

administering Federal Regional Commission grant funds.

(f) When RHS has no loan or grant funds in the project, an administrative charge will be made pursuant to the Economy Act (31 U.S.C. 1535).

§§ 3570.94–3570.99 [Reserved]

§ 3570.100 OMB control number.

The information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 0575–0173. You are not required to respond to this collection of information unless it displays a valid OMB control number.

Dated: June 1, 1999.

Inga Smulkstys,

Deputy Under Secretary, Operations & Management, Rural Development.

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FEDERAL ELECTION COMMISSION

11 CFR Part 9034

[Notice 1999–9]

Matching Credit Card and Debit Card Contributions in Presidential Campaigns

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Commission has adopted new regulations that allow contributions made by credit or debit card, including contributions made over the Internet, to be matched under the Presidential Primary Matching Payment Account Act. “Matchable contributions” are those which, when received by candidates who qualify for payments under the Presidential Primary Matching Payment Account Act, are matched by the Federal Government. The new rules provide that credit and debit card contributions, including those made over the Internet, are matchable to the extent provided by law, provided that controls and procedures are in place to detect excessive and prohibited contributions. Please note that further documentation requirements may be addressed in the Commission’s upcoming final rules governing public financing of presidential primary and general election candidates.

DATES: Further action, including the publication of a document in the **Federal Register** announcing an effective date, will be taken after these

regulations have been before Congress for 30 legislative days pursuant to 26 U.S.C. 9039(c).

FOR FURTHER INFORMATION CONTACT: N. Bradley Litchfield, Associate General Counsel, or Rita A. Reimer, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 694–1650 or (800) 424–9530 (toll free).

SUPPLEMENTARY INFORMATION: The Commission is publishing today revisions to its regulations at 11 CFR 9034.2 and 9034.3 to permit the matching of credit card and debit card contributions, including contributions received over the Internet, under the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031 *et seq.* (“Matching Payment Act”). Please note that other revisions to the Commission’s rules concerning the public financing of presidential primary and general election campaigns will be addressed in a separate document. In addition, the Commission may address further documentation requirements of these new rules in that document.

Debit card contributions are deducted directly from the contributor’s checking, savings, or other financial account. Credit card contributions are billed to the contributor and are usually processed by a third-party entity.

Under the Matching Payment Act, if a candidate for the presidential nomination of his or her party agrees to certain conditions and raises in excess of \$5,000 in contributions of \$250 or less from residents of each of at least 20 States, the first \$250 of each eligible contribution is matched by the Federal Government. 26 U.S.C. 9033, 9034. In the past the Commission has declined to match credit card contributions, although it has allowed them in other contexts. The Commission has always held contributions submitted for matching to a higher documentation standard, because the matching fund program involves the disbursement of millions of dollars in taxpayer funds. However, the Commission has now determined that such contributions may be matched under certain circumstances.

On December 16, 1998, the Commission published a Notice of Proposed rulemaking (“NPRM”) in which it sought comments on a wide range of issues involved in the public financing of presidential primary and general election campaigns. 63 FR 69524 (Dec. 16, 1998). While the NPRM did not specifically seek comments on credit card and Internet contributions, it stated that the Commission would welcome comments on “other aspects of the public financing process that could

be addressed in these regulations.” *Id.* at 69532.

In response to the NPRM, several commenters urged the Commission to match qualified contributions made by credit or debit card over the Internet. These commenters included America Online (“AOL”); Aristotle Publishing, Inc.; the Democratic National Committee (“DNC”); the Republican National Committee (“RNC”); and a joint comment by Lyn Utrecht and Eric Kleinfeld of Ryan, Phillips, Utrecht, & MacKinnon, and Patricia Fiori. In addition, the Commission held a public hearing on March 24, 1999, at which representatives of AOL, the DNC, the RNC, and Ms. Utrecht testified on this issue. After considering the comments, testimony and other relevant material, the Commission has decided to authorize the matching of such contributions under the circumstances described below.

It is well established that the Administrative Procedure Act (“APA”) requires only that an agency give notice which contains “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. 553(b)(3). Under the APA, the final rule must be a “logical outgrowth” of the proposed rule on which it solicited comments. *Chocolate Manufacturers Ass’n v. Block*, 755 F.2d 1098 (4th Cir. 1985).

