American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
http://www.aflcio.org

EXECUTIVE COUNCIL

JOHN J. SWEENEY
PRESIDENT

RICHARD L. TRUMKA
SECRETARY-TREASURER

LINDA CHAVEZ-THOMPSON
EXECUTIVE VICE PRESIDENT

Vincent R. Sombrotto
Frank Hanley
Douglas H. Dority
Michael Goodwin
James La Sala
Robert A. Scardelletti
John M. Bowers
Dennis Rivera
Elizabeth Bunn
Capt. Duane Woerth
Joseph J. Hunt
Cecil Roberts
Melissa Gilbert

Gerald W. McEntee
Michael Sacco
Clayola Brown
Joe L. Greene
William Lucy
Andrew L. Stern
Sandra Feldman
Bobby L. Harnage Sr.
Michael E. Monroe
Terence O'Sullivan
Cheryl Johnson
Edward C. Sullivan
Edward J. McElroy Jr.

Morton Bahr
Frank Hurt
M.A. "Mac" Fleming
Sonny Hall
Leon Lynch
Edward L. Fire
R. Thomas Buffenbarger
Stuart Appelbaum
Michael J. Sullivan
Harold Schaitberger
Bruce Raynor
William Burrus

Gene Upshaw
Gloria T. Johnson
Patricia Friend
Carroll Haynes
Arturo S. Rodriguez
Martin J. Maddaloni
Boyd D. Young
John W. Wilhelm
James P. Hoffa
Edwin D. Hill
Clyde Rivers
Leo W. Gerard

September 27, 2002

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2002 SEP 30 A 8 57

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

Re: Notice of Proposed Rulemaking, "Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds," 67 Fed. Reg. 55348 (August 29, 2002)

Dear Mr. Vergelli:

These comments concerning this notice of proposed rulemaking ("NPRM") are submitted on behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the national federation of 66 national and international unions representing over 13 million working men and women throughout the nation. We address one aspect of the NPRM[1]: its proposal, to be set forth at 11 C.F.R. § 113.1(g)(1)(i)(I), defining prohibited "personal use" of campaign funds to include "salary payments to a candidate or any other compensation for income lost as a result of the campaign for federal office." The AFL-CIO opposes this proposal because it appears to conflict with the Federal Election Campaign Act ("FECA"), as amended by the Bipartisan Campaign Reform Act ("BCRA") of 2002, and, even if the Commission has discretion on the matter, compelling policy reasons counsel against the proposal and in favor of issuing a regulation that explicitly authorizes salary payments, at least under some circumstances.

Current FECA § 313, 2 U.S.C. § 439a, provides in pertinent part: "Amounts received by

[1] In so confining its comments, the AFL-CIO should not be understood to express a view in favor of or against any other aspect of this NPRM.

a candidate as contributions that are in excess of any amount necessary to defray his expenditures . . . may be used by such candidate" to defray expenses as a holder of federal office, for contributions to an Internal Revenue Code ("IRC") § 501(c) organization, or "for any other lawful purpose," including transfers to political party committees; but, "no such amounts may be converted by any person to any personal use" other than expenses incurred in holding federal office.

Prior to 1995 the Commission's regulations did not define "personal use" or enumerate examples of expenses that § 439a prohibits; rather, the meaning of this provision was elucidated in advisory opinions and enforcement proceedings. In Advisory Opinion ("AO") 1992-1, the Commission was unable to secure four votes for a response to an inquiry by a candidate as to whether or not he could lawfully enter into a contractual arrangement with his principal committee under which the committee would pay him a salary of $3,000 per month (a rate less than his salary in his usual occupation as a research scientist) to compensate him for the time he expended providing services to the campaign, including managing it and making public appearances. In the simultaneously issued AO 1992-4, the Commission similarly deadlocked with respect to an inquiry by an unemployed candidate as to whether or not his campaign could defray a reasonable amount of his and his wife's monthly living expenses so that he could spend full time gathering signatures to qualify for the ballot and so his wife could assist his campaign. The Commission did determine, however, that the campaign lawfully could hire the candidate's wife and pay her a salary "to compensate her for services provided to the campaign. It is the Commission's view that the wide discretion accorded political committees for their expenditures allows the campaign to choose the personnel it wishes to employ." Id. (footnote omitted).

