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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA ITEM**

For Meeting of 10-9-14

September 26, 2014

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *LJS by AN*  
Deputy General Counsel

Adav Noti *AN*  
Acting Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Joanna S. Waldstreicher *JSW by RMK*  
Attorney

Subject: Draft AO 2014-15 (Brat)

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

1 ADVISORY OPINION 2014-15

2  
3 David Alan Brat  
4 Dave Brat for Congress  
5 P.O. Box 5094  
6 Glen Allen, VA 23058

**DRAFT**

7  
8 Dear Mr. Brat:

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

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter received on  
17 September 3, and the email received from counsel on September 2, 2014.

18 You are a candidate for the U.S. House of Representatives in Virginia’s 7th District. You  
19 have been employed by Randolph-Macon College (the “College”) since September 1, 1996, and  
20 currently you are a full-time, tenured professor. The College is a corporation registered with the  
21 Commonwealth of Virginia.

22 When you won the Republican nomination for the U.S. House of Representatives, the  
23 College offered and you accepted an unpaid leave of absence for the duration of your campaign,  
24 beginning August 8, 2014. You and the College have entered into a Memorandum of  
25 Understanding (the “MOU”) setting forth the terms of your leave of absence. One of the terms  
26 in the MOU provides for the continuation of fringe benefits for which you were eligible prior to  
27 the leave of absence, including medical, life, and disability insurance. The MOU states that the

1 College will continue to provide its “financial insurance subsidy” for these benefits and requires  
2 you to timely pay your portion of the premiums, as well. MOU at 2. Your benefits would be  
3 continued for the duration of your unpaid leave, which would end when you return to work at the  
4 College or resign to take office, depending on the outcome of the election, “but in no event later  
5 than January 1, 2015.” *Id.*

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

21 ***Question Presented***

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

1 ***Legal Analysis and Conclusions***

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

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

14 In determining whether an employer may pay its share of an employee's benefits while  
15 the employee is on leave to conduct campaign work, the Commission has reconciled these two  
16 regulations by distinguishing between payments for benefits that the employee accrued before  
17 going on leave (which the employer may pay under section 100.54(c)) and benefits that have not  
18 accrued but are being continued during the leave (which the employer may not pay under section  
19 114.12(c)(1)). *See* Advisory Opinion 2000-01 (Taveras) at 3; Advisory Opinion 1976-70  
20 (National Republican Congressional Committee). In applying this distinction, the Commission  
21 looks to whether the payments are made pursuant to a generally applicable, pre-existing policy  
22 that grants fringe benefits to all employees on unpaid leave as "a form of compensation payable

1 to the employee by [the employer] and as part of ‘other earned leave time.’” Advisory Opinion  
2 1992-03 (Reynolds) at 2.

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

12 Here, the College’s policy regarding unpaid leave and benefits is highly discretionary.  
13 The Faculty Handbook provides that the provost may approve or deny requests for unpaid leaves  
14 of absence “in the best interests of the applicant and of the College,” but neither this portion of  
15 the Handbook nor the provisions governing benefits requires (or even addresses) the continuation  
16 of benefits during leave. Rather, the request states that the “[t]ypical[ ]” procedure for requests is  
17 that, if leave is granted, “the Provost, working with [other staff], will make determinations  
18 regarding benefits continuation.” Such continuation is then “generally” approved. The fact that  
19 “determinations” must be made and that benefits continuation is “generally” approved indicates  
20 that such continuations during leave are not earned payments that the employer owes the  
21 requestor a matter of binding policy, as in Advisory Opinion 1992-03 (Reynolds), but are instead  
22 discretionary accommodations that the College offers the requestor voluntarily, as in Advisory  
23 Opinion 2000-01 (Taveras) and Advisory Opinion 1976-70 (National Republican Congressional

1 Committee). Thus, under the Commission’s consistent approach to such situations, the proposal  
2 here to continue the College’s payments for your fringe benefits during your leave of absence is  
3 prohibited by section 114.12(c)(1).<sup>1</sup>

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

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

9  
10 (B) The compensation is exclusively in consideration of services  
11 provided by the employee as part of this employment; and

12  
13 (C) The compensation does not exceed the amount of  
14 compensation which would be paid to any other similarly qualified  
15 person for the same work over the same period of time.

16  
17 11 C.F.R. § 113.1(g)(6)(iii).

18  
19 The facts of your request would not satisfy these criteria. Because you would not be  
20 performing any work for the College during the period of your unpaid leave, the compensation  
21 would not be “exclusively in consideration of services provided by [you] as part of [your]  
22 employment.” See Advisory Opinion 2000-01 (Taveras) at 4. In addition, the benefits payments  
23 that the College has offered through the MOU are not “genuinely independent of [your]  
24 candidacy”: The MOU makes clear that its terms are being offered “[b]ecause of the time  
25 commitment required to engage in such a high-profile campaign” and “[in] the best interests of  
26 both [the requestor] and the College.” In other words, the MOU acknowledges that its terms are

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<sup>1</sup> 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.

