

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.