



June 30, 2021

Amy Rothstein
Assistant General Counsel
Federal Election Commission
1050 First Street, NE Washington, DC 20463
Submitted electronically to www.fec.gov/fosers

Re: Comments on REG 2021-01: Candidate Salaries

Dear Ms. Rothstein,

The Campaign Legal Center (“CLC”) respectfully submits these comments in response to the notice of availability in REG 2021-01, 86 Fed. Reg. 23300 (May 3, 2021).

CLC urges the Commission to amend its regulations to standardize the date on which an eligible candidate may begin receiving a campaign salary. The Commission should also consider allowing greater flexibility in the calculation of a candidate’s prior income for campaign salary purposes, and the circumstances under which a candidate’s health insurance costs would not exist irrespective of one’s campaign.

Candidate Salary Period

Candidates may not use campaign funds for personal use.¹ Campaign funds have been converted to personal use if the funds are used “to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate’s election campaign” or officeholder duties.²

When a candidate foregoes income to run for office, a candidate salary may be an expense that would not exist “irrespective” of their campaign. For that reason, the Commission in 2002 adopted regulations permitting candidates, under limited circumstances, to draw salaries from campaign funds without violating the personal use ban.³ As the Commission noted when adopting the regulations, “but for the candidacy, the candidate would be paid a salary in exchange for services rendered to an employer.”⁴

Under Commission regulations, candidates who forego income in order to run for office may pay themselves a pro-rated salary, with the amount they may earn capped at the lesser of their prior year’s income or the annual salary of the office sought.⁵

Together, these rules seek to strike an important balance, opening the door for those who are not independently wealthy to seek office, while ensuring that donor dollars are not used for personal enrichment.

¹ See 11 C.F.R. 113.1(g).

² 52 U.S.C. § 30114(b)(2); see also 11 C.F.R. § 113.1(g).

³ Using Contributions to Pay for Salaries to Candidates, 67 Fed. Reg. 76961, 76971 (Dec. 13, 2002), <https://sers.fec.gov/fosers/showpdf.htm?docid=8982#page=11>.

⁴ *Id.* at 76972.

⁵ 11 C.F.R. 113.1(g)(1)(i)(I).

However, there are significant state-by-state variations regarding the date on which an otherwise eligible candidate may begin drawing a salary. These variations appear to undermine the former goal while doing nothing to advance the latter.

Current regulations specify that a candidate may begin receiving a salary on the date of “the filing deadline for access to the primary election ballot for the Federal office that the candidate seeks, as determined by state law, or in those states that do not conduct primaries, on January 1 of each even-numbered year.”⁶

As noted in the petition, in the 2018 cycle, primary ballot access deadlines ranged from December 4, 2017, in Illinois to July 10, 2018, in Delaware.⁷ Some state filing deadlines occur just two months before a primary election—although campaigning, including full-time campaigning, may begin far earlier. For example, petitioner Nabilah Islam spent 16 months campaigning full time, most of it unpaid.⁸

When the Commission issued the relevant regulations in 2002, it may have been seeking an objective start date for salary payments, yet experience in the decades since shows that campaigning starts much earlier than primary ballot deadlines.⁹ Newcomers facing an incumbent may feel even greater pressure to begin campaigning early, given the advantages in fundraising and name recognition an incumbent typically assumes.¹⁰

There is no clear relationship between state primary ballot access dates and whether candidate salary costs would pass the “irrespective” test. Salary costs are no less irrespective of one’s candidacy whether one is campaigning in Illinois or Delaware, and yet, varying primary ballot access dates can result in significantly different salary availability. These variations are likely to be most critical for those considering a bid for office who do not have significant savings to fall back on.

A standardized start date for drawing a salary—such as 180 days before a state’s primary election—could enable working people across the country to run for office, without infringing on the important anti-corruption goals of the ban on personal use of campaign funds. Such a rule would give candidates substantial time to commit their efforts to campaigning ahead of a primary election, while retaining important limits on misuses of donor funds.

Minimum Candidate Salary

As noted above, when an eligible candidate does draw a campaign salary, it is limited to the lesser of their prior year’s income or the annual salary of the office sought.¹¹

The Commission might consider a more adaptive rule regarding the calculation of prior income. This is particularly relevant given the economic devastation of the past

⁶ *Id.* The salary period ends at the time a candidate loses her primary or otherwise withdraws her candidacy, or if the candidate wins her primary, on “the date of the general election, up to and including the date of any general election runoff.” *Id.*

⁷ See Fed. Election Comm’n, *2018 Congressional Primary Dates and Candidate Filing Deadlines for Ballot* (Aug. 17, 2018), <https://www.fec.gov/resources/cms-content/documents/2018updates.pdf>.

⁸ Nabilah Islam, *Petition for Rulemaking to Improve Candidate Salary Rules*, REG 2021-03 (March 23, 2021), <https://sers.fec.gov/fosers/showpdf.htm?docid=413694>.

