alternative A would involve removing the list of thirteen examples of particular types of convention expenses in 11 CFR 9008.7(a)(4). The Commission's experience with national nominating conventions indicates that, generally speaking, the public funds provided for conventions are carefully conserved, given the convention committees' limited resources. Thus, the Commission is considering, under Alternative A, whether the convention committees' use of funds can be adequately addressed with the general and generic definition of "convention expenses" in section 9008.7(a)(4). Additionally, using a broad and generic definition is consistent with the approach in the Commission's regulations concerning qualified campaign expenses for presidential primary and general elections. *See* 11 CFR 9002.11 (general election definition of qualified campaign expense); 11 CFR 9004.4 (general election use of payments); 11 CFR 9032.9 (primary election definition of qualified campaign expense); and 11 CFR 9034.4 (primary election use of contributions and matching payments).

Moreover, a number of the examples qualify as "convention expenses" in such an unambiguous way, the value of stating them as an example is questionable. For example, one states that "salaries and expenses of convention committee employees \* \* \* and similar personnel, whose responsibilities involve planning, management or otherwise conducting

the convention." Could such expenses fail to meet the general definition of "convention expenses" in section 9008.7(a)(4) under any interpretation? A few of the examples impose some limitations that may not otherwise be obvious. Entertainment activity expenses is one such provision, 11 CFR 9008.7(a)(4)(viii). While provisions such as this one focus on preventing the convention committee from subsidizing other organizations, the Commission is considering whether the opposite arrangement is more frequently encountered. The Commission also seeks comment on two other particular provisions: 11 CFR 9008.7(a)(4)(iii) and (iv), which permit convention committees to reimburse national party committees for a portion of certain employees' compensation. Do convention committees typically make the arrangements contemplated by these provisions? Or do some employees temporarily leave the employ of the national party committees and become employees of the convention committees?

The Commission seeks comment on its proposed simplification of the definition of convention expenses under Alternative A. Particularly, are any of the thirteen examples necessary to include in the codified regulation? Are there any drawbacks to deleting the thirteen examples? Does the proposed definition of "convention expense" standing alone provide sufficient guidance?

Alternatively, the Commission seeks comment on whether it should refine the current list of examples. Under this alternative, the Commission would retain the general definition of "convention expenses" in 11 CFR 9008.7(a)(4). What changes should be made to the list of examples? Should any be deleted? Should other examples be added?

In contrast, Alternative B would retain the list of thirteen permissible convention expenses currently located in section 9008.7(a)(4), but move them to a new section, 11 CFR 9008.17. Under this alternative, new section 9008.17 would contain lists of permissible expenses for convention committees (paragraphs (a) and (b)), and host committees and municipal funds (paragraphs (b) and (c)). *See* proposed 11 CFR 9008.17. Paragraph (a) of section 9008.17 would define "convention expenses" generally in the same manner as it is currently defined in section 9008.7(a)(4). *See* proposed 11 CFR 9008.17(a). The thirteen specific permissible convention expenses that may be paid by convention committees currently listed in section 9008.7(a)(4)

would be moved to new section 9008.17(a) and (b).

Please note that under Alternative B, section 9008.7(a)(4) would be revised to cross reference 11 CFR 9008.17(a) and (b). Alternative B's version of section 9008.7(a)(4) is not set out in the regulation text that follows. Neither alternative would amend the prohibited uses of a convention committee's public funds listed in 11 CFR 9008.7(b).

*B. Substantive Changes to Permissible Host Committee and Municipal Fund Expenses.*

The Commission also proposes under both alternatives to revise the list of permissible expense purposes for host committees and municipal funds listed in current 11 CFR 9008.52(c)(1). The proposed revised listed would appear in paragraph (b) of section 9008.52, and would be based substantially on the current list in section 9008.52(c)(1). However, the Commission proposes a number of changes intended to clarify and add specificity as to the range of permissible expenses.

The Commission proposes to combine current 11 CFR 9008.52(c)(1)(i) and (c)(1)(x) to state that host committees and municipal funds may pay expenses incurred for the purpose of promoting the suitability of the city as a convention site including those related to the selection committee's accommodations. *See* 11 CFR 9008.52(b)(1). The Commission seeks comment on this proposed revision, particularly whether the rule should be limited to such costs incurred prior to signing the site selection agreement.

The Commission proposes to narrow the focus of the provision concerning the use of an auditorium or convention center and construction-related services in current section 9008.52(c)(1)(v). *See* proposed 11 CFR 9008.52(b)(5). To that end, the revised purpose would contain a non-exhaustive list of permissible construction-related services and would make it clear that only construction-related services for the purpose of designing, creating, or installing the physical or technological infrastructure for the conduct of the convention are permissible. *Id.* It would also codify in the regulations some of the Commission's decisions made in connection with the 1996 conventions. Specifically, the Commission considered a number of television production expenses and determined that some were permissible host committee expenses and others were not. Many of the distinctions the Commission made were based on whether the particular expense was related to the infrastructure of the

convention center. Another of the Commission's decisions related to 1996 reflected in the proposed section 9008.52(b)(5) was to permit host committees to pay telephone charges incurred by the convention committee.

The proposal would narrow the rule in current section 9008.52(c)(1)(vi) allowing for the provision of local transportation services. Whereas the current section allows for the provision of local transportation services without restriction, the Commission proposes to narrow this purpose to the host committee to provide such services only if they are made available to convention delegates and other individuals attending the convention. See proposed 11 CFR 9008.52(b)(6).

The rule in current section 9008.52(c)(1)(vii) allowing for the provision of law enforcement services would be expanded. In light of heightened security concerns involving high-profile events attended by large numbers of people, such as presidential conventions, the Commission proposes to broaden this purpose to permit the provision of "security services" as well as law enforcement services. *See* proposed 11 CFR 9008.52(b)(7). The Commission also proposes to delete the current requirement that only law enforcement services "necessary to assure orderly conventions" may be provided, in recognition of the fact that maintenance of orderly conventions is only one of many legitimate security concerns. *Id.* To codify another of the Commission's decisions in connection with the 1996 conventions, tickets, badges, and passes would be specifically mentioned as part of permitted security.

The provision related to hotel rooms in current 11 CFR 9008.52(c)(1)(ix) would also be clarified. This would codify another of the Commission's 1996 decisions. The provision would be clarified to permit host committees and municipal funds to provide hotel rooms to convention committees for whatever rate the host committee paid for the rooms, including at no charge or at a reduced rate based on the number of other rooms rented. *See* proposed 11 CFR 9008.52(c)(9).

The Commission proposes to eliminate the final purpose of "other similar convention related facilities and services," in current section 9008.52(c)(1)(xi), which has created confusion and could be improperly read to include a broad array of expenses that is inconsistent with a specific list of permitted expenses. The Commission seeks comment on this change.

The Commission seeks comment on the proposed changes to the list of

permissible host committee and municipal fund expense purposes. Specifically, does the proposed regulation provide sufficient guidance to inform convention committees, host committees, and municipal funds of what is permitted? Are other restrictions necessary to ensure that the permitted expenses are appropriate for host committees and municipal funds? Should other expense purposes be added to list? Are there any other aspects of the Commission's 1996 decisions that should be incorporated into the rules?

The Commission also proposes to add a new provision defining impermissible host committee and municipal fund expense purposes. This provision is proposed as paragraph (c) of section 9008.52 under Alternative A. It would include a general prohibition on providing anything of value to a convention committee, national political party committee, or any other political committee, except as expressly permitted under 11 CFR 9008.52(b)(1) and (5) through (8). *See* proposed 11 CFR 9008.52(c)(1). These purposes listed in paragraph (b) of proposed section 9008.52 are included in the exception because appropriate host committee and municipal fund expenses under these sections would involve the provision of something of value to the convention committee. The purposes listed in section 9008.52(b)(2) through (4) are not included in the exception because a host committee or municipal fund must not provide anything of value to the convention committee as it welcomes attendees to the convention city, facilitates commerce, or pays its own administrative expenses, which are the purposes listed in the cited provisions. The list of prohibited expense purposes includes another provision to prohibit the use of donations to host committee or municipal funds for expenses related to creating, producing, or directing the convention proceedings. *See* proposed 11 CFR 9008.52(c)(2). The proposal is intended to limit any of the permissible purposes so that if the expense would be prohibited by 11 CFR 9008.52(c)(2), then it would not be permitted even if it might also satisfy one of the permissible expense purposes in 11 CFR 9008.52(b). This proposal would codify one of the more significant of the Commission's decisions in connection with the 1996 conventions that the Commission cited as guidance in the 1999 rulemaking. *See Explanation and Justification for Public Financing of Presidential Primary and General Election Candidates*, 64 FR 49355,

4935 (Sept. 13, 1999). The Commission seeks comment on whether this proposal is sufficient to contain the non-Federal funds of host committees and municipal funds to uses consistent with the prohibitions and limitations imposed on the use of such funds by BCRA. Should additional expense purposes be added to the prohibited list? Do the listed prohibitions provide adequate guidance?

