



Glen Shor <gshor@campaignlegalcenter.org> on 09/19/2003 04:27:09 PM

Please respond to gshor@campaignlegalcenter.org

To: travel2003@fec.gov  
cc:

Subject: Comments on NPRM

Attached (in Microsoft word format) are comments of the Campaign Legal Center on Notice 2003-14, Candidate Travel.

Please call me if you have any problems opening the attached document.

Thank you in advance for your consideration.

Glen Shor  
FEC Program Director  
The Campaign Legal Center

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Glen Shor  
FEC Program Director & Associate Legal Counsel  
The Campaign Legal Center  
1101 Connecticut Ave, NW Suite 330  
Washington, DC 20036  
gshor@campaignlegalcenter.org  
t: (202) 736-2200  
f: (202) 736-2222

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September 19, 2003

Mai T. Dinh  
Acting Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463

**Re: Notice 2003-14**

Dear Ms. Dinh:

I am writing on behalf of the Campaign Legal Center regarding Notice 2003-14, an FEC Notice of Proposed Rulemaking addressing the rates and timing for payment of candidate travel on private means of transportation that are not offered for commercial use, including government conveyances.

I. Background

When federal candidates use private means of transportation not offered for commercial use (*e.g.*, a private jet owned or leased by a corporation) for campaign travel, they generally receive an in-kind contribution unless they reimburse the provider. Moreover, FEC regulations specifically require publicly financed presidential candidates to reimburse the government for use of government conveyances for campaign travel.

The principle underlying such requirements is that reimbursement is needed to protect the integrity of federal campaign finance law's source prohibitions, contribution amount limitations and, in the case of the presidential public financing system, expenditure caps. Clearly, the provision of campaign transportation services is of great value to federal candidates. Absent reimbursement, candidates would receive an in-kind campaign benefit, potentially exceeding contribution limitations, or from prohibited sources of campaign contributions, or not accounted for under the expenditure caps applicable to publicly financed presidential candidates.

The FEC's regulations specify the rates and timing under which federal candidates must make reimbursement payments for their travel on private means of transportation that are not offered for commercial use, including government conveyances. In undertaking this rulemaking, the Commission has expressed concern about perceived complexity and inconsistencies in those regulations.

We agree that the existing reimbursement rate rules are quite complex and make some arbitrary distinctions. However, we believe that the chief flaw of the existing rules is their failure in a number of respects to require adequate reimbursement from federal candidates for their campaign travel on private airplanes that are not offered for commercial use, resulting in the undermining of federal campaign finance limits. The Commission's principal objective should be to plug the loopholes spawned by its existing campaign travel reimbursement regulations -- and it should at a minimum refrain from expanding those loopholes in a quest for uniformity and simplicity.

Private air transportation offers numerous benefits to candidates, as compared to travel on regularly scheduled commercial airline service. As put succinctly in a well-known guide to corporate political activity, "This convenience [of reimbursed candidate travel on corporate airplanes] affords a measure of privacy and allows the candidate to avoid commercial airline schedules." See Jan Witold Baran, *Political Contributions and Expenditures by Corporations*, 1331 PLI/Corp 13, 52 (2002). Indeed, the private transportation can much more readily be conformed to the candidates' schedules and official responsibilities, affording them greater flexibility to fulfill political needs and goals.<sup>1</sup> It likewise provides a higher level of privacy (and often comfort) than does regularly scheduled commercial airline service.<sup>2</sup>

However, under the FEC's current regulations, when using private air transportation not offered for commercial use for campaign travel, federal candidates are in many instances not required to reimburse the provider for the full value of the services. If undertaking campaign travel on a private aircraft owned by an individual not licensed to provide commercial service, a candidate must (to avoid acceptance of an in-kind contribution) reimburse the provider at the rate of the "usual and normal charge" for the services provided -- which is generally the equivalent charter rate for the means of transportation used. See 11 C.F.R. § 100.52(d); FEC, *Financial Control and Compliance Manual for Presidential Primary Candidates Receiving Public Funding* at 177 (2000 ed.).

