

**FEDERAL ELECTION COMMISSION**

**11 CFR Parts 104, 107, 110, 9001, 9003, 9004, 9008, 9031, 9032, 9033, 9034, 9035, 9036, and 9038**

[Notice 2003–12]

**Public Financing of Presidential Candidates and Nominating Conventions**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is revising several portions of its regulations governing the public financing of Presidential candidates, in both primary and general election campaigns, and Presidential nominating conventions. These regulations implement the provisions of the Presidential Election Campaign Fund Act (“Fund Act”) and the Presidential Matching Payment Account Act (“Matching Payment 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. The revised rules also implement the Bipartisan Campaign Reform Act of 2002, as it applies particularly to the Fund Act and the Matching Payment Act. The revised rules reflect the Commission’s experience in administering these programs, particularly during the 2000 election cycle, and anticipate some questions that may arise during the 2004 Presidential election cycle. Further information is contained in the Supplementary Information that follows.

**EFFECTIVE DATE:** Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 26 U.S.C. 9009(c).

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary C. Smith, Acting Associate General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, 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 publishing today the final text of revisions to 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 26 U.S.C. 9001–13 and 26 U.S.C. 9031–42. The revised rules apply certain provisions of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, 116 Stat. 81 (2002) (“BCRA”), to Presidential nominating convention financing. The revised rules also: (1) Limit the use of public funds for winding down costs for both primary and general election Presidential candidates; (2) clarify rules concerning the attribution of expenses to the expenditure limitations for Presidential primary candidates and repayments based on expenditures in excess of those limitations; (3) modify several aspects of General Election Legal and Accounting Compliance Funds; (4) require Presidential committees to notify the Commission prior to changing their non-election year reporting schedules; (5) create a new “shortfall bridge loan exemption” from a primary candidate’s overall expenditure limitation; (6) define “municipal funds” to eliminate the former distinction between permissible host committee activity that was impermissible for municipal funds; (7) subject municipal funds to the same disclosure rules as host committees; (8) delete the requirements that only “local” individuals and “local” entities may donate to host committees and municipal funds; and (9) make technical changes.

The Commission published a Notice of Proposed Rulemaking on April 15, 2003, 68 FR 18484. Written comments were due by May 23, 2003. The names of commenters and their comments are available at <http://www.fec.gov/register.htm> under “Public Financing of Presidential Candidates and Nominating Conventions.” The Commission held a public hearing on June 6, 2003 at which it heard testimony from 12 witnesses. Transcripts of the hearing are available at the Web site identified above. Please note that, for purposes of this document, the terms “commenter” and “comment” apply to both written comments and oral testimony at the public hearing.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the **Federal Register** at least 30 calendar days before they take effect. In addition, 26 U.S.C. 9009(c) requires that any rules or regulations prescribed by the Commission to carry out the provisions of the Fund Act be transmitted to the Speaker of the House of Representatives and the President of

the Senate 30 legislative days before they are finally promulgated. The final rules that follow were transmitted to Congress on July 31, 2003.

**Explanation and Justification**

**11 CFR Part 104—Reports by Political Committees**

*11 CFR 104.5(b)(1)—Election Year Reports*

The regulation at 11 CFR 104.5(b)(1) establishes the filing dates for reports by principal campaign committees (“PCC”s) of Presidential candidates, during election years in accordance with 2 U.S.C. 434(a)(3)(A). This rule is being revised to correct several citations to reflect changes to 11 CFR 104.5(a) promulgated when the Commission implemented BCRA’s new reporting requirements. The new citations refer to the same pre- and post-election reports so the reporting requirements are not changed. Specifically, the reference in 11 CFR 104.5(b)(1)(i)(C) is being changed from 11 CFR 104.5(a)(1)(i) to “paragraph (a)(2)(i) of this section” and the reference to 11 CFR 104.5(a)(1)(ii) is being changed to “paragraph (a)(2)(ii) of this section.” In 11 CFR 104.5(b)(1)(ii), the reference to 11 CFR 104.5(a)(1) is being changed to “paragraphs (a)(1) and (2) of this section.”

Section 104.5(b)(1)(ii) operates with two other provisions, § 104.5(b)(1)(i) and (iii), to specify the circumstances under which a Presidential PCC is not required to file monthly reports during the Presidential election year. A Presidential PCC must report monthly during an election year if contribution receipts or expenditures exceed or are anticipated to exceed \$100,000. 11 CFR 104.5(b)(1)(i) and (iii). In order for the three provisions to work harmoniously, all four conditions listed in § 104.5(b)(1)(ii) must be satisfied before a PCC is relieved of the monthly filing requirement. Therefore, section 104.5(b)(1)(ii) is being revised to replace the disjunctions “or” with the conjunctions “and” in three instances.

*11 CFR 104.5(b)(2)—Non-Election Year Reports: Quarterly and Monthly Reporting Requirements*

Section 104.5(b)(2) provides that principal campaign committees of Presidential candidates may file campaign reports in non-election years on either a monthly or a quarterly basis. The previous rules did not explain how PCCs may change their reporting frequency during a non-election year from monthly to quarterly or *vice versa*.

The Commission is revising § 104.5(b)(2) to set forth requirements for PCCs of Presidential candidates

seeking to change reporting frequency. One commenter stated that this change fills a gap in the regulations and provides a procedure for switching reporting similar to that for unauthorized committees, which will be beneficial even though Presidential candidates' PCCs will seldom switch reporting schedules. The revised rule at § 104.5(b)(2) allows a PCC 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 Presidential candidate's PCC is then required to file the next required report under its new filing frequency. In addition, a PCC may change its filing frequency no more than once in a calendar year. This rule establishes the same requirements as are found in 11 CFR 104.5(c) for unauthorized committees. The Commission notes that Presidential candidates' 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 must begin filing monthly reports at the next reporting period after it receives contributions or makes expenditures in excess of \$100,000.

#### **11 CFR Part 107—Presidential Nominating Convention, Registration and Reports**

##### *11 CFR 107.2—Registration and Reports by Host Committees and Municipal Funds*

The NPRM proposed revising the host committee and municipal fund registration and reporting requirements in 11 CFR 107.2 in two respects to reflect proposed changes to other Commission regulations. 68 FR at 18512. First, the NPRM proposed changing the title of section 107.2 as well as a reference in the text of the section to reflect the new definition of "municipal fund" it had proposed for 11 CFR 9008.50(c). Second, the NPRM proposed adding a sentence to 11 CFR 107.2 to reflect a revision it proposed for 11 CFR 9008.51 to require that host committee and municipal fund reports contain the information specified in 11 CFR part 104.

For the reasons explained in greater detail below, the Commission has decided to modify both 11 CFR 9008.50 and 11 CFR 9008.51 as proposed. See Explanation and Justification for new 11 CFR 9008.50(c) and 11 CFR 9008.51(b)(1), below. Accordingly, the Commission has decided to change the title of section 107.2 from "Registration and reports by host committees and

committees, organizations or other groups representing a state, city or other local government agency" to "Registration and reports by host committees and municipal funds." See new 11 CFR 107.2. Similarly, the Commission has decided to change the phrase used to describe municipal funds in the text of the section from "each committee or other organization or group of persons which represents a State, municipality, local government agency or other political subdivision in dealing with officials of a national political party with respect to matters involving a Presidential nominating convention" to "municipal fund." In addition, the Commission has decided to add the proposed sentence to § 107.2 requiring that host committee and municipal fund reports "shall contain the information specified in 11 CFR part 104." None of the commenters addressed these changes.

#### **11 CFR Part 110—Contribution and Expenditure Limitations and Prohibitions**

##### *11 CFR 110.2—Contributions by Multicandidate Political Committees (2 U.S.C. 441a(a)(2))*

For a full discussion of pre-candidacy expenditures by multicandidate political committees that are deemed in-kind contributions, see the Explanation and Justification for 11 CFR 9034.10 below. The language in the final rules at 11 CFR 110.2(l) varies from the language at 11 CFR 9034.10 because the candidate involved would not be publicly funded and, therefore, the consequence of a reimbursement would be simply to convert the payment from an in-kind contribution to an expenditure of the candidate. The qualified campaign expense concept and the attendant spending limit provisions are not implicated for candidates who are not publicly funded.

#### **11 CFR Part 9001—Scope**

##### *11 CFR 9001.1—Scope*

The Commission is making two technical amendments to this section to update the references to its other regulations.

#### **11 CFR Part 9003—Eligibility for Payments**

##### *11 CFR 9003.1—Candidate and Committee Agreement*

The Commission is making a technical amendment to the regulations on candidate agreements in § 9003.1 to update the reference to other regulations. Under revised paragraph (b)(8), candidates and their authorized

committees must agree to comply with the Commission's rules through 11 CFR part 400.

##### *11 CFR 9003.3—Allowable Contributions; General Election Legal and Accounting Compliance Fund*

The Commission is revising its rule governing General Election Legal and Accounting Compliance Funds ("GELACs") in several respects.

##### *11 CFR 9003.3(a)(1)—Sources*

#### 1. Solicitation of GELAC Funds

Regulations issued in 1999 barred the solicitation and deposit of GELAC contributions prior to June 1 of the calendar year of a Presidential general election. See former 11 CFR 9003.3(a)(1)(i) and (a)(1)(i)(A). Deposits earlier than June 1 were permitted only for excessive primary contributions that had been redesignated for the GELAC under the previous rules. The NPRM sought comment on whether to change the date to either April 1 or May 1. One commenter supported the greater flexibility that would be provided with an earlier date, but nonetheless described the proposed change as a relatively insignificant step. The only other commenter to address this issue saw no reason to change the June 1 date.

The 1999 explanation and justification stated that the June 1 rule was intended to address two issues. The first was that candidates who do not receive their party's nomination must return all GELAC contributions, which can be difficult if some have been used to defray overhead expenses or to solicit additional GELAC contributions. The second concern was to ensure that GELAC funds are not improperly used to make primary election expenditures. See *Explanation and Justification of the Rules Governing Public Financing of Presidential Primary and General Election Candidates*, 64 FR 49355, 49356 (Sept. 13, 1999). The Commission 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.* Because the effective date of these regulatory amendments was June 1, 2000, the pre-June 1 solicitation prohibition was not operative for the 2000 election cycle.

The Commission has decided to change the starting date for GELAC solicitations and most deposits to April 1. The earlier primary dates for some states in the 2004 Presidential election cycle are likely to lead to an earlier

resolution of nomination contests, even though the later than usual dates for the Presidential nominating conventions in 2004 will mean that the official start of the general election campaigns will be later in the cycle than usual. Therefore, the June 1 date in the former 11 CFR 9003.3(a)(1)(i) and (a)(1)(i)(A) is changed to April 1 of the election year as the starting date for GELAC solicitations and most deposits.

## 2. Redesignation of Excessive Contributions to the GELAC

The Commission is revising its rules governing the sources of GELAC funds at 11 CFR 9003.3(a)(1) to reflect its recent changes to its rules concerning the redesignation of excessive contributions at 11 CFR 110.1(b)(5)(ii)(B). See *Explanation and Justification for the Rules Governing Contribution Limitations and Prohibitions*, 67 FR 69928, 69930–32 (Nov. 19, 2002). These changes allow authorized committees to redesignate excessive primary contributions to the general election without obtaining a signed written document from the contributor under certain circumstances. Section 110.1(b)(5)(ii)(B) allows the candidate's committee to presume that the contributor of an excessive primary contribution would not object to a redesignation of any excessive amount to that candidate's general election, without obtaining written agreement from the contributor for the redesignation. *Id.* at 69931. The explanation and justification for this rule elaborated 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.

The NPRM proposed revisions to 11 CFR 9003.3(a)(1)(i), (a)(1)(i)(C) and (a)(1)(v) to permit publicly funded Presidential candidates to presume that those making excessive contributions for the primary election would consent to the redesignation of their contributions to the candidate's GELAC. The three commenters who addressed this issue supported these proposed changes.

The Commission has decided to revise its rules to reflect the adoption of the presumptive redesignations for the GELAC, with several changes from proposed 11 CFR 9003.3(a)(1) to clarify the operation of the rule and presumptive redesignations. Section 9003.3(a)(1)(i) is being revised to delete the phrase "by the contributor" to

permit the deposit of contributions redesignated by presumption into GELACs. Section 9003.3(a)(1)(i)(C) is not being revised because the NPRM's revisions for this provision incorrectly suggested that a contribution redesignated by presumption is considered a contribution designated in writing.

Section 9003.3(a)(1)(ii)(A), which the NPRM would not have revised, applies by its terms to "contributions made during the matching payment period that do not exceed the contributor's limit for the primary election." Because presumptive redesignations are limited to excessive contributions, contributions under this provision can only be redesignated in writing, so the reference to "redesignations" in section 9003.3(a)(1)(ii)(A)(3) is being revised to "written redesignations." Similarly, the citation to 11 CFR 110.1(b)(5) in § 9003.3(a)(1)(ii)(A)(4) is being revised to refer only to the provisions for written redesignations, which are 11 CFR 110.1(b)(5)(i) and (ii)(A). The recordkeeping requirements in 11 CFR 110.1(l) continue to be incorporated by citation into § 9003.3(a)(1)(ii)(A)(4).

Section 9003.3(a)(1)(iv) continues to require that contributions that are made after the beginning of the expenditure report period but that are not designated in writing for the GELAC must first be used to satisfy any primary committee debts or repayment obligations before they can be redesignated in writing for the GELAC. This approach constitutes an exception to the usual approach, which would consider these contributions as made with respect to the general election (*i.e.*, chronologically the next election under 11 CFR 110.1(b)(2)(i)). The Commission believes that the priority for primary committee obligations should be continued for these contributions. Consequently, the provision is being revised to state explicitly that these contributions are considered made with respect to the primary election. Additionally, § 9003.3(a)(1)(iv)(C) is being revised to state that the redesignation must be written; it is not presumptive. The contributions subject to redesignation under section 9003.3(a)(1)(iv) are those that do not exceed the contributor's limit for the primary election. These revisions were not in the NPRM, but they are consistent with the proposal, which would not have revised the primary preference and would have limited presumptive redesignation to excessive contributions.

Revisions to § 9003.3(a)(1)(v) make clear that excessive primary contributions can be presumptively

redesignated for the GELAC pursuant to 11 CFR 110.1(b)(5)(ii)(B). This applies to contributions made during the matching payment period or, pursuant to 11 CFR 9003.3(a)(1)(iv), during the expenditure report period. In order to do so, the phrase "obtains the contributor's redesignation for the GELAC" is being replaced with "redesignates the contribution for the GELAC," and the citation to 11 CFR 110.1 is being clarified to 11 CFR 110.1(b)(5)(i) and (ii)(A) or (ii)(B). This provision is also amended to note specifically that the timing requirement in the presumptive redesignation regulation, 11 CFR 110.1(b)(5)(ii)(B)(1), does not apply in this instance due to the operation of section 9003.3(a)(1)(iv).

Contributions made during the expenditure report period that are considered made with respect to the primary election may not be submitted for matching. See 11 CFR 9034.3(i). Although one commenter supported the matchability of such contributions, the Commission continues to consider these contributions to be unmatchable. As presumptively redesignated contributions, they were made for a purpose other than influencing the results of a primary election, and section 9034.3(i) prohibits matching such contributions.

Thus, considered as a whole, the revised 11 CFR 9003.3(a)(1) allows a candidate to treat all or part of an excessive primary contribution as a GELAC contribution, as long as the contribution meets the following requirements: (1) The contribution was not designated for a particular election; (2) the contribution would exceed the primary election contribution limitations if it were treated as a primary contribution; (3) the redesignation would not cause the contributor to exceed the contribution limitations; and (4) the treasurer provides a written notification to the contributor within 60 days of receipt of the contribution of the amount that was redesignated to the GELAC and that the contributor may request a refund. The Commission notes that presumptively redesignated contributions to the GELAC must be refunded if the contributor requests a refund or, as with all other contributions accepted for the GELAC, within 60 days of a candidate's date of ineligibility ("DOI") if the candidate does not become the nominee. See 11 CFR 9003.3(a)(1)(i)(A).

The NPRM also sought comment on expressly allowing 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). The Commission's rules at 11 CFR 110.1(b)(5)(ii)(C) allow authorized committees to redesignate excessive contributions presumptively to the primary election, under certain conditions. One commenter supported the proposal to apply these rules to the GELAC.

The Commission has determined that no further changes to §9003.3(a)(1) in this regard are necessary because there are no other GELAC contributions that could be presumptively redesignated for the primary election. Contributions that are designated in writing by the contributors for the GELAC would be ineligible for redesignation by presumption pursuant to 11 CFR 110.1(b)(5)(ii)(C)(2). Contributions that are not designated in writing for the GELAC will be considered made with respect to the primary election, except when the conditions for depositing them in the GELAC pursuant to 11 CFR 9003.3(a)(1)(iv) are satisfied. If these contributions exceed the contributor's primary election contribution limit, they may be presumptively redesignated pursuant to revised §9003.3(a)(1)(v).

#### *11 CFR 9003.3(a)(2)—Uses*

The rule on the uses of GELAC funds is being revised to update the permissible uses of GELAC funds consistent with BCRA and to otherwise improve the rule.

#### *11 CFR 9003.3(a)(2)(i)(D)—Primary Repayments*

The NPRM proposed amending the rule on the permissible uses of GELAC funds to permit Presidential candidates to use GELAC funds to make any repayments owed by their authorized committee for the primary election. GELACs are permitted to make general election repayments under 11 CFR 9007.2, and the proposed revisions at 11 CFR 9003.3(a)(2)(i)(D) specified that GELACs may also make primary campaign repayments required under 11 CFR 9038.2 or 9038.3. One commenter stated the revision is justified, provided the rule does not require that repayments must be made before other permissible uses of GELAC funds under paragraphs (a)(2)(i)(A) through (H). The only other commenter opposed the proposed revision, based on an expressed opposition to GELACs in general.

The Commission has decided to revise 11 CFR 9003.3(a)(2)(i)(D) to specify that the GELAC may be used to make repayments owed by the candidate's primary campaign committee pursuant to 11 CFR 9038.2

and 9038.3 in addition to general election repayments under 11 CFR 9007.2. This amendment to the GELAC rules is 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 statutory language is sufficiently broad to encompass primary election repayments. The effect of this revision, combined with the revisions to 11 CFR 9003.3(a)(2)(iv) described below, is to require Presidential candidates to use their GELAC funds for their primary committee repayments before any funds remaining in the GELAC can be dispensed pursuant to 2 U.S.C. 439a. Thus, this revision imposes an obligation on GELACs as much as it permits such funds to be used to satisfy debts to the United States Treasury.

#### *11 CFR 9003.3(a)(2)(i)(I)—Winding Down Expenses*

The NPRM proposed revisions to 11 CFR 9003.3(a)(2)(i) to restore a provision related to the use of GELACs for general election winding down expenses. In 1995, the Commission adopted 11 CFR 9004.4(a)(4)(iii), which stated 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 through 2003 editions. The Commission is reinstating this important provision, with certain revisions discussed below, and moving it to 11 CFR 9003.3(a)(2)(i)(I). No commenters addressed this rule.

