

Revised paragraph (d) contains many of the procedural provisions formerly found in 11 CFR 9007.1(c), which discussed preparation of the IAR. This paragraph has been renamed "Preparation of audit report," and refers to the report prepared following consideration of written materials submitted in response to the ECM. Revised paragraph (d)(1) notes that this report may address issues other than those discussed at the exit conference. This report also contains the repayment determination made by the Commission pursuant to 11 CFR 9007.2(c)(1).

In addition, former 11 CFR 9007.1(e)(2) has been moved to new paragraph (d)(2). The language has been revised to conform with the Commission's practice of issuing audit reports in their entirety, including all matters noted in the audit process. Former 11 CFR 9007.1(e)(4) has been moved to new paragraph (d)(3), and the language revised to clarify that addenda to the audit report may include additional repayment determination(s).

Revised paragraph (e), which discusses the public release of the audit report, corresponds to former 11 CFR 9007.1(e) (1) and (3), and has been slightly reworded to conform to the new procedures.

Sampling

The Commission is also adding new paragraph (f) to 11 CFR 9007.1 to incorporate sampling and disgorgement procedures that were adopted for use during the 1992 presidential election cycle.

The Commission has a statutory obligation to complete the audits of publicly-funded committees in a thorough and timely manner. In the past, the resources required to conduct reviews of the contributions received by presidential committees contributed to the Commission's difficulty in fulfilling that obligation.

Beginning with the 1992 election cycle, the Commission began to make more extensive use of statistical sampling for audits of contributions received by publicly-financed presidential primary election committees, and to use the sample results to quantify, in whole or in part, the dollar value of any related audit findings. While the Commission continues to conduct a limited non-sample review of contributions received by these committees, most audit testing of contributions and supporting documentation is now done on a sample basis.

The Commission notes that this approach will apply in a general election only to contributions that need

to be raised due to a deficiency in the Presidential Election Campaign Fund, to the GELAC, or to contributions raised by new or minor party candidates. See 26 U.S.C. §§ 9003(c)(2), 9006(c); 11 CFR 9003.2 (a)(2) and (b)(2), 9003.3 (b) and (c).

Some commenters argued that the Commission does not have the statutory authority to use statistical sampling in conducting its audits. However, the Commission has been given broad authority to audit publicly-funded presidential and vice presidential campaigns, see 26 U.S.C. § 9007(a), which authority includes the right to utilize generally accepted auditing standards in conducting these audits.

The use of statistical sampling is legally acceptable for projecting certain components of a large universe, such as excessive and prohibited contributions. See, e.g. *Chavez County Home Health Service v. Sullivan*, 931 F.2d 904 (D.C. Cir. 1991) (sampling audit used to recoup Medicaid overpayments to health care providers); *Michigan Dep't of Education v. U.S. Dep't of Education*, 875 F.2d 1196 (6th Cir. 1989) (sampling of 259 out of 66,368 total payment authorizations upheld as proper basis for determining amount of misexpended federal funds in vocational-rehabilitative program); *Georgia v. Califano*, 446 F. Supp. 404 (N.D. Ga. 1977) (Medicaid overpayments).

Most of these cases require the agency to demonstrate that it is infeasible to conduct a 100% review. See, e.g., *Chavez*, 931 F.2d at 916. While the Commission was able to conduct a more extensive review in the past, the increasing volume of records to be checked has now made this impossible. An accountant who testified at the Commission's public hearing stated that the Commission had no option but to use sampling, because of the large number of records involved in presidential campaign audits—a recent campaign with which he had been worked had involved over 200,000 contributions and tens of thousands of disbursements. These figures are not unusual in presidential campaign audits.

One commenter argued that these cases, which involve recoupment of government overpaid funds, should not be used to justify the use of sampling to determine excessive and illegal contributions which come from private sources. However, for statistical purposes there is no distinction between these two situations.

Some commenters also questioned the validity of the statistical sampling technique currently employed in this process. However, the fact that the

technique may be used in dissimilar programs, or programs seeking other types of information, does not mean that it is not appropriate for use in this context.

There is substantial judicial precedent to the effect that, when considering a challenge to individual accounting rules, the reviewing court must defer to agency expertise. In *A.T.&T. Co. v. United States*, 299 U.S. 232 (1936), the Supreme Court stated that before it would overrule an agency's decision to use a certain accounting system, that system "must appear to be so entirely at odds with fundamental principles of correct accounting as to be the expression of whim rather than an exercise of judgment." *Id.* at 236-37. See also *Transcontinental Gas Pipe Line Corp. v. Federal Power Commission*, 518 F.2d 459, 465 (D.C. Cir. 1975).

The statistical sampling method used for the Commission's matching fund submission process was designed and recommended by Ernst and Whinney (now Ernst and Young), one of the world's largest accounting firms. The Commission believes that this method works equally well in evaluating excessive and illegal contributions. In addition, in 1979 the Commission's Audit Division wrote to Arthur Andersen & Company, asking whether it would be appropriate to use statistical sampling to determine both matching fund eligibility and nonqualified campaign expenses. They responded that this would be appropriate in both situations. The Commission soon afterwards began to use statistical sampling in making matching fund determinations, but has not yet done so to determine nonqualified campaign expenses. However, if statistical sampling can be used to extrapolate the amount of nonqualified campaign expenses, it would seem equally capable of extrapolating the number of excessive and illegal contributions.

One commenter who supported this approach requested that the Commission advise committees in advance what records will be reviewed on a full 100% basis. The Commission believes it is inappropriate to divulge this kind of information in advance. Also, this can vary from committee to committee.

In its letter endorsing the use of statistical sampling to determine the amount of nonqualified campaign expenses, Arthur Andersen & Company recommended "that the resulting repayment determination [the repayment determination based on the sample] not be deemed as final until the committee being audited has been provided with the opportunity to