determination. If the inquiry results in an initial or additional repayment determination, whether or not this coincides with a Commission audit, the procedures set forth at 11 CFR 9038.2, 9038.4 and 9038.5 shall be followed.

The new rules also include conforming amendments to 11 CFR 9033.1(b)(7), 9036.5(a), and 9038.2(c)(1).

Additional Issues

The Commission considered other proposals in the course of this rulemaking that it did not ultimately incorporate into the final rules. A summary of these proposals follows.

Convention Expenses of Ineligible Candidates

The Commission also sought comments in the NPRM on whether expenses incurred by losing primary election candidates in attending their party's national nominating convention should be considered a qualified campaign expense under 11 CFR 9032.9. Such attendance can provide a defeated candidate the opportunity to continue to fundraise and to maintain contact with his or her pledged convention delegates.

The Commission has decided for several reasons not to take this action. Qualified campaign expenses are defined in the Matching Payment Act at 26 U.S.C. § 9032(9)(A) as those "incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination for election." This definition seemingly does not apply to those no longer seeking the presidential nomination.

Also, the purpose of the 10% rule set forth at 11 CFR 9033.5(b), under which a candidate becomes ineligible for additional funding on the 30th day following the date of the second consecutive primary election in which he or she receives less than 10% of the popular vote, is to discontinue funding of candidates who have not received substantial support following their initial establishment of eligibility. Allowing them to obtain additional funding at a later point in the process would undercut this purpose. Under 11 CFR 9034.1(b), candidates

Under 11 CFR 9034.1(b), candidates can already count fundraising expenses incurred following their DOI, including those incurred at a national nominating convention, as qualified campaign expenses as part of their winding down costs. The Commission notes, however, that only those expenses directly related to fundraising qualify as qualified campaign expenses under this section. Creating an additional window of eligibility during the wind down period could substantially lengthen and complicate the audit process.

Treating Matching Payments as an Entitlement

One commenter urged the Commission to treat the matching payment program as more of an entitlement program. This commenter argued that the entitlement of a candidate who remains eligible for matching payments until the nominating convention should not be limited by the candidate's net outstanding campaign obligations. Instead, such a candidate should be entitled to receive matching funds for all matchable contributions received, up to fifty percent of the expenditure limitation. See 26 U.S.C. § 9034(b), 11 CFR 9034.1(d). The commenter said that the Commission should match all qualifying contributions submitted by such a candidate for matching, up to fifty percent of the limitation, and then seek a ratio surplus repayment once all campaign obligations have been satisfied.

However, this approach is inconsistent with the Matching Payment Act. Although the Act limits a candidate's overall entitlement to fifty percent of the expenditure limitation, the Act also further limits entitlement for candidates who become ineligible. Ineligible candidates are limited to matching payments for their net outstanding campaign obligations. 26 U.S.C. § 9033(c)(2). See 11 CFR 9034.1(b). All candidates for the nomination become ineligible when the party makes its nomination, because they can no longer be "seeking" a nomination that has already been awarded. See 26 U.S.C. § 9033(b)(2). Thus, a candidate's post-convention entitlement is limited to his or her NOCO, even if the candidate was eligible at the time the convention began.

If the commenter's suggestion were adopted, a candidate who was still eligible at the time of the convention could submit a large matching payment request after the nomination was awarded and have that request fully matched, even if the campaign had no debts outstanding at the time the funds were certified. The funds received would be treated as surplus funds rather than funds received in excess of entitlement. Thus, the committee would only be required to repay a portion of the funds under the surplus repayment rules. Such a result would frustrate the purposes of the Matching Payment Act, which requires a full repayment of any funds received by a candidate who has no further entitlement on the date of certification. 26 U.S.C. § 9038(b)(1). See 11 CFR 9038.2(b)(1).

The Commission also notes that this issue is the subject of ongoing litigation.

Certification of No Effect Pursuant to 5 U.S.C. § 605(b) (Regulatory Flexibility Act)

The attached final rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that few, if any, small entities will be affected by these final rules. Further, any small entities affected are already required to comply with the requirements of the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act in these areas.

List of Subjects

11 CFR Part 106

Campaign funds, Political candidate, Political committee and parties, Reporting and recordkeeping requirements.

11 CFR Parts 9002-9004

Campaign funds, Elections, Political candidates.

11 CFR Parts 9006-9007

Administrative practice and procedure, Campaign funds, Elections, Political candidates, Reporting requirements.

11 CFR Part 9008

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Parts 9032-9034

Campaign funds, Elections, Political candidate.

11 CFR Parts 9036-9039

Administrative practice and procedure, Campaign funds, Political candidates.

For the reasons set out in the preamble, subchapters A, E and F of chapter I of title 11 of the Code of Federal Regulations are amended as follows:

PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

1. The authority citation for part 106 continues to read as follows:

Authority: 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

2. Section 106.2 is amended by adding a sentence to the end of paragraph (a)(1), to read as follows: