AGENDA DOCUMENT NO. 09-78

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

AGENDA ITEM
For Meeting of: 11-19-09

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan
General Counsel

Rosemary C. Smith
Associate General Counsel

Amy L. Rothstein
Assistant General Counsel

Joshua S. Blume
Attorney

Joanna S. Waldstreicher
Attorney

SUBJECT: Draft Explanation and Justification for Final Rules voted on December 14, 2007 on Campaign Travel

Attached is a draft Explanation and Justification for the Final Rules voted on by the Commission on December 14, 2007 implementing the campaign travel provisions of section 601 of Public Law 110-81, the "Honest Leadership and Open Government Act of 2007."

We have been asked to place this draft on the agenda for November 19, 2009.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 113, 9004, 9034

[Notice 2009 - XXXXX]

Campaign Travel

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission is promulgating new and revised rules implementing the provision of the Honest Leadership and Open Government Act governing non-commercial campaign travel on aircraft. These changes restrict, and in some situations prohibit, Federal candidates and their political committees from expending campaign funds for non-commercial air travel. The rules apply to all Federal candidates, including publicly funded presidential candidates, and other individuals traveling on behalf of candidates, political party committees, and other political committees, where the travel is in connection with Federal elections. Further information is provided in the supplementary information that follows.

DATES: The effective date for the revisions to 11 CFR parts 100, 113 and 9034 is [INSERT DATE THIRTY DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Further action on revisions to 11 CFR part 9004, 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. 9009(c).

FOR FURTHER INFORMATION CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, Mr. Joshua S. Blume, Attorney, or Ms. Joanna S. Waldstreicher, Attorney, 999 E Street N.W., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is promulgating several changes to its rules in order to implement sections 204(8)(B) and 601 of Pub. L. No. 110-81, 121 Stat. 735, the "Honest Leadership and Open Government Act of 2007" ("HLOGA"). These provisions of HLOGA became effective upon enactment on September 14, 2007. HLOGA amended the Federal Election Campaign Act of 1971, as amended (2 U.S.C. 431 et seq.) ("the Act") by restricting, and in some cases prohibiting, the expenditure of campaign funds by candidates for Federal office for non-commercial travel aboard aircraft. See 2 U.S.C. 439a(c).

The Commission is implementing these provisions of HLOGA by adding new section 113.5 to 11 CFR Part 113, which governs the expenditure of campaign funds by candidates for Federal office and their authorized political committees. In addition, the Commission is promulgating revisions to 11 CFR 100.93, which establishes an exception to the definition of "contribution" for non-commercial travel aboard aircraft by, or on behalf of, Federal candidates and political committees, if the candidates and political committees reimburse the service providers at specified rates. The revisions to 11 CFR 100.93 apply not only to campaign travel by, or on behalf of, candidates for Federal

office, but also to campaign travel by other persons, such as the staff of a political party committee or a nonconnected political committee, even when their campaign travel is not on behalf of a specific candidate. The revisions to 11 CFR 100.93 are also incorporated by reference into the Commission's rules governing travel by publicly funded presidential candidates. The changes in these final rules, however, do not substantively alter the Commission's treatment of travel by means of transportation other than aircraft, or of travel aboard commercial airliners or charter flights.

The Notice of Proposed Rulemaking ("NPRM") on which these final rules are based was published in the Federal Register on October 23, 2007. 72 FR 59953 (October 23, 2007). The comment period closed on November 13, 2007. The Commission received eight comments from eleven commenters.[1] The comments are available at http://www.fec.gov/law/law_rulemakings.shtml#travel07. Because no commenters requested the opportunity to testify, the Commission did not hold a hearing on this rulemaking.

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the Federal Register at least thirty calendar days before they take effect. In addition, 26 U.S.C. 9009(c) requires that any rules or regulations prescribed by the Commission to carry out the provisions of the Presidential Election Campaign Fund Act be transmitted to the Speaker of the House of Representatives and the President of the

[1] These comments included a written comment from the Internal Revenue Service stating that it did not find any conflict between its regulations and the Commission's proposed rules.

Senate thirty legislative days before they are finally promulgated. The final rules that follow were transmitted to Congress on _____.

Explanation and Justification

I. Background

A. Statutory and Regulatory Framework

The Act defines a "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i); see also 11 CFR 100.52(a). The phrase "anything of value" encompasses "the provision of any goods or services without charge or at a charge that is less than the normal and usual charge for such goods or services." 11 CFR 100.52(d)(1). When goods or services are provided at less than the usual and normal charge, "the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services at the time of the contribution and the amount charged the political committee." Id.

As a result, candidates who travel aboard a commercial airliner or other conveyance for which a fee is normally charged must pay the usual and normal charge for that service to avoid receiving an in-kind contribution from the person providing the travel service. Such in-kind contributions would be prohibited if provided by certain entities, including corporations, labor organizations, Federal contractors, and foreign nationals. See 2 U.S.C. 441b, 441c, and 441e; 11 CFR 110.20, 114.2(b), and 115.2. If the in-kind contributions are from permissible sources, they nevertheless would be

subject to the contribution limits of the Act and Commission regulations. See 2 U.S.C. 441a through 441k; 11 CFR Parts 110, 114, and 115.

1. Promulgation of 11 CFR 100.93 in 2003 – Payment for non-commercial travel

The usual and normal charge for travel aboard a commercial aircraft is the publicly available price for a ticket, and the usual and normal charge for a chartered aircraft is the publicly available charter or lease rate. The usual and normal charge for travel aboard a non-commercial flight, however, may not be as apparent. For example, there is generally not a ticket price for a seat aboard a corporate aircraft that is operated exclusively for the private travel of the corporation's executives and their guests. Because candidates for Federal office traveled on these privately operated aircraft, the Commission's regulations provided specific guidance about the rate of reimbursement that candidates and others had to pay to avoid receiving an excessive or a prohibited in-kind contribution for travel aboard such aircraft.

On December 15, 2003, the Commission promulgated final rules adding 11 CFR 100.93. See Final Rules and Explanation and Justification for Travel on Behalf of Candidates and Political Committees, 68 FR 69,583 (Dec. 15, 2003) ("2003 travel rules" or "2003 E&J"). The 2003 travel rules established an exception from the definition of "contribution" for payments at specified rates for non-commercial travel in connection with a Federal election. Under the 2003 travel rules, the payment required for non-commercial air travel varied among the first-class, coach, or charter rate, depending on whether the travel occurred between cities served by regularly scheduled commercial airline service, and whether that service was available at a first-class or coach rate. See former 11 CFR 100.93(a)(3)(i) and (c).

2. Revisions in 2003 to 11 CFR 9004.7 and 9034.7 – Travel by presidential and vice-presidential candidates accepting public funds

Candidates in the presidential primary elections may qualify to receive partial public funding in the form of matching payments from the Federal government. Additionally, presidential general election candidates may qualify to receive outright grants of public funds. In both cases, the presidential candidates must agree, among other things, to use the public funds they receive solely for "qualified campaign expenses" and not to exceed specified expenditure limits. 2 U.S.C. 441a(b)(1)(A) and (B); 26 U.S.C. 9003(b) and (c), 9033(b).

As part of the 2003 travel rules, the Commission promulgated separate regulations at 11 CFR 9004.7(b)(5)(i) and (v) and (b)(8), and 9034.7(b)(5)(i) and (v) and (b)(8), setting forth the appropriate reimbursement rates that publicly funded candidates must use for campaign-related travel on non-commercial transportation. While 11 CFR 100.93 treats the underpayment for travel as an in-kind contribution, 11 CFR 9004.7 and 9034.7 address the extent to which payments for campaign-related travel constitute "qualified campaign expenses." The 2003 travel rules revised the rates and recordkeeping requirements for presidential and vice-presidential candidates accepting public funds to conform them to the new rates in 11 CFR 100.93.

II. Revisions to 2 U.S.C. 439a – Use of Campaign Funds

HLOGA amended the Act to prohibit House candidates from making any expenditure[2] for non-commercial travel on aircraft, with an exception for travel on

[2] An "expenditure" includes any payment "made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i).

government-operated aircraft and aircraft owned or leased by a candidate or an immediate family member of the candidate. See 2 U.S.C. 439a(c)(2) and (3). HLOGA also specified new reimbursement rates that presidential and Senate candidates must pay for non-commercial campaign travel on aircraft. See 2 U.S.C. 439a(c)(1). These reimbursement rates differ from those contained in the Commission's 2003 travel rules. HLOGA did not, however, affect campaign travel on commercial flights, which all candidates must still reimburse at the "usual and normal charge." See 11 CFR 100.52(a) and (d) and 11 CFR 100.93(a)(2).

III. 11 CFR 100.5(e)(6) – Definition of "Leadership PAC"

The term "leadership PAC" is defined in section 204(a) of HLOGA (2 U.S.C. 434(i)(8)(B)) as "a political committee that is directly or indirectly established, financed, maintained or controlled by [a] candidate [for Federal office] or [an] individual [holding Federal office] but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that such term does not include a political committee of a political party."[3] The term "PAC" is an acronym for "political action committee," a term generally used to refer to all political committees other than authorized candidate committees and committees of a political party.[4]

As part of the final rules governing the reporting of contributions bundled by

[3] This definition is consistent with the Commission's rules that treat such committees as unaffiliated with a candidate's authorized committee. See 11 CFR 100.5(g).

[4] The term "PAC" has not been a term of art in the law or in Commission regulations prior to the passage of HLOGA. PACs sponsored by a corporation or a labor organization are separate segregated funds ("SSFs"). See, e.g., 2 U.S.C. 441b(b)(2)(C); 11 CFR 100.5(b). PACs that lack corporate or labor sponsorship are referred to in the regulations as "nonconnected committees." See, e.g., 11 CFR 104.10 and 106.6(a).

lobbyists, registrants and the PACs of lobbyists and registrants, the Commission adopted a definition of "leadership PAC" at 11 CFR 100.5(e)(6), which became effective on March 19, 2009. *See* Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants, 74 Fed. Reg. 7285, 7286 (Feb. 17, 2009). The definition mirrors the definition of the same term in HLOGA.