The Commission subsequently undertook to define by regulation "personal use" and to enumerate examples of prohibited expenses. Notice of Proposed Rulemaking, "Expenditure; Personal Use of Campaign Funds," 58 Fed. Reg. 45463 (August 30, 1993). The Commission proposed to define "personal use" generally to mean "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or responsibilities as a Federal officeholder." Id. at 45466. The proposed regulation also included a non-exhaustive list of prohibited personal uses, including "[t]he payment of a salary to the candidate" and two alternative formulations prohibiting the payment of a salary to a candidate's spouse or other family member absent the performance of services for the campaign. Id.

After receiving comments, the Commission issued a revised NPRM seeking additional comments. Proposed Rule, "Expenditure; Personal Use of Campaign Funds," 59 Fed. Reg. 42183 (August 17, 1994). This proposal included a different general definition of "personal use": "any use of funds that confers a benefit on a present or former candidate or a member of such a candidate's family that is not primarily related to the candidate's campaign or the ordinary and necessary duties of the holder of Federal office." Id. at 42184-85. The proposal included a

similar list of prohibited uses as in the original NPRM, including "[t]he use of funds to pay the candidate a salary," but it did not address the issue of a salary to a candidate's spouse or other family member.

The Commission issued its final, current personal use regulations on February 9, 1995. Explanation and Justification, Final Rules, "Expenditures; Reports by Political Committees; Personal Use of Campaign Funds," 60 Fed. Reg. 7862. The Commission adopted the "irrespective" test set forth in the initial NPRM, explaining:

> The irrespective definition is preferable to the alternative version because determining whether an expense would exist irrespective of candidacy can be done more objectively than determining whether an expense is primarily related to the candidacy. If campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an officeholder, that use is not personal use. However, if the obligation would exist even in the absence of the candidacy or even if the officeholder were not in office, then the use of funds for that obligation generally would be personal use.

Id. at 7863-64. The Commission enumerated particular expenses that would comprise "personal use," including:

> Salary payments to a member of the candidate's family, unless the family member is providing *bona fide* services to the campaign. If a family member provides *bona fide* services to the campaign, any salary payment in excess of the fair market value of the services provided is personal use.

Id. at 7874; see 11 C.F.R. § 113.1(g)(1)(i)(H). The Commission agreed with commenters who "argue[d] that family members should be treated the same as other members of the campaign staff." 60 Fed. Reg. at 7866. The Commission could not agree, however, on whether or not to prohibit salary payments to a *candidate*; and, in its explanation it merely reviewed the range of comments received and reported its inability to reach a majority view on the issue. Id. at 7866-67.

The candidate salary issue recurred in 1999 in an advisory opinion request by a House candidate who sought to enter into a written contract with his campaign committee to receive a salary sufficient to offset the business income loss attributable to the amount of time he spent on necessary campaign activities, according to a formula predicated on his average monthly income of $5,000 per month as an independent remodeling contractor. The Office of General Counsel

presented alternative draft advisory opinions to the Commission, one approving and the other disapproving the payment, in light of the Commission's deadlocks in 1992 and 1995 on the overall issue. See Agenda Document No. 99-23 (February 18, 1999). The Commission subsequently voted 4-2 (Commissioners McDonald, Thomas, Sandstrom and Wold voting affirmatively, and Commissioners Mason and Elliott dissenting) in favor of the so-called "no" draft. Minutes of an Open Meeting at 3 (February 25, 1999).

AO 1999-1 offered several reasons for its conclusion. First, the majority determined that under the proposed arrangement the campaign committee would "do indirectly what it cannot do directly; i.e., pay for expenses that are not related to [the] campaign." Second, the Commission stated that a candidate's performance of candidate functions "traditionally" occurs "regardless of remuneration" and "are not new or additional services which a candidate brings to a campaign, but instead are activities inherent in any candidate's campaign. Payment of a salary to a candidate would be based on the false premise of the Committee's purchasing something that it would not otherwise possess." Finally, the Commission distinguished between the payment of a salary and the payment of "additional expenses incurred in connection with conducting [the] campaign, such as travel to campaign events and additional child care related to those events."

