

February 10, 2023

Chair Allen Dickerson
Vice Chair Dara Lindenbaum
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: REG 2021-01, Candidate Salaries

Dear Chair Dickerson and Vice Chair Lindenbaum:

The Brennan Center for Justice at New York University School of Law¹ respectfully submits this comment in response to the Commission’s Notice of Proposed Rulemaking re: Candidate Salaries (“NPRM”), published December 12, 2022 (87 FR 75945), concerning the use of campaign funds to compensate candidates. We urge the Commission to update its rules for candidate salaries to make it easier for individuals from all walks of life and who represent America’s true diversity to run for and win office. Should the Commission hold a hearing in this proceeding, we would welcome the opportunity to testify.

I. Current Rules for Candidate Salaries are Unfair

Running for office is an expensive proposition, not only because of the rising cost of campaigns but also because doing so successfully often precludes other employment and may entail additional life expenses, such as extra childcare.² While candidates are allowed to receive compensation from their campaign funds in certain circumstances, the Commission’s current rules are skewed against those who are not able to easily support themselves financially while running for office.

¹ The Brennan Center is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center’s Money in Politics project works to reduce the undue influence of money in our democracy. This comment does not purport to convey the position of New York University School of Law, if any.

² See Ross Barkan, *It’s way too hard for working-class people to run for office*, THE WASHINGTON POST (Jan. 16, 2019), <https://www.washingtonpost.com/outlook/2019/01/16/its-way-too-hard-working-class-people-run-office/>; Anna North, *This mom just won the right to use campaign funds to pay for child care*, VOX (May 11, 2018), <https://www.vox.com/2018/5/11/17340698/mom-mothers-congress-child-care-liuba-grechen-shirley-campaign-funds-babysitting>.

The Commission’s current regulations provide that a candidate may only pay herself the *lower* of either the minimum salary for the office sought or the candidate’s previous annual salary.³ This means that if a candidate earned \$20,000 the year before running for office, she can only receive up to that amount from her campaign, whereas her opponent who earned \$100,000 can receive five times as much. A candidate who was a full-time caregiver and did not earn any salary in the previous year cannot pay herself anything and would need to get special permission through an advisory opinion even to use campaign funds to cover basic expenses associated with campaigning, like childcare while she was out on the trail.⁴

As the Commission itself acknowledged in the NPRM, “[T]he current regulation[s] might not adequately cover individuals who had a gap in employment or an unusually low level of income the year before becoming a candidate[.]”⁵ More broadly, the rules simply disfavor those who work lower paying jobs or part time, or need to forego paid work altogether, often to care for others. Such individuals are disproportionately women, people of color, LGBTQ+, and/or working class.⁶ Many of these same individuals are also less likely to have access to the sort of accumulated wealth that can make running for office without a paid salary feasible.⁷ They bear the brunt of the Commission’s current inequitable rules among many other disproportionate barriers to running for office.

³ 11 C.F.R. 113.1(g)(1)(i)(I).

⁴ See Ltr. from Brennan Center re: REG 2021-01, Candidate Salaries (“BCJ 2021 Comment”) (July 2, 2021) at 3, <https://www.brennancenter.org/sites/default/files/2021-07/BCJ%20Comment%20REG%202021-01.pdf>. As noted in our prior comment, the Commission has approved several recent requests to use campaign funds for childcare through the advisory opinion process. Advisory opinions granted to individual requestors for specific circumstances are not necessarily binding on other individuals and do not provide the same level of clarity as clear, generally applicable regulations, however. See 11 C.F.R. 112.5(a)(2) (reliance on advisory opinion granted to another party is appropriate only in circumstances that are “indistinguishable in all [] material respects” from the transaction that was the subject of the advisory opinion).

⁵ NPRM at 75948.

⁶ BCJ 2021 Comment at 1–2.

⁷ *Id.* at 1 n.2 (citing ELIZABETH HIRA ET AL., BRENNAN CENTER FOR JUSTICE, EQUITY FOR THE PEOPLE: S.1/H.R. 1 AND THE FIGHT FOR AN INCLUSIVE DEMOCRACY (2021) at 25, <https://www.brennancenter.org/our-work/research-reports/equity-people>; RUBEN GONZALES ET AL., VICTORY INSTITUTE, THE DECISION TO RUN: UNCOVERING THE BARRIERS AND MOTIVATORS FOR LGBTQ WOMEN RUNNING FOR OFFICE (2021) at 8, https://victoryinstitute.org/wp-content/uploads/2021/04/Victory-Institute_The-Decision-to-Run-Report.pdf).

