From:	Renata Strause
To:	Candidate Salaries
Cc:	Laurence Gold; Jessica Robinson; dlee@afscme.org; dora.chen@seiu.org; dhurwitz@nea.org
Subject:	Comments re: Notification of Availability for REG 2021-01
Date:	Sunday, July 4, 2021 11:40:25 AM
Attachments:	Labor Organizations Comment July 2 2021 - REG 2021-01.docx

Dear Ms. Rothstein:

Attached are comments from four labor organizations in response to the Notification of Availability for REG 2021-01. We recognize that the deadline for submission was Friday, July 2, and apologize for the untimely submission, which was due to an internal mixup just discovered. We ask that the Commission consider our comments nonetheless, as no prejudice will result from their unavailability until now and we are filing them before the first business day after they were due.

Thank you for your consideration.

Renata Strause
Trister, Ross, Schadler & Gold, PLLC
1666 Connecticut Ave. NW, Fifth Floor| Washington DC 20009
202-285-5764
rstrause@tristerross.com
she/her/hers
Admitted only in Pennsylvania; supervised by partners of the firm who are members of the D.C. Bar.

July 2, 2021

Ms. Amy Rothstein
Assistant General Counsel
Federal Election Commission
1050 First St. NE
Washington, DC 20463

RE: Notification of Availability,
"Rulemaking Petition: Candidate Salaries,"
86 Fed. Reg. 23300 (May 3, 2021)

Dear Ms. Rothstein:

The undersigned national labor organizations ("Labor Organizations") respectfully submit these comments on the above-captioned notification of availability arising from the March 23, 2001 "Petition for Rulemaking to Improve Candidate Salary Rules") ("Petition"). We urge the Commission to conduct a rulemaking to consider modifications of the regulations that permit candidates to draw salaries from their principal campaign committees. 11 C.F.R. § 113.1(g)(1)(i)(I). While we do not offer substantive suggestions at this phase, the Labor Organizations support the Petition's request that the Commission reconsider the current limitations on candidate salaries and its determination that payments for health insurance premiums are impermissible.

The Commission's decision in 2002 to promulgate regulations permitting candidates to draw salaries from their principal campaign committees provided important and welcome clarity. Throughout the decade prior to issuing the rule, the Commission had deadlocked repeatedly on the permissibility of candidate salaries. *See* AO 1992-1 (candidate's inquiry regarding whether his principal campaign committee could pay him a salary); AO 1992-4 (unemployed candidate's inquiry as to whether or not his principal campaign committee could defray a reasonable amount of living expenses); Explanation and Justification, Final Rules, "Expenditures; Reports by Political Committees; Personal Use of Campaign Funds," 60 Fed. Reg. 7862, 7866-67 (Feb. 9, 1995) (noting that the Commission could not agree on whether or not to prohibit salary payments to a candidate as personal use). Then in AO 1999-1, the Commission mustered four votes to advise that salary payments to candidates were unlawful, in part on the premise that the requester's proposed salary arrangement would allow his campaign committee to "do indirectly what it cannot do directly" – that is, pay for expenses such as utilities and clothing that Commission regulations specified were *per se* impermissible.

The Commission's position on candidate salaries was short-lived, due to revisions to the statutory "personal use" prohibition made by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), now codified at 52 U.S.C. § 30114(b). The text defines as personal use any payments from campaign committee funds that "fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office," and sets forth a list of examples of such expenses. *Id.* As the Commission noted in the Explanation and Justification accompanying the current rule,

BCRA's legislative history made clear that the law was intended to codify the Commission's pre-BCRA regulations on personal use but *not* its interpretation of those regulations. Explanation and Justification, Final Rules, "Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds," 67 Fed. Reg. 76962, 76971 (Dec. 13, 2002). Because the new statutory text did not include candidate salaries among the list of *per se* personal uses of campaign funds, the door was open for the Commission to reconsider its prior position. At the urging of ideologically diverse commenters, the Commission approved a final rule superseding the 1999 AO and ending the decade-long period of uncertainty and churn.

