MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson
Deputy General Counsel

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September 26, 2014

Subject: Draft AO 2014-14 (Trammell)

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 5:00 pm (Eastern Time) on October 1, 2014.

For more information about how to submit comments, go to http://www.fec.gov/law/draftaos.shtml.

Attachment
Dear Mr. Trammell:

We are responding to your advisory opinion request concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457) (the “Act”), and Commission regulations to your proposal for your employer to pay your share of certain fringe benefits during your unpaid leave of absence to run for federal office. The Commission concludes that the proposed payments are not permissible under the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on August 15 and the email received from counsel on September 2, 2014.

You are a candidate for the U.S. House of Representatives in Virginia’s 7th District. You have been employed by Randolph-Macon College (the “College”) since October 17, 2000, and currently you are the Director of Disability Support Services and an Assistant Professor. The College is a corporation registered with the Commonwealth of Virginia.

When you won the Democratic nomination for the U.S. House of Representatives, the College offered and you accepted an unpaid leave of absence for the duration of your campaign, beginning August 8, 2014. You and the College have entered into a Memorandum of Understanding (the “MOU”) setting forth the terms of your leave of absence. One of the terms in the MOU provides for the continuation of fringe benefits for which you were eligible prior to the leave of absence, including medical, life, and disability insurance. The MOU states that the
College will continue to provide its “financial insurance subsidy” for these benefits and requires you to timely pay your portion of the premiums, as well. MOU at 2. Your benefits would be continued for the duration of your unpaid leave, which would end when you return to work at the College or resign to take office, depending on the outcome of the election, “but in no event later than January 1, 2015.” Id.

Your benefits are being continued under the College’s pre-existing policy regarding the continuation of fringe benefits during an employee’s leave of absence. The College’s Faculty Handbook, which governs your employment, states that “[l]eaves of absence may be granted by the Provost for such reasons and for such duration as the Provost believes are in the best interests of the applicant and of the College. Recommendations on such leaves are made by the Committee on the Faculty.” Email from Katherine Payne, Esq., to Joanna Waldstreicher, Attorney, FEC at 1 (Sep. 2, 2014). According to the request, the College’s provost determines whether to approve a faculty member’s request for a leave of absence, based on the reason for and duration of the leave. Examples of appropriate reasons for approved leave include medical reasons, government or military service, and professional advancement that also benefits the College and its students. If the provost approves the leave request, the provost works with other College staff to make determinations regarding benefits continuation, payment of remaining salary, and details of the faculty member’s return to work, and these terms are memorialized in a letter or MOU. For approved leaves of absence, “the Provost will generally approve the continuation of benefits.” Id. at 2.

**Question Presented**

Are the terms of the MOU consistent with the Act and Commission regulations?
Legal Analysis and Conclusions

No, the MOU's provision concerning the College's payment of the employer portion of your fringe benefits during your unpaid leave of absence would not comply with the Act and Commission regulations.

The Act prohibits a corporation from making any contribution in connection with a federal election. 52 U.S.C. § 30118(a), (a)(2) (formerly 2 U.S.C. § 441b(a), (a)(2)); see also 11 C.F.R. § 114.2(b). Accordingly, Commission regulations specifically provide that a corporation may not pay the employer's share of the cost of fringe benefits, such as health and life insurance, for an employee who is on leave without pay to participate in the campaign of a federal candidate. 11 C.F.R. § 114.12(c)(1). Commission regulations also provide, however, that a corporation's payment of compensation to an employee does not result in a contribution from the corporation where the employee engages in campaign activity on bona fide vacation time or other earned leave time. 11 C.F.R. § 100.54(c).

In determining whether an employer may pay its share of an employee's benefits while the employee is on leave to conduct campaign work, the Commission has reconciled these two regulations by distinguishing between payments for benefits that the employee accrued before going on leave (which the employer may pay under section 100.54(c)) and benefits that have not accrued but are being continued during the leave (which the employer may not pay under section 114.12(c)(1)). See Advisory Opinion 2000-01 (Taveras) at 3; Advisory Opinion 1976-70 (National Republican Congressional Committee). In applying this distinction, the Commission looks to whether the payments are made pursuant to a generally applicable, pre-existing policy that grants fringe benefits to all employees on unpaid leave as "a form of compensation payable
to the employee by [the employer] and as part of ‘other earned leave time.’” Advisory Opinion 1992-03 (Reynolds) at 2.