The definition of "leadership PAC" is relevant to two areas of the new law that fall within the Commission's purview: (1) the new restrictions on candidate travel that are implemented through revisions to 11 CFR 100.93 and the addition of 11 CFR 113.5, and (2) the disclosure requirements in Section 204 of HLOGA for contributions bundled by lobbyists and registrants. In the provision relevant to this rulemaking, HLOGA generally prohibits a "candidate for election for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, an authorized committee and a leadership PAC" from making expenditures for non-commercial air travel. Pub. L. No. 110-81, section 601(a) (codified at 2 U.S.C 439a(c)(2)) (emphasis added).

IV. Revisions to 11 CFR 100.93 – Travel By Aircraft or Other Means of Transportation

The Commission is amending 11 CFR 100.93 to eliminate a conflict between (1) the provisions which required candidates and political committees to pay for non-commercial air travel at specified rates to avoid the receipt of an excessive or a prohibited in-kind contribution and (2) section 601 of HLOGA, which permits candidates and

political committees to make expenditures at different specified rates to pay for non-commercial air travel.[5]

The Commission is otherwise retaining 11 CFR 100.93 intact, except as identified below. The explanations for the purpose and provisions of 11 CFR 100.93 were set out in the 2003 E&J and continue to apply unless addressed in the following discussion. In the NPRM, the Commission sought comments on the overall structure of 11 CFR 100.93. None of the commenters called for a change in the structure or general function of the section.

A. 100.93(a) – Scope and Definitions

The Commission is changing the scope and definitions in 11 CFR 100.93(a) as noted below. First, for internal consistency, the Commission is replacing all references to "airplanes" in 11 CFR 100.93 with the term "aircraft." HLOGA uses the term "aircraft," which the Federal Aviation Authority (FAA) defines as "a device that is used or intended to be used for flight in the air." 14 CFR 1.1. The term "aircraft" includes helicopters, which the Commission's 2003 travel rules had grouped with buses and conveyances other than airplanes. See former 11 CFR 100.93(a)(3)(ii) (definition of "service provider" focuses on "person who makes the airplane or other conveyance available"), former 11 CFR 100.93(c) ("travel by airplane") and 11 CFR 100.93(d) ("other means of transportation" includes "any other means of transportation" and specifically lists

[5] The intent of section 601 of HLOGA was frequently characterized by its sponsors as an effort to "end subsidization" of air travel provided by corporations and others, and thereby reduce the potential for corruption or the appearance thereof. See, e.g., 153 Cong. Rec. S263 (daily ed. Jan. 1, 2007) (statement of Sen. Obama); 153 Cong. Rec. S267 (daily ed. Jan. 9, 2007) (statement of Sen. Feingold); 153 Cong. Rec. S320 (daily ed. Jan. 10, 2007) (statement of Sen. Lieberman); 153 Cong. Rec. S10692 (daily ed. Aug. 2, 2007) (statement of then Sen. Obama).

helicopters). The primary impact of these changes is that travel aboard a helicopter now would be reimbursed at the rate required in 11 CFR 100.93(c) (aircraft), rather than (d) (other conveyances), which was the case under the 2003 travel rules, as discussed below.

1. 11 CFR 100.93(a)(1) and (2) – Scope of 11 CFR 100.93

The rule at 11 CFR 100.93 is intended to establish reimbursement rates for "non-commercial travel" in the absence of a usual and normal charge. 11 CFR 100.93(a)(1). When a usual and normal charge is readily ascertainable , such as a specified fee by route, mileage, or date and time of use, the travel is generally considered "commercial travel" and the usual and normal charge must be paid to avoid receiving an in-kind contribution. See 11 CFR 100.93(a)(2) and 11 CFR 100.52(d)(1).

The Commission's 2003 travel rules distinguished between commercial and non-commercial air travel based on the certification system of the Federal Aviation Administration (FAA). Specifically, the Commission's 2003 travel rules applied to all airplanes not licensed by the FAA to operate for compensation or hire under 14 CFR parts 121, 129, or 135. See former 11 CFR 100.93(a)(1)(i).

HLOGA accomplishes the same result without explicit reference to specific FAA regulatory provisions. In order to simplify and align the Commission's regulations with HLOGA, the Commission is replacing its reliance on specific FAA regulatory provisions with the new terms "commercial travel" and "non-commercial travel," which are defined in new 11 CFR 100.93(a)(3)(iv) and (v) and explained below. None of the commenters opposed this change.

2. 11 CFR 100.93(a)(3)(i) – Definition of "campaign traveler"

The Commission also is making a change to the definition of "campaign traveler" in 11 CFR 100.93(a)(3) to clarify that the term encompasses not only persons traveling on behalf of a candidate, but also candidates who travel on behalf of themselves. In the NPRM, the Commission proposed amending the definition of "campaign traveler" to include "[a]ny candidate for Federal office," as well as "any individual traveling in connection with an election for Federal office on behalf of a candidate or political committee" and "[a]ny member of the news media traveling with a candidate." See proposed 11 CFR 100.93(a)(3)(i). The Commission received one comment in support of the proposed change, and no comments in opposition.

The Commission is adopting the proposed change along with one further revision to clarify that a candidate is a "campaign traveler" only when "traveling in connection with an election for Federal office." The term "campaign traveler" in revised 11 CFR 100.93 does not include Members of Congress when they engage in official travel, or candidates when they engage in personal travel or any other travel that is not in connection with an election for Federal office. Security personnel, including government-provided security personnel (such as the Secret Service), shall be treated as campaign travelers when traveling in connection with a Federal election. However, government-provided security personnel are not included when determining a "comparable aircraft of sufficient size to accommodate all campaign travelers" under 11 CFR 100.93(e)(1)(i), as discussed below.

3. 11 CFR 100.93(a)(3)(iv) and (v) – Definitions of "commercial travel" and "non-commercial travel"

The definition of "commercial travel" in new 11 CFR 100.93(a)(3)(iv)(A) corresponds to the new statutory language of HLOGA: travel aboard an aircraft "operated by an air carrier or commercial operator certificated by the Federal Aviation Administration ("FAA") and the flight is required to be conducted under air carrier safety rules, or, in the case of travel which is abroad, by an air carrier or commercial operator certificated by an appropriate foreign civil aviation authority and the flight is required to be conducted under air carrier safety rules."[6] 2 U.S.C. 439a(c)(1) and (2). The definition of "non-commercial travel" in 11 CFR 100.93(a)(3)(v) encompasses all air travel not included in the definition of "commercial travel." These definitions are unchanged from the NPRM.

One comment addressed these definitions, supporting both. The Commission did not receive any comments identifying a difference between the universe of aircraft encompassed by the new term "non-commercial travel" and the aircraft included in former 11 CFR 100.93(c) ("an airplane not licensed by the Federal Aviation Administration to operate for compensation or hire under 14 CFR parts 121, 129, or 135").

The Commission is defining "commercial travel" with respect to conveyances other than aircraft as "other means of transportation operated for commercial passenger

[6] Both "air carrier" and "commercial operator" are terms of art defined in FAA regulations. See 14 CFR 1.1. An "air carrier" is "a person who undertakes directly by lease or other arrangement to engage in air transportation." A "commercial operator" is "a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property other than as an air carrier or foreign air carrier or under part 375." The FAA's air carrier safety rules are contained in 14 CFR parts 121 (large airplanes) and 135 (smaller airplanes and other aircraft).

service." 11 CFR 100.93(a)(3)(iv)(B). This definition is unchanged from the proposed rule. The Commission did not receive any comments on this proposed definition.

The Commission also did not receive any comments on whether the definitions of "commercial travel" and "non-commercial travel" should specifically address the treatment of aircraft operated under complex multiple ownership or leasing arrangements, such as arrangements in which some of the owners of an aircraft are commercial operators certificated by the FAA but others are not. The Commission has decided not to address this issue in the final rule's definitions because the Commission expects that the structure of the final rule will eliminate any potential for confusion arising from complex ownership arrangements. The final rule focuses on the operator of the aircraft at the time of a given flight and whether that particular flight is subject to the applicable FAA safety standards, rather than the owners, service providers, or prior uses of the aircraft as in former 11 CFR 100.93. Multiple ownership arrangements for aircraft owned or leased by a candidate or a candidate's immediate family member through a multiple-ownership arrangement are addressed in 11 CFR 100.93(g), discussed below.

4. 11 CFR 100.93(a)(3)(vi) – Definition of "comparable aircraft"

HLOGA Section 601 requires reimbursement of fair market value for a flight based on the charter rate for a "comparable plane of comparable size" to the one actually flown. 2 U.S.C. 439a(c)(1)(B). The Commission interprets the term "comparable plane of comparable size" to mean an aircraft with similar physical dimensions to the aircraft actually flown and that is able to carry a similar number of passengers. The Commission recognizes, however, that there is no "comparable plane" for a helicopter and is, instead, construing the statute to require a comparison of similar types of aircraft (i.e., compare a

helicopter to a helicopter). Accordingly, the Commission has defined the term "comparable aircraft" in new 11 CFR 100.93(a)(3)(vi) as "an aircraft of similar make and model as the aircraft that actually makes the trip, with similar amenities as that aircraft." See new 11 CFR 100.93(a)(3)(vi).

This interpretation is consistent with the Commission's interpretation of a similar term, "comparable commercial airplane," in its 2003 travel rules, as explained in the 2003 E&J. See 2003 E&J at 69588-589. The definition is also consistent with advisory opinions issued prior to the 2003 travel rules. For example, in Advisory Opinion 1984-48 (Hunt), when applying the then-operative term of a "comparable commercial conveyance" to an airplane, the Commission interpreted a "comparable" airplane as being of the same "type (e.g., jet aircraft versus prop plane) and services offered (e.g., plane with dining service or lavatory versus one without)" as the plane actually used. Therefore, if a candidate used a twin engine prop jet, a single engine prop aircraft would not be a comparable aircraft. The new term "comparable aircraft" is intended to require consideration of these distinctions as well as other differences, such as whether a plane is chartered with or without a crew, or with or without fuel.

B. 11 CFR 100.93(b) – Reimbursement of Service Provider Required to Avoid the Receipt of a Contribution

Paragraphs (b)(1) and (b)(2) of section 100.93 require a campaign traveler, or the political committee on whose behalf the travel occurred, to reimburse the provider of the aircraft or other conveyance at the applicable rate specified in 11 CFR 100.93(c), (d), (e), or (g) to avoid receipt of an excessive or prohibited in-kind contribution.