In addition, the Commission has decided to add primary election winding down costs incurred after the end of the expenditure report period to the rule on permissible uses of GELAC funds at new 11 CFR 9003.3(a)(2)(i)(I). Two commenters addressed this proposal. One commenter expressed opposition to GELACs in general and, by extension, any expansion of permissible uses of GELACs. Another commenter thought it unfair to permit candidates who run in both the primary and the general elections to use GELACs to pay primary winding down costs, while primary candidates who do not compete in the general election are required to refund GELAC contributions. This commenter also faulted the use of any GELAC funds for

expenditures subject to the primary expenditure limit.

In reaching its decision, the Commission considered that the primary and general election campaign committees are simultaneously winding down following the expenditure report period and often share salary, overhead, and computer expenses. In addition, the primary and general election committees often share winding down expenses related to legal and accounting compliance such as attorneys and accountants. The regulation at 11 CFR 9034.4(a)(3)(iii) recognizes that a significant amount of winding down activity during this period is related to compliance and allows 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. Similarly, former 11 CFR 9004.4(a)(4)(iii) presumed these expenses were for compliance and therefore exempted them from the general election expenditure limitation pursuant to 11 CFR 9002.11(b)(5). Permitting the GELAC to pay salary, overhead, and computer costs after the end of the expenditure report period for both the primary and general election committees will allow candidates who run in both the primary and general elections to choose to pay these costs from the GELAC. Because these expenses are exempt from both the primary and general election expenditure limits, the concerns about one publicly financed campaign funding another are reduced. Any primary winding down costs not entitled to the compliance exemption will be subject to the primary expenditure limit, even if paid by the GELAC. Primary winding down costs paid by the GELAC must be included on the Statement of Net Outstanding Campaign Obligations pursuant to 11 CFR 9034.5(a)(1). A receivable from the GELAC must also be listed for any primary winding down costs paid with GELAC funds. 11 CFR 9034.5(a)(2)(iii). Any winding down costs paid by the GELAC will not count toward either winding down limitations in new 11 CFR 9004.11(b) or 9034.11(b).

The Commission acknowledges that primary candidates who do not compete in the general election will not have GELAC funds available for their winding down costs. This result is unavoidable, however, because FECA's contribution limits are per election. See 2 U.S.C. 441a. Thus, contributors to candidates who compete only in the primary are limited to contributing for that election only; while contributors to candidates who compete in both the

primary and general elections may contribute the full amount for both the primary election and the GELAC. The authorization to use GELAC funds to pay primary winding down expenses does not cause the different treatment, and it cannot justify permitting primary candidates to receiving contributions of twice the per-election limit.

*11 CFR 9003.3(a)(2)(iv)—Funds Remaining in the GELAC*

The rule at 11 CFR 9003.3(a)(2)(iv) concerning the use of GELAC funds is being revised to update the permissible uses of GELAC funds consistent with BCRA. The previous rule at 11 CFR 9003.3(a)(2)(iv) stated that if there are “excess campaign funds” after payment of all expenses set forth in §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,” and 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 rule governing the use of GELAC funds is being revised to replace the reference to “excess campaign funds” in 11 CFR 9003.3(a)(2)(iv) with “funds remaining in the GELAC” 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. All of the commenters who addressed this proposed change supported it, provided the purposes permitted under 2 U.S.C. 439a and 11 CFR part 113 continue to be permissible uses of funds remaining in the GELAC, which they are.

The Commission also is revising 11 CFR 9003.3(a)(2)(iv) to state expressly that GELAC funds must not be used for the purposes permitted under 2 U.S.C. 439a and 11 CFR part 113 that are beyond the uses listed in 11 CFR 9003.3(a)(2) until the completion of the audit and repayment process, which includes making any repayments owed. No commenters addressed this provision.

*11 CFR 9003.5—Documentation of Disbursements*

Commission regulations in 11 CFR 102.9(b) describe the requirements for the documentation of disbursements applicable to all political committees. Additional documentation requirements for publicly funded general election committees are set forth in 11 CFR

9003.5. Section 9003.5 is being revised to clarify that publicly funded general election candidates must comply with both the general rules at §102.9(b), as well as the specific rules applicable to publicly funded general election candidates governing the documentation of disbursements in 11 CFR 9003.5(b). No commenters addressed this revision.

**11 CFR Part 9004—Entitlement of Eligible Candidates to Payments; Use of Payments**

*11 CFR 9004.4—Use of Payments; Examples of Qualified Campaign Expenses and Non-Qualified Campaign Expenses*

Section 9004.4, which concerns qualified and non-qualified campaign expenses, is being revised in several respects. First, the section heading for 11 CFR 9004.4 is being modified to indicate that it contains examples of qualified campaign expenses and non-qualified campaign expenses. Previous §9004.4(a)(4)(ii) is being renumbered as §9004.4(a)(5) to clarify that accounts payable costs are a separate type of qualified campaign expense from winding down costs. There were no comments on these changes.

Second, the rules on winding down costs are being moved from paragraph (a)(4) to new §9004.11. Revised 11 CFR 9004.4(a)(4) provides that payments from the Presidential Election Campaign Fund may be used to defray winding down costs pursuant to 11 CFR 9004.11, which contains new rules on winding down costs and is discussed below.

*11 CFR 9004.4(a)(6)—Gifts and Bonuses*

The NPRM proposed revising the rules governing payment of gifts and bonuses by general election candidates at newly redesignated 11 CFR 9004.4(a)(6). The rules allow gifts and bonuses to be treated as qualified campaign expenses for general election candidates if they meet certain conditions. Under 11 CFR 9004.4(a)(6), 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. Monetary bonuses for employees and consultants in recognition of campaign-related activities or services must be provided for pursuant to a written contract made prior to the general election and must be paid no later than 30 days after the end of the expenditure report period. *Id.* The NPRM sought comment as to whether to limit the amounts of gifts and bonuses, whether to retain the requirement of a

written contract for monetary bonuses, and whether to create possible additional or different controls.

The Commission has decided to narrow the requirements with respect to when a written contract will be required for monetary bonuses. Because the Commission does not require written contracts for other employer-employee relationships, the new rule is more narrowly tailored to address the purpose of the restriction. The previous regulation was promulgated in reaction to a publicly funded campaign paying large monetary bonuses after the election upon discovery of excess public funds. The new rule addresses that abuse more directly while not otherwise limiting employment arrangements, in recognition of the absence of an incentive to waste public funds before the date of the election. Therefore, the new rule requires a written contract only when monetary bonuses are paid after the election.

*11 CFR 9004.4(b)(3)—Non-Qualified Campaign Expenses*

Section 9004.4(b) lists non-qualified campaign expenses. Paragraph (b)(3) previously stated that any expenditures incurred after the close of the expenditure report period were not qualified campaign expenses except to the extent permitted as winding down costs or accounts payable under 11 CFR 9004.4(a)(4). Section 9004.4(b)(3) is being clarified to state specifically that accounts payable pursuant to newly redesignated 11 CFR 9004.4(a)(5) and winding down costs pursuant to new §9004.11, discussed below, are considered qualified campaign expenses. There were no comments on these changes.

*11 CFR 9004.11—Winding Down Costs*

During the audit and repayment process, Presidential committees and the Commission’s auditors estimate costs associated with terminating the campaign and complying with the post-election requirements of the Fund Act and FECA, 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 have lengthened the audit and repayment processes for some campaigns. Both actual and estimated future winding down costs are included in 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 NOQCE and any surplus funds or resulting repayment. Disallowed winding down expenses can increase the amount of any surplus funds and the resulting repayment determination, or for primary election candidates, the disallowed expenses can decrease a candidate's entitlement to additional matching funds.

To avoid these disputes in the future, the Commission has decided to place certain reasonable restrictions on the amount of public funds used for winding down expenses. Thus, a new rule in 11 CFR 9004.11 is being added regarding general election candidates' winding down expenses. A comparable new rule applicable to primary election candidates is located in new 11 CFR 9034.11, which is discussed below.

*11 CFR 9004.11(a)—Definition of "Winding Down Costs"*

New 11 CFR 9004.11(a) contains the definition of winding down costs previously found in 11 CFR 9004.4(a)(4). The new definition is not significantly changed from the previous one, except that it clarifies that winding down costs include post-election requirements of both FECA and the Fund Act.

*11 CFR 9004.11(b)—Winding Down Limitation*

The NPRM proposed two restrictions for general election winding down costs: a temporal restriction and a monetary limitation of 2.5% of the general election spending limit.

Several commenters opposed the restrictions proposed in the NPRM. Some believed publicly funded Presidential campaigns do not have an incentive to inflate their winding down expenses because primary candidates would prefer to repay the ratio portion of any surplus funds, in order to have flexibility in spending the remaining surplus, and because general election candidates would prefer to use limited public funds over the course of the election.

The Commission disagrees. In the Commission's experience, some candidates might have incentives to prolong and increase their winding down activity, either to maximize their entitlement or to consume any remaining public funds while minimizing potential surplus repayments. Although primary candidates have more flexibility in spending surplus funds after making a *pro rata* repayment, this benefit is outweighed by the possibility of significantly reducing a potential repayment by contesting it. Similarly,

although general election candidates may not plan to reserve much money from active campaigning for winding down expenses, to the extent some of them have remaining public funds after the election, using them for winding down costs may be preferable to repaying them.

One commenter noted that the candidate's burden to demonstrate and document that winding down costs are qualified campaign expenses to avoid a repayment deters unreasonable winding down expenses. Others pointed out that winding down costs are not necessarily related to the amount of expenditures made by a campaign and that under-funded campaigns may have high winding down expenses because they did not have sufficient funds for compliance during the campaign and might need to spend more on post-election record reconstruction. Some noted that the costs of defending a campaign in enforcement matters, audits, repayment determinations, and other legal proceedings are unrelated to the amount of the candidate's expenditures, and that complaints and law suits may be politically motivated. Some expressed concern that winding down restrictions would result in numerous surplus repayments by primary candidates after their winding down in excess of the restrictions is disallowed, and candidates would have to raise private funds to defend themselves and defray winding down costs long after the election is over. Another argument against the winding down limit was that public funding is intended to reduce reliance on private contributions and that limiting winding down while allowing winding down costs to be paid from the GELAC would encourage candidates to rely more heavily upon private funds in the GELAC to meet legitimate and unavoidable campaign expenses.

On the other hand, one commenter argued that the three general election campaigns in 2000 that wound down for less than the proposed limit show that the limit is unnecessary because candidates would only exceed the limit under extraordinary circumstances.

**1. Monetary Limit**

The Commission has decided to adopt new 11 CFR 9004.11(b), which establishes a monetary limitation on the total amount of general election winding down expenses that may be paid for with public funds. In considering this issue, the Commission reviewed the amounts spent for winding down costs by publicly funded candidates during the 2000 election cycle and 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 winding down limitation of 2.5% of the expenditure limitation. The last committee paid some of its winding down expenses with GELAC funds, which reduced its winding down costs to less than 2% of the expenditure limitation.

The "winding down limitation" in new § 9004.11(b) limits the total amount of publicly funded winding down expenses for general election candidates to the lesser of: (1) 2.5% of the expenditure limitation; or (2) 2.5% of the total of: (A) the candidate's expenditures subject to the expenditure limitation as of the end of the expenditure report period; plus (B) the candidate's expenses exempt from the expenditure limitation, such as fundraising expenses, as of the end of the expenditure report period. Basing the winding down limitation on a candidate's expenditures or on the maximum expenditure limitation recognizes that larger campaigns will generally have more winding down expenses than smaller campaigns. Notwithstanding the amount determined based on these calculations, the new rule permits all general election candidates to spend at least \$100,000 on winding down costs. The \$100,000 allowance recognizes that all publicly funded committees incur certain winding down expenses related to the requirements of the audit and repayment process that do not vary with the total amount of the committees' expenditures.

Based in part on the 2000 winding down data and experience in prior election cycles, the Commission is satisfied that campaigns can wind down in compliance with the 2.5% limit without any hardship and that the limitation will affect only campaigns with unusually high winding down costs. The monetary limitation is necessary to ensure that publicly funded campaign committees wind down as quickly and efficiently as possible and do not inflate winding down costs in order to avoid a surplus repayment to the United States Treasury. The monetary limitation establishes a fair and readily determined amount to ensure that all campaigns are treated consistently with respect to winding down costs and that public funds are used in accordance with statutory purposes.

The Commission expects that most PCCs of Presidential candidates will incur winding down expenses substantially below the new dollar limitations. Campaigns with unusually high compliance costs may use their GELAC or a primary candidate's private funds after no public funds remain in the candidate's accounts to pay for such expenses. Paying winding down expenses with a GELAC is justified because a large amount of winding down expenses are related to compliance and most winding down expenses are not directly related to active campaigning.

In practice, the winding down limitation for fully funded major party general election candidates will be the maximum winding down limitation, 2.5% of the expenditure limitation for general election candidates under § 9004.11(b)(1). This maximum winding down limitation is calculated based upon a percentage of the general election candidate's expenditure limitation pursuant to 2 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, and 9002.11(b)(5). Currently, the general election expenditure limitation is equal to \$72,960,000, so the 2.5% limit would equal \$1,824,000.<sup>1</sup>

In contrast, the winding down limitation for most minor party general election candidates will equal 2.5% of their expenses during the expenditure report period under section 9004.11(c)(2).<sup>2</sup> The final rule addresses 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, § 9004.11(b)(2)(i), plus their exempt expenses, § 9004.11(b)(2)(ii). 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. 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), *i.e.*, 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). 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). Thus, the exempt expenses considered under § 9004.11(c)(2)(ii) will include all three of the types of exempt expenses.

For purposes of calculating the amount of the winding down limitation under § 9004.11(b)(2), a candidate's expenses will include both disbursements and accounts payable as of 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 should 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 calculation does not include any expenditures in excess of the general election candidate's 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. In addition, the new rule restricts the expenses used to calculate the winding down limitation to the period prior to 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.

## 2. Expenses Subject to Winding Down Limitation

All expenses incurred and paid by a candidate during the winding down period, including fundraising costs, are subject to the new winding down limitation in new 11 CFR 9004.11. Under the new rule, the use of public funds to pay for winding down expenses in excess of these restrictions will constitute a non-qualified campaign expense that may be subject to repayment. However, these restrictions apply to the use of public funds or a

mixture of public and private funds for winding down costs and will not limit the payment of winding down expenses from private contributions in a candidate's GELAC. Thus, expenses for legal and accounting compliance costs paid for with public funds count against the winding down limitation, but any winding down costs paid by a GELAC do not.

### 11 CFR 9004.11(c)—Allocation of Primary and General Winding Down Costs

Candidates who run in both the primary and general elections must allocate winding down expenses between the primary and general election campaigns. This can be complicated during the period after the general election because both campaigns are winding down simultaneously, often using the same staff, offices, equipment, vendors and legal representatives. To simplify the allocation, the NPRM proposed that committees could 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.

One commenter advocated allowing campaigns to use any reasonable method that would require expenses indisputably related to one election be paid as winding down expenses of that election while shared winding down expenses such as legal fees could be allocated on any reasonable basis reflecting a good-faith estimate.

The final rules in new 11 CFR 9004.11(c) allow a candidate who runs in both the primary and general election to divide winding down costs between the primary and general campaigns using any reasonable allocation method. The final rule also specifies that an allocation method will be considered reasonable if it divides the total winding down costs between the primary and general election committees and results in no less than one third of total winding down costs allocated to each committee. With this provision, the Commission has created a range of winding down cost allocations between a candidate's primary and general election authorized committees that will be considered *per se* to be the result of a reasonable method and therefore in compliance with this requirement. If particular circumstances require a candidate to allocate winding down costs so that one of the two committees is allocated less than one third of the total costs, with the other necessarily being allocated more than two thirds, those committees will be required to

<sup>1</sup> Before the 2004 general election, the general election expenditure limit under 2 U.S.C. 441a(b)(1)(B) is subject to an additional annual adjustment under 2 U.S.C. 441a(c).

<sup>2</sup> If major party candidates were required to solicit contributions to make up a deficiency in public funds, the winding down limitation would also equal 2.5% of their expenses during the expenditure report period.

demonstrate that their allocation method was reasonable. This new rule will 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 have larger potential repayments. Any winding down costs paid by the GELAC can be allocated to either the primary or the general election committees for this purpose, although they will not count toward either winding down limitation in new 11 CFR 9004.11(b) or 9034.11(b).

#### *Temporal Limits*

The NPRM proposed a temporal restriction on winding down expenses, the "winding down period," based on the length of a committee's audit and repayment process, including the administrative review of the repayment determination. Several commenters opposed these temporal limits because after the expiration of this period, campaigns may be involved in enforcement actions, repayment determination court challenges, investigations by other government entities, or other lawsuits.

The Commission believes that the winding down monetary limitation will be sufficient to address its concerns that winding down be completed expeditiously. Therefore, the Commission has decided not to include any temporal limitation in the final rule at 11 CFR 9004.11. Because the Commission is not including the temporal limit in the final rule, it is also not making the conforming changes proposed in the NPRM to 11 CFR 9004.9(a)(4) and 9034.5(b)(2) that would have referred to the winding down period in the sections discussing NOQCE and NOCO statements.

#### *Other Winding Down Proposals*

The NPRM also proposed increasing allowable winding down expenses to reflect the number of compliance actions involving a Presidential candidate's campaign committee.

One commenter stated that the Commission should not limit the use of public funds for costs related to compliance actions because candidates do not elect these expenses, and the

compliance process is often used for political ends. This commenter further noted that campaigns and the Commission regularly dispute factual and legal issues, and responding to a compliance matter is an unwanted diversion that does not advance the candidate's campaign. The commenter also suggested that candidates should have the option of a separate legal defense account similar to a GELAC. In addition, this commenter suggested that recent changes to the public financing rules, such as the limitation on the timing for creating a GELAC, limiting legal and compliance costs to 15% of the primary spending limit and the new limits on winding down costs, discourage spending money on compliance.

As discussed above, winding down costs resulting from compliance actions were considered in determining the winding down limitations. This new rule allows candidates to classify compliance matters arising from the campaign as winding down costs. To the extent that such costs fall within the specified limitations, candidates may use public funds to pay for them. This rule is consistent with the Commission's prior practice. In addition, new 11 CFR 9004.11(a) clarifies that winding down costs include the costs of complying with both the FECA and the Fund Act (*e.g.*, costs related to the audit and repayment processes and reporting and recordkeeping, as well as costs incurred in responding to compliance matters). If a general election candidate exceeds the winding down limitations, private funds will be available through their GELAC for compliance expenses related to enforcement matters. For primary candidates, private funds will be available once the public funds in the candidates' accounts have been exhausted.

#### *Combining Primary and General Winding Down Limitations*

The Commission also considered whether to allow candidates who accept public funds for both the primary and general elections to combine their primary and general election winding down limitations into a joint monetary limit for the total winding down expenses of both committees. The Commission decided not to make this change because primary and general election winding down expenses are legally distinct and a candidate's primary and general election committees are generally treated as separate entities; thus, they should be required to adhere to separate winding down limitations. See new 11 CFR 9004.11(a) and 9034.11(a).

#### *Alternative Proposals to Winding Down Restrictions*

The NPRM sought comment on disallowing the use of public funds to pay any winding down costs. Under such an alternative, a primary election candidate would not have been permitted to use public funds to pay for any expenses incurred after the candidate's DOI or any expenses for goods or services to be used after the DOI. A general election candidate would not have been permitted to use public funds to pay for any expenses incurred after the end of the expenditure report period or any expenses for goods or services to be used after the end of the expenditure report period.

