

# Recent FEC Opinion on University's Payment to Campaign Intern Is Reminder of Myriad Legal Issues Companies Face During Election Season

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March 2016

By Michael E. Toner and Eric Wang

The Federal Election Commission (FEC) recently issued an advisory opinion to Hillary Clinton's presidential campaign regarding payments made by third parties to a campaign intern. While not directly relevant to most companies, the opinion is a useful reminder of some of the legal issues that may affect corporations and entities during an election year. These issues may include, for example, hosting political fundraisers, employees' and corporations' use of corporate resources and work time to engage in campaign activity, and employees who run for office.

The issue at the center of the FEC opinion is a provision of the federal campaign statute which treats "the payment by any person of compensation for the personal services of another person which are rendered to a political committee" as a contribution to the committee. This provision may be implicated in many contexts and may result in an incorporated entity (whether for- or non-profit) unwittingly making a prohibited campaign contribution.

The particular question raised by the Clinton campaign was whether one of its unpaid interns, who was a student at DePauw University, could accept a \$3,000 stipend for "basic travel and subsistence expenses" and academic credit from the university for her campaign work. According to representations made by the campaign, the stipend and academic credit were awarded on a non-partisan basis

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## Practice Areas

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Federal & State Lobbying  
Federal & State Pay-to-Play Compliance  
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Representation  
Foreign Agents Registration Act (FARA)  
Government Ethics  
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and in conformance with accepted accreditation standards, and were available to students interning with non-profit, government, and start-up entities.

While the facts presented in this matter were fairly straightforward, the legal analysis was anything but. The FEC commissioners deliberated for more than two months and considered five draft opinions before arriving at a consensus that the academic credit was not compensation, and the stipend was not "compensation for the provision of... personal services" to the campaign, but rather was "provided to students for bona fide educational objectives" (emphasis in the original). "[U]nder the circumstances presented here," the Commission concluded, "DePauw University's stipend [to the intern] is not compensation for personal services provided by [the intern to the campaign] and is not a contribution."

Even then, Democratic Commissioner Ellen Weintraub traded point-counterpoint written statements with her Republican colleagues over how far the reasoning of the opinion went. Weintraub insisted that the opinion be read narrowly, and as providing "no cover to super PACs, [501(c)(4) entities], or billionaires with political agendas seeking to subsidize the staff of their favorite candidates." The Republican commissioners underscored the "purpose-laden" approach the advisory opinion took in determining whether a third-party payment is considered to be a campaign "contribution," and suggested that this advisory opinion contradicted and superseded certain prior advisory opinions that imposed greater restrictions on the use of educational stipends by campaign interns.

While the Clinton advisory opinion, given its narrow scope, is not directly relevant to most corporations, it does underscore the importance of ensuring that no corporate resources are being used to compensate employees or executives who are volunteering on campaigns or who are themselves running for office. As a general matter, if employees and executives are using compensated work time instead of personal time for their campaign activities on behalf of any candidate, political party, or PAC (other than the corporation's own PAC), a corporation may be making a prohibited in-kind campaign contribution. The use of corporate facilities, such as office space and equipment, in connection with such activities also may result in prohibited contributions.

The use of corporate resources in connection with independent political activity also remains murky in many respects even six years after the Supreme Court of the United States' *Citizens United v. FEC* decision freed corporations to make independent expenditures. For example, immediately after the *Citizens United* decision, a union ordered its employees to engage in political activity during paid work time to support a congressional candidate independently of the candidate's campaign. The FEC commissioners split 3-3 on whether this activity violated a prohibition on coercing employees into making campaign contributions. Even if ordering its employees to engage in the campaign activity was permissible, the commissioners still concluded unanimously that the union was required to disclose the value of the union's resources used for the activity on an independent expenditure report, and which the union failed to do.

During an election season such as the one upon us now, it is often easy to overlook the mundane and technical minutiae of compliance with the election laws, especially when so much attention is focused on the campaign rhetoric, polls, fundraising numbers, and super PAC ads. As the FEC's advisory opinion to the

Clinton campaign illustrates, there are many ways for corporations and non-profit entities engaged in seemingly routine transactions to get tangled in legal red tape when their activities bear on an election.