#### *C. Regulatory Structure of Permissible Host Committee and Municipal Fund Expenses.*

Again, the Commission is considering two alternatives that differ as to the location for the provisions regarding permissible host committee and municipal fund expenses. Both reflect the proposed substantive changes to the host committee and municipal fund permitted expenses described above in the section entitled "Substantive Changes to Permissible Host Committee and Municipal Fund Expenses." Alternative A would involve providing a revised list of permissible host committee/municipal fund expenses in paragraph (b) of section 9008.52. *See* proposed 11 CFR 9008.52. Alternative B would involve providing substantially the same revised list of permissible host committee and municipal fund expenses, but would locate them in paragraphs (b) and (c) of new section 9008.17, rather than in 11 CFR 9008.52(b). Paragraph (b) of new section 9008.17 would list expenses that may be paid by convention committees, host committees, or municipal funds and paragraph (c) of 9008.17 would list expenses that may be paid by host committees or municipal funds, but shall not be paid by convention committees. Finally, the new provisions expressly prohibiting certain expenses to host committees and municipal funds would appear in 11 CFR 9008.52(c) under Alternative A and in 11 CFR 9008.17(d) under Alternative B.

Please note that under Alternative B, 11 CFR 9008.52 and 9008.53 would be revised to cross reference to the appropriate provisions of the new section 9008.17; the Alternative B version of sections 9008.52 and 9008.53 is not set out in the proposed regulations that follow. The Commission seeks comment on the two different organization schemes for permissible host committee and municipal fund expenses.

#### **VII. Definition of "Local" Businesses, Labor Organizations, Other Organizations, and Individuals**

Commission regulations currently permit host committees and municipal

funds to receive donations from local businesses, local labor organizations, and other local organizations or individuals who maintain a local residence or who work for a local business, local labor organization, or local organization. 11 CFR 9008.52(c)(1) and 9008.53(b)(1). Frequently, the Commission has been called upon to determine whether a particular individual, corporation, labor organization, or other organization qualifies as “local” within the meaning of 11 CFR 9008.52(c)(1) and 9009.53(b). These often entail difficult and seemingly arbitrary distinctions. For example, does the presence of a single employee working from a home-based office constitute a business’s local office under section 9008.52 and section 9008.53?

Given the Commission’s proposal to tighten the restrictions that prohibit host committees and municipal funds from paying expenses that have primarily a political, rather than commercial, purpose, the Commission is considering whether it remains necessary to focus on the source of host committee and municipal fund donations. Accordingly, the Commission proposes to delete the requirements in 11 CFR 9008.52(c)(1) (host committees) and 11 CFR 9008.53(b)(1) (municipal funds) that only “local” businesses, labor organizations, other organizations, and individuals may make donations to host committees and municipal funds. A conforming change would also be made to 11 CFR 9008.12(b)(7). Under the Commission’s proposal, any business, labor organization, other organization, or individual, no matter where they are located, reside, or do business, would be permitted to make donations or in-kind contributions to host committees and municipal funds, provided those donations and in-kind contributions comply with the restrictions prescribed in the regulations. Regardless of what it does on the categories of expenses that host committees and municipal funds may pay for, should the Commission abolish the locality requirement with respect to donations to host committees and municipal funds? If the Commission adopted this proposal, would it make it more feasible for smaller and mid-size cities, whose corporate and business presence may not be as great as the nation’s largest cities, to successfully stage a national convention? The Commission seeks public comment on this approach.

As an alternative to deleting these “local” requirements, the Commission is considering an alternative approach that would retain the requirement that only “local” businesses, labor

organizations, and other organizations may make donations and in-kind contributions to host committees and municipal funds. Under this alternative, the Commission would clarify its 1999 amendment to these regulations. The accompanying Explanation and Justification explained that this language was intended to cover “individuals who work for a business’s local office, or a labor organization’s local office, or another organization’s local office.” *Explanation and Justification of Rules Governing Public Financing of Presidential Primary and General Election Candidates*, 64 FR 49355, 49358 (Sept. 13, 1999). However, the regulatory text did not require that the individuals work in the *local office* of the local organization; it only required that the individuals work for an organization that had a local office, which suggested that employees of a nationwide organization could donate to a host committee for any area where the organization maintained a facility. Thus, under this alternative, the Commission would revise the provision so that it would read “individuals \* \* \* who work for the local office of a business, labor organization, or other organization.” A third alternative approach the Commission is considering is to rely exclusively on an individual’s residence to determine whether the individual is local, instead of looking to an individual’s employment as well. The Commission seeks comment on each of these alternatives.

### **VIII. Host Committee and Municipal Fund Registration and Reporting Requirements**

Under 11 CFR 9008.51(a)(1), host committees must register with the Commission within 10 days of the date on which the party chooses the convention city. Host committees must also report using FEC Form 4 to disclose all receipts and disbursements, including in-kind contributions, made with respect to a national nominating convention. 11 CFR 9008.51(b). The initial reports are not due until the earlier of 60 days after the convention or 20 days prior to the presidential general election. *Id.* Subsequent reports are due quarterly, on the fifteenth day after the end of the quarter. 11 CFR 9008.51(b)(2). A final host committee report is due ten days after it ceases reportable activity. 11 CFR 9008.51(b)(3). Municipal funds, in contrast, are required to file only one report, which is due on the same day as the initial host committee report. 11 CFR 9008.51(c). This report need list only categories of facilities and services

provided for the convention for disbursements and the total amounts of general revenues and private donations received to defray the expenses. *Id.* This municipal fund reporting regime was intended to strike a balance between two competing concerns: ensuring adequate public disclosure, on the one hand, and avoiding the imposition of unduly burdensome requirements on municipalities and other governmental entities, on the other. *See Explanation and Justification for Regulations on Presidential Election Campaign Fund and Financing of Presidential Nominating Conventions*, 59 FR 33606, 33614 (June 29, 1994).

The Commission seeks comment on several proposed revisions to these registration and reporting requirements for host committees and municipal funds, as described below. First, the Commission’s experience has been that not all host committees are established within the ten days of the date on which the party chooses the convention, which is the current registration deadline. Accordingly, the Commission is proposing to revise the registration deadline in 11 CFR 9008.51(a) to require registration within ten days of the date on which the party chooses the convention city or ten days after the host committee is formed, whichever occurs later. Revised paragraph (a) would require that such registration be made by filing a Statement of Organization on FEC Form 1. The Commission is proposing that municipal funds be similarly treated as host committees, so they would be required to register with the Commission within ten days of the date on which the party chooses the convention city or ten days after the municipal fund is formed, whichever occurs later. Alternatively, the Commission seeks comment on whether either of the host committee or municipal fund registration deadlines should be ten days after they first solicit or accept donations for convention activities, or make disbursements for this purpose.

Second, the Commission proposes to apply the same reporting requirements that currently apply to host committees to municipal funds. Currently, paragraph (b)(1) of 11 CFR 9008.51 requires host committees to file a post convention report with the Commission on FEC Form 4. This report must be filed either 60 days following the last day that the convention is officially in session or 20 days prior to the presidential general election, whichever date is earlier. Currently, paragraph (b)(1) does not, however, provide a date for the close of books for host

committees' post-convention reports. The Commission proposes to revise paragraph (b)(1) to establish this date as of 15 days prior to the date of filing. This timeframe is consistent with the timeframes employed for post-convention reports filed by convention committees, *see* 11 CFR 9008.3(b)(2)(ii), and the Commission believes it should also provide sufficient time for host committees and municipal funds to prepare their reports. The Commission seeks comment on this approach.

Under current paragraph (b)(2) of 11 CFR 9008.51, host committees are required to file quarterly reports if they continue to accept receipts or make disbursements after the completion date of the post convention report. Host committees must continue to file such reports until they cease all activity. 11 CFR 9008.51(b)(2).