Two commenters opposed this proposal. One commenter argued that 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 "promptly" to repay a ratio of any surplus funds, is not determinative as to whether winding down costs are qualified campaign expenses because the statute contemplates a completely different system than the current audit process administered by the Commission. This commenter asserted that the statute envisioned that all issues related to the campaign, including the audit, repayment and enforcement matters would conclude within six months and advocated a complete overhaul of the audit and related enforcement process if winding down costs were to be limited. Another commenter stated that winding down expenses are unavoidable costs of a campaign, and that changing the rules would make candidates spend more time raising private funds to pay for these unavoidable costs, which could prolong the life of losing campaigns that must seek contributions to pay winding down costs.

The Commission is retaining its long-standing treatment of winding down costs as qualified campaign expenses. Although winding down costs are a category of qualified campaign expenses not specifically identified in the Fund Act or the Matching Payment Act, it is necessary to allow them to ensure that candidates may respond adequately during the audit, repayment and enforcement processes.

The NPRM also presented a second alternative approach to winding down costs which would have more precisely delineated the types of winding down costs that are permissible, consisting of

staff salaries, legal and accounting services, office space rental, utilities, computer services, other overhead expenses, consultants, storage, insurance, office supplies and fundraising expenses. One commenter said this alternative could be useful if the list is not intended to be exhaustive, because of the possibility of unforeseen but legitimate types of winding down costs.

The Commission has decided not to adopt this alternative approach because it is unlikely to resolve the issues that have arisen and could generate more issues. 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 rather than focusing on the type of expenditure. A list of permissible winding down expenses would not address these frequently disputed issues, nor would it reduce the amount of winding down expenses.

Please note that the Commission made no changes to 11 CFR 9008.10(g)(7), governing winding down costs of convention committees.

### **11 CFR Part 9008—Federal Financing of Presidential Nominating Conventions**

#### *11 CFR 9008.3—Eligibility for Payments; Registration and Reporting*

The Commission has decided to revise the convention committee reporting requirements in 11 CFR 9008.3 to require convention committees to submit a copy of all written contracts and agreements they make with the cities, counties, or States hosting the convention or any host committee or municipal fund. See new 11 CFR 9008.3(b)(1)(ii). Convention committees, host committees, and municipal funds are also required to submit any subsequent modifications to a previous contract or agreement.

The Commission believes that it is necessary to have copies of all such agreements in order to understand fully the obligations that each of those entities has agreed to assume with respect to the convention. Such contracts must be submitted with the report for the applicable reporting period. Related changes are also being made to the host committee and municipal fund reporting requirements. See Explanation and Justification for 11 CFR 9008.51, below. The wording of the final rule is being slightly clarified from the proposed rule, which was not addressed by any of the commenters.

#### *11 CFR 9008.7(a)(4)(xii)—Use of Funds—Gifts and Bonuses*

The NPRM sought comment on revising the rules governing the payment of gifts and bonuses by primary and general election candidates and by convention committees. The Commission has decided to make changes to 11 CFR 9008.7(a)(4)(xii), governing gifts and bonuses for convention committees, to make that section more consistent with the rules governing primary and general election committees. See newly redesignated 11 CFR 9004.4(a)(6) and 9034.4(a)(5). Specifically, the structure of the section is being changed to separate the requirements for gifts from those for bonuses. The new paragraph on bonuses requires that bonuses paid after the last date of the convention to committee staff and consultants in recognition of convention-related activities or services must be provided for pursuant to a written contract made prior to the date of the convention, and must be paid no later than 30 days after the convention.

#### *11 CFR 9008.8—Limitation of Expenditures*

The NPRM proposed two revisions to 11 CFR 9008.8. The first proposal was to revise references in the title and text of paragraph (b)(2) to reflect the proposed new definition of “municipal fund” in 11 CFR 9008.50(c). 68 FR at 18508. As explained below, the Commission is adopting the proposed definition of “municipal fund.” See Explanation and Justification for new 11 CFR 9008.50(c). Thus, the Commission is revising 11 CFR 9008.8(b)(2) to change the references in this provision from “municipal corporations” to “municipal funds.” The NPRM also proposed deleting “government agencies.” However, because some State or local governments may directly make convention expenditures, the references to government agencies are retained.

The second proposal in the NPRM was to revise 11 CFR 9008.8(b)(4)(ii)(B) to permit convention committees to establish separate legal and accounting compliance funds (“CLAF”). 68 FR at 18512. Under this proposal, contributions to CLAFs would only have been permitted to be used to pay for legal and accounting services related to compliance with FECA and the Fund Act. Disbursements from the CLAF for legal and accounting compliance services would not have been considered “expenditures” and, therefore, would not have counted against the convention committee’s expenditure limit in 11 CFR 9008.8. The CLAF would have had a separate

contribution limit from the national committee’s limit.

The NPRM also sought comment on the contribution limit that should apply to contributors who wish to contribute to both the CLAF and to the political committees established and maintained by the same national political party. The only commenter to address this issue argued that allowing convention committees to establish CLAFs would amount to effectively doubling the national party contribution limit in 2 U.S.C. 441a(a)(1)(B) by allowing a donor to make two contributions up to the national party limit, one to the national party itself and the other to the CLAF. The commenter challenged the Commission’s authority to allow convention committees to establish CLAFs because the receipt of public money by convention committees is conditioned on their abiding by set spending limits. The commenter also asserted that CLAFs would allow “the infusion of private money into a system where Congress intended the party spending to be fully financed with public funds.”

The Commission has decided that permitting the national party committees to pay compliance expenses of the convention committee under 11 CFR 9008.8(b)(4)(ii) adequately addresses this issue. Therefore, the Commission has decided not to allow convention committees to establish separate legal and accounting compliance funds as proposed in the NPRM.

In addition to the proposals in the NPRM, the Commission is revising 11 CFR 9008.8(b)(4)(ii)(B), which previously stated the contribution limits for contributions to national political party committees from persons and from multicandidate committees. BCRA amended the first of those two limits and indexed the limitation to inflation. Therefore, the Commission is revising the regulation to refer to the amounts permitted under 11 CFR 110.1(c) and 110.2(c).

#### *11 CFR 9008.10—Documentation of Disbursements; Net Outstanding Convention Expenses*

The requirements for the documentation of disbursements applicable to all committees are described in 11 CFR 102.9(b). Additional documentation requirements for publicly funded convention committees are set forth in 11 CFR 9008.10. The introductory language in section 9008.10 is being revised to state that the requirements in this section are in addition to the requirements of 11 CFR 102.9(b) governing the

documentation of disbursements. Adding this reference to 11 CFR 102.9(b) will assist the reader in locating these other pertinent provisions.

#### 11 CFR 9008.12—Repayments

The Commission is revising 11 CFR 9008.12(b)(7) to reflect changes in other portions of the convention regulations. First, two references within paragraph (b)(7) are being changed to reflect the new definition of “municipal fund” in 11 CFR 9008.50(c). See Explanation and Justification for 11 CFR 9008.50, below.

Second, the Commission is deleting the final clause in paragraph (b)(7), which had identified donations from a nonlocal businesses as impermissible host committee/municipal fund contributions, to reflect its deletion of the requirement in 11 CFR 9008.52(c) and 11 CFR 9008.53(b) that only local entities and individuals may make donations to host committees and municipal funds to defray convention expenses. See Explanation and Justification for 11 CFR 9008.52 and 11 CFR 9008.53, below. The final rules substantially follow the proposed rules, which were not addressed by any of the commenters.

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

#### 11 CFR 9008.50—Scope and Definitions

The NPRM noted that host committees and municipal funds have evolved to the point where their roles in convention financing are increasingly similar but the Commission’s rules had treated them differently. 68 FR at 18507. The NPRM sought public comment on whether host committees and municipal funds should be treated the same.

One discrepancy in the regulations relating to host committees and municipal funds was that the rules defined “host committee,” in 11 CFR 9008.52(a), but did not define “municipal fund.” 68 FR at 18507–08. The NPRM proposed to add a definition of “municipal fund” in new paragraph (c) of 11 CFR 9008.50, and to move the definition of “host committee” from 11 CFR 9008.52(a) to paragraph (b) of 11 CFR 9008.50. The proposal defined a “municipal fund” as “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.”

The NPRM stated that any municipal fund that accepted donations and made disbursements related to convention

activities would be required, under the proposed definition, to use a separate account for such purposes. Comment was sought on whether any other restrictions should be imposed on municipal funds to ensure that funds received or disbursed by municipal funds are used solely for the purpose of promoting the city and its commerce, such as limiting them to accounts subject to audit by State or local public agencies.

No commenters addressed this topic. The Commission believes that it is helpful to add a definition of “municipal fund.” Accordingly, the Commission has decided to adopt the proposed definition of “municipal fund,” which is located in paragraph (c) of 11 CFR 9008.50. This provision defines a municipal fund as a fund or account of a government agency, municipality, or municipal corporation.

The definition distinguishes a municipal fund from a host committee, in part, by limiting municipal funds to those funds or accounts of a government agency, municipality, or municipal corporation, and “whose receipt and use of funds is subject to the control of officials of the State or local government.” When engaged in activities that promote an area and its commerce, State and local governments participate in a wide variety of organizations that often permit the private sector to participate in some role. The Commission intends that municipal funds will be limited to the group of such organizations whose funds are under the control of State or local government officials acting in their official capacities when they receive and disburse funds. Any organizational structure that includes public officials in some capacity but does not keep the funds under governmental control cannot qualify as a municipal fund, but may qualify as a host committee. For example, if a local civic association includes a city’s mayor as an officer, but the association’s funds are not maintained in a city account, the local civic association could not be a municipal fund, but it could be a host committee, if it met the requirements of new 11 CFR 9008.50(b).

The Commission has decided to move the definition of “host committee” to paragraph (b) of 11 CFR 9008.50, so that the definitions are grouped together.

#### 11 CFR 9008.51—Registration and Reports

##### 11 CFR 9008.51(a)(1)—Registration Requirements

The Commission has decided to make a number of changes to the host

committee and municipal fund registration and reporting requirements. With respect to the registration requirements, 11 CFR 9008.51(a) is being revised to require host committees and municipal funds to file FEC Form 1 (Statement of Organization) within ten days of the date on which the national party chooses the convention city or ten days after the host committee or municipal fund is formed, whichever date occurs later.

These new registration requirements differ from the former requirements in two respects. First, the former provision required host committees and municipal funds to file a “Convention Registration Form,” not a Statement of Organization. Second, the former provision required host committees and municipal funds to register within ten days of the date on which the party selected the convention city.

The NPRM sought comment on the change in the registration deadline, as well as an alternative deadline that would have required host committees and municipal funds to register within 10 days of when they first solicit or accept donations or make disbursements for convention activities. No commenters specifically addressed the proposed changes to the host committee and municipal fund registration requirements in 11 CFR 9008.51(a).

With respect to the proposal to require host committees and municipal funds to register using FEC Form 1, the Commission notes that host committees and municipal funds typically use this form already. Therefore, the Commission has decided to adopt the proposed change requiring host committees and municipal funds to register using Form 1.

The Commission is adopting the proposal to require host committees and municipal funds to file within 10 days of their formation or within 10 days of convention city selection, whichever date occurs later. This change represents a more realistic timeframe, in that it accounts for the possibility that not all host committees or municipal funds are established within 10 days of when the convention city is selected. The Commission is not adopting the alternative that would have required host committees and municipal funds to register within 10 days of soliciting, accepting, or disbursing funds for convention activities. The alternative could have made it difficult to determine when particular host committee or municipal fund registration statements would actually be due.

*11 CFR 9008.51(a)(3)—Submission of Convention Committee, Host Committee, and Municipal Fund Agreements*

As discussed above, the NPRM proposed to require convention committees, host committees, and municipal funds 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 Explanation and Justification for 11 CFR 9008.3(b)(ii), above; see also 68 FR at 18512. For the reasons stated above, the Commission has decided to adopt this proposed rule.

Accordingly, the Commission is revising 11 CFR 9008.51 to require host committees and municipal funds to submit any and all such written contracts and agreements with the report covering the reporting period during which the agreement is executed. See 11 CFR 9008.51(a)(3). As explained below, this will usually be the post-convention report. Host committees and municipal funds must also submit any subsequent modifications to a previous agreement. However, host committees and municipal funds need not submit contracts made with convention committees that have already been filed by the convention committees themselves. No commenters addressed these revisions.

*11 CFR 9008.51(b)—Reporting Requirements*

The NPRM proposed a number of changes to the reporting requirements applicable to host committees and municipal funds in 11 CFR 9008.51(b) and (c). First, the NPRM proposed to apply the same reporting requirements to both host committees and municipal funds. Under previous Commission regulations, different reporting requirements applied to host committees and municipal funds. While host committees were required to file a post convention report on FEC Form 4, municipal funds were only required to file a post convention letter, which did not need to contain all of the information required on FEC Form 4. Compare former 11 CFR 9008.51(b)(1) with former 11 CFR 9008.51(c). In addition, host committees were required to continue filing quarterly reports as long as they continued to accept funds or make disbursements after filing the post convention report, but municipal funds were not subject to such a requirement. Former 11 CFR 9008.51(b)(2). Furthermore, host committees were required to file a final report within 10 days of ceasing

reportable activity, but municipal funds were not. Former 11 CFR 9008.51(b)(3).

One commenter contended that it was in the public interest to require municipal funds to file reports with the same frequency and containing the same level of detail regarding receipts and disbursements as those filed by host committees. The Commission agrees, especially because it is dropping the former restrictions on municipal fund fundraising and permitting municipal funds to accept donations under the same conditions as host committees. See Explanation and Justification for 11 CFR 9008.53. Accordingly, the Commission is revising 11 CFR 9008.51 to state that the reporting provisions in paragraphs (b)(1), (2), and (3) apply to both host committees and municipal funds.

The NPRM also proposed two other changes to the host committee reporting requirements in 11 CFR 9008.51(b)(1). First, noting that paragraph (b)(1) of § 9008.51 did not provide a date for the close of books for host committees' post-convention reports, the NPRM proposed revising 11 CFR 9008.51(b)(1) to set the close of books as 15 days prior to the date of filing. No commenters specifically addressed this date. The Commission believes that the proposed time frame is reasonable, in that it should provide sufficient time for host committees and municipal funds to prepare their reports. In addition, the Commission believes that it makes sense to apply the same time frame to host committees and municipal fund reports that currently applies to convention committee reports under 11 CFR 9008.3(b)(2)(ii). Accordingly, the Commission is revising 11 CFR 9008.51(b)(1) to establish the close of books for host committee and municipal fund reports as 15 days prior to the due date for filing these reports.

Second, the NPRM proposed revising 11 CFR 9008.51(b)(1) to require that reports filed pursuant to 2 U.S.C. 437 must contain the information specified in 11 CFR part 104. The statutory authority for 11 CFR part 104 is based in 2 U.S.C. 434. Host committee and municipal fund reporting is required by 2 U.S.C. 437, which explicitly allows the Commission to require a "full and complete financial statement, in such form and detail as it may prescribe." Requiring host committee and municipal fund reports to be presented in the same format as other reports that are filed with the Commission significantly enhances the public disclosure of convention-related financial activity. No commenters addressed this proposed change. Accordingly, the Commission is revising 11 CFR 9008.51(b)(1) to state that host

committee and municipal fund post-convention reports must "disclose all the information required by 11 CFR part 104."

The NPRM also sought comment on whether requiring host committees and municipal funds to file quarterly reports after the 60-day post-convention report is required by and consistent with 2 U.S.C. 437, which refers to a single financial statement. No commenters addressed this question.

The Commission concludes that it does have the authority to require further reports by municipal funds. Section 437 states that host committees and municipal funds must, "within 60 days following the end of the convention (but not later than 20 days prior to the date on which presidential and vice-presidential electors are chosen), file with the Commission a full and complete financial statement, in such form and detail as [the Commission] may prescribe, of the sources from which it derived its funds, and the purpose for which such funds were expended." 2 U.S.C. 437. The Commission's experience with convention financing indicates that it is often not possible for host committees and municipal funds to provide a full and complete financial statement within the prescribed time frame because receipts and invoices pertaining to the convention tend to continue to arrive after the convention has ended and even after the November general election. The Commission believes that 2 U.S.C. 437 in conjunction with 26 U.S.C. 9009, which grants the Commission the authority to require the submission of "such books, records, and information, as it deems necessary to carry out the functions and duties imposed on it by this chapter," provides the Commission with sufficient statutory authority to require both host committees and municipal funds to continue filing reports with the Commission as long as they receive or spend funds relating to the conventions. Furthermore, the Commission notes that the reporting obligation beyond the initial report is expressly conditioned on further convention-related activity, which means that the obligation will only apply when the initial report is *not* a "full and complete financial statement," as required by 2 U.S.C. 437.

The NPRM also sought comment on the form that convention committees, host committees, and municipal funds should be required to use for their reports. Convention committees and host committees were required to report using FEC Form 4, while municipal funds were not required to use any particular form. See 11 CFR

9008.3(b)(2)(i) (convention committees); former 11 CFR 9008.51(b)(1) (host committees); and former 11 CFR 9008.51(c) (municipal funds). The NPRM indicated that the Commission was considering requiring convention committees, host committees, and municipal funds to use FEC Form 3P instead of FEC Form 4. FEC Form 3P is the report of receipts and disbursements filed by Presidential and Vice-Presidential candidates.

No commenters specifically addressed this issue. Given the familiarity that convention committees already have with FEC Form 4, the Commission has decided that the most prudent course is to continue requiring convention committees and host committees to file FEC Form 4. Accordingly, the Commission has decided to retain the references to Form 4 in 11 CFR 9008.3(b)(2)(i) and revised 11 CFR 9008.51(b)(1). The requirement to file using FEC Form 4 will also apply to municipal funds. This is consistent with the Commission's other parallel treatment of host committees and municipal funds as similar.

*11 CFR 9008.51(c)—Post Convention Statements by State and Local Government Agencies*

States, cities, and other local government agencies often provide facilities and services to Presidential nominating conventions under 11 CFR 9008.53, which are in addition to what may be provided by a separate municipal fund. When States, cities and local governments provide such facilities and services, they generally file letters with the Commission identifying the categories of facilities and services provided for the convention and the origin of the funds used for such facilities and services under 11 CFR 9008.51(c). Because the NPRM proposed that municipal funds would be made subject to the same reporting requirements as host committees under 11 CFR 9008.51(b), the NPRM proposed deleting 11 CFR 9008.51(c). No comments were received on this issue.

The Commission has decided, instead, to retain 11 CFR 9008.51(c) and revise it to require these letters to be filed only by those government agencies at the State, municipal, or local levels, or any other political subdivision, that use their general revenues to provide convention facilities or services pursuant to 11 CFR 9008.53. If a city directly makes convention expenditures with its own funds, it must report under 11 CFR 9008.51(c) but would not be required to report the same transactions

on a municipal fund report under § 9008.51(b).

*11 CFR 9008.52—Receipts and Disbursements of Host Committees; Proposed Restructuring of 11 CFR 9008.52*

The Commission has decided to move the definition of "host committee" from 11 CFR 9008.52(a) to 11 CFR 9008.50(b). See Explanation and Justification for revised 11 CFR 9008.50, above.

