

the oral hearing. The language in these paragraphs for the most part follows the former rules, with the following additions. The deadline for filing written materials seeking an administrative review of the repayment determination has been lengthened from 30 to 60 days. Also, the candidate's failure to timely raise an issue in the written materials presented pursuant to paragraph (c)(2)(i) will be deemed a waiver of the candidate's right to raise the issue at any future stage of the proceedings. See *Robertson v. FEC*, 45 F.3d 486 (D.C. Cir. 1995). Further, under paragraph (c)(2)(ii), a candidate who desires an oral hearing must, at the same time he or she presents written materials pursuant to paragraph (c)(2)(i), request such a hearing in writing, and identify in that request the repayment issues the candidate wishes to address at the oral hearing.

Revised paragraph (c)(3) corresponds to former 11 CFR 9007.2(c)(4), and now deals with repayment determinations made after an administrative review. Please note that the statement regarding the Commission's possible consideration of new or additional information from other sources does not provide a means for the candidate or anyone acting on the candidate's behalf to make untimely submissions. Former 11 CFR 9007.2(c)(4) has been repealed.

Paragraphs (d), (f), (g) and (i) have been revised to conform with the new terminology used elsewhere in this section.

#### *Gains On the Use of Public Funds*

As indicated in the discussion of section 9004.5, above, the final rules contain a conforming amendment to the introductory language of section 9007.2(b)(4). This amendment clarifies that receiving income from investment or any other use of payments from the Fund is a basis for requiring payment to the Treasury. The Commission will require the committee to pay any such income received, less taxes paid, to the Treasury. The revisions to sections 9004.5 and 9007.2 ensure that any income received through the use of public funds benefits the public financing system. However, as indicated above, this provision does not apply to income that is exempt function income under 26 U.S.C. § 527(c)(3), such as amounts received from fundraising activities.

#### *Interest*

The Commission sought comment in the NPRM on whether interest should be assessed in certain situations. Although some commenters opposed this idea, the Commission believes it is

appropriate to assess interest on late repayments, and is therefore amending 11 CFR 9007.2(d) to provide that interest will be assessed on repayments made after the initial 90-day repayment period established at 11 CFR 9007.2(d)(1) or after the 30-day repayment period established at 11 CFR 9007.2(d)(2).

In the absence of interest charges for late repayments, debtors have little or no incentive to make timely repayments. Without this requirement, debtors may be more likely to pay their private sector debts first, as these generally accrue interest, and their government debts last.

While the presidential fund Acts contain no language on interest assessment, federal common law holds that interest may be assessed on debts owed the government, even without a statutory provision granting that power. *Robinson v. Watts Detective Agency*, 685 F.2d 729, 741 (1st Cir. 1982), cert. denied, 459 U.S. 1204 (1983). In particular, a statute is not necessary to compel payment of interest where equitable principles allow this. *Young v. Godbe*, 82 U.S. 562, 565 (1872).

The Commission has already established the precedent that it may assess interest when a presidential committee seeks a stay of a repayment determination pending appeal. 11 CFR 9007.5(c)(4), 9038.5(c)(4). One reason cited by the Commission for taking this action was to protect the Treasury "by helping to ensure that the repayment challenge is a serious one and not a dilatory tactic." Agenda Document 86-118, Proposed Revision of Title 26 Regulations (Nov. 26, 1986). Another was that, if the candidate is earning interest on the disputed repayment amount, the Treasury and not the candidate should receive the benefit if the Commission's repayment determination is upheld. *Id.* Both reasons are equally applicable in this situation.

By agreeing to certain conditions, including an audit and appropriate repayment, the presidential committees have established a contractual relationship with the Commission under which interest assessment becomes appropriate. See *West Virginia v. United States*, 479 U.S. 305, 310 (1987). Also, if a debtor-creditor relationship is established, "interest is allowed as a means of compensating a creditor for loss of use of his money." *United States v. United Drill and Tool Corporation*, 183 F.2d 998, 999 (D.C. Cir. 1950). Such a relationship exists in this context in that, prior to the receipt of public funds, the candidate must agree to repay unexpended funds, money determined

to be spent in an unqualified manner, and amounts received in excess of entitlement. 11 CFR 9003.1(b)(6), 9033.1(b)(7).

The interest currently assessed under 11 CFR 9007.5(c)(4) and 9038.5(c)(4) is the greater of that calculated using the formula set forth at 28 U.S.C. § 1961 (a) and (b) for computing interest on money judgments in federal civil cases, or the amount actually earned on the funds set aside under those sections. The Commission believes it is appropriate to utilize a similar approach in this situation. The Commission is therefore adding new paragraph 9007.2(d)(3) to provide that a comparable formula shall be used in assessing interest on late repayments under section 9007.2.

#### *Section 9007.3 Extensions of Time*

The Commission is amending paragraph (c) to include in that paragraph the policy that, whenever 11 CFR Part 9007 establishes a 60-day response period, the Commission may grant no more than one extension of time, which extension shall not exceed 15 days. The rules formerly provided for a 30 day response period. Materials provided to the committees prior to the audit process explained that extensions of time were limited to a single, 45 day extension. The rules thus continue the former 75-day total response period, and the initial 60-day response period may result in fewer extension of time requests.

#### *Section 9007.5 Petitions for Rehearings; Stays of Repayment Determinations*

The Commission is making conforming amendments to paragraphs (a), (b), (c)(1)(ii) and (c)(4), to reflect changes in terminology for the audit and repayment process. See discussion of 11 CFR 9007.1 and 9007.2, above.

#### *Section 9007.7 Administrative Record*

New section 9007.7 explains which documents constitute the administrative record for purposes of judicial review of final determinations regarding candidate certification and eligibility, and repayment determinations. The NPRM had included a lengthy list of documents that usually form the basis of the administrative record. It also indicated that certain items are not part of the Commission's decisionmaking process, and thus not part of the record on review.

One commenter expressed concern that the Commission was trying to impermissibly restrict documents to be included in the administrative record. The comment noted that judicial review is based on the whole record before the