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To <travel07@fec.gov>
cc <arothstein@fec.gov>, <secretary@fec.gov>
bcc
Subject Comments on NPRM 2007-20

Attached please find comments of the Campaign Legal Center and Democracy 21 on NPRM 2007-20 (Candidate travel).

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Comments of CLC and D21 on NPRM 2007-20.pdf

November 13, 2007

By Electronic Mail (travel07@fec.gov)

Ms. Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Notice 2007-20: Candidate Travel

Dear Ms. Rothstein:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Notice of Proposed Rulemaking (NPRM) on "Candidate Travel." *See* NPRM 2007-20, 72 Fed. Reg. 59953 (October 23, 2007). The Commission requests comments on proposed changes to its rules to implement new statutory provisions governing the rates and timing of payment for non-commercial campaign travel on aircraft, and a proposed definition of "Leadership PAC."

Specifically, the new law provides that a candidate for the office of President or Senate may fly on a non-commercial flight only if the candidate pays "the pro rata share of the fair market value of such flight (as 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). Candidates for the House are generally prohibited from flying on non-commercial flights. *See id.* at § 439a(c)(2). The new law contains an exception for flights "on an aircraft owned or leased by the candidate involved or an immediate family member of the candidate." *Id.* at § 439a(c)(3).

Congress' intent in enacting the new travel restrictions was to end the long-time practice of candidates being subsidized for travel on non-commercial flights through the unsurprising generosity of corporations, wealthy individuals and others. These benefactors were happy to provide a substantial in-kind benefit to candidates in the form of the convenience and comfort of a private jet made available at the candidates' disposal at the wildly discounted rate of first-class airfare, and in return to have the candidates' gratitude, and often their undivided attention during those flights.

It is essential for the Commission to implement these statutory provisions in a manner that fulfills the congressional purpose of ending the below-market rate use of private jets by federal candidates. As we more fully explain below, the statute does not permit – and therefore we strongly urge the Commission not to permit – candidates or private jet owners to shift any part of the full charter cost onto other political committees, or onto non-campaign travelers.

Any such rule would contradict and defeat the congressional purpose of ensuring that the entire cost of a charter flight is to be borne by the candidate(s) aboard the flight (or represented on the flight), regardless of who else travels on the plane.

Further, the statute requires, and therefore the Commission must ensure, that the candidate pays the usual charter fare for a plane comparable to *the plane actually provided to and used by the candidate,* not for a wholly different (and potentially much smaller) plane that is merely of sufficient size to carry the candidate. Allowing the latter would fundamentally undermine the statute and violate the clear intent of Congress, for it would simply continue the prohibited subsidy in a different form.

I. Background and Introduction

Under the Federal Election Campaign Act (FECA), the term "contribution" is defined 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). The phrase "anything of value," in turn, includes "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services." 11 C.F.R. § 100.52(d)(1). As explained in NPRM 2007-20, "[w]hen 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 . . . and the amount charged the political committee." 72 Fed. Reg. at 5993 (quoting 11 C.F.R. § 100.52(d)(1)) (internal quotation marks omitted).

For years, the Commission has allowed federal candidates to travel on non-commercial flights while paying far less than the true value of such flights, without that being deemed an illegal in-kind contribution to the candidate. An exception to the definition of "contribution" found at current 11 C.F.R. § 100.93 permits candidates to travel on non-commercial flights – including on airplanes owned and operated by corporations, wealthy individuals and others – while often paying only the price of a commercial first-class airplane ticket. *See* 11 C.F.R. § 100.93(c)(1) (re travel between cities served by regularly scheduled commercial airline service).

In other words, by regulatory fiat, the Commission has deemed first class airfare to be the measure of the "usual and normal" charge for travel on a private jet, even though in reality, that first class airfare represents only a small fraction of the actual cost of chartering a jet.

Recognizing the threat of buying access and influence posed by activities permitted under the Commission's regulation – namely, the ability of corporations, wealthy individuals and others to subsidize candidate travel and obtain valuable private access to such candidates in the process – Congress included provisions (found at section 601) in the recently enacted "Honest Leadership and Open Government Act of 2007," Pub. L. 110–81, 121 Stat. 735, restricting, and in some cases prohibiting, the expenditure of campaign funds by federal candidates for non-commercial travel aboard aircraft. *See* 2 U.S.C. § 439a(c) (henceforth referred to as "new 2 U.S.C. § 439a(c)" or "the new law").