Accordingly, the Commission is restructuring 11 CFR 9008.52 as follows: Former paragraph (b) is being redesignated as paragraph (a) and former paragraph (c) is being redesignated as paragraph (b).

*Proposed Relocation of Commercial Vendor Provisions*

The NPRM proposed moving the provisions in former 11 CFR 9008.9(b) and (c) to 11 CFR 9008.52(a). However, because the Commission has decided not to amend 11 CFR 9008.9, the corresponding changes proposed for 11 CFR 9008.52 are unnecessary. See Explanation and Justification for 11 CFR 9008.55, below.

*Proposed Revisions to Permissible Expenses*

The NPRM proposed a number of substantive revisions to the list of permissible host committee expenses in former 11 CFR 9008.52(c)(1).<sup>3</sup> The proposed revisions were intended to clarify and add specificity to the list of permissible expenses.

The NPRM proposed combining the expenses in former 11 CFR 9008.52(c)(1)(i) and (c)(1)(x). Former § 9008.52(c)(1)(i) allowed host committees to defray expenses incurred for the purpose of promoting the suitability of the city as a convention site whereas § 9008.52(c)(1)(x) permitted host committees to provide accommodations and hospitality for those responsible for choosing the convention site. The proposed combined list would have permitted host committees and municipal funds to "defray those expenses incurred for the purpose of promoting 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."

The NPRM also proposed narrowing permissible host committee expenses for providing convention committees with

the use of an auditorium or convention center. Whereas the former rule at 11 CFR 9008.52(c)(1)(v) permitted host committees and municipal funds to provide both construction- and convention-related services for convention committees, the proposal sought to limit them to providing only construction-related services that are clearly related to designing, creating, or installing the physical or technological infrastructure of the convention facility. The proposed rule would have deleted the reference to convention-related services and added a non-exhaustive list of permissible construction-related services.

In addition, the NPRM proposed narrowing the description of transportation services that may be provided by host committees and municipal funds in former 11 CFR 9008.52(c)(1)(vi) to permit the provision of only those transportation services that were made "widely available to convention delegates and other individuals attending the convention." See proposed 11 CFR 9008.52(b)(6). Conversely, the proposed rules would have broadened the types of law enforcement services that host committees and municipal funds may provide to allow not only those necessary "to assure orderly conventions" but also other "law enforcement and security services, facilities, and personnel, including tickets, badges, and passes."

Another proposal would have addressed the provision related to hotel rooms in former 11 CFR 9008.52(c)(1)(ix). Whereas the former and current provision states that host committees and municipal funds may provide hotel rooms "at no charge or a reduced rate on the basis of the number of rooms actually booked for the convention," the proposed provision would have permitted the provision of hotel rooms at the rate paid by the host committee or municipal fund. This proposal would have allowed host committees and municipal funds to pass through to convention committees any discounts they received based on the number of rooms rented but would have prohibited host committees or municipal funds from subsidizing the actual cost of such accommodations.

The NPRM also proposed eliminating the final, catchall expense category in former 11 CFR 9008.52(c)(1)(xi), which allowed host committees and municipal funds to provide "other similar convention-related facilities and services," and proposed adding a new list of *impermissible* host committee and municipal fund expenses. Proposed 11 CFR 9008.52(c)(1) would have

<sup>3</sup> Under both previous and revised 11 CFR 9008.53(b)(1), municipal funds are permitted to pay the same types of expenses as host committees.

prohibited host committees and municipal funds from providing "anything of value" to a convention committee, national party committee, or other political committee, except those items that were expressly described in proposed 11 CFR 9008.52(b)(1) and (b)(5) through (b)(8). Proposed 11 CFR 9008.52(c)(2) would have prohibited host committees and municipal funds from defraying any expenses related to "creating, producing, or directing convention proceedings."

The NPRM also sought public comment on whether there was any need to continue to provide a list of permissible convention expenses, or whether the definition of "convention expenses," standing alone, gives sufficient guidance to convention committees regarding what they may or may not pay. Comment was also sought on whether to refine the current list of permissible convention expenses, by deleting some examples and/or adding others.

The Commission also sought comment on whether BCRA requires that the list of permissible host committee and municipal fund expenses in former 11 CFR 9008.52 must be modified to ensure that convention committees will not receive "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)." 2 U.S.C. 441i(a)(1). In many of the transactions contemplated by 11 CFR 9008.52(c)(1), host committees provide something of value to convention delegates, other attendees, press, local businesses, and the local community, but 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 and dining guide, to convention attendees, it is difficult to conclude that the convention committee received anything of value. One commenter advocated a variation on this approach.

In addition to the proposed substantive revisions, the NPRM proposed two alternative locations for the revised list of permissible host committee and municipal fund expenses located in former 11 CFR 9008.52(c)(1). The list of permissible convention committee expenses in 11 CFR 9008.7(a)(4) would have been affected by the proposed reorganization as well. The NPRM proposed either deleting the non-exhaustive list of thirteen permissible convention expenses that may be paid by convention committees, or in the

alternative retaining the list of permissible convention expenses but moving them to a new section.

With respect to the proposed substantive and structural changes, a number of commenters believed that the current regulations work well and are not in need of additional clarification. These commenters expressed concern that any changes to the list of permissible expenses this close to the 2004 election would be extremely disruptive, would invite confusion, and would interfere with the obligations that host committees have already agreed by contract to undertake for the 2004 national nominating conventions. In their opinion, no deficiencies in the current list that warrant either of the proposed alternative changes had been identified. A number of the commenters also stated that there was no indication that Congress, in enacting BCRA, intended to restrict or modify the range of permissible convention committee, host committee, and municipal fund expenses prior to BCRA.

After carefully considering the concerns raised by these commenters, the Commission has decided not to adopt any of the proposed substantive or structural revisions to the list of permissible convention committee, host committee and municipal fund expenses. The Commission is mindful of the potentially disruptive effect of modifying existing regulations regarding the expenses that may be paid by convention committees, host committees, and municipal funds in such close proximity to the 2004 conventions. See *Explanation and Justification for Public Financing of Presidential Primary and General Election Candidates*, 64 FR 49355, 49358 (Sept. 13, 1999) (declining to modify the existing list of permissible convention committee and host committee expenses "given that the party committees have already entered into contractual agreements with the sites selected"). Accordingly, the list of permissible host committee and municipal fund expenses will remain in 11 CFR 9008.52. The list is substantively identical to that in current 11 CFR 9008.52(c)(1), however, as explained above, it will be re-designated as 11 CFR 9008.52(b) in light of other changes to section 9008.52.

With respect to the reorganization of permissible convention expenses in 11 CFR 9008.7(a)(4), the Commission is persuaded that it should retain the current non-exhaustive list of permissible convention expenses. In addition, rather than relocating the list to two different paragraphs in a new section, the Commission has decided to

keep the list intact in paragraph (a)(4) of 11 CFR 9008.7. The Commission concludes that the list of permissible convention expenses has worked reasonably well in practice. The Commission also concludes that the proposed changes would not add sufficient clarity or precision to justify the possible confusion and disruption they may engender at a time when preparations for the 2004 conventions are well advanced, and further concludes that none of the proposed changes are required by BCRA.

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

The NPRM proposed to eliminate the requirement, in former 11 CFR 9008.52(c)(1) and 11 CFR 9008.53(b)(1), that only "local" businesses, labor organizations, other organizations, and individuals are permitted to make donations to host committees and municipal funds.

The NPRM sought comment on whether eliminating that restriction would make it more feasible for smaller or mid-sized cities to host a Presidential nominating convention. Comment was also sought on two alternative proposals. Under the first alternative proposal, the locality requirements in former 11 CFR 9008.52(c)(1) and (c)(2) and former 11 CFR 9008.53(b)(1) and (b)(2) would have been retained, but modified to permit only those donations made by "individuals who maintain a local residence or who work for the local office of a business, labor organization, or other organization." Under the second alternative approach, the locality restrictions in both 11 CFR 9008.52(c)(1) and 11 CFR 9008.53(b)(1) would have been revised to permit donations only from those individuals who have a local residence.

Most of the commenters who addressed this issue favored deletion of the locality requirement. They pointed out that the physical location of a business is a poor indicator of the extent of a company's commercial interests in a particular geographic region, especially in light of the increasingly global nature of the economy. These commenters believed the restriction frustrated the ability of host committees to raise funds for the legitimate purpose of promoting the host city. They argued that deleting this restriction would make it easier for smaller cities, without large local business communities, to bid successfully for a future convention.

These commenters also maintained that donors to host committees and municipal funds are motivated by legitimate commercial considerations or

by civic pride, not by political considerations. They contended that many businesses that do not maintain an office in or near the convention city nevertheless have a legitimate commercial interest in supporting large-scale events such as conventions in the host city, such as developing business in the convention city or showcasing their products to a prominent national audience. They pointed out that many corporations also make sizeable donations to host committees for other large-scale events such as host committees for the Super Bowl and the Olympics. One commenter suggested that the motive of those making donations to host committees is irrelevant because such donors have no control over how the host committee spends the funds.

On the other hand, a different commenter opposed the Commission's proposal to delete the locality requirement in 11 CFR 9008.52(c)(1) and 11 CFR 9008.53(b)(1), expressing the view that the locality restriction already was too permissive and should not be eliminated.

After careful consideration of the viewpoints expressed by the commenters on this issue, the Commission has decided to eliminate the locality requirement from 11 CFR 9008.52 and 11 CFR 9008.53. The Commission is persuaded that this restriction no longer serves a meaningful purpose because the disbursements that host committees and municipal funds are permitted to make are consistent with the narrow purpose of promoting commerce in, and the suitability of, the convention city. The Commission notes that the requirement that donors be local has resulted in reliance on Metropolitan Areas to draw difficult and seemingly arbitrary distinctions in specific cases. Accordingly, under the revised rules at 11 CFR 9008.52(b) (host committees) and 11 CFR 9008.53(a) (municipal funds), businesses, labor organizations, other organizations, and individuals are permitted to donate funds or make in-kind donations to host committees and municipal funds, regardless of their geographic locations.

#### *11 CFR 9008.53—Receipts and Disbursements of Municipal Funds*

As discussed in greater detail above, the NPRM proposed to eliminate many of the differences in the manner that the Commission's regulations treat host committees and municipal funds. (See Explanation and Justification for 11 CFR 9008.50, above.) One of these differences was that municipal funds were subject to certain fundraising

requirements that did not apply to host committees. Former 11 CFR 9008.53(b)(1)(i) and (ii) provided that neither the municipal fund itself nor the donations the municipal fund received or solicited could be restricted to use in connection with a particular convention. Host committees were not subject to these fundraising restrictions.

These disparate requirements limited the ability of host committees and municipal funds to raise funds in concert with one another. The NPRM acknowledged that the restrictions on municipal fund fundraising were based on Commission decisions in Advisory Opinion ("AO") 1982-27 and AO 1983-29. Comment was sought on deleting these requirements on municipal funds. In the alternative the NPRM proposed retaining the restrictions and clarifying the appropriate standard for determining whether a municipal fund itself, or the funds it receives, are impermissibly restricted to the Presidential nominating convention.

No commenters addressed this topic. The Commission has concluded that the former restrictions serve little or no purpose, while, at the same time, they unnecessarily hamper the ability of host committees and municipal funds to undertake joint fundraising activities. Accordingly, the Commission has decided to eliminate the restrictions on municipal fund fundraising in former 11 CFR 9008.53(b)(1)(i) and (ii).

The NPRM also proposed eliminating the requirement, in 11 CFR 9008.53(b)(1), that only "local" businesses, labor organizations, other organizations, and individuals are permitted to make donations to municipal funds. For the reasons stated above, the Commission has decided to eliminate this limitation on donations to municipal funds as well as host committees. See Explanation and Justification for 11 CFR 9008.52.

#### *11 CFR 9008.55—Funding for Convention Committees, Host Committees and Municipal Funds*

The Commission is adopting a new §9008.55 to explain the application of BCRA to convention committees, host committees, and municipal funds. This new regulation should be viewed in the overall context of the legal structure of public financing and the development of the Commission's regulatory approach regarding the role of host committees and municipal funds.

The national committees of both major and minor political parties are entitled to receive public funds to defray their expenses incurred in connection with a Presidential nominating convention under 26 U.S.C.

9008(b). Major party committees may receive an inflation-adjusted payment from the Presidential Election Campaign Fund for their national nominating conventions. 26 U.S.C. 9008(b)(1).<sup>4</sup> For the 2004 conventions, the major party committees received \$14,880,000 in July 2003 and are entitled to receive an additional payment in 2004 for an inflation adjustment, subject to all applicable requirements.<sup>5</sup> A national committee of a major 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 that accept public funding 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 Federal payment.

#### *Development of Commission Rules on Host Committees and Municipal Funds*

As mentioned in the discussion of 11 CFR 9008.50, above, the Commission has historically allowed host committees and municipal funds to raise and spend money for activities related to conventions. The NPRM provided a detailed history of the development of the Commission's policy in this area. Although a convention committee is precluded from receiving contributions, the Commission has held that host committees and municipal funds may solicit and receive funds because such funds "are 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, the Commission has allowed donations to these entities from sources prohibited from making contributions under 2 U.S.C. 441b, because such donations 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*

<sup>4</sup> Minor party committees may 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). No candidate (other than the major party candidates) received a sufficient number of votes in the 2000 presidential general election to provide his or her party with minor party status in 2004.

<sup>5</sup> In 2000, the Democratic and Republican National Committees each received \$13,512,000 for their national nominating convention.

*Nominating Conventions*, 44 FR 63036, 63037–38 (Nov. 1, 1979).

The Commission has repeatedly endorsed the use of these funds for convention-related activities. Recent testimony on behalf of the 2004 host committees amply supports the Commission's long-held view that "businesses and organizations that donate to municipal funds are motivated by commercial and civic reasons, rather than election-influencing purposes." *Explanation and Justification of Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions*, 59 FR 33606, 33615 (June 29, 1994).

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

Title I of BCRA includes several provisions potentially applicable to Presidential nominating convention financing. 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).

BCRA prohibits national party committees, their officers and agents, and entities directly or indirectly established, financed, maintained, or controlled by them from raising any funds for, or making or directing any donations to, certain tax exempt organizations. 2 U.S.C. 441i(d). This prohibition extends only to organizations that are described in section 501(c) of the Internal Revenue Code of 1986 and that are exempt from taxation under section 501(a) of such Code (or that have submitted an application for determination of tax exempt status under such section) ("501(c) organizations") and that make "expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)." *Id.*

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 funds in connection with an election for Federal office that do not comply with the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. 441i(e)(1)(A). With respect to fundraising for non-profit organizations, BCRA provides two exceptions. Under the exception relevant here, BCRA permits Federal candidates and officeholders to make "general solicitations" of funds on behalf of organizations described in section 501(c) of the Internal Revenue Code, other than entities whose principal purpose is to conduct certain types of Federal election activity (including voter registration, voter identification, and get-out-the-vote activity), where the solicitations do not specify how the funds will or should be spent. 2 U.S.C. 441i(e)(4)(A).<sup>6</sup> Convention committees, host committees, and municipal funds are unlikely to engage in these types of Federal election activity.

#### 11 CFR 9008.55(a)—Convention Committees Are Subject to 2 U.S.C. 441i(a)(1)

Convention committees are, as a matter of law, entities directly established, financed, maintained, or controlled by national party committees. The Commission's regulations at 11 CFR 9008.3(a)(2) 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." 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." Typically, convention committees list the national party committees as an affiliated committee on their Statements of Organization.

Convention committees are also "agents" of the national party committees. Under the Commission's definition of "agent," a principal cannot be held liable for the actions of an agent

<sup>6</sup> BCRA also permits Federal candidates and officeholders to make "specific solicitations" on behalf of organizations described in Section 501(c) of the Internal Revenue Code, where the entities' principal purpose is to conduct certain Federal election activities or where the solicitation is "explicitly to obtain funds" for certain Federal election activities. 2 U.S.C. 441i(e)(4)(B). Such "specific solicitations" may only be made to individuals in amounts not exceeding \$20,000 per calendar year. *Id.*

unless (1) the agent has actual authority, (2) the agent is acting on behalf of the principal, and (3), with respect to national party committees, the agent is soliciting, directing, or receiving any contribution, donation or transfer of funds on behalf of the national party committee. 11 CFR 300.2(b). Given that a convention committee is authorized by law to receive the national party committee's convention funds, this aspect of their relationship is sufficient to make the convention committee an agent of the relevant national party committee under 11 CFR 300.2(b).

The NPRM proposed that BCRA's ban in 2 U.S.C. 441i(a)(1) on national parties soliciting, receiving, directing, and spending funds that do not comply with the source prohibitions and amount limitations should apply to convention committees by operation of 2 U.S.C. 441i(a)(2) and 11 CFR 300.10(c). One of the national party committees commenting on this proposal agreed that convention committees are required by law to be established by national party committees, which triggers 2 U.S.C. 441i(a)(2). No other commenter addressed this issue.

The Commission concludes that as a matter of law convention committees are subject to 2 U.S.C. 441i(a)(1) and 11 CFR 300.10(a) by operation of 2 U.S.C. 441i(a)(2) and 11 CFR 300.2(b), (c) and 11 CFR 300.10(c). Accordingly, under new 11 CFR 9008.55(a), all convention committees established pursuant to 11 CFR 9008.2(a)(2) are subject to the national party committee prohibitions in 11 CFR 300.10(a).

#### 11 CFR 9008.55(a)—Donations From Host Committees and Municipal Funds to Convention Committees

The Commission sought comment on whether BCRA bars convention committees from accepting many of the in-kind donations typically provided by host committees and municipal funds. The current rules on permitted expenditures of host committees and convention committees overlap, which reflects the fact that some host committee disbursements are for goods or services related to the conduct of a convention, and not merely the promotion of their cities. *See, e.g.*, revised 11 CFR 9008.52(b)(5), discussed above. There was no consensus among the commenters on this issue.

Several commenters argued that there is no language in BCRA that compels or even anticipates changes to the long-standing regulations regarding convention financing. Some commenters also emphasized the non-political nature of host committee activities and that nothing in BCRA

requires or justifies the Commission to alter its conclusion that donations to host committees are commercially, not politically, motivated. According to some commenters, the provision of goods and services by a host committee has never been considered an in-kind contribution, and BCRA did not amend the statutory definition of in-kind contribution in 2 U.S.C. 431(8)(A)(i). A commenter also pointed out that another provision of BCRA repealed certain Commission regulations. Because Congress did not similarly address the convention financing regulations, its silence is "a conclusive indication that there was no Congressional intent that the Commission modify these regulations in any way," according to this commenter. One commenter argued that BCRA's prohibitions in 2 U.S.C. 4411(a) are limited to national party committees, their agents, and any entity that is established, financed, maintained, or controlled by the national party committees. In this commenter's view, host committees do not constitute any of these covered persons, so host committees should be permitted to continue accepting and using non-Federal funds to pay for certain convention related costs.

