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