By contrast, under current paragraph (c) of 11 CFR 9008.51, municipal funds are required to file a post convention letter only rather than a post convention report on FEC Form 4. The timeframe within which municipal funds have to file this letter is the same as the timeframe applicable to host committees' post convention reports. Unlike host committees, however, municipal funds are not required to continue filing information with the Commission regarding their post convention activities, even if they accept receipts or make disbursements after the completion date of the post convention letter.

Given that the Commission is proposing to permit municipal funds to accept donations and make disbursements on the same terms as host committees, the Commission believes that it is necessary to apply the same reporting requirements to municipal funds that currently apply to host committees. Moreover, the Commission proposes to require continuing reporting in order to ensure that the reported information is "complete" as required by 2 U.S.C. 437(1). Accordingly, the Commission proposes to change paragraph (b) of 11 CFR 9008.51 to make the same reporting requirements apply to municipal funds as apply to host committees. As a conforming amendment, the Commission proposes to delete paragraph (c) of 11 CFR 9008.51, which sets forth the current municipal fund reporting requirements. The Commission seeks public comment on this approach, particularly on the issue of whether continuing reports are required in FECA to ensure completeness or are inconsistent with FECA's reference to a singular financial statement. 2 U.S.C. 437.

The Commission also proposes to revise paragraph (b)(1) of 11 CFR 5008.51 to clarify that reports filed pursuant to the requirements of 2 U.S.C. 437 contain the information specified in part 104, notwithstanding part 104's references to 2 U.S.C. 434. Although host committees and municipal funds are required to report by 2 U.S.C. 437(1), and 11 CFR part 104 refers to 2 U.S.C. 434, the Commission believes that having the information presented in the same format as that of other required reports would greatly aid the public disclosure of this financial activity. The Commission also proposes to revise 11 CFR 107.2 to reflect the revisions made to the registration and reporting requirements for host committees and municipal funds.

Finally, the Commission is proposing that convention committees, host committees, and municipal funds be required to submit a copy of all agreements that any one of those organizations makes with the city, county or State hosting the convention or any of the other convention-related organizations. *See* new 11 CFR 9008.3(b)(ii) (convention committees) and new 11 CFR 9008.51(a)(3) (host committees/municipal funds). Under the Commission's proposal, any such agreements would be required to be submitted along with the first required report due after the execution of the agreement. *Id.* This would include subsequent agreements to a previous agreement. Host committees and municipal funds would not be required to submit agreements made with convention committees if such agreements were already submitted to the Commission by the convention committee. *See* new 11 CFR 9008.51(a)(3).

The Commission is also seeking comment on which form convention committees, host committees, and municipal funds should use to report to the Commission. Current regulations require convention committees and host committees to use FEC Form 4 when reporting to the Commission. *See* 11 CFR 9008.3(b)(2)(i) and 9008.51(b)(1). The proposed rules that follow would maintain this requirement, in addition to requiring that municipal funds also use FEC Form 4 under new 11 CFR 9008.51(b)(1). The Commission is also considering eliminating this form and requiring convention committees, host committees, and municipal funds to file FEC Form 3P instead. FEC Form 3P is for reports of receipts and disbursements by authorized committees of candidates for the Office of President or Vice President. Use of FEC Form 3P would require some

adaptation for the convention scenarios. The Commission seeks comment on whether it should maintain its requirement of FEC Form 4, or if it should adopt FEC Form 3P for convention committees, host committees, and municipal funds.

#### IX. Convention Legal and Accounting Fund ("CLAF")

The Commission is proposing that convention committees be permitted to establish separate legal and accounting funds ("CLAF") to pay for the legal and accounting services related solely to compliance with the Federal Election Campaign Act and the Presidential Election Campaign Fund Act. *See* proposed 11 CFR 9008.8(b)(4)(ii)(B). Under this proposal, the funds raised by the CLAF would be required to be deposited in a separate account and would have to comply with the limitations and prohibitions of 11 CFR parts 110, 114 and 115. Contributions to the CLAF could not exceed \$25,000 per person, and \$15,000 per multi-candidate political committee in any calendar year.

If proposed section 9008.8(b)(4)(ii)(B) were adopted, the payment by the CLAF of compensation to any individual or entity for legal and accounting services to ensure compliance with the FECA and the Fund Act and rendered to or on behalf of the convention committee in connection with the presidential nominating convention or convention-related activities would not be considered an expenditure and would not count against the expenditure limitations of this section. The convention committee would report contributions received to pay for legal and accounting services on a separate Schedule A, and would report payments for legal and accounting services on a separate Schedule B.

The Commission notes that its current regulations permit convention committees some flexibility in this area. National party committees, under 11 CFR 9008.8(b)(4), may raise contributions for convention related legal and accounting costs subject to national party committee limits for individuals and multi-candidate committees and otherwise in compliance with 11 CFR parts 110, 114 and 115. Furthermore, the regulations do not require that a separate account be established for legal and accounting receipts and expenditures. The current regulations also exempt payments made for legal and accounting expenditures from the expenditure limitations of section 9008.8.

Nevertheless, the establishment of a separate convention legal and

accounting fund would provide several beneficial aspects for the convention committee. The CLAF would have a separate contribution limit from the National committee's limit but subject to the same limitations and restrictions of the National committee. May the Commission permit contributors to make one contribution of the amount specified in 2 U.S.C. 441a(a)(1)(B) or 2 U.S.C. 441a(a)(2)(B) to the political committees established and maintained by the same national political party and a second contribution up to that same amount to a CLAF? May the Commission permit such committees to accept such contributions consistent with 2 U.S.C. 441a(f) and 441i(a)(1) and (2)? Contributions raised for the CLAF and spent for the convention related legal and accounting costs would free up convention grant funds to cover political activities rather than being used to pay lawyers and accountants. And finally, funds raised for the CLAF would help ensure that sufficient resources were available to the convention committee for legal and compliance obligations. The Commission seeks comment on all issues raised by this proposal.

#### X. Effective Date

The Commission invites comment on what the effective date should be for any regulations it adopts relating to financing of the national nominating conventions. Specifically, considering that efforts related to the 2004 conventions are underway, should any or all changes to the Commission's regulations not become effective until the 2008 conventions? If certain changes are required by BCRA, which became effective on November 5, 2002, does the Commission have the legal authority under the Administrative Procedures Act or otherwise to postpone the effective date until after the 2004 conventions have been held? Can the Commission have final regulations effective, but not enforce them until the 2008 conventions? If the Commission took either of these actions, would the Commission be essentially suspending BCRA as it applies to convention financing until 2008 and, if so, does the Commission have the power legally to do so? Alternatively, should any arrangements that were memorialized in a written contract by a convention committee, host committee or municipal fund prior to the effective date of the regulatory changes be subject to the regulations in effect at the contract's execution? For example, in September 1999, the Commission declined to modify existing regulations regarding the division of expenses between

convention committees and host committees and stated it was doing so "given that the party committees have already entered into contractual agreements with the sites selected." *Explanation and Justification for Public Financing of Presidential Primary and General Election Candidates*, 64 FR 49355, 49358 (Sept. 13, 1999). If the Commission concludes that BCRA as a matter of law requires certain regulatory changes, and that therefore its existing regulations are no longer consistent with the statutory law, does the Commission nevertheless have the legal authority to decline to modify existing regulations or to postpone the effective date of new regulations? The Commission also seeks comments on alternative approaches to the effective date issue.

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

The attached proposed rules, if promulgated, would 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 would be affected by these proposals, which apply only to presidential candidates and their campaign committees. Presidential candidates, their committees and national party committees are not small entities. Most of these presidential campaigns receive full or partial funding from the Federal Government, and are subsequently audited by the Commission. The Commission reviews these rules every four years to reflect its experience in the previous presidential campaign. These rules propose no sweeping changes, and are largely intended to simplify this process. Many expand committee options; several are technical; and others codify past Commission practice. Those few proposals that might increase the cost of compliance by small entities would not do so in such an amount as to cause a significant economic impact.

#### List of Subjects

##### 11 CFR Part 104

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

##### 11 CFR Part 107

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

##### 11 CFR Part 110

Campaign funds, Political committees and parties.

#### 11 CFR Part 9003

Campaign funds, Reporting and recordkeeping requirements.

#### 11 CFR Part 9004

Campaign funds.

