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December 15, 2015

MEMORANDUM

TO: The Commission

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Subject: AO 2015-14 (Hillary for America II) Draft A

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 9:00 am (Eastern Time) on December 17, 2015.

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 <http://www.fec.gov/law/draftaos.shtml>.

Attachment

2
3 Marc E. Elias, Esq.
4 Jacquelyn K. Lopez, Esq.
5 Perkins Coie LLP
6 700 13th Street, NW
7 Suite 600
8 Washington, DC 20005-3960
9

10 Dear Mr. Elias and Ms. Lopez:

11 We are responding to your advisory opinion request on behalf of Hillary for America
12 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the
13 “Act”), and Commission regulations to your proposal for DePauw University to provide a
14 stipend and academic credit to a student who interned in the requestor’s compliance and vetting
15 departments. The Commission concludes that the provision of a stipend is permissible under the
16 Act and Commission regulations for the legal and compliance services that the student provided
17 but not for her other campaign work. The Commission also concludes that the provision of
18 academic credit is permissible for all of the student’s work.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on October
21 29, 2015, and your email received on December 15, 2015.

22 DePauw is an accredited institution of higher learning holding tax-exempt status under 26
23 U.S.C. § 501(c)(3). Advisory Opinion Request (“AOR”) at AOR002. DePauw administers two
24 programs that help students gain practical experience to supplement their academic courses.
25 First, the Hubbard Center Summer Internship Grant Program (“Grant Program”) provides
26 stipends to students who accept unpaid internships in non-profits or start-ups. AOR003. Under
27 the Grant Program, any DePauw student may apply for a summer stipend of up to \$3,000 by
28 securing a summer internship and submitting a written application and detailed budget to the

1 Hubbard Center, the department that administers the program. The Hubbard Center makes an
2 individualized determination to grant or deny each student's application, based on a rubric that
3 weighs how well the internship "relate[s] and connect[s] to [the student's] academic, personal,
4 and professional goals." AOR003; AOR019-021. In 2015, the Hubbard Center provided
5 stipends to 78 of the 142 students who applied, or approximately 55%. AOR003.

6 Second, DePauw requires all students to receive credit from two "Extended Studies"
7 experiences. AOR004. The purpose of the requirement is to ensure students can "intensely
8 focus on a particular topic, problem, or skill-set, which enhances their liberal arts education."
9 *Id.* Some students fulfill these credits through summer internships. Students must also submit a
10 "contract that included a list of the personal development goals [they] aim[] to achieve through
11 the experience," set forth in consultation with both DePauw and the internship supervisor, before
12 submitting for final approval by DePauw, which reviews the application against the
13 aforementioned requirements. *Id.*; AOR023; AOR019-021.

14 Victoria Houghtalen is a current DePauw student. AOR004. In the spring of 2015, Ms.
15 Houghtalen was offered an unpaid internship with the requestor, the principal campaign
16 committee for presidential candidate Hillary Clinton, for eight weeks during the summer of
17 2015. Upon receiving the offer, Ms. Houghtalen applied for a stipend through the Grant
18 Program. After reviewing her application, the Hubbard Center awarded her a \$3,000 stipend for
19 her eight-week internship. Ms. Houghtalen also applied to DePauw to receive Extended Studies
20 credit, which DePauw granted. *Id.* Ms. Houghtalen subsequently accepted the offered
21 internship. *Id.*

22 During her internship, Ms. Houghtalen performed a number of tasks for the requestor.
23 Specifically, she "assisted the [c]ampaign with the preparation of its July quarterly FEC Report,

1 while also spending a significant amount of time engaged in a range of other substantive work
2 . . . , such as helping with the [c]ampaign’s vetting, attending educational events organized by
3 the [requestor] and interacting with [c]ampaign supporters and volunteers.” AOR005.

