February 10, 2023

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

Re: Notice of Proposed Rulemaking,
"Candidate Salaries," 87 Fed. Reg. 75945
(December 12, 2022)

Dear Ms. Rothstein:

The undersigned national labor organizations ("Labor Organizations") respectfully submit these comments on the above-captioned notice of proposed rulemaking ("NPRM") arising from the "Petition for Rulemaking to Improve Candidate Salary Rules" filed by Nabilah Islam on March 23, 2021 ("Petition"). The Labor Organizations welcome this effort by the Federal Election Commission ("the Commission" or "FEC") to update and improve the current regulation on candidate salaries, 11 C.F.R. § 113.1(g)(1)(i)(I), which dates from 2002. We respectfully request that the Commission adopt an amended regulation that reflects the recommendations we explain here.

The Continued Soundness of the Rule's Legal and Policy Bases

The legal and policy bases for the current regulation remain sound. In promulgating it at the urging of ideologically diverse commenters, the Commission reversed its previous position, expressed in Advisory Opinion 1999-01, that a campaign's payment of a salary to a candidate was an unlawful "personal use" of campaign funds. The Commission's corrective conclusion in 2002 remains the right one: an authorized committee paying the candidate a salary satisfies the "irrespective" standard at 52 U.S.C. § 30114(b) because "'[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.'" NPRM, 87 Fed. Reg. 73945, 73946 (December 12, 2022), quoting FEC, Explanation and Justification, Final Rules, "Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds," 67 Fed. Reg. 76962, 76972 (Dec. 13, 2002). And, in several advisory opinions since then the Commission has applied the "irrespective" standard to approve authorized committee payment for certain candidate childcare expenses, albeit not in the context of candidate compensation under 11 C.F.R. § 113.1(g)(1)(i)(I).[1] Their rationale warrants an expansion of the "salary" rule to encompass additional forms of compensation or compensation-like reimbursements.

Importantly, the Commission's 2002 rulemaking has expanded opportunities for working Americans – like the combined 17 million whom the Labor Organizations and our affiliates represent – to run for federal office. Each of the Labor Organizations has long conducted

[1] See AO 2022-07 (Swallwell); AO 2019-13 (MJ for Texas); AO 2018-06 (Liuba for Congress); 1995-42 (McCrery for Congress).

programs and efforts to encourage its members to run for office, and to assist them in accordance with the Federal Election Campaign Act and the Commission's regulations. These workers, and millions of others like them, typically perform jobs that prescribe particular working times, hours and worksites, even after the pandemic-prompted changes of the past three years. Without adequate compensation for the role of candidate, most are at a disadvantage, not relevant to merit, to higher-income workers who face fewer constraints on how much, when and where they work. And, most lack the accumulated means that enable wealthier non-incumbent candidates to devote substantial blocks of time to their candidacies rather than working to provide for their families and themselves. Moreover, of course, the same racial, ethnic, gender and other inequalities that still beset the Nation are especially reflected in the relative inaccessibility of a federal candidacy to those who cannot afford to forgo regular paychecks.

And, just as commenters in the original candidate-salary rulemaking observed that Congress was largely a domain of the wealthy, it has become even more so. 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.[2] That remained true at least through the 116th Congress,[3] Open Secrets, "Majority of Lawmakers in 116th Congress are Millionaires,"[4] when 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.[5]

Nothing suggests that situation has since changed. Indeed, "[a]s has been true in recent Congresses, the vast majority of Members (93.8% of House Members and 100% of Senators) at the beginning of the 117th Congress have earned at least a bachelor's degree. Sixty-seven percent of House Members and 76% of Senators hold educational degrees beyond a bachelor's." Congressional Research Service, *Membership of the 117th Congress: A Profile*, p. 8 (December 14, 2022).[6] And, in a comment filed in response to the Petition in 2021, Duke University Professor Nicholas Carnes advised that his research revealed, for example, that "working class jobs (manual labor jobs, service industry jobs, or clerical jobs) have always made up a majority of the American labor force, but legislators with significant experience in those kinds of jobs have never made up more than 2% of Congress"; and, he has found, "voters consistently report that they would prefer to see more working-class politicians in office," but they "do not seem to

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

[3] See https://www.opensecrets.org/news/2020/04/majority-of-lawmakers-millionaires/. This is the most recent such data gleaned from an Internet search.

[4] Available at https://www.opensecrets.org/news/2020/04/majority-of-lawmakers-millionaires/.

[5] 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.

