

I. Proposed 11 CFR 100.93 Payment for Travel by Airplane and Other Means of Transportation

A. Proposed Replacement of 11 CFR 114.9(e) With Proposed 11 CFR 100.93

The Commission proposes several changes to the candidate travel rules currently set forth at 11 CFR 114.9(e). While 11 CFR part 114 focuses on corporate and labor organization activity, and current 11 CFR 114.9(e)(2) focuses on means of travel owned or leased by corporations or labor organizations, the Commission seeks to broaden the rules to include airplanes and other means of travel owned by persons other than corporations and labor organizations. The Commission recognizes that in most cases the means of travel used for campaign trips is likely to be owned or leased by a corporation or labor organization, but notes that the current section heading for 11 CFR 114.9, "Use of corporate and labor organization facilities and means of transportation," would not accurately convey the scope of the proposed travel rules encompassing airplanes and other means of transportation owned by individuals, partnerships, or other entities. Therefore, the Commission proposes deleting the reference to "means of transportation" from the title of 11 CFR 114.9, removing and reserving paragraph (e) of 114.9, and relocating the substance of the travel reimbursement rules to a new section.

To accommodate the broadened scope of the travel reimbursement rules, the Commission proposes adding new section 100.93 to the enumerated exceptions to the definition of "contribution" in 11 CFR part 100, subpart C. This new section would describe circumstances in which the use of a private means of transportation not owned or leased by candidates or their authorized committees would not be contributions, much like current § 100.52 (also in subpart C), which describes when the use of commercial transportation is or is not a contribution. Proposed § 100.93 would be based on the current 11 CFR 114.9(e), with the organizational and substantive changes described below.

B. Proposed 11 CFR 100.93(a) Scope and Definitions

1. Proposed Paragraph (a)(1) Scope

Proposed paragraph (a)(1) would define the scope of the rules and clarify any perceived ambiguity regarding the scope of the current 11 CFR 114.9(e)(1). The current rule focuses on the use of airplanes owned by corporations or labor organizations that "are not

licensed to offer commercial service for travel in connection with a Federal election." One district court found this wording to be ambiguous. In this case, a presidential candidate claimed that the regulation applied to all travel on airplanes except airplanes owned or leased by a corporation or labor organization possessing a license for travel in connection with a Federal election. *See Federal Election Commission v. Arlen Specter '96*, 150 F. Supp. 2d 797, 804 and 808 (E.D. Pa. 2001). The Court noted that no such license existed and ultimately deferred to the Commission's longstanding determination that 11 CFR 114.9(e) applies to airplanes owned by corporations or labor organizations not engaged in the business of providing commercial air service generally, without regard to any connection with a Federal election. *Id.* at 812.

In order to remove this perceived ambiguity, the Commission proposes further clarification of the class of airplanes affected. As noted above, proposed 11 CFR 100.93 would apply to service providers depending on whether the airplane is or is not "normally operated for commercial passenger service," rather than whether the owner of the airplane is "licensed to offer commercial service for travel in connection with a Federal election."

The Commission notes that commercial and non-commercial air travel is subject to the authority of the Department of Transportation (DOT) and various certifications of the Federal Aviation Administration (FAA). Aircraft are permitted to operate pursuant to various FAA safety certifications based generally on passenger capacity, route frequency, and type of service offered. Private aircraft not offering commercial passenger service operations normally operate under certification provided pursuant to either 14 CFR parts 91 or 125.¹ Some airlines receive certificates of public necessity and convenience to operate commercial passenger service as common carriers within specified domestic locations pursuant to 14 CFR part 135. Other common carriers, such as commercial air taxi service and on-demand charter service, are permitted to operate under special certification in 14

CFR part 298, which exempts them from certain requirements that would be otherwise required under 14 CFR part 135. Certain other aircraft are also permitted to serve as common carriers and offer passenger service for compensation under 14 CFR parts 121 and 129. Each of the FAA certifications focuses mainly on the technical specifications and safety requirements of the aircraft and crew.

Aircraft operating under 14 CFR part 91 certification are not usually permitted to accept any form of payment or reimbursement from passengers, but a special FAA exception permits Federal candidates to reimburse the owners of such aircraft for the use of planes pursuant to the Commission's regulations. *See* 14 CFR 91.321.² The Commission therefore intends its regulations in proposed 11 CFR 100.93 to apply only to airplanes *not* authorized to conduct operations in air transportation as a common carrier (e.g., 14 CFR parts 91 or 125), while the current regulations at 11 CFR 100.52 would apply to all airplanes operated pursuant to other certifications that do permit carriage of passengers for compensation. Proposed 11 CFR 100.93, however, would focus on the normal use of the airplane, rather than the operating certificate possessed by its owner, to avoid the need for title and certification checks. The Commission seeks comment on whether the type of certification with the FAA, or some other method, should be used to determine whether an airplane is normally operated for commercial passenger service such that a normal and usual rate for that passenger service could be readily and accurately ascertained.

As noted above, the current rule distinguishes between the use of airplanes owned or leased by a corporation or labor organization licensed to offer commercial services for travel, and airplanes that are owned by other corporations or labor organizations not normally engaged in commercial air passenger service. This distinction requires an examination of the plane's ownership or lease structure to determine the proper reimbursement timing and amount. The Commission is concerned that the ownership determination may add unnecessary confusion to the payment process and is proposing to shift the focus of the rule away from whether the airplane's owner is a corporation or labor organization

¹ Aircraft operating pursuant to certification under 14 CFR parts 91 or 125 are not permitted to operate as common carriers, meaning that they cannot hold themselves out to the public as providing passenger service for compensation. *See* 14 CFR 119.1(a) (establishing additional base requirements in excess of the 14 CFR part 91 requirements for all air carriers and commercial operators that serve as common carriers) and 14 CFR 125.1(a) (applies to aircraft with a seating capacity of 20 or more persons, but only where common carriage is not involved).

² Aircraft operating under 14 CFR part 125 certification are similarly prohibited from operating as common carriers, but there is no similar general prohibition on the acceptance of payment from passengers to warrant an identical exception.