Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL ELECTION COMMISSION

11 CFR Part 9038

[Notice 2000–5]

Public Funding of Presidential Primary Candidates—Repayments

AGENCY: Federal Election Commission.

ACTION: Notice of disposition; Termination of rulemaking.

SUMMARY: On December 16, 1998, the Commission issued a Notice of Proposed Rulemaking in which it sought public comments on deleting one section of its regulations governing the public financing of presidential primary election campaigns. These rules implement the Presidential Primary Matching Payment Account Act (''Matching Payment Act''), which indicates how funds received under the public financing system may be spent. In addition, the Matching Payment Act requires the Commission to seek repayment from publicly financed campaigns under certain conditions. The rule in question addresses the repayment of federal funds when candidates exceed the limits on either state-by-state or overall spending. The Commission is making no changes to this regulation at this time. Further information is provided in the supplementary information that follows.

FOR FURTHER INFORMATION CONTACT: Ms. Rosemary C. Smith, Assistant General Counsel, 999 E Street, NW, Washington, DC 20463, (202) 694–1650 or toll free (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission has been considering whether to revise its regulations at 11 CFR 9038.2(b) governing repayments of matching funds in situations where primary candidates exceed the spending limits set forth in section 441a(b) of the Federal Election Campaign Act, 2 U.S.C. 441a(b) (''FECA''). These regulations implement 26 U.S.C. 9038. For the reasons explained below, the Commission is making no changes at this time to 11 CFR 9038.2(b).

On December 16, 1998, the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations, as well as on a number of other aspects of the Commission's public funding regulations. 63 FR 69524 (Dec. 16, 1998). In response to the NPRM, written comments addressing the repayment issue were received from Common Cause and Democracy 21 (joint comment); and Lyn Utrecht, Eric Kleinfeld, and Patricia Fiori (joint comment). The Internal Revenue Service stated that it has reviewed the NPRM and finds no conflict with the Internal Revenue Code or regulations thereunder. Subsequently, the Commission reopened the comment period and held a public hearing on March 24, 1999, at which the following witnesses presented testimony on the Commission's ability to seek repayments: Lyn Utrecht (Ryan, Phillips, Utrecht & MacKinnon), Joseph E. Sandler (Democratic National Committee), and Thomas J. Josefiak (Republican National Committee).

Please note that the Commission has already published separately several sets of final rules regarding other aspects of the public funding system. For a summary of these other provisions, *see* Explanation and Justification, 64 FR 49355 (Sept. 13, 1999), and Explanation and Justification, 64 FR 61777 (Nov. 15, 1999).

1. Alternatives Presented in the NPRM

The NPRM raised the issue of whether to delete paragraph (b)(2)(ii)(A) of section 9038.2 from the Commission's regulations. Under this provision, the Commission has in the past required the repayment of primary matching funds based on a determination that a candidate or authorized committee has made expenditures in excess of the primary spending limits. The NPRM raised the argument that this provision is without statutory basis, and that the reading implied in the current regulation is effectively prohibited by the statute. The NPRM noted that this issue has ramifications for excessive expenditures made directly by the candidate's campaign committee from its own funds, as well as excessive expenditures stemming from the campaign committee's acceptance of in-kind contributions, and excessive expenditures arising from primary campaign activities coordinated with the candidate's party committee.

Section 9038 of the Matching Payment Act (26 U.S.C. 9038) provides three bases for determining repayments of primary matching funds: (1) payments in excess of entitlement; (2) payments used for other than qualified campaign expenses; and (3) excess funds remaining six months after the end of the matching payment period. In contrast, section 9007 of the Presidential Election Campaign Fund Act (26 U.S.C 9007) (''Fund Act'') provides four bases for determining repayments of general election funds: (1) Payments in excess of entitlement; (2) an amount equal to any excess qualified campaign expenses; (3) an amount equal to any contributions accepted; and (4) payments used for other than qualified campaign expenses.

