

VIA ELECTRONIC SUBMISSION

July 2, 2021

Chair Shana M. Broussard
Vice Chair Allen Dickerson
Federal Election Commission
1050 First Street, NE
Washington, D.C. 20463

Re: REG 2021-01, Candidate Salaries

Dear Chair Broussard and Vice Chair Dickerson:

The Brennan Center for Justice at New York University School of Law (the “Brennan Center”)¹ respectfully submits this Comment in response to the Notification of Availability published May 3, 2021 (86 FR 2330), concerning candidate salaries and the permissible use of campaign funds. We urge the Federal Election Commission (the “Commission”) to grant the Petition for Rulemaking. We strongly support Petitioner’s proposals and urge the Commission to make these and other changes to its rules to help make it possible for Americans from all walks of life to run for and win office.

I. The Commission’s Current Rules are Inequitable and Make it More Difficult for Candidates from Diverse Walks of Life to Run for Office

It is a fact of our current political reality that access to personal wealth is a major factor in one’s ability to run for office. This includes not only the ability to self-fund a campaign, but the even more basic issue of which candidates can support themselves and their dependents during the long process of running for office, which often ends in failure. This challenge tends to disproportionately impact candidates who are women, people of color, and LGBTQ+, who, in significant part due to historical discrimination, often hold less wealth than other equally qualified candidates.²

¹ The Brennan Center is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center Democracy Project works to ensure that all Americans have an equal voice in our elections and that our government advances the public interest and upholds the rule of law. This Comment does not purport to convey the position of New York University School of Law, if any.

² See, e.g., 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, *available at*

To its credit, the Commission has long recognized the reality that candidates must be able to support themselves, including coverage of basic expenses, while running for office. Since 2002, it has allowed candidates to pay themselves a salary.³ An important advisory opinion issued in 2018 also permitted a candidate who was a primary caregiver to use campaign funds to pay for childcare so that she could devote time to campaigning.⁴

As the Petition explains, however, the Commission’s approach still has significant limitations that disproportionately hurt those who already face the most barriers to running. Most notably, its salary rules provide that a candidate may only pay herself the *lower* of two options: the salary of the office sought or the candidate’s previous annual salary.⁵ This structure specifically disadvantages candidates who earned lower salaries than their wealthier counterparts (including many working-class candidates) and individuals who were full-time caregivers and not financially compensated for this work prior to running. In this way, the Commission’s rules inadvertently reinforce the outmoded stereotype of elected leaders as well-off, typically male professionals unconstrained by significant family responsibilities.

This harm is compounded by the fact that current rules are silent on non-salary benefits, such as health insurance, notwithstanding that such benefits are often connected to employment. For candidates who are not wealthy the inability to cover these significant expenses may preclude a run for office, especially with the low salary cap provided under current rules.

Finally, the reality is that even if the Commission’s salary rules improve, some candidates may still be reluctant to pay themselves for fear of attracting criticism.⁶ Here again, nontraditional

<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, *available at* https://victoryinstitute.org/wp-content/uploads/2021/04/Victory-Institute_The-Decision-to-Run-Report.pdf.

³ 11 C.F.R. § 113.1(g)(1)(i)(I) (2002).

⁴ Advisory Opinion 2018-06 (Shirley) (2018).

⁵ U.S. FED. ELECTION COMM’N, *Personal Use* (last visited Jul. 2, 2021)

<https://www.fec.gov/help-candidates-and-committees/making-disbursements/personal-use/> (“The salary must not exceed the lesser of the minimum annual salary for the federal office sought or what the candidate received as earned income in the previous year [...]).”)

⁶ *See e.g.* Ashley Balcerzak, *You’re Young and Broke. Here’s How to Still Win a Congressional Seat*, CENTER FOR PUBLIC INTEGRITY, (Dec. 10, 2018), <https://publicintegrity.org/politics/young-broke-money-win-congress-election/> (“Most candidates [for federal office] don’t take advantage of this provision [allowing them to draw a salary]. [...] [A]t least 22 candidates running in the

candidates, such as those with significant caregiving responsibilities (which even today fall disproportionately on women⁷) are at a significant disadvantage. For instance, the Commission’s rules are silent on the very common life expense of hiring a babysitter. The Commission did laudable work in addressing one instance of this problem in its 2018 advisory opinion but that opinion applies only to the requestor in that case and others who are identically situated.⁸ Thus, while we applaud the FEC for issuing this specific advisory opinion, there remains an urgent need for the Commission to promulgate a general regulation which all candidates may rely upon.

