

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

II. Primary Expenditure Limitations and Repayments

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

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

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

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

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

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

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

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