Importantly, the Commission's 2002 rulemaking also expanded opportunities for working Americans – like the combined 17 million whom the Labor Organizations and our affiliates represent – to run for federal office. Commenters noted 19 years ago that Congress was largely a domain of the well-off – and it is even more so today. Ten years after the current rule was adopted, the wealth of members of Congress passed a milestone when, for the first time, more than half were millionaires. Carly Cody, NPR, *Majority in Congress are Millionaires*, Jan. 13, 2014.[1] By 2018, the median minimum net worth of members of Congress was *quintuple* the median net worth of an American household. David Hawkings, Roll Call, *Wealth of Congress: Richer Than Ever, but Mostly at the Very Top*, Feb. 27, 2018.[2] And while the current rule has helped enable the candidacies of workers from a range of backgrounds – our informal survey of recent election cycles found candidate salaries paid to, for example, a nurse, a non-profit policy director, a small business owner, and a local government employee – the Commission should further expand opportunities for Americans of ordinary means to run for office by revisiting its conditions on the minimum amount a candidate can be paid and the time period during which a salary may be drawn.

Moreover, the actual wealth gap between Members of Congress and the general public aside, incumbents of any personal means are advantaged by their ability to spend as much of their time as they wish campaigning for reelection while receiving their full public salaries and benefits. Employed non-incumbents have no such opportunity, as campaigning during their working time counts as an in-kind contribution from their employers, which is either unlawful or strictly limited. An adequate opportunity to draw a salary as a candidate ameliorates this advantage of incumbency, which has nothing to do with relative candidate quality.

The undersigned Labor Organizations particularly encourage the Commission to reconsider its interpretation of the "personal use" prohibition as applied to health insurance premiums. The first and, at least as publicly disclosed, only time the Commission addressed the permissibility of using campaign funds to pay for a candidate's health insurance, it found that the payments were "of a character of those fringe benefit payments to the candidate that the Commission has determined are personal use[.]" Factual and Legal Analysis, MUR 7068 at 10 (Mowrer for Iowa, *et al*.) (Dec. 20, 2017). The Commission further reasoned that because the

[1] Available at https://www.npr.org/sections/itsallpolitics/2014/01/10/261398205/majority-in-congress-are-millionaires.

[2] Available at https://www.rollcall.com/2018/02/27/wealth-of-congress-richer-than-ever-but-mostly-at-the-very-top/. For its analysis, Roll Call calculated a member's "median minimum net worth" by subtracting the minimum value in the dollar amount brackets used in congressional financial disclosures of a member's immediate family liabilities from the minimum dollar reported value of all of his or her assets.

payments were made to fulfill a "commitment, obligation, or expense that would exist irrespective of the candidate's campaign," the candidate and his committee had violated the law. *Id*. Yet in reaching this conclusion, the Commission failed to consider the simple fact that a majority of American adults obtain their health insurance through work. U.S. Census Bureau, *Health Insurance Coverage in the United States: 2019*, P60-271. The Commission also tacitly acknowledged that the permissibility of paying for candidate health insurance premiums is a matter on which Congress has not "directly spoken," which, under *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984), means that the Commission may proceed with a range of interpretive discretion and would receive judicial deference to any permissible construction of 52 U.S.C. § 30114(b).

The Commission should take this opportunity to reexamine the way in which it has approached this aspect of the personal use prohibition so that it may consider information beyond the context available in a single enforcement action and consider the efficacy of its nearly 20-year old rule in light of current societal conditions that pose challenges for working Americans who wish to engage competitively in the political process. On behalf of the undersigned Labor Organizations, we urge the Commission to open a rulemaking in response to the Petition. Thank you for your consideration.

Yours truly,

Laurence E. Gold
Renata Strause
Trister, Ross, Schadler & Gold, PLLC
1666 Connecticut Ave. NW, Suite 500
Washington, DC 20009
(202) 464-0353
lgold@tristerross.com
Counsel to American Federation of Labor and Congress of Industrial Organizations

Dawn Lee
Associate General Counsel
American Federation of State, County and Municipal Employees
1625 L St. NW
Washington, DC 20036
(202) 775-5900
DLee@afscme.org

Jessica Robinson
Trister, Ross, Schadler & Gold, PLLC
1666 Connecticut Ave. NW, Suite 500
Washington DC 20009
(202) 839-4352
jrobinson@tristerross.com
Counsel to American Federation of State, County and Municipal Employees

Darrin Hurwitz
Staff Counsel
National Education Association
1201 16th St. NW
Washington DC 20036
(202) 822-7293
dhurwitz@nea.org

Nicole G. Berner, General Counsel
Dora V. Chen, Associate General Counsel
Service Employees International Union
1800 Massachusetts Ave. NW
Washington, DC 20036
(202) 730-7469
dora.chen@seiu.org