But if undertaking campaign travel on a private aircraft owned or leased by a corporation or union which is not licensed to provide commercial service, the candidate must only reimburse at the rate equivalent to first-class air fare for the trip when the destination city is served by regularly scheduled commercial service. 11 C.F.R. § 114.9(e)(i). The Commission has broadly construed when a destination city would be deemed to be "served by regularly scheduled commercial service," covering even certain airports

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<sup>1</sup> As indicated by the spokeswoman for a current presidential candidate, "Candidates have to use private planes to make their schedules work." See John Wagner, *Lawyers' Planes Kept Edwards' Campaign Aloft*, Raleigh News & Observer, Apr. 17, 2003, available at <http://209.157.64.200/focus/f-news/895064/posts>. The cited article indicates that this presidential candidate had used a law firm's plane on 15 occasions, primarily for fund-raising trips. *Id.* For example, he interrupted a campaign swing in a state to return to Washington for an afternoon budget vote and returned to the state on a private plane in order to make a reception. *Id.*

<sup>2</sup> See California Fair Political Practices Commission, 3 FPPC Ops. 52, 56 (1977), available at <http://www.fppc.ca.gov/opinions/stone.pdf> ("Even if no time saving is involved, the official enjoys the intangible benefits that ordinarily accompany private air service, such as the added comfort and convenience and avoiding the aggravation that often attends commercial air travel.").

which are outside the corporate limits of a city. See FEC Adv. Op. 1999-13. This approach has expanded the availability of the first-class air fare. Only in the case of campaign travel on a private, non-commercial corporate or labor jet to a city not considered to be served by regularly scheduled commercial service would a candidate have to reimburse the provider in an amount equivalent to the usual charter rate. See 11 C.F.R. 114.9(e)(1)(ii).

Similarly, under 11 C.F.R. §§ 9004.7(b)(5)(i) and 9034.7(b)(5)(i), if a publicly financed presidential candidate uses a government airplane for campaign-related travel, the candidate's authorized campaign committee must reimburse at the lowest unrestricted and non-discounted first-class commercial air fare available for the time traveled, in the case of travel to a city served by a regularly scheduled commercial airline service. Indeed, if the city is served by regularly scheduled coach airline service but not regularly scheduled first-class airline service, reimbursement at the coach rate is permissible. Only if the presidential candidate uses the government plane to travel to a city not served by regularly scheduled commercial airline service would his or her authorized committee have to reimburse the appropriate government entity at the commercial charter rate for an airplane sufficient in size to accommodate the campaign-related travelers (plus the news media and Secret Service).

Under these rules, candidates traveling on private means of air transportation that are not offered for commercial use are often paying a fare pegged to the price of first-class commercial airline service (and a coach price in certain instances), but they are receiving much more than first-class or coach commercial airline service in those instances. As opposed to the regularly scheduled commercial air service that cannot be bent to candidate scheduling needs and desires, private air transport for campaigning offers candidates the enormous benefit of being able to conform flight to schedule.<sup>3</sup> It also offers a measure of privacy (and often comfort) not matched by even first-class travel on regularly scheduled commercial flights.

Along these lines, it is no surprise that the normal and usual fares for the better analogy to candidate flight on private air transport not offered for commercial use – charter flights from air charter services<sup>4</sup> – tend to be much larger than those for first-class commercial airline service. This has been documented in congressional studies and other analyses. See, e.g., Minority Staff of House Committee on Gov't Reform & Oversight, *Air*

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<sup>3</sup> According to a *Washington Post* article of July 20, 1998, a current Member of Congress characterized the benefit of this arrangement for lawmakers as being able to travel “whenever [the lawmaker] wants” instead of having to “schlep around to airports and wait for schedules.” See Sandra Torry, *Tobacco's Influence Takes Flight in GOP; Hill Report Examines Subsidized Trips*, Wash. Post., Jul. 20, 1998, at A1. A senior vice president for a corporation that made its planes available to federal candidates characterized one of the jets used as “real comfortable” and further elaborated, “You don't feel like you're in something itty-bitty . . . It certainly beats having to change planes in airports.” See Meredith O'Brien, *Presidential Frequent Fliers*, The Public i (Newsletter of the Center for Public Integrity), Dec. 1996, p. 5, available at [www.publicintegrity.org/dtaweb/downloads/fliers\\_pi.pdf](http://www.publicintegrity.org/dtaweb/downloads/fliers_pi.pdf).

<sup>4</sup> In the Notice of Proposed Rulemaking, the Commission itself indicates that an alternative it is considering that would uniformly require reimbursement based on a charter rate “could provide a more accurate reflection of the true value of the use of a private or governmental airplane by campaign travelers.” 68 Fed. Reg. 50,481, 50,485 (Aug. 21, 2003).

