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Part III

Federal Election Commission

11 CFR Parts 100, 104, and 113
Contribution and Expenditure Limitations and Prohibitions: Personal Use of Campaign Funds; Final Rule

FEDERAL ELECTION COMMISSION

[Notice 1995–5]

11 CFR Parts 100, 104 and 113

Expenditures; Reports by Political Committees; Personal Use of Campaign Funds

AGENCY: Federal Election Commission.

ACTION: Final rules; transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission has revised its regulations governing the personal use of campaign funds. These regulations implement portions of the Federal Election Campaign Act of 1971, as amended. The new rules insert a definition of personal use into the Commission's regulations. The rules also amend the definition of expenditure and the reporting requirements for authorized committees in the current regulations.

EFFECTIVE DATES: Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d). A document announcing the effective date will be published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 219–3690 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission is today publishing the final text of revisions to its regulations at 11 CFR parts 100, 104 and 113. These revisions implement section 439a of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* ["FECA" or "the Act"]. Section 439a states that no amounts received by a candidate as contributions that are in excess of any amount necessary to defray his or her expenditures may be converted by any person to any personal use, other than to defray and ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office. The new rules insert a definition of personal use into Part 113 of the current regulations. The rules also amend the reporting requirements for authorized committees at 11 CFR 104.3, and the definition of expenditure at 11 CFR 100.8.

The final rules published today are the result of an extended rulemaking process. In August of 1993, the Commission published a Notice of Proposed Rulemaking ["NPRM"] seeking comment on proposed rules governing the conversion of campaign funds to personal use. 58 FR 45463 (August 30, 1993). The NPRM contained a proposed general definition of personal use, several enumerated examples, and other provisions for the administration of the personal use prohibition. The Commission subsequently granted a request for a 45 day extension of the comment period. 58 FR 52040 (Oct. 6, 1993). The Commission received 32 comments from 31 commenters in response to the NPRM. The Commission also held a public hearing on January 12, 1994, at which it heard testimony from five witnesses on the proposed rules.

After reviewing the comments received and the testimony given, Commission staff prepared draft final rules, which were considered at an open meeting held on May 19, 1994. The Commission also considered at that time several requests it had received for an additional opportunity to comment on the rules before they were finally promulgated. The Commission decided to seek additional comment on the rules, and published a Request for Additional Comments on August 17, 1994 ["RAC"]. 59 FR 42183 (August 17, 1994). The RAC contained a revised set of draft rules, including a revised definition of personal use that differed significantly from the general definition set out in the 1993 NPRM. The Commission received 31 comments from 34 commenters in response to the Request.

The comments received provided valuable information that serves as the basis for the final rules published today. Elements of both sets of draft rules have been incorporated into the final rules.

Section 438(d) of Title 2, United States Code requires that any rules or regulations prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on February 3, 1995.

Explanation and Justification

The 1979 amendments to the Federal Election Campaign Act, Pub. L. No. 96–187, 93 Stat. 1339, 1366–67, amended 2 U.S.C. § 439a to prohibit the use of campaign funds by any person for personal use, other than an individual serving as a Member of Congress on January 8, 1980. Under this provision, the Commission must determine whether a disbursement of campaign funds is a campaign expenditure, a permissible expense connected to the duties of a holder of Federal office, or a conversion to personal use. The Commission undertook this rulemaking in an effort to provide additional guidance on these issues to the regulated community.

Some of the comments received contained general observations on the Commission's effort to promulgate personal use rules. Many commenters expressed general support for the Commission's efforts, but other commenters objected to Commission action in this area. One commenter expressed doubt that the Commission would be able to regulate personal use with these kinds of rules. A number of commenters argued that this entire area should be left to Congress. Two of these commenters objected to the rulemaking on the grounds that it is an expansion of Commission authority that is not mandated by Congressional action, one saying Congressional inaction does not confer jurisdiction on the Commission to take action.

However, this rulemaking is clearly within the Commission's jurisdiction and authority. Section 438(a)(8) of Title 2 states that "[t]he Commission shall prescribe rules, regulations and forms to carry out the provisions of [the Federal Election Campaign Act] * * *." This rulemaking is an effort by the Commission to carry out the provisions of section 439a by more clearly defining personal use. Thus, it is precisely the kind of rulemaking contemplated by Congress when it enacted section 438(a)(8).

In addition, this rulemaking is prompted, in large part, by more recent Congressional action, specifically, the Ethics Reform Act of 1989, Pub. L. No. 101–194, 103 Stat. 1716. Section 504 of the Ethics Reform Act repealed a "grandfather" provision that Congress included in section 439a when it enacted the personal use prohibition in 1979. This grandfather provision exempted any person who was a "Senator or Representative in, or Delegate or Resident Commissioner to, the Congress" on January 8, 1980 from the personal use prohibition. By repealing the grandfather provision, Section 504 of the Ethics Reform Act limited conversions to personal use by grandfathered Members and former Members to the unobligated balance in their campaign accounts on November 30, 1989. It also completely prohibited conversions of campaign funds by anyone serving in the 103rd or any later Congress. Thus, any grandfathered Members who returned to Congress in January, 1993 gave up the right to convert funds to personal use.

Many of the enforcement actions and advisory opinions the Commission

addressed before the start of the 103rd Congress involved persons who, because they were Members of Congress on January 8, 1980, were eligible to convert campaign funds to personal use. Consequently, the question of whether a particular disbursement was a legitimate campaign expenditure or a conversion of campaign funds to personal use may not have been fully explored during that period. A few former Members of Congress may still be covered by the grandfather provision and so continue to be eligible to convert campaign funds to personal use. These former Members are not affected by the new rules published today.

However, the Commission expects that, in the future, most of the situations it will address will involve persons who are not eligible to convert funds to personal use. This increases the need for a clear distinction between permissible uses of campaign funds and impermissible conversions to personal use. In an effort to address this need, the Commission initiated this rulemaking. The Commission is hopeful that the promulgation of these rules will provide much needed guidance to the regulated community.

This Explanation and Justification departs from the Commission's usual practice of discussing the provisions of the final rules in numerical order. The amendments to Parts 100 and 104 are an outgrowth of the new rules inserted in part 113. Consequently, part 113 will be discussed first, in order to place the amendments to parts 100 and 104 in the proper context.

Part 113—Excess Campaign Funds and Funds Donated to Support Federal Officeholder Activities (2 U.S.C. 439a)

Section 113.1 Definitions (2 U.S.C. 439a)

The final rules insert a definition of personal use into § 113.1, which contains the definitions that apply to Part 113. Part 113 lists the permissible uses of excess campaign funds and states that excess funds cannot be converted to personal use. Under § 113.1(e), candidates can determine that a portion of their campaign funds are excess campaign funds. The final rules treat the use of campaign funds for personal use as a determination by the candidate that the funds used are excess campaign funds. The personal use definition is inserted as section 113.1(g).

Section 113.1(g) contains a general definition of personal use. Section 113.1(g)(1) expands on this general definition. Paragraph (g)(1)(i) contains a list of expenses that are *per se* personal use. Paragraph (g)(1)(ii) explains how the Commission will analyze situations not covered by the list of expenses in paragraph (g)(1)(i). The remaining provisions of § 113.1(g) set out specific exclusions from the definition of personal use, explain how the definition interacts with certain House and Senate rules, and describe the circumstances under which payments for personal use expenses by third parties will be considered contributions.

Section 113.1(g) General Definition

The general definition of personal use is set out in new paragraph 113.1(g). Personal use is any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or responsibilities as a Federal officeholder.

Under this definition, expenses that would be incurred even if the candidate was not a candidate or officeholder are treated as personal rather than campaign or officeholder related. This approach is based on Advisory Opinions 1980–138 and 1981–2, in which the Commission said that "expenses which would exist regardless of an individual's election to Federal office are not 'incidental' and may not be paid from campaign funds." Advisory Opinion 1981–2. Since not all cases that raise personal use questions can be specifically addressed in a rule, this standard provides a guideline for the Commission and the regulated community to use in determining whether a particular expense is permissible or prohibited.

The final rules supersede Advisory Opinion 1976–17, in which the Commission said that "any disbursements made and reported by the campaign as expenditures will be deemed to be for the purpose of influencing the candidate's election." A disbursement for campaign funds will not be deemed to be for the purpose of influencing an election if the disbursement is for an expense that is considered a personal use under these rules.

The rules supersede Advisory Opinion 1980–49, in which the Commission indicated that section 439a allows a campaign to pay the "personal living expenses" of the candidate. The use of campaign funds to pay the personal living expenses of the candidate is a prohibited personal use under these rules. Similarly, the rules supersede Advisory Opinions 1982–64 and 1976–53, to the extent that they allowed the use of campaign funds for living expenses incurred during the campaign. However, the rules do not prohibit the use of campaign funds for campaign or officeholder related meal expenses or subsistence expenses incurred during campaign or officeholder related travel. Generally, these uses are permissible under §§ 113.1(g)(1)(ii) (B) and (C). These sections will be discussed in detail below.