#### 11 CFR Part 9008

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

#### 11 CFR Part 9032

Campaign funds.

#### 11 CFR Part 9033

Campaign funds, Reporting and recordkeeping requirements.

#### 11 CFR Part 9034

Campaign funds.

#### 11 CFR Part 9035

Campaign funds.

#### 11 CFR Part 9036

Administrative practice and procedure, Campaign funds, Reporting and recordkeeping requirements.

#### 11 CFR Part 9038

Administrative practice and procedure, Campaign funds.

For the reasons set out in the preamble, it is proposed to amend Subchapters A, E and F of Chapter I of title 11 of the Code of Federal Regulations as follows:

#### PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

1. The authority citation for Part 104 would continue to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a, and 441a.

2. Section 104.5 would be amended by:

- a. Revising paragraph (b)(1)(i)(C);
- b. Revising paragraph (b)(1)(ii); and
- c. Revising paragraph (b)(2).

Revisions are to read as follows:

##### § 104.5 Filing dates (2 U.S.C. 434(a)(2)).

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) \* \* \*

(C) In lieu of the monthly reports due in November and December, a pre-election report shall be filed as prescribed at paragraph (a)(2)(i) of this section, a post-general election report shall be filed as prescribed at paragraph (a)(2)(ii) of this section, and a year-end report shall be filed no later than January 31 of the following calendar year.

(ii) If on January 1 of the election year, the committee does not anticipate

receiving and has not received contributions aggregating \$100,000 and does not anticipate making and has not made expenditures aggregating \$100,000, the committee shall file a preelection report or reports, a post general election report and, quarterly reports, as prescribed in paragraphs (a)(1) and (2) of this section.

\* \* \* \* \*

(2) *Non-election year reports.* During a non-election year, the treasurer shall file either monthly reports as prescribed by paragraph (b)(1)(i) of this section; or quarterly reports as prescribed by paragraph (a)(1) of this section. A principal campaign committee of a presidential candidate reporting under paragraph (b)(2) of this section may elect to change the frequency of its reporting from monthly to quarterly or vice versa during a non-election year only after notifying the Commission in writing of its intention at the time it files a required report under its current filing frequency. The committee will then be required to file the next required report under its new filing frequency. The committee may change its filing frequency no more than once per calendar year.

\* \* \* \* \*

## PART 107—PRESIDENTIAL NOMINATING CONVENTION, REGISTRATION AND REPORTS

3. The authority citation for part 107 would continue to read as follows:

**Authority:** 2 U.S.C. 437, 438(a)(8).

4. Section 107.2 would be revised to read as follows:

### § 107.2 Registration and reports by host committees and municipal funds.

Each host committee and municipal fund shall register and report in accordance with 11 CFR 9008.51. The reports shall contain the information specified in 11 CFR part 104.

## PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

5. The authority citation for part 110 would continue to read as follows:

**Authority:** 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d, 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h, and 441k.

6. Section 110.2 would be amended by adding paragraph (l) to read as follows:

### § 110.2 Contributions by multicandidate political committees (2 U.S.C. 441a(a)(2)).

\* \* \* \* \*

(l) *Expenditures for qualified campaign expenses of a Presidential*

*candidate.* (1) For purposes of this paragraph (l), qualified campaign expense has the same meaning as 11 CFR 9034.10(a).

(2) If a multicandidate political committee makes an expenditure for any qualified campaign expense of a candidate for President, who is not accepting public funding under 11 CFR subchapter E or F, on or after January 1 of the year immediately following the last Presidential election year, the expenditure shall be:

(i) Deemed to be an in-kind contribution by that multicandidate political committee to the authorized committee of the candidate for President; and

(ii) Subject to the contribution limitations set forth in paragraph (b) of this section.

(3) Any expenditure described in paragraph (l)(2) of this section, when aggregated with other contributions to the same candidate for President, that exceed the contribution limitation in paragraph (b) of this section shall be deemed to be an excessive contribution.

## PART 9003—ELIGIBILITY FOR PAYMENTS

7. The authority for part 9003 would continue to read as follows:

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

8. Section 9003.3 would be amended by:

- a. Revising the introductory language in paragraph (a)(1)(i);
- b. Revising paragraph (a)(1)(i)(C);
- c. Revising paragraph (a)(1)(v);
- d. Revising paragraph (a)(2)(i)(D);
- e. Revising paragraph (a)(2)(i)(G);
- f. Revising paragraph (a)(2)(i)(H);
- g. Adding new paragraph (a)(2)(i)(I);
- h. Revising paragraph (a)(2)(iii); and
- i. Revising paragraph (a)(2)(iv).

Revisions and additions are to read as follows:

### § 9003.3 Allowable contributions; General election legal and accounting compliance fund.

(a) \* \* \*

(1) \* \* \*

(i) A major party candidate, or an individual who is seeking the nomination of a major party, 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 individual 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. Before June 1 of the

calendar year in which a Presidential general election is held, contributions may only be deposited in the GELAC if they are made for the primary and exceed the contributor's contribution limits for the primary and are lawfully redesignated for the GELAC pursuant to 11 CFR 110.1.

\* \* \* \* \*

(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, it is accompanied by a proper designation for the GELAC, or it meets the requirements of 11 CFR 110.1(b)(5)(ii)(B). Any contribution that is designated in writing or redesignated for the GELAC shall not be matched pursuant to 11 CFR 9034.2.

\* \* \* \* \*

(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 redesignates the contribution for the GELAC in accordance with 11 CFR 110.1.

\* \* \* \* \*

(2) \* \* \*

(i) \* \* \*

(D) To make repayments under 11 CFR 9007.2, 9038.2, or 9038.3;

\* \* \* \* \*

(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;

(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; and

(I) To defray winding down expenses for legal and accounting compliance activities incurred after the end of the expenditure report period by either the candidate's primary election committee, general election committee, or both committees. For purposes of this section, 100% of salary, overhead and computer expenses incurred after the end of the expenditure report period shall be considered winding down expenses for legal and accounting compliance activities payable from GELAC funds, 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.*

(iii) Amounts paid from the GELAC for the purposes permitted by paragraphs (a)(2)(i) (A) through (F), (H) and (I) 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 100.146.) 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 and funds deposited in the GELAC may not be used to retire debts remaining from the presidential primaries, except that, after payment of all expenses set out in paragraph (a)(2)(i) of this section, and the completion of the audit and repayment process, including the making of all repayments owed to the United States Treasury by both the candidate's primary and general election committees, funds remaining in the GELAC may be used for any purpose permitted under 2 U.S.C. 439a and 11 CFR part 113, including payment of primary election debts.

9. Section 9003.5 would be amended by adding new paragraph (b)(4), to read as follows:

#### **§ 9003.5 Documentation of disbursements.**

\* \* \* \* \*

(b) \* \* \*

(4) The documentation requirements of 11 CFR 102.9(b) shall also apply to disbursements.

\* \* \* \* \*

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

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

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

11. Section 9004.4 would be amended by:

- a. Revising the section heading;
- b. Revising paragraph (a)(3);
- c. Revising paragraph (a)(4) introductory text;
- d. Removing paragraph (a)(4)(i);
- e. Redesignating paragraph (a)(5) as paragraph (a)(6) and redesignating paragraph (a)(4)(ii) as paragraph (a)(5) and revising newly-designated (a)(5); and
- f. Revising paragraph (b)(3).

Revisions, removals, and redesignations are to read as follows:

#### **§ 9004.4 Use of payments; examples of qualified campaign expenses and non-qualified campaign expenses.**

(a) \* \* \*

(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) To defray winding down costs pursuant to 11 CFR 9004.11; and

(5) To defray costs associated with the candidate's general election campaign paid after the end of the expenditure report period, but 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.

\* \* \* \* \*

(b) \* \* \*

(3) *Expenditures incurred after the close of the expenditure report period.* Except for accounts payable costs pursuant to paragraph (a)(5) of this section and winding down cost pursuant to 11 CFR 9004.11, any expenditures incurred after the close of the expenditure report period, as defined in 11 CFR 9002.12, are not qualified campaign expenses.

\* \* \* \* \*

12. Section 9004.9 would be amended by revising paragraph (a)(4) to read as follows:

#### **§ 9004.9 Net outstanding qualified campaign expenses.**

(a) \* \* \*

(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 end of the winding down period.