The Commission is revising 11 CFR 100.93(b)(1) to add leadership PACs to the list of political committees that must reimburse a service provider for non-commercial travel on their behalf to avoid the receipt of an excessive or prohibited in-kind contribution. This change reflects HLOGA's inclusion of leadership PACs, which are now treated the same as a candidate's authorized committee for these purposes.

The Commission is also renumbering former paragraph (b)(1)(iii) as paragraph (b)(3) and revising it to permit members of the news media and government-provided security personnel traveling with a candidate to reimburse the political committee or to pay the service provider directly for their pro rata share of the travel. Ultimately it is the candidate committee's exclusive responsibility to ensure that the service provider is reimbursed for the value of the transportation provided to all persons traveling with the candidate, however allowing members of the news media to reimburse the political committee or to pay the service provider directly is consistent with former 11 CFR 100.93 and takes into account the variety of billing practices that have been used by members of the media to pay for their travel. See 2003 E&J at 69586. See also 11 CFR 9004.6 and 9034.6.[7]

Like members of the news media, a Federal or State government provider of security personnel traveling with a candidate, such as the Secret Service and national security staff, also may reimburse the political committee paying for the security personnel's portion of the travel expenses. See, e.g., Advisory Opinion 1992-38 (Clinton/Gore) (loan proposal premised on the obligation of the Secret Service to provide reimbursement); see also 11 CFR 9004.6 and 9034.6. Under the revised rule, the

[7] To the extent that any portion of 11 CFR 9004.6 or 9034.6 is inconsistent with 11 CFR 100.93, section 100.93 governs.

government security provider therefore may pay the service provider directly or reimburse the political committee paying for the travel. In either case, members of the news media or the government provider of security must not pay more than their pro rata share of the travel costs, as determined in accordance with 11 CFR 100.93(c), (d), (e), or (g).

There is no indication that Congress was concerned about news media or government-provided security personnel paying for their own travel when traveling with Federal candidates or officeholders. Unlike when a corporation or political committee provides free or reduced travel services to a candidate, the reimbursement by news media or government-provided security personnel for their own travel does not implicate the goals of the Act in deterring corruption or the appearance of corruption. Moreover, a candidate may have little or no control over whether to be accompanied by government-provided security personnel. Finally, although several commenters urged the Commission to prohibit political committees from paying any portion of the cost of a Federal candidate's flight, none of the commenters indicated that payments by the news media or government entities would pose the same dangers of corruption or the appearance of corruption or that the news media and government security providers should be prohibited from paying for their own travel, particularly when paying the same rate as others on the aircraft. Although the rule proposed in the NPRM would have prohibited any form of payment by the news media, the Commission sees no compelling reason to deviate from its longstanding policy of permitting the news media and government-provided security personnel to pay for their pro rata share of the fair market value of the travel.

C. 11 CFR 100.93(c)(1) – Non-Commercial Air Travel by or on Behalf of Candidates for President, Vice-President, and U.S. Senate

HLOGA requires candidates for President, Vice President, and the U.S. Senate to pay their "pro rata share of the fair market value" of non-commercial flights aboard aircraft. The pro rata share is "determined by dividing the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size by the number of candidates on the flight." 2 U.S.C. 439a(c)(1)(B). (emphasis added). Accordingly, new 11 CFR 100.93(c)(1) requires that the entire charter rate for a comparable aircraft of comparable size be divided among the candidates aboard the flight, or their representatives, as proposed in the NPRM.

All of the commenters who addressed this topic supported the requirement that presidential, vice-presidential, and Senate candidates pay the entire charter cost, rather than allowing other political committees or non-campaign travelers to pay for their own portion of the flight.

The final rule differs from the proposed rule only in that under the final rule the cost of the flight is split among candidates based on the number of campaign travelers flying on behalf of each candidate, rather than split evenly among the candidates as proposed in the NPRM. 72 FR at 59956. The new rule therefore provides a more accurate reflection of the proportion of the benefit derived from the flight by each candidate, while still requiring presidential, vice-presidential, and Senate candidates to pay the entire charter cost. For example, if Senate Candidate A is traveling with two campaign staffers, and Senate Candidate B is also traveling on the aircraft, and each candidate is traveling on behalf of his

or her own campaign, then Candidate A would pay three-fourths of the charter fare and Candidate B would pay one-fourth.

This result is also consistent with the comment submitted by two of the sponsors of HLOGA, Senators Feingold and Obama, who suggested that the cost of the flight be split among candidates in proportion to the benefit derived by each campaign. The Senators stated that this approach would be consistent with the payment for air travel required under the Senate Ethics Rules. See Standing Rules of the Senate, Rule XXXV, Paragraph 1(c)(1)(C)(i).

Under new 11 CFR 100.93(c)(1), the "pro rata share" is calculated based on the number of candidates represented on a flight, regardless of whether the individual candidate is present on the flight. This provision is consistent with HLOGA, which limits expenditures for non-commercial air travel not only by presidential, vice-presidential, and Senate candidates, but also by authorized committees and leadership PACs. A candidate is represented on a flight if a person is traveling on behalf of that candidate, the candidate's authorized committee, or the candidate's leadership PAC.[8] See 11 CFR 100.93(c)(1). Thus, for example, if Senate Candidate A travels with the campaign manager of Senate Candidate B, but Candidate B does not travel, then the two Senate candidates must nonetheless each pay half of the charter rate. Candidate B's committee receives the same benefit from the travel by its staff as if Candidate B had taken the flight. This result is the same as proposed in the NPRM, which was supported by all of the commenters addressing this aspect of the proposed rule.

Under new 11 CFR 100.93(c)(1), when a presidential, vice-presidential, or Senate candidate, or a representative of the candidate, is traveling on behalf of another political

[8] See discussion of leadership PACs in subsection C.3 below.

committee (such as a political party committee), rather than on behalf of the candidate's own authorized committee or leadership PAC, the reimbursement for that travel is the responsibility of the political committee on whose behalf the travel occurs. The appropriate reimbursement rate for that political committee is set forth in new 11 CFR 100.93(c)(3), discussed below. In such cases, the presidential, vice-presidential, or Senate candidate, or candidate's representative, is treated the same as any other person traveling on behalf of the political committee.[9]

The reimbursement rates for travel aboard government-operated aircraft or aircraft owned by a candidate or a member of a candidate's immediate family, are treated separately in paragraphs (e) and (g) of 11 CFR 100.93, as discussed below. See subsections H and I.

2. Alternatives not adopted

In the NPRM, the Commission sought comment on three alternative methodologies for calculating the appropriate reimbursement rate for travel by presidential, vice-presidential, or Senate candidates and their representatives.

First, the NPRM included several variations of a "per committee" alternative that would have required reimbursement based on the number of represented committees of any type, rather than the number of represented candidates or candidate committees. Second, a "per passenger" alternative would have required candidates to reimburse the service provider for only that portion of the normal and usual charter rate which reflected

[9] One commenter asked the Commission to address a hypothetical scenario in which the chairman of a political party committee and a Senate candidate both travel aboard a non-commercial aircraft to a political party committee fundraiser. In response to this request, the Commission notes that because the candidate would be traveling on behalf of the political party committee, that individual's status as a candidate would be irrelevant. Therefore, the political party committee would pay for the candidate's portion of the travel. See 11 CFR 100.93(c)(3).

the number of candidate representatives as a percentage of all passengers on the aircraft. Third, a "comparable aircraft" alternative would have followed the approach in the Commission's 2003 travel rules by permitting reimbursement at the normal and usual charter rate or rental charge for an aircraft of sufficient size to carry all of the campaign travelers on the flight. See former 11 CFR 100.93(c)(3) (requiring reimbursement of "the normal and usual charter fare or rental charge for a comparable commercial airplane of sufficient size to accommodate all campaign travelers").

The Commission has decided not to adopt any of the alternative methodologies proposed in the NPRM. The Commission believes that the methodology in the final rule described above is most consistent with the letter and spirit of HLOGA. Moreover, the Commission believes that the proposed alternative methodologies might have lent themselves to manipulation, with the result that corporations, political committees, and others could provide a benefit to the candidate or political committee on whose behalf the travel was undertaken by allowing the candidate or political committee to pay less than its pro rata share of the charter rate. Most of the commenters agreed that the proposed alternative methodologies were inconsistent with the intent of HLOGA.

One commenter proposed an alternative based on the "comparable aircraft" alternative proposed in the NPRM. This alternative would have followed the approach in the Commission's 2003 travel rules by permitting reimbursement at the normal and usual charter rate or rental charge for an aircraft of sufficient size to carry all of the campaign travelers on the flight. See former 11 CFR 100.93(c)(3). The Commission is not adopting this commenter's version of the "comparable aircraft" alternative because it would allow for the potential reduction of costs by using smaller aircraft for comparison

purposes rather than the aircraft actually flown. Moreover, the additional separate calculation of the fair market value of the flight actually taken would add unnecessary complexity to compliance with, and enforcement of, the rules.

3. Travel on behalf of leadership PACs of Senate, presidential, and vice-presidential candidates

HLOGA prohibits non-commercial air travel on behalf of leadership PACs of House candidates, but it does not prohibit travel on behalf of leadership PACs of Senate, presidential, or vice-presidential candidates. HLOGA, however, does not specify the rate at which the Senate, presidential, or vice-presidential candidates' leadership PACs must reimburse a service provider to avoid a contribution. The Commission is applying the new reimbursement rates in 11 CFR 100.93(c)(1) to travel on behalf of the leadership PAC of any Senate, presidential, or vice-presidential candidate to make the new rules consistent with the HLOGA provision for House candidates. See 2 U.S.C. 439a(c)(2). Just as HLOGA treats travel on behalf of a House leadership PAC the same as travel on behalf of the authorized committee of a House candidate, the new rules treat travel on behalf of a Senate leadership PAC the same as travel on behalf of a Senator's authorized committee. All of the commenters addressing this issue supported this approach.

D. 11 CFR 100.93(c)(2) – Non-Commercial Air Travel by or on Behalf of Candidates for the House of Representatives

New 2 U.S.C. 439a(c)(2) states that "in the case of a candidate for election for the office of Representative in, or Delegate or Resident Commissioner to, the Congress [hereinafter "House candidates"], an authorized committee and a leadership PAC of the candidate may not make any expenditure" for non-commercial air travel, with exceptions

for travel on government-operated airplanes and aircraft owned by the candidate or members of the candidate's immediate family. Both exceptions are discussed below. The effect of this provision is generally to prohibit travel by House candidates on non-commercial aircraft.