Other commenters advocated for the exact opposite position, citing BCRA's unqualified prohibition on the national party committees' accepting any non-Federal funds. These commenters construed both FECA and BCRA to prohibit a convention committee from accepting in-kind contributions from a host committee funded by corporate donations. These commenters also contended that conventions have become vehicles for the infusion of massive amounts of non-Federal funds into both political parties and to their candidates and officeholders. Another commenter argued that the changes to the Commission's host committee regulations in 1977, 1979, 1994, and 1999 make continued reliance on the original justification unwarranted. More than 1,100 timely, essentially identical, comments that the Commission received by e-mail expressed support for the use of tax dollars to fund party conventions "precisely so that parties may turn away other sources of inappropriate funds."

For many of these same reasons, a petition for rulemaking sought 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.

One commenter presented data that it claimed challenged some of the

assumptions upon which the Commission's host committee rules are based. This commenter argued that the tremendous escalation of private contributions to finance host committees, traced over the course of several conventions, is inconsistent with the assumptions that the host committee and municipal fund exception to the expenditure limit is a "very narrow exception" and that such donations are not politically motivated. However, the commenter also documented that party leaders at the State and local level have been active in raising funds for conventions held in their cities to nominate candidates of the opposing party.

Other commenters challenged the data and conclusions drawn by this commenter. They argued that the increase in corporate funding reflects a general trend of increasing corporate sponsorship for large-scale civic events. A decreased willingness or ability of State and local governments to assist endeavors of this scale was also cited as a potential explanation for rising private donations.

The Commission's consideration of these issues begins with consideration of BCRA's language. Nothing in the text of BCRA, however, expressly addresses convention financing.

The Commission then looked to BCRA's legislative history on these issues. In light of the sparse and inconclusive legislative history, the NPRM sought comment as to whether Congress intended BCRA to change the rules for convention financing, and it cited the very few statements on this topic made during the Senate's consideration of BCRA. For example, Senator Mitch McConnell said the bill "will end national party conventions as we have known them." 148 Cong. Rec. S2122 (daily ed. Mar. 20, 2002).

Only two commenters addressed these remarks. One noted that the Supreme Court and other courts have found the views of legislative opponents to be an unreliable guide to the construction of a statute, citing *National Labor Relations Board v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 66 (1964); *Bryan v. United States*, 525 U.S. 384, 196 (1998) (quoting *Schwegman Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951)); and *Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 879 F.2d 917, 923 n. 47 (D.C. Cir. 1989). The only other commenter to address these remarks stated that they show that Congress understood that BCRA's national party and Federal candidate provisions would prohibit non-Federal funds in relation to Presidential nominating conventions.

Because of the scarcity of comment indicating the pre-enactment intent of those who wrote or voted for the bill, the Commission affords little weight to the single passing comment made in the waning hours of floor debate. See *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 66 (1964) (noting that legislative opponents, "[i]n their zeal to defeat a bill, \* \* \* understandably tend to overstate its reach").

BCRA's principal sponsors in Congress did not file comments in response to the NPRM in this rulemaking. However, in comments filed in the Non-Federal Funds rulemaking, the sponsors did address convention financing. The Commission declines to rely on a single post-enactment statement in a separate rulemaking that unspecified "tight restrictions" exist as a basis to determine that BCRA effectively prohibits a major source of funding for the Presidential nominating conventions.

In considering whether BCRA bars convention committees from accepting in-kind donations from host committees and municipal funds, the Commission considered several other factors as well. Title I of BCRA, entitled "Reduction of Special Interest Influence" and the cornerstone of BCRA, begins with the prohibition on national party committees. BCRA, sec. 101(a), 116 Stat. at 82. Presidential nominating conventions are the only publicly funded endeavors of a national party committee. Underlying the convention public funding program is an elaborate statutory regime, 26 U.S.C. 9008, which Congress created. Moreover, Members of Congress often play substantial roles in Presidential nominating conventions. In fact, since 1996, all Democratic Members of Congress have served as automatic delegates to their party's convention, according to one of the commenters.

The Commission's regulations on host committees have been in effect since the earliest days of the Commission. Despite other changes to the host committee regulations, the Commission has consistently maintained that donations of funds to host committees are, as a matter of law, distinct from other donations by prohibited sources in that they are motivated by a desire to promote the convention city and hence are not subject to the absolute ban on corporate contributions in 2 U.S.C. 441b. This conclusion is buttressed by the fact that frequently members of the opposite political party have played prominent and active roles in convention host committees. For example, in 2000 David L. Cohen, a

longtime aide to Ed Rendell (who was then mayor of Philadelphia, and now is the Democratic Governor of Pennsylvania), chaired the host committee for the Republican National Convention. Mr. Rendell was also actively involved in the 2000 Philadelphia host committee's activities. In addition, Noelia Rodriguez, former Deputy Mayor to Mayor Richard Riordan, and now Press Secretary for First Lady Laura Bush, served as Executive Director of the Los Angeles host committee for the 2000 Democratic National Convention. Furthermore, the co-chair of the host committee for the 1996 Democratic National Convention in Chicago was Richard Notebaert, who has been a major contributor to Republican candidates and to the Republican Party. The fact that historically members of the opposite political party have played key roles in convention host committees strongly supports the Commission's conclusion that host committee activity is motivated by a desire to promote the convention city and not by political considerations. While it is always difficult to interpret Congressional silence, the Commission does note that BCRA specifically repealed another of the Commission's regulations, BCRA, sec. 214(b), 116 Stat. at 94, and yet did not similarly repeal or otherwise address the Commission regulations on convention financing. Congress has also declined other opportunities to disapprove of the Commission's regulations regarding host committees. These regulations were submitted to Congress in 1977, 1994, and 1999, and Congress has not taken action to invalidate the regulations. In those regulations, one of only two subparts is devoted to host committees and municipal funds, 11 CFR part 9008, subpart B, which provides host committees a legal prominence in the regulatory structure as well.

Courts have recognized that when it is not clear whether statutory amendments affect past agency interpretations, agencies are left with their ordinary ability to interpret the law as amended, subject to deferential judicial review. *See, e.g., Chisholm v. FCC*, 538 F.2d 349, 366 (D.C. Cir. 1976) (noting court's obligation to defer to agency's interpretation even if it is not the only interpretation permissible). Thus, the Commission must decide whether to maintain its interpretation of 2 U.S.C. 441b and 26 U.S.C. 9008(d) and extend it to 2 U.S.C. 441i(a) or to overturn the regulatory system governing convention financing.

In light of all of these specific circumstances described above—the

absence in BCRA of an express reference to conventions, the dearth of legislative history on the subject of convention financing, the prominence of conventions for the parties, the role of Members of Congress in convention activities, the extensive, existing regulations for convention financing, and the Commission's long-standing regulatory position regarding host committee funds, which has never been repudiated by Congress—the Commission declines to interpret the general prohibitions in 2 U.S.C. 441i(a) to eliminate the Commission's discretion to interpret 2 U.S.C. 441b, 441i(a), and 26 U.S.C. 9008(d) to permit the financing regime established by its rules in 11 CFR part 9008.

In considering whether to maintain the current convention financing system, the Commission evaluated the relationship between the convention committee and the localities hosting the convention. This relationship is established by an arms-length agreement negotiated by independent actors. There is keen competition among cities to host conventions, and on more than one occasion, cities have sought the conventions of both major national parties. The highly detailed contract underlying this relationship calls for the city, its host committee, its municipal fund, or some combination of the three to provide very specific facilities and services to the convention committee in exchange for the convention committee agreement to bring the Presidential convention to that city instead of any other. In turn, the city and region receive a significant economic benefit from the commerce that directly results from the convention.

For these reasons, the Commission concludes that convention committees may continue to receive in-kind donations from host committees and municipal funds of the convention expenses described in 11 CFR 9008.52. The Commission is adopting new 11 CFR 9008.55(a), stating in part that convention committees may accept in-kind donations that are in compliance with 11 CFR 9008.52 or 9008.53 from host committees or municipal funds. The Commission emphasizes that this interpretation is limited to the unique circumstances of Presidential nominating convention financing.

*11 CFR 9008.55(b)—Historically, Host Committees and Municipal Funds Are Not "Agents" of National Party Committees*

BCRA's ban on national parties soliciting, receiving, directing, transferring and spending non-Federal funds also applies to "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)(1)(i). Section 300.2(b)(1) therefore requires a fact-specific determination of the nature of any authority conferred by a national party committee.

The NPRM sought comment on whether host committees and municipal funds satisfy the definition of "agents" under 11 CFR 300.2(b)(1) with respect to the national political party committees or their convention committees. Comment was also sought on whether host committees and municipal funds should be treated as *per se* agents of national party committees. Such an approach would have limited 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 function in practice, and regardless of their actual relationship with the national party committees. An alternative approach would have treated host committees and municipal funds as *per se* not agents of national party committees and, therefore, not subject as a matter of law to 2 U.S.C. 441i(a)(2) or 11 CFR 300.10(c)(1), no matter how such host committees and municipal funds actually operate or interact with the national party committees. The commenters were divided on these issues.

Some commenters argued that host committees are independent from convention committees and should therefore not be considered agents of convention committees. Both host committees for the 2004 Presidential nominating conventions for the two major parties assured the Commission that their sole purpose was to encourage commerce in their cities and project a favorable image of their cities to the convention attendees. Counsel to one host committee explained that the committee conducts its own fundraising by its own staff and consultants, without national party committee participation. Counsel to the other host committee stated that the committee does not raise funds on behalf of the national party committee holding its convention in that city. Conversely, other commenters would treat host committees as agents. One commenter reasoned that because host committees raise funds to pay for convention

expenses, they are in essence raising funds for the convention committee, which would make host committees agents under 11 CFR 300.2(b)(1)(i).

The Commission has decided that the regulatory definition of “agent” of a national committee of a political party in 11 CFR 300.2(b)(1) sufficiently addresses the issue of when a host committee will be considered an agent of a national committee of a political party. It provides for a fact-specific determination, rather than a *per se* rule applicable to all host committees and municipal funds. Accordingly, the Commission has decided to adopt a new provision, 11 CFR 9008.55(b), simply stating that host committees and municipal funds are not agents of national party committees, except as provided in 11 CFR 300.2(b)(1).

The Commission’s experience is that host committees typically do not have authority to solicit, direct, or receive any contribution, donation, or transfer of funds on behalf of the national committees of political parties. Thus, as long as host committees and convention committees conduct their affairs as they have in the past, host committees will not be considered agents of convention committees. National party committees, convention committees, and host committees should look to 11 CFR 300.2(b)(1) for guidance on under what circumstances a host committee would be an agent of a national party committee or convention committee. In effect, this approach amounts to a presumption that host committees and municipal funds are not agents of the national party committee. Such a presumption could be rebutted by a showing that the conditions of §300.2(b)(1)(i) or (ii) are satisfied by the relationship of a particular host committee and convention committee. If a particular host committee or municipal fund were to become an “agent” of a national party committee, then it, like the national party committee itself, 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).

*11 CFR 9008.55(c)—Historically, Host Committees and Municipal Funds Are Not Entities “Directly or Indirectly Established, Financed, Maintained, or Controlled” by National Party Committees*

The prohibitions on national party committees under BCRA also apply to entities that are “directly or indirectly established, financed, maintained, or controlled” by a national party committee. 2 U.S.C. 441i(a)(2); 11 CFR

300.10(c)(2). As noted above, 11 CFR 300.2(c) provides 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 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 resolution of this issue requires a fact-specific evaluation of the circumstances.

The NPRM sought comment on whether host committees and municipal funds satisfy the factors listed in 11 CFR 300.2(c) and should, therefore, be considered entities that are directly or indirectly established, financed, maintained, or controlled by the national party committees holding conventions in the relevant cities. The NPRM posed the corresponding *per se* alternatives on this question as it did on the agency issue, discussed above.

The commenters divided on this issue as well. Some commenters contended that the party committees control or coordinate with host committees so closely that host committees are affiliates of the national party committees. One commenter argued that the rules should not presume the organizations affiliated, but should instead rely on the factors listed in 11 CFR 300.2(c). This commenter also noted that two of those factors nearly always exist between the host committee and the convention committee. The two factors are that the party committees provide funds in a significant amount to host committees by virtue of selecting their cities to host the conventions, 11 CFR 300.2(c)(1)(vii), and that the party committees and host committees have a similar pattern of receipts that indicate a formal or ongoing relationship under 11 CFR 300.2(c)(1)(x). Other commenters disagreed; they argued that host committees are not directly or indirectly established, financed, maintained, or controlled under 11 CFR 300.2(c)(1). Both host committees cited detailed facts about their organizations to show that their organizations’ relationship with the respective national party committees do not satisfy the factors listed in the definition of “directly or indirectly establish, finance, maintain, or control.” 11 CFR 300.2(c)(2)(i) through (x).

The Commission has decided that the regulatory definition of “directly or indirectly establish, finance, maintain or control” by a national committee of a political party in 11 CFR 300.2(c)(1)

sufficiently addresses the issue. Section 300.2(c)(1) provides for a fact-specific evaluation of particular circumstances, rather than a *per se* rule applicable to all host committees and municipal funds. The Commission has decided therefore to adopt a new provision, 11 CFR 9008.55(c), stating that host committees and municipal funds are not directly or indirectly established, financed, maintained, or controlled by a national political party, except as provided in 11 CFR 300.2(c).

The Commission’s experience is that host committees typically would not meet the affiliation test established in 11 CFR 300.2(c)(1). Thus, so long as host committees and convention committees conduct their affairs as they have in the past, host committees will not be considered directly or indirectly established, financed, maintained, or controlled by a national party committee. In effect, this approach amounts to a presumption that host committees are not directly or indirectly established, financed, maintained, or controlled by a national party committee. Such a presumption could be rebutted by a showing that the conditions of 11 CFR 300.2(c) are satisfied by the relationship of a particular host committee or municipal fund and a national party committee.

*11 CFR 9008.55(d)—National Party Solicitations of Funds for Host Committees and Municipal Funds*

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). These prohibitions extend to funds solicited or directed for only certain 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.*; 11 CFR 300.2(a).

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).” FECA defines “election” to include nominating conventions. 2 U.S.C. 431(1)(B). The Commission’s previous treatment of permissible host committee and municipal fund disbursements has been that they are not “contributions or expenditures”

under 2 U.S.C. 441b because they are not made “in connection with” an election. However, BCRA reaches 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). In light of these definitions and the previous treatment of host committees and municipal funds, the Commission sought 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.

Two commenters stated that because host committees have not been considered political committees, host committees cannot be considered to make “disbursements in connection with an election.” However, the Commission notes that FECA defines “political committee,” in part, as any committee that receives contributions or makes *expenditures* aggregating in excess of \$1,000 during a calendar year. 2 U.S.C. 431(4). The definitions of “contribution,” 2 U.S.C. 431(8)(A)(i), and “expenditure,” 2 U.S.C. 431(9)(A)(i), both include the requirement that the transaction be “for the purpose of influencing any election for Federal office.” Thus, the determination that host committees are not political committees does not resolve the question of whether they make “disbursements in connection with a Federal election.”

One commenter also asserted that, in litigation challenging BCRA, the Commission explained that 2 U.S.C. 441i(d) reflected Congressional recognition that some tax-exempt organizations engage in campaign activities to benefit Federal candidates. The commenter suggested that because this purpose is not relevant to host committees, the Commission should not consider solicitations for host committees subject to 2 U.S.C. 441i(d). The Commission disagrees. The passage of the government’s brief quoted by this commenter did not purport to be an exhaustive list of activities prohibited by 2 U.S.C. 441i(d). Indeed, later in the same brief, the wider effect of the provision was made clear: “Moreover, donations solicited or directed by national party committees to benefit tax-exempt organizations that conduct political activities create the same potential problems of corruption that other unregulated fund-raising by the national party engenders. \* \* \*” Brief of Defendants, at 118, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003);

*prob. juris. noted*, 123 S.Ct. 2268 (U.S. 2003).

The Commission has determined that host committee and municipal fund disbursements related to convention activities are not “disbursements in connection with an election” sufficient to trigger the prohibition in 2 U.S.C. 441i(d) with respect to those host committee and municipal funds that are 501(c) organizations. Therefore, the Commission is not promulgating a new rule at 11 CFR 9008.55(d) 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. Further, host committees and municipal funds therefore will not be required to make any certification pursuant to 11 CFR 300.11(d) or 300.50(d).

The Commission concluded that consistent with the longstanding rationale for not treating host committee and municipal fund activity “in connection with” an election for purposes of 2 U.S.C. 441b, it should similarly apply the “in connection with” language at 2 U.S.C. 441i(d). As noted earlier, the overriding purpose of permissible host committee and municipal fund activity is commercial or civic in nature.

Even though the restrictions of 441i(d) may not apply, national party agents will still be bound by the broad proscription at 2 U.S.C. 441i(a). This will mean that such agents may not solicit any funds not subject to the limits, prohibitions, and reporting requirements of the statute. In effect, such agents will be able to solicit funds that would be subject to the contribution limit for “any other political committee” (*i.e.*, \$5,000 per year pursuant to 2 U.S.C. 441a(a)(1)(C), (2)(C)), but no donations from prohibited sources could be solicited, and the funds would have to be reported by the recipient host committee or municipal fund.

#### 11 CFR 9008.55(e)—Candidate Solicitations for Host Committee and Municipal Funds

BCRA also prohibits Federal candidates and individuals holding Federal office<sup>7</sup> from soliciting,

<sup>7</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

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 agents acting on their behalf of either Federal candidates or individuals holding Federal office, as well as to entities directly or indirectly established, financed, maintained, or controlled by such candidates or officeholders. 2 U.S.C. 441i(e)(1).

BCRA creates two exceptions from that general rule in 2 U.S.C. 441i(e)(4), only one of which is relevant to Presidential nominating conventions. 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, so long as the solicitation does not specify how the funds will or should be spent. 2 U.S.C. 441i(e)(4)(A). The “Federal election activity” referenced in this exception is voter registration within 120 days of a Federal election and voter identification, GOTV activities, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot. 2 U.S.C. 441i(e)(4)(A) (*citing* 2 U.S.C. 431(20)(A)(i) and (ii)).

The principal purpose of a host committee or municipal fund is to promote and generate commerce in the host city; its principal purpose is not to conduct the specified types of Federal election activity that would trigger the exception to the rule permitting general solicitations for 501(c) organizations. Therefore, under 2 U.S.C. 441i(e)(4)(A), Federal candidates and officeholders may make general solicitations of funds on behalf of any host committee or municipal fund that is a 501(c) organization where such solicitations do not specify how the funds will or should be spent and where the Federal candidates and officeholders do not establish, finance, maintain, or control these organizations.<sup>8</sup>

The final rule at 11 CFR 9008.55(e) is modified from the proposed rule to state that Federal candidates and officeholders and their agents may make

definition of “Federal officeholder” in 11 CFR 113.2(c).

<sup>8</sup> In AO 2003–12, the Commission determined that the exceptions in 2 U.S.C. 441i(e)(4) do not apply to a section 501(c) organization established, financed, maintained, or controlled by a Federal candidate or officeholder, or agent of either.

general solicitations on behalf of host committees or municipal funds that are section 501(c) organizations, provided the solicitations do not specify how the funds will or should be spent and provided that the solicitations are otherwise permitted by 2 U.S.C. 441i(e)(4)(A).<sup>9</sup>

### Other Convention-Related Issues

#### A. Goods and Services Provided to Convention Committees by Commercial Vendors

The NPRM also sought comment on proposed changes to the rule on convention committees receiving goods and services from commercial vendors, 11 CFR 9008.9. Some commenters argued that nothing in BCRA should change the conclusion that the provision of these goods and services is permissible. In contrast, a different commenter argued that this exception violates both FECA and BCRA, citing many of the same reasons some commenters used to argue that the Commission's current host committee and municipal regulations are contrary to FECA and BCRA. For the same reasons stated above regarding the host committee and municipal fund exception, the Commission has determined that no change to 11 CFR 9008.9 is required by BCRA.