The provisions on ''payments in excess of entitlement'' and ''other than qualified campaign expenses'' are nearly identical between the two chapters. Inasmuch as Congress specified ''excess expenses'' as a repayment basis separate from ''other than qualified campaign expenditures'' in the general election statute, an argument exists that the nearly identical provision on ''other than qualified campaign expenses'' in the primary statute cannot reasonably be read to include excess expenses.

The argument against treating ''excess'' campaign expenditures as ''nonqualified'' is buttressed by the text of the ''qualified campaign expense limitation'' (26 U.S.C. 9035) itself, which prohibits candidates from ''knowingly incur[ring] qualified campaign expenses in excess of the expenditure limitation applicable under section 441a(b)(1)(A) of title 2.'' First, one can argue that it is impossible to read this section other than as treating ''excess'' spending as ''qualified.'' Second, this provision states that violation of the primary spending limits is a Title 2 violation, which would be addressed in the FEC's enforcement process, rather than a Title 26 violation, which could be addressed in the audit/repayment process.

The NPRM also set out countervailing arguments in support of retaining 11 CFR 9038.2(b)(2)(ii)(A). While section 9007(b)(2) of the Fund Act clearly states that repayments can be sought from general election candidates who incur

expenses in excess of the aggregate payments to which they are entitled, the Matching Payment Act can be interpreted to set forth repayment requirements for primary candidates that are the equivalent of that general election provision.

A qualified campaign expense of a primary election committee is an expense where ''neither the incurring nor payment * * * constitutes a violation of any law of the United States * * *.'' 26 U.S.C. 9032(9). A Presidential primary candidate who exceeds the expenditure limitations violates two laws, 26 U.S.C. 9035 and 2 U.S.C. 441a(b)(1)(A). Section 9035 of the Matching Payment Act states that ''no candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitations applicable under section 441a(b)(1)(A) of title 2 * * *.'' Section 441a(b)(1) of the FECA states that ''no candidate for the Office of President who is eligible'' to receive public funds may make expenditures in excess of the statutorily prescribed limitations. 2 U.S.C. 441a(b)(1). Thus, one reading of this language is that expenses in excess of expenditure limitations for publicly funded primary candidates are non-qualified because they violate the law. Consequently, it can be argued that they are repayable under 26 U.S.C. 9038(b)(2). The answer to the argument that the language of section 9035 specifically contemplates that amounts spent in excess of the expenditure limitations can constitute qualified campaign expenses is that the two statutes must be read together, and section 9035 may mean that candidates shall not incur expenses that would otherwise be qualified except for the fact that they exceed the section 441a expenditure limitations.

Additionally, there is a countervailing argument that the Fund Act and the Matching Payment Act mandate identical results—namely, the repayment of expenditures exceeding the spending limits—albeit in slightly different ways. Arguably, there is no provision in the general election Fund Act corresponding to section 9035 of the Matching Payment Act. Consequently, it can be argued that this may be why 26 U.S.C. 9007(b)(2) specifically mandates repayments from general election committees for spending amounts that exceed their entitlements. Under this interpretation, language corresponding to section 9007(b)(2) is not needed in the Matching Payment Act because repayments are already required when primary election committees make non-qualified campaign expenses by violating the law, which they do whenever they exceed the spending limits set forth in 2 U.S.C. 441a(b)(1) and 26 U.S.C. 9035. This reading of the two statutes avoids the anomalous situation that would result if spending limit violations involving candidates who accepted public funding for their primary elections were treated entirely differently than spending limit violations involving the very same candidates during their general election campaigns.

This argument is supported by the court decision in *John Glenn Presidential Committee v. FEC,* 822 F.2d 1097 (D.C. Cir. 1987) (upholding the Commission's repayment determination against a publicly funded primary election candidate for exceeding the state-by-state expenditure limitations in the face of a constitutional challenge). The *Glenn* opinion stated that ''campaign expenses are not 'qualified' if they exceed the limits Congress set, including the limits on spending in each state. 26 U.S.C. 9035(a).'' *Id.* at 1099. *See also, Kennedy for President Committee v. FEC,* 734 F.2d 1558, 1560 n. 1 (D.C. Cir. 1984) (holding that ''[u]nder 26 U.S.C. 9035, campaign expenditures are not 'qualified' if they exceed certain spending limits, including limitations on spending in each state during the presidential primaries''). The state-by-state spending limits at issue in these two cases are in section 441a(b)(1)(A) and (g) of the FECA. These court decisions arguably require the Commission to order repayments of matching funds used for unqualified purposes. *Glenn* at 1099, *Kennedy* at 1561.