Since these rules are not major rules within the meaning of 5 U.S.C. 804(2), the Matching Payment Act controls the legislative review process. See 5 U.S.C. 801(a)(4), Small Business Enforcement Fairness Act, Pub. Law 104–121, section 251, 110 Stat. 857, 869 (1996). Section 9039(c) of Title 26, United States Code, requires that any rules or regulations prescribed by the Commission to carry out the provisions of the Matching Payment Act be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on Friday, June 11, 1999.

Explanation and Justification

A matchable contribution for purposes of the Matching Fund Act is generally defined at 26 U.S.C. 9034(a) as “a gift of money made by a written instrument which identifies the person making the contribution by full name and mailing address.” The Commission’s regulations at 11 CFR 9034.2(b) define the term *written instrument* to mean a check written on a personal, escrow or trust account representing or containing the contributor’s personal funds; a money

order; or any similar negotiable instrument." The written instrument must contain the full name and signature of the contributor(s), the amount and date of the contribution, and the mailing address of the contributor(s). 11 CFR 9034.2(c). The Commission's rules at 11 CFR 9034.3(c) state that "a contract, promise, or agreement, whether or not legally enforceable, such as a pledge card or credit card transaction" is a non-matchable contribution.

All contributions received in connection with Federal elections are subject to the limitations and prohibitions of the Federal Election Campaign Act ("FECA" or the "Act"), 2 U.S.C. 431 *et seq.* The Act prohibits corporations, labor organizations and national banks from making any contribution in connection with a Federal election, 2 U.S.C. 441b(a). The Act also prohibits contributions by Federal contractors, 2 U.S.C. 441c, and by foreign nationals who are not permanent legal residents, 2 U.S.C. 441e. Contributions by persons whose contributions are not prohibited by the Act are subject to the limits set out in 2 U.S.C. 441a(a), generally \$1,000 per candidate per election to Federal office. 2 U.S.C. 441a(a)(1). Individual contributions to candidates and political committees may not aggregate more than \$25,000 in any calendar year. 2 U.S.C. 441a(a)(3).

The Commission considered the possibility of matching credit card contributions in 1983 but declined to match such payments "because credit cards present problems for ensuring that the requirements of matchability are met." 48 FR 5224, 5228 (Feb. 4, 1983). The Commission cited as examples of such problems the fact that credit card contributions made by phone would lack the contributor's signature; determining the source of the funds used for the contributions could be complicated, since some accounts that appear to be personal are actually paid for by corporations; and candidates would be requesting more in matching funds than they receive in contributions, since credit card companies deduct varying amounts to pay for their services. *Id.*

The Commission has, however, authorized the use of credit cards for unmatched contributions since 1978. See Advisory Opinion ("AO") 1978-68. It has also authorized corporations to reimburse their Political Action Committees ("PAC") for service charges incurred by credit card contributions, AO 1984-45; automatic fund transfers from contributors' bank accounts to committee accounts, AO 1989-26;

contributions and membership dues to be paid to a PAC via credit card, AO 1990-4; and campaigns to solicit contributions to be made by advance authorization of credit card charges, AO 1991-1.

In AO 1978-68 the Commission assumed that credit card issuers would follow their usual and normal collection procedures with respect to obtaining payment from persons who used their cards to make political contributions; and that credit card issuers, as well as the companies processing the credit card charges, would render their services in the ordinary course of business and receive the usual and normal charge for their services, i.e., the prevailing charge for the services at the time they were rendered. See 11 CFR 100.4(a)(1)(iii)(B). Otherwise, the difference would constitute an in-kind corporate contribution in violation of 2 U.S.C. 441b. The Commission is making the same assumptions for purposes of this rulemaking.

The Commission is making this change for several reasons. The use of credit cards has expanded dramatically since this issue was last considered in 1983. The Commission is convinced that credit and debit card contributions present no greater danger of fraud than do other contributions, if adequate precautions are taken. This approach also allows matching contributions to be made over the Internet, consistent with the Commission's expressed interest in utilizing this evolving medium where appropriate in FECA and public funding contexts.

