

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.¹⁰

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

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