



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

October 10, 2014

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2014-15

David Alan Brat  
Dave Brat for Congress  
P.O. Box 5094  
Glen Allen, VA 23058

Dear Mr. Brat:

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 its share of certain fringe benefits during your unpaid leave of absence to run for federal office. The Commission concludes that the proposed payments are permissible under the Act and Commission regulations.

### ***Background***

The facts presented in this advisory opinion are based on your letter received on September 3 (the “AOR”); the email received from counsel on September 2; the comment on the draft advisory opinion received from counsel on behalf of Randolph-Macon College on October 1 (“College Comment”); and the comment received on Advisory Opinion 2014-14, which considers similar facts, from your opponent, Jack Trammell, and his campaign committee, Trammell for Congress on October 2, 2014 (“Trammell Comment”).

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 September 1, 1996, and currently you are a full-time, tenured professor. The College is a corporation registered with the Commonwealth of Virginia. Your opponent in Virginia’s 7th District is also employed by the College.

When you won the Republican nomination, and your colleague won the Democratic nomination, for the U.S. House of Representatives, the College offered both of you, on materially identical terms, unpaid leaves of absence for the duration of your campaigns,

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 and tuition reduction, exchange, and remission benefits. 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. You are entitled to take a leave of absence by virtue of your position as a full-time professor at the College, provided it be in the best interest of both you and the College. College Comment at 3. The College will pay to continue your benefits pursuant to a pre-existing policy to cover fringe benefits during a leave of absence, which is generally applicable to all employees of the College, and not one which was created for this particular situation. *Id.* at 1. The College considers the continuation of benefits for employees on leaves of absence to be a form of conditional compensation for those who garner faculty rank. *Id.* at 3. 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. Similarly, any College employee who “take[s] unpaid leave or is terminated” is entitled to continuation of the tuition reduction, exchange, and remission benefits for one semester. College Comment at 4.

### ***Question Presented***

*Are the terms of the MOU consistent with the Act and Commission regulations?*

### ***Legal Analysis and Conclusions***

Yes, the MOU’s provision concerning the College’s payment of the employer portion of your fringe benefits, including tuition remission, during your unpaid leave of absence would comply with the Act and Commission regulations.

The Act prohibits a corporation from making any contribution to a candidate 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). Contributions include “any gift, subscription, loan, advance, or deposit of money or anything of value . . . for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A) (formerly 2 U.S.C. § 431(8)(A)).

Because unearned corporate compensation for candidates and campaign workers could constitute prohibited contributions, Commission regulations 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). The explanation and justification for section 114.12(c)(1) clarifies, however, that the prohibition does not apply to “fringe benefits for employees on annual leave or other leave which the employee has the right to take as a result of a contract and which may be used by the employee for any purpose.” Explanation for Part 114, H.R. DOC. NO. 95-1a, at 117 (Jan. 12, 1977). Commission regulations also provide 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).

Although the College exercises its discretion when considering requests for leave, the facts before us suggest that payments for continued benefits are issued *pro forma* once the request is granted. *See* Trammell Comment at 1; College Comment at 3. Because the unpaid leave of absence that is the subject of the MOU does not raise the issue of possible corporate contributions, the Commission next considers the permissibility of the related payment for continuation of fringe benefits.

The Commission addressed this issue in Advisory Opinion 1992-03 (Reynolds). In that opinion, a corporation had an established unpaid-leave policy of paying fringe benefits for 31 days from any employee’s last day of work. Because the benefits policy was pre-existing and not created to benefit an employee-candidate and because the period of time during which the payments would be made was relatively brief, the Commission viewed the extension of benefits under those circumstances “as a form of compensation payable to the employee by Reynolds and as part of ‘other earned leave time’” under Commission regulations. Advisory Opinion 1992-03 (Reynolds) at 2.

In Advisory Opinion 2000-01 (Taveras), on the other hand, the Commission did not permit a law firm to continue paying one-half of a candidate’s usual salary during a leave of absence, even though the law firm had in the past approved paid leave if the firm found the employee’s situation “deserving.” Advisory Opinion 2001-01 (Taveras) at 4. The Commission distinguished the facts in Advisory Opinion 2001-01 (Taveras), where a law firm would grant leave with one-half normal salary “if the firm [found] the situation deserving,” from those in Advisory Opinion 1992-03 (Reynolds), where payment of the candidate’s insurance was “customary for all approved, unpaid leave situations.” Advisory Opinion 2000-01 (Taveras) at 3.

The facts in your request are more akin to Advisory Opinion 1992-03 (Reynolds) than Advisory Opinion 2000-01 (Taveras). Here, the payment for continued benefits is “generally

approve[d]” (Email from Katherine Payne, Esq., to Joanna Waldstreicher, Attorney, FEC (Sep. 2, 2014) at 2) for those granted leaves of absence under a pre-existing and “long-standing policy [that] is generally applicable to all employees of the College, and not one that was created for this particular situation.” College Comment at 1. Moreover, the College states that the continuation of benefits for employees on leave is a form of conditional compensation for faculty. College Comment at 3.

Accordingly, several factors demonstrate that the proposed benefits payments are not prohibited corporate contributions. First, it does not appear the College is creating a benefits policy to give you an advantage as a federal candidate-employee. The College’s policy of granting sabbaticals for a variety of purposes and generally approving payment of fringe benefits during those sabbaticals indicates the College is according you the same treatment it affords other employees who are granted leave for other reasons. AOR at 1; College Comment at 2.

Second, the College states that “[t]he continuation of [employee] benefits [during leaves of absence] is indeed a form of conditional compensation for employees who garner faculty rank.” College Comment at 3. Your opponent, Mr. Trammell, states as much in his comment to the Commission, characterizing the practice of continued payment for fringe benefits while on leave as “a standing policy” that, if denied, “would be a departure from customary practice.” Trammell Comment at 1.

Finally, the College plans to provide materially identical payment agreements to both you and your opponent in the race for Virginia’s 7th District seat in the U.S. House of Representatives. Continuing payment for your fringe benefits during a leave period appears to be part of a consistent policy available to all qualifying employees that is designed to afford you the same treatment as other faculty members who take sabbaticals for non-political purposes. As a result, the payments are not prohibited by section 114.4(c)(1).

For the same reasons, the payments are not prohibited by 11 C.F.R. § 113.1(g)(6)(iii), which addresses what types of third-party payments are contributions. That regulation permits compensation that meets the following three criteria:

- (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.

Under the circumstances here, the College policy of liberally granting sabbaticals (including to both major party candidates in the same federal election) and generally approving continuation of benefits, including for those on sabbaticals for non-political purposes, meets these criteria.

Accordingly, the Commission concludes that the proposed payments and benefits are

permissible under the Act and Commission regulations.

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,

(signed)  
Lee E. Goodman  
Chairman