Contributions Made Over the Internet—Background

The Commission has interpreted its regulations to be consistent with contemporary technological innovations where the use of the technology would not compromise the intent of law. However, the Commission believes that additional precautions must be taken when credit and debit card contributions are made over the Internet, because there is no direct paper transfer involved in such transactions. In contrast, if a credit card contribution is solicited over the telephone, the person taking the information can inform the contributor directly of the Act's limits and prohibitions, and check any potentially troublesome information, such as a foreign residential address. Where contributions are solicited by mail or other printed material, the recipient has a written document setting out the Act's requirements and prohibitions for permanent reference.

In AO 1995-9, the Commission authorized political contributions to be made via credit card over the Internet, provided that safeguards were in place to screen out excessive and prohibited contributions. It subsequently authorized the *solicitation* of matchable contributions over the Internet, in AO 1995-35. However, the requester of that AO sought permission only to solicit funds over the Internet—contributors were asked to mail the resulting contributions to the campaign in the form of personal checks. Those who commented on the current NPRM asked the Commission to match contributions that are both solicited and paid for by credit card over the Internet, thus eliminating this middle step.

On March 18, 1999, the Commission received Advisory Opinion Request 1999-9, which sought to accomplish this same result through the AO process. The Commission approved that request on June 10, 1999, but made its approval contingent on final promulgation of the regulations following the Congressional review period.

The Commission has determined in these advisory opinions that certain conditions and procedures are sufficient to allay concerns over the receipt of prohibited contributions using credit cards, and to meet other FECA requirements. While the Commission is not mandating any particular language or procedures for this purpose, it notes that the following measures constitute "safe harbors" which have already been deemed satisfactory. Additional information on this topic will be included in the Commission's Guideline for Presentation in Good Order ("PIGO"), which is made available to all candidates who qualify for funding under the Matching Payment Act, as well as to other interested parties. See 11 CFR 9033.1(b)(9).

Section 9034.2(b) The "Written Instrument" Requirement

The Commission is amending paragraph (b) of section 9034.2 to clarify the meaning of the term *written instrument* in the context of contributions by credit or debit card. Consistent with the *Black's Law Dictionary* definition discussed below, the new rule specifically states that this term covers either a transaction slip or other writing signed by the cardholder, or in the case of such a contribution made over the Internet, an electronic record of the transaction created and transmitted by the cardholder, and including the name of the cardholder and the card number, which can be maintained electronically and reproduced in a written form by the

recipient candidate or candidate's committee.

Black's Law Dictionary defines *written instrument* as "[s]omething reduced to writing as a means of evidence, and as the means of giving formal expression to some act or contract" (6th Ed., 1990, at 1612). Clearly this would cover credit card transactions that were "reduced to writing" at some stage of the process. In fact, there is a small but growing body of case law holding that computer records also constitute written instruments, as long as they can be printed out in paper form. *Clyburn v. Allstate Insurance Co.*, 826 F.Supp. 955, 956 (D.S.C. 1993); *People v. Perry*, 605 N.Y.S.2d 790, 199 A.D.2d 889 (1993); *Colonial Dodge, Inc. v. Chrysler Corporation*, 11 F.Supp.3d 737, 750-51 (D.Md. 1996); see also *People v. LeGrand*, 439 N.Y.S.2d 695, 81 A.D.2d 945 (1981) (credit card vouchers and receipts held to be "written instruments" for purposes of state forgery statute).

While the use of the Internet for campaign contributions does not entail a "written instrument" in the traditional sense, this does not foreclose its use for this purpose. The Commission stated in AO 1995-9 that, in order to be valid under the FECA, electronic transactions of this nature must entail the creation and maintenance of a complete and reliable "paper trail" for recordkeeping, disclosure, and audit purposes. The campaign can then print out these forms as required. Please note that the Commission is not requiring campaigns to print out these records at the time they are received, but only that they be kept in a form which will allow them to be printed out as needed.

Section 9034.2(c) Definition of Signature

The Commission is revising paragraph (c) of section 9034.2 to clarify that the term *signature* means, in the case of a contribution by a credit or debit card, either an actual signature by the cardholder who is the donor on a transaction slip or other writing, or in the case of such a contribution made over the Internet, the full name and card number of the cardholder who is the donor, entered and transmitted by the cardholder.

The Commission does not believe that the term *signature* can be extended to telephone transactions where the only record is being created wholly by the recipient committee. While the use of electronic signatures is becoming increasingly common, it is universally understood that it is the signatory's (in this case, the donor's) act of entering his or her name that represents a legal act. However, if the committee sends out a

voucher and receives a contributor-signed return of the voucher, or obtains some other verification of the contribution from the contributor, the credit card contribution initially approved over the telephone could then be matched.

