

FEC Regulations for Carriage of Federal Political Candidates

Disclaimer: This resource provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. You are urged to consult your attorney or other advisor concerning your own situation.

The Federal Aviation Regulations (“FARs”) allow a FAR Part 91 non-commercial operator to carry federal 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 reimbursement not to exceed the rates required by the Federal Election Commission (the “FEC”) under 11 C.F.R. § 100.93 (the “FEC Regulations”).¹ Unlike federal candidates, state and local candidates are governed by state and local laws, not necessarily the FEC Regulations. This resource will focus on the FEC Regulations, but it is important that you become knowledgeable of federal, state, and local laws governing in-kind contributions to campaigns as well, as such laws may be implicated in the course of the carriage of federal candidates. This article will explore and summarize the FEC Regulations.

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.² 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 includes candidates, campaign members, security personnel, media members, authorized committees, and leadership of Political Action Committees for such candidates. The FEC 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 Regulations lay out the method for calculating the reimbursement rate for allowable non-commercial air travel.

The FEC Regulations only apply to candidates seeking federal office, not already elected federal officials. Generally, elected federal officials are prohibited from using non-commercial aircraft. Therefore, aircraft operators should 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 Non-Commercial 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 non-commercial aircraft travel. Furthermore, due to limitations on in-kind contributions, the ban on using campaign funds essentially prohibits non-commercial aircraft travel for House candidates. As noted below, 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 non-commercial air travel provided the aircraft operators are reimbursed according to certain guidelines.

¹ The FEC Regulations created a conflict with the FARs that was resolved by the publication of FAR 91.321 in 1978. Specifically, FAR 91.321 “was issued to resolve a conflict that was created when compliance with the regulations of the FEC resulted in a violation of the FAR.” Carriage of Candidates in Federal Elections, 45 FR 43160-02; Department of Transportation (D.O.T.) Federal Aviation Administration, 2011 WL 6141472, at *1.

² Codified at 2 U.S.C. § 1601 *et seq.*

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.³

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 usual 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 Candidate A travels with Candidate B and Candidate B's campaign manager on a non-commercial aircraft, then Candidate A is responsible for one-third and Candidate B is responsible for two-thirds of the normal and usual charter rate or rental charge on a comparable aircraft of comparable size. The FEC Regulations also provide that when determining the comparable size of the aircraft, the federal candidate is not required to include government mandated security personnel and equipment. Further, the FEC Regulations also allow media and government personnel who accompany a candidate to reimburse the aircraft operator directly.

The FEC Regulations provide two exceptions to the standard reimbursement rate. The exceptions are non-commercial air travel on government- and candidate-owned aircraft; these exceptions apply to House candidates.

Failure to obtain the entire reimbursement can be considered as an illegal campaign contribution.⁴ 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.

For IRS purposes, the carriage of candidates by a non-commercial 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 is subject to the Federal Excise Tax Note: The operator 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.

Government-Owned Aircraft Exception

Federal candidates that travel on non-commercial 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.⁵ The Private Traveler rate is a rate specified by the governmental entity for each campaign traveler.

Candidate-Owned Aircraft Exceptions

The second exception is for travel on an aircraft owned by the federal candidate or the candidate's immediate family member.⁶ 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 non-commercial 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, as specified above. Prior to each flight on an aircraft of which the candidate owns a proportional ownership interest, the candidate's committee must 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.

³ 11 C.F.R. § 100.93(c)(1)

⁴ *RBG Bush Planes, LLC v. Alaska Pub. Offices Comm'n*, 361 P.3d 886, 898 (Alaska 2015)

⁵ 11 C.F.R. § 100.93(e)

⁶ 11 C.F.R. § 100.93(g)

Because House candidates are prohibited from expending campaign funds on non-commercial 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 the 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 non-commercial air travel.⁷ 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 (7) 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.

FARs and State and Local Laws

In addition to the FEC Regulations, candidates and aircraft operators must satisfy the regulations of the FAA and any applicable state or local laws. The FARs allow an aircraft operator of non-commercial air travel to carry federal candidates under FAR 91.321 so long as the aircraft operator does not hold an air carrier certificate. Further, the FAA requires that the reimbursement does not exceed the rates required by the FEC Regulations. While the FEC Regulations preempt certain state and local laws "with respect to travel in connection with a federal election,"⁸ 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 consult appropriate counsel before providing or accepting non-commercial air travel in connection with state and local elections.

Conclusion

The FEC Regulations restrict, and at times prohibit, federal candidates from traveling on non-commercial aircraft. Additionally, for allowable non-commercial air travel, the FEC Regulations provide reimbursement guidelines, which federal candidates must follow to avoid in-kind contributions from aircraft operators. This article serves as a general and broad overview of the FEC Regulations and should not be construed as legal advice or opinion. 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 non-commercial air travel in connection with federal elections.

7 11 C.F.R. § 100.93(j)

8 11 C.F.R. § 100.93(g)