In the NPRM, the Commission proposed a general rule that would prohibit non-commercial air travel by House candidates and sought comment on whether House candidates should nonetheless be permitted to travel on non-commercial aircraft on behalf of their own campaigns, if the cost of the travel is provided by a permissible source, by treating the travel as a permissible in-kind contribution. One group of commenters addressed this question and urged the Commission to prohibit non-commercial air travel by House candidates as proposed in the NPRM and not allow such travel if it was provided by a permissible source as a permissible in-kind contribution.

The Commission agrees with the commenters, and is adopting the rule as proposed in the NPRM. See 11 CFR 100.93(c)(2). Outside of the exceptions for travel on government-operated and candidate-owned aircraft, there is no discussion in the legislative history of this provision to indicate that Congress contemplated allowing non-commercial air travel by House candidates. Instead, statements by sponsors of the new law referred to a "ban" on House travel. See, e.g., 153 Cong. Rec. S10713 (daily ed. Aug. 2, 2007) (statement of HLOGA sponsors offered by Sen. Feinstein). In addition, the statute itself does not include any reimbursement rate for non-commercial travel by House candidates whereas Congress did specify a rate for Senate and presidential candidates.

New 11 CFR 100.93(c)(2) prohibits House candidates, and individuals traveling on behalf of House candidates, their authorized committees or leadership PACs, from engaging in non-commercial campaign travel on aircraft. This prohibition cannot be avoided by payments to the service provider, even by payments from the personal funds of a House candidate. [10]

The prohibition does not apply, however, when the travel would be considered an expenditure by someone other than the House candidate, House candidate's authorized committee, or House candidate's leadership PAC. For example, travel by a House candidate on behalf of a Senate or presidential candidate, or a political party committee, would be permissible so long as the political party committee or candidate on whose behalf the travel occurs reimburses the service provider at the applicable rate under 11 CFR 100.93(c)(1) or (3).

E. 11 CFR 100.93(c)(3) – Non-Commercial Air Travel by Campaign Travelers Other than Federal Candidates and Their Representatives

In the NPRM, the Commission proposed two alternatives with respect to non-commercial air travel by individuals traveling on behalf of political party committees and other political committees that are not candidates' authorized committees or leadership PACs. The first alternative would have applied the charter rate applicable to travel on behalf of Senate or presidential candidates unless one or more candidates or candidate representatives are also aboard the flight (in which case the candidates would already be paying the entire applicable charter rate to the service provider). The second alternative

[10] Although the general rule in 11 CFR 100.93(b)(2) states that no contribution results where a campaign traveler pays the service provider the required rate in accordance with 11 CFR 100.93(c), there is no rate applicable to House candidates in 11 CFR 100.93(c). Thus, 11 CFR 100.93(b)(2) does not permit House candidates to travel on non-commercial aircraft by paying the service provider.

would have retained the rates in the 2003 travel rules, which permitted reimbursement at the first-class or coach rate by campaign travelers other than candidates. For the reasons explained below, the Commission is adopting the first alternative and requiring campaign travelers who are not candidates to pay the same charter rate as Senate and presidential candidates. See 11 CFR 100.93(c)(3).

1. Campaign travelers who are not candidates and are not traveling with or on behalf of candidates

In 2003, the Commission extended its previous travel regulations to cover all travel in connection with a Federal election, stating, "[b]y establishing a single rate for travel reimbursement, the new rules will promote greater uniformity among all individuals traveling in connection with a Federal election on behalf of a political committee." 2003 E&J at 69,585. The Commission promulgated rules that applied to candidates and those traveling on behalf of candidates or their authorized committees, and extended those rules to other campaign travelers.

HLOGA does not explicitly address the reimbursement rate for campaign travelers other than candidates. Several commenters argued that HLOGA's silence amounts to implicit approval of the Commission's 2003 travel rule, which permitted all campaign travelers, candidate and non-candidate alike, to pay the first class or coach rate instead of the charter rate. One of the comments, for example, noted that lower rates would result in "the convenience and comfort of a private jet made available at the candidates' disposal at the wildly discounted rate of first-class airfare," but then argued that the lower first-class or coach rates should nevertheless be permitted for other campaign travelers.

The Commission disagrees with this argument. By enacting HLOGA, Congress explicitly rejected the first-class and coach rates as inadequate to capture the full value of the benefit provided.[11] Given that Congress has now determined the "normal and usual charge" for non-commercial travel on aircraft by and on behalf of candidates, candidate committees, and leadership PACs, the Commission sees no basis for departing from it for other campaign travelers.

Valuing a flight on a private aircraft in relation to a comparable charter rate is a constant set by Congress; it varies according to the features and size of the aircraft, but not by the identity of the traveler. The Commission sees no reason to establish two separate "usual and normal" charges for the same seat on a flight: one for candidates and those traveling on behalf of candidates, and one for other campaign travelers. To the extent that a first-class or coach rate fails to reflect the "usual and normal charge" for one campaign traveler, it fails equally with respect to other campaign travelers. If the receipt of a service from a corporate service provider at a rate below the usual and normal charge for a service presents the potential for corruption or the appearance thereof with respect to a candidate, then the receipt of the same service at the same discounted rate from the same corporation provides the same potential for corruption or the appearance thereof with respect to political party committees and nonconnected committees.

Therefore, new 11 CFR 100.93(c)(3) requires non-candidate campaign travelers to pay their pro rata share of the normal and usual charter or rental rate for a comparable

[11] See, e.g., 152 Cong. Rec. S2435 (daily ed. March 28, 2006) (statement of Sen. Obama); 152 Cong. Rec. S2500 (daily ed. March 29, 2006) (statement of Sen. McCain); 153 Cong. Rec. S186 (daily ed. Jan. 4, 2007) (statement of Sen. McCain); 153 Cong. Rec. S548-49 (daily ed. Jan. 16, 2007) (statement of Sen. Reid); 153 Cong. Rec. S1185 (daily ed. Jan. 25, 2007) (statement of Sen. Levin); 153 Cong. Rec. S8400 (daily ed. June 26, 2007) (statement of Sen. Reid); 153 Cong. Rec. S10694 (daily ed. Aug. 2, 2007) (statement of Sen. Feingold); 153 Cong. Rec. S10703 (daily ed. Aug. 2, 2007) (statement of Sen. Levin); 153 Cong. Rec. S10715 (daily ed. Aug. 2, 2007) (statement of Sen. Reid).

aircraft of comparable size. As with travel by or on behalf of a candidate, the pro rata share of travel by a non-candidate campaign traveler is determined by dividing the normal and usual cost of the charter by the number of campaign travelers on board the aircraft. Each political committee represented on the aircraft is then responsible for paying its proportional share for those traveling on its behalf. For example, if three representatives of PAC P accompany a representative of Party Committee C, the cost of the charter would be divided by the number of campaign travelers (four). PAC P would pay three-fourths of the charter cost while Party Committee C would pay one-fourth of the charter cost.

2. Candidates traveling with non-candidate campaign travelers

When a Federal candidate (other than a House candidate), or person traveling on behalf of a candidate or candidate's committee or leadership PAC, shares a non-commercial flight with one or more campaign travelers who are not traveling on behalf of a candidate, candidate's committee, or a leadership PAC, the candidate must pay the cost of the entire charter fare for a comparable aircraft of comparable size pursuant to 11 CFR 100.93(c)(1). Except as permitted under 11 CFR 100.93(b)(3), campaign travelers who are not traveling on behalf of a candidate, candidate's authorized committee, or leadership PAC, and other passengers cannot relieve the candidate's payment obligation.

For example, Senate Candidate A, Senate Candidate B, and Candidate B's campaign manager travel on a plane on behalf of their respective campaigns, along with PAC Representative P traveling on behalf of the PAC. The pro rata share of the fair market value of the flight is determined by dividing the normal and usual charter rate for the plane by three because there are three individuals who are candidates or traveling on

behalf of candidates (Candidate A, Candidate B, and Candidate B's campaign manager). New 11 CFR 100.93(c)(1) bases the rate calculation on the proportional share of travelers attributable to each Senate candidate, so Candidate A pays one-third of the charter rate and Candidate B pays two-thirds.[12]

The PAC need not reimburse the service provider for PAC representative P's travel because the service provider will be compensated at the full charter rate for the flight by the two candidates . Moreover, no in-kind contribution from the service provider to the PAC will result because the payments by Candidate A and Candidate B will fully compensate the service provider for the value of PAC representative P's travel. The authorized committee or leadership PAC of each candidate must report its payment to the service provider as an expenditure and need not report any portion of its payments to the service provider as an in-kind contribution to the PAC.[13]

F. Additional Revisions to 11 CFR 100.93(c)

1. Presidential and vice-presidential candidates

The Commission continues to treat travel by publicly financed presidential and vice-presidential candidates the same as travel by presidential and vice-presidential candidates who do not receive public funds. Therefore, 11 CFR 100.93(c)(1) applies to presidential and vice-presidential candidates who do not receive public funds, while

[12] One commenter posed a hypothetical situation in which the chairman of a political party committee, who is also a Senate candidate, takes non-commercial air travel to serve as the keynote speaker at a fundraiser to benefit a joint fundraising committee between the political party committee and his own campaign for the U.S. Senate. Because the joint fundraising committee is treated as an authorized committee of the Senate candidate, see 11 CFR 102.17(a)(1)(i), the Senate candidate's principal campaign committee (another authorized committee) must pay for the travel.

[13] One commenter posed a hypothetical scenario in which the chairman of a political party committee and a Senate candidate both travel aboard a non-commercial aircraft. Assuming that the Senate candidate is traveling on behalf of his own campaign, his authorized committee would be responsible for the full cost of the charter fare. See 11 CFR 100.93(c)(3). The commenter suggested that such travel be recorded as an in-kind transfer from the Senate candidate to the political party committee, but the new rules do not require the candidate or political party committee to record any such in-kind transfer.

11 CFR 9004.7 and 9034.7, discussed below, continue to incorporate the 11 CFR 100.93 rates by reference for candidates who accept public funds. One important distinction, however, is that a presidential candidate accepting public funds for the general election is prohibited from receiving any in-kind contribution from any person, including an in-kind contribution of non-commercial air travel. The Commission did not receive any comments on this aspect of the rules.

