

limitation; only two candidates spent far in excess of a 10% limitation.

Accordingly the Commission is adopting a winding down limitation for primary election candidates in new § 9034.11(b). Specifically, the new primary election winding down limitation is (1) 10% of the overall expenditure limitation; or (2) 10% of the total of the candidate's expenditures subject to the overall expenditure limitation as of the candidate's DOI, plus the candidate's expenses exempt from the overall expenditure limitation as of DOI, such as fundraising, legal and accounting compliance expenses and other expenses. Like general election candidates, all primary candidates may spend a minimum of \$100,000 on winding down costs.

This limitation only applies to the use of public funds or a mixture of public and private funds for winding down costs. The final rule allows a primary candidate who is in a deficit position at the DOI to pay for winding down costs in excess of the limitation after the committee's accounts no longer contain any matching funds. See 11 CFR 9038.2(b)(2)(iii)(B) and (iv). Primary candidates who have a surplus at the DOI will be required to make a surplus repayment to the United States Treasury before they may use private funds for winding down costs in excess of the limitation. See 11 CFR 9038.3(c). The rule restricts the expenses used to calculate the winding down limitation to the period prior to a primary candidate's DOI to prevent candidates from increasing their winding down limitation by spending more for winding down expenses.

In practice, the winding down limitation for primary candidates with large campaigns would be the maximum winding down limitation: 10% of the overall expenditure limitation. Currently, the primary election expenditure limitation is equal to \$36,480,000, so the 10% limit would equal \$3,648,000.¹¹ For primary candidates with smaller campaigns, the winding down limitation would equal 10% of their expenses prior to DOI. For purposes of calculating the amount of the winding down limitation based on a primary candidate's expenses, a candidate's expenses include both disbursements and accounts payable as of the DOI for the same categories of expenses that are listed above in the discussion of the general election candidate limitation at 11 CFR

9004.11(b). In addition, taxes on non-exempt function income such as interest, dividends and sale of property are exempt from a primary candidate's overall expenditure limitation. See 11 CFR 9034.4(a)(4).

After a primary candidate's accounts no longer contain public funds, including after making any required surplus repayments, private funds may be used to pay for expenses in excess of the winding down limitation without resulting in non-qualified campaign expenses. In addition, as discussed above, the new rule will permit a candidate's GELAC to pay the primary committee's winding down expenses under certain conditions.

One commenter argued that the Commission has the authority to create a fund for primary candidates like the GELAC and could provide clear guidance as to the permissible expenses from the fund, which would create an incentive for candidates to adopt strong compliance procedures. The Commission disagrees. Fully funded general election candidates may not accept private contributions; thus, the GELAC allows such candidates to accept contributions, but only for limited legal and compliance costs. See 11 CFR 9003.3. General election candidates are also permitted some expenses that do not count toward the expenditure limitations and the GELAC is a source of funds for these exempt expenditures. Primary candidates may accept private contributions. To the extent that primary candidates are not in a surplus position and no longer retain any matching funds in their accounts, they may use private contributions for winding down expenses in excess of the new restrictions without having to make a repayment for non-qualified campaign expenses. Thus, a separate compliance fund is not necessary for primary candidates. In addition, there is no basis for permitting primary candidates to have more than one contribution limitation for the same election by allowing a separate contribution limitation for a legal defense fund or legal and accounting compliance fund.

For these reasons, the Commission does not believe that a new primary legal defense fund for enforcement matters and other legal proceedings or a primary legal and compliance fund similar to a GELAC is necessary or appropriate for primary election candidates.

11 CFR 9034.11(c)—Allocation of Primary and General Election Winding Down Costs

The rules in new 11 CFR 9034.11(c) on the allocation of primary and general election winding down costs follow the new rules in 11 CFR 9004.11(c).

11 CFR 9034.11(d)—Candidates Who Run in Both Primary and General Elections

The Commission is revising its rules to clarify which costs constitute primary winding down costs for candidates who participate in both the primary and general elections. The Commission's rules in former 11 CFR 9034.4(a)(3)(i) and (iii) allowed only candidates who do not accept public funding in the general election to begin to incur winding down costs and to treat winding down expenses for salary, overhead and computer costs as 100% compliance costs beginning immediately after their DOI. The former rule, however, did not expressly address the situation of a candidate who runs in both the primary and general elections and does not receive public funding for the general election. In the 2000 election, questions arose about how to treat administrative expenses incurred during the general election expenditure report period by a publicly funded primary election candidate who also ran in the general election but did not receive public funds for the general election.

The Commission believes that candidates who are actively campaigning in the general election should not be considered to be terminating political activity and winding down their primary campaigns. Candidates who run in the general election, whether or not they receive public funds for that election, must wait until 31 days after the general election, which is the first day after the end of the expenditure report period for publicly financed general election candidates, before they may begin to incur and pay winding down expenses or allocate them as 100% compliance expenses. Consequently, the new rule at 11 CFR 9034.11(d) expressly applies without regard to whether candidates' general election campaigns are publicly funded. Expenses incurred during the expenditure report period for publicly funded general election candidates or the equivalent time period ending 30 days after the general election for other general election candidates, are general election expenses, rather than primary winding down costs. This rule prevents the use of primary matching funds for non-qualified expenses related to the

¹¹ Before the 2004 primary elections, the primary election expenditure limit under 2 U.S.C. 441a(b)(1)(A) is subject to an additional annual adjustment under 2 U.S.C. 441a(c).