II. The New Rules Should Make It Easier for Candidates to Use Campaign Funds to Support Themselves While Running for Office

The Commission should adopt new rules for non-incumbent candidate salaries and related compensation that make it easier for people from all walks of life to support themselves while running for office.

Salary Rules: With respect to salaries, of the six alternatives proposed in the NPRM, Alternative A comes closest to this objective, by allowing all candidates to pay themselves up to 50 percent of the minimum salary for the office they are seeking.⁸ In our view, it would also be reasonable for the Commission to simply cap salaries for all candidates at the total minimum salary for the office sought. As the Commission observed when promulgating the current regulations, the purpose of the salary rules is to allow a candidate to be adequately compensated for her service to the campaign, just as any other employee receives “a salary in exchange for services rendered to an employer.”⁹ Given that running for office is usually a full-time job lasting many months, the minimum salary the candidate would earn in the office she is seeking is a reasonable measure of the fair market value of the candidate’s contributions to her campaign.

Fair market value is the standard the Commission already employs in many analogous contexts, for example to determine the permissibility of payments to a candidate’s family members employed by her campaign and payments to the candidate herself for her campaign’s use of real or personal property that she owns.¹⁰ Setting the salary cap based on fair market value of the candidate’s services rendered to the campaign is preferable to the alternative suggested in the NPRM of focusing on the “opportunity cost” to the candidate of running for office.¹¹ True opportunity cost is difficult to quantify, since it includes both tangible and intangible costs, such as increased

⁸ The other alternatives proposed in the NPRM either rely on the candidate’s prior income, replicating the problem with the existing rules, limit the least wealthy candidates to paying themselves no more than the minimum wage or, in the case of Alternative C, limit to the least wealthy candidates to a salary of \$15 per hour, NPRM at 75948–50. The best of these alternatives allows for a salary equaling less than one-and-a-half times the federal poverty limit for a family of three, *see* Annual Update of the HHS Poverty Guidelines, published January 19, 2023 (88 FR 3424) at 3424 (noting the 2023 poverty limit for a family of three is \$24,860); *State minimum wage rates in the United States as of January 1, 2023, by state*, STATISTA, <https://www.statista.com/statistics/238997/minimum-wage-by-us-state/> (last visited Feb. 10, 2023).

⁹ Notice of Final Rule re: Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds (“2002 Final Rule”), published December 13, 2002 (67 FR 76962) at 76972; *see also id.* (“A salary paid to a candidate would be in return for the candidate’s services provided to the campaign and the necessity of that salary would not exist irrespective of the candidacy.”).

¹⁰ *See, e.g.*, 11 C.F.R. 113.1(g)(1)(i)(E), (H).

¹¹ *See, e.g.*, NPRM at 75948.

stress and time away from family. Alternatively, to the extent opportunity cost is reduced simply to tangible costs such as lost salary, the result is likely to preserve the inequities in the current rules by valuing the time and effort of candidates based on how much they earned in their previous jobs.

Other Benefits: Candidates should also be able to use campaign funds to provide themselves with reasonable employment benefits, including health and life insurance and retirement contributions. If a candidate is providing these benefits to all of her full-time employees as part of their compensation packages, she should be able to take advantage of them as well without affecting the salary cap.¹² Additional expenses incurred as a direct result of campaign activities, such as childcare not offered as part of a campaign benefits package, should also be payable from campaign funds without affecting the salary cap.¹³

Period for Earning Salary and Benefits: Finally, we support the Commission's proposal to standardize and extend the period during which candidates can receive salaries and benefits. Under the current rules, a candidate cannot draw a salary before primary filing deadlines, January 1 of each even-numbered year in states that do not conduct primaries, or the date a special election is set. Yet many candidates begin their campaigns long before those dates transpire.¹⁴ We support the proposal in the NPRM to allow candidates to begin earning salaries once they begin campaigning.¹⁵ We also support allowing winning candidates to compensate themselves from campaign funds until they are sworn into office.¹⁶ And we encourage the Commission to briefly extend the period during which losing candidates can continue paying themselves a salary. The proposed rules continue the Commission's current approach of barring compensation

¹² BCJ Comment at 4. To the extent the candidate chooses not to offer a benefit like health insurance to her campaign staff, she should still be allowed to use campaign funds to provide herself the benefit. In those instances, however, it would be reasonable to lower the cap on what she can pay herself as a salary by the cost of the benefit.

