

corporations or labor organizations not "licensed to offer commercial services for travel in connection with a Federal election." Thus, the previous rule distinguished between the use of airplanes owned or leased by a corporation or labor organization licensed to offer commercial services for travel, and airplanes owned by other corporations or labor organizations not normally engaged in commercial air passenger service. This distinction required an examination of the plane's ownership or lease structure to determine the proper reimbursement timing and amount.

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

In the NPRM, the Commission proposed the normal use of the airplane as the criterion for the applicability of section 100.93. Specifically, if the plane was normally operated for passenger service for a fee, 11 CFR 100.52 would apply, and if it was not, then section 100.93 would apply. Under section 100.52, "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services" is an "in-kind contribution." 11 CFR 100.52(d). Thus, a candidate or other campaign traveler receives an in-kind contribution when he or she is provided commercial transportation without charge or at a charge that is less than the usual and normal charge for that transportation.

The Commission received four comments addressing the scope of section 100.93. Three of the commenters supported the elimination of 11 CFR 114.9(e). Two commenters expressed support for the proposed distinction based on whether the airplane is

"normally operated for commercial passenger service." A different commenter, however, recommended that the rule focus on whether the person providing the service normally provides the service as a commercial service, rather than whether a particular airplane is normally operated for commercial passenger service. This commenter asserted that "when a commercial provider of transportation services leases an airplane specifically for the purpose of providing services to a campaign, the Commission should treat the commercial provider the same as if it owned the airplane. The fact that the airplane had never previously been used as a commercial aircraft would be irrelevant."

Likewise, another commenter urged the Commission to "focus on the provider of the air transportation and the primary business of that provider rather than the 'normal use' of a particular aircraft." This commenter asserted that it would be too difficult to determine the "normal use" of an aircraft in light of the varied ownership structures and shared users and uses of a single plane. The commenter argued that a rule focusing on the "normal use" of an aircraft would require significant clarification, including an explanation of whether the "normal use" pertained only to use by the usual operator or whether it would also apply to use by other persons leasing the aircraft for particular flights or for a longer period of time. This commenter recommended basing the distinction instead on the "FAA's long established primary business test." Under that test, the commenter stated, any aircraft offered to a candidate or other campaign traveler would be covered by 11 CFR 100.93 so long as air transportation is not the primary business of the provider. This approach is similar to an alternative proposed in the NPRM, which would delineate the airplanes covered by this new section based on whether the service provider is a "commercial vendor," as defined in 11 CFR 116.1(c), of air transportation services.

These comments raise a number of concerns about the difficulties inherent in basing a rule on "normal use" of an airplane. The approaches suggested by the commenters would be, to the extent they require a determination of the ownership structure or consideration of the prior use of the airplane, subject to manipulation and would perpetuate the difficulties presented by the previous rule. The Commission rejects the "commercial vendor" standard and the commenter's suggested "primary business test," because each would require analysis of the service provider's

structure and business practices. One impetus for this rulemaking is to avoid an ownership-dependent analysis in establishing the proper valuation of election-related travel where the value of that travel is not readily ascertainable from a normal and usual charge. The purpose of new § 100.93 is to provide clear guidance to campaign travelers, not to describe the business practices of service providers.

The Commission concludes that the legal operating authority for the airplane, rather than the ownership or leasing arrangement, is the relevant determinant because it indicates the applicability of 11 CFR 100.52(d) or new § 100.93. The service provider's business practice is relevant only to the extent that it discloses the operating authority of the airplane. Because the commenters are correct that a determination of the "normal use" of an airplane could be complex, the final rule relies on the classifications already established by the Federal Aviation Administration ("FAA").

The new rules in § 100.93 apply to all airplanes not licensed by the FAA to operate for compensation or hire under 14 CFR parts 121, 129, or 135.² 11 CFR 100.93(a)(1). This phrase eliminates any potential ambiguity in the current language at 11 CFR 114.9(e) and provides a readily discernible bright line based on existing FAA regulations. Paragraph (a) further clarifies that new section 100.93 also applies to airplanes operated by a Federal, State or local government in the United States.

The NPRM indicated that the proposed regulations in 11 CFR 100.93

² The FAA requires airplane operators who hold their service out to the public as willing to transport persons or property to be certificated under 14 CFR part 119 to conduct operations in accordance with 14 CFR part 121 or part 135, as applicable, depending primarily on the size of the aircraft used. Operators must notify the FAA of the specific aircraft they intend on using in the part 121 or 135 operation. Foreign aircraft held out to the public within the United States must comply with the requirements of 14 CFR part 129. Operators conducting operations for compensation or hire that are not common carriage, or operators that are private carriage in large aircraft must be certificated by the FAA to operate under part 125. See 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). Operators conducting flights in small private aircraft not for compensation or hire are regulated by the FAA under 14 CFR part 91. Although aircraft operating under 14 CFR part 91 certification are not usually permitted to accept any form of payment or reimbursement from passengers, 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. 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.