

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