¹³ While this is already the conclusion that could be derived from the Commission's recent advisory opinions, *see, e.g.*, Advisory Opinion 2002-07 (Swalwell); Advisory Opinion 2018-06 (Shirley), we urge you to codify the interpretations in these opinions in the Commission's regulations for the reasons described above.

¹⁴ *See, e.g.*, Kati Perry, *When do presidential candidates announce? Trump's 2024 bid comes early*, THE WASHINGTON POST (Nov. 17, 2022), <https://www.washingtonpost.com/politics/interactive/2022/president-candidate-announcement-timing/> (noting that recent presidential candidates tend to announce their campaigns about a year and a half before Election Day).

¹⁵ NPRM at 75952–53.

¹⁶ *Id.* at 75953.

once the election is over for losing candidates.¹⁷ But regardless of whether a candidate wins, she has a responsibility to wind down her campaign, and should be allowed to continue receiving compensation for a limited period after an election (not to exceed 1–2 months) subject to the other limits proposed in the NPRM.

* * *

Ultimately, as discussed below, all the Act requires is that campaign funds be used for campaign or officeholder purposes, which the payment of salary and benefits to a non-incumbent candidate easily satisfies. We acknowledge the longstanding concern that overly permissive rules could allow candidates to unfairly enrich themselves.¹⁸ In particular, the NPRM notes concerns from several commentators that a higher salary limit might incentivize so-called “professional candidate[s]” to run for office simply to earn a relatively generous salary.¹⁹ Of course, such candidates would still need to persuade donors to contribute to their campaigns, which is likely to be more difficult for a candidate running an obviously non-viable campaign. Additional safeguards proposed in the NPRM, like prohibiting a campaign committee from compensating a candidate if the committee seeks to settle its debts for less than their full value, will further disincentivize “professional candidates” from running simply to enrich themselves. Public disclosure of campaign expenses is another important safeguard against potential abuse.²⁰

In short, the benefit of allowing qualified candidates to receive fair compensation for the hard work of running for office outweighs the marginally increased risk that a higher salary cap will make it more attractive for a small number of them to run simply for the money.²¹ The policy choice is clear.

III. More Equitable Rules Are Consistent With the Act

The revisions to the Commission’s rules proposed in the NPRM and the modifications proposed in this comment are consistent with the Federal Election Campaign Act (“FECA”), as amended by the Bipartisan Campaign Reform Act of 2002 (“BCRA”). The Act bars candidates from using campaign funds for “any commitment, obligation, or expense of a person that would exist irrespective of the candidate’s election

¹⁷ *Id.*

¹⁸ See 2002 Final Rule at 76972.

¹⁹ NPRM at 75947.

²⁰ See *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976) (noting that campaign disclosure requirements are designed to inform the electorate, deter corruption, and provide data necessary to detect other violations).

²¹ If anything, the problem is the opposite: too few candidates who ought to take salaries from their campaigns do so out of fear of public criticism. See BCJ Comment at 2.

campaign or individual’s duties as a holder of Federal office,” which the Act deems as “personal use.”²² There is nothing inherent in the Commission’s “irrespective” test that requires candidate compensation, including both salary and fringe benefits, to be tethered to previous earned income, as even the more restrictive approaches proposed in the NPRM acknowledge.²³

Personal use restrictions serve an important purpose in deterring corruption and protecting the interests of campaign donors and the broader public. But the prohibition on personal use should not be interpreted so strictly that it prevents qualified candidates from running for office, thereby limiting Americans’ choices at the ballot box. Through this rulemaking, the Commission has an opportunity to send a message encouraging people of all backgrounds to put their names forward for public service. We hope you will take it.

Respectfully submitted,

/s/

Daniel I. Weiner
Harry Isaiah Black

²² 52 U.S.C. § 30114(b)(2).

²³ See NPRM at 75948–49 (proposing various salary caps that do not rely on the candidate’s prior income).