In approving the irrespective definition for inclusion in the final rules, the Commission returned to the definition set out in the 1993 NPRM. The Commission had proposed an alternative definition in the August 1994 Request for Additional Comments. Under the alternative definition, personal use would have been any use of funds that confers a benefit on a present or former candidate or a member of the candidate's family that is not primarily related to the candidate's campaign or the ordinary and necessary duties of a holder of Federal office. The Commission received numerous comments on both of these definitions.

Many commenters expressed strong support for the irrespective definition contained in the final rules. These commenters said the alternative definition is vague and would force the Commission to engage in piecemeal decisionmaking. Thus, the commenters said, the alternative definition would be difficult to enforce, and would not curtail any of the abuses taking place under current law. Consequently, the alternative version would not be an improvement over the current situation.

In contrast, the commenters who preferred the alternative version argued that it uses more established and well understood principles, and thus would reduce the likelihood of conflicts with other laws. They also said it more closely tracts the statute and more closely serves the purposes of the Ethics Reform Act of 1989, Pub. L. No. 101–194, 103 Stat. 1716 (1989). Two commenters criticized the irrespective definition, saying it does not provide enough guidance and leaves too much room for regulatory interpretation. These commenters said the alternative version would be flexible enough to accommodate a wide range of political and campaign activity, and would preserve the discretion recognized in the Commission's previous advisory opinions.

The irrespective definition is preferable to the alternative version because determining whether an expense would exist irrespective of candidacy can be done more objectively than determining whether an expense is primarily related to the candidacy. If campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an

officeholder, that use is not personal use. However, if the obligation would exist even in the absence of the candidacy or even if the officeholder were not in office, then the use of funds for that obligation generally would be personal use.

In contrast, determining whether an expense is primarily related to a campaign or the duties of an officeholder, or instead is primarily related to some other activity, would force the Commission to draw conclusions as to which relationship is more direct or significant. The Commission has been reluctant to make these kinds of subjective determinations in the past. Moreover, any rule that requires these kinds of determinations can result in more *ad hoc* decisionmaking. The Commission initiated this rulemaking in order to reduce piecemeal resolution of personal use issues, and to provide more prospective guidance to the regulated community as to the kinds of uses that will be considered personal use. The Commission has concluded that the irrespective definition will more successfully achieve these goals.

The general definition of personal use originally proposed by the Commission in the 1993 NPRM applied to any use of campaign funds, regardless of whether the use benefited the candidate, a family member, a campaign employee or an unrelated party. However, under the revised draft rules set out in the RAC, the general definition would have been more limited. This definition would have covered only those uses of campaign funds that benefit the candidate or members of the candidate's family.

The final rules return to the original approach because this approach is more consistent with the FECA. Section 439a states that no campaign funds "may be converted by any person to any personal use." Thus, under the final rules, any use of campaign funds that would exist irrespective of the campaign or the duties of a Federal officeholder is personal use, regardless of whether the beneficiary is the candidate, a family member of the candidate, or some other person.

Paragraph (g)(1)(i)

Paragraph (g)(1)(i) of the final rules contains a list of expenses that are considered personal use. The list includes household food items, funeral expenses, clothing, tuition payments, mortgage, rent and utility payments, entertainment expenses, club dues, and salary payments to family members. The rule assumes that, in the indicated circumstances, these expenses would exist irrespective of the candidate's campaign or duties as a Federal officerholder. Therefore, the rule treats the use of campaign funds for these expenses as *per se* personal use.

In adopting a *per se* list, the Commission rejected the alternative approach set out in the RAC. Under the alternative approach, the expenses on the list were not presumed to fall within the general definition of personal use. Instead, they were merely examples of expenses to which the "primarily related" standard would then be applied on a case by case basis.

Most of the commenters that addressed this issue preferred the list of *per se* personal uses that has been incorporated into the final rules. These commenters characterized the alternative version as a return to case by case review that would not provide any useful guidance to the regulated community and would not make it any easier to enforce the personal use prohibition. These commenters urged the Commission to use the *per se* approach and write whatever exceptions are necessary into the specific provisions of the list. The Commission used this approach in drafting the final rules.

However, two commenters went a step further. They urged the Commission to limit the rule to a list of specific uses that would be personal use, and eliminate the general definition of personal use that would apply to other situations. However, the Commission decided not to adopt this approach. It is doubtful that the agency could draft a complete list of the kinds of uses that raise personal use issues under section 439a. In addition, the Commission has identified some situations that warrant allocation between permissible and personal expenses. *See* section 5 of the discussion of paragraph (g)(1)(ii), below. Therefore, the rules would be incomplete without a general definition that could be applied to other situations.

One commenter argued that the *per se* list will reduce candidate flexibility in determining how to use campaign resources, and urged the Commission to adopt the alternative proposal because it strikes what the commenter believes is the appropriate balance.

However, a list of *per se* personal uses is preferable to a list of examples to which a "primarily related" test would be applied. By listing those uses that will be considered personal use and setting out the exceptions that apply, the *per se* list draws a clearer line and reduces the need or case by case review. A committee or a candidate can examine the rules and be much more certain about what constitutes personal use.

In contrast, the alternative approach undercuts the Commission's efforts to provide clearer guidance. Under the alternative approach, the Commission would have to examine the facts and circumstances of each situation in order to determine whether a particular use is personal use. Thus, the alternative approach would require more Commission involvement in the resolution of personal use issues.

1. Household Food Items and Supplies. Under paragraph (g)(1)(i)(A) of the final rules, the use of campaign funds for household food items and supplies is personal use. This provision covers any food purchased for day to day consumption in the home, and any supplies purchased for use in maintaining the household. The need for these items would exist irrespective of the candidate's campaign or duties as a Federal officeholder. Therefore, the Commission regards them as inherently personal and subject to the personal use ban.

However, this provision would not prohibit the purchase of food or supplies for use in fundraising activities, even if the fundraising activities take place in the candidate's home. Items obtained for fundraising activities are not household items within the meaning of this provision. Similarly, refreshments for a campaign meeting would not be covered by this paragraph.

In addition, this provision does not apply to the use of campaign funds for meal expenses incurred outside the home. The use of campaign funds for these expenses is governed by section 113.1(g)(1)(ii)(B), which will be discussed further below. Similarly, this provision does not apply to the use of campaign funds for subsistence expenses, that is, food and shelter, incurred during travel. Section 113.1(g)(1)(ii)(C) specifically addressed this situation, and will be discussed in greater detail below.

2. Funeral, Cremation and Burial Expenses. Paragraph (g)(1)(i)(B) of the final rules indicates that the use of campaign funds to pay funeral, cremation or burial expenses is personal use. Campaign funds have been used for these expenses in the past by the estates of former Members of Congress who were covered by the grandfather provision and therefore could convert campaign funds to personal use. The Commission believes that these expenses are inherently personal in nature, and, under the current state of the law, should be covered by the personal use ban. The Commission

received no comments on this provision.

Section 113.1(g)(4) of the final rules contains an exception to the personal use definition that is relevant here. Section 113.1(g)(4), which will be discussed further below, states that gifts and donations of nominal value made on special occasions are not personal use, unless they are made to a member of the candidate's family. Under this provision, campaign funds can be used to send flowers to a constituent's funeral as an expression of sympathy without violating section 439a. However, if campaign funds are used to pay for costs of the funeral, that use is personal use under paragraph (g)(1)(i)(B).

3. Clothing. Under paragraph (g)(1)(i)(C) of the final rules, the use of campaign funds to purchase clothing is generally personal use. However, the rule contains an exception for clothing items of *de minimis* value that are used in the campaign. Thus, if a campaign committee uses campaign funds to purchase campaign T-shirts and caps with campaign slogans, the purchase is not personal use. One commenter expressed support for this provision.

This rule supersedes Advisory Opinion 1985–22 to the extent that opinion can be read to allow the use of campaign funds for these purposes. In that opinion, the requester sought to use campaign funds to purchase "specialized attire" to wear at "politically related functions which [were] both social and official business." The Commission concluded that the requester's committee could use the funds for these purposes because the requester was grandfathered. However, the language of the opinion suggests that the use of campaign funds for these purposes would also have been permissible if the clothing was to be used in connection with the campaign. Under paragraph (g)(1)(i)(C), the use of campaign funds for these purposes is personal use.

4. Tuition Payments. Under paragraph (g)(1)(i)(D) of the final rules, the use of campaign funds for tuition payments is personal use. However, this provision contains an exception that allows a committee to pay the costs of training campaign staff members, including candidates and officeholders, to perform the tasks involved in conducting a campaign. The Commission received no comments on this provision.

The Commission has concluded that only those tuition payments that fall within the narrow exception set out in the rule are campaign related and should be payable with campaign funds. Other tuition costs, whether for members of the campaign staff or other persons, are subject to the personal use prohibition.

5. Mortgage, Rent and Utility Payments. Paragraph (g)(1)(i)(E) of the final rules addresses the use of campaign funds for mortgage, rent or utility payments on real or personal property owned by the candidate or a member of the candidate's family. In the past, the Commission has generally allowed campaigns to rent property owned by the candidate or a family member for use in the campaign, so long as the campaign did not pay rent in excess of the usual and normal charge for the kind of property being rented. See Advisory Opinions 1993–1, 1988–13, 1985–42, 1983–1, 1978–80, 1977–12, and 1976–53.

