

January 21, 2016

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The Honorable Matthew S. Petersen, Chairman
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request 2015-14 (“Hillary for America II”)

Dear Commissioners:

We submit these comments on behalf of Hillary for America (“HFA” or the “Campaign”) regarding Advisory Opinion 2015-14 (the “Request”). We want to thank the Commission for its willingness to diligently work together to arrive at an opinion that will allow Ms. Houghtalen to accept the Hubbard Center Stipend (the “Stipend”) and Extended Studies Credit.

These comments set forth two reasons why the Commission should find that the provision of the Stipend is permissible under the Federal Election Campaign Act (the “Act”). This approach relies on a commonsense read of the Act and articulates a clear standard that will sufficiently guard against direct corporate participation in federal elections.

DISCUSSION

Section 100.54 of the Commission’s regulations provides that the “payment by any person of compensation for the personal services of another person . . . [that] are rendered without charge to a political committee” is a contribution by the payor.¹ Likewise, federal law treats any payment that is made “for the purpose of influencing any election for federal office” as a contribution.² There are two reasons why the Stipend does not result in a “contribution” under these tests. First, the Stipend is not being offered as compensation in exchange for the personal services provided to HFA. Instead, it is being offered to offset expenses that Ms. Houghtalen must necessarily incur to participate in the Hubbard Center Summer Internship Grant Program (the “Grant Program”). Second, the Stipend is not being offered for any electoral purpose. Instead, it is being offered for a bona fide educational purpose that goes to the heart of DePauw University’s academic mission.

¹ 11 C.F.R. § 100.54.

² 52 U.S.C. § 30101(8)(A)(i).

I. The Stipend Is Not Compensation Provided for Personal Services Rendered to HFA

Neither the Act nor Commission regulations define the word “compensation.” As a point of reference for the ordinary meaning of the term, however, Black’s Law Dictionary defines compensation as, “[r]emuneration and other benefits received in return for services rendered; esp., salary or wages.”³ The Stipend was not offered to Ms. Houghtalen to provide her with remuneration for services, but rather to defray the basic subsistence expenses she would incur during the HFA internship.

In fact, the \$3,000 stipend awarded to Ms. Houghtalen was less than her budgeted travel and subsistence expenses for the summer (\$4,735).⁴ Such a small stipend would lessen the financial burden the unpaid internship put upon Ms. Houghtalen, but would in no way compensate her for services provided to HFA. As Draft C notes, “[t]his supports requestor’s assertion that the purpose of DePauw’s Summer Internship Grant Program stipend is not to pay students for the work they perform, but to ‘offset the basic living expenses that will be incurred during the period.’”⁵ In prior opinions where the Commission found that a corporate-paid stipend *was* compensation offered in exchange for services to a political committee, the stipend at issue had exceeded the travel and subsistence costs of the recipient⁶ or the Commission did not appear to have the necessary facts to make this determination.⁷

Treating the stipend in this way is also consistent with past Commission precedents concluding that work performed by a student for a political committee is not a contribution “if the students receive no compensation *for the work*.”⁸ That is the basis on which the Commission has allowed universities to provide academic credit for campaign internships. School credit, as any student will attest, has significant value. But where it has been clear, as it is here, that the university is providing credit to recognize the educational benefit of internships and thereby encourage future student participation in an internship program, the Commission has consistently and correctly held that the student has not been “compensated” for services performed for a political committee.⁹ And, accordingly, the Commission has not found that the university has made an impermissible corporate contribution.

³ Black’s Law Dictionary (10th ed. 2014).

⁴ A copy of the estimated budget that Ms. Houghtalen filled out as part of her application to the Grant Program is available in Appendix D of the Request.

⁵ Draft C, FEC Adv. Op. 2015-14 (Hillary for America II) (quoting from request).

⁶ See, e.g. FEC Adv. Ops. 1979-67 (RNC-DNC); 1982-60 (ASME).

⁷ See FEC Adv. Op. 1982-31 (Koenig).