Section 301 of the BCRA repeals and replaces current 2 U.S.C. § 439a. New § 439a(a) sets forth four "[p]ermitted [u]ses" of contributions, including "otherwise authorized expenditures in connection with" a candidate's campaign, ordinary and necessary expenses incurred by the individual as a federal officeholder, contributions to IRC § 501(c) organizations, and transfers to political party committees. New § 439a(b)(1) provides that a contribution "shall not be converted by any person to personal use" and § 439a(b)(2) codifies the so-called "irrespective test" by providing that such unlawful conversion occurs "if 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 . . . ." Section 439a(b) then lists nine such expenses that largely correspond with the itemization in current 11 C.F.R. § 113.1(g)(1)(i), including the omission of salaries for candidates, but also omits, unlike the regulation, salaries for a candidate's family members.

The legislative debates over the BCRA in 2001 and 2002 contain no reference to the salary issue, nor, indeed, any discussion whatsoever of Section 301, with one exception. In a colloquy between Senator Lieberman and Senator Feingold on March 20, 2002, just before the Senate voted on final passage of H.R. 2356, Senator Feingold stated:

> [W]hile [Section 301] 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.

148 Cong. Rec. S2143 (daily ed. March 20, 2002).

In the current NPRM, the Commission proposes to add to the BCRA list of personal uses, largely using the same language as in current § 113.1(g)(1), including verbatim the conditional prohibition on salary payments to a member of a candidate's family. But the Commission also proposes to add a prohibition on "salary payments to a candidate or any other compensation for income lost as a result of the campaign for federal office." See proposed § 113.1(g)(1)(i)(I), 67 Fed. Reg. at 55356. The NPRM explains this proposal as follows:

> Neither pre-BCRA section 439a nor new section 439a directly address this issue, but the Commission believes that the proposed addition of candidate salaries to the list of impermissible personal uses is consistent with the non-exhaustive list Congress included in amended section 439a(b)(2). The Commission notes that it failed to reach a four-vote majority vote on this issue when it considered the personal use rules in 1995 (60 FR 7867 (February 9, 1995)), but it has since addressed this issue in Advisory Opinion 1999-1. Comments are sought as to whether this interpretation is appropriate.

67 Fed. Reg. at 55353-54. The NPRM further states that "Congress codified the regulatory irrespective test" in terms "virtually identical to the Commission's description" in its current regulation, so "the Commission will, therefore, continue, post-BCRA, to apply the irrespective test as before." Id. at 55354.

We submit that the proscription under any circumstances of a campaign's payment of a salary to the candidate is not supported by the BCRA. First, it is not embraced by, and contradicts the principle underlying, the "irrespective" test. As noted above, revised § 439a(b)(2) precludes a campaign's use of a contribution "to fulfill any commitment, obligation or expense of a person that would exist irrespective of the candidate's election campaign . . . ." This definition and the new statutory list of prohibited items concern only specific personal expenses that a candidate, the same as non-candidates, ordinarily would pay for. The definition of "personal use" does not comprise a *payment to*, as opposed to an *obligation of*, a candidate, and an undifferentiated salary is qualitatively different from an arrangement whereby a campaign reimburses a candidate for a specific personal expense. Rather, a salary may replace income that otherwise is lost or foregone precisely *because* of the candidate's election campaign, not "irrespective" of it. Indeed, the text of the proposed rule explicitly acknowledges this causation, as it describes the prohibited expenditures as "[s]alary payments to a candidate or other compensation *for income lost as a result of the campaign for federal office*" (emphasis added). Cf. Internal Revenue Service National Office Technical Advice Memorandum 9516006 (January 10, 1995) (principal campaign committee's payment of wages to its candidate for services

rendered to the campaign as a candidate are "exempt function" expenditures within the meaning of IRC § 527).