The new rule changes the Commission's policy with regard to rental of all or part of a candidate or family member's personal residence. Under paragraph (g)(1)(i)(E)(*1*), the use of campaign funds for mortgage, rent or utility payments on any part of a personal residence of the candidate or a member of the candidate's family is personal use, even if part of the personal residence is being used in the campaign. This paragraph supersedes Advisory Opinions 1988–13, 1985–42, 1983–1 and 1976–53, since they allow the use of campaign funds for these purposes.

In contrast, paragraph (g)(1)(i)(E)(*2*) continues the Commission's current policy in situations where the property being rented is not part of a personal residence of the candidate or a member of the candidate's family. Thus, a campaign committee can continue to rent part of an office building owned by the candidate for use in the campaign, so long as the committee pays no more than fair market value for the property usage.

Paragraph (g)(1)(i)(E)(*2*) is consistent with Advisory Opinions 1977–12 and 1978–80. It is also consistent with the result reached in Advisory Opinion 1993–1, in which the Commission allowed a candidate to rent a storage shed that was not part of his or her personal residence for use in the campaign. However, Advisory Opinion 1993–1 cites Advisory Opinions 1988–13, 1985–42, and 1983–1 as authority for this conclusion. As indicated above, these opinions are superseded by paragraph (*1*). Consequently, they should no longer be regarded as authority for the result reached in AO 1993–1.

The use of campaign funds to make mortgage, rent or utility payments on real or personal property that is not used in the campaign would be reviewed under the general definition of personal use. These expenses presumably would exist irrespective of the candidacy, so the use of campaign funds to pay these expenses would be personal use.

The Commission received a number of comments on its proposed rules in this area. Four commenters urged the Commission to prohibit all transactions between the campaign committee and the candidate, saying that the rules should require the committee to enter into arms length transactions with unrelated third parties. Two of these commenters said the prohibition should be extended to transactions with any member of the candidate's family unit. In contrast, four other commenters urged the Commission to continue to allow these transactions so long as they involve *bona fide* rentals at fair market value.

The Commission has adopted what is essentially a middle ground. The rule prohibits payments for use of a personal residence because the expenses of maintaining a personal residence would exist irrespective of the candidacy or the Federal officeholder's duties. Thus, the rule draws a clear line, and avoids the need to allocate expenses associated with the residence between campaign and personal use.

At the same time, the Commission believes it is unnecessary to change its current policy regarding payments for the use of other property. These arrangements more closely resemble arms length transactions in that the property in question is available on the open market. Also, these arrangements generally do not raise the same kinds of allocation issues. Consequently, so long as the campaign pays fair market value, these payments will not be considered personal use.

It is important to note that paragraph (g)(1)(i)(E)(*1*) does not prohibit the campaign from using a portion of the candidate's personal residence for campaign purposes. It merely limits the committee's ability to pay rent for such a use. The candidate retains the option of using his or her personal residence in the campaign, so long as it is done at no cost to the committee. The Commission specifically allowed such an arrangement in Advisory Opinion 1986–28. That opinion is not affected by the new rules.

Nor should this rule be read to prohibit a campaign committee from paying the cost of long distance telephone calls associated with the campaign, even if those calls are made on a telephone located in a personal residence of the candidate or a member of the candidate's family. Since these calls are separately itemized on the residential telephone bill, they can

easily be attributed to the campaign without raising allocation issues.

6. Entertainment. Paragraph (g)(1)(i)(F) states that the use of campaign funds to pay for admission to a sporting event, concert, theater or other form of entertainment is personal use, unless the admission is part of a specific campaign or officeholder activity.

Several commenters urged the Commission to impose limits on the use of campaign funds for admission to these kinds of events, One suggested that these uses be prohibited unless they are part of a *bona fide* fundraising event, and said the Commission should require explicit solicitation of contributions in order to ensure that fundraising takes place. Another commenter recommended that the rule only allow the use of campaign funds if guests are present, and then only for the guests' admissions. A third commenter would require the candidate to show that the event was overwhelmingly campaign related in order to eliminate borderline cases. A fourth argued that these uses should only be allowed when the event is integral to campaign activity, and not when it is merely an event at which those present occasionally discuss campaign related subjects.

Other commenters took a different view. One commenter argued that meeting and mingling with supporters is a legitimate campaign activity, and that the expenses associated with that activity are a legitimate campaign expense. This commenter urged the Commission to allow the use of campaign funds for these purposes so long as the event takes place within the candidate's district. Another commenter said that the rules should allow committees to buy tickets for these events and give them to campaign workers, volunteers, and constituents.

The final rules require that the purchase of tickets be part of a particular campaign event or officeholder activity and not a leisure outing at which the discussion occasionally focuses on the campaign or official functions. This is not intended to include traditional campaign activity, such as attendance at county picnics, organizational conventions, or other community or civic occasions. This approach recognizes that these activities can be campaign or officeholder related. Moreover, the rules do not require an explicit solicitation of contributions or make distinctions based on who participates in the activity, since this would be a significant intrusion into how candidates and officeholders conduct campaign business.

7. Dues, Fees and Gratuities. Paragraph (g)(1)(i)(G) of the final rules provides that using campaign funds to pay dues, fees or gratuities to a country club, health club, recreational facility or other nonpolitical organization is personal use. Under this rule, membership dues, greens fees, court fees or other payments for access to these clubs are personal use, as are payments to caddies or professionals who provide services at the club, regardless of whether they are club employees or independent contractors. However, this rule contains an exception that allows a candidate holding a fundraising event on club premises to use campaign funds to pay the cost of the event. In this situation, the payments would be expenditures rather than personal use.

The Commission received a mix of comments on this provision. One commenter supported the rule, but urged the Commission to make it stronger by narrowing the exception for fundraising events. Another commenter took a different view, saying that a candidate's greens fees for golf with supporters or potential supporters is a legitimate campaign expense and should be allowed.

Once again, the rule charts a middle course. Playing a round of golf or going to a health club is often a social outing where the benefits received are inherently personal. Consequently, the use of campaign funds to pay for these activities will generally be personal use.

However, the rule is not so broad as to limit legitimate campaign related or officeholder related activity. The costs of a fundraising event held on club premises are no different under the FECA than the costs of a fundraiser held at another location, so the rule contains and exception that indicates that payments for these costs are not personal use. However, this exception does not cover payments made to maintain unlimited access to such a facility, even if access if maintained to facilitate fundraising activity. The exception is limited to payments for the costs of a specific fundraising event.

The rule also allows a candidate or officeholder to use campaign funds to pay membership dues in an organization that may have political interests. This would include community or civic organizations that a candidate or officeholder joins in his or her district in order to maintain political contacts with constituents or the business community. Even though these organizations are not considered political organizations under 26 U.S.C. § 527, they will be considered to have political aspects for the purposes of this rule.

8. Salary Payments to the Candidate's Family Members. The final rules also clarify the Commission's policy regarding the payment of a salary to members of the candidate's family. Under paragraph (g)(1)(i)(H), salary payments to a member of the candidate's family are personal use, unless the family member is providing *bona fide* services to the campaign. If a family member provides *bona fide* services to the campaign, any salary payment in excess of the fair market value of the services provided is personal use. This rule is consistent with the Commission's current policy, as set out in Advisory Opinion 1992–1.

Several commenters urged the Commission to take a stricter approach. Two suggested that the Commission prohibit salary payments for any member of the candidate's household unit, because the salary could be used to pay the living expenses of the candidate. Other commenters urged the Commission to prohibit salary payments unless the family member was hired to perform services that he or she previously provided in a professional capacity outside the campaign. Some commenters expressed concern that the fair market value standard could be abused.

In contrast, a number of commenters urged the Commission to allow these payments. Two commenters questioned why family members should be treated any differently from other employees who provide legitimate services to the campaign. One commenter said the test should be whether the family member is actually working for the campaign. If so, salary payments should be allowed.

The Commission agrees with those commenters that argue that family members should be treated the same as other members of the campaign staff. So long as the family member is providing *bona fide* services to the campaign, salary payments to that family member should not be considered personal use. However, the Commission believes these payments should be limited to the fair market value of the services provided. Consequently, the final rules treat salary payments in excess of that amount as personal use.

9. Additional Issues. Both the Notice of Proposed Rulemaking and the Request for Additional Comments proposed to treat the use of campaign funds to pay the candidate a salary as personal use. This rule would have the effect of prohibiting candidate salaries, and would resolve an issue raised in Advisory Opinion 1992–1. The

Commission received numerous comments on this provision.

Several commenters objected to this provision and urged the Commission to allow candidate salaries. Most said that a prohibition would aggravate existing inequities between incumbents and challengers and would create a wealth test or property qualification for running for office. These commenters urged the Commission to allow candidate salaries in order to level the playing field and open up the election process to candidates of modest means. One commenter strongly believes a candidate should be able to receive a reasonable salary based on his or her experience and the services he or she renders to the campaign. Many different proposals for determining the amount of a candidate's salary were suggested.