#### B. Offsets

The NPRM sought comment on whether BCRA required any reevaluation of the practice of permitting convention committees to "offset" in-kind contributions received from host committees that are deemed impermissible in post-convention audits. Under this practice, rather than require repayment of 100% of these receipts, the convention committee is permitted to offset the impermissible in-kind contributions with convention committee expenditures that could have been paid by the host committee. The Commission has concluded that under BCRA convention committees may continue to receive in-kind donations from host committees and municipal funds provided the in-kind donations are in accordance with 11 CFR 9008.52

<sup>9</sup> The new regulations at 11 CFR 300.52 and 300.65 could be read to restrict a broader range of general solicitations made on behalf of 501(c) organizations than does the related provision of BCRA, 2 U.S.C. 441(e)(4)(A). Specifically, the regulations appear to bar general solicitations on behalf of 501(c) organizations for any election activity, including certain types of Federal election activity; section 441(e)(4)(A), however, bars only those general solicitations on behalf of 501(c) organizations whose principal purpose is to conduct these specified types of Federal election activity. The regulations should be read as barring only those solicitations covered by the statute.

and 9008.53. See new 11 CFR 9008.55(a). Therefore, the Commission has also determined that convention committees may offset host committee or municipal fund impermissible in-kind contributions. Accordingly, no revisions need be made in the final rules.

#### C. Private Hospitality Events

The NPRM also sought comment on whether BCRA requires regulation of private hospitality events held by corporations, labor organizations, and other groups in the convention city during the convention. Such events are typically held in locations outside the convention venue, but often in close proximity to it. Convention attendees including delegates, Federal candidates and officeholders, and political party officials are often invited to these events, and such individuals frequently speak or are recognized at such events.

Four commenters addressed this issue, and they all agreed that BCRA does not require regulatory language regarding these hospitality events. One of the commenters noted that these events could be subject to regulation on some other basis, if, for example, the events were also fundraisers for a political committee under the Act.

The Commission has concluded that BCRA does not change the determination that the temporal and geographic proximity of these events to Presidential nominating conventions does not subject the events to regulation under FECA solely because of that proximity. The Commission notes that FECA regulation could be triggered nonetheless by such events if, for example, a Federal political committee holds a fundraising event.

#### D. Host Committee Audits

The NPRM sought comment on whether the examination and audit authority set forth in current 11 CFR 9008.54 has an adequate statutory basis under FECA or the Fund Act. This section mandates audits of all host committees. The Fund Act gives the Commission the authority "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 (the Commission) by this chapter." 26 U.S.C. 9009(b).

When the predecessor to the current version of 11 CFR 9008.54 was promulgated in 1979, the Commission determined it was necessary to audit host committees because host committees are allowed to accept donations to defray convention

expenses and, therefore, the Commission had a responsibility to insure that such 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).

Two commenters argued that the Commission does not have statutory authority to conduct routine audits of host committees. In their view, the Commission's routine audit authority is limited to candidates and committees that receive public funds, and is meant to ensure that such candidates and committees do not misspend those public funds. One commenter stated that routine audits of host committees are unwarranted because host committees do not receive public funds. Both commenters favored repealing 11 CFR 9008.54.

After considering the comments, the Commission has concluded that it possesses authority to audit host committees on a routine basis. The Commission notes that the audit authority in 26 U.S.C. 9009(b) is broad. That section grants the Commission the power "to conduct such examinations and audits" as it deems necessary to carry out the responsibilities with which the Commission has been charged. Unlike 26 U.S.C. 9007(a), which requires the Commission to conduct routine audits of publicly-financed candidates and convention committees, section 9009(b) does not require the Commission to audit host committees. It does, however, grant the Commission the discretion to do so. Given the increasingly vital role that host committees play in financing the national nominating conventions, the Commission continues to find it necessary to conduct routine host committee audits to ensure that such entities do not provide "anything of value" to convention committees, except as expressly permitted in 11 CFR 9008.52(b).

#### E. Municipal Fund Audits

While the NPRM proposed to eliminate many of the discrepancies in the manner that the Commission's regulations applied to host committees and municipal funds, it did not propose extending the routine audit provision applicable to host committees, 11 CFR 9008.54, to municipal funds as well.

While the NPRM did not propose to conduct routine audits of municipal funds, it indicated that the Commission retains the authority to conduct a detailed and thorough review of municipal fund transactions if such an

examination is necessary in particular circumstances. Comment was sought on whether, because municipal funds are already subject to government oversight, as well as for the sake of comity between Federal and State or local agencies, the Commission should decline to revise 11 CFR 9008.54 to extend its audit authority to cover municipal funds. One commenter opposed subjecting municipal funds to automatic audits.

The Commission has decided not to extend the audit authority set forth in 11 CFR 9008.54 to municipal funds because routine, full-scale audits of municipal funds are unnecessary, given that municipal funds' financial transactions are already subject to careful scrutiny by local authorities. The Commission does, however, retain the authority to conduct detailed and thorough examinations of municipal fund transactions and accounts related to the convention when warranted.

#### **11 CFR Part 9031—Scope**

##### *11 CFR 9031.1—Scope*

The Commission is making two technical amendments to this section to update the references to its other regulations.

#### **11 CFR Part 9032—Definitions**

##### *11 CFR 9032.9—Qualified Campaign Expenses*

Section 9032.9 defines qualified campaign expenses. One technical correction is being made in § 9032.9(c). Previously, this rule stated 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. The reference to “expenditure report period” was an error because that term applies to general election candidates. See 11 CFR 9002.12. This reference is being changed 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. No commenters addressed this topic.

#### **11 CFR Part 9033—Eligibility for Payments**

##### *11 CFR 9033.1—Candidate and Committee Agreements*

Similar to the technical amendment to 11 CFR 9003.1(b)(8) discussed above, the Commission is revising § 9033.1. The reference to 11 CFR parts 100–116 in paragraph (b)(10) is amended to

encompass all the regulations up to and including 11 CFR part 400 among the regulations with which candidates and their authorized committees agree to comply.

##### *11 CFR 9033.11—Documentation of Disbursements*

The changes to § 9033.11 follow the changes to 11 CFR 9003.5 discussed above.

#### **11 CFR Part 9034—Entitlements**

##### *11 CFR 9034.4—Use of Contributions and Matching Payments; Examples of Qualified Campaign Expenses and Non-Qualified Campaign Expenses*

Section 9034.4, which concerns the use of contributions and matching payments for qualified and non-qualified campaign expenses, is being amended in several respects. First, the heading for this section is being modified by adding the words “examples of qualified campaign expenses and nonqualified campaign expenses” to assist the reader in locating these examples.

##### *11 CFR 9034.4(a)(3)(i)—Definition of “Winding Down Costs”*

The Commission is revising 11 CFR 9034.4 to move provisions from paragraph (a)(3)(i) to the new rule on winding down costs in 11 CFR 9034.11, discussed below. Revised § 9034.4(a)(3)(i) indicates that winding down costs that satisfy new 11 CFR 9034.11 are qualified campaign expenses.

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

The Commission is also revising 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. Previously, paragraph (a)(3)(ii) provided that these candidates may use “contributions received after” the DOI to continue to campaign. However, 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, contributions that were dated on or before the DOI but received after the DOI were subject to both rules, and the previous rules did not make clear how they should be treated. Section 9034.4(a)(3)(ii) is being revised to eliminate the overlap by stating that only a contribution that is dated after a candidate's DOI may be used to continue to campaign.

In addition, the Commission is deleting the sentence in former § 9034.4(a)(3)(ii) that stated: “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. Deleting this sentence makes clear that candidates will 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. Revised 11 CFR 9034.4(a)(3)(ii) also includes a new reference to 11 CFR 9034.11. No comments were received regarding these changes to § 9034.4(a)(3)(ii).

##### *11 CFR 9034.4(a)(3)(iii)*

As discussed below in the explanation and justification of 11 CFR 9035.1(c)(1), paragraph (a)(3)(iii) is being moved from § 9034.4 to § 9035.1(c)(1).

##### *11 CFR 9034.4(a)(5)—Gifts and Bonuses*

The NPRM sought comment on revising 11 CFR 9034.3(a)(5) regarding gifts and bonuses paid to campaign employees, consultants, and volunteers. For the reasons explained above in the explanation and justification for newly redesignated 11 CFR 9004.4(a)(6), the Commission has decided to make a similar change to 11 CFR 9034.4(a)(5).

##### *11 CFR 9034.4(a)(6)—Convention Expenses of Ineligible Candidates*

The NPRM proposed adding a new section 11 CFR 9034.4(a)(6) 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 permitted ineligible candidates to treat as qualified campaign expenses certain costs related to meetings and events at the national nominating conventions subject to some restrictions. Specifically, the Commission allowed costs related to meetings and receptions to thank delegates and supporters to be treated as qualified campaign expenses, but did not also allow travel costs related to such events to be considered qualified campaign expenses. The Commission also permitted ineligible candidates to incur qualified campaign expenses related to specific fundraising events at

the national nominating conventions, as well as travel expenses to attend such events.

One commenter agreed that the expenses in AO 2000–12 should be treated as qualified campaign expenses, and suggested that the rule should be extended to cover most convention expenses of primary candidates incurred after DOI. This commenter asserted that reasonable convention expenses are in connection with a candidate's campaign for nomination both for candidates who continue to campaign past their eligibility date and those who withdraw or suspend their campaigns. Candidates who withdraw or suspend their campaigns might restart their campaigns depending on changed circumstances. The commenter suggested a ceiling of \$100,000 to \$250,000 for such expenses.

The Commission is adding new 11 CFR 9034.4(a)(6) to provide a simpler approach in which a candidate may treat expenses related to the national nominating convention of up to \$50,000 as qualified campaign expenses. This rule recognizes that ineligible candidates have interests in participating in their parties' national nominating convention related to their candidacy for the nomination. Thus, it is reasonable to allow candidates to use public funds to participate in their party's national nominating convention. This bright line rule avoids the necessity of considering whether convention expenses are in fact necessary for fundraising activities or are genuinely to thank those who assisted the campaign as required by AO 2002–12.

The new rule in 11 CFR 9034.4(a)(6) provides that an ineligible candidate may treat up to \$50,000 in expenses related to the national nominating convention as qualified campaign expenses. Any costs reasonably related to the candidate's attendance, participation or activities at the Presidential nominating convention would be a qualified campaign expense under the new rule, including travel and lodging costs of the candidate, his or her family, and campaign staff, consultants and volunteers to attend the convention, the costs of hosting receptions and events, and other convention-related costs. Any amount in excess of \$50,000 will not be considered a qualified campaign expense and may be subject to repayment. The \$50,000 cap is based on the Commission's experience as to how much is reasonably necessary for this purpose. Apart from the \$50,000 cap, any candidate who is in a deficit position after DOI may incur additional qualified campaign expenses related to

fundraising events at the national nominating conventions to retire campaign debt.

#### *11 CFR 9034.4(b)(3)—Non-Qualified Campaign Expenses*

Revisions are being made to 11 CFR 9034.4(b)(3) to more clearly state that winding down costs addressed in paragraph (a)(3) of this section are qualified campaign expenses. The revised rules also indicate that certain convention expenses permitted under paragraph (a)(6) of this section are qualified campaign expenses. As proposed in the NPRM, § 9034.4(b)(3) would have also referred to continuing to campaign costs; however, in the final rules, it does not refer to continuing to campaign costs because those costs are not qualified campaign expenses.

#### *11 CFR 9034.10—Pre-Candidacy Payments by Multicandidate Political Committees Deemed In-kind Contributions and Qualified Campaign Expenses; Effect of Reimbursement*

In the NPRM, the Commission proposed adding language at 11 CFR 9034.10 to treat certain expenses incurred by multicandidate committees as in-kind contributions benefiting publicly funded Presidential candidates. Similar language was proposed at 11 CFR 110.2(l) to reach a similar result where multicandidate committees incur such expenses benefiting Presidential candidates who are not publicly funded. These provisions were designed to address situations where unauthorized political committees closely associated with a particular individual planning to run for President defray costs that are properly treated as in-kind contributions unless reimbursed by the Presidential campaign.

Two commenters addressed this topic. One commenter generally supported the proposed rule, but noted that it did not address similar issues in Congressional campaigns. The other commenter suggested that in this context even polling that did not mention a particular Presidential candidate should be covered.

The Commission is adopting final rules that use much of the approach set forth in the proposed rules. The final rules, though, narrow their focus so they are clearer in application and better targeted to the situations that truly present the potential for evasion of the contribution and spending limits. The final rules also provide a mechanism for a Presidential campaign to achieve compliance with the law by promptly reimbursing the multicandidate committee. If there is full and timely reimbursement, the multicandidate

political committee's payment is not to be treated as an in-kind contribution for either entity, but rather the reimbursement is an expenditure of the candidate's campaign and is a qualified campaign expense of the candidate's campaign (in the case of a publicly funded candidate).

One distinction built into the final rules is that they cover only payments by multicandidate political committees before the individual benefiting actually becomes a *candidate* within the meaning of 2 U.S.C. 431(2) and 26 U.S.C. 9032(2). The Commission's experience is that after an individual becomes a candidate for the Presidency by virtue of receiving more than \$5,000 in contributions or making more than \$5,000 in expenditures, and taking into account the "testing the waters" allowances at 11 CFR 100.72 and 100.131, the candidate's principal campaign committee or other authorized committee would pay the types of expenses involved here. The focus of the final rules, therefore, is those expenses paid by multicandidate political committees prior to actual candidacy under the law, *i.e.*, during the "testing the waters" phase and before. For other situations not addressed in new § 110.2(l) or § 9034.10, including when expenditures are paid for by multicandidate committees after candidacy, the general provisions describing in-kind contributions at 11 CFR 100.52(a) and (d), 109.20, 109.21, 109.23, and 109.37 would apply. The covered expenses in the new rules at 11 CFR 110.2(l) and 9034.10 would not trigger candidacy themselves, but would count as contributions in-kind and/or qualified campaign expenses if and when the individual benefiting becomes a candidate, including by operation of 11 CFR 100.72(b) and 100.131(b).

Both final rules narrow the types of expenses covered in the proposed rules by qualifying each. For example, only polling expenses that involve measuring the favorability, name recognition, or relative support of the person who becomes a Presidential candidate are subject to the rules. General polling solely regarding issues would not be covered. Compensation and office expenses would be covered only to the extent they relate to activities in states where Presidential primaries, caucuses, or preference polls are yet to be conducted.

Both final rules also narrow the coverage to situations where there is some involvement of the benefiting candidate. It became apparent that there may be some multicandidate political committee payments of the type described that are undertaken without

any involvement of the individual who becomes a Presidential candidate. For example, some multicandidate committees might independently undertake polling to test the relative support of various potential candidates for President in order to make decisions about which candidate to support with contributions or independent expenditures. Other committees might be setting up staffed offices in States that will be conducting Presidential primaries, but have no involvement whatsoever with a person who becomes a Presidential candidate.

The Commission decided to refer to standards already in the regulations to reach only those expenditures that properly should be treated as in-kind contributions and/or qualified campaign expenses. Thus, the final rules cover only those situations where the benefiting candidate "accepted or received" the goods or services, "requested or suggested" the goods or services, had "material involvement" in the decision to provide the goods or services, or was involved in "substantial discussions" about providing the goods or services. See 11 CFR 106.4(b); 109.21(b)(2), (d)(1), (d)(2), (d)(3). This approach was driven, in part, by the fact that the Commission did not in these rules want to try to differentiate between various types of multicandidate committees, such as those commonly referred to as "leadership PACs." However, without some nexus with a particular benefiting candidate, the rules would reach too broadly. As a practical matter, the final rules probably will have the most impact on so called "leadership PACs," but other types of multicandidate political committees will be covered as well.

If reimbursement is made by the Presidential campaign within 30 days after the benefiting candidate becomes a candidate, the multicandidate political committee's payment will not be deemed an in-kind contribution. Because some such payments may fall within the last 30 days of a multicandidate committee's and a Presidential candidate's reporting period, and before the reimbursement has been made, the question of whether to initially report the payment as a contribution in-kind arises. Because of the nature of these expenses, and the fact that treatment as an in-kind contribution does not arise unless and until the benefiting Presidential aspirant legally becomes a candidate, the Commission will not require the payment to be treated as an in-kind contribution under these circumstances. After the reimbursement opportunity has passed, though (30 days after

candidacy), the payment must be treated as an in-kind contribution, and any such payments not previously reported as such would have to be so reported through the amendment process.

Please note that nothing in these final rules alters the application of 11 CFR 109.21(b)(2) or 109.37(a)(3) or (b). The Commission also notes that these final rules in no way address situations where the Commission determines that the multicandidate political committee and the candidate's principal campaign committee are affiliated under 11 CFR 100.5(g)(4).

#### *11 CFR 9034.11—Winding Down Costs*

This new section addresses winding down costs for primary election candidates. For the reasons stated in the explanation and justification for new 11 CFR 9004.11, which addresses winding down costs for general election candidates, the Commission is adopting a similar approach to winding down costs of primary candidates in new § 9034.11, with some differences described below.

#### *11 CFR 9034.11(a)—Definition of "Winding Down Costs"*

The definition of "winding down costs" in new § 9034.11(a) is similar to the definition in § 9004.11(a) except that the costs are related to the candidate's campaign for nomination rather than the candidate's general election campaign. New § 9034.11(a) includes a revised version of the first sentence of previous 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 change helps to clarify that primary election campaign winding down expenses are legally distinct from general election campaign winding down expenses.

#### *11 CFR 9034.11(b)—Winding Down Limitation*

In the NPRM the Commission proposed placing a 5% amount limitation on winding down costs for primary election candidates similar to the limit proposed for general election candidates. One commenter opposed the 5% limit, noting that in the 2000 election cycle a number of candidates would have exceeded this limitation. The commenter viewed winding down costs as fixed costs. The commenter stated that media costs become an increasingly larger percentage of a campaign's expenditures as money becomes available, while the percentage of expenditures for accounting, legal services, office space and supplies

diminishes because such costs are often provided at a fixed price for the anticipated duration of the service and are not directly dependent upon whether the campaign is active or closing down.