*Tobacco: Campaign Travel on Tobacco Industry Jets*, Jul. 20, 1998, available at <http://www.tobacco.org/Documents/airtobaccoof/airtobacco.html>; Statement of U.S. Rep. Tom Barrett (D-WI) on Amending H.R. 3485, House Committee on Rules, Mar. 25, 1998, available at 1998 WL 8993706; Sheryl Fred, *Jet Setters: FEC Clears Pols for Takeoff in Corporate Planes*, Capital Eye, July 1999, available at <http://www.opensecrets.org/newsletter/ce64/05jetset.htm>; Meredith O'Brien, *Presidential Frequent Fliers*, The Public i (Newsletter of the Center for Public Integrity), Dec. 1996, pp. 4-5, available at [www.publicintegrity.org/dtaweb/downloads/fliers\\_pi.pdf](http://www.publicintegrity.org/dtaweb/downloads/fliers_pi.pdf). See also *Specter v. FEC*, 150 F. Supp.2d 797 (E.D.Pa. 2001) (revolving around the fact that the full charter fare was considerably higher than the first-class fare).

The differential between the reimbursed first-class fare and the higher charter fare is the subsidy – or in-kind contribution -- to the candidate campaign traveler. Such a subsidy should not have been allowed at all where the owner or lessee of the private non-commercial air transportation ferrying a candidate for campaign travel was a corporation or union, for 2 U.S.C. § 441b flatly forbids corporate and union contributions to candidates.<sup>5</sup> Likewise, the Commission's undervaluation of the true value of presidential campaign travel on government aircraft is contrary to the purposes and proper effectuation of the spending limits of the presidential public financing system.

## II. Proposed Alternatives A, B and C

The Commission would accentuate the problems discussed above were it to adopt the proposals contained in Alternative A addressing the rates and timing for reimbursement of candidate travel on airplanes not normally operated for commercial passenger service, including government conveyances.

Alternative A allows a campaign traveler using an airplane that is not normally operated for commercial passenger service to reimburse the service provider (whether the provider is an individual, corporation, labor union, or governmental entity) at a first-class rate

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<sup>5</sup> As elaborated on in a press release from a current U.S. Senator, "Organizations like corporations or unions are prohibited from giving money directly from their treasuries to a candidate's campaign committee . . . Only their PACs are allowed to make such contributions. Often times, however, candidates find ways around this law by riding on a corporate jet . . . Under present law, a candidate need only reimburse the owner of a corporate jet for the value [sic] a first-class ticket on a commercial airline for a comparable flight. 'This practice should be changed by requiring candidates to pay fair market value for flying on corporate jets,' Johnson said." See U.S. Senator Tim Johnson, Press Release, Johnson to Fight Candidates' Misuse of Campaign Funds and Private Jets, Oct. 6, 1997, available at <http://www.senate.gov/~johnson/releases/10-6-97campfin.html>. Likewise, in an April 1998 *USA Today* article, a House Member (now no longer in office) stated that getting what amounts to a charter flight for the price of a first-class ticket amounts to a corporate gift. See Jim Drinkard, *Lobbying at 30,000 Feet: Getting a Ride Legal, But Many Say It's Not Right*, *USA Today*, Apr. 16, 1998, available at 1998 WL 5721879. Another House Member has indicated that the current system allows corporations to make "stealth contributions" by providing a "direct benefit" in excess of what is publicly reported. See Sandra Torry, *Tobacco's Influence Takes Flight in GOP; Hill Report Examines Subsidized Trips*, *Wash. Post.*, Jul. 20, 1998, at A1. The previously cited *Air Tobacco* report of the Minority Staff of the House Committee on Government Reform and Oversight notes that "[t]he actual cost of chartering the jet . . . can be many times the cost of the first-class air travel," with the result being a "de facto corporate contribution." <http://www.tobacco.org/Documents/airtobaccoof/airtobacco.html>.

whether or not the destination airport is served by regularly scheduled commercial airline service. If the airport is serviced by regularly scheduled coach commercial service but not regularly scheduled first-class commercial service, reimbursement is permitted at the lowest unrestricted and non-discounted coach rate.

Alternative A expands the flaws of the current system in a number of respects:

- While the current system at least requires (to avoid an in-kind contribution) reimbursement at the normal and usual rate – generally the equivalent charter rate for the means of transportation employed – when a candidate has traveled on a private, non-commercial airplane owned or leased by an *individual*, Alternative A would allow reimbursement at a first-class rate or even a coach rate in such instances;
- While the current system requires reimbursement at the *first-class rate* when a candidate has traveled to a city served by regularly scheduled commercial service on a private, non-commercial airplane owned or leased by a *corporation or union*, Alternative A would lower the reimbursement rate even further by allowing reimbursement to the corporation or union at the lowest unrestricted and non-discounted *coach* commercial air fare in certain instances;
- While the current system at least requires reimbursement at a *charter rate* when a candidate has traveled on private, non-commercial airplane (including a government airplane) to a city not served by regularly scheduled commercial service, Alternative A would eliminate any prospect of reimbursement at the charter rate (by indicating that if the destination airport is not served by regularly scheduled commercial airline service, reimbursement would be required equivalent to first-class airfare to the airport with regularly scheduled first-class commercial service that is *closest to* the airport actually used).