Several other commenters questioned why full disclosure of salary payments would not adequately prevent any unfairness to campaign contributors. Another commenter argued that candidates are essentially employees of the party by whom they are nominated, and, as such, the party should be permitted to pay the candidate a salary.

In contrast, two commenters strongly supported a prohibition on candidate salaries, saying such a prohibition is required under section 439a. They urged the Commission to adopt a blanket rule prohibiting the use of campaign funds for this purpose, because permitting salaries effectively allows the candidate to use campaign funds to pay his or her personal living expenses and does away with the personal use prohibition. These commenters acknowledged that the inequities that exist between incumbents and challengers is a problem that needs to be rectified. Nevertheless, they said this inequity cannot be resolved in this rulemaking because nothing in section 439a requires a level playing field. They also argue that nothing in section 439a justifies distinguishing between incumbents and other candidates, and since Members of Congress would not be allowed to take a salary from their campaigns in addition to their Congressional salary, the statute requires a prohibition on salary payments to the candidate.

One of these two commenters also urged the Commission not to try to level the playing field by reversing what the commenter described as the Commission's policy of requiring corporate employees to take an unpaid leave of absence to campaign for office. This commenter also said that a means test for payment of candidate salaries would not work.

The Commission took up the candidate salary issue when it considered the final rules, but could not reach a majority decision by the required four affirmative votes. See 2 U.S.C. § 437c(c). Consequently, this issue has not been addressed in the final rules.

Paragraph (g)(1)(ii)

Paragraph (g)(1)(ii) explains how the Commission will address other uses of campaign funds not covered by the *per se* list of examples. If an issue comes before the Commission as to whether a use not listed in paragraph (g)(1)(i) is personal use, the Commission will determine whether the use is for an expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder. If so, it will be personal use unless some other specific exception applies. These determinations will be made on a case by case basis. Committees should look to the general definition for guidance in determining whether uses not listed in paragraph (g)(1)(i) are personal use.

Two commenters expressed concerns with this approach. One said that case by case review will cause great difficulty, and urged the Commission to allow candidates to explain the campaign relationship of any use that may appear to be personal. This commenter also argued that if the use reasonably appears to have a campaign relationship, it should not be personal use. The other commenter said that this provision leaves the question of personal use unsettled, and urged the Commission to affirm that candidates have wide discretion over the use of campaign funds and treat uses outside the categories contained in the rule as presumptively permissible.

In contrast, a third commenter expressed support for this provision if it is implemented in conjunction with a general definition of personal use that uses the irrespective standard.

The Commission is aware of the problems of case by case decisionmaking. It has sought to minimize these problems by incorporating a list of examples that specifically addresses the most common personal use issues into the final rules.

However, the Commission cannot anticipate every type of expense that will raise personal issues. Thus, the Commission cannot create a list that addresses every situation. Furthermore, some expenses that do raise personal use issues cannot be characterized as either personal or campaign related in the majority of situations, so they cannot be addressed in a *per se* list. Consequently, it is necessary to have a plan for addressing situations not covered by the *per se* list. The Commission is including paragraph (g)(1)(ii) in the rules to provide guidance to the regulated community as to how these situations will be handled. Should a personal use issue arise, the candidate and committee will have ample opportunity to present their views. The Commission, however, reaffirms its long-standing opinion that candidates have wide discretion over the use of campaign funds. If the candidate can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use.

The Notice of Proposed Rulemaking sought comments on other uses of campaign funds that sometimes raise personal use issues. In particular, the Commission encouraged commenters to submit their views on when the use of campaign funds for legal expenses, meal expenses, travel expenses and vehicle expenses would be personal use.

Because the use of campaign funds for these expenses can raise serious personal use issues, the Commission attempted to draft specific provisions on these uses and incorporate them into section 113.1(g)(1)(i). However, the Commission's efforts to craft language that would distinguish permissible uses from those subject to the prohibition generated rules that could have proved very confusing for the regulated community. Consequently, the Commission opted for a simpler approach. The Commission will address any issues raised by the use of campaign funds for these expenses by applying the general definition on a case by case basis. Thus, the use of campaign funds for these expenses will be personal use if the expense would exist irrespective of the candidate's campaign or duties as a Federal officeholder.

Legal, meal, travel and vehicle expenses are listed under paragraph (g)(1)(ii) as examples of uses that will be reviewed on a case by case basis. The Commission has inserted this list in the final rules in order to make it clear how issues involving the use of campaign funds for these expenses will be handled. These provisions, and the comments received in response to the NPRM, are discussed in detail below.

1. Legal expenses. Paragraph (g)(1)(ii)(A) indicates that issues regarding the use of campaign funds for legal expenses will be addressed on a case by case basis using the general definition of personal use. One commenter argued that legal expenses should be *per se* personal use except when they are incurred in ensuring compliance with the election laws. This commenter also urged the Commission

to prohibit contributions to the legal defense funds of other candidates.

Treating legal expenses other than those incurred in ensuring compliance with the election laws as *per se* personal use is too narrow a rule. A committee or a candidate could incur other legal expenses that arise out of campaign or officeholder activities but are not related to compliance with the FECA or other election laws. For example, a committee could incur legal expenses in its capacity as the employer of the campaign staff, or in its capacity as a contracting party in its dealings with campaign vendors. Consequently, the Commission has decided that issues raised by the use of campaign funds for a candidate's or committee's legal expenses will have to be addressed on a case by case basis.

However, legal expenses will not be treated as though they are campaign or officeholder related merely because the underlying legal proceedings have some impact on the campaign or the officeholder's status. Thus, legal expenses associated with a divorce or charges of driving under the influence of alcohol will be treated as personal, rather than campaign or officeholder related.

2. Meal Expenses. Paragraph (g)(1)(ii)(B) indicates that issues regarding the use of campaign funds for meal expenses will be addressed on a case by case basis using the general definition of personal use. One commenter thought payments for meals should be strictly limited, and recommended that the Commission prohibit the use of campaign funds to pay for meals that are not directly related to the campaign. Another commenter suggested the Commission follow the Internal Revenue Service approach for business meals, and allow the use of campaign funds if guests are present. Under this approach, family members would not qualify as guests, so campaign funds could not be used to pay for their meals.

A third commenter expressed doubt that persons who use campaign funds for entertainment actually discuss campaign business while the event is going on. The commenter said that, although these situations often involve face to face fundraising and therefore are campaign related, the Commission should require candidates to show that the event is overwhelmingly campaign related in order to eliminate borderline cases. A fourth commenter would require that the meal involve an explicit solicitation of contributions in order to allow use of campaign funds.

In contrast, two commenters objected to limits on the use of campaign funds for these purposes.

The Commission is aware of the potential for abuse in the use of campaign funds to pay for meal expenses. However, the Commission sought to establish a rule that would effectively curb these abuses without making it difficult to conduct legitimate campaign or officeholder related business. Consequently, the Commission has decided to address these situations on a case by case basis using the general definition of personal use.

Under this approach, the use of campaign funds for meals involving face to face fundraising would be permissible. Presumably, the candidate would not incur the costs associated with this activity if he or she were not a candidate. In contrast, the use of campaign funds to take the candidate's family out to dinner in a restaurant would be personal use, because the family's meal expenses would exist even if no member of the family were a candidate or an officeholder.

It should be noted that this provision applies to meal expenses incurred outside the home. It does not apply to the use of campaign funds for household food items, which are covered by section 113.1(g)(1)(i)(A). Nor does it apply to subsistence expenses incurred during campaign or officeholder related travel. These expenses will be considered part of the travel expenses addressed by paragraph (g)(1)(ii)(C).

3. Travel Expenses. Paragraph (g)(1)(iii)(C) indicates that the use of campaign funds for travel expenses, including subsistence expenses incurred during travel, will be addressed on a case by case basis using the general definition of personal use.

One commenter said that the rules should prohibit the use of campaign funds for expenses that are collateral to travel, such as greens fees, ski lift tickets and court time. This commenter also said the rules should prohibit the use the campaign funds for pleasure or vacation trips or extensions of campaign or officeholder related trips. Another commenter urged the Commission to adopt a two part test for travel expenses which would allow them only if the travel is predominantly for permissible purposes and the trip is necessary for the fulfillment of those purposes. This commenter also urged the Commission to prohibit the payment of per diems, since they allow campaigns to use campaign funds without disclosing how they are used.

As will be discussed further below (see section 5 on "mixed use"), the final rules do prohibit the use of campaign funds for personal expenses collateral to campaign or officeholder related travel by treating these uses as personal use unless the committee is reimbursed. However, the Commission has decided against adopting the two part test suggested, because it would require closer review of a candidate's or officeholder's travel to determine the predominant purpose or necessity of a particular trip. This approach has been rejected, and is a departure from the analysis under the irrespective standard.

The Commission has also decided against imposing limits on per diem payments, since the Commission has a long-standing policy of allowing these payments, see Advisory Opinion 1984–8, and because these limits would be impractical and would impose unreasonable burdens on candidates and committees. However, per diem payments must be used for expenses that meet the general standard. They cannot be converted to personal use.