2. Commercially reasonable time frame

HLOGA requires candidates for President, Vice-President, and the U.S. Senate to pay their pro rata share of non-commercial travel on aircraft "within a commercially reasonable time frame after the date on which the flight is taken." 2 U.S.C. 439a(c)(1)(B). The Commission implements this requirement by specifying in 11 CFR 100.93(c) that the "commercially reasonable time frame" for payment is within seven days after the first day of the flight. This time frame applies to all payments required under new 11 CFR 100.93(c).

The seven-day time frame was established in the 2003 travel rules, and nothing in the record of this rulemaking suggests that a longer or shorter period is warranted. Nor has the Commission's experience in administering and enforcing the 2003 travel rule indicated any reason to adjust the time frame. The Commission received only one comment addressing this time frame, and that comment supported the seven-day time frame.

G. 11 CFR 100.93(d) – Other means of transportation

For other means of transportation, such as limousines and all other automobiles, trains, and buses, a political committee must pay the service provider an amount equal to

the normal and usual fare or rental charge for a comparable commercial conveyance of comparable size. 11 CFR 100.93(d). This rule is identical to the 2003 travel rule except for two changes. The first change is that revised 11 CFR 100.93(d) bases the rate on a vehicle of "comparable size," rather than a vehicle of "sufficient size to accommodate all campaign travelers." This change is consistent with HLOGA. See 2 U.S.C. 439a(c)(1)(B). The term "comparable size" in 11 CFR 100.93(d) has the same meaning with respect to other vehicles as in new 11 CFR 100.93(c) for aircraft: a vehicle with similar physical dimensions that is able to carry a similar number of passengers.

The second change is that new 11 CFR 100.93(d) defines "comparable vehicle" as "a conveyance of similar make and model as the conveyance that actually makes the trip, with similar amenities as that conveyance." This definition is consistent with "comparable aircraft" in new 11 CFR 100.93(a)(3)(vi) and the 2003 E&J.

The Commission did not receive any comments on proposed 11 CFR 100.93(d).

H. 11 CFR 100.93(e) – Government conveyances

The Commission's 2003 travel rules at 11 CFR 100.93(e) required reimbursement for travel aboard airplanes provided by the Federal government, or by any State or local government entity, at the same rate as travel aboard other airplanes. Non-commercial campaign travel aboard government conveyances other than aircraft was reimbursed under former 11 CFR 100.93(e)(2) at the same rate as travel aboard the equivalent means of transportation not provided by a government entity.

HLOGA generally prohibits House candidates from using campaign funds for non-commercial travel, except for travel aboard an aircraft "operated by an entity of the

Federal government or the government of any State."[14] 2 U.S.C. 439a(c)(2)(B). HLOGA does not specify any particular rate of reimbursement for travel aboard government-operated aircraft.

The NPRM proposed a set of two different rates in 11 CFR 100.93(e)(1) that candidates could choose from for reimbursement for government-operated aircraft. The first rate, proposed in 11 CFR 100.93(e)(1)(i), requires reimbursement of the appropriate government entity at the pro rata share per represented candidate of the normal and usual charter fare or rental charge for the flight on a comparable aircraft of sufficient size to accommodate all of the campaign travelers (the "per candidate campaign traveler" reimbursement rate). The second rate, proposed in 11 CFR 100.93(e)(1)(ii), requires reimbursement at the private traveler reimbursement rate per campaign traveler, as specified by the government entity operating the aircraft (the "private traveler" reimbursement rate). The NPRM did not propose any substantive changes to 11 CFR 100.93(e)(2), which governs travel on government conveyances other than aircraft.

The Commission did not receive any comments on proposed 11 CFR 100.93(e).

New 11 CFR 100.93(e) is largely the same as proposed in the NPRM. Accordingly, a candidate must reimburse a government entity for travel on any government-operated aircraft at either of the two rates set out in new 11 CFR 100.93(e)(1)(i) and (ii).

[14] HLOGA similarly amends the Standing Rules of the Senate regarding travel to require Senators to pay the pro rata share of the fair market value of a flight for non-commercial travel, except for travel aboard "an aircraft owned or leased by a governmental entity." See Public Law 110-81, Sec. 544(c)(1), amending Paragraph 1(c)(1) of rule XXXV of the Standing Rules of the Senate. In order to avoid a regulatory gap with respect to travel on aircraft operated by local governments, new 11 CFR 100.93(e) applies to campaign travel on aircraft operated by local government entities in addition to Federal and State government, as proposed in the NPRM. The Commission did not receive any comments on this provision.

1. 11 CFR 100.93(e)(1)(i) – "Per candidate campaign traveler" reimbursement rate

Under the revised rules, the applicable charter rate is for a comparable aircraft of sufficient size to accommodate all of the campaign travelers. Unlike 11 CFR 100.93(c)(1), which requires the charter rate to be based on a comparable aircraft of comparable size, the comparable aircraft used for the basis of the charter rate in 11 CFR 100.93(e)(1)(i) need not be the same size as the government-operated aircraft actually used. Similarly, the comparable government aircraft need not be capable of accommodating the non-campaign passengers and equipment aboard the government-operated aircraft.

Members of the media traveling with a candidate, and security personnel not provided by a government entity, must be included in the number of campaign travelers for the purposes of identifying a comparable aircraft of sufficient size to accommodate all of the campaign travelers. A comparable aircraft, however, need not be able to accommodate government-required personnel (e.g., Secret Service or National Security Agency officers provided to protect the candidate) or government-required equipment (e.g., bulky security or communications devices provided for the national security or communications needs of the candidate).[15] For example, a significant portion of Air Force One may be occupied by personnel and equipment mandated by national security requirements and other needs associated with the office of the President, not the campaign. Government-required security personnel are not included in the number of

[15] The term "government-required personnel" encompasses individuals assigned to accompany a campaign traveler for reasons of national security or other official purposes as required by law or government policy. It does not encompass a Federal officeholder's staff or other individuals who are "required" by the officeholder solely by virtue of their staff positions.

campaign travelers for the purposes of identifying a comparable aircraft. The purpose for this exclusion is to avoid penalizing candidates who are required to travel with government security personnel by obliging them to pay the charter rate for a larger aircraft than would otherwise be needed to transport such candidates and their campaign travelers. All security personnel, including government-provided security personnel, are included, however, in determining the number of campaign travelers for purposes of calculating each candidate's pro rata share. This is consistent with the parallel provision concerning travel on private aircraft (11 CFR 100.93(c)(1)), and with the provision concerning travel on government-operated aircraft that is reimbursed at the "private traveler" reimbursement rate (11 CFR 100.93(e)(1)(ii); see discussion below). A candidate's authorized committee must thus reimburse the service provider for the same number of campaign travelers regardless of whether the travel occurs on a private or government-operated aircraft, and regardless of whether the candidate is reimbursing at the "per candidate campaign traveler" reimbursement rate or at the "private traveler" reimbursement rate. The general rule regarding reimbursement to a candidate committee by members of the news media and government-provided security personnel (11 CFR 100.93(b)(3)) applies to both private and government-operated aircraft.

For example, if eleven passengers (Presidential Candidate A, two campaign staffers traveling on behalf of Presidential Candidate A, Senate Candidate B, PAC representative P, four members of the news media traveling with Presidential Candidate A, and two members of the Secret Service required to travel with Candidate A), travel on a twelve-seat government aircraft, reimbursement would be required at the normal and usual charter rate for a comparable aircraft of sufficient size to accommodate nine

passengers. The two Secret Service agents need not be counted when determining the size of a comparable aircraft because they would be "government-required personnel." Given that no portion of the normal and usual charter fare or rental charge may be attributed to any non-candidate campaign traveler or any other passenger, the charter fare would be divided by ten (the number of candidates, their campaign staffers, members of the media, and security personnel traveling with the candidates). PAC representative P would not be required to reimburse the government entity for his or her travel and is not permitted to assume any of the payment otherwise required from the candidates.

Thus, Presidential Candidate A would pay nine-tenths of the full charter rate for the comparable nine-seat aircraft, and Senate Candidate B would pay one-tenth of the charter cost. The four media representatives or their employers may reimburse Presidential Candidate A for up to four-tenths of the cost of the nine-seat charter aircraft, or pay the government that amount directly, pursuant to 11 CFR 100.93(b)(3).[16] Likewise, the Secret Service may reimburse Candidate A up to two-tenths of the cost for the two Secret Service representatives, or it may pay that amount directly to the government entity providing the aircraft.

2. 11 CFR 100.93(e)(1)(ii) –"Private traveler" reimbursement rate

The second rate of reimbursement, the "private traveler" reimbursement rate, requires payment of the rate specified by the Federal, State, or local government agency or other government entity operating the aircraft. If the government entity has established a schedule of rates based on the type of traveler, and the schedule includes a

[16] The Commission is aware that the White House Travel Office has agreements with the White House Correspondents Association regarding travel arrangements for members of the media, and these rules are not intended to alter those agreements.

rate for private travel on its aircraft by members of the public, then the campaign traveler choosing this option must reimburse the government at that rate.[17]

For example, if the same eleven travelers (Presidential Candidate A, two campaign staffers traveling on behalf of Presidential Candidate A, Senate Candidate B, PAC representative P, four members of the media traveling with Presidential Candidate A, and two Secret Service agent required to travel with Presidential Candidate A) travel aboard an aircraft operated by a State government, either candidate could choose to pay the "private traveler" reimbursement rate if such a rate is specified by that State government instead of the charter rate for a comparable aircraft of sufficient size to accommodate the campaign travelers. If the State government normally charges $100 per person per hour for use of the aircraft by State or federal agencies and $200 per person per hour for private travel by authorized state employees and members of the public, then each candidate choosing this rate would pay for the campaign travelers traveling on behalf of that candidate at the $200 per person per hour rate. The two Secret Service agents fall within the definition of "campaign travelers," and as such Presidential Candidate A is responsible for the cost of their travel under 11 CFR 100.93(e)(1)(ii).[18] Presidential Candidate A's payment for nine campaign travelers is a total of $1,800 per hour, although the four media representatives could reimburse Presidential Candidate A up to a total of $800 per hour to cover the cost of their travel and the two Secret Service agents could reimburse Presidential Candidate A up to a total of $400 per hour for their

[17] The Department of Defense, for example, publishes a list of hourly reimbursement rates for both fixed-wing aircraft and helicopters and includes an "All Other User" rate, which is the private traveler rate for those aircraft. See Fiscal Year 2010 Reimbursement Rates, available at <http://www.defenselink.mil/comptroller/rates/fy2010/2010_f.pdf> and <http://www.defenselink.mil/comptroller/rates/fy2010/2010_h.pdf>.