4 ***Questions Presented***

5 (1) *May DePauw, a 501(c)(3) corporation, provide Ms. Houghtalen with a stipend*
6 *specifically for the time she spent assisting with legal and accounting work without a*
7 *contribution to the requestor resulting?*

8 (2) *May DePauw provide Ms. Houghtalen with a stipend for her other substantive work to*
9 *further its educational mission without a contribution to the requestor resulting?*

10 (3) *May DePauw provide Ms. Houghtalen with a stipend for her other substantive work*
11 *without a contribution to the requestor resulting because the requestor’s Internship Program*
12 *was for her educational benefit?*

13 (4) *May DePauw provide a stipend to Ms. Houghtalen for her other substantive work as part*
14 *of a bona fide and generally administered program without a contribution to the requestor*
15 *resulting?*

16 (5) *May DePauw provide Ms. Houghtalen with Extended Studies Credit for the requestor’s*
17 *Internship Program without a contribution to the requestor resulting?*

18 ***Legal Analysis and Conclusions***

19 (1) *May DePauw, a 501(c)(3) corporation, provide Ms. Houghtalen with a stipend*
20 *specifically for the time she spent assisting with legal and accounting work without a*
21 *contribution to the requestor resulting?*

22 Yes, DePauw may provide a stipend only for the legal and accounting services that Ms.
23 Houghtalen provided to the requestor without the stipend constituting a contribution to the

1 requestor because this work is exempt from the definition of “contribution.” *See* Advisory
2 Opinion 1982-31 (Koenig) at 2.

3 The Act and Commission regulations prohibit a corporation from making any
4 contribution to a candidate in connection with a federal election. 52 U.S.C. § 30118(a), (b)(2);
5 *see also* 11 C.F.R. § 114.2(b). This includes “the payment by any person of compensation for
6 the personal services of another person which is rendered to a political committee without charge
7 for any purpose.” 52 U.S.C. § 30101(8)(A)(ii); 11 C.F.R. § 100.54. Thus, the Commission has
8 consistently concluded that corporations — including 501(c)(3) organizations and other non-
9 profit corporations — would be making in-kind contributions by compensating interns for
10 campaign-related activities. *See* Advisory Opinion 1979-67 (RNC-DNC) at 2 (“The
11 Commission recognizes the basic educational purpose of the proposed intern program. There
12 would be, however, a contribution in-kind if the interns engage in activity related to the
13 campaigns of individuals seeking Federal office.”); Advisory Opinion 1985-17 (CYLC) at 2
14 (“[P]ayments by corporations to support such internships[] do not constitute corporate
15 contributions or expenditures prohibited by [the Act] so long as the intern is not compensated for
16 any Federal election activity.”); Advisory Opinion 1982-60 (ASME) at 2 (“[P]ayments by
17 corporations to participants in [internship programs] do not give rise to a corporate contribution
18 so long as the intern does not engage in activity related to the election campaign.”); *cf.* Advisory
19 Opinion 2003-20 (Reyes) at 3 (concluding that funds raised and spent for scholarship program
20 were not contributions, “provided that the recipients of the scholarships do not engage in
21 activities relating to Federal elections as part of the scholarship programs”).

22 The Act, however, permits an individual’s “regular employer” to compensate that
23 individual for legal and accounting services rendered on behalf of an authorized committee

1 without the services or the compensation constituting contributions. *See* 52 U.S.C.
2 § 30101(8)(B)(viii)(2); 11 C.F.R. § 100.86. Accordingly, in Advisory Opinion 1982-31
3 (Koenig), the Commission determined that a student who provided legal and accounting services
4 to an authorized committee could permissibly receive a stipend for those services from a
5 university-based internship program without the school making a contribution. *Id.* at 2-3. The
6 Commission clearly limited this exemption, stating that, “to remain within the exemption, [the
7 intern’s] duties must be confined to legal and accounting services solely for the purpose of
8 ensuring compliance with the Act.” *Id.* at 2.

