

Use of Non-Commercial Aircraft by Members of the House and Senate

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The intersection of congressional ethics rules and federal election laws and regulations on the use of “non-commercial”—that is, corporate or other private—aircraft by Members of, and candidates for, the U.S. House of Representatives or U.S. Senate can seem complicated. Two separate sets of ethics rules and two different provisions of Federal Election Commission law and regulations are relevant to these issues. Figuring out which rules and which law and regulations apply under what set of circumstances often takes some concentration. And the apparent complexity of the situation is not helped by the fact that the House Committee on Ethics' published guidance on use of non-commercial aircraft by Members does not reflect the current state of the House rules.

With the important caveat that it is generally advisable to consult both outside counsel and the relevant ethics office when questions involving use of private aircraft by Members of Congress arise, what are some of the basics on Member use of and payment for such aircraft that you should be aware of as company, association, or campaign counsel? Consider the following hypotheticals:

Your company is sponsoring a fact-finding trip for a U.S. Senator and a Member of the U.S. House to tour two of its operating facilities in a Mountain West state. One of the facilities is in a remote locale and the only practical and timely way to get to it is to use your company's corporate jet. Under House and Senate travel regulations, could your company provide free travel on the jet? If not, could the Senator and the Representative use funds of their respective candidate committees to pay for this non-commercial air travel for this leg of the trip? What if, on another occasion, the Representative asks to use your company's jet for travel for her reelection campaign, offering to

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reimburse the appropriate amount through her candidate committee? Is this arrangement permissible? What if, instead, the Representative is running for a Senate seat and asks to use the company jet for travel on her Senate campaign?

Use of non-commercial aircraft for privately sponsored travel. The Senate travel regulations state plainly that use of private or charter aircraft for privately sponsored, officially connected travel is a “prohibited expense.” The House travel regulations, issued in December 2012, do not directly state that use of private, non-commercial, non-charter aircraft for privately sponsored, officially connected travel is prohibited. However, the House travel regs also do not include such non-commercial aircraft among the enumerated “permissible” expenses for such travel: The regs state that “coach class or business class of commercial air carriers” may be used and, with prior Ethics Committee approval, also permit use of “first class or charter” travel. On the other hand, the House Ethics Manual, published in 2008, states that “private aircraft flights are permitted only under limited conditions” or where “exceptional circumstances” exist. The practical bottom line: Contact the House Ethics Committee well in advance if the use of private aircraft might be necessary for a fact-finding trip involving House Members or staff.

Use of a Member's campaign funds to pay for non-commercial aircraft. Rather than having a private trip sponsor provide use of private aircraft for free in connection with a fact-finding trip, could the traveling Senator or Representative use funds of his or her principal campaign committee to pick up the costs of this travel? Once again, the answer on the Senate side—under the Senate gift rule—is fairly straightforward: “Yes,” at least as a general matter. To avoid any gift issue, the Senator would have to pay the donor of the private air travel fair market value for the flight. The Senate ethics rules define “fair market value” for use of private aircraft to be the Senate traveler's “pro rata share of the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size, as determined by dividing such cost by the number of Members, officers, or employees of Congress on the flight.”

On the House side, the answer to whether campaign funds could be used to pay for a flight on a private aircraft is “No,” not if the Representative in question is also a candidate for reelection to the House (as most Members of the House are). This is because—under a 2007 Honest Leadership and Open Government Act-era amendment to the federal election laws—an “authorized committee [or] a leadership PAC” of a candidate for the House may not, as a general matter, make expenditures for flights on private, non-commercial aircraft. This statutory restriction on use of private aircraft by Members of the House applies despite the fact that the House rules were amended at the beginning of the 113th Congress to permit Members to use their personal funds, official funds or campaign funds to pay for flights on private aircraft (if they use the same formula for determining “fair market value” for the flight as set out above for the Senate). The statutory prohibition on use of campaign (or leadership PAC) funds by House candidates to pay for flights on private aircraft trumps the permission provided to House Members under the rules.

The current House rule permitting Members to pay for the use of private aircraft with either personal, official, or campaign funds reverses the previous rule, in place since 2007, under which Member payment, from any source of funds, for flights on private, non-commercial aircraft was generally prohibited. This change to the rules in the current Congress was not well publicized. It went “under the radar.” In fact—and inexplicably—the

House Ethics Committee's published guidance on use of private aircraft (including the guidance currently up on the Committee's website) does not appear to even mention the January 2013 rules change permitting payment for the use of private aircraft with a Member's personal, official, or campaign funds.

Use of non-commercial aircraft by a Senator's or House Member's campaign. As a general matter, under federal election law and regulations, the authorized committee of a Senate candidate may pay for campaign travel on private, non-commercial aircraft if the appropriate reimbursement formula is used to pay for such flights. This reimbursement formula—similar to the formula set forth in the Senate gift rules as discussed above—requires use of the charter rate for comparable aircraft and determination of the applicable pro rata share by dividing this charter rate by the number of campaign travelers on the flight who represent the candidate or the candidate's authorized committee. Such use of Senate campaign funds would be permissible for any candidate for the Senate, including a sitting Member of the House who is running for a Senate seat. But—as also discussed above—a candidate for the House, including a House Member running for reelection, may not use his or her campaign funds to pay for flights on private aircraft.

The discussion in this article can only provide the view from 30,000 feet. Contact Wiley Rein's Election Law & Government Ethics Team to discuss specific questions or issues on use of non-commercial aircraft by Members of the House and Senate and by campaign committees.