In short, the new law provides that a candidate for the office of President or Senate may fly on a non-commercial flight only if the candidate pays "the pro rata share of the fair market value of such flight (as 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). Candidates for the House are generally prohibited from flying on non-commercial flights. *See id.* at § 439a(c)(2).

Senate Majority Leader Harry Reid (D-NV) made clear that these reforms were intended to serve the purpose of "renewing the [American] people's faith in the integrity of Congress" and "putting an end to abuses of corporate travel." 153 Cong. Rec. S10715 (daily ed. Aug. 2, 2007) (statement of Sen. Reid).

Congress clearly did not authorize or envision an implementing regulation that allows for the division of the costs of charter flights among non-candidate travelers in such a manner that would allow the reconstitution of the present practice of having corporations and others effectively subsidize the non-commercial travel costs of federal candidates. Yet several aspects of the Commission's proposed rule (or alternatives proposed in the NPRM) would have this effect.

Congress could not have been more clear in the statute – the full charter cost of a non-commercial flight is to be paid by the candidate (or divided among and paid by two or more candidates) aboard the flight (or the candidate's representatives, in the absence of the candidate), not by other political committees or non-campaign travelers. It is this overarching principle that guides our comments here. We strongly oppose any aspects of the proposed rule that would have the effect of permitting non-candidate entities to subsidize the non-commercial travel costs of federal candidates. With this in mind, we comment below on several specific issues and questions raised in NPRM 2007-20.

II. Definition of "Leadership PAC"

The Commission proposes in NRPM 2007-20 to incorporate into its definition of "political committee," *see* 11 C.F.R. § 100.5, a definition of the term "leadership PAC" that mirrors the statutory definition of that term at new 2 U.S.C. § 434(i)(8)(B), which is incorporated by reference into the new travel restrictions at 2 U.S.C. § 439a(c)(4). *See* 72 Fed. Reg. at 59954-55. We support the proposed content and placement of the definition of "leadership PAC," which accurately reflects the statutory language.

III. Proposed Revisions to 11 C.F.R. § 100.93 – Payment for Travel Aboard Non-Commercial Aircraft.

In Part IV of NPRM 2007-20, the Commission proposes to apply the new travel rules not only to candidates themselves, but also to "campaign travelers" as currently defined in the Commission's regulations. *See* 72 Fed. Reg. at 59955; *see also* 11 C.F.R. § 100.93(3)(i)(A) (defining "campaign traveler"). The Commission specifically asks whether "there is any evidence that suggests that Congress intended to exclude campaign staff, or others traveling on the candidate's behalf, from the general scope of the rule?" 72 Fed. Reg. at 59955. Given the

lack of any such evidence, and the fact that new section 439a applies not only to candidates, but also to their authorized committees, we support this proposal to apply the new rules both to candidates themselves, and to those traveling on behalf of candidates and their authorized committees. Furthermore, we support the Commission's proposal to supplement the regulatory definition of "campaign traveler" to include not only those traveling on behalf of a candidate or authorized committee, but also the candidate himself/herself. *See* 72 Fed. Reg. at 59956.

Similarly, we do not oppose the Commission's proposed replacement of the FAA-based language in its current regulations with definitions of "commercial travel" and "non-commercial travel," in order to simplify the regulations and align them with the new statutory language. *See* 72 Fed. Reg. at 59956.

Importantly, the Commission correctly notes that the new statutory language is specific that the "number of candidates on the flight" determines the "pro rata share" that a candidate or such candidate's authorized committee must pay for the flight. *See* 72 Fed. Reg. at 59956. Moreover, the Commission correctly notes that the new statute applies not only to candidates but also to their authorized committees. *Id.* Consequently, the Commission proposes defining the term "pro rata share" based on the number of candidates and/or candidate committees represented on the flight, regardless of whether there are other campaign travelers (such as PAC representatives) or passengers aboard. *Id*. Under the Commission's proposal, a "candidate is represented on the flight if a person is traveling on behalf of that candidate, the candidate's authorized committee, or the candidate's leadership PAC." *Id.*

We strongly support this approach to defining the term "pro rata share." Indeed, this is the only acceptable approach to defining "pro rata share" under the statute. In calculating the applicable "pro rata share," any alternative that would take into consideration travelers other than a candidate or those traveling on behalf of a candidate's authorized committee would have the effect of permitting such non-candidate travelers to subsidize candidate travel and, consequently, would undermine the language and intent of the new law.