With regard to alleged in-kind contributions by third parties such as political party committees, it can be argued that the *Glenn* and *Kennedy* cases are not dispositive because they did not involve third party expenditures, and that these amounts are not necessarily in the same pool of funds from which a publicly funded campaign makes expenditures. The *Glenn* court indicated that it was not ruling on a repayment determination involving private funds. *Glenn* at 1098. However, on the other hand, in-kind contributions to candidates are simultaneously treated as expenditures by those candidates under section 431(8)(A)(i) and (9)(A)(i) of the FECA, and must be reported as both contributions and expenditures under 11 CFR 104.13. In the past, the Commission has considered in-kind contributions to be commingled with a publicly financed candidate's other expenditures and subject to the candidate's expenditure limitations.

2. Public Comments

Two written comments addressing the Commission's statutory authority to seek repayment from Presidential primary committees that exceed the spending limits were received from Common Cause and Democracy 21 (joint comment); and Lyn Utrecht, Eric Kleinfeld, and Patricia Fiori (joint comment). The witnesses who presented testimony on this issue were Lyn Utrecht (Ryan, Phillips, Utrecht & MacKinnon), Joseph E. Sandler (DNC), and Thomas J. Josefiak (RNC).

The bipartisan comments and testimony supported the Commission's authority to obtain repayments for excessive spending by primary candidates' campaign committees using their own funds to exceed the limits. However, two witnesses indicated that they did not believe the Commission has the authority to require a repayment from a Presidential campaign committee based on expenditures made by a party committee, or based on contributors' in-kind contributions, where these expenses were not incurred or accepted by the candidate's campaign committee. One of these witnesses observed that both sections 9002(11) and 9032(9) of Title 26 define ''qualified campaign expense'' to mean an expense ''incurred'' by the candidate or the candidate's authorized committee. Thus, the witness' comment argued that expenditures made by other individuals or entities are not ''qualified campaign expenses'' and cannot form the basis for a repayment determination.

3. Additional Alternative—Repayment of Funds Exceeding Entitlement

After the close of the comment period and the hearing, the Commission considered whether repayments can be required under paragraph (b)(1) of 26 U.S.C. 9038, which addresses the repayment of funds received in excess of the aggregate amount of payments to which the candidate is entitled. The rationale for this approach would be that, since presidential primary candidates and their committees do not receive these matching funds until after they meet or exceed either the state-by-state or the overall spending limits, the campaigns were not entitled to receive these funds in the first place, and therefore must repay these amounts to the Treasury. None of the public comments or testimony addressed the payments-in-excess-of-entitlement theory for repayments under 26 U.S.C. 9038(b)(1) because this approach was not specifically included in the December 1998 NPRM.

4. Conclusion

The Commission has decided to make no changes to the regulation at 11 CFR 9038.2(b), which currently requires publicly funded Presidential primary campaigns to make repayments on the basis of exceeding the Congressionally-mandated spending limits. The current rule is not being changed at this time because there is no consensus in favor of changing the regulation.

Dated: March 17, 2000.

Darryl R. Wold,

Chairman, Federal Election Commission.

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 742

Regulatory Flexibility and Exemption Program

AGENCY: National Credit Union Administration (NCUA).

ACTION: Advance Notice of proposed rulemaking.

SUMMARY: NCUA is soliciting public comment on whether, and under what circumstances, NCUA should adopt a regulation that would permit credit unions with advanced levels of net worth and consistently strong CAMEL ratings to be exempt, in whole or in part, from certain NCUA regulations that are not specifically required by statute. Comments are also requested on whether the adoption of such a regulation would reduce regulatory burden without adversely affecting safety and soundness. Information from interested parties will assist NCUA in determining whether and in what form to issue a proposed rule on regulatory flexibility.

