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2003 JUL 28 P 4:

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June 23, 2003

AOR 2003-22

Via Hand Delivery

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

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COMMISSION
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COUNSEL
2003 JUN 23 P 3:52

RE: Advisory Opinion Request

Dear Mr. Norton:

We are submitting this advisory opinion request ("AOR") on behalf of the American Bankers Association ("ABA") regarding the application of the Federal Election Campaign Act of 1971, as amended, ("FECA") and Federal Election Commission ("Commission" or "FEC") regulations to ABA's federal separate segregated fund, ABA BankPAC. The ABA is the leading trade association for the banking industry, composed of community, regional, and money-center banks and holding companies, as well as savings associations, trust companies and savings banks. It solicits contributions to ABA BankPAC from executive and administrative personnel of its member corporations that have provided the annual authorization under 11 C.F.R. §114.8(c).

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. These contribution checks will be made payable directly to the ABA BankPAC, and any written solicitations will contain the disclaimers required under FEC rules (including, but not limited to, "you may refuse to contribute without reprisal"). We request the Commission to confirm that this practice is permissible under FECA and FEC rules.

In particular, the Commission recently entered into two conciliation agreements relating to the fundraising activity of corporate members. In MUR 5208 (the "Amboy MUR"), the Commission penalized Amboy National Bank for facilitating the making of contributions by establishing accounts into which an executive's bonus was deposited and then making political contributions from those accounts to candidates and political committees. In MUR 5337 (the "First Consumers MUR"), the Commission penalized First Consumers National Bank for facilitating contributions to its trade association's PAC by coercively soliciting those contributions and not including in its written solicitations the disclaimer that solicitees may "refuse to contribute without reprisal." However, the language used in the conciliation agreements of both MURs implies that an impermissible facilitation would result when there is any effort, no matter how routine, on the part of a corporate member to use its resources to solicit contributions for its trade association's PAC or have its corporate executives collect and forward contribution checks to such PAC.

This language in the conciliation agreements is over-inclusive in that the Commission's rules and advisory opinions ("AOs") permit member corporations to solicit and facilitate contributions on behalf of their trade association's PAC. We can only surmise that the language was over-inclusive because it was in the context of other behavior that ran afoul of the FEC rules. Indeed, Commission rules expressly state that there is no limitation on the method of solicitation or the method of facilitation that a trade association may use to raise funds for its PAC, except that a corporate member may not use a payroll deduction system.[1] 11 C.F.R. § 114.8(e)(3). In AO 1979-8, the Commission opined that this provision extends to the activities of a member corporation as well as to the trade association. The Commission noted that in the history of the rulemaking of 11 C.F.R. § 114.8, the Commission concluded that incidental services by corporate members of a trade association in solicitations for the trade association's PAC were permissible. See AO 1979-8 (citing Federal Election Regulations, Explanation and Justification, House Document No. 95-44, page 114). The AO also opined that a corporate member may pay for the expenses related to administering and soliciting contributions on behalf of its trade association's PAC, as described below.

The fact that 11 C.F.R. § 114.8(e)(3) extends to corporate members is also evident under the plain language of the rule. In particular, the rule prohibits "member corporations" from facilitating contributions through a payroll deduction system, while expressly permitting all other methods of solicitation and facilitation for a trade association PAC. Thus, by referring to "member corporations" in the carve out for payroll deduction systems, the rule necessarily refers to member corporations in the rest of the provision that permits without limitation other forms of solicitation and facilitation.

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[1] Please note that this activity is also exempt from the prohibition on corporate facilitation set forth in 11 C.F.R. § 114.2(f). See 11 C.F.R. § 114.2(f)(3)(i).

