Section 9038.2 Repayments Repayment Ratio

Section 9038.2(b)(2) of the current rules requires candidates to repay amounts received from the matching payment account that are used for nonqualified campaign expenses. The amount of the repayment is determined by multiplying the total amount of nonqualified campaign expenses by the candidate's repayment ratio. The repayment ratio is the ratio of matching funds received by a candidate to the candidate's total deposits. Under the current rules, the repayment ratio is determined as of the candidate's date of ineligibility.

The new rule changes the date for determining a candidate's repayment ratio from the date of ineligibility to 90 days after the date of ineligibility. Under the new rule, the Commission will multiply the amount of non-qualified campaign expenses by the ratio of matching funds to total deposits received as of 90 days after the candidate's date of ineligibility, in order to determine the amount the candidate must repay for using matching funds for non-qualified campaign expenses.

The new rule generates a repayment ratio that more accurately reflects the mix of public funds and private contributions received during the campaign, particularly for a candidate who receives significant amounts of private contributions after his or her date of ineligibility. By taking private contributions received within 90 days of DOI into account when determining a candidate's repayment ratio, the new rule will likely reduce the radio, thereby reducing the amount of the candidate's

repayment.

This approach is also more consistent with the statute when applied to a candidate who does not receive matching payments until after his or her date of ineligibility. Section 9038(b)(2) of the Matching Payment Act requires a candidate who uses public funds for non-qualified campaign expenses to repay a portion of the public funds he or she received to the Treasury. However, when section 8038.2(b)(2) of the current regulations is applied to a candidate who does not receive matching payments until after his or her DOI, it arguably generates a repayment ratio of zero. Thus, it does not require the candidate to make a repayment, even if the candidate incurred numerous non-qualified campaign expenses.

The new rule takes these post-DOI matching payments into account, thereby generating a ratio that is greater than zero and more accurately reflects

the mix is greater than zero and more accurately reflects the mix of matching payments and private contributions actually received. As a result, publiclyfunded candidates that incur nonqualified campaign expenses will be required to make a repayment, even if they do not receive any public funds until after their date of ineligibility.

In approving this approach for the final rules, the Commission rejected an alternative approach set out in the NPRM. The alternative approach would treat all matching funds certified in response to matching payment submissions received before the candidate's DOI as if they were certified before the candidate's DOI. This would result in a repayment ratio of greater than zero that could be used to determine a repayment amount under section 9038(b)(2) of the statute. However, this approach would only address the zero repayment situation outlined above. Since determining the repayment ratio 90 days after DOI addresses both situations, the Commission has incorporated this approach into the final rules.

In an effort to improve clarity, the final rules break the last three sentences of this section into two separate paragraphs. The Commission received no comments on this provision.

Income Derived From the Use of Surplus Public Funds

Paragraph 9038.2(b)(4) has been revised to indicate that the Commission may determine that income resulting from any use of surplus public funds after the candidate's DOI, less taxes, paid, shall be paid to the Treasury. This change parallels the changes made to sections 9004.5 and 9007.2(b)(4), discussed above.

Further Streamlining the Audit Process

The amendments to the audit process contained in this section follow those made to section 9007.2(d), above.

Conforming Amendments

A conforming amendment has been added to paragraph 9038.2(c)(1), to clarify that the repayment procedures followed by the Commission in connection with an 11 CFR part 9038 examination or audit also apply to an 11 CFR part 9039 examination or audit. See discussion of Part 9039, below.

The amendments to paragraph (d) of this section are identical to those made to 11 CFR 9007.2, discussed above.

Section 9038.4 Extensions of Time

The amendment to this section follows that made to section 9007.3, above.

Section 9038.5 Petitions for Rehearing; Stays of Repayment Determinations

The amendments to this section follow those made to section 9007.5, above.

Section 9038.7 Administrative Record

This section generally follows new section 9007.7.

Part 9039—Review and Investigation Authority

Section 9039.3 Examinations and Audits: Investigations

The Commission's review and investigatory authority for administering the matching fund program is set forth at 26 U.S.C. § 9039(b). In carrying out these responsibilities, the Commission must perform a continuing review of candidate and committee reports and submissions, and other relevant information. Regulations implementing these requirements are found at 11 CFR part 9039.

For the most part the Commission's review is routine, carried out in accordance with the eligibility, audit and repayment procedures contained elsewhere in the regulations. Section 9039(b) and its implementing regulations provide authority to conduct audits and investigations in situations other than those addressed by 26 U.S.C. § 9038, 11 CFR part 9038, 2 U.S.C. § 437g and 11 CFR part 111. To date, most of these situations have involved issues relating to a candidate's continuing eligibility or the amount of his or her entitlement during the course of the campaign, although they can also involve a post-election inquiry.

Section 9039.3 of the regulations describes how examinations, audits and investments are conducted in these inquiries. However, the prior section did not address the actions that may be taken at the conclusion of any such action. The Commission is therefore adopting new paragraph 9039.3(b)(4) for

that purpose.

This new paragraph states that, if the Commission decides to take no further action in a part 9039 case, the candidates(s) and committee(s) involved will be so notified. If the Commission decides to take further action, such action will follow as closely as possible the procedures already in place for comparable situations. Specifically, if the inquiry results in an adjustments to the amount of certified matching funds, the procedures set forth at 11 CFR 9036.5 shall be followed. If the inquiry coincides with an audit undertaken pursuant to 11 CFR 9038.1, the information obtained in the inquiry will be utilized as part of the repayment