AO-1991 incorrectly termed a salary payment is an "indirect" means to accomplish what cannot be done directly. Indeed, the Commission historically has distinguished a general salary from a personal expense, reasoning that the fact that a salary is later devoted by the recipient to personal uses is a "secondary" outcome of the campaign's payment of the salary, which is directly for services to the campaign. See, e.g., AO 1995-29. As the General Counsel's "yes" draft of AO 1999-1 put it, such secondary use is "the natural result of a payment of salary to anyone providing services to a campaign." Indeed, that principle underlies the current regulations and advisory opinions that permit a campaign's payment of a salary to the family member of a candidate for actual services rendered.

Moreover, in both AO 1999-1 and current § 113.1(g)(1) the Commission has stated that a campaign can legitimately pay for a candidate's expenses that ordinarily are of a personal nature if they increase because of the campaign, specifying items such as travel, vehicle use and child care. Each of these expenses results from a volitional choice by a candidate to undertake certain campaigning, presumably because the candidate believes the effort is helpful or necessary to win the election, and the Commission accordingly authorizes a committee's use of contributions to pay those expenses despite their "personal" dimension. Indeed, the rationale underlying the permissibility of those expenses clashes with the reasoning in AO 1999-1 that a candidate "inherent[ly]" performs services as a candidate and so should not be paid to do so, and that travel and child care expenses are different because they must be "incurred in order to enable the candidate and immediate family members to attend campaign related events." For, by the same token, a candidate may make the volitional choice to forego or curtail his or her regular employment because the candidate finds it advisable or necessary to devote more time to the campaign, including attendance at campaign-related events, so the loss of income occurs only because of the campaign. That is - - to adjust the language of AO 1999-1 - - "[p]ayment of a salary to a candidate would be based on the *correct* premise that *in such circumstances* the Committee *is* purchasing something that it would not otherwise possess" – the candidate's time. Cf. AO 1982-64 (deeming as contributions to a candidate's principal committee moneys he solicited after his campaign ended in order to pay off personal loans he incurred during the campaign in order to pay his living expenses because he had reduced his ordinary employment and consequent income so he could spend sufficient time campaigning).

Indeed, in promulgating its current "personal use" regulations in 1995, the Commission noted that many possible expenses, including "some expenses that do raise personal use issues[,] cannot be characterized as either personal or campaign related in the majority of situations," and so should not be included in a per se list. The Commission instead left such expenses to case-by-case determinations, and in doing so "reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use of campaign funds. If the candidate can reasonably show that the

expense at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use." 60 Fed. Reg. at 7867.

The General Counsel's "yes" draft of AO 1999-1 succinctly presented the foregoing analysis:

> The Commission acknowledges that the candidate's salary will ultimately be used for some of the *per se* and other expense categories listed above, but the ultimate use of the salary funds by a recipient is of secondary concern to the nature of the expenditure itself. Since the payment of a candidate salary is not on the *per se* list, it must be analyzed under the general definition at 11 CFR 113.1(g). A salary plan that is specifically tailored to enabling a candidate to take time off from his full-time job so that he can participate fully in his campaign would not be personal use. Your salary proposal permits you to prepare for and attend campaign events, solicit contributions by phone or otherwise, participate in the formulation of campaign strategy, and remain current on campaign issues. Thus, the salary payments are an expense necessary to the campaign that would not exist but for the candidate's need to engage in campaign activity. See Advisory Opinions 1996-34, 1995-42, and 1995-20 (which permitted the expenditure of campaign funds for child care or family travel to enable the candidate and immediate family members to attend campaign events).

Second, the NPRM acknowledges that revised § 439a does not address the salary issue, and the Commission errs in suggesting that the new provision gives implicit support for the proposed prohibition. In enacting BCRA § 313, Congress easily could have codified AO 1999-1 by including among the enumerated prohibited uses the payment of a salary to a candidate. But Congress declined to do so. And, the scant legislative history of § 313 chiefly includes Senator Feingold's assertion, just before final passage, that this section's intent was to "codify the FEC's current regulations on the use of campaign funds for personal expenses," but "not . . . to codify any advisory opinion or other current interpretation of those regulations." Given the revised statutory text and this assertion, Congress may reasonably be understood to have signaled that it did not accept AO 1999-1.

