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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2000 FEB 24 P 3 15

February 24, 2000

**MEMORANDUM**

**AGENDA ITEM**  
For Meeting of: 3-02-00

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence M. Noble *L*  
General Counsel

N. Bradley Litchfield *NBL*  
Associate General Counsel

Michael G. Marinelli *mm*  
Staff Attorney

SUBJECT: Draft AO 2000-01

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 2, 2000.

Attachment

1 **ADVISORY OPINION 2000-01**

2  
3 **Angel Taveras**  
4 **123 Webster Avenue**  
5 **Providence, Rhode Island 02909**

**DRAFT**

6  
7 **Dear Mr. Taveras:**

8  
9 **This refers to your letters dated January 13, 2000, and December 16, 1999,**  
10 **concerning the application of the Federal Election Campaign Act of 1971, as amended**  
11 **("the Act"), and Commission regulations to your proposal to receive a partially paid leave**  
12 **of absence when you become a candidate for Federal office.**

13 **FACTS**

14 **You state that you are a candidate for the United States House of Representatives**  
15 **in the 2<sup>nd</sup> Congressional District of Rhode Island.<sup>1</sup> Currently, you are an attorney at the**  
16 **law firm of Brown, Rudnick, Freed & Gesmer ("Brown Rudnick"), a professional**  
17 **corporation. You wish confirmation that it is acceptable to receive a partially paid leave**  
18 **of absence from Brown Rudnick for the duration of your candidacy.**

19 **You explain that your compensation is on a salary basis, with an annual bonus.**  
20 **The bonus is based on your prior year's work performance, on your productivity (i.e., your**  
21 **billable hours), quality of work, market rate, and your overall contributions to the firm.**  
22 **You explain that you first worked for the firm in the summer of 1995 as a summer**  
23 **associate, and you joined the firm in September of 1996, as a full time associate attorney.**  
24 **You also confirm that the paid leave proposal means that you would be released from all**  
25 **duties and responsibilities with the firm and will not have any work assignments from the**

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<sup>1</sup> According to Commission records, your principal campaign committee, Angel Taveras for Congress, has shown sufficient financial activity to qualify you as a Federal candidate under 2 U.S.C. §431(2).

1 firm or any of its members during the period of your leave. You also will not perform any  
2 work for the firm or its members that will result in billable hours to firm clients. You will,  
3 however, receive one half of your usual salary for this leave period.

4 You explain that Brown Rudnick's paid leave policy is as follows: an attorney  
5 submits a written proposal to the firm's policy committee (the management committee).  
6 The management committee makes a decision based on an attorney's time with the firm,  
7 reason for the leave, and benefit to the attorney's practice and the firm overall. In the past,  
8 the firm has approved paid leave on the same terms offered to you for an attorney to train  
9 for and enter the 1992 Olympics, and for another attorney to seek election to the Boston  
10 City Council in 1997. In addition, the firm also has a past practice of granting paid leaves  
11 to attorneys who have pursued further education and for attorneys facing a personal crisis.  
12 As part of your request, you include a letter from the firm chairman which confirms your  
13 description of the firm's paid leave proposal and its application to your situation.

#### 14 **ACT AND COMMISSION REGULATIONS**

15 The Act prohibits a corporation from making any contribution or expenditure in  
16 connection with a Federal election and provides in this context that "contribution or  
17 expenditure" includes "any direct or indirect payment, distribution . . . or gift of money, or  
18 any services, or anything of value . . . to any candidate, [or] campaign committee . . ." in  
19 connection with any Federal election. 2 U.S.C. §§441b(a) and 441b(b)(2). Commission  
20 regulations also provide that, except for certain legal and accounting services, the payment  
21 of compensation for the campaign services of an employee or other person is a  
22 contribution by the employer or payer. 11 CFR 100.7(a)(3). However, no contribution  
23 results where the time used by the employee to engage in political activity is bona fide,

1 although compensable, vacation time or other earned leave time. 11 CFR 100.7(a)(3)(iii).  
2 Furthermore, a corporation may not pay the employer's share of the cost of fringe benefits,  
3 such as health and life insurance and retirement, when granting leave-without pay status to  
4 any employee who wishes to participate in the political campaign of a Federal candidate.  
5 11 CFR 114.12(c)(1) and Advisory Opinions 1992-3 and 1976-70.

6 The Act and Commission regulations also prohibit the conversion of campaign  
7 funds to any personal use. 2 U.S.C. §439a; 11 CFR 113.2(d). Notwithstanding that the  
8 use of funds for a particular expense would be a personal use, payment of that expense by  
9 any person other than the candidate or the campaign committee shall be a contribution to  
10 the candidate, unless the payment would have been made irrespective of the candidacy. 11  
11 CFR 113.1(g)(6). Examples of payments considered to be irrespective of the candidacy  
12 include, but are not limited to, situations where--

13 (i) The payment is a donation to a legal expense trust fund established in  
14 accordance with the rules of the United States Senate or the United States House of  
15 Representatives;

16 (ii) The payment is made from funds that are the candidate's personal funds as  
17 defined in 11 CFR 110.10(b), including an account jointly held by the candidate and a  
18 member of the candidate's family;

19 (iii) Payments for that expense were made by the person making the payment  
20 before the candidate became a candidate. Payments that are compensation shall be  
21 considered contributions unless--

22 (A) The compensation results from *bona fide* employment that is genuinely  
23 independent of the candidacy;