[18] Because Candidate A is responsible for the cost of the Secret Service travelers, the Secret Service may reimburse Candidate A for the cost of their travel under 11 CFR 100.93(b).

travel. Candidate B's cost is $200 per hour to cover the candidate's own travel. PAC representative P must pay for his or her own travel at $200 per hour.[19]

If, however, the government entity's private traveler reimbursement rate is based on an hourly rate for the entire aircraft, then the candidate choosing this rate would calculate the amount that he or she must reimburse by determining what his or her share of the entire hourly rate split between the two candidates and the PAC is, in proportion to the number of campaign travelers traveling on behalf of each candidate, including the media. There are a total of eleven candidate campaign travelers on the flight (Presidential Candidate A, two campaign staffers traveling on behalf of Presidential Candidate A, Senate Candidate B, four members of the media traveling with Presidential Candidate A, and two Secret Service agent required to travel with Presidential Candidate A, PAC Representative P), so Presidential Candidate A must pay nine-elevenths of the hourly rate, for which the media could reimburse the candidate up to four-elevenths of the charter rate and the Secret Service could reimburse the candidate up to two-elevenths of the charter rate, Candidate B must pay one- eleventh and PAC Representative P must pay one-eleventh.

The Commission did not receive any comments on this aspect of the proposed rule. The rule is unchanged from that proposed in the NPRM. See 11 CFR 100.93(e)(1)(ii).

3. Travel on Air Force One or Two

The Commission sought, but did not receive, comments on whether it should promulgate final rules specifically to address travel on Air Force One and Two.[20] The

[19] Pursuant to 11 CFR 100.93(a)(3)(i)(A) any individual traveling in connection with an election for federal office on behalf of a political committee is a "campaign traveler."

Commission is not promulgating a separate rule for travel on these aircraft because the application of either of the rates in 11 CFR 100.93(e)(1) is sufficient to address travel on Air Force One and Two. Specifically, reimbursement for travel on Air Force One or Two using the "per candidate campaign traveler" rate (11 CFR 100.93(e)(1)(i)) already provides that the charter rate be based on an aircraft of "sufficient size to accommodate campaign travelers," excluding all government-required personnel and equipment. Travel aboard Air Force One or Two therefore would simply be a specific application of the more general rule applicable for travel on all government-operated aircraft.

4. Non-candidate campaign travelers

The Commission sought, but did not receive, comments on the extent to which campaign travelers fly on government-operated aircraft when not traveling with, or on behalf of, a candidate or candidate's committee. For example, a representative of a political party committee might travel in connection with a Federal election on a government-operated aircraft on which a Federal candidate is not also present. In the absence of a record indicating that this travel is frequent enough to justify a separate provision in the rule, or that a special rule is needed, the final rules do not treat this potentially hypothetical situation differently from other travel on government aircraft. Therefore, because in such instances there would be no candidate campaign travelers traveling, if a campaign traveler does travel aboard an aircraft operated by a government entity, the traveler must reimburse the government entity at the "private traveler"

[20] As noted above, Air Force One is a designation assigned to any airplane that is providing transportation to the President of the United States. Air Force Two is the designation assigned to any airplane that is providing transportation to the Vice President of the United States. Marine One is the designation used for any Marine helicopter that is providing transportation to the President. Because "aircraft" includes airplanes and helicopters, this discussion is equally applicable to Marine One.

reimbursement rate specified by the government entity operating the aircraft. See 11 CFR 100.93(e)(1)(ii).

5. Time period for reimbursement of travel on government conveyances

New 11 CFR 100.93(e) provides that payment must be made within the time period specified by the government entity providing the aircraft or other conveyance. This policy defers to a government entity's management of its own aircraft and avoids potential conflicts with that entity's own regulations. The NPRM did not propose a specific time period for reimbursement for travel on government-operated aircraft under either of the alternative rates, and the Commission did not receive any comments on an appropriate period. The government entity's accountability for the use of its aircraft serves as a check on potential abuses in payment delays by campaign travelers.

I. Proposed 11 CFR 100.93(g) – Exception for Aircraft Owned by Federal Candidates and their Immediate Family Members

HLOGA's amendments to 2 U.S.C. 439a contain an exception from the payment and reimbursement requirements for travel aboard aircraft that are "owned or leased" by a candidate or a candidate's immediate family member (hereinafter "candidate owned"), including an aircraft owned or leased by any entity in which the candidate or a member of the candidate's immediate family "has an ownership interest," provided that (1) the entity is not a "public corporation" and (2) the use of the aircraft is not "more than the candidate's or immediate family member's proportionate share of ownership allows." 2 U.S.C. 439a(c)(3)(A). In the NPRM the Commission proposed a rule, new 11 CFR 100.93(g), in which the exception would apply to all of the restrictions on expenditures for air travel in new 2 U.S.C. 439a(c). See discussion of new 11 CFR 113.5. The

Commission requested comments on this proposed exception, new 11 CFR 100.93(g), but received none.

While the exception relieves the restrictions on expenditures, it still requires a candidate to reimburse the service providers (candidates, members of their immediate family, or entities in which either owns an interest) if the candidate seeks to avoid receiving an in-kind contribution from the service provider for the candidate's use of the aircraft. See 11 CFR 100.93. New section 100.93(g) sets out the appropriate reimbursement rates. Even though candidates for Federal office may make unlimited contributions to their own campaigns, those contributions must be reported by their authorized committees.[21] 11 CFR 110.10; Advisory Opinions 1991-09 (Hoagland), 1990-09 (Mueller), 1985-33 (Collins), 1984-60 (Mulloy). Contributions by all other persons, including immediate family members, are subject to the applicable amount limits and source prohibitions. 11 CFR 110.1 et seq.

The NPRM proposed three alternative reimbursement rates as follows:

The first alternative would have required reimbursement for aircraft owned by candidates and their immediate family members at the rates set forth in the Commission's 2003 travel rules: first-class, coach, or charter rates, depending on whether the origin and destination cities are served by regularly scheduled commercial airline service.

The second alternative would have required reimbursement for the "incremental cost" of operating the aircraft, meaning the actual cost of fuel and any incremental costs such as landing fees but excluding depreciation.

[21] There is one exception to this general rule: a $50,000 limit applies to publicly-funded presidential candidates in the primary and the general election. See 11 CFR 9003.2(c), 9033.2(b)(2), and 9035.2(a)(1).

The third alternative would have been based on the "actual cost" of operating the aircraft, such as the hourly, mileage, or other applicable rate charged the candidate, corporation, or immediate family member for the costs of the travel. For example, if a candidate traveled on an aircraft leased by an immediate family member at a cost of $1,000 per hour, the appropriate reimbursement rate to that family member would have been $1,000 per hour.

New 11 CFR 100.93(g) combines several aspects of these alternatives. The Commission is also re-organizing the rule in recognition that an increasing number of aircraft are operated through shared-ownership arrangements, while other aircraft may be owned solely by the candidate or the candidate's immediate family members. In addition, the new rules reflect the statutory limitation in 2 U.S.C. 439a(c)(3)(A) that in situations where the aircraft is owned through a shared-ownership arrangement, the candidate's use of the aircraft must not exceed the proportional ownership interest attributable to the candidate or the candidate's immediate family member.

The new rule provides three alternative rates to address three different scenarios: (1) a shared-ownership arrangement where the candidate uses the aircraft within the limits of the relevant ownership interest; (2) a shared-ownership arrangement where the candidate uses the aircraft in excess of the limits of the relevant ownership interest; or (3) the aircraft is wholly owned by a candidate or a candidate's immediate family members.

Because the exception in 2 U.S.C. 439a(c)(3) for travel on aircraft owned by candidates or members of their immediate family permits otherwise restricted or prohibited expenditures by candidates and their committees, the exception is limited only to travel by candidates or persons traveling on behalf of candidates, their authorized

committees, or their leadership PACs. Similarly, the exception applies only to travel by a candidate on an aircraft owned or leased by that candidate or that candidate's immediate family member. The exception does not extend, however, to travel by other candidates who are traveling on behalf of their own campaigns, or for individuals traveling on behalf of other political committees. These latter campaign travelers must reimburse the candidate or other owner of the aircraft according to the rates set forth in 11 CFR 100.93(c).

For example, if Senate Candidate A is traveling on behalf of his or her own campaign with Candidate B on behalf of his or her own campaign on an aircraft owned by Candidate B, then Candidate A must pay half of the cost of the normal and usual charter rate for a comparable aircraft of comparable size. Candidate B must pay for the candidate's own portion of the flight pursuant to the applicable rate in 11 CFR 100.93(g). Similarly, if Party Committee Official C travels with Candidate B on behalf of the party committee on an aircraft owned by Candidate B, the party committee must pay half of the cost of the normal and usual charter rate for a comparable aircraft of comparable size. The 11 CFR 100.93(c)(3) payment exception for travel with a candidate would not apply to travel on a candidate-owned aircraft because the candidate is not paying a charter rate for the entire aircraft in accordance with 11 CFR 100.93(c)(1).

1. 11 CFR 100.93(g)(1)(i) – Use within the limits of a shared-ownership arrangement

The exception in 11 CFR 100.93(g) applies to an aircraft owned or leased by any entity in which the candidate or a member of the candidate's immediate family "has an ownership interest," so long as that entity is not a corporation with publicly traded shares.

The rates in 11 CFR 100.93(g) therefore apply to a wide variety of shared-ownership arrangements, including time-sharing arrangements and certain lease arrangements, and regardless of whether the ownership is made available to the candidate through a commercial operator certificated by the FAA.