9 The instant request regarding DePauw’s payment of a stipend for the legal and
10 accounting services that Ms. Houghtalen provided to the requestor is indistinguishable in all its
11 material aspects from the stipend that the Commission approved in Advisory Opinion 1982-31
12 (Koenig). Thus, DePauw may provide a stipend to Ms. Houghtalen for the “legal and accounting
13 services [that she provided] solely for the purpose of ensuring [the requestor’s] compliance with
14 the Act” without a contribution resulting. *Id.* The advisory opinion request does not indicate
15 how much time Ms. Houghtalen dedicated to legal and accounting services versus her other work
16 for the requestor. In Advisory Opinion 1982-31 (Koenig), the Commission noted that the
17 campaign intern receiving a stipend from school could permissibly provide services other than
18 legal and accounting services in exchange for “proportionate” payment by the committee, or as
19 an entirely unpaid volunteer. *Id.* at 2-3. Accordingly, although the Commission does not make a
20 determination as to whether \$3,000 is “proportionate” compensation for the time Ms. Houghtalen
21 devoted to legal and accounting services versus other work for the requestor, this is a relevant
22 consideration in determining the amount of the stipend that DePauw may pay Ms. Houghtalen
23 without a contribution resulting.

1 (2) *May DePauw provide Ms. Houghtalen with a stipend for her other substantive work to*
2 *further its educational mission without a contribution to the requestor resulting?*

3 No, a corporation's payment of a stipend for campaign services other than legal or
4 accounting services would constitute an unlawful corporate contribution, regardless of the tax
5 status or "mission" of the corporation.

6 As discussed above, a corporation's payment of compensation for "the personal services
7 of another person which is rendered to a political committee without charge" is an unlawful
8 corporate contribution, 52 U.S.C. § 30101(8)(A)(ii), and the Commission has consistently
9 applied this prohibition to educational institutions and other tax-exempt corporations. *See supra*
10 *pp. 3-5.* Here, DePauw seeks to provide a stipend as compensation in part for Ms. Houghtalen's
11 campaign-related services — for example, "spending a significant amount of time . . . helping
12 with [the requestor]'s vetting."¹ AOR005. Accordingly, providing Ms. Houghtalen a stipend for
13 these campaign-related activities would result in an impermissible corporate contribution. *See*
14 *Advisory Opinion 1982-31 (Koenig) at 2-3; Advisory Opinion 1979-67 (RNC-DNC) at 2; see*
15 *also Advisory Opinion 2003-20 (Reyes) at 3 (noting that 501(c)(3) educational fund was not*
16 *permitted to provide scholarships to students who "engage in any activity in connection with a*
17 *Federal or non-Federal election as part of, or in exchange for, the scholarship").*²

¹ The requestor indicates that 10-20% of the work Ms. Houghtalen performed in its Vetting Department consisted of screening contributions to determine their legality and the remainder of her work in the Vetting Department was "political in nature." *See* AOR033. To the extent that the vetting of contributions Ms. Houghtalen performed was a legal or accounting service solely to ensure compliance with the Act, DePauw's payment of a stipend to Ms. Houghtalen for the time she spent performing those services would not result in a contribution to the requestor. *See supra pp. 3-5.*

² The requestor acknowledges the Commission's longstanding interpretation of corporate contributions and internships but asks the Commission to overrule that interpretation as inconsistent with the Act. *See* AOR007. The requestor relies upon Advisory Opinion 2000-16 (Third Millennium), which involved a 501(c)(3) organization displaying on the internet a set of presidential candidates' advertisements as part of a study of young voter disengagement. Advisory Opinion 2000-16 (Third Millennium) at 2, 4. The Commission found the activity

1 (3) *May DePauw provide Ms. Houghtalen with a stipend for her other substantive work*
2 *without a contribution to the requestor resulting because the requestor's Internship Program*
3 *was for her educational benefit?*