Under the section of the NPRM entitled "Application of Proposed Rule," *see* 72 Fed. Reg. at 59956-57, the Commission presents a hypothetical situation wherein "Candidate A, 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." *Id.* The NPRM correctly concludes that "the pro rata share of the fair market value of the flight would be determined by dividing the normal and usual charter rate for the plane by two because there are two candidates represented on the flight (Candidate A and B)." *Id*. Under the scenario, each candidate would be responsible for paying 50% of the cost of the charter to avoid receiving an in-kind contribution from the plane's owner.

The NPRM further states that because the plane's owner would have been compensated for the full cost of the flight by the candidates, PAC Representative P would not be required to pay the plane's owner any travel costs. *Id*. The Commission asks whether the candidates' payment of PAC Representative P's travel costs should be treated as an in-kind contribution to the PAC from one or more of the candidates paying for the flight.

It should not be. We urge the Commission instead to require the PAC representative to pay the plane's owner the value of the flight under the Commission's current rules at 11 C.F.R. § 100.93 (*e.g.*, under 100.93(c)(1), first-class airfare) – even though this would arguably result in a windfall to the plane's owner, which would receive reimbursements in an amount that exceeds the total actual cost of the charter flight. A requirement that the PAC representative pay for the flight under existing rules would maintain the purpose and effect of Congress' new rule on candidate travel, which did not otherwise disturb the existing rules on PAC travel.[1]

This "Application of Proposed Rule" section of the NPRM further states that "[r]epayment under the proposed rule would not vary based on the number of non-campaign travelers on the plane." *Id*. This is the correct interpretation of the new law. Any alternative interpretation would simply allow non-campaign travelers to functionally subsidize the charter plane travel by candidates – a result directly contrary to the statute.

NPRM 2007-20 presents three unacceptable alternatives to the approach outlined above:

- A "per represented committee" alternative (*i.e.*, the pro rata share to be determined based on the total number of political committees represented, including non-candidate committees such as PACs);

- A "per passenger" alternative (*i.e.*, the pro rata share to be determined based on the total number of passengers on the plane, including non-campaign passengers such as, for instance, corporate executives); and

- A "comparable aircraft" alternative (*i.e.*, the pro rata share to be determined based on the usual charter rate of a plane sufficient to carry all campaign travelers, rather than based on the actual plane used).

72 Fed. Reg. at 59957.

Each of these three alternative approaches plainly conflicts with the language of the statute and would undermine the purpose and intent of the new candidate travel restrictions by enabling candidates to travel on private planes while paying only a fraction of the actual costs of doing so, and having the remainder of those costs subsidized by others. As recognized by the Commission elsewhere in the NPRM, the Commission must avoid promulgating

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[1] Thus, with respect to non-commercial travel by "other campaign travelers" (*i.e.*, non-candidate committees and their representatives), we support "Alternative 2," which would retain the existing reimbursement rate structure for non-candidate travel. *See* 72 Fed. Reg. at 59958. As the Commission acknowledges in this section of the NPRM, this approach may "result in the service provider being paid more than the fair market value of the flight." *Id.* Nevertheless, Congress did not address non-candidate travel in the new statute; and retaining the existing reimbursement rate structure for non-candidate travel is likely the easiest way for the Commission and the regulated community to comply with the mandates of the new law without creating the legal consequences of in-kind contributions from candidates to non-candidate committees.

regulations here "permitting outside organizations to subsidize a candidate's travel." 72 Fed. Reg. at 59958.