Moreover, permitting member corporations to solicit and facilitate contributions on behalf of its trade association PAC is good policy. The sole mission of a trade association is to represent and further the interests of its members (in this case, corporate members). In fact, officers from member corporations in many cases make up a trade association's governing board. Dues payments made by members, including corporate members, are also the major source of a trade association's funding, including the funds used to administer the trade association's PAC. Thus, member corporations may stand in the place of its trade association when it comes to soliciting or facilitating contributions on behalf of the trade association's PAC. The Commission has repeatedly recognized the ability of a member corporation to pay for, or incur expenses in connection with, administering and soliciting contributions to the PAC of its trade association. See, e.g., FEC AOs 1979-8, 1986-13, 1982-36, and 1980-59. By the same token, a member corporation should also be permitted to facilitate contributions on behalf of such PAC as set forth in 11 C.F.R. § 114.8(e)(3), which views solicitation and facilitation in the same manner when it comes to trade association PACs.

To find otherwise, the Commission would be sanctioning the anomalous result (especially in light of Section 114.8) of permitting a member corporation to pay for the facilitation of contributions to its trade association's PAC (i.e., by paying for the PAC's administrative expenses), but prohibiting the member corporation from facilitating the contributions itself. Moreover, messengers from a member corporation's mail department would be permitted to deliver solicitations on behalf of a trade association's PAC, but they would be prohibited from collecting the solicited checks in a later pick-up. Such results would be contradictory, and at best, based on artificial distinctions.

Please note that under this approach, establishing accounts into which an executive's bonuses are deposited and then used to contribute to a PAC (as was primarily at issue in the Amboy MUR) would still be prohibited in that such activity would constitute a payroll deduction that is expressly prohibited under 11 C.F.R. § 114.8(e)(3). Moreover, solicitations without appropriate disclaimers and related concerns (as was primarily at issue in the First Consumers MUR) would also be prohibited.

For the reasons described above, we request that the Commission issue an advisory opinion confirming that the ABA may have executives of its corporate members solicit contributions on behalf of ABA BankPAC, and then collect and forward those contribution checks to ABA BankPAC.

Please call with any questions regarding this letter or if you need any further information.

Sincerely,

Kenneth A. Gross
Skadden, Arps, Slate, Meagher & Flom LLP

Ki P. Hong
Skadden, Arps, Slate, Meagher & Flom LLP

Attorneys for American Bankers Association

cc: Rosemary Smith, Esq.

FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 3, 2003

Kenneth A. Gross
Ki P. Hong
Skadden, Arps, Slate, Meagher, & Flom, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Dear Messrs. Gross and Hong:

This refers to your letter dated June 23, 2003, on behalf of the American Bankers Association ("ABA") concerning the application of the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of contributions to its separate segregated fund, ABA BankPAC.

You state that ABA is a trade association for the banking industry and its membership consists of banks and bank holding companies. It solicits contributions to ABA BankPAC from executive and administrative personnel of the member corporations that have provided the annual authorization under 11 CFR 114.8(c). You state that the ABA wants its member corporations to assist in such solicitations by having their executives solicit their fellow restricted class personnel at the company for contribution checks and then collect and forward the checks to ABA BankPAC. You state that the contribution checks will be made payable directly to ABA BankPAC, and that any written disclaimers will contain the disclaimers required under Commission rules (e.g., the voluntariness language). You also state that the proposed activities would not include the establishment of accounts into which corporate personnel could deposit bonuses and then withdraw funds for contributions to ABA BankPAC. You ask whether the Act and Commission regulations permit the corporate executives to engage in solicitations for ABA BankPAC.

The Act authorizes the Commission to issue an advisory opinion request in response to a "complete written request" from any person about a specific transaction or activity by the requesting person. 2 U.S.C. §437f(a). Such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). The Office of General Counsel shall determine if a request is incomplete or otherwise not qualified as an advisory opinion request. *See* 11 CFR 112.1(d).

In view of the above requirements, this Office will need further detail as to the proposed activities of the executives of the member corporations. You should describe the methods that the executives will use to solicit, orally and/or in writing, the other restricted class employees, and how corporate facilities will be used. Your answer should include, but not be limited to, the following information that will be applicable to your situation:

(1) A description of all categories of persons (e.g., ABA, member corporations, or corporate executives) who will be creating and distributing the solicitations, including solicitations created by ABA and mailed to the corporation for distribution.

(2) A description of all categories of persons (e.g., ABA, member corporations, or corporate executives), who will determine the timing and the frequency of the corporate executive's solicitation or distribution of solicitation materials, and identify the anticipated frequency of such solicitations.

