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September 27, 2002

John C. Vergelli
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

RE: Federal Election Commission Notice of Proposed Rulemaking 2002-15: Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds

Dear Mr. Vergelli:

The Alliance for Justice welcomes the opportunity to submit comments in response to the Notice of Proposed Rulemaking ("NPRM") issued on August 29, 2002.[1] We appreciate the effort that the Commission has made to create regulations to implement these provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") regarding disclaimers, fraudulent solicitation, civil penalties, and personal use of campaign funds. For this NPRM, we are limiting our comments to the issue of personal use of campaign funds for payment of candidates' salaries encompassed in proposed regulation 11 C.F.R. 113.1(g)(1)(i)(I).[2]

The Alliance for Justice is a national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to the justice system. While most of the Alliance's members are charitable organizations, a significant number also work with or are affiliated with social welfare and advocacy organizations that engage in political activity. Like most nonprofit sector employees, staff of these nonprofit organizations earn salaries substantially less than they could command if they chose to work in the private sector.

The Alliance opposes to proposed regulation 11 C.F.R. 113.1(g)(1)(i)(I) because it creates a *per se* prohibition against candidates' use of private contributions for salaries or other compensation for income

[1] Federal Elections Commission Notice of Proposed Rulemaking on Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, Notice 2002-15, 67 Fed. Reg. 55348 (August 29, 2002) ("NPRM").
[2] NPRM at 55356.

loss as a result of campaigning by treating the use of campaign funds to pay candidate a salary as a conversion to personal use.[3] We chose to address this issue because the proposed regulation would limit the ability of lower- to moderate-income persons, including many employed in the nonprofit sector, to seek federal office in spite of the lack of clear authority for the Commission. The Alliance is not currently requesting a rule that would affirmatively allow the use of campaign contributions for candidate salaries, however we are requesting that the issue not be foreclosed through this rulemaking process because there is no authority for enacting such a prohibition and there are strong policy reasons for not prohibiting payment of candidates' salaries.

I. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO PROHIBIT PAYMENT OF CANDIDATES' SALARIES

In the NPRM, the Commission requested comments as to whether the insertion of 11 C.F.R 113.1(g)(1)(i)(I) was an appropriate interpretation of the statute.[4] The interpretation reflected in the NPRM is not appropriate because the Commission lacks the authority to insert this prohibition based solely on its Advisory Opinion 1999-1 and its belief that the proposed regulation is consistent with the new non-exhaustive list in amended section 439a(b)(2).

As noted in the NPRM, Senator Feingold explained that "while the provision [amended 2 U.S.C. section 439a] is intended to codify the FEC's current regulations on the use of campaign funds for personal expenses, we do not intend to codify any advisory opinion or other current interpretation of those regulations."[5] Prior to Advisory Opinion 1999-1, the Commission repeatedly was unable to reach a conclusion as to the appropriate rule.[6] Thus, the only preexisting authority for a prohibition on payment of salary from campaign funds is Advisory Opinion 1999-1, not a previous regulation. While Advisory Opinion 1999-1 refused one candidate's request that he be allowed to receive a salary from campaign funds, Senator Feingold's comments indicate advisory opinions were not meant to be codified under BCRA as a *per se* prohibition. The NPRM further acknowledges this in noting, "[n]either pre-BRCA section 439a nor new section 439a directly address this issue." [7] Thus, there is no authority for the inclusion of the provision prohibiting on salary.

Additionally, when Congress enacted BCRA and replaced 2 U.S.C. section 439a, Congress chose to include a non-exhaustive list of prohibited personal uses of campaign funds. It is notable that on this statutory list, Congress did not include the prohibition of the candidate's use of campaign funds to pay candidates to compensate themselves for income lost as a result of campaigning. Although the failure of Congress to include a candidate salary provision is not clear evidence that Congress meant to allow candidate salaries, its omission from the list is notable given that the issue has been raised before the Commission several times.

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[3] *Id.* at 55356 (defining impermissible conversion of funds to personal use to include "[s]alary payments to a candidate or any other compensation for income lost as a result of the campaign for federal office").
[4] NPRM at 55354.
[5] 148 Cong. Rec. S2143 (daily ed. March 20, 2002) (statement of Sen. Feingold).
[6] *See. e.g.*, Federal Election Commission Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, Notice 1995-5, 60 Fed. Reg. 7862, 7866 (February 9, 1995) (stating that the Commission was unable to reach a decision regarding the candidate salary issue when finalizing the regulations in 1995); Advisory Opinion 1992-1 (expressing that the Commission was unable to reach a majority decision that would permit or bar a campaign committee from paying the candidate's salary).
[7] NPRM at 55353-54.