\* \* \* \* \*

13. New section 9004.11 would be added, to read as follows:

#### **§ 9004.11 Winding down costs.**

(a) *Winding down costs.* *Winding down costs* are 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. Winding down costs shall be considered qualified campaign expenses.

(b) *Winding down period.* The candidate may use public funds to pay for winding down costs only until the end of the winding down period. The winding down period begins on the day following the last day of the expenditure report period and continues until no earlier than:

(1) 30 days after the candidate's receipt of a Commission audit report that does not contain a repayment determination;

(2) 60 days after service of notice to the candidate of a Commission repayment determination if the candidate does not file a request for an administrative review of the repayment determination; or

(3) 30 days after service of notice to the candidate of the Commission's post-administrative review repayment determination or 30 days after service of notice of other final action concerning the administrative review.

(c) *Winding down limitation.* The total amount of winding down costs that may be paid for with public funds shall not exceed the lesser of:

(1) 2.5% of the expenditure limitation pursuant to 11 CFR 110.8(a)(2); or

(2) 2.5% of the total of:

(i) The candidate's expenditures subject to the expenditure limitation as of the end of the expenditure report period; plus

(ii) The candidate's expenses exempt from the expenditure limitation as of the end of the expenditure report period; except that

(iii) The winding down limitation shall be no less than \$100,000.

(d) *Allocation of primary and general election winding down costs.* A candidate who runs in both the primary and general election may divide winding down expenses between his or her primary and general election committees using any allocation method, including payment of 100% of these expenses by the primary or general election committee.

#### **PART 9008—FEDERAL FINANCING OF PRESIDENTIAL NOMINATING CONVENTIONS**

14. The authority citation for Part 9008 would be revised to read as follows:

**Authority:** 2 U.S.C. 437, 438(a)(8), 441i; 26 U.S.C. 9008, 9009(b).

15. Section 9008.3 would be amended by redesignating paragraph (b)(1)(ii) as paragraph (b)(1)(iii) and adding new paragraph (b)(1)(ii), to read as follows:

**§ 9008.3 Eligibility for payments; registration and reporting.**

\* \* \* \*

(b) \* \* \*

(1) \* \* \*

(ii) Each convention committee established by a national committee under paragraph (a)(2) of this section shall submit to the Commission a copy of any and all signed agreements that the convention committee has entered into with the city, county, or State hosting the convention, a host committee, or a municipal fund, including subsequent modifications to previous agreements. Each such agreement or modification shall be filed along with the first report due under paragraph (b)(2) of this section after the agreement or modification is executed.

\* \* \* \*

16. In section 9008.7, paragraph (a)(4) would be revised to read as follows:

**§ 9008.7 Use of funds.**

(a) \* \* \*

(4) "Convention expenses" include all expenses incurred by or on behalf of a political party's national committee or convention committee with respect to and for the purpose of conducting a presidential nominating convention or convention-related activities.

\* \* \* \*

17. Section 9008.8 would be amended by revising the paragraph heading for paragraph (b)(2), revising paragraph (b)(2), and revising paragraph (b)(4)(ii)(B) to read as follows:

**§ 9008.8 Limitation of expenditures.**

\* \* \* \*

(b) \* \* \*

(2) *Expenditures by municipal funds.* Expenditures made by municipal funds shall not be considered expenditures by the national committee and shall not count against the expenditure limitations of this section if the funds are spent in accordance with the requirements of 11 CFR 9008.53.

\* \* \* \*

(4) \* \* \*

(ii) \* \* \*

(B) The contributions raised by a Convention Legal and Accounting Fund to pay for legal and accounting services must comply with the limitations and prohibitions of 11 CFR parts 110, 114 and 115 and shall be deposited in a separate account. These contributions shall not exceed \$25,000 per person, and \$15,000 per multi-candidate political committee in any calendar year.

\* \* \* \*

18. Section 9008.9 would be revised to read as follows:

**§ 9008.9 Receipt of goods and services from commercial vendors.***(a) Standard reductions or discounts.*

A commercial vendor may sell, lease, rent or provide goods or services to the national committee with respect to a Presidential nominating convention at reduced or discounted rates, provided that it does so in the ordinary course of business. A reduction or discount shall be considered in the ordinary course of business if the commercial vendor has an established practice of providing the same reductions or discounts for the same amount of its goods or services to non-political clients, or if the reduction or discount is consistent with established practice in the commercial vendor's trade or industry. Examples of reductions or discounts made in the ordinary course of business include standard volume discounts and reduced rates for corporate, governmental or preferred customers. Reductions or discounts provided under this section need not be reported. For purposes of this section, *commercial vendor* has the same meaning as provided in 11 CFR 116.1(c).

(b) *Expenditure Limits.* The value of goods or services provided pursuant to this section will not count toward the national party's expenditure limitation under 11 CFR 9008.8(a).

19. Section 9008.10 would be amended by revising the introductory language to read as follows:

**§ 9008.10 Documentation of disbursements; net outstanding convention expenses.**

In addition to the requirements set forth at 11 CFR 102.9(b), the convention committee must include as part of the evidence of convention expenses the following documentation:

\* \* \* \*

20. Section 9008.12 would be amended by revising paragraph (b)(7) to read as follows:

**§ 9008.12 Repayments.**

\* \* \* \*

(b) \* \* \*

(7) The Commission may seek repayment, or may initiate an enforcement action, if the convention committee knowingly helps, assists or participates in the making of a convention expenditure by the host committee or municipal fund that is not in accordance with 11 CFR 9008.52 or 9008.53, or the acceptance of a contribution by the host committee or municipal fund from an impermissible source.

\* \* \* \*

21. Part 9008 would be amended by adding new § 9008.17, to read as follows:

**§ 9008.17 Payment for Convention and Host Committee or Municipal Fund Expenses.**

(a) *Convention expenses* include all expenses incurred by or on behalf of a political party's national committee or convention committee with respect to and for the purpose of conducting a presidential nominating convention or convention-related activities. The following convention expenses may be paid by the convention committee, but shall not be paid by the host committee or municipal fund:

(1) Salaries and expenses of convention committee employees, volunteers and similar personnel, whose responsibilities involve planning, management or otherwise conducting the convention;

(2) Salary or portion of the salary of any national committee employee for any period of time during which, as a major responsibility, that employee performs services related to the convention;

(3) Expenses of national committee employees, volunteers or other similar personnel if those expenses were incurred in the performance of services for the convention in addition to the services normally rendered to the national committee by such personnel;

(4) Expenses for conducting meetings of or related to committees dealing with the conduct and operation of the convention, such as rules, credentials, platform, site, contests, call, arrangements and permanent organization committees, including printing materials and rental costs for meeting space;

(5) Expenses for entertainment activities which are part of the official convention activity sponsored by the national committee, including but not limited to dinners, concerts, and receptions; except that expenses for the following activities are excluded:

(i) Entertainment activities sponsored by or on behalf of candidates for nomination to the office of President or Vice President, or State delegations;

(ii) Entertainment activities sponsored by the national committee if the purpose of the activity is primarily for national committee business, such as fund-raising events, or selection of new national committee officers;

(iii) Entertainment activities sponsored by persons other than the national committee; and

(iv) Entertainment activities prohibited by law;

(6) Expenses for printing convention programs, a journal of proceedings, agendas, and other similar publications;

(7) Administrative and office expenses for conducting the convention, including stationery, office supplies, office machines, and telephone charges; but excluded from these expenses are the cost of any services supplied by the national committee at its headquarters or principal office if such services are incidental to the convention and not utilized primarily for the convention;

(8) Payment of the principal and interest, at a commercially reasonable rate, on loans the proceeds of which were used to defray convention expenses;

(9) Expenses for gifts or monetary bonuses for national committee or convention committee employees, volunteers and convention officials in recognition for convention-related activities or services, provided that the gifts and bonuses do not exceed \$150 total per individual, and the total for all gifts and bonuses does not exceed \$20,000;

(10) Expenses for producing biographical films, or similar materials, for use at the convention, about candidates for nomination or election to the office of President or Vice President, but any other political committee(s) that use part or all of the biographical films or materials shall pay the convention committee for the reasonably allocated cost of the biographical films or materials used; and

(11) To defray any expenses related to creating, producing, or directing convention proceedings, such as directors, producers, and writers.