1           **(B) The compensation is exclusively in consideration of services provided by the**  
2 **employee as part of this employment; and**

3           **(C) The compensation does not exceed the amount of compensation which would**  
4 **be paid to any other similarly qualified person for the same work over the same period of**  
5 **time.**

## 6 **APPLICATION TO PROPOSAL**

7  
8           **As noted above, Commission regulations allow a corporation to compensate an**  
9 **employee for leave time where “the time used by employee to engage in political activity is**  
10 **bona fide, although compensable, vacation time or other earned leave time.” 11 CFR**  
11 **100.7(a)(3)(iii). The proposal you present would not qualify within the quoted definition.**  
12 **Rather than earned vacation time or leave time which is accrued by an employee (where**  
13 **the only discretionary question is when the earned leave may be used), your proposal**  
14 **entails a discretionary determination by the firm which is based, in part, on factors other**  
15 **than past employment. As you describe the policy, an employee has the right to apply for**  
16 **partially paid leave, but it is not an earned or accrued employment benefit. Furthermore,**  
17 **whether it is granted at all is solely in the discretion of the firm.**

18           **The Commission acknowledges your reliance on Advisory Opinion 1992-3.**  
19 **Unlike your situation, that opinion concerned a candidate who was taking an unpaid leave**  
20 **of absence from the employer. At issue was whether the corporation could continue to**  
21 **pay the candidate’s insurance which was customary for all approved, unpaid leave**  
22 **situations. The Commission concluded the benefits could be paid since the 31-day**  
23 **continuation period of employee benefits was brief and “was viewed as a form of**  
24 **compensation payable to the employee by the corporation as part of other earned leave**

1 time.” This contrasts with your situation where, if the firm finds your situation deserving,  
2 you will be granted one half of your normal salary for the period of your Federal  
3 candidacy.<sup>2</sup> Since the firm’s payment of compensation to you in these circumstances  
4 would not be considered a permitted exception to the regulatory definition of contribution,  
5 it would be considered a contribution to your campaign.<sup>3</sup> Because Brown Rudnick is a  
6 corporation, the payment of a salary in these circumstances would be prohibited pursuant  
7 to 2 U.S.C. §441b(a).

8 This conclusion would also result under 11 CFR 113.1(g) as well.<sup>4</sup> This regulation  
9 provides that payment by a third person of a candidate’s personal expenses during the  
10 campaign would be considered a contribution by the third person (your firm, in this case)  
11 to that candidate, unless the payment would be made irrespective of the candidacy. Three  
12 examples in the regulation provide guidance as to the meaning of “irrespective of the  
13 candidacy.” The third example notes that payments of compensation are contributions,  
14 unless the compensation results from bona fide employment that is genuinely independent

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<sup>2</sup> The Commission notes your reliance on the fact that other individuals were also partially paid their salaries for extended periods. You also present what you consider to be an interpretation of Advisory Opinion 1976-70 found in Advisory Opinion 1992-3 that suggests that “a paid leave is acceptable as long as there is a pre-existing policy regarding paid leaves.” The Commission disagrees with your reading of these two opinions since the important issue is not whether a policy is pre-existing or has been applied to other individuals, but whether the policy meets the requirements of section 100.7(a)(3) in that the salary is paid pursuant to bona fide, although compensable, vacation time or other earned leave time.

<sup>3</sup> In this regard, past advisory opinions have examined other situations where attorneys seeking Federal office or working for political campaigns have continued to receive compensation from their law firms. See Advisory Opinions 1980-115, 1980-107, 1979-58 and 1978-6. If the compensation is tied to a billable hour system, the Commission has concluded that a firm would be viewed as making a contribution to the attorney’s campaign to the extent it failed to reduce an attorney’s compensation for reduced work time. Advisory Opinions 1980-115 and 1978-6. In situations, however, where the compensation is tied to other factors such as a proprietary or ownership interest, seniority of service or ability to attract clients, a failure to reduce compensation would not necessarily be viewed as a contribution to the attorney’s campaign. Advisory Opinions 1980-107 and 1979-58.

<sup>4</sup> In Advisory Opinion 1999-1, the Commission concluded that the payment of a salary to a Federal candidate by the candidate’s campaign committee was not permissible since it would constitute personal use of campaign funds by the candidate.

1 of the candidacy, the compensation is exclusively in consideration of services provided by  
2 the employee, and the payment does not exceed the amount of compensation which would  
3 be paid to any other similarly qualified person for the same work over the same period of  
4 time.<sup>5</sup>

5 The facts underlying the proposal would not meet these requirements. In  
6 particular, the basis for paying you one half of your usual salary includes factors that are  
7 not "exclusively in consideration of services you provide as part of" your employment.  
8 You would not perform legal services for the firm during the course of your campaign  
9 when you receive one half of your usual salary, and the firm would consider elements  
10 other than your past employment or employee benefits granted to you because of your  
11 past services to the firm. For example, one of the reasons for granting the paid leave is  
12 whether it would benefit the firm, in some overall manner.

13 Therefore, based on the foregoing, the Commission concludes that you may not  
14 receive a partial salary from your law firm during the period in which you are a candidate  
15 for Federal office and will not perform services for the firm.

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<sup>5</sup> The other exceptions for third party payments concern payments that are donations to a permissible legal expense trust fund or funds that are the candidate's personal funds, as defined in 11 CFR 110.10(b). See 11 CFR 113.1(g)(6)(i) and (ii).