(3) The methods the soliciting executives will use to collect the contributions, including the distribution of envelopes and stamps. Please confirm that the contribution checks will be transmitted to ABA BankPAC and not first deposited in the soliciting executive's account or a corporate account first.

(4) Whether the solicitations will be made in conjunction with events held by the member corporation or by the soliciting executive, such as a luncheon or a party, and whether contributors will be offered a memento or other inducement to contribute, paid for by the member corporation or the soliciting executive.

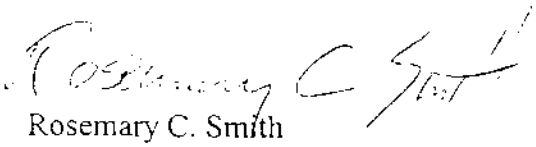
(5) How and to what extent the corporate member's facilities and non-restricted class personnel (such as meeting rooms, stationery, the member's network server, equipment, office equipment, and corporate secretarial and other support staff) will be used to create and distribute oral and/or written solicitations, and to collect contributions, and whether these activities will occur during compensated work hours.

If other activities by the corporate members relating to solicitation are contemplated in your request, please describe them.

For your information and guidance, we enclose Advisory Opinions 2000-04 and 1997-9. Upon receipt of your responses, this Office will give further consideration to

your inquiry. If you have any questions about the advisory opinion process, the enclosed opinions, or this letter, please contact Jonathan Levin, a senior attorney in this Office, at 202-694-1542.

Sincerely,



Rosemary C. Smith
Acting Associate General Counsel

Enclosure
Advisory Opinions 2000-04 and 1997-9

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July 10, 2003

Via Hand Delivery

Rosemary C. Smith, Esq.
Acting Associate General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20005

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COUNSEL
2003 JUL 10 P 1:50

RE: Supplemental Response Relating to Advisory Opinion Request

Dear Ms. Smith:

This is in response to your letter, dated July 3, 2003, in which you request additional information regarding the advisory opinion request ("AOR") that was submitted on behalf of the American Bankers Association ("ABA") on June 23, 2003. In particular, the following separately responds to the specific requests contained in that letter. As is apparent from these responses, generally, neither the ABA nor ABA BankPAC directs corporate members as to how they should solicit, collect or transmit contributions to ABA BankPAC. However, ABA would like to provide guidance to its corporate members as to what methods for soliciting, collecting and transmitting contributions to ABA BankPAC are permissible under the Federal Election Campaign Act of 1971, as amended ("FECA").

Notwithstanding our responses, we note that many of the requests ask for information regarding the involvement of corporate members and their executives in the solicitation of contributions to ABA BankPAC. This is, however, irrelevant to the AOR in that the AOR relates to whether corporate members and their executives may collect and forward contributions to ABA BankPAC. Indeed, the Federal Election Commission ("FEC") has repeatedly made clear that corporate members may be involved in, and incur expenses related to, soliciting contributions for a trade association's PAC. See, e.g., FEC, AO 1979-8.

Request #1: A description of all categories of persons (e.g., ABA, member corporations, or corporate executives) who will be creating and distributing the solicitations, including solicitations created by ABA and mailed to the corporation for distribution.

Response: ABA and ABA BankPAC officers and staff will be creating and distributing solicitations to the corporate members of ABA that have authorized the solicitation of their restricted class under 11 C.F.R. § 114.8(c). Executives of such member corporations may, at their discretion, prepare and distribute additional solicitation material, but this is neither required nor requested by ABA or ABA BankPAC.

Request #2: A description of all categories of persons (e.g., ABA, member corporations, or corporation executives), who will determine the timing and the frequency of the corporate executive's solicitation or distribution of solicitation materials, and identify the anticipated frequency of such solicitations.

Response: ABA and ABA BankPAC request authorization from corporate members to solicit their restricted class and distribute solicitation materials to corporate members that grant such authorization. This is done as part of an annual BankPAC fund-raising effort. The member corporations decide on the frequency and timing of the solicitations made to their own restricted class. The corporate members vary on the frequency and timing they choose for their solicitations. Thus, we cannot anticipate what the frequency of the solicitation will be.

