

service provider, so long as the service provider is permitted to make an in-kind contribution and the amount of the contribution does not exceed the limitations of the Act. New 11 CFR 100.93(b)(2) addresses this situation by stating when a service provider makes an in-kind contribution. A candidate's authorized committee or other political committee paying for the travel must comply with the payment conditions in 11 CFR 100.93 to avoid receiving a contribution in the amount of the unreimbursed value. If these conditions are not met, then the provision of the value of the travel would be a prohibited in-kind contribution if the service provider is a corporation or labor organization, or an excessive in-kind contribution if the value of the service would, when added to other contributions to the same candidate or political committee by the service provider, exceed that service provider's contribution limit. *See* 11 CFR 100.93(b)(2). The value of the in-kind contribution is determined in the same manner as the amount of the reimbursement would normally be determined under paragraphs (c), (d) or (e) of new section 100.93.

The Commission recognizes that this approach may, in some cases, require the same type of ownership analysis that is discussed above. This analysis, however, is not a necessary step in every circumstance because it must be employed only where the service's provider elects not to seek full or partial reimbursement from the political committee, or when the political committee fails to pay the service provider. The Commission sought comments on whether reimbursement should always be required, regardless of the ownership, or whether the possibility of an in-kind contribution from a permissible source should be addressed in some other fashion. One commenter stated that it is not important for the Commission to preserve the option of making an in-kind contribution because the value of the transportation will often exceed the contribution limits. While the commenter makes a valid point, there are still some circumstances in which an in-kind contribution is otherwise permissible under the Act. The Commission is therefore preserving the option of an in-kind contribution as described above.

D. 11 CFR 100.93(c) Travel by Airplane

Under the previous rules at 11 CFR 114.9(e)(1), when a candidate or other campaign passenger used an airplane owned by corporation or labor organization not in the business of

providing commercial air travel, the rate of reimbursement was either the first-class airfare or the normal charter rate, depending on whether the destination city was served by regularly scheduled commercial air service. The charter rate, which in many cases is considerably higher than first-class airfare to a city in the same area, better represents the actual cost that a political committee would incur, but for the use of the corporate or labor organization airplane, to reach a particular destination by air when that destination is not served by commercial air service. Nevertheless, the NPRM recognized that candidates who campaign in major metropolitan areas that have regularly scheduled commercial airline service will generally be able to use a private plane and reimburse only the equivalent of a first-class airfare, whereas candidates who campaign in more rural areas that have little, if any, commercial air service would be required to reimburse the equivalent charter rate. Consequently, the NPRM expressed concern that the reimbursement scheme in 11 CFR 114.9(e)(1) may have been unnecessarily complex and unfairly affected campaigning in rural areas.

1. Three Alternatives in NPRM

To address these concerns, the NPRM sought comments on three alternative reimbursement rules in proposed 11 CFR 100.93(c), as well as any other appropriate payment systems. The Commission also sought comments on whether and how it should further simplify the rules and address other inequities, if any, arising from the previous application of 11 CFR 114.9(e) or the changes proposed for section 100.93.

Alternative A proposed setting the payment rate at the amount of the lowest unrestricted and non-discounted first-class airfare to the closest airport that has such service. For an airport served by regularly scheduled coach airline service but not regularly scheduled first-class airline service, Alternative A proposed setting the payment at the lowest unrestricted and non-discounted commercial coach rate to that destination.

Alternative B proposed two different payment rates, following closely the travel valuation rules set forth in the ethics rules for the House of Representatives and the United States Senate.⁵ The first rate, the normal cost

of first-class airfare between the cities, would have applied to previously scheduled flights, as opposed to flights specifically scheduled for a campaign traveler, between cities with regularly scheduled air service. Like Alternative A, Alternative B would also have permitted payment at the unrestricted and non-discounted commercial coach rate where coach service is regularly scheduled on the same route in cases where only coach service is available. The second rate under Alternative B, the normal charter rate for a similar airplane, would have applied to flights specifically scheduled for a campaign traveler and flights where the origin or destination city is not served by regularly scheduled commercial air service.

Alternative C would have established a uniform rule by requiring the payment amount to be the normal and usual cost of chartering a plane of sufficient size to accommodate all campaign travelers plus the news media and security personnel where applicable. This payment rate would depend on the rate for chartering the entire plane, rather than a per-passenger cost, and would not vary based on whether the destination airport is served by regularly scheduled commercial air service of any particular class.

2. Comments on Proposed Alternatives A, B, and C

The Commission received eight comments regarding proposed alternatives A, B, and C, reflecting a lack of consensus. One commenter submitted general recommendations encouraging the Commission to adopt a "clear, uniform format."

Two of the comments criticized the previous rules at 11 CFR 114.9(e) for undervaluing the travel service provided by permitting, in some instances, candidates to pay for charter services at the lower first-class airfare rates. This undervaluation of travel services, these commenters asserted, constitutes a prohibited contribution where the service is provided by a corporation or labor organization. These commenters urged the Commission to adopt Alternative C as the most accurate reflection of the actual cost of the travel service provided, as well as the easiest of the alternatives to administer. These commenters opposed Alternative A as permitting an even greater amount of in-kind contributions than allowed under the previous 11 CFR 114.9(e). Furthermore, they stated Alternative B

⁵ *See* Select Committee on Ethics, U.S. Senate, Senate Ethics Manual, S. Pub. No. 108-1 (2003), "Private Air Travel" at p. 60; Committee on Standards of Official Conduct, U.S. House of Representatives, Rules of the U.S. House of Representatives on Gifts and Travel (2001), "Use of

Private Aircraft for Travel" available at http://www.house.gov/ethics/Gifts_and_Travel_Chapter.htm#_Toc476623633.