Section 9034.2(c)(8) Credit and Debit Card Contributions, Including Those Made Over the Internet

Section 9034.2(c)(8)(i) General Requirement

This section establishes the requirements for matching credit and debit card contributions, including those received over the Internet. It generally states at paragraph (c)(8)(i) that such contributions are matchable, provided that the requirements of 11 CFR 9034.2(b) concerning a written instrument and of 11 CFR 9034.2(c) concerning a signature are satisfied. As explained above, it excludes telephone transactions where the only record is being created wholly by the recipient committee.

Section 9034.2(c)(8)(ii) Prohibited Contributions

The new rules state at paragraph (c)(8)(ii) that credit card and debit card contributions will be matched, if evidence is submitted by the committee that the contributor has affirmed that the contribution is from personal funds and not from funds otherwise prohibited by law.

In order to comply with this provision, a committee should take steps to insure that controls and procedures are in place to minimize the possibility of contributions by foreign nationals, by Federal Government contractors, and by labor organizations, or by an individual using corporate or other business entity credit accounts. Such controls and procedures should also help the recipient committee identify contributions made by the same individual using different or multiple credit card accounts; and contributions by two or more individuals who are each authorized to use the same account, but where the legal obligation to pay the account only extends to one (or more) of the card holders, and not to all of them.

In Advisory Opinion 1999-9 the requester outlined numerous steps and procedures that campaign intended to take to screen for prohibited and excessive contributions. In Advisory Opinion 1995-9 the Commission approved other specific procedures for this purpose. While these regulations do not mandate all of these procedures, campaigns are still required to make

reasonable efforts to prevent receipt of prohibited or excessive contributions. In Advisory Opinion 1999-9, for instance, to screen further for corporate or business entity cards, the committee explained that it intended to take advantage of the fact that corporate or business entity credit cards are generally billed directly to the entity's offices, rather than to an individual's home. If the billing and residential addresses provided by the prospective donor were different, the committee's web site would display a message noting the discrepancy and reminding the donor that it cannot accept contributions made on corporate or business entity credit cards, or on any card that does not represent the contributor's own personal funds. It was noted at the Commission's public hearing that similar action could be taken in an effort to bar prohibited contributions from foreign nationals, if the residence address was outside the United States. However, the rules do not prescribe particular language and procedures to assure that these concerns are met.

If contributions are not rejected for one of the foregoing reasons, soliciting campaigns present them for payment by the credit card company or other servicing entity in the usual manner. That entity will, in turn, ascertain that the name, address and other identifying information provided by the contributor matches that on record. If so, it will forward the amount of the contribution, less applicable fees, to the campaign. In the case of a debit card transaction, the financial institution that administers the account will forward the money to the campaign without this intermediate step. The receipt of the money by the campaign will serve as confirmation that the financial institution or other processing entity considers the transaction to be legal.

Section 9034.3(c) Non-Matchable Contributions

The Commission is revising section 9034.3(c) to delete from the definition of non-matchable contributions the term "credit card transactions," because it has determined that credit card contributions may be matched under the circumstances set forth in this document.

Other Issues

Best Efforts

Treasurers of political committees are required to exercise "best efforts" to report all contributions, 2 U.S.C. 432(i), and to include in these reports the complete identification of each

contributor whose contributions aggregate more than \$200 per calendar year. 2 U.S.C. 434(b)(3)(A). For an individual, "identification" means the full name, mailing address, occupation and employer. 2 U.S.C. 431(13). A contributor's failure to provide this information does not bar the recipient committee from accepting the contribution, since the FECA requires only that the committee make "best efforts" to obtain it. However, the Commission's rules at 11 CFR 104.7(b)(2) require the recipient to make one oral or written follow-up attempt to obtain the contributor information for any contribution that exceeds \$200 per calendar year.

The Commission is not revising its "best efforts" regulations in this rulemaking because those rules apply to all categories of political committees, including presidential campaign committees that qualify for matching Federal payments under 26 U.S.C. 9031 *et seq.* Furthermore, Commission regulations impose additional documentation requirements for matchable contributions whether or not a presidential campaign has exerted "best efforts" to obtain the contributor information that it is required to report under 2 U.S.C. 434(b)(3)(A). See 11 CFR 9036.1(b)(1)(i) and (ii) and 9036.2(b)(1)(v). Nevertheless, the Commission notes that the use of computer technology to solicit and receive matchable contributions through the Internet does present new options for a committee's compliance with the "best efforts" rules.