(b) The following expenses may be paid by the convention committee, host committee, or municipal fund. Convention committees, host committees, and municipal funds may use donated funds and in-kind donations they have received for the following purposes:

(1) To defray those expenses incurred for the purpose of promoting or evaluating the suitability of the city as a convention site, including accommodations and hospitality for officials and employees of the convention and national party committees who are responsible for choosing the sites of the conventions;

(2) To provide the convention committee use of an auditorium or convention center and to provide construction and related services for that location to design, create, or install the physical or technological infrastructure for the conduct of the convention, such as: construction of podiums; press facilities; seating;

lighting equipment; electrical systems; air conditioning systems; loudspeaker and other communication systems; computer networks; office facilities; office equipment; and other expenses for preparing, maintaining, or dismantling the physical site of the convention, including convention hall utilities;

(3) To defray the costs of various local transportation services that are widely available to convention delegates and other individuals attending the convention, including the provision of buses and automobiles;

(4) To defray the costs of law enforcement and other security services, facilities, and personnel, including tickets, badges, and passes;

(5) To defray the cost of using convention bureau personnel to provide central housing and reservation services; and

(6) To provide hotel rooms at no charge or a reduced rate on the basis of the number of rooms actually booked for the convention.

(c) The following expenses may be paid by the host committee or municipal fund, but shall not be paid by the convention committee. Convention committees are also prohibited from using public funds as specified in 11 CFR 9008.7(b). Host committees and municipal funds may use donated funds and in-kind donations they have received for the following purposes:

(1) To defray those expenses incurred in facilitating commerce, such as providing the convention attendees with shopping and entertainment guides and distributing the samples and promotional material specified in 11 CFR 9008.52(a);

(2) To defray those expenses incurred for welcoming the convention attendees to the city, such as expenses for information booths, receptions, and tours; and

(3) To defray the host committee's administrative expenses incurred by the host committee, such as host committee employee compensation and expense reimbursement, host committee office rent, and host committee liability insurance.

(d) *Prohibited uses of donations received by host committees and municipal funds.* Host committees and municipal funds shall not use donated funds or in-kind donations in connection with a national nominating convention for the following purposes:

(1) To provide anything of value to a convention committee, a national political party committee, or any other political committee, except as expressly permitted by paragraphs (b) and (c) of this section; or

(2) To defray any expenses related to creating, producing, or directing convention proceedings, such as directors, producers, and writers.

22. The title of Subpart B of Part 9008 would be revised to read as follows:

## **Subpart B—Host Committees and Municipal Funds Representing a Convention City**

23. Section 9008.50 would be revised to read as follows:

### **§ 9008.50 Scope and definitions.**

(a) *Scope.* This subpart B governs registration and reporting by host committees and municipal funds representing convention cities. Unsuccessful efforts to attract a convention need not be reported by any city, committee or other organization. Subpart B also describes permissible sources of funds and other permissible donations to host committees and municipal funds. In addition, subpart B describes permissible disbursements by host committees and municipal funds to defray convention expenses and to promote the convention city and its commerce.

(b) *Definition of host committee.* A host committee includes any local organization, such as a local civil association, business league, chamber of commerce, real estate board, board of trade, or convention bureau that satisfies all of the following conditions:

(1) It is not organized for profit;  
(2) Its net earnings do not inure to the benefit of any private shareholder or individual; and

(3) Its principal purpose is the encouragement of commerce in the convention city, as well as the projection of a favorable image of the city to convention attendees.

(c) *Definition of municipal fund.* A municipal fund is any separate fund or account of a government agency, municipality, or municipal corporation whose principal purpose is the encouragement of commerce in the municipality and whose receipt and use of funds is subject to control of officials of the State or local government.

24. Section 9008.51 would be amended by:

a. Revising the paragraph heading for paragraph (a);

b. Revising paragraph (a)(1);  
c. Adding paragraph (a)(3);  
d. Revising paragraph (b); and  
e. Deleting paragraph (c).

The revisions, additions, and deletions are to read as follows:

### **§ 9008.51 Registration and reports.**

(a) *Registration by host committees and municipal funds.*

(1) Each host committee and municipal fund shall register with the Commission by filing a *Statement of Organization* on FEC Form 1 within 10 days of the date on which such party chooses the convention city, or within 10 days after the formation of the host committee or municipal fund, whichever is later. In addition to the information already required to be provided on FEC Form 1, the following information shall be disclosed by the registering entity on FEC Form 1: The name and address; the name and address of its officers; and a list of the activities that the registering entity plans to undertake in connection with the convention.

\* \* \* \* \*

(3) Each host committee and municipal fund required to register with the Commission under paragraph (a) of this section, shall submit to the Commission a copy of any and all signed agreements that they have entered into with the city, county, or State hosting the convention, a host committee, a municipal fund, or a convention committee, including subsequent modifications to previous agreements, unless such agreements or modifications have already been submitted to the Commission by the convention committee. Each such agreement or modification shall be filed along with the first report due under paragraph (b) of this section after the agreement or modification is executed.

(b) *Post-convention and quarterly reports by host committees and municipal funds; content and time of filing.* (1) Each host committee or municipal fund required to register with the Commission pursuant to paragraph (a) of this section shall file a post convention report on FEC Form 4. The report shall be filed on the earlier of: 60 days following the last day the convention is officially in session; or 20 days prior to the presidential general election. This report shall be complete as of 15 days prior to the date on which the report must be filed and shall disclose all the information required by 11 CFR part 104 with respect to all activities related to a presidential nominating convention.

(2) If such host committee or municipal fund has receipts or makes disbursements after the completion date of the post convention report, it shall begin to file quarterly reports no later than 15 days after the end of the following calendar quarter. This report shall disclose all transactions completed as of the close of that calendar quarter. Quarterly reports shall be filed thereafter until the host committee or

municipal fund ceases all activity that must be reported under this section.

(3) Such host committee or municipal fund shall file a final report with the Commission not later than 10 days after it ceases activity that must be reported under this section, unless such status is reflected in either the post-convention report or a quarterly report.

#### Alternative to § 9008.17

25. Section 9008.52 would be revised to read as follows:

#### § 9008.52 Receipts and disbursements of host committees.

(a) *Receipt of goods or services from commercial vendors.* (1) *Definition of “commercial vendor.”* For purposes of this section, *commercial vendor* has the same meaning as provided in 11 CFR 116.1(c).

(2) *Standard reductions or discounts.* Commercial vendors may sell, lease, rent or provide their goods or services to the host committee at reduced or discounted rates, or at no charge, provided that they do so in the ordinary course of business. A reduction or discount shall be considered in the ordinary course of business if the commercial vendor has an established practice of providing the same reductions of discounts for the same amount of its goods or services to non-political clients, or if the reduction or discount is consistent with established practice in the commercial vendor's trade or industry. Examples of reductions or discounts made in the ordinary course of business include standard volume discounts and reduced rates for corporate, governmental or preferred customers. Reductions or discounts provided under this section need not be reported.

(3) *Items provided for promotional consideration.* (i) A commercial vendor may provide goods or services to a host committee in exchange for promotional consideration provided that doing so is in the ordinary course of business.

(ii) The provision of goods or services shall be considered in the ordinary course of business under this paragraph:

(A) If the commercial vendor has an established practice of providing goods or services on a similar scale and on similar terms to non-political clients, or

(B) If the terms and conditions under which the goods or services are provided are consistent with established practice in the commercial vendor's trade or industry in similar circumstances.

(iii) In all cases, the value of the goods or services provided shall not exceed the commercial benefit reasonably expected to be derived from the unique

promotional opportunity presented by the national nominating convention.

(iv) The host committee shall maintain documentation showing: the goods or services provided; the date(s) on which the goods or services were provided; the terms and conditions of the arrangement; and what promotional consideration was provided. In addition, the host committee shall disclose in its report covering the period the goods or services are received in a memo entry, a description of the goods or services provided for promotional consideration, the name and address of the commercial vendor, and the dates on which the goods or services was provided (e.g., “Generic Motor Co., Detroit, Michigan—ten automobiles for use 7/15–7/20, received on 7/14”, or “Workers Inc., New York, New York—five temporary secretarial assistants to work 8/1–8/30, received on 8/1”).

(4) *Items of de minimis value.*

Commercial vendors (including banks) may sell at nominal cost, or provide at no charge, items of *de minimis* value, such as samples, discount coupons, maps, pens, pencils, or other items included in tote bags for those attending the convention. The items of *de minimis* value may be distributed by or with the help of persons employed by the commercial vendor, or employed by or volunteering for a host committee. The value of the items of *de minimis* value provided under this paragraph need not be reported.

