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Washington, DC 20463

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For meeting of December 16, 2021

December 9, 2021

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by NFS*
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Subject: AO 2021-13 (Hoh) - Draft B

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00pm (Eastern Time) on December 15, 2021.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2021-13

2
3 Matthew P. Hoh

4 339 E Pine Ave

5 Wake Forest, NC 27587

DRAFT B

6 Dear Mr. Hoh:

7 We are responding to your request for an advisory opinion asking whether the
8 Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission
9 regulations recognize your government-provided disability benefits as “earned income”
10 for purposes of receiving a candidate salary from your principal campaign committee.

11 The Commission concludes that your disability benefits do not constitute “earned
12 income” and, therefore, cannot be used to calculate the amount of any candidate salary
13 that you may receive under 11 C.F.R. § 113.1(g)(1)(i)(I) (the “candidate salary
14 regulation”).

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter received on
17 October 27, 2021, and your email received on November 12, 2021.¹

18 You are a Marine Corps combat veteran who has been classified as “100%
19 disabled” by the U.S. Department of Veterans Affairs (“VA”).² Accordingly, you have
20 received non-taxable VA disability benefits for the past several years. Although “being
21 classified as 100% disabled by the VA does not limit other income or employment,” due
22 to your disability you were “unable to earn any money” for most of five years beginning

¹ Advisory Opinion Request (“AOR”).

² AOR001.

1 in 2015.³ In 2020, however, you earned approximately \$5,000 in taxable income as
2 compensation for employment. You anticipate earning approximately \$8,000 in taxable
3 income from employment in 2021.⁴

4 You intend to run for the United States Senate in the 2022 election cycle.⁵ You
5 state that your candidacy will have no impact on your VA disability benefits, and you
6 expect to continue to receive these benefits during your campaign.⁶ You are interested in
7 also receiving a candidate salary from your principal campaign committee once you
8 become eligible under Commission regulations. You are “not interested in receiving a
9 candidate salary greater than \$1,000-\$2,000 a month” from campaign funds, which would
10 be less than you expect to receive in VA disability benefits.⁷

11 ***Question Presented***

12 *Do your VA disability benefits constitute “earned income” for purposes of the*
13 *Commission’s candidate salary regulation?*

14 ***Legal Analysis and Conclusion***

15 No, your VA disability benefits do not constitute “earned income” for purposes of
16 the candidate salary regulation. Accordingly, they cannot be used to calculate the

³ *Id.*; AOR003.

⁴ AOR003.

⁵ See Matthew Hoh for Senate, FEC Form 1 (Sept. 23, 2021), <https://docquery.fec.gov/pdf/247/202109239466978247/202109239466978247.pdf>; Matthew Patrick Hoh, Statement of Candidacy, FEC Form 2 (Sept. 9, 2021), <https://docquery.fec.gov/pdf/817/202109099466636817/202109099466636817.pdf>.

⁶ AOR003.

⁷ AOR001.

1 maximum amount of candidate salary that you may receive from your principal campaign
2 committee.⁸

3 The Act and Commission regulations prohibit any person from converting
4 campaign funds to “personal use.”⁹ “Personal use” is defined as the use of campaign
5 funds “to fulfill any commitment, obligation, or expense of a person that would exist
6 irrespective of the candidate's election campaign or individual’s duties as a holder of
7 Federal office.”¹⁰ The Act and Commission regulations provide a non-exhaustive list of
8 expenses that, when paid using campaign funds, constitute *per se* conversion of those
9 funds to personal use.¹¹

10 Under Commission regulations, salary payments by a candidate’s principal
11 campaign committee to the candidate are *per se* personal use unless specific requirements
12 are met.¹² One of these requirements is that candidate salary payments must not exceed
13 “the lesser of: the minimum salary paid to a Federal officeholder holding the office that
14 the candidate seeks; or the earned income that the candidate received during the year

⁸ A rulemaking petition to amend the candidate salary regulation is currently pending before the Commission. For the most recent updates on this rulemaking petition, visit <https://sers.fec.gov/fosers/>, reference REG 2021-01 (Candidate Salaries).

⁹ 52 U.S.C. § 30114(b)(1); 11 C.F.R. § 113.2(e).

¹⁰ 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g).

¹¹ 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g)(1)(i).

¹² 11 C.F.R. § 113.1(g)(1)(i)(I).

