



ALERTS

Fly Me To The Rally: Governing Carriage Of Federal Candidates On Corporate Aircraft

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The Federal Aviation Regulations (FARs) allow a noncommercial operator to carry federal political candidates under FAR 91.321 so long as the operator does not hold an Air Carrier Certificate. Additionally, the Federal Aviation Administration (FAA) requires the requisite reimbursement not to exceed the rates required by the Federal Election Commission (FEC) under 11 C.F.R. § 100.93, the FEC regulations. Unlike federal candidates, state and local political candidates are governed by state and local laws, not by the FEC regulations.

As the 2020 election season kicks into high gear, it is important to take note of the regulations that govern federal political candidates' air travel. It is equally important to become knowledgeable of other federal, state and local laws governing in-kind contributions to campaigns, as such laws may be implicated in the course of transporting federal political candidates.

Background and Scope of the FEC Regulations

Originating from the [Honest Leadership and Open Government Act of 2007](#), the FEC has promulgated the FEC regulations governing the carriage of federal political candidates. The rules, in their current form, have been in effect since Jan. 6, 2010, and apply to any individuals traveling in connection with an election for federal office, which including candidates, campaign members, security personnel, media members, authorized committees and leadership of Political Action Committees

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(PACs) for such candidates. The regulations restrict, and in some situations prohibit, federal candidates and certain individuals traveling on behalf of such candidates from utilizing noncommercial air travel. Further, the FEC lays out the method for calculating the reimbursement rate for allowable noncommercial air travel.

The FEC regulations only apply to candidates seeking federal office, not elected federal officials. Generally, elected federal officials are prohibited from using noncommercial aircraft. Therefore, aircraft operators should follow best practices and limit providing air travel for Part 91.321 compensation to only federal campaign travelers, defined as individuals meeting the definition of a candidate and traveling in connection with an election for federal office.

Limits on Noncommercial Travel

The FEC regulations provide that House candidates and individuals traveling on behalf or in connection with House candidates are prohibited from expending campaign funds on noncommercial aircraft travel. Furthermore, due to limitations on in-kind contributions, the ban on using campaign funds essentially prohibits noncommercial aircraft travel for House candidates. The FEC regulations do provide two exceptions that allow House candidates to fly on government- or candidate-owned aircraft. Unlike House candidates, Senate, presidential, and vice-presidential candidates are permitted to use noncommercial air travel provided the aircraft operators are reimbursed according to certain guidelines.

Reimbursement Rates

FEC regulations provide that the reimbursement rate for Senate, presidential, or vice presidential candidates is the candidate's pro rata share of the normal and usual charter rate or rental charge for travel on a comparable aircraft of comparable size.

A comparable aircraft is one of similar make and model as the aircraft that actually makes the trip, with similar amenities. A normal and usual charter rate or rental charge is typically obtained by asking charter companies for the hourly rate they would charge for a flight in a comparable aircraft and then multiplying that hourly rate by the actual duration of the candidate's flight. Further, the candidate's pro rata share is the normal and usually charter rate divided by the total number of campaign travelers, then multiplied by the number of campaign travelers associated with such candidate.

For example, if a presidential candidate travels with a vice presidential candidate and the vice presidential candidate's campaign manager on a noncommercial aircraft, then the presidential candidate is responsible for one-third of the applicable cost and the vice presidential candidate is responsible for two-thirds of the cost. The FEC regulations provide that when determining the comparable size of the aircraft, the federal candidate is not required to include government-mandated security personnel and equipment. Additionally, the regulations allow media and governmental personnel who accompany a candidate to reimburse the aircraft operator directly. Repositioning flights (flight to pick up the candidate) or deadhead flights (return flights without candidates) are typically not counted for purposes of determining the amount of reimbursement.).

Failure to obtain the entire reimbursement can be considered an illegal campaign contribution, according to a federal court decision in *RBG Bush Planes, LLC v. Alaska Pub. Offices Comm'n*. Accordingly, it is recommended that you obtain reimbursement before the beginning of the flight. Payment is generally required within seven days after the flight. Importantly, any unreimbursed amount would likely be treated as a contribution to the candidate or a political action committee, possibly resulting in FEC violations. It is also important to strictly comply with applicable FEC regulations.