4. Vehicle Expenses. Paragraph (g)(1)(ii)(D) indicates that issues regarding the use of campaign funds for vehicle expenses will be addressed on a case by case basis using the general definition of personal use. However, the rule contains an exception for vehicle expenses of a *de minimis* amount. Thus, vehicle expenses that would exist irrespective of the candidate's campaign or duties as a holder of Federal office will be personal use, unless they are a *de minimis* amount. If these expenses exceed a *de minimis* amount, the person(s) using the vehicle for personal purposes must reimburse the committee for the entire amount associated with the personal use. See section 5 on "mixed use," below.

One commenter urged the Commission to make the vehicle expense provision more specific by defining *de minimis* and setting a specific cents per mile reimbursement amount. This commenter also urged the Commission to include a limit on payments for the candidate's personal vehicle.

The Commission is sensitive to the difficulties that candidates and committees would face in completely eliminating all vehicle uses that confer a personal benefit. Consequently, the Commission has sought to carefully craft a rule that will provide a mechanism for addressing apparent abuses of campaign vehicles without imposing unrealistic burdens on candidates and committees. The Commission has decided not to impose the more specific requirements

suggested by the commenter. Instead, it will review the facts of a particular case in order to determine whether personal use has occurred. The Commission will make use of the *de minimis* concept by assessing whether the amount of expenses associated with personal activities is significant in relation to the overall vehicle use.

While the comments focused on the use of campaign funds to pay for expenses associated with the candidate's personal vehicle, the rule applies to the use of campaign funds for expenses associated with any vehicle, regardless of whether it is owned or leased by the committee or the candidate. Because the expenses associated with a personal vehicle usually exist irrespective of the candidacy or the officeholder's duties, the use of campaign funds for these expenses will generally be considered personal use.

5. Mixed Use. Paragraphs (g)(1)(ii) (C) and (D) also explain the Commission's policy regarding the use of campaign funds for travel and vehicle expenses associated with a mixture of personal and campaign or officeholder related activities.

Under paragraph (c), if a campaign committee uses campaign funds to pay expenses associated with travel that involves both personal activities and campaign or officeholder related activities, the incremental expenses that result from the personal activities are personal use, unless the person(s) benefiting from this use reimburse(s) the campaign within thirty days for the amount of the incremental expenses.

Paragraph (D) contains a similar rule regarding vehicle expenses. However, this rule does not apply to vehicle expenses that are a *de minimis* amount. If the vehicle expenses associated with personal activities exceed a *de minimis* amount, the person(s) using the vehicle for personal activities must reimburses(s) the campaign within thirty days for the entire amount associated with the personal activities. Otherwise, the use of campaign funds for the vehicle expenses is personal use. This approach is consistent with Advisory Opinions 1984–59 and 1992–12.

For example, under paragraph (C), if a Member of Congress travels to Florida to make a speech in his or her official capacity, and stays an extra week there to enjoy a vacation, the Member's campaign committee can pay the Member's transportation costs and the subsistence costs necessary for making the speech. However, if the committee pays the cost of the entire trip, including the expenses incurred during the extra week of vacation, the Member is required to reimburse the committee for the expenses incurred during this extra week. This includes the hotel and meal expenses for the extra week along with any entertainment expenses incurred during this time that are included in the amount paid by the committee.

Of course, the reimbursement need only cover the incremental costs of the personal activities, that is the increase in the total cost of the trip that is attributable to the extra week of vacation. Thus, if the vacation and the speech take place in the same location, the Member is not required to reimburse the committee for any portion of the airfare, since that expense would have been incurred even if the trip had not been extended. See Advisory Opinion 1993–6.

On the other hand, if the Member travels to one location to make the speech, travels on to another location for the vacation, and then returns to his or her point of origin, the Member is required to reimburse the committee for the increase in transportation costs attributable to the vacation leg of the trip. The increased costs would be calculated by determining the cost of a fictional trip that includes only the campaign and officeholder related stops, that is, a trip that starts at the point of origin, goes to every campaign related or officeholder related stop, and returns to the point of origin. The difference between the transportation costs of this fictional, campaign related trip and the total transportation costs of the trip actually taken is the incremental cost attributable to the personal leg of the trip.

These rules apply to any Federal candidate or officeholder. Thus, challengers are also required to reimburse their committees for any personal travel expenses that are paid with campaign funds.

These principles also apply to vehicle expenses for a trip that involves both campaign or officeholder related activities and personal activities in excess of a *de minimis* amount. If the personal activities are more than a *de minimis* portion of the trip, the person using the vehicle is required to reimburse the committee for the difference between the total vehicle expenses incurred during the trip and the amount that would be incurred on a fictional trip that only includes the campaign or officeholder related stops. Section 106.3(b) of the Commission's regulations sets out a method for allocating campaign and non-campaign related vehicle expenses. Advisory Opinion 1992–34 contains an example of how this allocation mechanism works.

The Commission notes that if the person benefiting from the use of campaign funds for personal travel or vehicle expenses makes a timely reimbursement under this section, that reimbursement is not a contribution under the Act. However, if a reimbursement required under this section is made by a person other than the person benefiting, it may be a contribution under § 113.1(g)(6). Section 113.1(g)(6) will be discussed further below.

Section 113.1(g)(2) Charitable Donations

Section 113.1(g)(2) indicates that donations of campaign funds to organizations described in section 170(c) of the Internal Revenue Code are not personal use, so long as the candidate does not receive compensation from the recipient organization before it has expended the entire amount donated for purposes unrelated to the candidate's personal benefit. Compensation does not include reimbursements for expenses ordinarily and necessarily incurred on behalf of such organization by the candidate. This provision is based on the approach taken by the Commission in Advisory Opinion 1983–27, and is consistent with subsequent Commission treatment of charitable donations made with campaign funds. See Advisory Opinions 1986–39 and 1993–22. The Commission received no comments on this provision.

Section 113.1(g)(3) Transfers of Campaign Assets

Under § 113.1(g)(3), the sale or other transfer of a campaign asset is not personal use so long as the transfer is for fair market value. This provision seeks to limit indirect conversions of campaign funds to personal use. An indirect conversion occurs when a committee sells an asset for less than the asset's actual value, thereby essentially giving part of the asset to the purchaser at no charge. Section 113.1(g)(3) limits these conversions by requiring these transactions be for fair market value.

Section 113.1(g)(3) also seeks to limit indirect conversions to personal use by ensuring that any depreciation in the value of an asset being transferred is properly allocated between the committee and the purchaser. Many assets such as vehicles and office equipment depreciate dramatically immediately after they are purchased. If a campaign committee purchases an asset, uses it during a campaign season, and then sells it to the candidate at its

depreciated fair market value, the candidate receives the asset at a substantially reduced cost but with significant time remaining in its useful life. Thus, the cost of the depreciation falls disproportionately upon the campaign committee. This would effectively be a conversion of campaign funds to personal use.

Section 113.1(g)(3) addresses this situation by requiring that any depreciation that takes place before the transfer be allocated between the committee and the purchaser based on the useful life of the asset. Thus, the committee should absorb only that portion of the depreciation that is attributable to the time period during which it uses the asset. This approach is consistent with Advisory Opinion 1992–12, in which the Commission required a Congressman who was assuming a lease of a van from his campaign committee to "accept a pro rata share of the financial obligations and charges attending the lease * * *." The Commission also noted that "the lease may provide for a discount on the purchase price of the van at the conclusion of the agreement. In that event, a portion of the discount may belong to the committee." Advisory Opinion 1992–12, n.3.

Two commenters expressed views on this provision. One commenter argued that, even if the asset's depreciation is allocated between the committee and the purchaser, the purchaser is still getting a bargain. This commenter urged the Commission to require the committee to sell its assets to third parties and use the proceeds to pay campaign debts or to make contributions to charities.

The Commission has decided not to require committees to sell their assets only to third parties, because such a requirement would not serve the purposes of the personal use prohibition. Section 439a prohibits conversions of campaign funds to any person's personal use. Thus, a violation of section 439a occurs whenever an asset is transferred for less than fair market value. It makes no difference whether the purchaser is the candidate or an unrelated third party. Consequently, a rule that requires that all transfers of campaign assets be for fair market value will fully serve the purposes of section 439a.

Section 113.1(g)(4) Gifts

As indicated above, the final rules generally apply with equal force to uses of campaign funds that benefit third parties as they do to uses of campaign funds that benefit the candidate or a member of the candidate's immediate family. However, the final rules also contain a provision that allows a committee to use campaign funds to benefit constituents or supporters on certain occasions without violating the personal use prohibition. Section 113.1(g)(4) indicates that gifts or donations of nominal value given on special occasions to persons other than family members of the candidate are not personal use. This will allow a committee to use campaign funds to send flowers to a constituent's funeral without violating the personal use prohibition.

The Commission recognizes that candidates and officeholders frequently send small gifts to constituents and supporters on special occasions as gestures of sympathy or goodwill, and that such an expense would not exist irrespective of the candidate's or officeholder's status. The Commission has included this provision in the rules to specifically indicate that the use of campaign funds for this purpose is permitted.