When a candidate or a candidate's immediate family member owns or leases an aircraft through any form of shared-ownership or lease agreement, 11 CFR 100.93(g)(1)(i) requires the candidate's committee to reimburse the candidate, candidate's immediate family member, or the administrator of the aircraft (e.g., NetJets), for the hourly, mileage, or other applicable rate charged to the candidate, immediate family member, or corporation or other entity through which the aircraft is ultimately available to the candidate, for the costs of the travel. This reimbursement rate applies only to the extent that the candidate's use of the aircraft does not exceed the proportional share of the ownership interest in the aircraft held by the candidate or candidate's immediate family member, as defined in 11 CFR 100.93(g)(3).[22] Because a candidate would receive an in-kind contribution to the extent that the candidate is provided with something of value at less than the normal and usual cost, the ownership or lease agreement cannot provide a disproportionate benefit to the candidate. Thus, the amount of use to which the candidate or the candidate's immediate family member is entitled under an ownership or lease agreement must be similar to the amount of use to which other similarly situated owners are entitled. For example, if a candidate is one of four owners who each own 25 percent of an aircraft in a shared-ownership arrangement, the ownership agreement cannot allow the candidate to use the aircraft free of charge or at a

[22] This reimbursement rate does not apply to the candidate's use of the aircraft that exceeds the proportional share of the ownership interest as defined in 11 CFR 100.93(g)(3).

reduced rate forty percent of the time while each other owner has access to the aircraft for only twenty percent of the time.

2. 11 CFR 100.93(g)(1)(ii) – Use in excess of the limits of a shared ownership arrangement

In some shared-ownership agreements, an ownership interest entitles each "owner" to a specified amount of use of one or more aircraft. In this case, if a candidate's flight exceeds his or her proportional ownership interest in the aircraft, or that of the candidate's immediate family member, that flight falls outside of 11 CFR 100.93(g). See new 11 CFR 100.93(g)(1)(ii). Only a flight that exceeds the use permitted under the ownership agreement, however, would be excluded from the exception in 11 CFR 100.93(g). For example, if a candidate's spouse owns an interest in an aircraft through a time-share arrangement that entitles the spouse to ten hours of flight time per month, and the candidate uses the aircraft for three separate five-hour flights in a single month, the rate provided in 11 CFR 100.93(g)(1)(i) applies to the first 10 hours but does not apply to the last five hour flight. For the purposes of this example, the spouse's ten hours of flight time per month must not have been otherwise used by the spouse or another person. If the spouse or another person does make use of the aircraft for any part of the ten allotted hours, the candidate's use of the aircraft would be combined with the other uses for purposes of calculating the ten hour limit. For the last five hour flight, a Senate, presidential, or vice-presidential candidate must provide reimbursement at the rate established by 11 CFR 100.93(c)(1), in accordance with 11 CFR 100.93(g)(1)(ii). Excessive use by a House candidate, on the other hand, would be subject to the general prohibition on non-commercial air travel by House candidates. See 11 CFR 100.93(c)(2).

3. 11 CFR 100.93(g)(1)(iii) – Wholly owned aircraft

When the entire aircraft is owned by a candidate as an individual, or by the candidate's immediate family members as individuals, the candidate's authorized committee need reimburse (or report as an in-kind contribution, to the extent permissible) only the pro rata share per campaign traveler of the costs associated with the trip.[23] 11 CFR 100.93(g)(1)(iii). These associated costs include, but are not limited to, the cost of fuel and crew, and a proportionate share of annual and recurring maintenance costs. Id. For example, because aircraft must periodically undergo regularly scheduled maintenance in order to comply with applicable safety laws, the candidate's committee must pay its proportionate share of these regular costs. The candidate's committee need not pay, however, for general depreciation in the value of the aircraft. Similarly, reimbursement for piloting and crew expense is not required when the candidate or candidate's immediate family member pilots the aircraft and serves as the crew. On the other hand, if a pilot or crew is employed for the flight, the cost of their services must be included in the reimbursement rate.

4. 11 CFR 100.93(g)(2) and (3) - Ownership interest and proportional share of an ownership interest

HLOGA does not define the term "ownership interest." The Commission interprets the term "ownership interest" to include fractional ownership, voting or equity interest, or use arrangements, as well as "time-sharing" arrangements in which the

[23] As discussed above, with the exception of publicly-funded Presidential candidates, candidates are permitted to make unlimited contributions to their own campaigns. Contributions by all other persons, including immediate family members, are subject to the applicable amount limits and source prohibitions. An aircraft owned entirely by a family-held corporation would be treated as an aircraft accessed through a multiple ownership arrangement under 11 CFR 100.93(g)(1)(i) or (ii), rather than (iii).

candidate or an immediate family member pays a fee for a specified amount of travel on the aircraft.

Similarly, HLOGA does not define the term "public corporation." The Commission interprets the term "public corporation" as applying to any corporation with publicly traded shares. See 11 CFR 100.93(g)(2). Because HLOGA explicitly extends the exception contained in 2 U.S.C. 439a(c)(3)(A) to "aircraft owned by an entity that is not a public corporation," aircraft owned by privately held corporations without publicly traded shares, partnerships without publicly traded equity interests, limited liability companies without publicly traded shares, and all other entities without publicly traded shares or equity interests would fall within 11 CFR 100.93(g), so long as a candidate or a member of the candidate's immediate family owns an equity interest or voting interest in that entity.

HLOGA limits a candidate's use of the aircraft to not "more than the candidate's or immediate family member's proportionate share of ownership allows." 2 U.S.C. 439(c)(3)(A). However, the statute does not specify the exact nature of the relationship between ownership shares and use of the aircraft.

New 11 CFR 100.93(g)(3) defines a "proportional share of the ownership interest" as "the amount of use to which a candidate or immediate family member is entitled under an ownership or lease agreement." Rather than account for all of the potential ownership structures of an entity that may own or lease an aircraft, new 11 CFR 100.93(g)(3) establishes one general condition for the exception to apply: unless the aircraft is owned entirely by the candidate or the candidate's immediate family members, the amount of use of the aircraft to which each ownership share is entitled must be

specified in writing prior to the candidate's use of the airplane. The Commission does not intend to delve into the various ownership structures, so long as the ownership or lease agreement does not provide a benefit to the candidate that is disproportionally greater than the benefit provided to others with similar ownership interests in the aircraft.

In order to ensure that the candidate's use of the aircraft remains within the parameters of use specified in the agreement, the candidate's committee must, prior to each flight, obtain certification from the individual or entity making the aircraft available that the candidate's planned use, in combination with the other uses of the aircraft by the person or persons with the ownership interest in the aircraft, will not exceed the amount of use permitted under the ownership or lease agreement. If any part of a flight does exceed the use permitted under the ownership interest, then payment for the entire flight must be made under 11 CFR 100.93(c), not 11 CFR 100.93(g). For example, if a candidate plans a five-hour flight and the candidate's spouse is entitled to use an aircraft for ten hours per month through the spouse's position with a partnership that participates in a time-share agreement, the candidate must not make use of the aircraft until it obtains certification from the spouse, the partnership, or time-share provider that the candidate's planned five-hour flight will not cause the spouse to exceed the spouse's ten-hour limit. If the spouse has already used the aircraft for six hours that month, the candidate's planned use would cause the spouse to exceed the ten-hour limit and the entire five-hour flight would fall under 11 CFR 100.93(c), not 11 CFR 100.93(g). See 11 CFR 100.93(g)(1)(ii).

Some ownership agreements, however, may include specific fees for any use of an aircraft above or beyond the normal amount of permitted use under the agreement.

For example, an ownership agreement might provide that one annual ownership share entitles that owner to use an aircraft for twenty hours per month without additional charge, and up to an additional one hundred hours per month at an additional charge of $1,000 per hour. In such cases, the hourly fee for the additional hundred hours would be included within the "proportional share" of that ownership interest. A candidate with such an ownership interest could therefore use the aircraft for up to one hundred and twenty hours in a month and reimburse the entity operating the aircraft at the rate in 11 CFR 100.93(g)(1)(i). The candidate would be required to pay the operator for one-twelfth of the ownership share (the cost of one month of the annual ownership share) to cover the first twenty hours, plus $1,000 for each of the additional hundred hours ($100,000).

5. Specific time period for repayment

The NPRM inquired whether the Commission should require the candidate's committee to make the payment required by 11 CFR 100.93(g) within a specific time period, such as no later than seven days from the first day of travel, which would be consistent with payment for travel on other aircraft under 11 CFR 100.93(c). The Commission did not receive any comments on this issue. The Commission is not specifying a time period for repayment in the rule itself in expectation that, in shared-ownership or lease arrangements, the candidate will make the repayment in accordance with the normal business practices of the entity administering the shared-ownership or lease agreements. If not, that entity will be deemed to have made a loan to the candidate's committee that would, if not repaid within the required commercially

reasonable period, become an in-kind contribution to the candidate's authorized committee, subject to the limits, prohibitions, and reporting requirements of the Act.

J. 11 CFR 100.93(i) – Reporting Requirements

The Commission is relocating the reporting requirements of 11 CFR 100.93 from paragraph (h) to paragraph (i), as proposed in the NPRM, but is not making any substantive revisions to those requirements. The Commission did not receive any comments on the reporting requirements.

K. 11 CFR 100.93(j) – Recordkeeping Requirements

Consistent with the changes to the reimbursement rates required for candidates and candidate representatives, the Commission is making several significant revisions to the recordkeeping requirements for non-commercial travel at 11 CFR 100.93(i), which are being relocated to new 11 CFR 100.93(j).

First, although the Commission's 2003 travel rules permitted candidates and other campaign travelers to pay first-class or coach rates for most flights, these rates are no longer applicable to any campaign traveler (except where specified as the private traveler reimbursement rate by the appropriate government entity). See new 11 CFR 100.93(c), (e), and (g). Accordingly, the Commission is removing all references to the recordkeeping requirements associated with travel at the first-class or coach rates.

Second, the Commission is requiring candidate committees to obtain and keep copies of any shared-ownership or lease agreements, as well as the pre-flight certifications of compliance with those agreements, that the candidate's committee must obtain to comply with the requirements of 11 CFR 100.93(g)(1)(i) and (g)(3). These records are necessary to determine whether a candidate's use of the aircraft would cause

the person with the ownership interest in the aircraft (the candidate or the candidate's immediate family member) to exceed the amount of use of the aircraft included in that ownership interest.

The Commission also sought comment on the appropriate duration of this record retention requirement, but did not receive any comments. Thus, the general record retention period of three years applies to these documents. See 11 CFR 104.14(b)(3). All other applicable recordkeeping requirements remain in effect with respect to these documents. See, e.g., 11 CFR 104.14(b).