As it did with the 2000 general election candidates, the Commission compared the approximate winding down costs of the primary election candidates to the proposed winding down limitations. 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 these, only one would have exceeded the proposed winding down limitation, having spent 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 proposed in the NPRM, with winding down costs ranging between approximately 13% and 42% of their expenditures. One candidate who would have been subject to the minimum winding down limitation of \$100,000 spent substantially less than that amount. Thus, of the ten publicly funded primary committees in the 2000 Presidential elections, five committees had winding down expenses that would have exceeded the proposed limitation. One of these had sufficient funds in its related GELAC that could have paid the excessive winding down expenses. The other four committees would have received less matching funds after their DOIs.<sup>10</sup>

The Commission also considered the results of the hypothetical application to the 2000 candidates of a 10% winding down limitation for primary election candidates. This percentage would allow most campaigns, particularly small campaigns of unsuccessful candidates, to pay necessary winding down costs without exceeding the winding down limitation, and ensure that only campaigns with extraordinarily high winding down expenses exceed the winding down limitation. Although four of the ten 2000 election cycle primary candidates would have spent more than a 10% limitation, two of those candidates spent close to that amount (13% and 14%) and might have been able to adjust their expenditures to fall within the new

<sup>10</sup>Of course, this comparison is hypothetical, and the committees might have curbed certain expenses had the new rules been in effect.

limitation; only two candidates spent far in excess of a 10% limitation.

Accordingly the Commission is adopting a winding down limitation for primary election candidates in new § 9034.11(b). Specifically, the new primary election winding down limitation is (1) 10% of the overall expenditure limitation; or (2) 10% 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. Like general election candidates, all primary candidates may spend a minimum of \$100,000 on winding down costs.

This limitation only applies to the use of public funds or a mixture of public and private funds for winding down costs. The final rule allows a primary candidate who is in a deficit position at the DOI to pay for winding down costs in excess of the limitation 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 will be required to make a surplus repayment to the United States Treasury before they may use private funds for winding down costs in excess of the limitation. See 11 CFR 9038.3(c). The rule restricts the expenses used to calculate the winding down limitation to the period prior to a primary candidate's DOI to prevent candidates from increasing their winding down limitation by spending more for winding down expenses.

In practice, the winding down limitation for primary candidates with large campaigns would be the maximum winding down limitation: 10% of the overall expenditure limitation. Currently, the primary election expenditure limitation is equal to \$36,480,000, so the 10% limit would equal \$3,648,000.<sup>11</sup> For primary candidates with smaller campaigns, the winding down limitation would equal 10% of their expenses prior to DOI. For purposes of calculating the amount of the winding down limitation based on a primary candidate's expenses, a candidate's expenses include both disbursements and accounts payable as of the DOI for the same categories of expenses that are listed above in the discussion of the general election candidate limitation at 11 CFR

9004.11(b). 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).

After a primary candidate's accounts no longer contain public funds, including after making any required surplus repayments, private funds may be used to pay for expenses in excess of the winding down limitation without resulting in non-qualified campaign expenses. In addition, as discussed above, the new rule will permit a candidate's GELAC to pay the primary committee's winding down expenses under certain conditions.

One commenter argued that the Commission has the authority to create a fund for primary candidates like the GELAC and could provide clear guidance as to the permissible expenses from the fund, which would create an incentive for candidates to adopt strong compliance procedures. The Commission disagrees. Fully funded general election candidates may not accept private contributions; thus, the GELAC allows such candidates to accept contributions, but only for limited legal and compliance costs. See 11 CFR 9003.3. General election candidates are also permitted some expenses that do not count toward the expenditure limitations and the GELAC is a source of funds for these exempt expenditures. Primary candidates may accept private contributions. To the extent that primary candidates are not in a surplus position and no longer retain any matching funds in their accounts, they may use private contributions for winding down expenses in excess of the new restrictions without having to make a repayment for non-qualified campaign expenses. Thus, a separate compliance fund is not necessary for primary candidates. In addition, there is no basis for permitting primary candidates to have more than one contribution limitation for the same election by allowing a separate contribution limitation for a legal defense fund or legal and accounting compliance fund.

For these reasons, the Commission does not believe that a new primary legal defense fund for enforcement matters and other legal proceedings or a primary legal and compliance fund similar to a GELAC is necessary or appropriate for primary election candidates.

#### *11 CFR 9034.11(c)—Allocation of Primary and General Election Winding Down Costs*

The rules in new 11 CFR 9034.11(c) on the allocation of primary and general election winding down costs follow the new rules in 11 CFR 9004.11(c).

#### *11 CFR 9034.11(d)—Candidates Who Run in Both Primary and General Elections*

The Commission is revising 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 rules in former 11 CFR 9034.4(a)(3)(i) and (iii) allowed only candidates who do not accept public funding 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. The former rule, however, did 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 believes 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. Candidates who run in the general election, whether or not they receive public funds for that election, must wait until 31 days after the general election, which is the first day after the end of the expenditure report period for publicly financed general election candidates, before they may begin to incur and pay winding down expenses or allocate them as 100% compliance expenses. Consequently, the new rule at 11 CFR 9034.11(d) expressly applies without regard to whether candidates' general election campaigns are publicly funded. Expenses incurred 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, are general election expenses, rather than primary winding down costs. This rule prevents the use of primary matching funds for non-qualified expenses related to the

<sup>11</sup> Before the 2004 primary elections, the primary election expenditure limit under 2 U.S.C. 441a(b)(1)(A) is subject to an additional annual adjustment under 2 U.S.C. 441a(c).

general election. See 11 CFR 9032.9(a) and 9034.4(b). Although this revised rule may result in general election campaigns incurring a small amount of administrative costs related to terminating the primary campaign during the general election period, in practice, these expenses are offset by general election start up costs that are incurred and paid by the primary committee prior to the candidate's DOI. 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 allow some primary related expenses to be paid by the general election committee and *vice versa*.

One commenter believed that this approach addresses the danger of primary funds paying for general election activity but fails to address the situation where a candidate only receives public funds in the general election and could use primary campaign funds to defray general election expenses. The Commission does not agree that this is a problem because a candidate is not permitted to supplement the general election grant by paying general election expenses with primary funds.

New paragraph 11 CFR 9034.11(d) is based on former 11 CFR 9034.4(a)(3)(i) with certain revisions. The new rule at 11 CFR 9034.11(d) states 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 also clarifies 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. Other portions of former § 9034.4(a)(3)(i) are discussed below in the explanation and justification for 11 CFR 9035.1(c)(i).

#### **11 CFR Part 9035—Expenditure Limitations**

##### *11 CFR 9035.1—Campaign Expenditure Limitation; Compliance and Fundraising Exemptions*

Section 9035.1(a)(1) of the Commission's regulations implements the spending limit for primary election candidates and their authorized committees in 2 U.S.C. 441a(b)(1)(A). Section 9035.1(a)(2) prescribes how the amounts of expenditures attributed to the spending limits will be calculated. The NPRM proposed to clarify 11 CFR

9035.1(a) to provide guidance on the extent to which coordinated expenditures, coordinated communications, coordinated party expenditures, party coordinated communications and other in-kind contributions will count against the spending limits in § 9035.1(a)(1). The Commission has decided to adopt the proposed additions to the rules at 11 CFR 9035.1.

The Commission has generally treated the receipt of in-kind contributions by Presidential primary candidates as expenditures made by those candidates subject to the expenditure limitations and has included such in-kind contributions in the total amount of a candidate's expenditures subject to the limits in calculating repayments based on excessive expenditures. In one 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 associated with that candidate, which was considered his "leadership PAC," were subject to the candidate's state-by-state spending limits. The Commission considered in-kind contributions to be part of the mixed pool of public and private funds, and thus, these expenditures were included in calculating the amount in excess of the limitations subject to repayment. The final rules amend 11 CFR 9035.1(a) and 9038.2(b)(2) (discussed below) to reflect this approach.

In the BCRA rulemaking on coordinated and independent expenditures, the Commission defined the terms "coordinated," "coordinated communication," and "party coordinated communications" in 11 CFR 109.20, 109.21, and 109.37, respectively. See *Explanation and Justification for Final Rules on Coordinated and Independent Expenditures*, 68 FR 421 (Jan. 3, 2003). These rules also describe circumstances in which coordinated expenditures and coordinated communications are treated as in-kind contributions.

Under 11 CFR 109.21(b)(2) and 11 CFR 109.37(a)(3), some coordinated expenditures are made by a person or party committee, but are not received or accepted by a candidate. 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), 11 CFR 109.21(d)(2) (material involvement), or 11 CFR 109.21(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 11 CFR 109.37, result in the receipt or acceptance of an in-kind contribution arising from a coordinated communication or a party coordinated communication. Only in-kind contributions received or accepted by the candidate or authorized committee or agent are treated as expenditures made by the candidate. See 11 CFR 109.20(b) (requiring a candidate to report coordinated expenditures as expenditures); 11 CFR 109.21(b)(1) (requiring a candidate to report received or accepted coordinated communications as expenditures); 11 CFR 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).

The final rules add new paragraph (a)(3) to § 9035.1 to specify that coordinated expenditures pursuant to 11 CFR 109.20, coordinated communications pursuant to section 109.21, coordinated party expenditures, party coordinated communications pursuant to section 109.37, and in-kind contributions count against the expenditure limitations and are included in the total amount of a publicly funded candidate's expenditures subject to the limits. New 11 CFR 9035.1(a)(3) states that the Commission will attribute to a candidate's overall and state-by-state expenditure limitations the total of all: (1) Coordinated expenditures under 11 CFR 109.20; (2) coordinated communications under 11 CFR 109.21 that are in-kind contributions received or accepted by the candidate, authorized committee or agent; (3) coordinated party expenditures, including party coordinated communications under 11 CFR 109.37 that are in-kind contributions received or accepted by the candidate, authorized committee or agent and that exceed the coordinated party expenditure limitation at 11 CFR 109.32(a); and (4) other in-kind contributions received or accepted by the candidate, authorized committee or agent. This new paragraph is consistent with the Commission's general past practice in audits of treating in-kind contributions as expenditures by the recipient Presidential candidates and their authorized committees.

The phrase "receive or accept" in 11 CFR 9035.1 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 that are not "received or accepted" by a candidate do not count against that candidate's expenditure limitations. One commenter stated that limiting the rule to in-kind contributions that the candidate has received or accepted under 11 CFR part 109 is a common sense extension of the existing rules, which provide that a person may make an excessive in-kind contribution but the intended beneficiary will not violate the law unless the candidate or committee accepts or receives the contribution. This commenter stated that it is appropriate to apply the legal principle that liability is the consequence of one's own acts and not the acts of others to regulations governing whether a candidate has made expenditures in excess of the limitations. The Commission is limiting the new rule to in-kind contributions received or accepted by the candidate, authorized committee or agents to be consistent with the rules in 11 CFR part 109.

Additionally, new paragraph (a)(4) provides that the value of an in-kind contribution is the usual and normal charge for the goods and services provided.

The revised rule in 11 CFR 9035.1 does not specifically list 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, as provided in 11 CFR 109.21 and 11 CFR 109.37, respectively. Because the revised rule at 11 CFR 9035.1(a)(3) specifically includes coordinated communications and party coordinated communications that are received or accepted, 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 § 109.32(a), which specifies the limitations for coordinated party expenditures in Presidential elections, do not count against the candidate's expenditure limitations. However, any party coordinated expenditures exceeding the 2 U.S.C. 441a(d)(2) party expenditure limitations would count against the candidate's expenditure limitations. Thus, the new rule in 11 CFR 9035.1(a)(3) does not adversely affect coordinated party expenditures because § 9035.1(a)(3) applies only to amounts in excess of the statutory limitations in 2 U.S.C. 441a(d)(2).

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. Any coordinated party expenditures that are in excess of the coordinated party expenditure limitation at 11 CFR 109.32(a) 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.

#### *11 CFR 9035.1(c)(1)—Compliance Exemption*

Section 11 CFR 9035.1(c)(1) addresses the legal and accounting compliance exemption to the expenditure limitations. For greater clarity, the Commission is revising the rule to include a revised version of former 11 CFR 9034.4(a)(3)(iii), related to the treatment of certain winding down expenses as 100% compliance costs. The revised regulation provides that only candidates who do not run in the general election may treat 100% of salary, overhead and computer expenses as exempt compliance expenses immediately after their date of ineligibility. Candidates who run in the general election must wait until 31 days after the general election to treat these expenses as exempt compliance costs. For further discussion of the treatment of winding down costs for candidates who run in both the primary and general elections, see the explanation and justification for 11 CFR 9034.11(d) above.

#### *11 CFR 9035.1(c)(3)—Shortfall Bridge Loan Exemption*

During recent election cycles, the Presidential Primary Matching Payment Account has occasionally contained insufficient funds to fully pay all of the matching funds to which primary candidates were entitled on the dates

payments were due. *See generally* 26 U.S.C. 9037(b); 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 additional costs for "bridge loans" 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.

To mitigate the effect of a potential shortfall on candidates, the Commission is creating a new "shortfall bridge loan exemption" from a primary candidate's overall expenditure limitation at new 11 CFR 9035.1(c)(3). The NPRM proposed a flat exemption of 5% of the amount of all delayed or deficient payments of matching funds to which the candidate is entitled. One commenter supported this concept but noted the difficulty in choosing a fair formula that would not favor candidates whose payments are delayed over those who are less dependent on public funds. The commenter argued that a candidate's expenditure limitation should not be raised significantly over that applicable to other candidates unless the amount accurately reflects costs actually incurred by the candidate.

Rather than the flat percentage proposed in the NPRM, the Commission has decided to base the new exemption on the amount of interest charges accrued during a shortfall period on all bridge loans obtained by a candidate if the candidate experiences any delay or deficiency in matching fund payments due to a shortfall. Under new 11 CFR 9035.1(c)(3), only loans secured or guaranteed by matching funds will be eligible for this exemption. The interest charges that are exempt from the expenditure limit are those that accrued during a shortfall period, which the new rule defines as beginning when the shortfall first impacts the candidate—the first payment date on which the candidate does not receive the entire amount of matching funds certified by the Commission. The shortfall period ends on the date the candidate receives the last of the matching funds to which the candidate is entitled or becomes ineligible to receive them because the Commission revises the amount it previously certified.

If a candidate experiences a delay or deficiency in matching fund payments, the candidate need not demonstrate that any bridge loan was necessitated by the deficiency in matching fund payments to claim this exemption. In practice, it is difficult to distinguish between the

costs of bridge loans that are a direct result of a shortfall in matching funds and other loan expenses because a shortfall in public funds may be only one of several reasons a candidate needs to obtain a bridge loan. The new rule also requires that the candidate must provide documentation demonstrating the amount of interest charged on all loans guaranteed or secured by matching funds.

Finally, the Commission is not creating a similar exemption for general election candidates because payments of public funds to general election candidates and conventions receive priority over matching funds payments. While there has been a shortfall in matching fund payments in previous election cycles, there has never been a shortfall in payments to general election candidates.

#### **11 CFR Part 9036—Review of Matching Fund Submissions and Certification of Payments by Commission**

##### *11 CFR 9036.1—Matching Fund Submission*

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. See *Explanation and Justification for the Rules Governing Election Cycle Reporting by Authorized Committees*, 65 FR 42619 (July 11, 2000). The new rules, which reflect a 1999 amendment to 2 U.S.C. 434(b), apply to reporting periods beginning on or after January 1, 2001. See Pub. L. 106–58, section 641, 113 Stat. 430, 477 (1999); *Announcement of Effective Date for the Rules Governing Election Cycle Reporting by Authorized Committees*, 65 FR 70644 (Nov. 27, 2000). Under 11 CFR 100.3(b), an election cycle begins on the first day after the date of the previous general election for the office the candidate seeks or on the date an individual becomes a candidate and ends on the date of the next general election for that office. The election cycle is thus four years or less for Presidential candidates.

The Commission's rules regarding threshold submissions for matching funds in 11 CFR 9036.1(b)(1)(ii) previously required 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. Section 9036.1(b)(1)(ii) is being revised 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. One commenter noted that these changes are not controversial and aim to reconcile the statute and regulations.

##### *11 CFR 9036.2—Additional Submissions for Matching Fund Payments*

The changes to the rules on additional submissions for matching funds at 11 CFR 9036.2(b)(1)(v) follow the changes made to 11 CFR 9036.1 regarding threshold submissions.

#### **11 CFR Part 9038—Examination and Audits**

##### *11 CFR 9038.2(b)(4)—Technical Correction*

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 in the previous regulations. This word is being restored in the final rule.

#### **Other Candidate Issues**

##### *A. Candidate Salary*

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 decided to allow certain 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) indicated that a salary payment to a candidate from campaign funds is 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." 67 FR at 76972. The Commission noted that a candidate's salary does not constitute a qualified campaign expense under 11 CFR 9002.11 and 9032.9. *Id.*

Sections 9004.4(b)(6) and 9034.4(b)(5) state that payments made to a publicly funded candidate by the candidate's

general election or primary campaign 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 NPRM for these Final Rules indicated that the Commission was considering whether to revise 11 CFR 9004.4 and 9034.4 to allow publicly funded primary and general election Presidential candidates to receive salaries paid, in whole or part, with Federal funds, and to treat salary payments to candidates as qualified campaign expenses under similar conditions as those for salary payments to other Federal candidates at 11 CFR 113.1(g)(1)(i)(I).

There was no consensus among the commenters on this issue. One commenter cautioned that this is a policy issue best left to Congress, and it could have an adverse effect on the public financing system by depressing public participation in the tax check-off system. In addition, this commenter observed that it may not be logical to allow public funds to be used to pay for candidate salary but not for household expenses, mortgages and tuition for the candidate's family. Conversely, other commenters agreed with the proposal, noting that currently, incumbent Members of Congress, Presidents and Vice Presidents maintain their salaries while they are Presidential candidates, but some challengers might be unable to do so. Some commenters believed the proposal had sufficient safeguards and disclosure to prevent Presidential candidates from receiving a windfall from a campaign, while others saw a potential for abuse.

The Commission has decided to maintain its longstanding rule that payments out of public funds to a Presidential candidate, except for campaign expense reimbursements, are not qualified campaign expenses. Because public funds are involved, the Commission believes that this issue is a policy question that is best addressed by Congress. Therefore, the rules in 11 CFR 9004.4(b) and 9034.4(b) will continue to treat salaries paid out of public funds to

publicly funded candidates as non-qualified campaign expenses.

#### B. Media Travel Expenses

The Commission's rules at 11 CFR 9004.6 and 9034.6 establish procedures for authorized committees of Presidential primary and general election candidates to obtain reimbursement for transportation and other services that are provided to the news media and the Secret Service over the course of a campaign. These rules contain a non-exhaustive list of such services. Sections 9004.6(a)(3) and 9034.6(a)(3) state that Presidential campaign committees may seek reimbursement from the news 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 Travel Manual"). Expenses for which a publicly-funded 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 under 11 CFR 9004.6(a)(2) and 9034.6(a)(2).

In the 1996 campaign, some Presidential campaign 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 Travel Manual* for 1996, which has not changed to date. The NPRM in this rulemaking sought comment on whether the Commission should revise the rules to permit Presidential campaign committees to obtain reimbursement for aircraft reconfiguration expenses from the news media.

One joint comment submitted by 23 news organizations supported continued use of the *White House Travel Manual*. It also argued that most previous aircraft reconfigurations have been minor and for the convenience for the campaign, so that any cost sharing should be negotiated by the campaign and the press organizations. Another commenter stated that the *White House Travel Manual* does not address aircraft reconfiguration because the needs of the press have been taken into consideration when government aircraft are originally designed or reconfigured, but candidates who do not travel on government aircraft should be able to make the necessary changes to an

aircraft and seek press reimbursement. This commenter stated that the use of the *White House Travel Manual* to determine reimbursable expenses is generally a wise policy, but advocated a mechanism for candidates to seek exceptions to the general rule if the candidate can demonstrate that an expense was incurred at the request of and to accommodate the press.

