

terminology used in 11 CFR 109.21(b)(2), 11 CFR 109.23(a) and 11 CFR 109.37(a)(3) to ensure that any coordinated expenditures that are not "received or accepted" by a candidate do not count against that candidate's expenditure limitations. One commenter stated that limiting the rule to in-kind contributions that the candidate has received or accepted under 11 CFR part 109 is a common sense extension of the existing rules, which provide that a person may make an excessive in-kind contribution but the intended beneficiary will not violate the law unless the candidate or committee accepts or receives the contribution. This commenter stated that it is appropriate to apply the legal principle that liability is the consequence of one's own acts and not the acts of others to regulations governing whether a candidate has made expenditures in excess of the limitations. The Commission is limiting the new rule to in-kind contributions received or accepted by the candidate, authorized committee or agents to be consistent with the rules in 11 CFR part 109.

Additionally, new paragraph (a)(4) provides that the value of an in-kind contribution is the usual and normal charge for the goods and services provided.

The revised rule in 11 CFR 9035.1 does not specifically list the dissemination, distribution or republication of campaign material prepared by a candidate, which is governed by 11 CFR 109.23. Section 109.23(a) provides that the candidate who prepared the campaign materials does not receive or accept an in-kind contribution, and need not report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37. Thus, the cost of such campaign materials would not count against the candidate's expenditure limitations unless the candidate receives or accepts them as in-kind contributions in the form of coordinated communications or party coordinated communications, as provided in 11 CFR 109.21 and 11 CFR 109.37, respectively. Because the revised rule at 11 CFR 9035.1(a)(3) specifically includes coordinated communications and party coordinated communications that are received or accepted, a reference to the republication of campaign materials is unnecessary.

The Commission also notes that 11 CFR 109.32(a)(4) provides that any

coordinated party expenditures made under § 109.32(a), which specifies the limitations for coordinated party expenditures in Presidential elections, do not count against the candidate's expenditure limitations. However, any party coordinated expenditures exceeding the 2 U.S.C. 441a(d)(2) party expenditure limitations would count against the candidate's expenditure limitations. Thus, the new rule in 11 CFR 9035.1(a)(3) does not adversely affect coordinated party expenditures because § 9035.1(a)(3) applies only to amounts in excess of the statutory limitations in 2 U.S.C. 441a(d)(2).

Although coordinated party expenditures are made in connection with the general election campaign of a Presidential candidate, they may be made prior to the date of the candidate's nomination, pursuant to 11 CFR 109.34. Any coordinated party expenditures that are in excess of the coordinated party expenditure limitation at 11 CFR 109.32(a) may be attributable to a Presidential primary candidate's expenditure limitations based on the "bright line" rules at 11 CFR 9034.4(e) for attributing expenditures between the primary and general election spending limitations.

11 CFR 9035.1(c)(1)—Compliance Exemption

Section 11 CFR 9035.1(c)(1) addresses the legal and accounting compliance exemption to the expenditure limitations. For greater clarity, the Commission is revising the rule to include a revised version of former 11 CFR 9034.4(a)(3)(iii), related to the treatment of certain winding down expenses as 100% compliance costs. The revised regulation provides that only candidates who do not run in the general election may treat 100% of salary, overhead and computer expenses as exempt compliance expenses immediately after their date of ineligibility. Candidates who run in the general election must wait until 31 days after the general election to treat these expenses as exempt compliance costs. For further discussion of the treatment of winding down costs for candidates who run in both the primary and general elections, see the explanation and justification for 11 CFR 9034.11(d) above.

11 CFR 9035.1(c)(3)—Shortfall Bridge Loan Exemption

During recent election cycles, the Presidential Primary Matching Payment Account has occasionally contained insufficient funds to fully pay all of the matching funds to which primary candidates were entitled on the dates

payments were due. *See generally* 26 U.S.C. 9037(b); 11 CFR 9036.4(c)(2), 9037.1, 9037.2. The delay or deficiency in matching fund payments has resulted in inconvenience and additional costs for candidates, such as additional costs for "bridge loans" to pay for their expenses until they received their full entitlement of matching funds several months later. Such expenses currently count against a candidate's overall expenditure limitation, reducing the amount the candidate may spend on other campaign activities.

To mitigate the effect of a potential shortfall on candidates, the Commission is creating a new "shortfall bridge loan exemption" from a primary candidate's overall expenditure limitation at new 11 CFR 9035.1(c)(3). The NPRM proposed a flat exemption of 5% of the amount of all delayed or deficient payments of matching funds to which the candidate is entitled. One commenter supported this concept but noted the difficulty in choosing a fair formula that would not favor candidates whose payments are delayed over those who are less dependent on public funds. The commenter argued that a candidate's expenditure limitation should not be raised significantly over that applicable to other candidates unless the amount accurately reflects costs actually incurred by the candidate.

Rather than the flat percentage proposed in the NPRM, the Commission has decided to base the new exemption on the amount of interest charges accrued during a shortfall period on all bridge loans obtained by a candidate if the candidate experiences any delay or deficiency in matching fund payments due to a shortfall. Under new 11 CFR 9035.1(c)(3), only loans secured or guaranteed by matching funds will be eligible for this exemption. The interest charges that are exempt from the expenditure limit are those that accrued during a shortfall period, which the new rule defines as beginning when the shortfall first impacts the candidate—the first payment date on which the candidate does not receive the entire amount of matching funds certified by the Commission. The shortfall period ends on the date the candidate receives the last of the matching funds to which the candidate is entitled or becomes ineligible to receive them because the Commission revises the amount it previously certified.

If a candidate experiences a delay or deficiency in matching fund payments, the candidate need not demonstrate that any bridge loan was necessitated by the deficiency in matching fund payments to claim this exemption. In practice, it is difficult to distinguish between the