V. Restrictions on use of campaign funds for flights on noncommercial aircraft (2 U.S.C. 439a(c)) - 11 CFR 113.5

In addition to amending the travel reimbursement regulations at 11 CFR 100.93, the Commission is adding new 11 CFR 113.5 to implement the limit on expenditures for non-commercial air travel established by HLOGA. The Commission is promulgating new 11 CFR 113.5 to provide guidance regarding the making of expenditures, which is parallel to the guidance provided in 11 CFR 100.93 regarding contributions. The final rule is identical to proposed 11 CFR 113.5. In the NPRM, the Commission requested comments as to whether a new rule (11 CFR 113.5) is necessary to implement new 2 U.S.C. 439a(c) in light of the proposed revisions to 11 CFR 100.93, but did not receive any comments addressing the question.

A. New 11 CFR 113.5(a) – Presidential, Vice-Presidential and Senate Candidates

New 11 CFR 113.5(a)(1) implements the general prohibition in new 2 U.S.C. 439a(c) on the expenditure of funds by candidates for President, Vice-President or the

Senate and their authorized committees and leadership PACs for aircraft flights, with the two exceptions provided in HLOGA (in addition to the special provisions for travel on government-operated aircraft and candidate-owned aircraft). The first exception is for air travel on "commercial" flights. See 11 CFR 113.5(a)(1). The second exception is for air travel on "non-commercial" flights if either the candidate, the authorized committee, or another political committee, reimburses the provider of the aircraft for the candidate's pro rata share per candidate campaign traveler of the normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size within seven days of when the flight began. See 11 CFR 113.5(a)(2). New 11 CFR 113.5(a)(1) and (2) provide cross-references to definitions of the terms "commercial travel" and "non-commercial travel" in 11 CFR 100.93(a)(3)(iv) and (v). The "candidate's pro rata share per candidate campaign traveler of the normal and usual charter fare" is calculated in the same manner as in 11 CFR 100.93(c)(1). A candidate's committee or leadership PAC will not be considered to have made an expenditure when members of the media and government-provided security personnel pay the service provider directly for their portion of the travel as permitted under 11 CFR 100.93(b)(3).

Under new 11 CFR 113.5(a), the restrictions on expenditures by candidates and their authorized committees also apply to expenditures by leadership PACs of Senate, presidential, and vice-presidential candidates, to conform to the Commission's language in 11 CFR 100.93(c)(1).

The Commission received no comments specifically addressing new 11 CFR 113.5(a).

B. New 11 CFR 113.5(b) – House Candidates

As noted above, HLOGA prohibits House candidates and their authorized committees and leadership PACs from spending campaign funds on private, non-commercial air travel. 2 U.S.C. 439a(c)(2). Instead, House candidates must spend campaign funds on air travel only for commercial air travel, or for travel on aircraft owned by the candidate or the candidate's immediate family member, or for flights operated by the Federal government or a State or local government. Because House candidates, their authorized committees, and their leadership PACs are prohibited from spending campaign funds on non-commercial travel, other than travel permitted under 11 CFR 100.93(e) (government conveyances) or 11 CFR 100.93(g) (aircraft owned or leased by a candidate or a candidate's immediate family member), the new rule at 11 CFR 113.5(b) also prohibits House candidates from accepting in-kind contributions in the form of non-commercial air travel. In the NPRM, the Commission requested comment and received one comment, which expressed support. Accordingly, the Commission is implementing this proposal in new 11 CFR 113.5(b)(1) and (2). Paragraph (b)(1) contains the same "commercial exception" as is set forth in 11 CFR 113.5(a)(2), discussed above. Travel on government-operated aircraft is reflected in paragraph (b)(2). Travel on candidate-owned aircraft is addressed below.

C. New 11 CFR 113.5(c) – Exception for Aircraft Owned or Leased by Candidates and Immediate Family Members of Candidates

As noted above, the restrictions on expenditures in HLOGA do not apply to travel aboard aircraft that are owned or leased by a candidate or the candidate's immediate family members, including aircraft owned or leased by any entity in which the candidate

or a member of the candidate's immediate family "has an ownership interest," provided that the entity is not a "public corporation," and the use of the aircraft is not "more than the candidate's or immediate family member's proportionate share of ownership allows." 2 U.S.C. 439a(c)(3)(A).

New 11 CFR 113.5(c)(1) implements this statutory provision and cross-references the definition of "proportional share of ownership" in 11 CFR 100.93(g)(3). New 11 CFR 113.5(c)(2) states that candidates and immediate family members will be considered to own or lease aircraft under the conditions described in 11 CFR 100.93(g)(2), namely, when there is an ownership interest in an entity (other than a public corporation) that owns the aircraft. New 11 CFR 113.5(c)(3) cross-references the definition of "immediate family member" in 11 CFR 100.93(g)(4). The Commission received no comments specifically addressing 11 CFR 113.5(c) as proposed in the NPRM.

D. New 11 CFR 113.5(d) – In-kind Contribution

New 11 CFR 113.5(d) states that the unreimbursed value of transportation provided to any campaign traveler (as defined in 11 CFR 100.93(a)(3)(i)), is an in-kind contribution from the service provider to the candidate or political committee on whose behalf, or with whom, the campaign traveler traveled, and that such contributions are subject to the limits, prohibitions, and reporting requirements of the Act. As noted above, House candidates are generally prohibited from receiving such contributions. The Commission received no comments specifically addressing 11 CFR 113.5(d) as proposed in the NPRM and is adopting the rule proposed in the NPRM.

E. Change of Title for 11 CFR Part 113

Along with adding new 11 CFR 113.5, which implements new 2 U.S.C. 439a(c), the Commission is changing the title of Part 113. The former title, "Use of Campaign Accounts for Non-Campaign Purposes," does not encompass new section 113.5, which governs use of campaign funds for campaign travel. The new title for Part 113 is "Permitted and Prohibited Uses of Campaign Accounts." The Commission received no comments addressing this change and is adopting the rule proposed in the NPRM.

VI. Publicly-Financed Presidential and Vice-Presidential Candidates - 11 CFR 9004.7 and 9034.7

Although HLOGA does not amend either the Presidential Election Campaign Fund Act (Fund Act) (26 U.S.C. 9001 et seq.) or the Presidential Primary Matching Payment Account Act (Matching Payment Act) (26 U.S.C. 9031 et seq.), the Commission proposed in the NPRM to make certain amendments to its regulations implementing these laws to conform them to the changes it proposed to 11 CFR 100.93. The Commission received no comments regarding these proposals and is implementing them without change from the NPRM.

Sections 9004.7 and 9034.7 are substantively identically worded regulations promulgated under the authority of the Fund Act and the Matching Payment Act, respectively, and cross-reference 11 CFR 100.93. Both regulations prescribe the procedures that publicly funded primary and general election presidential campaigns must follow in attributing their travel expenses to campaign-related and to non-campaign-

related activities. The Commission is making the following technical amendments to these regulations.

A. Aircraft

Revised 11 CFR 9004.7(b)(5)(i), (iii), and (v), and 11 CFR 9004.7(b)(8) replace the word "airplane" with the word "aircraft." These changes conform the regulations to the terminology in HLOGA, as well as revised 11 CFR 100.93 and new 11 CFR 113.5.

B. Recordkeeping Requirements

Former 11 CFR 9004.7(b)(5)(v) and 11 CFR 9034.7(b)(5)(v) required the authorized committees of presidential and vice-presidential candidates to maintain documentation of the lowest unrestricted non-discounted airfare as required in former 11 CFR 100.93(i)(1) or (2). Former sections 100.93(i)(1) and (2) contained recordkeeping requirements relating to rates of reimbursement prescribed in former 11 CFR 100.93(c) and (e). Revised 11 CFR 100.93, however, replaces the old reimbursement rate for non-commercial air travel by presidential and vice-presidential candidates with a rate based on the "pro rata share per candidate campaign traveler" of the normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size, and sets out the corresponding recordkeeping requirements in 11 CFR 100.93(j)(1). The Commission is therefore revising 11 CFR 9004.7(b)(5)(v) and 11 CFR 9034.7(b)(5)(v) to conform them to the new recordkeeping requirements in amended 11 CFR 100.93(j)(1). The Commission is also amending the final sentence in sections 9004.7(b)(5)(v) and 9034.7(b)(5)(v), which address recordkeeping requirements for travel on other conveyances to reflect that the recordkeeping requirements for other conveyances are now addressed in 11 CFR 100.93(j)(2).

C. 11 CFR 9004.7(b)(8) and 11 CFR 9034.7(b)(8) – Conforming changes in terminology

The Commission is revising 11 CFR 9004.7(b)(8) and 9034.7(b)(8) to conform the terminology to that used in new 2 U.S.C. 439a(c) and in revised 11 CFR 100.93. Former sections 9004.7(b)(8) and 9034.7(b)(8) used the same terminology as former section 100.93 in describing aircraft that are "licensed for compensation or hire" under various FAA certification authorities. Revised 11 CFR 100.93 defines the term "non-commercial travel," and uses the term "aircraft" instead of "airplane." Accordingly, revised 11 CFR 9004.7(b)(8) and 11 CFR 9034.7(b)(8) state that travel on non-commercial aircraft is governed by 11 CFR 100.93 and that the term "non-commercial travel" is defined in accordance with 11 CFR 100.93(a)(3)(v).

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

[Regulatory Flexibility Act]

The Commission certifies that the attached rules 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 are affected by these final rules, which impose obligations only on Federal candidates, their campaign committees, other individuals traveling in connection with Federal elections, and the political committees on whose behalf this travel is conducted. Federal candidates, their campaign committees, and most political party committees and other political committees entitled to rely on these rules are not small entities. These rules generally clarify or supplement existing rules and are largely intended to implement a statutory directive and simplify the process

of determining reimbursement rates. The rules do not impose compliance costs on any service providers (as defined in the rules) that are small entities so as to cause a significant economic impact. With respect to the determination of the amount of reimbursement for travel, the new rules merely reflect an extension of existing similar rules. To the extent that operators of air-taxi services or on-demand air charter services are small entities indirectly impacted by these rules, any economic effects would result from the travel choices of individual candidates or other travelers rather than Commission requirements and, in any event, are likely to be less than $100,000,000 per year.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 113

Campaign funds, and political candidates.

11 CFR Part 9004

Campaign funds.

11 CFR Part 9034

Campaign funds, reporting and recordkeeping requirements.