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Commissioners
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Travel NPRM

Dear Commissioners:

On behalf of the law firm Perkins, Coie LLP, I am submitting the following comments on the changes that the Commission is proposing to make to its rules regarding candidate payment for travel on government and private aircraft. Perkins, Coie represents a large number of candidates and political committees that would be impacted by these rules. As a general matter, the proposed changes in the rules would provide for a more uniform and simpler payment scheme. Notwithstanding the specific concerns raised below, the proposed rules would be a significant improvement on the current rules.

One of our primary concerns is that the proposed rules are limited, probably unintentionally, to candidate and candidate related travel. There is no apparent reason that payment for travel on behalf of political committees including national party committees should not be treated in the same manner as candidate travel. Unless this aspect of the rule is addressed, unnecessary doubt will cloud the use of noncommercial transportation by political committee employees and staff. If the Commission does not intend different treatment, the Commission should change the proposed rules to expressly cover all regulated travel.

Below are our comments on the specific rules, set forth in the order in which the rules are presented in the Notice of Proposed Rulemaking.

I. Payment for Travel by Airplane and Other Means of Transportation

A. Proposed replacement of 11 CFR 114.9(e) with proposed 11 CFR 100.93

The proposed broadening of the existing rule to cover aircraft and other means of conveyance owned by persons other than corporations and labor organizations is a sensible extension of the current rule. Since the current rule was promulgated, the forms of ownership in which assets including aircraft are held have multiplied. As a consequence, the issue of whether a candidate's use of private aircraft is a contribution to the candidate often comes up outside the context of corporate or union ownership. The emphasis of the proposed regulation on providing general rules for determining when a provider of transportation services is deemed to have made a contribution is well placed.

B. Proposed 11 CFR 100.93(a) Scope and Definitions

1. Proposed paragraph (a) (1) Scope

In analyzing whether a person providing transportation services to a candidate or a political committee has made a contribution, the threshold issue is whether the person providing the service is in the business of providing such service. The Commission proposes to change the focus for making this determination from an examination of whether the person providing the travel is licensed to offer commercial service to an examination of whether the airplane or other conveyance is normally employed in the provision of commercial passenger service. The proposed rule would eliminate the need for a traveler to investigate the license under which the person providing the travel is operating. Such investigations are often unsatisfactory and the results can be misunderstood resulting in inadvertent violations of the law. Clarifying the law in this regard will result in better compliance.

The Commission should reconsider one aspect of the proposed change. The rule should focus on whether the person providing the service normally provides the service as a commercial service. The rule should not turn on whether a particular airplane is normally operated for commercial passenger service. When a commercial provider of transportation services leases an airplane specifically for the purpose of providing services to a campaign, the Commission undoubtedly intends to treat the commercial provider the same as if it owned the airplane. The fact that the airplane had never previously been used as a commercial aircraft would be irrelevant.

The proposed rule should also be clarified by adding at the end of the first sentence of proposed 11 CFR 100.93 (a)(1) "but shall not include any service that the provider offers as a common carrier pursuant to Federal Aviation Administration certification." This would be a shorthand means of incorporating the Commission's explanation of the rule into the rule itself.

2. Proposed Paragraph (a)(2) Definitions

The Commission should define "service provider" to include persons other than owners and lessors. A corporation may make its aircraft available to persons outside the corporation, for example a major client or independent contractor. In such instances, the service provider might not be the owner but the person who has been given the right to use the aircraft. This may be a relatively rare occurrence but since it could be easily addressed in the regulation, the Commission should consider amending the proposed rule to cover this possibility. Failure to comply with the regulation in such a case would be violation by person actually providing the service rather than the innocent corporate owner. Where multiple persons (e.g., different corporations) share access to an airplane, the Commission should make clear that it is the person who makes the airplane available to the candidate or committee that is subject to the rule.

C. 11 CFR 100.93(b) General Rule

Under the proposed rule, any unpaid use of an aircraft is a contribution. If the service provider were a corporation or labor union, unpaid use would be a prohibited contribution. If the service provider were a person permitted to make contributions, unpaid use would be an in-kind contribution subject to the general rules governing in-kind contributions. Consequently, as the Commission notes, if the candidate or political committee that has been provided the service wants to treat any portion of its use of an airplane as an in-kind contribution, it will need to inquire into the legal status of the service provider. The Commission asks whether there is an alternative to requiring this inquiry. Notwithstanding the duty that it creates, the rule is sound and consistent with its treatment of other forms of in-kind contributions.

D. Proposed 11 CFR 100.93(c) Travel by Airplane

The Commission seeks comments on whether it should include in the calculation of the required payment certain costs that may be included as separate billing items by

some charter services. Most notably are charges for "deadhead miles" and prepositioning of aircraft. Usually the rate quoted for a flight would include these charges.

The problem with attempting to craft a rule that would separately account for these items in the payment is the incredible complexity that would be introduced by the rule. Charges for these services even when provided by a commercial provider of common carrier service usually depend on the particulars of a trip. For example, whether commercial charter service charges for prepositioning often will turn on whether the company regularly provides service to and from the city in question. Calculating the payment based on where and how the airplane is going to be used before and after the trip would be exceedingly complex. The simplicity and clarity of the proposed rule would fall victim to the difficulty inherent in this calculation.

1. Alternative A: Payment based on first-class airfare

In the explaining this alternative, the Commission states that the proposed rule sets the payment at the "lowest non-discounted first-class airfare to the closest airport that has such service regardless of whether the actual destination airport is served by regularly scheduled commercial service." Despite this statement of intent, the actual language of the rule does something quite different. Proposed subsection (c)(2) clearly provides that the payment to an airport with regularly scheduled commercial service but not regularly scheduled first-class commercial airline service is "the lowest unrestricted and non-discounted coach commercial air fare." The proposed rule is better and more workable than the one suggested in the Commission explanation.

