

agency. Similarly, another commenter stated that the administrative record should include all materials that form the basis of the Commission's decisions. Two comments suggested including workpapers on which the auditors relied in making their calculations and recommendations. During the course of the audit and repayment processes, it has been the Commission's practice to provide committees with the audit work papers they need to formulate their responses.

The Commission agrees that the administrative record includes all materials it considered in making its decision, and the final rules have been modified to reflect this. Thus, it will generally include all documents circulated to the Commission (including attachments) and materials referenced in those documents. However, documents in the files of individual Commissioners, or documents in FEC employees' files which do not constitute a basis for the Commission's decisions, are not included in the record. The administrative record also does not include transcripts or tapes of Commission discussions of audit or repayment matters. See, *Common Cause v. Federal Election Commission*, 676 F. Supp. 286, 289 and n.3 (D.D.C. 1986). Although these materials may sometimes be made available under the Freedom of Information and Government in the Sunshine Acts, they do not provide an adequate explanation of the reasons for the Commission's decisions because they represent pre-decisional discussions. Documents properly subject to privileges such as an attorney-client privilege, or items constituting attorney work product, are also excluded from the administrative record.

The new rules indicate that documents and materials timely submitted by publicly-funded committees for Commission consideration are a part of the administrative record. Materials will also be considered timely submitted if they are received within an extension of time granted by the Commission. It is important that committees avail themselves of the opportunity to submit documents and other materials in a timely fashion, as they will be deemed to have admitted all specific findings and conclusions contained in an audit report or a repayment determination unless they specifically contest those findings and conclusions and provide supporting evidence and legal arguments at the appropriate time. When submitting evidentiary materials, committees should keep in mind that statements of counsel that are not

supported by personal knowledge do not constitute evidence. Committees may include in their submissions the audit work papers with which they have been provided. They need not include transcripts or tapes of their oral presentation to the Commission regarding repayment determinations, as those materials are already a part of the record.

Section 9008.12 Repayments

A conforming amendment has been added to paragraph (a)(2), to state that the audit report provided to the convention committee that contains the Commission's repayment determination will constitute notification for purposes of the three-year notification requirement of 26 U.S.C. 9008(h).

The Commission's rules governing public financing of national nominating conventions provide at 11 CFR 9008.11 that audits of convention committees follow the procedures for audits of presidential campaign committees set forth at 11 CFR 9007.1 and 9038.1. The former language contained a reference to the IAR, which is no longer a part of these procedures.

Part 9032—Definitions

Section 9032.9 Qualified Campaign Expenses

The Commission is adding a conforming amendment to paragraph (c) of this section to reflect the new attribution of certain expenditures between the primary and the general election limits. The amendment notes that certain expenditures formerly covered by this paragraph will not be attributed under these new guidelines. See discussion of 11 CFR 9034.4(e), below.

Part 9033—Eligibility for Payments

Section 9033.1 Candidate and Committee Agreements

In the interests of clarity, the Commission is adding a comma in the second sentence of 11 CFR 9033.1(b)(5). Paragraph (b)(5) concerns candidate and committee agreements to furnish certain documentation to the Commission.

A conforming amendment has been added to paragraph 9033.1(b)(7), clarifying that the same candidate and committee responsibilities that attach to an audit and examination made pursuant to 11 CFR part 9038 also attach to part 9039 investigations, under appropriate circumstances. See discussion of part 9039, below.

The final rules slightly reword paragraph (b)(11) of this section to more clearly indicate that candidates must agree to pay any civil penalties arising

from violations of the FECA, whether provided for in a conciliation agreement or imposed in a judicial proceeding.

New paragraph 9033.1(b)(12) has been added to require presidential primary candidates to include closed captioning in the preparation of their television commercials, as a precondition of their receiving public funds. This amendment corresponds to new paragraph 9003.1(b)(10), discussed above. The Legislative Branch Appropriations Act of 1992 does not specifically amend 26 U.S.C. § 9033, which sets out the eligibility requirements for presidential primary candidates. However, the Appropriations Act does state that the closed captioning requirement inserted in 26 U.S.C. § 9003(e) applies both to general election candidates and to candidates who are eligible for funding "under chapter 96" of Title 26 of the United States Code, that is, the Matching Payment Act. The Commission is therefore amending 11 CFR 9033.1(b) to reflect this new requirement.

Section 9033.4 Matching Payment Eligibility Threshold Requirements

Former 11 CFR 9033.4(b) stated that, in evaluating a candidate's matching fund submission, the Commission could consider other relevant information in its possession, including but not limited to past actions of the candidate in an earlier campaign. This provision was held to exceed the Commission's statutory authority in *LaRouche v. FEC*, 996 F.2d 1263 (D.C. Cir. 1993), cert. denied 114 S. Ct. 550. The Commission is therefore deleting this paragraph from the rule.

Section 9033.11 Documentation of Disbursements

Revised section 9033.11 follows revised section 9003.5.

Part 9034—Entitlements

Section 9034.4 Use of Contributions and Matching Payments

Winding Down Costs

The regulations at 11 CFR 9034.4(a)(3)(i) permit candidates to receive contributions and matching funds, and make disbursements, for the purpose of defraying winding down costs over an extended period after the candidate's date of ineligibility ("DOI"). These amounts are treated as qualified campaign expenses, and can result in additional audit fieldwork and preparation of addenda to audit reports to focus on these receipts and disbursements.

As part of an effort to streamline and shorten the audit process, the