Furthermore, candidate salaries can be easily distinguished from the prohibited uses of campaign funds that Congress did include. For all other activities, not included in the statutory list, the touchstone for determining if the contribution is converted for personal use is whether the "contribution or amount is used to 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."[8] As discussed below, candidates would earn salaries for services to the campaign that would not be necessary absent the election campaign.

What section 439a(b) seeks to curtail is the direct conversion of campaign funds for personal uses, in other words the conversion of campaign funds for "an expense that would exist irrespective of the campaign." But, there is an important distinction between paying directly for personal expenses and paying for candidate's services rendered to the campaign. A candidate would receive a salary from the campaign for work related to the campaign. Candidates would not need to forgo their regular source of income but for engaging in campaign work. Thus, the need for a salary is directly related to the campaign. In rendering services to the campaign including fundraising, appearances, and other electoral activity the candidate is no different than any other paid campaign employee.

Further, the candidate's use of a salary is at his or her discretion as with any other campaign employee.[9] Thus, a candidate's use that salary to pay for food, mortgage or other personal expenses is materially different from the campaign paying those expenses directly. An illustrative analogy is that while FECA forbids corporate contributions to candidates, FECA allows corporate officers to take the salary they earn and make personal contributions to candidates. Similarly, while the contributions may not directly be paid out for mortgage or food for a candidate, a candidate should be permitted to take the salary he or she earns for the work on the campaign to pay for personal expenses such as mortgage or food.

Based on the lack of legislative authority and the legal analysis that payment of candidates' salary is materially different than expenses that exist irrespective of the campaign, the Commission's insertion of 11 C.F.R. 113.1(g)(1)(i)(I) is not appropriate.

II. STRONG POLICY REASONS EXIST FOR NOT PROHIBITING PAYMENT OF CANDIDATES' SALARIES

There are persuasive policy reasons not to prohibit the use of campaign money through a regulation at this time. Such a restriction would exclude all but wealthy candidates from running. Any perceived potential for abuse could more effectively be addressed by appropriate regulation and public disclosure of candidate salaries.

The ban on candidate salaries proposed in this rule would make it less feasible or even prohibitive for moderate- or low- income persons to run for office. The purpose of permitting

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[8] 2 U.S.C. Section 439a(b)(2).

[9] *See, e.g.*, Advisory Opinion 1992-4 (holding that FECA and regulations would allow the campaign committee to hire the candidate's wife and pay her a salary for her services to the campaign which could be used to defray the wife's monthly living expenses).

compensation from contributions would be to allow a candidate with limited personal resources to take time off from a full-time job so they can participate in campaign activity. If enacted, this prohibition would require a candidate to choose to either forgo his or her salary to run for elected office or to engage in campaign activity solely on their personal time. This choice is forced by the Federal Election Campaign Act ("FECA") that treats an employer's continued payment of salary to a candidate who is campaigning as an in-kind contribution to the employee-candidate's campaign. In contrast to this choice forced by this proposed rule, federal incumbents continue to receive their salaries regardless of the amount of campaigning that they engage in while holding their current office. Similarly, wealthy candidates have more choice when confronted with the possibility of forgoing salary while campaigning.

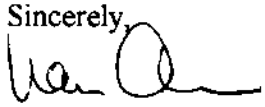
Fear of candidates abusing a right to receive a salary from a campaign is unwarranted. The Commission could create a rule that money paid to candidates in the form of a salary could be required to be publicly reported. The Commission could also regulate permissible salaries. For example, the Commission could cap the salary at the lesser of either the candidate's current salary or a percentage of the salary designated for the office for which the candidate is competing. Further, this amount could be offset by any outside earnings that the candidate actually receives. The scrutiny of the media and public could effectively address abuses. The candidate would be accountable to his or her donors and would risk losing confidence, contributions, and votes if the salary was perceived as excessive or unwarranted.

Regardless of whether the Commission is persuaded by these arguments, it is essential to note that the effect of not adopting proposed regulation 11 C.F.R. 113.1(g)(1)(i)(I) at this time would not affirmatively permit the use of campaign funds for candidates' salaries or compensation. Instead, the effect would be to maintain the status quo until this issue could be directly and fully addressed. Particularly because there is a significant question whether there is authority for this provision, and because of the past history of dissention on this issue, it would be premature for the Commission to foreclose the reexamination of this issue and the ruling in Advisory Opinion 1999-1.

In sum, the Commission has been very divided on this issue failing to reach decisions on multiple occasions in the past. It is not necessary and the Commission does not have the authority to end the discussion by including the prohibition in a regulation pursuant to BCRA. Instead, the Commission should not change the status quo at this time and either reconsider Advisory Opinion 1999-1 or allow Congress to reach a decision on this issue.

Thank you for the opportunity to comment on this Notice of Proposed Rulemaking. We are available to provide any additional information or thoughts the FEC would find helpful in its consideration of this rule.

Sincerely,



Nan Aron
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