⁸ FEC Adv. Op. 1975-100 (Moss) (emphasis added).

⁹ See FEC Adv. Op. 1975-100 (Moss); Factual and Legal Analysis at 7, MUR 6620 (Friends of Brian Woodworth) (July 2, 2013).

II. The Stipend is Offered for a Bona Fide Educational Purpose

Federal law treats any payment that is made “for the purpose of influencing any election for federal office” as a contribution.¹⁰ But the Commission has correctly recognized that not every ancillary benefit received by a political committee as the result of an action taken by a corporation is a “contribution.” Rather, the Commission has consistently allowed corporations to provide political committees with discounts and other benefits in the ordinary course of business and on the same terms and conditions as it provides such discounts or benefits to other non-political entities.¹¹ The basic legal principle here is that third parties may not treat political committees *more favorably* than similarly situated entities, but that they need not *discriminate against* political committees to avoid granting them an ancillary benefit.

The facts demonstrate that DePauw did not offer Ms. Houghtalen the Stipend to compensate her for her work for HFA or for the purpose of influencing a federal election. Rather, the Stipend was offered irrespective of the political nature of her internship for the purpose of advancing a bona fide educational purpose of the University. Several factors are particularly instructive in demonstrating that the Stipend furthers a bona fide educational purpose rather than an impermissible electoral purpose.

First, the Internal Revenue Code prohibits the University from operating the Grant Program for a partisan political purpose. As a section 501(c)(3) organization, DePauw is prohibited by the Internal Revenue Code from participating or intervening in any political campaign on behalf of or in opposition to any candidate for public office.¹² Additionally, as a 501(c)(3) organization, the University is required to be primarily engaged in activities which accomplish its tax-exempt purpose, meaning that no more than an insubstantial part of its activities may further a non-exempt purpose.¹³ The presence of a single substantial non-exempt purpose destroys an organization’s exempt status.¹⁴ Accordingly, if the University failed to operate the Grant

¹⁰ 52 U.S.C. § 30101(8)(A)(i).

¹¹ See e.g., FEC Adv. Ops. 1987-24 (Hyatt) (approving the provision of discounted or complimentary hotel rooms and other amenities to campaigns on the same terms and conditions offered to other, non-political clients); 2004-06 (Meetup) (approving the provision of premium services for a discounted fee to House candidates where the fees were calculated based on a fixed set of criteria applied to all customers); 1989-14 (Anthony’s Pier 4) (approving the provision of catering and reception services to political committees at a reduced rate available on equal terms to other customers); 1995-46 (D’Amato) (approving a publisher’s sale of books at a bulk rate to the author’s candidate committee where such a price was the standard price available for large purchasers who agree to the same conditions of sale).

¹² See 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iii).

¹³ 26 C.F.R. § 1.501(c)(3)-1(c)(1). The exempt purposes for a section 501(c)(3) organization are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals. See 26 U.S.C. § 501(c)(3).

¹⁴ See *Am. Campaign Acad. v. C.I.R.*, 92 T.C. 1053, 1065 (1989) (citing *Better Business Bureau v. United States*, 326 U.S. 279, 283 (1945) and *Copyright Clearance Center v. Commissioner*, 79 T.C. 793, 804 (1982)).

Program to exclusively further a bona fide educational purpose, and rather awarded stipends by taking into account political considerations, it would risk forfeiting its tax-exempt status.

This is not a theoretical risk. The IRS actively polices the engagement of tax exempt organizations in partisan activities and takes aggressive action to curtail prohibited activities. As one example of particular relevance, the IRS has previously denied a tax-exempt application under section 501(c)(3) for an organization whose primary activity was to operate a school to train individuals for careers as political campaign professionals.¹⁵ The campaign school appeared to be organized for an educational purpose: it maintained a regularly scheduled curriculum, a regular faculty and a full-time student body.¹⁶ However, both the IRS and the reviewing tax court evaluated the operation of the school and found that in practice the school “conducted its educational activities with the partisan objective of benefiting Republican candidates and entities.”¹⁷ Accordingly, the organization was denied 501(c)(3) tax exempt status based on its failure to operate exclusively for exempt purposes.¹⁸ As demonstrated by this precedent, any 501(c)(3) organization, including DePauw, would be unable to rely on a disingenuous claim that a grant program operated to advance an educational purpose if in practice the program operated according to partisan, political considerations.