4 No, Ms. Houghtalen's status as an intern does not bear on whether she provided
5 "personal services" to the requestor.

6 As discussed above, the Commission has long provided that compensation for an
7 educational internship is a contribution if the intern engages in campaign-related activity.
8 Therefore the relevant question here is whether Ms. Houghtalen's activities constitute personal
9 services "related to the campaigns of individuals seeking federal office." Advisory Opinion
10 1979-67 (RNC-DNC). The request indicates that Ms. Houghtalen "spen[t] a significant amount
11 of time. . . helping with [requestor]'s vetting," among other things. AOR005. Such "substantive
12 work," AOR005, provides a service to the committee, and accordingly it constitutes "personal
13 services" for purposes of 11 C.F.R. § 100.54. Cf. Advisory Opinion 1980-88 (Citizens for
14 Election of Harry Davis as President Committee) (concluding that bookkeeping activities
15 constituted provision of "personal services" to committee); Advisory Opinion 1982-04
16 (Apodaca) (carpentry services); Advisory Opinion 2006-22 (Wallace) (legal services not related
17 to compliance with Act). Thus, DePauw's compensation of Ms. Houghtalen for these services
18 would constitute an unlawful corporate contribution to the requestor.³

permissible under the Act and Commission regulations, but no rationale for that conclusion garnered the affirmative votes of four Commissioners, and none of the concurring statements that Commissioners issued to explain their separate reasoning analyzed — or even mentioned — the compensation question at issue here. Nor did any of those statements indicate, as the requestor suggests, that spending by "a 501 (c)(3) corporation that is prohibited by the Internal Revenue Code . . . from participating or intervening in any political campaign" is necessarily "outside the scope of a prohibited corporate contribution." See AOR006.

³ The requestor asks the Commission to take note of the Department of Labor's standards for determining what constitutes an internship under the Fair Labor Standards Act ("FLSA"). AOR007-008. The Commission expresses no opinion as to the application of FLSA because such determinations are not within the Commission's

1 (4) *May DePauw provide a stipend to Ms. Houghtalen for her other substantive work as part*
2 *of a bona fide and generally administered program without a contribution to the requestor*
3 *resulting?*

4 No, the Grant Program is not a generally administered vacation time or earned leave
5 program, and so the stipend in question does not fall under the regulation that exempts such
6 programs from the ban on corporate contributions, 11 C.F.R. § 100.54(c).

7 The Act prohibits a corporation from making any contribution in connection with a
8 federal election. 52 U.S.C. § 30118(a), (b)(2); *see also* 11 C.F.R. § 114.2(b). Accordingly,
9 Commission regulations specifically provide that a corporate employer may not pay its share of
10 the cost of an employee’s fringe benefits, such as health and life insurance, for an employee who
11 is on unpaid leave to participate in the campaign of a federal candidate. 11 C.F.R.
12 § 114.12(c)(1). Commission regulations also provide, however, that a corporation’s payment of
13 compensation to an employee does not result in a contribution from the corporation where the
14 employee engages in campaign activity on *bona fide* vacation time or other earned leave time.
15 11 C.F.R. § 100.54(c).

16 In Advisory Opinion 2000-01 (Taveras), the Commission noted that the distinction
17 between earned payments and continued payments in this context turns largely on whether the

jurisdiction. Nonetheless, the Commission notes that the request does not indicate whether Ms. Houghtalen’s “substantive work” for the requestor’s compliance and vetting operations qualified as a *bona fide* internship under FLSA. *See* AOR008 (acknowledging that *bona fide* intern must provide employer with “no immediate advantage”); *see also* U.S. Dept. of Labor, Wage and Hour Division, *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, <http://www.dol.gov/whd/regs/compliance/whdfs71.htm>; *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 384 (2d Cir. 2015) (rejecting Department of Labor’s proposed test of whether an unpaid intern is “employee” under FLSA and adopting test that “focuses on what the intern receives in exchange for his work” and “accords courts the flexibility to examine the economic reality as it exists between the intern and the employer”). In any event, as the advisory opinions cited above make clear, compensation for work performed during even a *bona fide* internship constitutes a contribution if the intern provides personal services that do not fall within the exemption for legal and accounting services.