However, the exception does not cover gifts that are of more than nominal value. For example, using campaign funds for other expenses associated with special occasions, such as the funeral and burial expenses covered under section 113.1(g)(1)(i)(B), would be personal use. Nor does this exception allow the committee to use campaign funds to send gifts to members of the candidate's family. Presumably, the candidate would give such a gift irrespective of whether he or she were a candidate or Federal officeholder. Therefore, the use of campaign funds for such a gift would be personal use.

Section 113.1(g)(5) Political or Officially Connected Expenses

Section 113.1(g)(5) explains how the personal use rules interact with the rules of the U.S. House of Representatives and the United States Senate. Under House rules, a Member "shall convert no campaign funds to personal use * * * and shall expend no funds from his campaign account not attributable to bona fide campaign or political purposes." House Rule 43, clause 6. Senate Rule 38 also prohibits personal use, but allows a Member to use campaign funds to defray "expenses incurred * * * in connection with his official duties." Senate Rule 38, clause 1(a). Thus, these rules allow Members to use campaign funds for what are described as "political" and "officially connected" expenses. Several commenters have raised the question of how the personal use rules would apply to the use of campaign funds for these purposes.

Section 113.1(g)(5) indicates that the use of campaign funds for a political or officially connected expense is not personal use to the extent that it is an expenditure under 11 CFR 100.8 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office. The rule also reiterates that any use of funds that would be personal use under § 113.1(g)(1) will not be considered an expenditure or an ordinary and necessary expense incurred in connection with the duties of a Federal officeholder.

One commenter urged the Commission to be consistent with House and Senate rules in this area, saying that, since House rules specifically allow Members to use campaign funds for political expenses, the Commission's rules should specifically exclude these uses from the definition of personal use. Two other commenters agreed, and urged the Commission not to introduce additional confusion into this area.

In contrast, two commenters rejected the suggestion that the Commission should defer to House and Senate rules in this area. They asserted that enforcement of the personal use ban is the Commission's responsibility, and that, since Congressional precedents are based on rules with different language than section 439a, the Commission should not look to those precedents for guidance.

Other commenters expressed their views on the specific language of the rule. One commenter urged the Commission to treat what the commenter referred to as campaign disbursements and political disbursements as synonymous, and to treat what the commenter referred to as political and officially connected expenses as permissible ordinary and necessary expenses under section 439a. Another commenter criticized the provision as tautological, and cited this as an area in which the Commission should reaffirm that candidates and officeholders have wide discretion.

Two commenters said the rule is an improvement over a previous draft that was read to have ceded authority for determining whether uses by incumbents are personal use to the House and Senate. However, one said that the rule still defers too much to Congress because it still says political and officially connected expenses are not personal use to the extent that they are expenditures or the ordinary and necessary expenses of a Federal officeholder. The other commenter said the rule is acceptable so long as the list of uses is truly a per se list.

The Commission recognizes that the existence of two sets of rules creates the potential for confusion. However, the Commission cannot create a blanket exclusion from personal use for all uses that qualify as a political or officially connected expense under Congressional rules. Congress has given the Commission the authority to interpret and enforce the personal use prohibition in section 439a. Creating an exclusion for all political or officially connected expenses would effectively be an abdication of that authority, particularly since section 439a uses different standards than House and Senate rules for determining whether a particular use of campaign funds is permissible.

Nevertheless, the Commission anticipates that, in most circumstances other than those specifically addressed in the rules, political and officially connected expenses will be considered ordinary and necessary expenses incurred in connection with the duties of a Federal officeholder, as that term is used under the FECA. As such, they will not be personal use under § 113.1(g)(1). In other circumstances, political and officially connected expenses may be expenditures under the Act, and therefore clearly permissible. In short, the Commission does not anticipate a significant number of conflicting results under these rules.

The Commission notes that the FY 1991 Legislative Branch Appropriations Act (Pub. L. 101–520) provides that "official expenses" may not be paid from excess campaign funds. Thus, even though 2 U.S.C. § 439a, House Rule 43, and Senate Rule 38 contemplate the use of campaign funds for "ordinary and necessary expenses," "political purposes," and expenses "in connection with" official duties, guidance regarding the scope of the Legislative Branch Appropriations Act provision referred to above should be sought by persons covered.

Section 113.1(g)(6) Third Party Payments of Personal Use Expenses

Section 113.1(g)(6) sets out Commission policy on payments for personal use expenses by persons other than the candidate or the candidate's committee. Generally, payments of expenses that would be personal use if made by the candidate or the candidate's committee will be considered contributions to the candidate if made by a third party. Consequently, the amount donated or expended will count towards the person's contribution limits. However, no contribution will result if the payment would have been made irrespective of the candidacy. The final rule contains three examples of payments that will be considered to be irrespective of the candidacy.

Several commenters expressed views on this provision. Three commenters objected to it, arguing that it is inconsistent to say that the use of campaign funds for certain expenses is personal use when those expenses are not campaign related, while at the same time saying that payments for those same expenses by third parties are contributions because they are being made for the purpose of influencing an election. Two of these commenters recommended that the Commission reverse its existing policy and allow corporate employers to pay employee-candidates a salary during the campaign in order to level the playing field.

Another commenter objected to this provision, saying that third parties should be allowed to pay the personal living expenses of a candidate who loses his or her salary upon becoming a full time candidate, subject to three conditions: (1) The payments are disclosed and limited as in-kind contributions under the FECA; (2) the payments are for essential living expenses; and (3) the total payments and the candidate's salary during the campaign period do not exceed his or her average monthly salary over the previous year, or that of an incumbent Member of Congress.

In contrast, one commenter approved of this provision. Another commenter urged the Commission to flatly prohibit these payments rather than treating them as contributions, saying that third parties should not be able to label as contributions payments that could not be made by the committee itself.

The Commission has decided to treat payments by third parties for personal use expenses as contributions subject to the limits and prohibitions of the Act, unless the payment would have been made irrespective of the candidacy. If a third party pays for the candidate's personal expenses, but would not ordinarily have done so if that candidate were not running for office, the third party is effectively making the payment for the purpose of assisting that candidacy. As such, it is appropriate to treat such a payment as a contribution under the Act. This rule follows portions of Advisory Opinions 1982–64, 1978–40, 1976–70 and the Commission's response to Advisory Opinion Request 1976–84. The Commission understands the concerns about the inequities between incumbents and challengers expressed by the commenters in relation to this provision and other aspects of this rulemaking. However, the FECA is not intended to level the playing field between incumbents and challengers. See *Buckley* v. *Valeo*, 424 U.S. 1, 48–49 (1976).

If the payment would have been made even in the absence of the candidacy, the payment should not be treated as a contribution. Section 113.1(g)(6) excludes payments that would have been made irrespective of the candidacy, and sets out three examples of such payments. These examples protect a wide range of payments of personal use expenses from being treated as contributions. Other situations will be examined on a case by case basis.

First, the final rule excludes payments to a legal expense trust fund established under House and Senate rules. House and Senate rules provide Members of Congress with a mechanism they can use to accept donations to pay for legal expenses. The final rule places donations to these funds outside the scope of the contribution definition of the FECA. Donations to other legal defense funds will be examined on a case by case basis.

Second, the final rule excludes payments made from the personal funds of the candidate, as defined in 11 CFR 110.10(b). Section 110.10 allows candidates for Federal office to make unlimited expenditures from personal funds, as defined in paragraph (b) of that section. Thus, if a payment by a third party is made with the candidate's personal funds, the payment will not be considered a contribution that is subject to the limits and prohibitions of the Act. Similarly excluded from contribution treatment under this provision are payments made from an account jointly held by the candidate and a member of the candidate's family.

Finally, the rule indicates that a third party's payment of a personal use expense will not be considered a contribution if payments for that expense were made by the third party before the candidate became a candidate. If the third party is continuing a series of payments that were made before the beginning of the candidacy, the Commission considers this convincing evidence that the payment would have been made irrespective of the candidacy, and therefore should not be considered a contribution. For example, if the parents of a candidate had been making college tuition payments for the candidate's children, the parents could continue to do so during the candidacy without making a contribution.

It should be noted, however, that the exclusion for payments made before the candidacy contains a caveat for

compensation payments. Compensation payments that were made before the candidacy and continue during the candidacy will be considered contributions to the candidate unless three conditions are met: the compensation results from *bona fide* employment that is genuinely independent of the candidacy, the compensation is exclusively in consideration of services provided by the candidate as part of the employment, and the compensation does not exceed the amount that would be paid to a similarly qualified person for the same work over the same period of time. The Commission assumes that, when these three conditions exist, the compensation payment would have been made irrespective of the candidacy and should not be treated as a contribution. This rule is based on Advisory Opinion 1979–74, and is consistent with Advisory Opinions 1977–45, 1977–68, 1978–6 and 1980–115.