Second, the structure of the Grant Program demonstrates that the Stipend is being offered for a bona fide educational purpose. Under the Program, any current DePauw student who has obtained an unpaid internship in a startup, government or non-profit environment is eligible to apply for a stipend.¹⁹ There are no qualifications on the subject area of the internship so long as the student can demonstrate in their application that the internship “relate[s] and connect[s] to [the student’s] academic, personal, and professional goals.”²⁰ In keeping with the purpose of the Grant Program, the University evaluates each application using a formal Scoring Rubric designed to determine whether the proposed internship will provide an in-depth experience that

¹⁵ *Id.* at 1079.

¹⁶ *Id.* at 1055.

¹⁷ *Id.* at 1070. For example, the organization was incorporated by the General Counsel of the NRCC, received funding exclusively from the National Republican Congressional Trust and instituted a curriculum that focused on the Republican party without offering comparative studies of the Democratic or other political parties. *Id.* Further, 85 of the schools’ graduates went on to work for campaigns of 98 Republican Senatorial and Congressional Candidates. *Id.* at 1072.

¹⁸ *Id.*

¹⁹ See DePauw University, “Summer Internship Grant Program,”

<http://www.depauw.edu/academics/centers/hubbard/distinctly-depauw/summer-internship-grant-program/>.

²⁰ A copy of the Hubbard Center Summer Internship Grant Program application form is available in Appendix A of the Request.

is focused on the individual student's learning objectives and interests.²¹ The political nature of an internship is not a factor in the Scoring Rubric.²²

Third, the Grant Program plays a particularly important role in DePauw's curriculum. A key focus of DePauw University's overall academic curriculum is the encouragement of experiential learning, or the process of learning through experience. The University administers the Grant Program to encourage experiential learning by making it financially feasible for students to accept unpaid summer internships that offer valuable hands-on work experience. As Draft C correctly recognized, "[t]he ongoing relationship with participating students is important because DePauw's Grant Program facilitates a requirement of the university's overall educational program."²³

As these objective factors definitively prove, the Grant Program is administered to further a bona fide educational purpose of the University. The University enjoys broad academic freedom under the First Amendment to pursue its educational mission free of unwarranted and unnecessary government interference.²⁴ Importantly, this academic freedom affords to universities "the freedom to make decisions about how and what to teach."²⁵ The recognition that practical learning experiences significantly enhance educational outcomes has led to the widespread adoption of grant programs as a core part of schools' academic curriculums. In denying the ability of a university to educate its students in this manner only with respect to political internships, the Commission risks imposing a content standard on bona fide educational speech that is not narrowly tailored to serve a compelling governmental interest.

Therefore, in order to achieve its regulatory goals without infringing upon the First Amendment rights of our nation's educational institutions, we urge the Commission to find that an internship stipend that merely covers the student's travel and subsistence expenses, and is provided pursuant to generally administered program for a bona fide educational purpose, falls outside the

²¹ A copy of the Hubbard Center Summer Internship Grant Program Scoring Rubric is available in Appendix B of the Request.

²² See *id.*

²³ Draft C, FEC Adv. Op. 2015-14 (Hillary for America II) at 8.


²⁴ See *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) ("Academic freedom . . . long has been viewed as a special concern of the First Amendment."); *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967) ("[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . ."); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

²⁵ *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 237 (2000).

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regulatory scope of the Act. Such a narrowly tailored opinion properly balances the rights of students and academic institutions against the Commission's legitimate interest in enforcing the prohibition on corporate contributions.

Very truly yours,



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