[6] Available at https://crsreports.congress.gov/product/pdf/R/R46705.

know how badly underrepresented working-class people really are." N. Carnes and N. Lupu, "The Economic Backgrounds of Politicians," Annu. Rev. Political Sci. 2023, 26:11.1, 11.11.

Analysis of the NPRM and Recommendations for an Amended Regulation

The key elements of an amended rule are the permissible duration of committee compensation of the candidate; the amount of permissible salary; the nature and amount of other permissible compensation; and the expansion of exceptions to the "personal use" category to take into account appropriate applications of the "irrespective" standard. We address each element in turn, and in doing so comment on the NPRM's specific alternative proposals.

Duration of Compensation

The current regulation essentially provides that a candidate salary may be paid during the interval from the state-law filing date for the primary election (or, in states where there is no primary, from January 1 of the election year) until the candidate ceases to be an active candidate, at the latest when the general election (or its runoff) occurs; The NPRM proposes that this period extend from the authorized committee's submission of Form 1, Statement of Organization until the candidate ceases to be an active candidate, except that a candidate who wins the general election (or its runoff) may continue to be paid until they are sworn into office.

The Labor Organizations agree with this proposal. As the petitioner demonstrated, states' candidate filing deadlines vary widely, and those dates are no measure of when an active candidacy begins. Many campaigns begin very early in an election cycle, and the rationale for a candidate salary holds true regardless of its duration, especially when coupled with the apt requirement that the permissible level of candidate compensation be reduced by the amount of actual earned income received during the period of eligibility. Imposition of an arbitrary temporal limit such as 180 days before the primary, as the Petition and some comments on it suggested, would, where it mattered practically, simply undermine that rationale with no evident purpose.

Similar considerations warrant extending the permissible salary period until the successful candidate is sworn in. Here the interval is essentially universal: from the general election date in early November until the following January 3, or approximately eight weeks (and, even less in the case of a runoff, almost none in the case of a special election, and 17 days longer if the office were President or Vice President). This brief employment gap certainly would not exist irrespective of candidacy, and the candidate is highly unlikely to secure ethically and politically acceptable employment during the gap – and if they do, the earned income setoff would apply.

Amount of Compensation

The current regulation limits the permissible salary to "the lesser of: the minimum salary paid to a federal officeholder holding the Federal office that the candidate seeks; or the earned income that the candidate received during the year prior to becoming a candidate." The NPRM

proposes six alternative compensation caps. The Labor Organizations recommend that the permissible salary be set at the statutory salary for the federal office that the candidate seeks.

This determination must take into account the interplay of two legal realities that the Commission cannot change. First, the statutory term "contribution" includes "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose," 52 U.S.C. § 30101(8)(A)(2), so a candidate who is employed other than by his or her authorized committee may not conduct campaign activities during working time. Second, this principle is not applied to incumbent federal officeholders: they may continue to draw full salary and benefits from that employment regardless of when and how they campaign for reelection or for election to another office; and of course they do, often for substantial periods of time, especially in competitive elections, and the entire congressional calendar during an election year is customarily geared to enable them to do so, especially during the critical period preceding the general election. Accordingly, an incumbent candidate and a non-incumbent candidate in the same election race operate under contradictory legal rules that substantially affect their practical ability to conduct every aspect of their competing campaigns. An adequate opportunity to draw a salary as a candidate ameliorates this advantage of incumbency, which has nothing to do with relative candidate quality.

Accordingly, on the premise that the payment of a salary to a candidate satisfies the "irrespective" requirement, the question is how to quantify what is appropriate. We believe the following points are material and point to a simple designation of the standard congressional salary as the maximum.

First, the candidate's actual previous earnings (as in the current regulation) should not be a factor in establishing the permissible salary, for several reasons. First, this does not satisfy the "irrespective" test because a candidate's previous earnings do not necessarily reflect what the candidate would have earned during the subsequent period of candidacy if there were no candidacy. Second, the standard favors higher income-earners, to no public end. Third, and relatedly, individuals who have recently experienced unemployment, full-time care-giving, student status or other circumstances that precluded income, or much income, during the look-back period are disadvantaged. Indeed, for these individuals the current formula leaves them unable to draw any or any more than a minimal campaign salary, which only perpetuates the current disincentives to candidacy for individuals of relatively modest means. Fourth, predicating the minimum or any aspect of the salary formula on previous earnings imposes an unnecessary administrative burden on both the candidate to demonstrate those earnings and on the Commission to enforce the regulation. Accordingly, the Commission should not adopt proposed Compensation Cap Alternatives D, E or F.