⁹ See, e.g., John Haltiwanger, *Americans are already exhausted with the 2020 election, and it’s just getting started. Other countries have laws limiting the length of campaigns*, BUSINESS INSIDER (Feb. 10, 2020), <https://www.businessinsider.com/us-presidential-elections-are-absurdly-long-compared-rest-of-world-2020-2>; Alicia Parlapiano, *How Presidential Campaigns Became Two-Year Marathons*, N.Y. TIMES (April 16, 2015), <https://www.nytimes.com/2015/04/17/upshot/how-presidential-campaigns-became-two-year-marathons.html>.

¹⁰ See, e.g., *Incumbent Advantage*, OPEN SECRETS (April 1, 2021), <https://www.opensecrets.org/elections-overview/incumbent-advantage>.

¹¹ 11 C.F.R. 113.1(g)(1)(i)(I).

year, when tens of millions of Americans lost jobs or saw their incomes decline.¹² Women, including working mothers, have been especially hard hit.¹³

Instead of looking to just the prior year's income statement, the Commission could consider rules allowing candidates to calculate their salary based on an average of the prior two or three years, or based on their income for any one of the prior few years. This additional flexibility could help to ensure that working candidates impacted by the pandemic—or by other economic forces outside of their control—are not discouraged from seeking office on that basis.

Healthcare Premiums

Finally, although health insurance premiums are generally an expense that would exist irrespective of a candidate's campaign,¹⁴ there may be situations where healthcare costs—like a candidate salary—would not exist but for one's candidacy.¹⁵

For example, if a candidate leaves his position to campaign full time and loses his employer-sponsored insurance, he may face two common choices: seek out a plan from an Affordable Care Act (ACA) exchange, or make use of the Consolidated Omnibus Budget Reconciliation Act (COBRA), which permits employees to extend their job-based coverage by paying out-of-pocket for the entire cost of the insurance.

In both cases, candidates are likely to incur significantly greater costs than they would under their previous employer-based healthcare plan. Workers pay, on average, roughly \$100 per month for single coverage under an employer-based plan.¹⁶ That could go up to something like \$450 per month in an ACA marketplace,¹⁷ or \$600 per month under COBRA.¹⁸ Those additional costs would not exist but for one's candidacy.¹⁹

The Commission applied a similar analysis when considering the use of campaign funds to pay for childcare expenses incurred by a candidate who, prior to becoming a candidate, had worked from home and provided full-time care for her children.²⁰ Under those circumstances, childcare costs incurred as a direct result of campaign activity “would not exist irrespective of [the candidate's] election campaign, and thus may be permissibly paid with campaign funds.”²¹ A similar logic may well exist for healthcare premiums, given the centrality of employer-based healthcare in our country.

¹² Ben Popken, *2020 was the year the jobs went away. But when will they come back?*, CNBC (Dec. 17, 2020), <https://www.nbcnews.com/business/economy/2020-was-year-jobs-went-away-when-will-they-come-n1251505> (noting that the U.S. economy shed 22 million jobs in the first few months of the COVID-19 pandemic, and many of those positions have yet to return).

¹³ See, e.g., Michelle Fox, *Lost jobs, less pay, no childcare: A year into the pandemic, women are not OK*, CNBC (Mar. 1, 2021), <https://www.cnbc.com/2021/03/01/from-jobs-to-pay-the-coronavirus-pandemic-has-hurt-women.html>.

¹⁴ See Factual & Legal Analysis at 10, MUR 7068 (Mowrer for Iowa, et al.) (Dec. 20, 2017), <https://www.fec.gov/files/legal/murs/7068/18044452908.pdf>.

¹⁵ As the Commission notes in its notification of availability, the For the People Act of 2021, which passed the House earlier this year, would amend FECA to expressly permit the use of a candidate's committee funds to pay for the candidate's healthcare premiums.

¹⁶ *2020 Employer Health Benefits Survey*, KAISER FAMILY FOUNDATION 81 (Oct. 8, 2020), <https://files.kff.org/attachment/Report-Employer-Health-Benefits-2020-Annual-Survey.pdf>.

¹⁷ *Marketplace Average Benchmark Premiums*, KAISER FAMILY FOUNDATION, <https://www.kff.org/health-reform/state-indicator/marketplace-average-benchmark-premiums>.

¹⁸ KAISER FAMILY FOUNDATION, *supra* note 16 at 33.

¹⁹ Another option is to forgo insurance altogether. Evidence suggests that numerous candidates went without health insurance during this past election season—despite the threat of the COVID-19 pandemic. For instance, Rep. Cori Bush, who won her seat last fall, drove herself to the emergency room with pneumonia during her campaign because she was uninsured and worried about the cost of an ambulance. See Isabella Grullón Paz, *What It's Like to Run for Congress Without Health Insurance During a Pandemic*, N.Y. TIMES (April 3, 2020), <https://www.nytimes.com/2020/04/03/us/politics/coronavirus-health-care-candidates.html>.

²⁰ See FEC Advisory Op. 2018-06 (Liuba for Congress), (May 10, 2018), <https://www.fec.gov/data/legal/advisory-opinions/2018-06/>.

²¹ *Id.*

Under circumstances such as those described above, the Commission should consider allowing candidates to join any healthcare plan they provide to campaign employees at the time they become eligible to receive a salary using candidate funds.

Sincerely,

_____/s/_____

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