In short, the unreasonable discounts for candidate campaign travel on private planes not offered for commercial use permitted under the current system would be significantly expanded under Alternative A. The Commission should not pursue this approach.

Alternative B indicates that a campaign traveler using an airplane not normally operated for commercial passenger service must reimburse the cost of a first-class ticket from the point of departure to the destination where (i) the cities have regularly scheduled first-class air service, and (ii) the flight was “previously or regularly scheduled” by the owner or operator of the plane.

Moreover, if the cities between which the campaign traveler is flying have (i) regularly scheduled coach air service (but not first-class service), and (ii) the flight was “previously or regularly scheduled” by the owner or operator of the plane, reimbursement must occur at the coach rate.

Finally, if either (i) the cities between which the campaign traveler is flying do not have regularly scheduled commercial air service, or (ii) the flight was scheduled “specifically for use of a campaign traveler,” then the candidate must reimburse the service provider the costs of chartering the same or a similar airplane for that flight.

Alternative B unfortunately expands the discounts provided under the current system in one respect. Under current law, if a corporation or union provides private, non-commercial air service to a candidate to a destination served by regularly scheduled commercial air service, the candidate must pay the equivalent of first-class air fare. Under Alternative B, if the only regularly scheduled commercial air service between the departure and destination points is coach service, then the candidate need only reimburse the corporation or union at the coach rate.

At the same time, Alternative B would at least on its face improve the current system in another respect.<sup>6</sup> Its terms would seem to more often require reimbursement at a charter rate, by mandating charter rate reimbursement when a flight was “scheduled specifically for the use of a campaign traveler” (whether or not the route was regularly served by commercial air service). However, we believe that the “scheduled specifically for the use of a campaign traveler” standard will prove so difficult to implement and enforce that, as a practical matter, the charter rate would not be paid in circumstances where a private flight was in fact scheduled to accommodate the candidate. Additionally, this standard does not account for the fact that first-class or coach fare may undervalue the travel even where the flight was truly not “scheduled specifically for a campaign traveler.” As noted previously, there are benefits of private air travel beyond facilitating scheduling and attendance at political events – including added comfort and convenience, a higher level of privacy, potentially enjoying direct service as opposed to travel with multiple stops, and avoiding other forms of aggravation often accompanying commercial air travel.<sup>7</sup>

In contrast to Alternatives A and B, Alternative C would establish a uniform rule requiring reimbursement for candidate campaign use of an airplane not normally operated for commercial passenger service at the usual commercial charter rate for an airplane sufficient in size to accommodate the campaign-related travelers, including the candidate, news media, and security personnel. In the Notice of Proposed Rulemaking, the Commission indicated that this approach “could provide a more accurate reflection of the true value of the use of a private or governmental airplane by campaign travelers.” 68 Fed. Reg. 50,481, 50,485 (Aug. 21, 2003).

We strongly support Alternative C’s uniform reliance on a charter rate for reimbursement purposes, because a charter rate does better approximate the true value of the use of the private or governmental airplane by campaign travelers. However, we suggest that the charter rate to be used be based on, as proposed under Alternative B, the cost of chartering the same or a similar airplane for the flight in question. Alternative C

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<sup>6</sup> Furthermore, unlike Alternative A, Alternative B would at least retain the current system’s insistence on reimbursement at a charter rate when the route was not served by regularly scheduled commercial air service.

<sup>7</sup> See *supra* notes 2 and 3.

currently uses a different calculation for determining the reimbursement, based on “the usual commercial charter rate for an airplane sufficient in size to accommodate the campaign-related travelers, including the candidate, news media, and security personnel.” This approach may improperly allow paying the charter cost for a lesser quality of airplane than is actually used. To the extent there are special circumstances that would render this approach unworkable, the Commission could provide carefully confined, specific guidance as to the charter rate calculation to be used only in those special circumstances.

Thank you in advance for your consideration of these comments. We are not requesting that the Commission hold a hearing on these proposed rules on October 1, 2003. However, if the Commission does decide to hold such a hearing, I would appreciate having the opportunity to testify on behalf of the Campaign Legal Center.

Sincerely,

*/s/ Glen Shor*

Glen Shor  
FEC Program Director  
The Campaign Legal Center  
1101 Connecticut Avenue, NW; Suite 330  
Washington, D.C. 20036  
(202) 736-2200, ext. 15  
[gshor@campaignlegalcenter.org](mailto:gshor@campaignlegalcenter.org)