

1. Revisions to 11 CFR 9035.1

The Commission believes that additional guidance concerning the attribution of in-kind contributions to the expenditure limitations would be beneficial. The Commission proposes to revise its rules by adding a new paragraph at 11 CFR 9035.1(a)(3) to provide that guidance and to apply the Commission's recently promulgated final rules on Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003), to publicly funded presidential candidates. The proposed rules that follow are intended to clarify that certain in-kind contributions will count against the presidential candidate's state-by-state and overall expenditure limitations under certain conditions, as explained below. Included are certain in-kind contributions received or accepted in the form of coordinated expenditures pursuant to 11 CFR 109.20, coordinated communications pursuant to 11 CFR 109.21, and coordinated party expenditures in excess of the coordinated party expenditure limitations at 2 U.S.C. 441a(d) and 11 CFR 109.32(a), which would include party coordinated communications pursuant to 11 CFR 109.37.

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

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

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

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

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

2. Revisions to 11 CFR 9038.2

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

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

A related issue is the calculation of the repayment ratio. The current regulations at 11 CFR 9038.2(b)(2)(iii) provide for a ratio repayment of amounts used for nonqualified campaign expenses, which includes expenditures in excess of the spending limitations. See 11 CFR 9038.2(b)(2)(ii)(A). Paragraph (b)(2)(iii) currently states that the amount of a repayment shall bear the same ratio to the total amount determined to have been used for non-qualified campaign expenses as the amount of matching funds certified to the candidate bears to the candidate's total deposits, as of 90 days after the candidate's date of ineligibility. "Total deposits" is defined