Second, the salary standard should be uniform across all jurisdictions, just as federal officeholder salaries are: nearly every Representative and Senator earns $174,000 per year, irrespective of the number of their constituents or the cost of living, geographic scope, distance from Washington, DC or any other aspect of their districts or states. The same should be true for non-incumbents regardless of where they reside.

Third, the regulation should be clear, easy to follow, workable and straightforward to administer. A single limit that is pegged to a relevant and independently set statutory figure has those virtues.

Fourth, the regulations should deter abuse by individuals who may seek to take advantage of the salary regulation by establishing and exploiting scam candidacies that fundraise primarily to amass personal income: a campaign finance version of the scheme in *The Producers*.[7] Notably, this does not appear to have become a problem in fact over the last 20 years, but eliminating the aspect of individual income from the calculation also eliminates an opportunity for fraud, where an individual would create a false record of earnings in order to demonstrate eligibility for a campaign salary as close as possible to the maximum permissible amount. The technological means to engage in such criminal activity have increased dramatically since 2002.

Fifth, the permissible salary should not be set unduly low. The NPRM does not explain why it would be preferable to use federal or state versions of the minimum wage, or a Commission-established $15 per hour wage, or a salary pegged at 50% of the federal officeholder salary. There is no objective standard to measure a particular candidate's true opportunity cost of candidacy (and, as explained above, the Commission should steer clear of individualized calculations), or what is "fair compensation" for candidacy activities where there is no historical marketplace as appoint of reference. The purpose of the salary regulation is to recognize that an effective non-incumbent candidacy is routinely incompatible with simultaneous employment otherwise. Accordingly, the Commission should not adopt proposed Compensation Cap Alternatives A, B, C or D.

Sixth, insofar as there are qualms about enabling any non-incumbent to attain a campaign salary as high as that of an incumbent federal officeholder, significant constraints are available. First, as aptly proposed by the NPRM, is the provision that would modify the current rule by requiring a reduction in the maximum permissible salary by the amount of any other earned income of the candidate during the period when they receive a campaign salary. (We also agree with the proposal that a candidate maintain and be required to provide evidence of such outside earned income for three years after the relevant committee report is filed.) Second, we agree with the NPRM's proposal that a campaign's debt to a candidate be subordinated to debts to other vendors in any debt settlement plan under 11 C.F.R. § 116.7 (although we do not agree that such a plan that settles debts for less than full compensation should disqualify the campaign from settling with the candidate as well). Third, the political marketplace itself compels every candidate who chooses to receive a salary to reckon with how voters will treat their receipt of a salary and the amount at which it is set, because the fact of the salary will be publicly disclosed in every report that the authorized committee files with the Commission. Candidates will have to be accountable for their choices by their impact on the two matters most important to their campaigns: voter attitudes and fundraising.

Finally, the Labor Organizations agree that the maximum salary should be decoupled from that of the *actual* incumbent federal officeholder, because that officeholder may have a leadership position that pays more than $174,000, which has no relevance to the non-incumbent

[7] See https://www.imdb.com/title/tt0063462/mediaviewer/rm362008577/?ref_=tt_ov_i.

candidate who seeks to replace that incumbent. The current regulation's language here was imprecise and did not reflect the evident intent. The NPRM proposes to use "the minimum annual salary paid to a Federal officeholder holding the Federal office that the candidate seeks." Either that would suffice, or the regulation could make an appropriate cross-reference to 2 U.S.C. § 4501(1)(A) & (2), which sets the standard congressional salary.

Non-salary Elements of Compensation

The current regulation is confined to salaries and does not address any form of non-monetary compensation. The NPRM proposes to do so via three potential alternatives that would include "any employment-related benefit" "including, but not limited to, health insurance premiums and dependent care costs." The Labor Organizations support the principle that benefits that are connected to employment should not be considered "personal use" of campaign funds any more than the salary itself is now so considered. As revised, the regulation should include the open-ended reference to "any", both in order to avoid having to codify a particular list and to accommodate societal changes in employee benefits practices.

Each of the three alternatives would mark a welcome reversal of Commission policy, just as the 2002 regulation did with respect to salaries themselves. As the NPRM explains, the Commission addressed the permissibility of using campaign funds to pay for a candidate's health insurance in an enforcement action where it concluded 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) (December 20, 2017). The Commission reasoned that because the 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 personal-use prohibition. *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, Report Number P60-278, *Health Insurance Coverage in the United States: 2021* (September 13, 2022).[8] 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).