The requesters of both AO 1995-9 and 1999-9 stated that, if a contributor did not provide the required donor information, he or she would immediately receive another message asking again for the information. Some witnesses at the public hearing stated that contributors are more likely to provide information when prompted to do so by a computer than they might in other circumstances. In AO 1995-9, the Commission determined that, in the unique case of a contribution received over the Internet, the request could consist of an electronic message sent to the contributor's e-mail address. Any such request must be made after the committee receives the confirmation discussed above, and must meet the specific "best efforts" requirements set forth in 11 CFR 104.7(b)(2).

Credit Card Costs

The Commission has reconsidered the concern which it expressed in 1983 over the percentage of credit card contributions that could be matched, and determined that the costs of

processing credit and debit card contributions should be an allowable fundraising expense. Several commenters and witnesses pointed out that the costs of processing credit card contributions may be a significantly smaller cost to the campaign than the expenses associated with direct mail solicitations, holding a physical fundraising event such as a dinner or a reception, or paying fundraising consultants.

Retroactive Application

These regulations will have retroactive application to otherwise qualified credit and debit card contributions made on January 1, 1999 and thereafter, unless Congress and the President disapprove the regulations. Now that the Commission has determined that credit and debit card contributions may be matched, it believes it is appropriate to retroactively match such contributions, since many presidential campaigns will have engaged in substantial fundraising by the time these rules take effect. Since matching funds will not be disbursed until after the start of the matching payment period on January 1, 2000, 26 U.S.C. 9032(6), 9037, this provides ample notice to those campaigns that wish to utilize this fundraising approach.

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

The attached final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that these regulations do not affect a substantial number of entities, and most covered entities are not "small entities" for purposes of the Regulatory Flexibility Act. Therefore the rules would not have a significant economic effect on a substantial number of small entities.

List of Subjects 11 CFR Part 9034

Campaign funds, recordkeeping and reporting requirements.

For the reasons set forth in the preamble, Subchapter A, Chapter I of Title 11 of the Code of Federal Regulations is amended to read as follows:

PART 9034—ENTITLEMENTS

1. The authority citation for Part 9034 continues to read as follows:

Authority: 26 U.S.C. 9034 and 9039(b).

2. Section 9034.2 is amended by revising paragraph (b), by adding a sentence at the end of the introductory

text of paragraph (c), and by adding new paragraph (c)(8), to read as follows:

§ 9034.2 Matchable contributions.

* * * * *

(b) For purposes of this section, the term *written instrument* means a check written on a personal, escrow or trust account representing or containing the contributor's personal funds; a money order; any similar negotiable instrument; or, for contributions by credit or debit card, a paper record, or an electronic record that can be reproduced on paper, of the transaction. For purposes of this section, the term *written instrument* also means, in the case of a contribution by a credit card or debit card, either a transaction slip or other writing signed by the cardholder, or in the case of such a contribution made over the Internet, an electronic record of the transaction created and transmitted by the cardholder, and including the name of the cardholder and the card number, which can be maintained electronically and reproduced in a written form by the recipient candidate or candidate's committee.

(c) * * * For purposes of this section, the term *signature* means, in the case of a contribution by a credit card or debit card, either an actual signature by the cardholder who is the donor on a transaction slip or other writing, or in the case of such a contribution made over the Internet, the full name and card number of the cardholder who is the donor, entered and transmitted by the cardholder.

* * * * *

(8) Contributions by credit or debit card are matchable contributions, provided that:

(i) The requirements of paragraph (b) of this section concerning a written instrument and of paragraph (c) of this section concerning a signature are satisfied. Contributions by credit card or debit card where the cardholder's name and card number are given to the recipient candidate or candidate's committee only orally are not matchable.

(ii) Evidence is submitted by the committee that the contributor has affirmed that the contribution is from personal funds and not from funds otherwise prohibited by law.

3. Section 9034.3 is amended by removing the phrase "or credit card transaction" in paragraph (c).

Dated: June 11, 1999.

Scott E. Thomas,

Chairman, Federal Election Commission.

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