II. The Commission Should Grant the Petition and Expand the Scope of the Proposed Rulemaking

For the foregoing reasons, we strongly support the petition for rulemaking and the revisions proposed by the Petitioner.⁹ We also urge the Commission to consider additional steps to make its regulations more equitable, in at least the following respects:

First, we believe the Commission has statutory authority to allow any candidate, regardless of their prior income, to pay themselves a salary above the annualized amount of \$15 per hour, which equates to less than one and a half times the federal poverty limit for a family of three.¹⁰ A

2017-2018 election cycle [...] together paid themselves about \$155,000 from campaign funds. None of these candidates the Center for Public Integrity identified this cycle appeared to collect a \$174,000 salary.”); Bridget Bowman, *Running for Office is a Full Time Job. How One Candidate is Still Getting Paid*, ROLL CALL (July 23, 2020), <https://www.rollcall.com/2020/07/23/running-for-office-is-a-full-time-job-how-one-candidate-is-still-getting-paid/>; Sam Janesch, *Jess King is the only Pennsylvania candidate for Congress drawing a salary from her campaign*, LANCASTER ONLINE, (Jul. 20, 2018) https://lancasteronline.com/news/politics/jess-king-is-the-only-pennsylvania-candidate-for-congress-drawing/article_86c5de3c-8b96-11e8-bc8f-3f9a023379f9.html; Michelle Tsai, *Take the Money and Run?*, SLATE, (Dec. 30, 2007), <https://slate.com/news-and-politics/2007/12/do-presidential-candidates-receive-a-salary.html> (“[I]t’s almost considered bad form for someone seeking the presidency [to accept a salary]....”).

⁷ Aliya Hamid Rao, *Even Breadwinning Wives Don’t Get Equality at Home*, THE ATLANTIC, (May 12, 2019), <https://www.theatlantic.com/family/archive/2019/05/breadwinning-wives-gender-inequality/589237/>.

⁸ See 52 U.S.C. § 30108(c).

⁹ The Petitioner asks the FEC to amend its regulations to lengthen and standardize the period during which a candidate may pay themselves a salary, create a salary floor that enables candidates to earn a living wage, and allow campaigns to pay the health insurance premiums for candidates on the same terms as other campaign employees. See 86 FR 23300-23301.

¹⁰ Annual Update of the HHS Poverty Guidelines, 86 Fed. Reg. 7732 (Feb. 1, 2021).

better approach would be to set the salary floor at the median salary for individuals in the candidate's home jurisdiction. We also believe it would be defensible to create a simple cap for all candidates corresponding to the salary of the office the candidate is seeking.

Second, any rule the Commission promulgates governing fringe benefits for candidates should not be limited to health insurance premiums. Ideally, the Commission would allow, consistent with the Act, campaign committees to provide candidates with other fringe benefits offered to full-time campaign employees, including retirement contributions, life insurance, and reimbursement for childcare expenses incurred to permit work outside of normal business hours.

Third, while it is our hope that this rulemaking will help normalize non-incumbent candidates paying themselves a fair salary, the Commission should update its rules to ensure that candidates who opt not to pay themselves a salary can still use campaign funds to cover certain essential life expenses necessitated by a run for office, most notably payments for child and eldercare services.¹¹

III. The Regulatory Changes Suggested in the Petition and this Comment are Consistent with the Act

The revisions to the Commission's rules endorsed herein are consistent with the Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA). The Act prohibits candidates from using campaign funds for "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," which the Act deems a "personal use."¹² These provisions codified the Commission's longstanding approach, under which "campaign funds ... used for a financial obligation that is caused by campaign activity or the activities of an officeholder ... [are] not personal use."¹³

When it promulgated its original salary regulations in 2002, the Commission explained that "[a] salary paid to a candidate would be in return for the candidate's services provided to the

¹¹ Many of the benefits that would be permitted under the proposed Help America Run Act, such as childcare and eldercare expenses, could also be permitted by regulation. *See* H.R.1623, 116th Cong. (2019), § 2.

¹² 52 U.S.C. § 30114(b).

¹³ Explanation and Justification, Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, at 7862-7864 (Feb. 9, 1995); *see also* Explanation and Justification Final Rules on Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 240 at 76962, 76970 (Dec. 13, 2002) (to be codified at 41 C.F.R. pts. 100, 101) ("Salary E&J").

campaign and the necessity of that salary would not exist irrespective of that candidacy.”¹⁴ The Commission also chose to cap salaries at the rate a candidate earned the previous year, but there is nothing inherent to the Commission’s approach to personal use that requires doing so, provided the salary and other benefits paid to the candidate are fair compensation for services rendered to, or otherwise necessary for, their campaign.¹⁵ The approach advocated in the Petition and this Comment is consistent with that constraint. Specific caregiving expenses reimbursed in lieu of a salary likewise fit comfortably within this framework.

The hallmark of a representative government is the ability to choose candidates who share our values and see them reflected in our laws. So long as running for office remains a viable option for just a select group of people, Americans are robbed of a truly representative government. The Commission has the power to amend its regulations to allow candidates from all walks of life to run, giving voters more choice and greater confidence that they are truly selecting the best person for the job. We urge you to take this opportunity.

Respectfully submitted,

/s/

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Elizabeth Hira
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¹⁴ Salary E&J, 67 Fed. Reg. 240 at 76962.

¹⁵ *See, e.g.*, 11 C.F.R. 113(g)(1)(i)(H) (salary payments to family members are allowed up to the fair market value of bona fide services they provide to the campaign); Advisory Opinion 2001-10 (Jackson) (permitting candidate salary payments to spouse for consulting services); Advisory Opinion 1997-11 (McCrery) (permitting payments for childcare to allow candidate and spouse to attend campaign events).