In Advisory Opinion 2000-01 (Taveras), the Commission noted that the distinction between earned payments and continued payments in this context turns largely on whether the employer has discretion regarding whether to make the payments. Thus, “earned vacation time or leave time [has been] accrued by an employee [where] the only discretionary question is when the earned leave may be used.” Id. at 3. Compensation payments have not accrued, however, where their payment turns on “a discretionary determination by the [employer] which is based, in part, on factors other than past employment.” See id.; see also Advisory Opinion 1992-03 (Reynolds) at 2 & n.2 (concluding that benefits payments were permissible where employer’s policy provided for 31 days of benefits for all employees on leave).

Here, the College’s policy regarding unpaid leave and benefits is highly discretionary. The Faculty Handbook provides that the provost may approve or deny requests for unpaid leaves of absence “in the best interests of the applicant and of the College,” but neither this portion of the Handbook nor the provisions governing benefits requires (or even addresses) the continuation of benefits during leave. Rather, the request states that the “[t]ypical[ ]” procedure for requests is that, if leave is granted, “the Provost, working with [other staff], will make determinations regarding benefits continuation.” Such continuation is then “generally” approved. The fact that “determinations” must be made and that benefits continuation is “generally” approved indicates that such continuations during leave are not earned payments that the employer owes the requestor a matter of binding policy, as in Advisory Opinion 1992-03 (Reynolds), but are instead discretionary accommodations that the College offers the requestor voluntarily, as in Advisory Opinion 2000-01 (Taveras) and Advisory Opinion 1976-70 (National Republican Congressional
Committee). Thus, under the Commission’s consistent approach to such situations, the proposal here to continue the College’s payments for your fringe benefits during your leave of absence is prohibited by section 114.12(c)(1).¹

In addition to section 114.12, section 113.1(g)(6) of the Commission’s regulations also prohibits the payments at issue here. Under section 113.1(g)(6), any compensation paid to a candidate is a contribution to that candidate unless:

- (A) The compensation results from *bona fide* employment that is genuinely independent of the candidacy;
- (B) The compensation is exclusively in consideration of services provided by the employee as part of this employment; and
- (C) The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

13 C.F.R. § 113.1(g)(6)(iii).

The facts of your request would not satisfy these criteria. Because you would not be performing any work for the College during the period of your unpaid leave, the compensation would not be “exclusively in consideration of services provided by [you] as part of [your] employment.” See Advisory Opinion 2000-01 (Taveras) at 4. In addition, the benefits payments that the College has offered through the MOU are not “genuinely independent of [your] candidacy”: The MOU makes clear that its terms are being offered “[b]ecause of the time commitment required to engage in such a high-profile campaign” and “[i]n the best interests of both [the requestor] and the College.” In other words, the MOU acknowledges that its terms are

¹ The Commission notes that section 114.12(c)(1) also provides that “an employee ... may, out of unreimbursed personal funds, assure the continuity of his or her fringe benefits during absence from work for political campaigning, and such payment would not be a contribution in-kind.” 11 C.F.R. § 114.12(c)(1). Therefore, although the College may not pay for your fringe benefits during your leave of absence, you may continue to receive these benefits during your leave of absence if you pay the cost yourself from unreimbursed personal funds.
influenced by the reason for your leave of absence — that is, your federal candidacy — and therefore that an employee on leave for a different reason might receive different terms. Thus, because the payment for your benefits would be made not in consideration of any services you offer the College, but rather (at least in part) because you are running for elected office, the College's payment of benefits during your leave of absence would constitute a prohibited contribution under 11 C.F.R. § 113.1(g)(6).

This response constitutes an advisory opinion concerning the application of FECA and Commission regulations to the specific transaction or activity set forth in your request. See 52 U.S.C. § 30108 (formerly 2 U.S.C. § 437f). The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. See 52 U.S.C. § 30108(c)(1)(B) (formerly 2 U.S.C. § 437f(c)(1)(B)). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

Lee E. Goodman
Chairman