Request #3: The methods the soliciting executives will use to collect the contributions, including the distribution of envelopes and stamps. Please confirm that the contribution checks will be transmitted to ABA BankPAC and not first deposited in the soliciting executive's account or a corporate account first.

Response: ABA does not dictate the method(s) to be used by its corporate member executives in collecting contributions on behalf of ABA BankPAC, but would like to provide guidance to its corporate members on the methods permitted under FECA. Each member corporation will have to determine for itself which of the permissible methods it will use. In providing guidance to its corporate members, ABA wants to give its corporate members the option of (1) providing envelopes and postage for the contributions to be mailed directly to ABA BankPAC, and/or (2) collecting and forwarding the contributions to ABA BankPAC, as described in the AOR.

Contribution checks will be transmitted to ABA BankPAC and will not be deposited into the account of either the soliciting executive or the member corporation. Corporate members will not be permitted to use a payroll deduction system for transmitting contributions to ABA BankPAC.

Request #4: Whether the solicitations will be made in conjunction with events held by the member corporation or by the soliciting executive, such as a luncheon or a party, and whether contributors will be offered a memento or other inducement to contribute, paid for by the member corporation or the soliciting executive.

Response: ABA does not require or request that member corporations hold events in conjunction with soliciting contributions, or offer a memento or other inducement, to contribute to ABA BankPAC. However, corporate members may, at their own discretion, hold and pay for such events or provide a memento or incentive. As set forth in the AOR, it is well established that the member corporations may "...pay for, or incur expenses in connection with, administering and soliciting contributions to the PAC of its trade association." We have no reason to believe that a corporate executive will pay for any solicitation event, memento, or incentive to contribute to ABA BankPAC.

Request #5: How and to what extent the corporate member's facilities and non-restricted class personnel (such as meeting rooms, stationery, the member's network server, equipment, office equipment, and corporate secretarial and other support staff) will be used to create and distribute oral and/or written solicitations, and to collect contributions, and whether these activities will occur during compensated work hours.

Response: The extent to which a corporate member's facilities and nonrestricted class personnel would be used to create and distribute oral and/or written solicitations, and to collect contributions, and when those activities will occur is up to the discretion of the corporate member involved. Given that ABA BankPAC is providing prepared solicitation materials, it is anticipated that the use of corporate facilities and nonrestricted personnel will be minimal.

If you have any further questions, please call us.

Sincerely,

Kenneth A. Gross
Skadden, Arps, Slate, Meagher & Flom LLP

Ki P. Hong
Skadden, Arps, Slate, Meagher & Flom LLP
Attorneys for American Bankers Association

cc: Jonathan Levin, Esq.

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July 24, 2003

Via Hand Delivery

Jonathan Levin, Esq.
Federal Election Commission
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Washington, D.C. 20463

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COUNSEL
2003 JUL 24 P 3: 09

RE: Follow-Up on Advisory Opinion Request

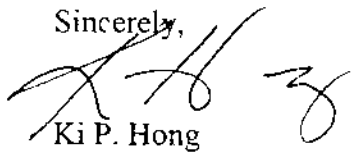
Dear Mr. Levin:

This is a follow-up to our recent conversation regarding the advisory opinion request ("AOR") that was submitted on behalf of the American Bankers Association ("ABA") on June 23, 2003. In particular, we want to confirm that the solicitations made by executives of ABA member corporations, as described in the AOR, will be made in compliance with Federal Election Commission ("Commission") rules.

Thus, we request that the Commission limit its Advisory Opinion in this case to the question of whether executives of member corporations are permitted to collect and forward contribution checks to the ABA BankPAC. 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. Otherwise, the Commission should base its Advisory Opinion on the facts and arguments as set forth in the AOR and our supplemental letter, dated July 10, 2003.

If you have any further questions, please call us.

Sincerely,



Ki P. Hong
Skadden, Arps, Slate, Meagher & Flom LLP

Attorney for American Bankers Association

cc: Rosemary C. Smith, Esq.