1 prior to becoming a candidate.”¹³ Thus, a candidate’s “earned income” in the year prior
2 to becoming a candidate determines (1) whether the candidate’s principal campaign
3 committee may use campaign funds to pay the candidate a salary (because if the prior
4 year’s earned income is zero dollars, then the maximum amount of campaign funds that
5 could be used to pay the candidate a salary would also be zero dollars), and (2) the
6 maximum amount of candidate salary that the committee may pay (if the prior year’s
7 earned income is less than the minimum salary paid to a person holding the federal office
8 the candidate seeks). Candidates receiving a salary from campaign funds must provide
9 “income tax records from the relevant years and other evidence of earned income” to the
10 Commission upon request.¹⁴

11 The Act and Commission regulations do not define the term “earned income.” As
12 explained below, however, interpreting the term to include VA disability benefits would
13 be inconsistent with the use of the term in the Act and Commission regulations, its
14 commonly understood meaning, and the purposes of the candidate salary regulation.

¹³ *Id.* The candidate salary regulation also imposes the following requirements: (1) The salary must be paid from the candidate’s principal campaign committee funds; (2) any income that the candidate earns from any other source must be counted against the minimum annual salary for the office the candidate seeks; (3) salary payments must be computed on a pro rata basis; (4) the salary must not be paid before the date of the filing deadline for access to the primary election for the office the candidate seeks (or January 1st of each even-numbered year in states that do not conduct primaries); and (5) salary payments must cease when the recipient is no longer a candidate for public office (*i.e.*, the candidate loses the primary or general election or otherwise withdraws from the race).

¹⁴ *Id.*

1 A. *Use of “earned income” under the Act and Commission regulations.*

2 In defining “personal funds,” the Act lists “earned income” along with “salary” as
3 income derived from employment,¹⁵ and as distinct from more passive forms of income
4 resulting from dividends, bequests, trusts, personal gifts, stock sales, and lottery
5 proceeds.¹⁶ Similarly, Commission regulations typically use the term “earned income” in
6 the context of employment. For example, the regulatory definition of “personal funds”
7 generally follows the definition in the Act by grouping “earned income that the candidate
8 receives from *bona fide* employment” and “salary.”¹⁷ Further, in determining the
9 maximum salary that a principal campaign committee may pay to a candidate, the federal
10 officeholder-salary calculation must be reduced by “[a]ny *earned income* that [the]
11 candidate *receive[d]* from *salaries or wages* from any other source.”¹⁸ These references
12 to “earned income” in the Act and Commission regulations indicate that the term refers to
13 compensation for services rendered in an employment context.

14 B. *Commonly understood meaning of “earned income.”*

15 Interpreting “earned income” as compensation paid in exchange for a person’s
16 time and labor is also consistent with the term’s commonly understood meaning. For

¹⁵ “The term ‘personal funds’ means an amount that is derived from . . . income received during the current election cycle of the candidate, including— a salary and other *earned income from bona fide employment*.” 52 U.S.C. § 30101(26)(B)(i) (emphasis added).

¹⁶ 52 U.S.C. § 30101(26)(B)(ii)-(vii); *see also* 11 C.F.R. § 100.33(b)(2)-(7).

¹⁷ 11 C.F.R. § 100.33(b)(1) (emphasis added).

¹⁸ *Id.* § 113.1(g)(1)(i)(I) (emphasis added). *See also id.* § 9003.2(c)(3)(ii) (defining “personal funds” to include “[s]alary and other earned income from *bona fide* employment” in regulations implementing Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-12); *id.* § 100.54(c) (referring to employee’s “earned leave time” in determining whether compensating employee who renders personal services without charge to political committee is contribution); *id.* § 9411.1(a)(3) (referring to “Limitations on Outside Earned Income, Employment and Affiliations for Certain Noncareer Employees”).

1 example, Black’s Law Dictionary defines “earned income” as a subset of “income” that
2 includes “[m]oney derived from one’s own labor or active participation; earnings from
3 services.”¹⁹ Further, the Oxford English Dictionary describes “earned income” as
4 “income derived from paid work, esp[ecially] as contrasted with [income] derived from
5 property, interest payments, etc.”²⁰

6 In addition, the Internal Revenue Service (“IRS”) excludes VA benefits from
7 taxable income. The IRS has stated that “veterans’ benefits paid under any law,
8 regulation, or administrative practice administered by the [VA]” should not be included
9 as income for federal tax purposes.²¹ As noted above, however, candidates receiving a
10 candidate salary must “provide income tax records . . . and other evidence of earned
11 income” to the Commission upon request, to verify that the salary is within regulatory
12 limits.²² If the Commission were to interpret the candidate salary regulation as including
13 VA disability benefits in “earned income,” the federal tax returns of any candidate
14 receiving VA benefits would likely fail to reflect those benefits, and thus would omit an
15 important component of income for Commission purposes. Further, the IRS’s treatment
16 of VA benefits is informative here, as the Act requires the Commission and the IRS to

¹⁹ *Income*, Black’s Law Dictionary (11th ed. 2019). *See also earned income*, Merriam-Webster Legal Dictionary, <https://www.merriam-webster.com/legal/earned%20income> (last visited Nov. 17, 2021) (“income (as wages, salary, professional fees, or commissions) that results from the personal labor or services of an individual”).