DATES: The NCUA must receive comments on or before May 22, 2000.

ADDRESSES: Direct comments to Becky Baker, Secretary of the Board. Mail or hand-deliver comments to: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428, or you may fax comments to (703) 518–6319. *Please send comments by one method only.*

FOR FURTHER INFORMATION CONTACT: Michael J. McKenna, Senior Staff Attorney, Division of Operations, Office of General Counsel, at the above address or telephone: (703) 518–6540 or Herb Yolles, Deputy Director, Office of Examination and Insurance, at the above address or telephone: (703) 518–6360.

SUPPLEMENTARY INFORMATION:

A. Background

NCUA is considering a policy for exempting qualifying credit unions from certain regulatory provisions. The regulatory provisions under consideration are those which are not specifically required by statute and the exemption from which would permit these credit unions greater flexibility in managing their operations. NCUA staff has reviewed agency regulations and has listed, in this advanced notice of proposed rulemaking (ANPR), those regulations which the NCUA Board believes may meet these criteria. The purpose of this ANPR is to elicit public comment on whether the proposed exemptions would in fact be of such benefit and to find out if there are any other regulations or NCUA requirements which credit unions believe should be considered in this proposal.

The NCUA Board believes that safe and sound credit unions with a proven record of effective risk management, as demonstrated by advanced levels of net worth and consistently high CAMEL ratings, may be reasonable candidates for greater regulatory flexibility from certain NCUA regulations which are not specifically required by statute and which have minimal safety and soundness ramifications when applied to federal credit unions with proven risk management records.

In considering this advance notice of proposed rulemaking, the NCUA Board did not include any current regulation which is statutorily imposed and therefore must continue to be implemented by NCUA in a form consistent with the manner specified for implementation when passed by Congress. Likewise, the NCUA Board did not consider a number of other regulations which, although not specifically required by statute, are nonetheless rooted in overriding concern for the overall safety and soundness of the credit union system and, therefore, would not be appropriate for inclusion in a formal regulatory flexibility proposal.

However, internal agency research and evaluation has produced examples of certain specified regulatory restrictions that are not specifically required by statute and may be unnecessary to apply equally to all credit unions based on their individual safety and soundness circumstances, because the regulations, although appropriate for some credit unions, have limited safety and soundness ramifications when applied to federal credit unions with advanced levels of net worth and ongoing strong management performance verified through the examination process and resulting high CAMEL ratings.

The NCUA Board is interested in receiving comments on whether credit unions with a proven track record of favorable performance should be allowed additional regulatory flexibility since their demonstrated ability mitigates the predominance of what limited safety and soundness concerns, if any, might arise from a reduction of certain specified regulatory requirements. Examples of mitigating factors include, but are not limited to, additional capital, strong management and consistent earnings. It is believed that a healthy risk management infrastructure strengthens capital adequacy and diminishes risk to the National Credit Union Share Insurance Fund (NCUSIF).

The NCUA Board is also interested in receiving comment on whether a flexible regulatory approach which results in the removal of selected regulatory obstacles for those credit unions with strong records of safety and soundness and effective risk management will encourage them to strive to maintain and enhance those levels of financial performance as well as to better enable them to remain competitive in the financial marketplace, foster innovation in member service and extend credit to the underserved.

The NCUA Board is interested in whether providing additional flexibility in selected regulatory requirements to credit unions that meet RegFlex triggers might result in a reduction in service within a credit union's field of membership for fear that with additional risk taking, delinquencies might increase and jeopardize the credit union maintaining their CAMEL 1 and 2 ratings.

Would establishing this special class of credit unions to receive different regulatory treatment provide a competitive advantage to RegFlex credit unions over non RegFlex eligible credit unions.

The proposal the NCUA Board is considering would involve an exemption process for qualifying federal credit unions, rather than a regulatory forbearance program available to all federal credit unions. Those federal credit unions that qualify must demonstrate, based on their CAMEL ratings and strong capital positions, that they are capable of managing the additional risks that these regulatory flexibilities may pose. NCUA believes that the proposed qualification and exemption process will effectively