Exceptions to the Reimbursement Rate

The FEC regulations provide two exceptions to the standard reimbursement rate. The exceptions are:

Government-Owned Aircraft

Federal candidates who travel on noncommercial aircraft provided by federal, state, or local governments must reimburse the governmental entity either at the normal and usual charter rate or rental charge, as specified above, or at the Private Traveler rate, a rate specified by the governmental entity for each campaign traveler.

Candidate-Owned Aircraft

The second exception is for travel on an aircraft owned by a federal candidate or their immediate family member. While travel on an aircraft owned by the federal candidate relieves the candidate from restrictions and limitations on such expenditures, the candidate's committee is still required to report the contributions. Thus, a federal candidate who travels on noncommercial aircraft owned by the candidate or candidate's immediate family member must reimburse the aircraft operator, the candidate, or candidate's family the costs associated with the trip, which may include the cost of fuel, cost of the crew, and a proportionate share of maintenance costs. If not reimbursed at the cost associated with such trip, the candidate's committee must report an in-kind contribution for the cost of the trip. Accordingly, even though federal candidates may make unlimited contributions to their campaigns, those contributions must be reported.

Additionally, if the aircraft is owned or leased under a shared ownership agreement and the candidate's use does not exceed the proportional ownership interest in such aircraft, the candidate must reimburse the aircraft operator for the hourly mileage or other applicable rate charged by such agreement. If the aircraft is owned or leased under a shared ownership agreement and the candidate exceeds her proportional ownership interest, then the candidate must reimburse the aircraft operator at the normal and usual charter rate or rental charge.

Prior to each flight on an aircraft of which the candidate owns a proportional ownership interest, the candidate's committee must, according to the regulations, obtain a certification from the aircraft operator that the candidate's planned use of the aircraft will not exceed the candidate's proportional share of use. Because House candidates are prohibited from expending campaign funds on noncommercial air travel, they are prohibited from exceeding their proportional use of the aircraft as allowed under the shared ownership agreement.

Further, the candidate-owned aircraft exception also applies to aircraft owned by a candidate's immediate family member or members, which include the father, mother, son, daughter, brother, sister, husband, wife, father-in-law, or mother-in-law of the candidate. Aircraft owned by an entity in which the candidate or candidate's immediate family member owns an interest are deemed to be owned by candidate or candidate's immediate family member, provided the entity is not a public corporation.

Recordkeeping Requirements

The FEC regulations also require federal candidates to maintain and report certain records pertaining to noncommercial air travel. Federal candidates are required to record and report the aircraft operator and the size, model, make, and tail number of the aircraft used to travel. Further, the federal candidates must maintain an itinerary, which shows the departure and arrival dates and a list of all passengers with designations. In addition, the federal candidates must provide a publicly available charter rate or rental charge for the comparable aircraft of comparable size with similar amenities that also identifies the airline, charter, or air taxi operator providing such rate or charge to the public. This comparable charter rate must be available to the public within seven days of the federal candidate's actual travel. If the candidate travels on an aircraft owned under an ownership or lease agreement, the candidate must report such agreement and the certification provided by the aircraft operator stating the candidate's use will not exceed their proportional ownership in such aircraft.

IRS Considerations

For IRS purposes, the carriage of candidates by a noncommercial operator (FAR Part 91) is considered commercial transportation for purposes of the applicable federal excise tax. Accordingly, amounts received by the aircraft operator for carriage of candidates are subject to federal excise tax. Operators should note that they will be required to file an IRS Form 720 for payment of federal excise tax and should be able to claim a fuel tax credit based upon the fuel burned during the flight subject to federal excise tax.

FARs and State and Local Laws

In addition to the FEC regulations, candidates and aircraft operators must satisfy FAA regulations and any applicable state or local laws. While the FEC regulations preempt certain state and local laws "with respect to travel in connection with a Federal election, such preemption does not apply to travel in connection with state and local elections. Unlike federal candidates, state and local candidates are governed by state and local laws, not FEC regulations. For this reason, it is recommended to consider consulting appropriate counsel before providing or accepting noncommercial air travel in connection with state and local elections.

Conclusion

The FEC regulations restrict, and at times prohibit, federal candidates from traveling on noncommercial aircraft. At a minimum, any company operating aircraft that is contemplating the carriage of federal candidates

should consider a written policy document addressing these issues. Every particular situation is different and one should consult appropriate counsel before providing or accepting noncommercial air travel in connection with Federal elections.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work, or Todd A. Dixon at 616-742-3959 or todd.dixon@btlaw.com or Clifford G. Maine at 616-742-3944 or clifford.maine@btlaw.com.

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