(b) *Receipt of donations from businesses, organizations, and individuals.* Businesses (including banks), labor organizations, and other organizations or individuals may donate funds or make in-kind donations to a host committee to be used only for the following purposes:

(1) To defray those expenses incurred for the purpose of promoting the suitability of the city as a convention site, including accommodations and hospitality for officials and employees of the convention and national party committees who are responsible for choosing the sites of the conventions;

(2) To defray those expenses incurred in facilitating commerce, such as providing the convention attendees with shopping and entertainment guides and distributing the samples and promotional material specified in paragraph (a) of this section;

(3) To defray those expenses incurred for welcoming the convention attendees to the city, such as expenses for information booths, receptions, and tours;

(4) To defray the host committee's administrative expenses incurred by the host committee, such as host committee

employee compensation and expense reimbursement, host committee office rent, and host committee liability insurance;

(5) To provide the convention committee use of an auditorium or convention center and to provide construction and related services for that location to design, create, or install the physical or technological infrastructure for the conduct of the convention, such as: construction of podiums; press facilities; seating; lighting equipment; electrical systems; air conditioning systems; loudspeaker and other communication systems; computer networks; office facilities; office equipment; and other expenses for preparing, maintaining, or dismantling the physical site of the convention, including convention hall utilities;

(6) To defray the costs of various local transportation services that are widely available to convention delegates and other individuals attending the convention, including the provision of buses and automobiles;

(7) To defray the costs of law enforcement and other security services, facilities, and personnel, including tickets, badges, and passes;

(8) To defray the cost of using convention bureau personnel to provide central housing and reservation services; and

(9) To provide hotel rooms for the rate paid by the host committee, including either at no charge or at a reduced rate on the basis of the number of rooms actually booked for the convention.

(c) *Prohibited uses of donations received by host committees.* Host committees shall not use donated funds or in-kind donations in connection with a national nominating convention for the following purposes:

(1) To provide anything of value to a convention committee, a national political party committee, or any other political committee, except as expressly permitted by paragraphs (b)(1) and (b)(5) through (8) of this section; or

(2) To defray any expenses related to creating, producing, or directing convention proceedings, such as directors, producers, and writers.

26. Section 9008.53 would be revised to read as follows:

#### **§ 9008.53 Receipts and disbursements of municipal funds.**

(a) *Receipt of goods and services provided by commercial vendors.* Municipal funds may accept goods or services from commercial vendors for convention uses under the same terms and conditions (including reporting

requirements) set forth at 11 CFR 9008.52 for host committees.

(b) *Receipt and use of donations to a municipal fund.* Businesses (including banks), labor organizations, and other organizations or individuals may donate funds or make in-kind donations to a municipal fund to pay for expenses listed in 11 CFR 9008.52(b), provided that such funds or in-kind donations shall not be used for the expenses listed in 11 CFR 9008.52(c).

27. Section 9008.55 would be added to read as follows:

#### **§ 9008.55 Solicitation of non-Federal funds for host committees and municipal funds.**

(a) Host committee and municipal fund payments made in compliance with this part shall be deemed *disbursements in connection with a Federal election* for purposes of 11 CFR part 300.

(b) Host committees and municipal funds shall not be eligible to make the certification pursuant to 11 CFR 300.11(d).

(c) Host committees and municipal funds shall not be eligible for the exception in 11 CFR 300.65.

#### **PART 9032—DEFINITIONS**

28. The authority for part 9032 would continue to read as follows:

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

29. Section 9032.9 would be amended by revising paragraph (c) to read as follows:

#### **§ 9032.9 Qualified campaign expense.**

\* \* \* \* \*

(c) Except as provided in 11 CFR 9034.4(e), expenditures incurred either prior to the date the individual becomes a candidate 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). Expenditures described under 11 CFR 9034.4(b) will not be considered qualified campaign expenses.

#### **PART 9033—ELIGIBILITY FOR PAYMENTS**

30. The authority citation for part 9033 would continue to read as follows:

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

31. Section 9033.11 would be amended by adding new paragraph (b)(4), to read as follows:

#### **§ 9033.11 Documentation of disbursements.**

\* \* \* \* \*

(b) \* \* \*

(4) The documentation requirements of 11 CFR 102.9(b) shall also apply to disbursements.

\* \* \* \* \*

#### **PART 9034—ENTITLEMENTS**

32. The authority citation for Part 9034 would continue to read as follows:

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

33. Section 9034.4 would be amended by:

- Revising the section heading;
- Revising paragraph (a)(3)(i);
- Revising paragraph (a)(3)(ii);
- Removing paragraph (a)(3)(iii);
- Adding paragraph (a)(6); and
- Revising paragraph (b)(3).

Revisions and additions are to read as follows:

#### **§ 9034.4 Use of contributions and matching payments; examples of qualified campaign expenses and non-qualified campaign expenses.**

(a) \* \* \*

(3) \* \* \*

(i) Winding down costs subject to the restrictions in 11 CFR 9034.11 shall be considered qualified campaign expenses.

(ii) If the candidate continues to campaign after becoming ineligible due to the operation of 11 CFR 9033.5(b), the candidate may only receive matching funds based on net outstanding campaign obligations as of the candidate's date of ineligibility. The statement of net outstanding campaign obligations shall only include 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, and shall not include winding down costs until the date on which the candidate qualifies to receive winding down costs under 11 CFR 9034.11. Each contribution made, dated and received after the candidate's date of ineligibility may be used to continue to campaign, and may be submitted for matching fund payments. Payments from the matching payment account that are received after the candidate's date of ineligibility may be used to defray the candidate's net outstanding campaign obligations, but shall not be used to defray any costs associated with continuing to campaign unless the candidate reestablishes eligibility under 11 CFR 9033.8.

\* \* \* \* \*

(6) Certain expenses incurred by ineligible candidates attending national nominating conventions.

(i) Expenses incurred by a candidate after the candidate's date of ineligibility to conduct a specific fundraising event at a national nominating convention needed to retire the candidate's net outstanding campaign obligations may be treated as qualified campaign expenses. The costs of the candidate's travel to attend such fundraising events, as well as the travel expenses of campaign staff who participate in the organization and administration of such events, may be treated as qualified campaign expenses. Travel costs consist of transportation, hotel or other lodging, and per diem subsistence for the candidate, the candidate's spouse, and campaign staff and volunteers who organize or administer the fundraising event. Expenses allocable to participation by the candidate or campaign staff in the national nominating convention, any other activities related to the convention, or any other activities conducted by the political party, other than such candidate fundraising events, are non-qualified campaign expenses. Expenses related to such a fundraising event may be treated as qualified campaign expenses only to the extent that, on the date of the fundraising event, the candidate has net outstanding campaign obligations pursuant to 11 CFR 9034.1(b).

(ii) Expenses incurred by a candidate after the candidate's date of ineligibility attributable to a meeting, reception, or other event at a national nominating convention to thank campaign employees, consultants and volunteers pursuant to paragraph (a)(5) of this section, may be treated as qualified campaign expenses so long as such a meeting, reception or event is restricted to attendees who served the candidate's primary campaign as employees, consultants, or volunteers. Travel expenses for the candidate to attend such events or for campaign staff who organize such events at the national nominating convention are not qualified campaign expenses.

(b) \* \* \*

(3) *General election and post-ineligibility expenditures.* Except for continuing to campaign costs and winding down costs pursuant to paragraph (a)(3) of this section and certain convention expenses described in paragraph (a)(6) of this section, any expenses incurred after a candidate's date of ineligibility, as determined under 11 CFR 9033.5, are not qualified campaign expenses. 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.

\* \* \* \* \*

34. Section 9034.5 would be amended by revising paragraph (b)(2) to read as follows:

**§ 9034.5 Net outstanding campaign obligations.**

\* \* \* \* \*

(b) \* \* \*

(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 end of the winding down period.

\* \* \* \* \*

35. Section 9034.10 would be added to read as follows:

**§ 9034.10 Expenditures for qualified campaign expenses by multicandidate political committees.**

(a) *Definition.* For purposes of this section, qualified campaign expense means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value—

(1) Incurred by, on behalf of, or for the benefit of a candidate or the candidate's authorized committee; and

(2) Made in connection with a candidate's campaign for nomination.

(3) Examples of a qualified campaign expense include, but are not limited to:

- (i) Polling expenses;
- (ii) Travel expenses;
- (iii) Staff salaries; and
- (iv) Office space expenses.