²⁰ *Earned income*, Oxford English Dictionary Online, www.oed.com/view/Entry/242656 (last visited Nov. 22, 2021).

²¹ *See* Internal Revenue Service, Pub. 525, Taxable and Nontaxable Income at 16 (Apr. 6, 2021), <https://www.irs.gov/pub/irs-pdf/p525.pdf>; *see also id.* at 18 (Military and Government Disability Pensions). The IRS provided the same guidance in 2002 when the candidate salary regulation was promulgated. Internal Revenue Service, Pub. 525, Taxable and Nontaxable Income at 12 (2002), <https://www.irs.gov/pub/irs-prior/p525--2002.pdf>.

²² 11 C.F.R. § 113.1(g)(1)(i)(I).

1 work together to promulgate “mutually consistent” regulations.²³ Excluding VA
2 disability benefits from the definition of “earned income” would thus be consistent with
3 the term’s commonly understood meaning and the manner in which the IRS appears to
4 characterize these benefits for its purposes.

5 *C. Purpose of the candidate salary regulation.*

6 Excluding VA disability benefits from “earned income” would also be consistent
7 with the purpose of the candidate salary regulation. When the Commission amended its
8 regulations to permit the use of campaign funds to pay candidate salaries in 2002, it
9 reasoned that “the payment of a salary to a candidate is not a prohibited personal use . . .
10 since, but for the candidacy, the candidate would be paid a *salary in exchange for*
11 *services rendered to an employer.*”²⁴ This comports with the stated objective of the
12 candidate salary regulation: “to compensate candidates for lost income that is forgone
13 due to becoming a candidate.”²⁵ You have stated that your VA disability benefits, by

²³ 52 U.S.C. § 30111(f). Additionally, guidance from both the House and Senate Ethics Committees direct Members of Congress and congressional candidates to exclude government benefits such as VA disability benefits from earned income when filing their financial disclosure reports. *See* U.S. House of Representatives Committee on Ethics, Instruction Guide: Financial Disclosure Statements and Periodic Transaction Reports at 30 (2020), <https://ethics.house.gov/sites/ethics.house.gov/files/documents/CY%202020%20Instruction%20Guide%20for%20Financial%20Disclosure%20Statements%20and%20PTRs.pdf>; U.S. Senate Select Committee on Ethics, Financial Disclosure Instructions for Calendar Year 2020 at 13 (Feb. 2021), https://www.ethics.senate.gov/public/_cache/files/1d1f7bc9-14f1-404d-ae6d-ba83395e651b/cy-2020-financial-disclosure-instructions-with-cover--final.pdf.

²⁴ Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,972 (Dec. 13, 2002) (emphasis added).

²⁵ *Id.* The Commission accordingly characterized the rule’s requirement that “no candidate may receive a salary from campaign funds in excess of what he or she received as earned income in the year prior to becoming a candidate” as a critical “safeguard” to ensure that “campaign salaries are not used to enrich candidates.” *Id.*

1 contrast, are not tied to salary and will continue to be paid throughout your campaign.²⁶

2 Nothing in the history of the candidate salary regulation suggests that the Commission
3 intended to include a government benefit with no connection to current employment,
4 which will be conferred without regard to a candidate's campaign, within the scope of
5 "earned income."

6 In sum, construing the term "earned income" as excluding your VA disability
7 benefits for purposes of the candidate salary regulation would be consistent with the use
8 of the term in the Act and Commission regulations, its commonly understood meaning,
9 and the purposes of the regulation. Consequently, the Commission concludes that VA
10 disability benefits are not "earned income" under 11 C.F.R. § 113.1(g)(1)(i)(I) and may
11 not be used to calculate any salary that you may receive from campaign funds.

12 This response constitutes an advisory opinion concerning the application of the
13 Act and Commission regulations to the specific transaction or activity set forth in your
14 request.²⁷ The Commission emphasizes that, if there is a change in any of the facts or
15 assumptions presented, and such facts or assumptions are material to a conclusion
16 presented in this advisory opinion, then the requestor may not rely on that conclusion as
17 support for its proposed activity. Any person involved in any specific transaction or
18 activity which is indistinguishable in all its material aspects from the transaction or
19 activity with respect to which this advisory opinion is rendered may rely on this advisory
20 opinion.²⁸ Please note that the analysis or conclusions in this advisory opinion may be

²⁶ AOR003.

²⁷ See 52 U.S.C. § 30108.

²⁸ See 52 U.S.C. § 30108(c)(1)(B).

1 affected by subsequent developments in the law including, but not limited to, statutes,
2 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
3 available on the Commission's website.

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On behalf of the Commission,

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Shana M. Broussard

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Chair