

general election. *See* 11 CFR 9032.9(a) and 9034.4(b). Although this revised rule may result in general election campaigns incurring a small amount of administrative costs related to terminating the primary campaign during the general election period, in practice, these expenses are offset by general election start up costs that are incurred and paid by the primary committee prior to the candidate's DOI. This approach is also consistent with the Commission's bright line rules for allocating expenses between primary and general campaigns at 11 CFR 9034.4(e), which allow some primary related expenses to be paid by the general election committee and *vice versa*.

One commenter believed that this approach addresses the danger of primary funds paying for general election activity but fails to address the situation where a candidate only receives public funds in the general election and could use primary campaign funds to defray general election expenses. The Commission does not agree that this is a problem because a candidate is not permitted to supplement the general election grant by paying general election expenses with primary funds.

New paragraph 11 CFR 9034.11(d) is based on former 11 CFR 9034.4(a)(3)(i) with certain revisions. The new rule at 11 CFR 9034.11(d) states that a candidate who runs in the general election must wait until the day following the date 30 days after the general election before using matching funds for primary winding down costs, regardless of whether the candidate receives public funds for the general election. This rule also clarifies that no expenses incurred prior to 31 days after the general election by candidates who run in the general election may be considered primary winding down costs or paid with matching funds. Other portions of former § 9034.4(a)(3)(i) are discussed below in the explanation and justification for 11 CFR 9035.1(c)(i).

11 CFR Part 9035—Expenditure Limitations

11 CFR 9035.1—Campaign Expenditure Limitation; Compliance and Fundraising Exemptions

Section 9035.1(a)(1) of the Commission's regulations implements the spending limit for primary election candidates and their authorized committees in 2 U.S.C. 441a(b)(1)(A). Section 9035.1(a)(2) prescribes how the amounts of expenditures attributed to the spending limits will be calculated. The NPRM proposed to clarify 11 CFR

9035.1(a) to provide guidance on the extent to which coordinated expenditures, coordinated communications, coordinated party expenditures, party coordinated communications and other in-kind contributions will count against the spending limits in § 9035.1(a)(1). The Commission has decided to adopt the proposed additions to the rules at 11 CFR 9035.1.

The Commission has generally treated the receipt of in-kind contributions by Presidential primary candidates as expenditures made by those candidates subject to the expenditure limitations and has included such in-kind contributions in the total amount of a candidate's expenditures subject to the limits in calculating repayments based on excessive expenditures. In one repayment determination arising from an audit of a 1988 candidate, the Commission concluded that in-kind contributions for testing-the-waters expenses from a multicandidate political committee associated with that candidate, which was considered his "leadership PAC," were subject to the candidate's state-by-state spending limits. The Commission considered in-kind contributions to be part of the mixed pool of public and private funds, and thus, these expenditures were included in calculating the amount in excess of the limitations subject to repayment. The final rules amend 11 CFR 9035.1(a) and 9038.2(b)(2) (discussed below) to reflect this approach.

In the BCRA rulemaking on coordinated and independent expenditures, the Commission defined the terms "coordinated," "coordinated communication," and "party coordinated communications" in 11 CFR 109.20, 109.21, and 109.37, respectively. *See Explanation and Justification for Final Rules on Coordinated and Independent Expenditures*, 68 FR 421 (Jan. 3, 2003). These rules also describe circumstances in which coordinated expenditures and coordinated communications are treated as in-kind contributions.

Under 11 CFR 109.21(b)(2) and 11 CFR 109.37(a)(3), some coordinated expenditures are made by a person or party committee, but are not received or accepted by a candidate. 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), 11 CFR 109.21(d)(2) (material involvement), or 11 CFR 109.21(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 11 CFR 109.37, result in the receipt or acceptance of an in-kind contribution arising from a coordinated communication or a party coordinated communication. Only in-kind contributions received or accepted by the candidate or authorized committee or agent are treated as expenditures made by the candidate. *See* 11 CFR 109.20(b) (requiring a candidate to report coordinated expenditures as expenditures); 11 CFR 109.21(b)(1) (requiring a candidate to report received or accepted coordinated communications as expenditures); 11 CFR 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).

The final rules add new paragraph (a)(3) to § 9035.1 to specify that coordinated expenditures pursuant to 11 CFR 109.20, coordinated communications pursuant to section 109.21, coordinated party expenditures, party coordinated communications pursuant to section 109.37, and in-kind contributions count against the expenditure limitations and are included in the total amount of a publicly funded candidate's expenditures subject to the limits. New 11 CFR 9035.1(a)(3) states that the Commission will attribute to a candidate's overall and state-by-state expenditure limitations the total of all: (1) Coordinated expenditures under 11 CFR 109.20; (2) coordinated communications under 11 CFR 109.21 that are in-kind contributions received or accepted by the candidate, authorized committee or agent; (3) coordinated party expenditures, including party coordinated communications under 11 CFR 109.37 that are in-kind contributions received or accepted by the candidate, authorized committee or agent and that exceed the coordinated party expenditure limitation at 11 CFR 109.32(a); and (4) other in-kind contributions received or accepted by the candidate, authorized committee or agent. This new paragraph is consistent with the Commission's general past practice in audits of treating in-kind contributions as expenditures by the recipient Presidential candidates and their authorized committees.

The phrase "receive or accept" in 11 CFR 9035.1 is consistent with the