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MEMORANDUM

AGENDA ITEM
For Meeting of: 11-21-02

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TO: Commission

THROUGH: Jim Perhkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

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SUBJECT: BCRA "Other Provisions": Draft Final Rules and Explanation and
Justification—Personal Use—Alternative Regarding Candidate Salaries

After discussions with the Regulations Committee, the Office of General Counsel understands that some Commissioners are interested in considering a rule that would permit salary payments from campaign funds to a candidate, subject to certain conditions. Accordingly, the Office of General Counsel presents the following draft final rule and Explanation and Justification that would reach this alternative result. The changes indicated below are keyed to the pagination and line numbers of Agenda Document No. 02-82.

However, the Office of General Counsel continues to recommend that salary payments to candidates be treated as *per se* personal use for the reasons stated in the Explanation and Justification in Agenda Document No. 02-82.

Explanation and Justification

1. On p. 38, strike lines 8 through 18, and replace them with the following:

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1 The Commission sought comment as to whether or not principal campaign
2 committees should be able to pay a candidate's salary out of campaign funds. Three
3 commenters opposed the NPRM's proposal to prohibit the payment of candidate salaries
4 and no commenter supported the proposal. One commenter argued that the definition of
5 personal use does not encompass a payment to, as distinguished from an obligation of, a
6 candidate. The same commenter also argued that because many candidates must forego
7 salary in order to conduct the business of the campaign, a candidate who is dependent on
8 an income is put at a severe disadvantage compared to an incumbent who is free to
9 campaign at all times without any reduction in compensation or to an affluent challenger,
10 who can afford to campaign without receiving any compensation.

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12 2. On p. 40, strike line 1 through p. 41, line 10, and replace them with the following:

13
14 The Commission agrees with the commenters that the payment of a salary to a
15 candidate is not a prohibited personal use as defined under Commission regulations since,
16 but for the candidacy, the candidate would be paid a salary in exchange for services
17 rendered to an employer. The Commission's personal use regulations issued on February
18 9, 1995 adopted the "irrespective test" in determining whether expenses would be deemed
19 personal use. In the Explanation and Justification, the Commission explained that "if
20 campaign funds are used for a financial obligation that is caused by campaign activity or
21 the activities of an officeholder, that use is not personal use." Explanation and
22 Justification, Final Rules on Expenditures; Reports by Political Committees; Personal Use
23 of Campaign Funds, 60 Fed. Reg. 7862, at 7863-7864 (Feb. 9, 1995). A salary paid to a
24 candidate would be in return for the candidate's services provided to the campaign and the
25 necessity of that salary would not exist irrespective of the candidacy. As the Commission
26 has previously stated, under the Act and Commission regulations, a candidate and the
27 candidate's campaign committee have wide discretion in making expenditures to influence
28 the candidate's election, but may not convert excess campaign funds to personal use.
29 2 U.S.C. 431(9) and 439a, AOs 1992-4, 1991-2, 1988-13, 1987-2, 1987-1, 1984-42, 1984-
30 8, 1980-138 and 1980-49. Therefore, the Commission will permit a candidate's principal
31 campaign committee to pay a salary to the candidate, thus superseding AO 1999-1.

32
33 Advisory Opinions 2001-10, 2001-03, 2000-40, 2000-37, and 2000-12 state the
34 Commission will permit the use of campaign funds for salary payments to a member of the
35 candidate's family provided that that the family member is providing bona fide services to
36 the campaign and the salary does not exceed fair market value for the services provided.
37 Unlike the payment of salaries to members of a candidate's family, however, there need not
38 be any showing that a candidate is providing bona fide services to the campaign; the fact
39 that the candidate's work is valuable to his or her campaign shall be presumed.

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41 Note that a candidate's salary does not, however, constitute a qualified campaign
42 expense as that term is defined in 11 CFR 9002.11 and 9032.9.

