America's Community Bankers
Shaping Our Future

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2003 AUG -8 P 3:47

2003 AUG -8 P 2:10
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL

August 8, 2003

Comment to AOR 2003-22

Lawrence H. Norton
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on AOR 2003-22

Dear Mr. Norton:

America's Community Bankers ("ACB") and its separate segregated fund, COMPAC, provide these comments in support of the Advisory Opinion Request of the American Bankers Association ("ABA"), AOR 2003-22 (the "AOR"). We offer several observations as to the request that the executive and administrative employees of a trade association's member corporations be permitted to facilitate collections to the trade association's separate segregated fund ("SSF"), is firmly grounded in the Federal Election Campaign Act ("FECA"). The request boils down to the question of whether a corporate member of a trade association is permitted to make a donation to the trade association for the explicit purposes of raising money for the trade association's SSF. The FECA, the implementing regulations, the Explanation and Justification for the regulations, and a series of Advisory Opinions all provide a resounding "yes" to this question. For the reasons outlined below, ACB urges the Commission to act favorably on the AOR.

The Commission has allowed donations from member corporations to administrative accounts of trade associations to fund solicitation and administrative costs for the trade association's SSF. For example, Advisory Opinion 1986-13 permitted a corporate member to donate money and also merchandise to the trade association's administrative account for the purpose of conducting a raffle for the association's SSF. Even earlier, the Commission explicitly allowed such donations, explaining:

> The Act specifically exempts from the definition of "contribution or expenditure" contained in 2 U.S.C. § 441b, those costs incurred by a corporation, labor organization, membership organization, cooperative or corporation without capital stock, to establish, administer and solicit contributions to such separate segregated funds. 2 U.S.C. § 441b(b)(2)(C), 11 CFR § 114.1(a)(2)(iii); *see also* 2 U.S.C. §

900 Nineteenth Street, NW ★ Suite 400 ★ Washington, DC 20006
Phone: (202) 857-3100 ★ Fax: (202) 296-8716 ★ www.AmericasCommunityBankers.com

> 431(8)(B)(vi) and (9)(B)(v). Therefore, in the situation presented…a corporate member of [the trade association], may donate funds to [the association] designated to defray administrative costs of [the association's SSF] without violating the prohibition against corporate contributions embodied in 2 U.S.C. § 441b. Once [the association] accepts the designated funds into its general treasury, [it] is permitted under Commission regulations to use the funds for the establishment and administration of, and for solicitation of contributions to, its separate segregated fund…. *See* 11 CFR § 114.5(b).

Advisory Opinion 1980-59. Thus, corporate members of a trade association would be allowed to make donations of money and other materials for the purposes of defraying solicitation and administrative costs of its SSF. There should be no difference in the treatment of in kind and actual donations.

Another analytical underpinning that supports the AOR is the undeniable fact that a trade association today could pay the member corporation for the cost of the facilitating activities. The value of the contribution would be the cost to the corporation of facilitating the contributions, including the value of the executive employees' time in collecting the contributions, the cost of the use of the corporation's facilities such as interoffice mail and postage, and the cost of any support personnel time in forwarding the contributions. Such payment, however, would be a meaningless gesture because there essentially would be a "circle of money."

The circle works as follows: If the trade association were to pay the corporation for these costs, then there would be no contribution from the member corporation. Because the corporation is a member of the trade association, and because the trade association is allowed to pay solicitation expenses for its SSF, the trade association could simply pay the corporation from its general treasury funds. Because the corporation is a member of the trade association, the trade association could in turn simply ask the member to donate that same amount of money that the trade association paid to the member corporation to prevent a prohibited contribution (or use the membership dues collected from the corporation and others). This payment back and forth is perfectly permissible as explained by the Advisory Opinions above; there would not be any money reported by either the trade association or the corporation. Rather than require the corporation to pay the trade association and the trade association to collect the money from the corporation, the AOR simply proposes that the facilitation be treated as an in kind donation to a trade association.

This "circle of money" analysis is explicitly endorsed in the Explanation and Justification to section 114.8(e):

> There was no legislative history on the extent of corporate participation in the trade association's solicitation of the stockholders and executive or administrative personnel of the corporation. An argument can be made from the statutory language that the exemption for solicitation costs applies only to solicitation by a corporation to its separate segregated fund. Under this interpretation, a trade association would be required to reimburse the corporation for any expenditure or assistance by the corporation. To require a trade association to reimburse the corporation for incidental services, such as the distribution of the association's material via the corporation's internal mailing system, seemed tenuous since the trade association will be paying for the substantial costs of the solicitation with the membership fees from corporations. Consequently, the Commission has not required the trade association to reimburse the corporation for such incidental expenditures.

Explanation and Justification of Regulations, H.R. Doc. No. 95-44 (1977), *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 930 at 3153. Thus, there is no reason why the trade association and member corporation should have to actually exchange equal amounts of money in order for the corporation's activities to be legal.

Two other sections of the regulations warrant a brief mention. First, the regulations permit officials of corporate members to discuss the SSF solicitation with their executive and administrative personnel. The AOR represents that all solicitations will comply with 11 C.F.R. § 114.5(a). The activity for which ABA seeks this request is activity with far less chance of abuse than that which is clearly permitted. The executives would merely be facilitating collection, an activity that would occur after the solicitations were made. There are no further limitations on the facilitation of the contribution to the SSF in the regulations and the FEC should not strain to create one.

Second, 11 C.F.R. § 102.8 provides complete guidance as to how the executive personnel should handle the contributions. This section applies to "[e]very person who receives a political contribution", and requires that the contributions be forwarded to the SSF in a certain amount of time and that the person collecting the contributions must provide the SSF with certain information about the contributor. Although section 102.6(b) discusses activities by "collecting agents", neither the executive employees nor the member corporations are within the definition of collecting agent. Thus, this set of regulations is inapplicable to the activities in question. Section 102.8's broad applicability is the proper framework for the activities that ABA proposes.

For the foregoing reasons, we urge the Commission to approve the activities outlined in the AOR.

Should you have any questions or need additional information, please feel free to me at (202) 857-3122 or via email at mbriggs@acbankers.org.

Respectfully submitted,

Michael W. Briggs
Chief Legal Officer