

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