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44 The payment of salaries to candidates from campaign funds is subject to certain
45 conditions in the final rules. First, the candidate's salary must be paid from his or her
46 principal campaign committee only, as defined in 11 CFR 100.5(e)(1). This condition
47 precludes the possibility of multiple salaries, and generally adds clarifying specificity.
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1 Second, the salary payment to the candidate must not exceed the minimum annual
2 salary for the Federal office sought. Thus, if a candidate seeks a seat held by a member of
3 the House of Representatives or the Senate who holds a leadership position, and is thus
4 paid more than the minimum salary payable to a member of the House of Representatives
5 or the Senate, respectively, the candidate's salary payment shall nonetheless not exceed the
6 lowest salary for the Federal office that he or she seeks. Any salary payment to a candidate
7 from campaign funds in excess of the salary paid to a Federal officeholder--U.S. House,
8 U.S. Senate, or the Presidency--shall be considered personal use. See Definition of
9 individual holding Federal office, 11 CFR 300.2(o). See also 11 CFR 113.1(c) and 11
10 CFR 100.4. Further, if the candidate receives a salary from his or her employer(s), the
11 total salary payment from the candidate's principal campaign committee to the candidate
12 may not exceed the minimum salary for the Federal office sought. This ceiling on
13 permissible candidate salaries from campaign funds is intended to prevent possible abuse
14 in terms of candidates paying themselves exorbitant salaries, and will likewise ensure that
15 a challenger may be paid out of campaign funds no more than the officeholder whom he or
16 she is running against is paid by the government for his or her government service.

17
18 Third, payments made under this paragraph must be computed on a pro-rata basis.
19 This is intended to prevent a candidate's principal campaign committee from paying the
20 candidate the entire minimum annual salary for the Federal office sought by the candidate,
21 unless he or she is a candidate, as defined by 11 CFR 100.3(a), for at least one year. Any
22 tax payments required by the Internal Revenue Service, or state and/or local governments,
23 are the responsibility of the candidate.

24
25 Fourth, an incumbent Federal officeholder, as defined in 11 CFR 100.5(f)(1), must
26 not receive salary payments as a candidate from campaign funds. Otherwise, of course,
27 such an incumbent officeholder would be receiving two salaries, one from his or her
28 campaign and one for his or her official duties.

29
30 Fifth, under the final rules at 11 CFR 113.1(g)(1)(i)(I), the first payment of a salary
31 from campaign funds to a candidate must be made no earlier than the filing deadline for
32 access to the primary election ballot for Federal candidates, as determined by State law, or
33 in those states that do not conduct primaries, on January 1 of each even-numbered year.
34 See 11 CFR 100.24(a)(1)(i). If the candidate wins the primary election, the principal
35 campaign committee may continue to pay him or her a salary from campaign funds
36 through the date of the general election, up to and including the date of any general runoff.
37 Id. If the candidate loses the primary, withdraws from the race, or otherwise ceases to be a
38 candidate, no salary payments may be paid beyond that date. In odd-numbered years in
39 which a special election for a Federal office occurs, the principal campaign committee of a
40 candidate may pay him or her a salary from campaign funds starting on the date the special
41 election is set and ending on the day of the special election. See 11 CFR 100.24(a)(1)(ii).

42
43 In making this decision, the Commission is satisfied that, because all candidate and
44 family members' salaries will be fully disclosed to the public, those who contribute to the
45 campaign and who support the candidate will be able to voice their approval, or
46 disapproval, of this use of campaign funds.

1 Amendment to the regulations at 11 CFR 113.1(g)(1)(i)
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3 On p. 64, strike lines 17-18 and replace them with the following:
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- 5 (I) Salary payments by a candidate's principal campaign to a candidate in
6 excess of the minimum salary paid to a Federal officeholder holding the
7 Federal office that the candidate seeks. Salary shall not be paid to a
8 candidate before the filing deadline for access to the primary election ballot
9 for the Federal office that the candidate seeks, as determined by State law,
10 or in those states that do not conduct primaries, on January 1 of each even-
11 numbered year. See 11 CFR 100.24(a)(1)(i). If the candidate wins the
12 primary election, his or her principal campaign committee may pay him or
13 her a salary from campaign funds through the date of the general election,
14 up to and including the date of any general election runoff. If the candidate
15 loses the primary, withdraws from the race, or otherwise ceases to be a
16 candidate, no salary payments may be paid beyond the date he or she is no
17 longer a candidate. In odd-numbered years in which a special election for a
18 Federal office occurs, the principal campaign committee of a candidate for
19 that office may pay him or her a salary from campaign funds starting on the
20 date the special election is set and ending on the day of the special election.
21 See 11 CFR 100.24(a)(1)(ii). During the time period in which a principal
22 campaign committee may pay a salary to a candidate under this paragraph,
23 such payment must be computed on a pro-rata basis. A Federal
24 officeholder, as defined in 11 CFR 100.5(f)(1), must not receive salary
25 payments as a candidate from campaign funds.
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