Section 113.1(g)(7) Members of the Candidate's Family

Section 113.1(g)(7) lists the persons who are members of the candidate's family for the purposes of §§ 113.1(g) and 100.8(b)(22). This list is significant for several provisions of the rules. Under § 113.1(g)(7), the candidate's family includes those persons traditionally considered part of an immediate family, regardless of whether they are of whole or half blood. Consistent with the laws of most states, the rules make no distinction between biological relationships and relationships that result from adoption or marriage. The grandparents of the candidate are also considered part of the candidate's family. Finally, the candidate's family also includes a person who has a committed relationship with the candidate, such as sharing a household and mutual responsibility for each other's welfare or living expenses. These persons will be treated as the equivalent of the candidate's spouse for the purposes of these rules.

Section 113.2 Use of Funds (2 U.S.C. 439a)

The final rules also contain an amendment to the list of permissible uses of excess campaign funds contained in 11 CFR 113.2. The amendment specifically indicates that certain travel costs and certain office operating expenditures will be considered ordinary and necessary expenses incurred in connection with the duties of a Federal officeholder.

The costs of travel for a Federal officeholder and an accompanying spouse who are participating in a function that is directly connected to *bona fide* official responsibilities will be considered ordinary and necessary expenses. 11 CFR 113.2(a)(1). The rule cites fact-finding meetings and events at which the officeholder makes an appearance in an official capacity as examples of functions covered by the rule. Note that spouse travel for campaign purposes continues to be a permissible expense.

In addition, the costs of winding down the office of a former Federal officeholder for six months after he or she leaves office will be considered ordinary and necessary expenses. 11 CFR 113.2(a)(2). Consequently, the use of excess campaign funds to pay for these expenses is permissible.

The Commission notes that the FY 1991 Legislative Branch Appropriations Act (Pub. L. 101–520) provides that "official expenses" may not be paid from excess campaign funds. Thus, even though 2 U.S.C. § 439a, House Rule 43, and Senate Rule 38 contemplate the use of campaign funds for "ordinary and necessary expenses," "political purposes," and expenses "in connection with" official duties, guidance regarding the scope of the Legislative Branch Appropriations Act provision referred to above should be sought by persons covered.

1. Travel Costs. Several commenters criticized the travel cost provision. One commenter thought Members of Congress received a stipend for these expenses, and argued that campaign funds should not be used for this purpose. Another commenter urged the Commission to only allow the use of campaign funds for travel between Washington, D.C. and the Member's district. A third commenter argued that the provision allowing travel expenses for a Member's spouse should be deleted because it creates confusion, and opens a loophole because it does not require the Member to demonstrate that the spouse participated in the official function.

One commenter urged the Commission to allow the use of campaign funds to defray expenses connected to officeholder duties, including travel, as permitted under House rules.

The Commission has concluded that the expenses of both the officeholder and the officeholder's spouse should be permitted. If an officeholder incurs expenses in traveling to a function that is directly connected to his or her *bona fide* official responsibilities, those expenses clearly would not exist irrespective of his or her duties as a Federal officeholder. As such, the use of campaign funds for those expenses would not be personal use under section 113.1(g)(1).

The Commission also recognizes that an officeholder's spouse is often expected to attend these functions with the officeholder. See Advisory Opinion 1981–25. In this context, the spouse's attendance alone amounts to a form of participation in the function, even if the spouse has no direct role in the activities that take place during the event. Consequently, the Commission has decided that the rule should specifically indicate that the expenses of an accompanying spouse can be paid with campaign funds when an officeholder travels to attend an official function.

This provision also helps to clarify the relationship between the personal use rules and the rules of the House and Senate on the use of campaign funds for travel. Although Members receive appropriated funds for certain travel expenses, House and Senate rules also allow them to pay for certain other expenses with campaign funds. The amendments to § 113.2 make it clear that, so long as the travel is for participation in a function connected to the Member's official responsibilities, the permissibility of this use is not affected by the personal use rules.

Advisory Opinion 1980–113 indicated that campaign funds could be used to defray expenses incurred in carrying out the duties of a state officeholder. That opinion also suggested that campaign funds could be used to defray the travel expenses of the spouse of such an officeholder if the spouse's expenses are incident to the duties of the state officeholder. However, in Advisory Opinion 1993–6, the Commission explicitly superseded Advisory Opinion 1980–113 to the extent that it allowed the use of campaign funds "for expenses related to that person's position as a holder of state office or any office which is not a Federal office as defined in the Act." Advisory Opinion 1993–6, n.3. The amendments to § 113.2 are consistent with Advisory Opinion 1993–6. As revised, § 113.2(a)(1) does not permit the use of campaign funds for travel expenses associated with official responsibilities other than those of a Federal officeholder.

Finally, the Commission has not limited this rule to expenses associated with travel between a Member's district and Washington, D.C. The Commission recognizes that travel to other locations may be directly connected to a Member's *bona fide* official responsibilities. So long as the travel is

so connected, the use of campaign funds to pay the expenses of that travel will also be permissible.

2. Winding Down Costs. Six commenters expressed views on the provision regarding winding down costs. 11 CFR 113.2(a)(2). One commenter disagreed with the proposed rule, and argued that former officeholders should not be allowed to use campaign funds for this purpose. Another commenter agreed that a candidate should not be allowed to retain and use campaign funds beyond a certain reasonable period after the campaign to pay debts and operating expenses. This commenter suggested that any funds that remain unused after that time period should be returned to donors or taxed at one hundred percent.

A third commenter urged the Commission to allow these uses only for incumbents who lose their seat, and recommended against allowing Members of Congress to build up a large treasury and then use that treasury after voluntarily leaving Federal office.

Three commenters agreed these uses should be allowed, but urged the Commission to approve a rule that limits the time period to sixty days.

The Commission believes the costs of winding down the office of a former Federal officeholder are ordinary and necessary expenses within the meaning of section 439a. See Advisory Opinion 1993–6. Therefore, the use of campaign funds to pay these costs is permissible under the FECA. Furthermore, there is no basis in the Act for distinguishing between winding down costs incurred by officeholders who lose their seats and those incurred by officeholders who leave office for other reasons. The costs incurred by either kind of former officeholder are equally permissible.

The Commission initially proposed a sixty day time period. Since this process often takes longer than anticipated, the Commission is inclined to provide former officeholders with some leeway in the use of funds for these purposes. Consequently, the Commission has extended the period to six months to ensure that former officeholders have ample time to close down their offices. It should also be noted that, as written, this provision acts as a safe harbor. It does not preclude a former officeholder who can demonstrate that he or she has incurred ordinary and necessary winding down expenses more than six months after leaving office from using campaign funds to pay those expenses.

Part 100—Scope and Definitions

Section 100.8 Expenditure (2 U.S.C. 431(9))

Current § 100.8(b) of the Commission's regulations excludes certain disbursements from the definition of expenditure. Paragraph (b)(22) of that section specifically excludes payments by a candidate from his or her personal funds, as defined in 11 CFR 110.10(b), for routine living expenses which would have been incurred without candidacy. Thus, a candidate can pay his or her routine living expenses from personal funds without making an expenditure that must be reported under the Act.

New language has been added to § 100.8(b)(22) that indicates that payments for routine living expenses by a member of the candidate's family are not expenditures if made from an account held jointly with the candidate, or if the expenses were paid by the family member before the candidate became a candidate. The revised rule treats payments from an account jointly held by the candidate and a family member the same as payments made from the candidate's personal funds, and excludes them from the expenditure definition. Similarly, the rule assumes that payments by a family member that are a continuation of payments made before the candidacy are not in connection with the candidacy, and should not be treated as expenditures.

Under this section, payments from an account that contains only the candidate's personal funds will be exempt from the definition of expenditure even if the payment is made by another person such as a housekeeper or an accountant who has access to the account in order to pay the candidate's routine living expenses. These payments will also be exempt if the housekeeper makes the payment from an account jointly held by the candidate and a member of the candidate's family. The ability of a person who is not a family member to make payments from the account will not change otherwise exempt payments from the account into contributions.

However, if the account is jointly held by the candidate and someone who is not a member of the candidate's family, or contains the funds of such a person, the exemption in § 100.8(b)(22) does not apply, and payments from that account for the candidate's personal living expenses will be expenditures that have reporting consequences under the Act. These payments will also be in-kind contributions under section 113.1(g)(6), and will count towards the joint account holder's contribution limits. See 11 CFR 110.1.

This section has been revised to parallel new § 113.1(g)(6). One commenter expressed general support for this provision.

Part 104—Reports by Political Committees

Section 104.3 Contents of Reports (2 U.S.C. 434(b))

The Notice of Proposed Rulemaking invited commenters to submit their views on any other issues raised by this rulemaking. Several commenters suggested that the Commission amend its reporting requirements in order to administer the personal use prohibition. These commenters urged the Commission to require more detailed reporting of expenditures that would force committees to bear the burden of establishing a clear connection between each expenditure and a campaign event. One commenter cited meals as an example, saying that the Commission should require the candidate to explain how the meal was related to the campaign and why it was not personal use. Two of these commenters recommended that the Commission initiate a separate rulemaking to implement more detailed reporting requirements.

The Commission agreed that additional reporting may be useful in administering the personal use rules, and solicited comments in the RAC on how new reporting requirements could be crafted to be both useful and not overly burdensome. One commenter responded, recommending that the Commission require committees to provide a detailed description of the relationship between a use of campaign funds and the candidate's campaign or officeholder duties.