Enabling an authorized committee to provide employment-related benefits to the candidate also would be consistent with setting the permissible salary at the congressional standard, as we recommend above. Members of Congress themselves enjoy substantial benefits as incidents of their employment. *See generally* Congressional Research Service, *Congressional Salaries and Allowances: In Brief*, pp.1- 4 (December 16, 2022).[9] There is no reason to deny non-incumbent candidates access to benefits incident to their own employment by the campaign.

[8] Available at https://www.census.gov/library/publications/2022/demo/p60-278.html.

[9] Available at https://crsreports.congress.gov/product/pdf/RL/RL30064.

That said, there is no reason to quantify the value of those benefits, cap them or seek parity or any other relationship with those incident to congressional employment. Such an undertaking would make the regulation unduly burdensome for campaigns and the Commission with little if any public reward. There are innumerable kinds of benefits policies; a campaign's access to any is limited in any event by its temporary nature; and all payments for benefits will be publicly disclosed and subject to the same political marketplace discussed above.

We do support one kind of restraint: as proposed in Compensation Definition Alternatives A and B, the provision of an employment benefit to the candidate should be permissible only if "the campaign also provides [it] to its staff," as both a hedge against abuse and a guarantee of some regularity. The language of the final rule should make clear, however, that if the candidate is the *only* employee, as could be the case, then the campaign nonetheless may provide benefits to the candidate alone. The potential for abuse here should be ameliorated by (1) the campaign's subjection, like any other employer, to both Internal Revenue Code and federal and state employment and unemployment laws that define who is an "employee" or "independent contractor" and that punish misclassification of workers, and (2) Commission and public access to the campaign's reports to the Commission that will disclose how much each worker is paid and indicate, even if not by so labeling, how each worker is classified.

We also concur with the exception to the staff-also principle in Compensation Definition Alternative B that a candidate may receive dependent-care expenses that are not also available to staff insofar (and only insofar) as they are "incurred as a result of the candidate's campaign activities," in recognition that the candidate has unique obligations and demands that could cause this kind of expense to be incurred much more frequently than by other campaign employees. However, dependent care expenses that are *not employment-related benefits* should be treated as described in the next section below.

Finally, unlike the set-off for other earned income, the value of non-salary benefits should *not* be deducted from the maximum permissible salary. Not only are they supplemental to the congressional standard that we advocate be used as the measure for that maximum, but this kind of set-off, unlike earned income, would be unduly burdensome to both the campaign to calculate and the Commission to enforce, with little if any public benefit.

Dependent Care Costs That Are Not Employment-related Benefits

As the NPRM relates, the Commission in several advisory opinions has approved an authorized committee's payment of a candidate's childcare expenses if they were a "direct result of campaign activity," primarily travel, because they would not exist irrespective of the campaign.[10] None of these expenses were paid as an incident of employment, and none arise solely for non-incumbent candidates. Nor do similar expenses that are specially incurred in caring for other dependents, such as elderly parents.

The NPRM proposes accounting for dependent care expenses only in the context of *compensation* that is incident to employment by the campaign. The Labor Organizations recommend that the Commission add a subsection to 11 C.F.R. § 113.1(g)(1) that provides that

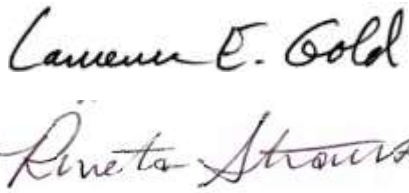
[10] See 87 Fed. Reg. at 73946; see also footnote 1, *supra*.

dependent care expenses of all kinds that are specially incurred by a candidate – incumbent or non-incumbent – as a direct result of campaign activity do not constitute personal use of campaign funds. We further recommend that either in this provision or in the accompanying Explanation and Justification the Commission reflect the view expressed in the statement by then-Chairman Dickerson and Commissioner Broussard regarding AO 2022-07 that a campaign's payment of such expenses is permissible "without regard to whether [the candidate's] spouse is available to care for their [dependents]."

Conclusion

The Labor Organizations appreciate the Commission's undertaking of this rulemaking as it reconsiders the efficacy of the 2002 regulation in light of current societal conditions that pose challenges for working and low-income Americans who wish to run for federal political office. If the Commission holds a public hearing on the NPRM we would appreciate the opportunity to testify. Thank you for your consideration of our comments.

Yours truly,



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