(b) If a multicandidate political committee makes an expenditure for any qualified campaign expense of a candidate on or after January 1 of the year immediately following the last Presidential election year, the expenditure shall be:

(1) Deemed to be an in-kind contribution by that multicandidate political committee to the authorized committee of the candidate and subject to the provision of 11 CFR 9035.1(a)(3)(iv);

(2) Subject to the contribution limitations set forth in 11 CFR 110.2(b);

(3) Included in the expenditures subject to the expenditure limitations in 11 CFR part 9035; and

(4) Subject to the provisions of 11 CFR 9038.1.

(c) Any expenditure described in paragraph (b) of this section, when aggregated with other contributions to the same candidate, that exceed the contribution limitation in 11 CFR 110.2(b) shall be deemed to be an excessive contribution.

36. New section 9034.11 would be added, to read as follows:

**§ 9034.11 Winding down costs.**

(a) *Winding down costs.* *Winding down costs* are costs associated with the termination of political activity related to a candidate's seeking his or her nomination for election, 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. Winding down costs shall be considered qualified campaign expenses.

(b) *Winding down period.* The candidate may use matching funds to pay for winding down costs only until the end of the winding down period. The *winding down period* begins on the day following the candidate's date of ineligibility for candidates who do not run in the general election, or on the day following the date 30 days after the general election for candidates who run in the general election, and continues until no earlier than:

(1) 30 days after the candidate's receipt of a Commission audit report that does not contain a repayment determination;

(2) 60 days after service of notice to the candidate of a Commission repayment determination if the candidate does not file a request for an administrative review of the repayment determination; or

(3) 30 days after service of notice to the candidate of the Commission's post-administrative review repayment determination or 30 days after service of notice of the Commission's determination that no repayment is owed.

(c) *Winding down limitation.* The total amount of winding down costs that may be paid for, in whole or part, with matching funds shall not exceed the lesser of:

(1) 5% of the overall expenditure limitation pursuant to 11 CFR 9035.1; or

(2) 5% of the total of:

(i) The candidate's expenditures subject to the overall expenditure

limitation as of the candidate's date of ineligibility; plus

(ii) The candidate's expenses exempt from the expenditure limitations as of the candidate's date of ineligibility; except that

(iii) The winding down limitation shall be no less than \$100,000.

(d) *Allocation of primary and general election winding down costs.* A candidate who runs in both the primary and general election may divide winding down expenses between his or her primary and general election committees using any allocation method, including payment of 100% of these expenses by the primary or general election committee.

(e) *Primary winding down costs during the general election period.* A primary election candidate who does not run in the general election 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. A primary election candidate who runs in the general election, regardless of whether the candidate receives public funds for the general election, must wait until 31 days after the general election before using any matching funds for winding down costs related to the primary election. No expenses incurred by a primary election candidate who runs in the general election prior to 31 days after the general election shall be considered primary winding down costs.

## PART 9035—EXPENDITURE LIMITATIONS

37. The authority citation for Part 9035 would continue to read as follows:

**Authority:** 26 U.S.C. 9035 and 9039(b).

38. Section 9035.1 would be amended by:

- a. Adding new paragraph (a)(3);
- b. Adding new paragraph (a)(4);
- c. Revising the paragraph heading in paragraph (c);
- d. Revising paragraph (c)(1); and
- e. Adding new paragraph (c)(3).

Additions and revisions are to read as follows:

### § 9035.1 Campaign expenditure limitation; compliance and fundraising exemptions.

(a) \* \* \*

(3) In addition to expenditures made by a candidate or the candidate's authorized committee(s) using campaign funds, the Commission will attribute to the candidate's overall expenditure

limitation and to the expenditure limitations of particular states under 11 CFR 110.8 the total amount of all:

(i) Coordinated expenditures under 11 CFR 109.20;

(ii) Coordinated communications under 11 CFR 109.21 that are in-kind contributions received or accepted by the candidate, the candidate's authorized committee(s), or agents, under 11 CFR 109.21(b);

(iii) Coordinated party expenditures, including party coordinated communications pursuant to 11 CFR 109.37 that are in-kind contributions received or accepted by the candidate, the candidate's authorized committee(s), or agents under 11 CFR 109.37(a)(3), and that exceed the coordinated party expenditure limitation for the presidential general election at 11 CFR 109.32(a); and

(iv) Other in-kind contributions received or accepted by the candidate or the candidate's authorized committee(s) or agents.

(4) The amount of each in-kind contribution attributed to the expenditure limitations under this section is the usual and normal charge for the goods or services provided to the candidate or the candidate's authorized committee(s) as an in-kind contribution.

### (c) *Compliance, fundraising and shortfall exemptions.*

(1) A candidate may exclude from the overall expenditure limitation set forth in paragraph (a) of this section an amount equal to 15% of the overall expenditure limitation as exempt legal and accounting compliance costs under 11 CFR 100.146. In the case of a candidate who does not run in the general election, for purposes of the expenditure limitations set forth in this section, 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. Candidates who continue to campaign or re-establish eligibility may not treat 100% of salary, overhead and computer 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 as exempt legal and accounting compliance expenses. For purposes of the expenditure limitations set forth in this section, candidates who run in the general election, regardless of whether they receive public funds, must wait until the day following the date 30 days after

the general election before they may treat 100% of salary, overhead and computer expenses as exempt legal and accounting compliance expenses.

\* \* \* \* \*

(3) A candidate may exclude from the overall expenditure limitation of this section 5% of the amount of any matching funds to which the candidate was entitled that were not paid to the candidate, or were paid on a date subsequent to the date on which payment of such matching funds was due to the candidate, because of a shortfall in the matching payment account.

\* \* \* \* \*

## PART 9036—REVIEW OF MATCHING FUND SUBMISSIONS AND CERTIFICATION OF PAYMENTS BY COMMISSION

39. The authority citation for Part 9036 would continue to read as follows:

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

40. Section 9036.1 would be amended by revising paragraph (b)(1)(ii) to read as follows:

### § 9036.1 Threshold submission.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(ii) The occupation and name of employer for individuals whose aggregate contributions exceed \$200 in an election cycle;

\* \* \* \* \*

41. Section 9036.2 would be amended by revising paragraph (b)(1)(v) to read as follows:

### § 9036.2 Additional submissions for matching fund payments.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(v) The occupation and employer's name need not be disclosed on the contributor list for individuals whose aggregate contributions exceed \$200 in the election cycle, but such information is subject to the recordkeeping and reporting requirements of 2 U.S.C. 432(c)(3), 434(b)(3)(A) and 11 CFR 102.9(a)(2), 104.3(a)(4)(i); and

\* \* \* \* \*

## PART 9038—EXAMINATIONS AND AUDITS

42. The authority citation for Part 9038 would continue to read as follows:

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

43. Section 9038.1 would be amended by revising paragraph (a)(2) to read as follows:

**§ 9038.1 Audit.**

(a) \* \* \*

(2) In addition, the Commission may conduct other examinations and audits from time to time as it deems necessary to carry out the provisions of this subchapter, including examinations and audits of multicandidate political committees operating under 11 CFR 9034.10.

\* \* \* \* \*

44. Section 9038.2 would be amended by:

- a. Revising paragraph (b)(2)(ii)(A);
- b. Revising the introductory text of paragraph (b)(2)(iii); and
- c. Revising paragraph (b)(4).

Revisions are to read as follows:

**§ 9038.2 Repayments.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) \* \* \*

(A) Determinations that a candidate, a candidate's authorized committee(s) or agents have made expenditures in excess of the limitations set forth in 11 CFR part 9035, by either making disbursements that are expenditures or by receiving or accepting in-kind contributions that are subject to the expenditure limitations pursuant to 11 CFR 9035.1(a)(3);

\* \* \* \* \*

(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 plus the usual and normal charge for all goods or

services provided as in-kind contributions. For the purposes of this paragraph (b)(2)(iii)—

\* \* \* \* \*

(4) The Commission may determine that the candidate's net outstanding campaign obligations, as defined in 11 CFR 9034.5, reflect a surplus. The Commission may determine that the net income derived from an investment or other use of surplus public funds after the candidate's date of ineligibility, less Federal, State and local taxes paid on such income, shall be paid to the Treasury.

\* \* \* \* \*

Dated: April 7, 2003.

**Ellen L. Weintraub,**

*Chair, Federal Election Commission.*

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