1 entitlement to the payments has already accrued by the time the employee goes on leave, such
2 that the employer has no meaningful discretion regarding whether to make the payments. *See*
3 *also* Advisory Opinion 2014-15 (Brat) at 3-4; Advisory Opinion 2014-14 (Trammell) at 3-4;
4 Advisory Opinion 1976-70 (National Republican Congressional Committee). Thus, “earned
5 vacation time or leave time [has been] accrued by an employee [w]here the only discretionary
6 question is when the earned leave may be used.” Advisory Opinion 2000-01 (Taveras) at 3.
7 Compensation payments have not accrued, however, where their payment turns on “a
8 discretionary determination by the [employer] which is based, in part, on factors other than past
9 employment.” *See id.*; *see also* Advisory Opinion 1992-03 (Reynolds Metal) at 2 & n.2
10 (concluding that benefits payments were permissible where employer’s policy provided for 31
11 days of benefits for all employees on leave).

12 The requestor asserts that “[t]he logic underlying this precedent” demonstrates that the
13 stipend in question “is analogous to the types of continued benefit programs the Commission
14 [has previously] approved.” AOR010. The Commission concludes, however, based on the facts
15 presented in the request, that the stipend at issue here is a discretionary payment, not an accrued
16 benefit.⁴ Here, approval of payments through the Grant Program is not *pro forma*, but rather it is
17 highly discretionary. *See* Advisory Opinion 2000-01 (Taveras) at 3 (rejecting a proposal for paid
18 leave because the “employee [had] the right to apply for partially paid leave, but it [was] not an
19 earned or accrued employment benefit,” it was granted “solely at the discretion of the firm,” and
20 the employer exercised its discretion based on “factors other than [the employee’s]
21 employment.”). The request notes that DePauw evaluates stipend applications using a

⁴ Because the stipend does not fall within section 100.54(c) for the reasons discussed below, the Commission need not and does not decide whether the relationship between Ms. Houghtalen and DePauw would constitute an employee-employer relationship for purposes of that section.

1 standardized but subjective rubric that considers a wide variety of factors other than mere
2 employment status, including why the applicant wanted to intern for the organization, the
3 organization's "recent projects, accomplishments or aspirations," and whether the application
4 contained "grammar, spelling, and punctuation errors." *See* AOR017; *see also* AOR014 (noting
5 that "preference will be given" to applicants interning in certain "environments"). Indeed,
6 applying these subjective criteria, DePauw rejected approximately 45% of stipend applications in
7 2015. AOR003. Thus, Ms. Houghtalen was not entitled to a stipend merely by virtue of her pre-
8 existing relationship with DePauw, nor is every other individual holding the same relationship to
9 DePauw entitled to the stipend that Ms. Houghtalen was awarded. Instead, DePauw retains (and
10 regularly exercises) its discretion to grant or deny stipend applications based on determinations
11 that are explicitly "focused on the individual [applicant]." AOR003. Accordingly, the
12 Commission concludes that the stipend at issue here is not analogous to "earned leave time"
13 owed to an employee as defined in 11 C.F.R. § 100.54(c), and therefore it is not exempt from the
14 prohibition on corporate payments of compensation for campaign activities.

15 (5) *May DePauw provide Ms. Houghtalen with Extended Studies credit for the requestor's*
16 *Internship Program without a contribution to the requestor resulting?*

17 Yes, awarding Extended Studies credit will not constitute a contribution to requestor.

18 The Commission has long recognized that college credit received for work on political
19 campaigns is not compensation under the Act, so long as the program is run in a non-partisan
20 manner and in a manner consistent with accepted accreditation standards generally applicable to
21 institutions of higher education. *See* Advisory Opinion 1975-100 (Moss); Factual and Legal
22 Analysis at 7, MUR 6620 (Friends of Brian Woodworth) (July 2, 2013). Because DePauw
23 operates in a non-partisan manner, AOR006, and because the Commission has no reason to

