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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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August 21, 2003

AGENDA ITEM

For Meeting of: 08-28-03

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *[Signature]*
Staff Director

FROM: Lawrence H. Norton *[Signature]*
General Counsel

James A. Kahl *[Signature]*
Deputy General Counsel

Rosemary C. Smith *[Signature]*
Acting Associate General Counsel

John C. Vergelli *[Signature]*
Acting Assistant General Counsel

Albert J. Kiss *[Signature]*
Staff Attorney

Subject: Draft AO 2003-22

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 28, 2003.

Attachment

1 ADVISORY OPINION 2003-22

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3
4 Kenneth A. Gross, Esq.
5 Ki P. Hong, Esq.
6 Skadden, Arps, Slate, Meagher & Flom LLP
7 1440 New York Avenue, N.W.
8 Washington, D.C. 20005-2111
9

DRAFT

10
11 Dear Messrs. Gross and Hong:

12 This responds to your letters dated June 23, 2003, July 10, 2003, and July 24, 2003,
13 requesting an advisory opinion on behalf of the American Bankers Association ("ABA")
14 concerning the application of the Federal Election Campaign Act of 1971 ("the Act"), and
15 Commission regulations, to the collecting and forwarding of contribution checks for ABA's
16 separate segregated fund ("SSF"), ABA BankPAC, by executives of ABA member
17 corporations.

18 ***Background***

19 You state that the ABA is an incorporated trade association for the banking industry
20 (composed of community, regional, and money-center banks and holding companies, as well
21 as savings associations, trust companies, and savings banks), that it is an organization
22 described in 26 U.S.C. 501(c)(6), and that it has corporations as members. The ABA solicits
23 contributions to ABA BankPAC from executive and administrative personnel of its member
24 corporations that have provided separate and specific approval for solicitations, in
25 compliance with 11 CFR 114.8(c).

26 You state that the ABA wants its member corporations to assist the ABA's support
27 of ABA BankPAC by collecting and forwarding contribution checks from executive and
28 administrative personnel of member corporations to ABA BankPAC. You state that this

may include, but is not necessarily limited to, the executives manually collecting and forwarding the contribution checks themselves; using the member corporation's inter-office mail system to help collect the checks; and providing envelopes and postage in which contributors can send their contributions to ABA BankPAC.

Question Presented

May executives of member corporations collect and forward contribution checks to the ABA BankPAC?¹

Legal Analysis and Conclusion

Executives of member corporations may collect and forward contribution checks to the ABA BankPAC in the circumstances you describe.

The Act prohibits corporations from making any contribution or expenditure in connection with a Federal election, and corporations that are members of trade associations are subject to these prohibitions. 2 U.S.C. 441b(a); 11 CFR 114.8(b). The Commission presumes that the ABA qualifies as a trade association as defined at 11 CFR 114.8(a). The Act allows a trade association, or its SSF, to solicit contributions to that SSF from members of the trade association. A trade association or its SSF may solicit the stockholders and the executive and administrative personnel of member corporations (and their families), to the extent that such solicitation has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one trade association in any calendar year. 2 U.S.C. 441b(b)(4)(D). All

¹ Although your letter dated June 23, 2003 states that the ABA "wants its member corporations to assist in such solicitations by having their executives solicit their fellow executive and administrative personnel at the company and then collecting and forwarding those contribution checks to ABA BankPAC," you subsequently limited your request in your letter dated July 24, 2003 to the question of whether executives of member corporations are permitted to collect and forward contribution checks.

1 contributions must be strictly voluntary and without coercion. *See* 2 U.S.C. 441b(b)(3) and
2 11 CFR 114.5(a).

3 In general, corporations, their officers, directors, and other representatives acting as
4 agents of corporations, are prohibited from “facilitating” the making of contributions to
5 candidates or political committees other than the *corporation’s own* SSF. 11 CFR
6 114.2(f)(1).² “Facilitation” means using corporate or labor organization resources or
7 facilities to engage in fundraising activities in connection with a Federal election, such as
8 activities that go beyond the limited exemptions set forth in 11 CFR part 100, subparts C and
9 E, or 11 CFR 114.9(a) through (c) and 114.13.³ 11 CFR 114.2(f)(1). An example of
10 facilitating the making of contributions is “[p]roviding materials for the purpose of
11 transmitting or delivering contributions, such as stamps, envelopes addressed to a candidate
12 or political committee other than the corporation’s SSF, or other similar items that would
13 assist in transmitting or delivering contributions . . .” 11 CFR 114.2(f)(2)(ii). For
14 purposes of 11 CFR Part 114, “method of facilitating the making of contributions” means
15 the “manner in which the contributions are received *or collected* such as, but not limited to,
16 payroll deduction or checkoff systems, other periodic payment plans, or return envelopes
17 enclosed in a solicitation request.” 11 CFR 114.1(f) (emphasis added). As such, collecting
18 and forwarding contribution checks, other than to a corporation’s own SSF, generally is both
19 a “method of facilitating the making of contributions” under 11 CFR 114.1(f) and is
20 “facilitation” subject to the prohibition in 11 CFR 114.2(f)(1).

² Although 11 CFR 114.2(f)(1) was adopted in 1995, facilitation has been prohibited at least since 1977. *See generally* Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 51 (1977).

³ None of these limited exemptions apply under the facts presented.

1 11 CFR 114.8, however, recognizes that certain activity in regards to a trade
2 association, which would be impermissible facilitation under section 114.2(f), is permissible
3 under section 114.8. In particular, 11 CFR 114.8(e)(3) provides that “[t]here is no limitation
4 on the method of soliciting voluntary contributions or the method of facilitating the making
5 of voluntary contributions which a trade association may use” and then states only one
6 condition: that “[t]he member corporation may not use a payroll deduction or checkoff
7 system for executive and administrative personnel contributing to the separate segregated
8 fund of the trade association.” 11 CFR 114.8(e)(3) thus appears to contemplate that
9 executives of member corporations may collect and forward contribution checks for a trade
10 association’s SSF.

11 Similarly, 11 CFR 114.8(d)(1) provides that a member corporation “must knowingly
12 and specifically approve any solicitation for a trade association, whether the solicitation is
13 done by the trade association, its separate segregated fund, *or the corporation or any of its*
14 *personnel*, for contributions to the trade association’s [SSF]” (emphasis added). This
15 provision also contemplates some limited facilitation by executives of member corporations.

16 Thus, the Commission concludes that the activity you ask about, in relation to a trade
17 association, is excluded from the prohibition in 11 CFR 114.2(f)(1). Therefore, executives
18 of the ABA’s member corporations may collect and forward contribution checks to ABA
19 BankPAC where those corporations and the SSF have complied with 11 CFR 114.5(a) and
20 114.8(b), (c) and (d).

21 This response constitutes an advisory opinion concerning the application of the Act
22 and Commission regulations to the specific transaction or activity set forth in your request.
23 *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts

1 or assumptions presented, and such facts or assumptions are material to a conclusion
2 presented in this opinion, then the requestor may not rely on that conclusion as support for
3 its proposed activity.

4 Sincerely,
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7
8 Ellen L. Weintraub
9 Chair
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