At the very least, Congress left the Commission with discretion as to how to deal with the salary issue, including rejecting the conclusion reached in AO 1999-1. And, in fact, compelling policy reasons warrant a regulation that affirmatively *authorizes* salary payments, at least in some circumstances. Waging an effective race for Congress (let alone the presidency) requires a candidate to spend substantial time fundraising and campaigning, requirements that may only increase in degree when the BCRA takes effect. But § 441b(a) precludes a corporation, labor organization or national bank from paying a salary or wages to a candidate-employee for time the employee devotes to his or her candidacy. Even an unincorporated entity (other than a labor

organization) can pay only $1,000 per election to a candidate ($2,000 effective January 1, 2003) that it employs for working time during which the candidate campaigns. An employed non-incumbent candidate who lacks sufficient savings, unearned income or spousal or other non-contribution support to replace lost income ordinarily cannot afford to forego paid employment in order to campaign competitively. In stark contrast, incumbent Members of Congress running for re-election or for other Federal office draw their full public salaries -- $150,000 per year, scheduled to rise to $155,000 on January 1, 2003, plus fringe benefits -- regardless of whether, and to what extent, they spend their time campaigning.

The cost of campaigns has risen in recent years, even measured only in "hard" dollars, federal campaign spending is destined to increase dramatically when the BCRA's increased contribution limits take effect, and campaigns for Congress more often get underway early during each two-year election cycle. A candidate, to be viable, must devote a significant portion of his or her time to the campaign for many months before a primary election, nominating convention or general election. A non-incumbent candidate who must confine campaign work to evenings and weekends or other non-working time operates at a substantial disadvantage to an incumbent, who is free to campaign at all times without any reduction in compensation. And, this non-incumbent is at a similar severe disadvantage to a wealthy opponent who does not rely upon a regular paycheck to make ends meet. Congress is already largely a domain for incumbents with safe seats and the well-off. The Commission simply should not adopt a rule that is not required by its governing statute and that would place election to federal office further beyond the practical reach of ordinary citizens.

Indeed, the interpretation we urge would foster more competitive elections, and at no additional public expense. Allowing challengers and other non-incumbents to apply a portion of the private contributions to their campaigns to a fully disclosed salary would enable them to devote as much time and effort to campaigning as can their incumbent opponents whose salaries are publicly financed, and as can relatively wealthy candidates who can afford to campaign full-time.

We also submit that there is little likelihood of abuse if candidate salaries are authorized. Section 434 would require that all such payments be reported, subjecting any salary arrangement to timely scrutiny by voters, the media and opposing candidates. Indeed, we are unaware of any history of abuse of the opportunity to be paid a salary that existed before AOL 1999-1 proscribed it.

Moreover, the Commission could condition such arrangements on the inclusion of various safeguards. For example, a regulation could preclude incumbent Members from drawing a salary and cap the non-incumbent candidate's salary at that candidate's foregone or lost income or at a percentage of the rate of pay and benefits applicable to the Federal office sought. The "yes" draft of AO 1999-1 spoke in terms of a "reasonable" salary set at a "fair market value"

structured so as not to "enrich" the candidate. Additionally, the regulation could require that the salary be paid pursuant to a written and publicly disclosed agreement between the committee and the candidate. As the "yes" draft also pointed out, in AO 1987-1 the Commission rejected a candidate's post-election effort to be paid lost wages by his principal committee only because there was no such prior contract between them. And, the salary payments and benefit coverage could be temporally limited, to end, for example, no later than 60 days after the general election (or 60 days after the primary election or convention if the candidacy ends there); the "yes" draft approved a duration of 90 days for such a "winding down period."

In sum, under either an analysis of the Act, as now amended, or upon consideration that sound public policy favors enhancing citizen participation in, and access to, all aspects of federal elections, we request that the Commission decline to adopt the proposal in the NPRM that a campaign's payment of a salary be prohibited in all instances, and recommend that the Commission instead promulgate a regulation that permits such payments under defined, reasonable circumstances.

If the Commission conducts a hearing on this NPRM, the AFL-CIO would welcome the opportunity to testify about this issue. Thank you for your consideration of our views.

Yours truly,

Laurence E. Gold

Laurence E. Gold
Associate General Counsel

LEG:hmp