

furnish additional support that might indicate that a modification of the sample results would be appropriate." The Commission follows this recommendation in projecting excessive and illegal contributions.

The Commission's projection of the total amount of excessive or prohibited contributions based on apparent excessive or prohibited contributions identified in a sample of a committee's contributions is only a preliminary finding. The Commission informs the committee which items served as the basis for the sample projection, and the committee responds to the specific sample items used to make the projection. If the committee shows that any errors found among the sample items were not excessive or prohibited contributions; were timely refunded, reattributed or redesignated; or for some other reason were not errors, a new projection is made, based on the reduced number of errors in the sample. A witness at the Commission's hearing on these rules endorsed the use of sampling in this context in part because of this opportunity to work with Commission auditors and obtain a lower projection if the committee provides additional information to reduce the number of errors found in the sample.

Disgorgement

The Commission is further clarifying at new paragraph 9007.1(f)(3) that the amount of any excessive or prohibited contributions that are not refunded, reattributed or redesignated in a timely manner shall be paid to the United States Treasury. Committees have 30 days from the date of receipt in which to refund prohibited contributions, and 60 days in which to obtain the reattribution, redesignation or refund of excessive contributions. 11 CFR 103.3(b)(1), (2) and (3). A committee's failure to take action on these contributions is a failure to cure contributions that are in violation of the FECA. The same is true of attempts to cure them outside of the specified time periods.

Courts have upheld the use of disgorgement in cases involving securities violations "as a method of forcing a defendant to give up the amount by which he was unjustly enriched." *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987), citing *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978). Requiring repayment to the Treasury for contributions that have been accepted in violation of 2 U.S.C. §§ 441a and 441b is consistent with this reasoning.

Disgorgement eliminates the need for the Commission to monitor a committee's refunds of excessive or

prohibited contributions. In addition, it is easier for a committee to make one payment to the Treasury, as opposed to refunding multiple contributions. Finally, although the Commission has used disgorgement in instances where a 100% review is conducted, this is a practical approach in those situations where it is difficult to discern the original contributors, e.g., where a 100% review is not done.

Some commenters questioned the Commission's authority to require repayment to the Treasury because this is not specifically provided for in the public funding Acts. However, the equitable doctrine of disgorgement supports the payment to the Treasury under these circumstances. The purpose of statistical sampling would be defeated if a 100% review of contributions was required to determine which particular contributions must be refunded, reattributed or redesignated. On the other hand, allowing committees to refund only those excessive or illegal contributions uncovered in the sample could result in a committee's retention of substantial funds to which it was not legally entitled.

Disgorgement is also consistent with past Commission practice. See Matter Under Review ("MUR") 1704, where, based upon preliminary estimates, Commission directed respondents to pay \$350,000 to the United States Treasury for contributions that would have exceeded section 441a limits; Plaintiff's Motion to Effectuate Judgment, *FEC v. Populist Party*, No. 92-0674(HHG) (D.D.C. filed May 4, 1993).

Moreover, this proposed payment is analogous to, and consistent with, the requirement at 11 CFR 9038.6 that stale-dated checks (those to creditors or contributors that remain outstanding after the campaign is over) be paid to the Treasury. This issue arose after the 1984 election cycle, and the rule was promulgated as a means to codify the Commission practice of requiring disgorgement, which was implemented during that cycle. See 52 FR 20864, 20874 (June 3, 1987).

One commenter argued that the stale-dated check situation should be distinguished from that involving excessive and illegal contributions, because the former involves the return of public funds to the Treasury, while the latter involves private contributions. Once again, however, the same accounting principles apply to both situations.

Section 9007.2 Repayments

Further Streamlining the Audit Process

Section 9007.2 has been revised to reflect amendments made to section 9007.1. Revised paragraph (a)(2) states that the audit report provided to the candidate under 11 CFR 9007.1(d), which contains the Commission's repayment determination, will constitute notification for purposes of the three-year notification requirement of 26 U.S.C. 9007(c). This approach is consistent with two recent decisions by the United States Court of Appeals for the District of Columbia Circuit, *Dukakis v. Federal Election Commission*, No. 93-1219 (D.C. Cir. May 5, 1995) and *Simon v. Federal Election Commission*, No. 93-1252 (D.C. Cir. May 5, 1995).

Paragraph (a)(2) has also been revised to conform to the statutory requirement that the 26 U.S.C. 9007(c) notification period ends 3 years after the day of the presidential election.

Paragraph (a)(3) has been reworded to state that once the candidate receives notice of the Commission's repayment determination contained in the audit report, the candidate should give preference to the repayment over all other outstanding obligations of the committee, except for any federal taxes owed by the committee.

The Commission is moving former 11 CFR 9004.4(c) to new paragraph (a)(4). This paragraph, which deals with permissible sources of repayments, is more properly located in the section dealing with repayments.

New repayment determination procedures are set forth in revised paragraph (c). Revised paragraph (c)(1) largely follows the former language, but refers to the audit report as the source of the repayment determination. The last sentence of that paragraph has also been revised to clarify that the candidate shall repay to the United States Treasury the amount which the Commission has determined to be repayable, using procedures set forth in 11 CFR 9007.2(d).

Revised paragraph (c)(2) sets forth the procedures necessary for a committee to obtain an administrative review of the repayment determination. Please note that this review is limited to repayment issues. It does not cover other issues, such as disgorgement, that will if necessary be handled through the enforcement process.

Paragraph (c)(2)(i) corresponds to former 11 CFR 9007.2(c)(2) and addresses the submission of written materials as part of this process. Paragraph (c)(2)(ii) corresponds to former 11 CFR 9007.2(c)(3), discussing