Rather than providing criticism of the language of the proposed rule, I will suggest an alternative that better reflects the Commission's stated intention. For travel between two airports currently served by regular commercial service, the payment should be the lowest unrestricted non-discounted first-class rate between the airports. If there were no first-class rate between the airports, then the rate would be the lowest unrestricted non-discounted rate coach rate between the airports. In the case of travel between two airports not served by regular commercial service, the payment should be the lowest unrestricted, non-discounted first class rate between any airports in the standard metropolitan statistical areas (SMSA) of the respective cities. Again if there is no regularly scheduled first-class commercial service between airports in the respective SMSAs, the rate should be the lowest unrestricted, non-discounted coach rate.

Devising a rule that covers service to or from an airport without regularly scheduled commercial service and that is outside a SMSA with regularly scheduled commercial service is difficult. If the new rule directs one to determine the closest airport to the one actually used, as the Commission proposes, then the rule must clarify how that airport is to be identified. For example, a candidate in Alaska might fly between two airports, neither of which has regularly scheduled commercial service. The nearest commercially served first-class airport to both airports might be Anchorage. Under the Commission proposal, how would one calculate the rate for this example? Similarly unanswered by the proposed regulation is how to calculate the rate for a multi-stop trip involving more than one airport without regularly scheduled service. Adopting a rule that would set the payment as the lowest first-class non-discounted between any two airports in the state or between the states of travel would have the benefit of simplicity and would be consistent with the general approach that I have suggested.

Modifying alternative A as suggested has the distinct advantage of determining the value of the service more objectively. It does not depend on whether the service provider has landing rights at a particular airport. A candidate or committee would calculate the payment based on an objective determination (i.e., the SMSA) of the desired destination. Whether the provider has secured landing rights at a particular airport would be not be a consideration in valuing the travel service. Alternative A so modified would provide a clear, easily enforced standard, where no published rate exists. Adopting either alternative B or C would go well beyond the stated purpose of the NPRM to provide a simple, uniform payment scheme for candidate use of private aircraft. Under either alternative, regulation would become more complicated and campaign travel would become more expensive, particularly travel to rural and remote areas. Both alternatives would require that candidates using private aircraft regularly reimburse the provider the equivalent of the charter rate for the use of the aircraft.

Both would reverse the Commission's longstanding policy, reflected in the current regulation, of allowing candidates to reimburse the service provider at the first-class rate for travel between cities with regularly scheduled commercial service. The Commission offers no justification for what would be a dramatic a change in its regulations. Congress was certainly aware of the Commission's travel regulation when it enacted the Bipartisan Campaign Reform Act. If this were an area of concern, one would certainly have expected Congress to have had addressed it. The Commission should hesitate before imposing additional costs on campaigns without clear congressional direction.

F. Proposed 11 CFR 100.93(d) Other Means of Transportation

This new rule would create a fixed deadline for the payment for travel by means other than aircraft. Under the rule, a political committee must pay within thirty days of receipt of the invoice but no more than sixty days following the date that the travel commenced. In the normal course of business, a committee should be able to comply with this rule. However, the rule should be when the travel ends; not when it commences. There are circumstances, however, not within its control in which a committee would have difficulty complying. A committee may not have received or may dispute an invoice. In the chaos of campaigns such instances are not infrequent. Scheduled travel is cancelled. Itineraries are rearranged.

A violation should not result where a committee has made a good faith effort to obtain or reasonably disputes an invoice. Requiring a committee to pay in such circumstances would undermine the committee's ability to resolve the matter in a fair and equitable manner. An exception to the rule should be crafted that recognizes and absolves committees in such instances.

G. Proposed 11 CFR 100.93(c) Government Conveyances.

This proposed rule would value travel on government conveyance and require payment in same manner as travel on private conveyance. Creating a uniform rule for travel on commercial and government conveyance seems fair and appropriate. The rule fixing the time in which payment is required should be subject to the same exception as proposed above. In fact, government invoicing and dispute procedures are often fixed and inflexible. Consequently, more time may often be necessary to properly resolve a matter.

H. Proposed 11 CFR 100.93(f) Reporting

Under proposed paragraph (f)(2) would require a political committee to report the actual date of travel in the "purpose of disbursement." The Commission understandably wants this information to provide a better audit trail. For the purposes of public disclosure, this information is of minimal value. Imposing this additional reporting obligation on committees is unwarranted given the difficulty that treasurer's will have in complying. Confusion often arises between when travel is scheduled and when it is undertaken. Because of the discrepancies that will inevitably arise between the reported date and the actual date of travel, the auditor's task is unlikely be made easier but is likely

to made more complicated. Significant violations of law in this area are unlikely to be discovered in this manner. Someone intent on violating the law simply would not report the travel. Therefore I would strongly urge the Commission not to impose this unnecessary reporting obligation on committees.

I. Proposed 11 CFR 100.93(g) Recordkeeping

The Commission proposes to require candidates and political committees to maintain the same travel records that publicly financed Presidential candidates are currently required to maintain. The question is whether the same level of detail should be required of political committees and candidates that are not relying on public resources. Given the "mom and pop" nature of many political committees, recordkeeping with this level of detail seems necessary. Absent some record of widespread abuse, imposing a new recordkeeping burden is unwarranted.

Very truly yours,

Marc E. Elias

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