The Commission has concluded that any significant changes to the reporting requirements should be taken up as part of a comprehensive review of the recordkeeping and reporting regulations. Such a review is currently under way as a separate rulemaking.

Nevertheless, the Commission has identified one limited change that can be made now and will be useful in administering the personal use rules. Section 104.3 contains a new reporting requirement for authorized committees that itemize certain disbursements implicating the personal use prohibition. The new reporting requirement is set out in section 104.3(b)(4)(i)(B).

Revised section 104.3(b)(4)(i)(B) requires an authorized committee that itemizes a disbursement for which

partial or total reimbursement is expected under new § 113.1(g)(1)(ii) (C) or (D) to briefly explain the activity for which reimbursement will be made. For example, when itemizing a disbursement of funds for travel expenses associated with a trip that was partially campaign related and partially a personal trip for the candidate, the committee is required to indicate that the trip includes the cost of the candidate's personal trip, for which the committee is anticipating reimbursement. This information would be included on schedule B of Form 3. Committees receiving reimbursements will report them as "other receipts" on the Detailed Summary Page of Form 3.

If an individual benefiting from the use of campaign funds for personal travel or vehicle expenses makes a reimbursement under this section, the reimbursement is not a contribution under the Act, and the individual is not required to report the reimbursement. However, if the reimbursement is made by a person other than the person benefiting from the use of the funds, it may be a contribution by the person making the reimbursement under § 113.1(g)(6). If so, it must be reported as a contribution.

Certification of No Effect Pursuant to 5 U.S.C. § 605(b) (Regulatory Flexibility Act)

The attached final rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that the final rules are directed at individuals rather than small entities within the meaning of the Regulatory Flexibility Act. Therefore, no small entities will be significantly impacted.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 104

Campaign funds, Political committees and parties, Political candidates.

11 CFR Part 113

Campaign funds, Political candidates, Elections.

For the reasons set out in the preamble, subchapter A, chapter I of title 11 of the Code of Federal Regulations is amended as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 438(a)(8).

2. Section 100.8 is amended by revising paragraph (b)(22) to read as follows:

§ 100.8 Expenditure (2 U.S.C. 431(9)).

* * * * *

(b) * * *

(22) Payments by a candidate from his or her personal funds, as defined at 11 CFR 110.10(b), for the candidate's routine living expenses which would have been incurred without candidacy, including the cost of food and residence, are not expenditures. Payments for such expenses by a member of the candidate's family as defined in 11 CFR 113.1(g)(7), are not expenditures if the payments are made from an account jointly held with the candidate, or if the expenses were paid by the family member before the candidate became a candidate.

* * * * *

PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

3. The authority citation for part 104 is revised to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

4. Section 104.3 is amended by revising the section heading and adding paragraph (b)(4)(i) (B) as follows:

§ 104.3 Contents of reports (2 U.S.C. 434(b), 439a).

* * * * *

(b) * * *

(4) * * *

(i) * * *

(A) * * *

(B) In addition to reporting the purpose described in 11 CFR 104.3(b)(4)(i)(A), whenever an authorized committee itemizes a disbursement that is partially or entirely a personal use for which reimbursement is required under 11 CFR 113.1(g)(1)(ii) (C) or (D), it shall provide a brief explanation of the activity for which reimbursement is required.

* * * * *

PART 113—EXCESS CAMPAIGN FUNDS AND FUNDS DONATED TO SUPPORT FEDERAL OFFICEHOLDER ACTIVITIES (2 U.S.C. 439a)

5. The authority citation for part 113 continues to read as follows:

Authority: 2 U.S.C. 432(h), 438(a)(8), 439a, 441a.

6. Section 113.1 is amended by adding paragraph (g) as follows:

§ 113.1 Definitions (2 U.S.C. 439a).

* * * * *

(g) *Personal use. Personal use* means any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder.

(1)(i) *Personal use* includes but is not limited to the use of funds in a campaign account for:

(A) Household food items or supplies

(B) Funeral, cremation or burial expenses;

(C) Clothing, other than items of *de minimis* value that are used in the campaign, such as campaign "T-shirts" or caps with campaign slogans;

(D) Tuition payments, other than those associated with training campaign staff;

(E) Mortgage, rent or utility payments—

(*1*) For any part of any personal residence of the candidate or a member of the candidate's family; or

(*2*) For real or personal property that is owned by the candidate or a member of the candidate's family and used for campaign purposes, to the extent the payments exceed the fair market value of the property usage;

(F) Admission to a sporting event, concert, theater or other form of entertainment, unless part of a specific campaign or officeholder activity;

(G) Dues, fees or gratuities at a country club, health club, recreational facility or other nonpolitical organization, unless they are part of the costs of a specific fundraising event that takes place on the organization's premises; and

(H) Salary payments to a member of the candidate's family, unless the family member is providing *bona fide* services to the campaign. If a family member provides *bona fide* services to the campaign, any salary payment in excess of the fair market value of the services provided is personal use.

(ii) The Commission will determine, on a case by case basis, whether other uses of funds in a campaign account fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder, and therefore are personal use. Examples of such other uses include:

(A) Legal expenses;

(B) Meal expenses;

(C) Travel expenses, including subsistence expenses incurred during travel. If a committee uses campaign funds to pay expenses associated with travel that involves both personal activities and campaign or officeholder related activities, the incremental expenses that result from the personal activities are personal use, unless the person(s) benefiting from this use

reimburse(s) the campaign account within thirty days for the amount of the incremental expenses; and

(D) Vehicle expenses, unless they are a *de minimis* amount. If a committee uses campaign funds to pay expenses associated with a vehicle that is used for both personal activities beyond a *de minimus* amount and campaign or officerholder related activities, the portion of the vehicle expenses associated with the personal activities is personal use, unless the person(s) using the vehicle for personal activities reimburse(s) the campaign account within thirty days for the expenses associated with the personal activities.

(2) *Charitable donations.* Donations of campaign funds or assets to an organization described in section 170(c) of Title 26 of the United States Code are not personal use, unless the candidate receives compensation from the organization before the organization has expended the entire amount donated for purposes unrelated to his or her personal benefit.

(3) *Transfers of campaign assets.* The transfer of a campaign committee asset is not personal use so long as the transfer is for fair market value. Any depreciation that takes place before the transfer must be allocated between the committee and the purchaser based on the useful life of the asset.

(4) *Gifts.* Gifts of nominal value and donations of a nominal amount made on a special occasion such as a holiday, graduation, marriage, retirement, or death are not personal use, unless made to a member of the candidate's family.

(5) *Political or officially connected expenses.* The use of campaign funds for an expense that would be a political expense under the rules of the United States House of Representatives or an officially connected expense under the rules of the United States Senate is not personal use to the extent that the expense is an expenditure under 11 CFR 100.8 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office. Any use of funds that would be personal use under 11 CFR 113.1(g)(1) will not be considered an expenditure under 11 CFR 100.8 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office.

(6) *Third party payments.* Notwithstanding that the use of funds for a particular expense would be a personal use under this section, payment of that expense by any person other than the candidate or the campaign committee shall be a contribution under 11 CFR 100.7 to the candidate unless the payment would have been made irrespective of the candidacy. Examples of payments considered to be irrespective of the candidacy include, but are not limited to, situations where—

(i) The payment is a donation to a legal expense trust fund established in accordance with the rules of the United States Senate or the United State House of Representatives;

(ii) The payment is made from funds that are the candidate's personal funds as defined in 11 CFR 110.10(b), including an account jointly held by the candidate and a member of the candidate's family;

(iii) Payments for that expense were made by the person making the payment before the candidate became a candidate. Payments that are compensation shall be considered contributions unless—

(A) The compensation results from *bona fide* employment that is genuinely independent of the candidacy;

(B) The compensation is exclusively in consideration of services provided by the employee as part of this employment; and

(C) The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

(7) *Members of the candidate's family.* For the purposes of section 113.1(g), the candidate's family includes:

(i) The spouse of the candidate;

(ii) Any child, step-child, parent, grandparent, sibling, half-sibling or step-sibling of the candidate or the candidate's spouse;

(iii) The spouse of any child, step-child, parent, grandparent, sibling, half-sibling or step-sibling of the candidate; and

(iv) A person who has a committed relationship with the candidate, such as sharing a household and having mutual responsibility for each other's personal welfare or living expenses.

7. In section 113.2, the introductory text is republished and paragraph (a) is revised to read as follows:

§ 113.2 Use of funds (2 U.S.C. 439a).

Excess campaign funds and funds donated:

(a) May be used to defray any ordinary and necessary expenses incurred in connection with the recipient's duties as a holder of Federal office, if applicable, including:

(1) The costs of travel by the recipient Federal officeholder and an accompanying spouse to participate in a function directly connected to *bona fide* official responsibilities, such as a fact-finding meeting or an event at which the officeholder's services are provided through a speech or appearance in an official capacity; and

(2) The costs of winding down the office of a former Federal officeholder for a period of 6 months after he or she leaves office; or

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Dated: February 3, 1995.

Danny L. McDonald,

Chairman, Federal Election Commission.

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