The Commission has determined that the aircraft reconfiguration expenses are not suitable for a rule of general applicability particularly because any reconfiguration will likely involve an airplane to be used by many members of the press on many different flights over the life of the campaign. Accordingly, it would be quite difficult to determine the appropriate amount of any monetary payment at a point when neither the press corps nor the campaign staff can predict the number of flights or their costs. The advisory opinion process, however, might serve as the appropriate means for the Commission to consider any particular arrangement for the sharing of these one-time expenses. Consequently, 11 CFR 9004.6 and 9034.6 are not being revised.

#### C. In-Kind Contributions and Repayments

The NPRM proposed amending 11 CFR 9038.2(b)(2)(ii)(A), which concerns repayments based on expenditures in excess of a Presidential primary candidate's expenditure limitations. Section 9038.2(b) would have provided that in-kind contributions, coordinated expenditures, coordinated communications, coordinated party expenditures and party coordinated communications that count against a candidate's expenditure limitations must be included in the total amount of expenditures for purposes of calculating repayment determinations for expenditures in excess of the limitations.

One commenter urged the Commission to state whether it will seek repayment for primary expenditures in excess of the expenditure limitations.

On a related issue, the NPRM also proposed revisions to 11 CFR 9038.2(b)(2)(iii) that would have included both total deposits and in-kind contributions received or accepted by the candidate in the calculation of the repayment ratio for non-qualified campaign expenses. One commenter stated that this change is consistent with the statute and regulations and that the change would reduce repayment amounts.

The Commission has decided to make no changes to the regulation at 11 CFR

9038.2(b)(2), which currently requires publicly funded Presidential primary campaigns to make repayments on the basis of exceeding the Congressionally-mandated spending limits. The current rule is not being changed at this time because there is no consensus in favor of changing the regulation. *See also Notice of Disposition for the Rules Governing Public Funding of Presidential Primary Candidates—Repayments*, 65 FR 15273 (Mar. 22, 2000).

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

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that few small entities will be affected by these rules, which apply only to Presidential candidates, their campaign committees, national party committees, host committees, and municipal funds. Most of these are not small entities. Most of the Presidential campaigns and convention committees receive full or partial funding from the Federal Government, and are subsequently audited by the Commission. The Commission amends 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 9001

Campaign funds.

##### 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 9031

Campaign funds.

11 CFR Part 9032

Campaign funds.

11 CFR Part 9033—9035

Campaign funds, Reporting and recordkeeping requirements.

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, subchapters A, E and F of Chapter I of Title 11 of the Code of Federal Regulations are amended as follows:

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

■ 1. The authority citation for part 104 continues 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 is amended by:

- a. Revising paragraph (b)(1)(i)(C);
  - b. Revising paragraph (b)(1)(ii); and
  - c. Revising paragraph (b)(2).
- Revisions 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 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 pre-existing 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 continues to read as follows:

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

■ 4. Section 107.2 is 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 continues 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 is amended by adding new paragraph (l) to read as follows:

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

(l) *Pre-candidacy expenditures by multicandidate political committees deemed in-kind contributions; effect of reimbursement.* (1) A payment by a multicandidate political committee is deemed an in-kind contribution to and an expenditure by a Presidential candidate, even though made before the individual becomes a candidate under 11 CFR 100.3, if—

(i) The expenditure is made on or after January 1 of the year immediately

following the last Presidential election year;

(ii) With respect to the goods or services involved, the candidate accepted or received them, requested or suggested their provision, was materially involved in the decision to provide them, or was involved in substantial discussions about their provision; and

(iii) The goods or services are—

(A) Polling expenses for determining the favorability, name recognition, or relative support level of the candidate involved;

(B) Compensation paid to employees, consultants, or vendors for services rendered in connection with establishing and staffing offices in States where Presidential primaries, caucuses, or preference polls are to be held, other than offices in the candidate's home state and in or near the District of Columbia;

(C) Administrative expenses, including rent, utilities, office supplies and equipment, in connection with establishing and staffing offices in States where Presidential primaries, caucuses, or preference polls are to be held, other than offices in the candidate's home state and in or near the District of Columbia; or

(D) Expenses of individuals seeking to become delegates in the Presidential nomination process.

(2) Notwithstanding paragraph (l)(1) of this section, if the candidate, through an authorized committee, reimburses the multicandidate political committee within 30 days of becoming a candidate, the payment shall not be deemed an in-kind contribution for either entity, and the reimbursement shall be an expenditure of the candidate.

**PART 9001—SCOPE**

■ 7. The authority citation for part 9001 continues to read as follows:

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

■ 8. Section 9001.1 is amended by removing the number "116" and adding in its place the number "400" in both instances in which "116" appears.

**PART 9003—ELIGIBILITY FOR PAYMENTS**

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

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

■ 10. In § 9003.1, paragraph (b)(8) is amended by removing the number "116" and adding in its place the number "400".

■ 11. Section 9003.3 is amended by:

- a. Revising the introductory text of paragraph (a)(1)(i);
- b. Revising paragraph (a)(1)(i)(A);
- c. Revising paragraph (a)(1)(ii)(A)(3);
- d. Revising paragraph (a)(1)(ii)(A)(4);
- e. Revising the introductory text of paragraph (a)(1)(iv);
- f. Revising paragraph (a)(1)(iv)(C);
- g. Revising paragraph (a)(1)(v);
- h. Revising paragraph (a)(2)(i)(D);
- i. Revising paragraph (a)(2)(i)(G);
- j. Revising paragraph (a)(2)(i)(H);
- k. Adding new paragraph (a)(2)(i)(I);
- l. Revising paragraph (a)(2)(iii); and
- m. Revising paragraph (a)(2)(iv).

Revisions and additions 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 April 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.

(A) All solicitations for contributions to the GELAC shall clearly state that Federal law prohibits private contributions from being used for the candidate’s election and that contributions will be used solely for legal and accounting services to ensure compliance with Federal law, and shall clearly state how contribution checks should be made payable. Contributions shall not be solicited for the GELAC before April 1 of the calendar year in which a Presidential general election is held. If the candidate does not become the nominee, all contributions accepted for the GELAC, including redesignated contributions, shall be refunded within sixty (60) days after the candidate’s date of ineligibility.

(ii) \* \* \*  
(A) \* \* \*

(3) The written redesignations are received within 60 days of the

Treasurer’s receipt of the contributions; and

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

\* \* \* \* \*

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

\* \* \* \* \*

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

(v) Contributions made with respect to the primary election that exceed the contributor’s limit for the primary election may be redesignated for the GELAC and transferred to the GELAC if the candidate redesignates the contribution for the GELAC in accordance with 11 CFR 110.1(b)(5)(i) and (ii)(A) or (ii)(B). For purposes of this section only, 11 CFR 110.1(b)(5)(ii)(B)(1) shall not apply.

\* \* \* \* \*

(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, which shall remain subject to the primary expenditure limit under 11 CFR 9035.1.

\* \* \* \* \*

■ 12. Section 9003.5 is 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**

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

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

■ 14. Section 9004.4 is 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), redesignating paragraph (a)(4)(ii) as paragraph (a)(5) and revising newly designated (a)(5) and revising newly designated (a)(6); and
- f. Revising paragraph (b)(3).

Revisions 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;

(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 for goods and services received during the expenditure reporting period; and

(6) Monetary bonuses paid after the date of the election and gifts shall be considered qualified campaign expenses, provided that:

(i) All monetary bonuses paid after the date of the election for committee employees and consultants in recognition of campaign-related activities or services:

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

(B) Are paid during the expenditure report period; and

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

(b) \* \* \*

(3) Expenditures incurred after the close of the expenditure report period. Except for accounts payable pursuant to paragraph (a)(5) of this section and winding down costs 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.

\* \* \* \* \*

■ 15. New section 9004.11 is 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 Federal Election Campaign Act and the Presidential Election Campaign Fund Act, and other necessary administrative costs associated with ending the campaign, including office space rental, staff salaries, and office supplies. Winding down costs are qualified campaign expenses.

(b) 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.

(c) 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 reasonable allocation method. An allocation method is reasonable if it divides the total winding down costs between the primary and general election committees and results in no less than one third of total winding down costs allocated to each committee. A candidate may demonstrate that an allocation method is reasonable even if either the primary or the general election committee is allocated less than one third of total winding down costs.

PART 9008—FEDERAL FINANCING OF PRESIDENTIAL NOMINATING CONVENTIONS

■ 16. The authority citation for part 9008 is revised to read as follows:

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

■ 17. Section 9008.3 is 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 written contracts or 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 written modifications to previous contracts or agreements. Each such contract, agreement or modification shall be filed with the report covering the reporting period in which the contract or agreement or modification is executed.

\* \* \* \* \*

■ 18. Section 9008.7 is amended by revising paragraph (a)(4)(xii) to read as follows:

§ 9008.7 Use of funds.

(a) \* \* \*

(4) \* \* \*

(xii) Expenses for monetary bonuses paid after the last date of the convention or gifts for national committee or convention committee employees, consultants, volunteers and convention officials in recognition of convention-related activities or services, provided that:

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

(B) All monetary bonuses paid after the last date of the convention for committee employees and consultants in recognition of convention-related activities or services are provided for pursuant to a written contract made prior to the date of the convention and are paid no later than 30 days after the convention; and

\* \* \* \* \*

■ 19. Section 9008.8 is amended by revising paragraph (b)(2) and paragraph (b)(4)(ii)(B) to read as follows:

§ 9008.8 Limitation of expenditures.

\* \* \* \* \*

(b) \* \* \*

(2) Expenditures by government agencies and municipal funds. Expenditures made by government agencies and 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 to pay for the legal and accounting services comply with the limitations and prohibitions of 11 CFR parts 110, 114 and 115. These contributions, when aggregated with other contributions from the same contributor to the political committees established and maintained by the national political party, shall not exceed the amounts permitted under 11 CFR 110.1(c) and 110.2(c), as applicable.

\* \* \* \* \*

■ 20. Section 9008.10 is amended by revising the introductory text 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:

\* \* \* \* \*

■ 21. Section 9008.12 is 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, government agency 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 government agency or municipal fund from an impermissible source.

\* \* \* \* \*

■ 22. The heading of subpart B of part 9008 is revised to read as follows:

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

■ 23. Section 9008.50 is 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* is any local organization, such as a local civic 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 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 the control of officials of the State or local government.

■ 24. Section 9008.51 is 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. Revising paragraph (c).

The revisions and additions 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 written contracts or agreements that it has entered into with the city, county, or State hosting the convention, a host committee, a municipal fund, or a convention committee, including subsequent written modifications to previous contracts or agreements, unless such contracts, agreements or modifications have already been submitted to the Commission by the convention committee. Each such contract or agreement or modification shall be filed with the first report due under paragraph (b) of this section after the contract or 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.

(c) *Post-convention statements by State and local government agencies.* Each government agency of a State, municipality, or other political subdivision that provides facilities or services related to a Presidential nominating convention shall file, by letter, a statement with the Commission reporting the total amount spent to provide facilities and services for the convention under 11 CFR 9008.52(b), a list of the categories of facilities and services the government agency provided for the convention, the total amount spent for each category of facilities and services provided, and the total amount defrayed from general revenues. This statement 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. Categories of facilities and services may include construction, security, communications, transportation, utilities, clean up, meeting rooms and accommodations. This paragraph (c) does not apply to any activities of a State or local government agency through a municipal fund that are reported pursuant to paragraph (b) of this section.

■ 25. Section 9008.52 is revised to read as follows:

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

(a) *Receipt of goods or services from commercial vendors.* Host committees may accept goods or services from commercial vendors under the same terms and conditions (including reporting requirements) set forth at 11 CFR 9008.9 for convention committees.

(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 for the following purposes:

(1) To defray those expenses incurred for the purpose of promoting the suitability of the city as a convention site;

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

(3) To defray those expenses incurred in facilitating commerce, such as providing the convention and attendees with shopping and entertainment guides and distributing the samples and promotional material specified in 11 CFR 9008.9(c);

(4) To defray the administrative expenses incurred by the host committee, such as salaries, rent, travel, and liability insurance;

(5) To provide the national committee use of an auditorium or convention center and to provide construction and convention related services for that location such as: construction of podiums; press tables; false floors; camera platforms; additional seating; lighting, electrical, air conditioning and loudspeaker systems; offices; office equipment; and decorations;

(6) To defray the costs of various local transportation services, including the provision of buses and automobiles;

(7) To defray the costs of law enforcement services necessary to assure orderly conventions;

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

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

(10) To provide accommodations and hospitality for committees of the parties responsible for choosing the sites of the conventions; and

(11) To provide other similar convention-related facilities and services.

■ 26. Section 9008.53 is 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 9008.9 for convention committees.

(b) *Receipt and use of donations to a municipal fund.* Businesses (including banks), labor organizations, and other organizations and individuals may donate funds or make in-kind donations to a municipal fund to pay for expenses listed in 11 CFR 9008.52(b).

■ 27. Section 9008.55 is added to read as follows:

**§ 9008.55 Funding for Convention Committees, Host Committees and Municipal Funds.**

(a) Convention committees, including any established pursuant to 11 CFR 9008.3(a)(2), are subject to 11 CFR 300.10, except that convention committees may accept in-kind donations from host committees and municipal funds provided that the in-kind donations are in accordance with the requirements of 11 CFR 9008.52 and 9008.53.

(b) Host committees and municipal funds are not “agents” of national committees of political parties or convention committees, unless they satisfy the prerequisites of 11 CFR 300.2(b)(1).

(c) Host committees and municipal funds are not “directly or indirectly established, financed, maintained, or controlled” by national committees of political parties or convention committees, unless they satisfy the prerequisites of 11 CFR 300.2(c).

(d) In accordance with 2 U.S.C. 441i(e)(4)(A), a person described in 11 CFR 300.60 may make a general solicitation of funds, without regard to source or amount limitation, for or on behalf of any host committee or municipal fund that is described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a) (or has submitted an application for determination of tax exempt status under such section) where such solicitation does not specify how the funds will or should be spent.

**PART 9031—SCOPE**

■ 28. The authority citation for part 9031 continues to read as follows:

Authority: 26 U.S.C. 9031 and 9039(b).

■ 29. Section 9003.1 is amended by removing the number “116” and adding in its place the number “400” in both instances in which “116” appears.

**PART 9032—DEFINITIONS**

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

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

■ 31. Section 9032.9 is 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**

■ 32. Authority: The authority citation for part 9033 continues to read as follows:

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

■ 33. In § 9033.1, paragraph (b)(10) is amended by removing the number “116” and adding in its place the number “400”.

■ 34. Section 9033.11 is 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**

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

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

■ 36. Section 9034.4 is amended by:

- a. Revising the section heading;
- b. Revising paragraph (a)(3)(i);
- c. Revising paragraph (a)(3)(ii);
- d. Removing paragraph (a)(3)(iii);
- e. Revising paragraph (a)(5);
- f. Adding paragraph (a)(6); and
- g. Revising paragraph (b)(3).

Revisions and additions 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 that is dated 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.

\* \* \* \* \*

(5) *Monetary bonuses paid after the date of ineligibility and gifts.* Monetary bonuses paid after the date of ineligibility and gifts shall be considered qualified campaign expenses, provided that:

(i) All monetary bonuses paid after the date of ineligibility for committee employees and consultants in recognition of campaign-related activities or services:

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

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

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

(6) *Expenses incurred by ineligible candidates attending national nominating conventions.* Expenses incurred by an ineligible candidate to

attend, participate in, or conduct activities at a national nominating convention may be treated as qualified campaign expenses, but such convention-related expenses shall not exceed a total of \$50,000.

(b) \* \* \*

(3) *General election and post-ineligibility expenditures.* Except for 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.

\* \* \* \* \*

■ 37. New §9034.10 is added to read as follows:

**§ 9034.10 Pre-candidacy payments by multicandidate political committees deemed in-kind contributions and qualified campaign expenses; effect of reimbursement.**

(a) A payment by a multicandidate political committee is an in-kind contribution to, and qualified campaign expense by, a Presidential candidate, even though made before the individual becomes a candidate under 11 CFR 100.3 and 9032.2, if—

(1) The expenditure is made on or after January 1 of the year immediately following the last Presidential election year;

(2) With respect to the goods or services involved, the candidate accepted or received them, requested or suggested their provision, was materially involved in the decision to provide them, or was involved in substantial discussions about their provision; and

(3) The goods or services are—

(i) Polling expenses for determining the favorability, name recognition, or relative support level of the candidate involved;

(ii) Compensation paid to employees, consultants, or vendors for services rendered in connection with establishing and staffing offices in States where Presidential primaries, caucuses, or preference polls are to be held, other than offices in the candidate's home state and in or near the District of Columbia;

(iii) Administrative expenses, including rent, utilities, office supplies

and equipment, in connection with establishing and staffing offices in States where Presidential primaries, caucuses, or preference polls are to be held, other than offices in the candidate's home state and in or near the District of Columbia; or

(iv) Expenses of individuals seeking to become delegates in the Presidential nomination process.

(b) Notwithstanding paragraph (a) of this section, if the candidate, through an authorized committee, reimburses the multicandidate political committee within 30 days of becoming a candidate, the payment shall not be deemed an in-kind contribution for either entity, and the reimbursement shall be an expenditure and a qualified campaign expense of the candidate.

■ 38. New section 9034.11 is 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 Federal Election Campaign Act and the Presidential Primary Matching Payment Account Act, and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies. Winding down costs are qualified campaign expenses.

(b) *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) 10% of the overall expenditure limitation pursuant to 11 CFR 9035.1; or

(2) 10% 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.

(c) *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 reasonable allocation method. An allocation method is reasonable if it divides the total winding down costs between the primary and general election committees and results in no less than

one third of total winding down costs allocated to each committee. A candidate may demonstrate that an allocation method is reasonable even if either the primary or the general election committee is allocated less than one third of total winding down costs.

(d) *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**

■ 39. The authority citation for part 9035 continues to read as follows:

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

- 40. Section 9035.1 is 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 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 bridge loan 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 31 days after the general election before they may treat 100% of salary, overhead and computer expenses as exempt legal and accounting compliance expenses.

\* \* \* \* \*

(3) If any matching funds to which the candidate is entitled are not paid to the candidate, or are paid after the date on which payment is due, the candidate may exclude from the overall expenditure limitation in paragraph (a) of this section the amount of all interest

charges that accrued during the shortfall period on all loans obtained by the candidate or authorized committee that are guaranteed or secured with matching funds, provided the candidate submits documentation as to the amount of all interest charges on such loans. The shortfall period begins on the first regularly scheduled payment date on which the candidate does not receive the entire amount of matching funds and ends on the payment date when the candidate receives the previously certified matching funds or the date on which the Commission revises the amount previously certified to eliminate the entitlement to the previously certified matching funds.

\* \* \* \* \*

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

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

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

■ 42. Section 9036.1 is 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;

\* \* \* \* \*

■ 43. Section 9036.2 is 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**

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

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

■ 45. Section 9038.2 is amended by revising paragraph (b)(4) to read as follows:

**§ 9038.2 Repayments.**

\* \* \* \* \*

(b) \* \* \*

(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: July 31, 2003.

**Ellen L. Weintraub,**

*Chair, Federal Election Commission.*

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