

**Flying Your Favorite Federal (and State)
Candidates and Elected Officials – Beware of Potential Pitfalls**

BY CHRISTOPHER B. YOUNGER

Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C.

It may be hard to believe, but the next presidential election is a mere twelve months away! Federal and state election campaigns are moving into high gear in anticipation of upcoming primary elections this spring and the general election next fall. Perhaps you have considered giving your favorite candidate's campaign a boost by providing him or her with the use of your private aircraft in connection with campaign travel.

However, before doing so, it is important to note that many governmental entities, including the FAA, the Federal Election Commission, the IRS, the U.S. Senate, the U.S. House of Representatives and the state counterparts to these agencies and legislative bodies, have enacted rules and regulations governing many aspects of providing air transportation to candidates and elected officials. Several of the general aspects of these rules and regulations are described below, although this article by no means contains an exhaustive list of the rules and regulations that must be followed when providing air transportation to such individuals.

The failure to comply with these restrictions can have unintended and often serious consequences for both the individual candidates and, more importantly, business aircraft owners themselves. Therefore, it is imperative that business aircraft owners consider such issues before providing their favorite candidates with transportation in privately owned business aircraft.

FEDERAL OFFICIALS

FEC Regulations

Under the Federal Campaign Act of 1971 (FECA), a corporation (including an LLC) may not make any contribution (including an in kind contribution) to a candidate for election, or reelection, to a federal office (i.e., Senate or House of Representatives). Thus, a corporation may not permit such a candidate to use its airplane at no charge or at a discount.

FEC regulations require that candidates, or individuals traveling on their behalf, reimburse any non-commercial operator for any air travel provided by such non-commercial operator within seven days of the date of the date of such travel. The candidate must pay the lowest unrestricted, non-discounted first class air fare between cities with regularly scheduled air service, the lowest unrestricted, non-discounted coach air fare between cities with regularly scheduled air service but without first class service, or, for travel to more remote points, the usual charter rate. One important worth noting is

that, if an aircraft is listed on FAR Part 121 or Part 135 operations specifications, the candidate must pay the applicable charter rate for the flight regardless of whether commercial service is available between the departure and arrival cities.

The FEC has defined all elected officials as candidates, and defined non-elected individuals as candidates if they have received more than \$5,000 in contributions, or made election related expenditures in excess of \$5,000. The applicable FEC regulations are found at 11 CFR 114.9 (e)(1). It is important that payment be made in advance of the flight, otherwise, the flight could be considered a campaign contribution and violate Federal Election law.

If the reimbursements described above are not timely made, such a violation constitutes an excessive and unlawful contribution by the transportation service provider to the extent that it exceeds an aggregate \$1,000 by a specific person or an aggregate \$2,000 by a specific person to a political committee in any one year.

FAA Regulations

The FAA's general policy is that no payment is permitted for flights operated under Part 91 of the Federal Aviation Regulations (FAR). However, there are certain limited and very specific exceptions to this policy. In recognition of the above described FEC requirements, one of these exceptions is set forth in FAR Section 91.321, which outlines the FAA's rules regarding carriage of federal, state or local elected officials or candidates under FAR Part 91.

The FAA allows non-commercial aircraft operators to receive payment for transporting elected officials if such flights are operated under FAR Part 91, and the payment received does not exceed that required under the FEC regulations (discussed below). FAR Part 91 regulations are not applicable to carriage of elected officials by charter or other commercial operators. Since payments made to FAR Part 91 operators will likely gain the attention of the IRS, it is often preferable in situations where an operator can transport elected officials under FAR Part 135 that the operator do so.

FAR Section 91.321 covers only candidates for elected office. Therefore, appointed officials, such as Cabinet Secretaries, are not covered *unless* they are traveling as a representative of a candidate. This means that such officials may not reimburse a business aircraft owner for travel even if required to do so by government ethics rules. For this reason, such officials may not usually be transported on business aircraft unless the travel is permitted without reimbursement because its purpose is to attend a meeting or other function connected with official duties.

IRS Regulations

The IRS views the payments by elected officials and candidates as described above as commercial air transportation notwithstanding the FAA's Part 91 regulations permitting such transportation in a noncommercial category for FAA purposes. As a result, the IRS

holds that payment by elected officials to Part 91 operators constitutes commercial air transportation and is subject to Federal Air Transportation Excise Tax and Federal “ticket tax.”

U.S. SENATE AND HOUSE RULES

Except as described below, the Federal Election Commission rules described above are applicable to Members of Congress.

Senate

The U.S. Senate generally prohibits private funds to defray official expenses, unless the value of the gift (aircraft use) is no more than \$50 and aggregates to no more than \$100 per year per individual. The valuation of flights on corporate aircraft is similar under the Senate Rules as the FEC rules, the only change is that when first-class service is not available between two points, the Senator need only reimburse at the standard coach rate.

House of Representatives

Recent changes to Section XXIII –Code of Official Conduct prohibit members of the U.S. House of Representatives from using official, personal, or campaign funds to pay for the use of privately owned airplanes. Members are still able to charter commercially available aircraft. Due to these changes, members of the U.S. House of Representatives are now prohibited from using their “personal funds, official funds, or campaign funds for a flight on a non-governmental airplane that is not licensed by the FAA to operate for compensation or hire”(i.e., charter aircraft or airline).

STATE AND LOCAL OFFICIALS

In most states, providers of non-commercial air transportation for state and local officials must follow the FEC regulations. However, the FAA does not require Part 91 operators to accept payment as indicated by the FEC. The IRS rules applicable to payment for air transportation would still apply. In order to avoid running afoul of either FEC or FAA regulations, non-commercial operators should avoid transporting state or local officials under Part 91 certificates.

INSURANCE

Insurance issues may also arise for FAR Part 91 operators who transport candidates for federal or state office. As a result, FAR Part 91 operators need to examine their insurance policies closely, to ensure that by accepting payment for transportation they are not violating their the terms of their insurance policies.

CONCLUSION

The foregoing description of the rules and regulations governing the provision of private air travel to candidates and elected officials is extensive. However, this article by no means contains an exhaustive list of the rules and regulations that must be followed when providing private air transportation to such individuals. If you are considering the provision of these services to a candidate or elected official, it would be prudent to seek the guidance of experienced aviation and tax counsel prior to doing so to ensure that you comply with the complex and myriad regulations governing the provision of such services.

Christopher B. Younger is a member of the Business Aircraft Group at Galland, Kharasch, Greenberg Fellman & Swirsky, P.C. He is a tax and FAA specialist concentrating in the areas of corporate aircraft transactions and aviation taxation. The firm's business aircraft practice group provides full-service tax and regulatory planning and counseling services to corporate aircraft owners, operators and managers. The group's services include Section 1031 tax-free exchanges, federal tax and regulatory planning, state sales and use tax planning, and preparation and negotiation of transactional documents commonly used in the business aviation industry, including aircraft purchase agreements, leases, joint-ownership and joint-use agreements, management and charter agreements, and fractional program documents.

Mr. Younger can be reached at the firm's Washington, DC office, 1054 31st Street, NW, Suite 200, Washington, DC 20007, telephone: (202) 342-5268, facsimile: (202) 342-5251, e-mail: cyounger@gkglaw.com.

IRS CIRCULAR 230 DISCLOSURE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.