Again, the statute clearly provides that a candidate may fly on a non-commercial flight only if the candidate pays "the pro rata share of the fair market value of such flight (as 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). The statute does not permit the Commission to determine the candidate's pro rata share based on the number of non-candidate travelers (*i.e.*, either non-candidate political committees and/or other persons); nor does the statute permit the candidate's pro rata share to be based on some hypothetical plane that the candidate could have flown on – had the candidate not flown on a much larger plane.[2] The statute explicitly requires the pro rate share to be based on the number of candidates and on a plane of comparable size to the one actually flown on.

To be specific, the following are all not permissible interpretations of the statute:

- Candidate A, Candidate B and PAC Representative P travel on a corporate jet. The actual cost of chartering the jet is divided three ways. *See*, *e.g.*, 72 Fed. Reg. at 59957 ("Per Represented Committee Alternative").

This is not permissible because it would effectively allow the PAC to subsidize a portion of the costs that should be borne by Candidates A and B. If the Commission were to issue such a regulation, it is foreseeable that companies owning private planes and that make such planes available to candidates would routinely invite PAC representatives to travel along with the candidate, and thereby relieve the candidate of the obligation to pay the full charter cost of traveling on the plane by shifting part of that cost to the PAC. This would be directly contrary to the statute.

- Candidate A travels on a corporate jet, along with three corporate representatives traveling on company business. The actual cost of chartering the jet is divided one-quarter to the candidate, and three-quarters to the company. *See*, *e.g.*, 72 Fed. Reg. at 59957 ("Per Passenger Alternative").

This is not permissible because it would effectively allow a corporate jet owner to subsidize the candidate's travel by diluting the candidate's share of the cost of the plane. A corporate jet owner could easily include corporate representatives, or other private travelers, on a trip with a candidate, and thereby shift a portion of the costs of the charter fare from the candidate to others. In fact, this would be highly desirable from the corporation's perspective – an opportunity both to subsidize the candidate's travel and to have the corporation's

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[2] As the Commission explained in its 2003 Explanation and Justification ("E&J") for its current travel rules, a "'comparable commercial airplane' means an airplane of similar make and model as the airplane that actually makes the trip, with the same amenities as that airplane." Final Rules and Explanation and Justification for Travel on Behalf of Candidates and Political Committees, 68 Fed. Reg. 69583, 69588-89 (Dec. 15, 2003); *see also* NPRM 2007-20, 72 Fed. Reg. at 59959.

representatives enjoy the candidate's captive attention. This would be directly contrary to the statute.

- Candidate A and two staff members travel on a corporate Boeing 737. They reimburse the company for the charter cost of a small jet that would accommodate three passengers, because that size jet would be sufficient to carry the campaign travelers. *See*, *e.g.*, 72 Fed. Reg. at 59957 ("Comparable Plane Alternative").

This is not permissible because it would allow corporations, wealthy individuals and others to effectively subsidize the actual travel by the candidate. The measure of the candidate's reimbursement obligation should be the actual benefit provided by the airplane owner, *i.e,* the full charter rate for the actual plane used, not for some hypothetical smaller plane. Again, the Commission correctly explained in the 2003 E&J for its current travel rules that a "'comparable commercial airplane' means an airplane of similar make and model as the airplane that actually makes the trip . . . ." *See supra* n. 2. Otherwise, corporate jet owners could continue to provide lavish travel benefits to candidates who would pay only a small fraction of the actual cost. This would be directly contrary to the statute.

As to other matters, we support the Commission's proposed rules for House candidate travel and we encourage the Commission to retain the proposed rule that prohibits House candidates from flying on non-commercial flights, even where the costs of such flights would be within the otherwise-applicable in-kind contribution limits. *See* 72 Fed. Reg. at 59957-58. Further, we support the Commission proposal to apply the new reimbursement rates to travel on behalf of a Senate candidate's leadership PAC. *See* 72 Fed. Reg. at 59959.

IV. Conclusion

We urge the Commission to promulgate rules that reflect the above-stated comments and, in particular, to ensure that the new rules do not permit non-candidate travelers to subsidize the non-commercial travel of candidates for federal office, and to require the charter fares paid by candidates to be based on a plane of comparable size to the actual plane used by the candidate.

We appreciate the opportunity to submit these comments.

Respectfully,

/s/ Fred Wertheimer	*/s/ J. Gerald Hebert*
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