



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUN 6 11 48 AM '94

AGENDA ITEM
For Meeting of: JUN 9 1994

June 6, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael Marinelli *m m.*
Attorney

SUBJECT: Revised Draft Advisory Opinion 1994-10

Attached is a further revised draft of Advisory Opinion 1994-10.

The revised document is based on Agenda Document #94-54, as amended pursuant to Commission discussion at the June 2, 1994, meeting. The major revisions are the deletion of material relating to a discussion of the examples provided by counsel to document the Bank's past business practice. The new or modified language is in bolded print. This office requests that the revised draft be placed on the June 9, 1994, agenda.

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3 CERTIFIED MAIL
4 RETURN RECEIPT REQUESTED

DRAFT

5 ADVISORY OPINION 1994-10

6 Robert F. Bauer
7 Perkins Coie
8 607 Fourteenth Street, N.W.
9 Washington, D.C. 20005-2011

10 Dear Mr. Bauer:

11 This refers to your letters of May 17, April 13 and
12 January 25, 1994, concerning application of the Federal
13 Election Campaign Act of 1971, as amended ("the Act"), to a
14 proposal by your client, Franklin National Bank ("the Bank"),
15 to waive certain bank service fees and costs charged to
16 borrowers who are political committees.

17 You state that in coming election cycles, the Bank plans
18 to make loans to qualified candidates for Federal office and
19 their committees.^{1/} In negotiating these loans, the Bank is
20 considering waiving certain fees and costs customarily
21 negotiated with borrowers establishing accounts with the
22 Bank. You describe these charges as including those for
23 incoming and outgoing wire transfers; stop payment orders;
24 daily account transfers; service charges on deposit accounts;
25 legal fees for the review of loan documentation and closing

26 1/ You state that the Bank intends to make these loans in
27 accordance with generally applicable banking laws and the
28 requirements of the Act, in particular, the provisions of 2
29 U.S.C. §431(8)(B)(vii); 11 CFR 100.7(b)(11) and 100.8(b)(12).
30 You have not presented any question or facts dealing with any
particular proposed loan. Therefore, this opinion is limited
solely to the issues relating to the waiver of bank fees
associated with loans made to political committees and does
not deal with any question related to the making of the loans
themselves whether past, current, or future.

4 services; and preparation of special bank statements to
5 conform to customer dating requirements.^{2/}

6 You state that in the ordinary course of managing
7 deposit relationships with customers, either at the request
8 of the customer or, more often, at the Bank's initiative,
9 these charges can be waived. You state that the Bank does
10 not have any special policy that governs waivers granted to
11 political committees as opposed to other customers.
12 Furthermore, a decision to grant a waiver is not based on the
13 terms of any loan negotiated with a customer. Rather, the
14 decision to grant a waiver is based on the Bank's business
15 judgment on the profitability of the customer relationship
16 and the profitability of the account itself. To the extent
17 it provides a historical framework to determine
18 profitability, the length of time that an account has been
19 maintained is a factor. However, you explain that if a new
20 account is substantial, the Bank is able to estimate
21 profitability based upon the expected level of deposit
22 balances versus the expected level of fees and charges likely
23 to be incurred. To show that the Bank grants these fee
24 waivers in the normal course of business, your request
25 contains five specific examples of situations where fee
26 waivers were granted to customers.

27 The Bank wishes to know whether granting such waivers to
28

29 ^{2/} As part of the Bank's request, you include a copy of its
30 fee schedule and deposit account charges. You state that
waivers may typically cover 80-100% of these fees.

3 clients who are political committees will cause the Bank to
4 violate the Act by making contributions prohibited by 2
5 U.S.C. §441b.

6 The Act prohibits any contribution or expenditure by a
7 national bank or by a corporation in connection with a
8 Federal election.^{3/} 2 U.S.C. §441b(a). For the purposes of
9 this prohibition, the term "contribution or expenditure"
10 includes "any direct or indirect payment, distribution, loan,
11 advance, deposit, or gift of money, or any services, or
12 anything of value ... to any candidate, [or] campaign
13 committee ... in connection with any" Federal election. 2
14 U.S.C. §441b(b)(2). Commission regulations define "anything
15 of value" as "the provision of any goods or services without
16 charge or at a charge which is less than the usual and normal
17 charge for such goods or services." 11 CFR
18 100.7(a)(1)(iii)(A).

19 In the past, the Commission has concluded that the
20 receipt of complimentary items or the purchase of goods or
21 services at a discount does not result in a contribution if
22 the discounted or complimentary goods were available to
23 others on equal terms or as part of a pre-existing business
24 relationship. See Advisory Opinions 1992-24, 1989-14 and
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27

28 3/ The prohibition on national bank contributions also
29 applies in state and local elections. Your inquiry is
30 limited to fee waivers in connection with Bank accounts
established by Federal candidates and their committees.

3 1987-24.^{4/}

4 The information contained in your request indicates that
5 the Bank will likewise offer fee waivers within the context
6 of a pre-existing business relationship and using the same
7 considerations it uses with all its clients. If the waiver
8 of the charges discussed in your request--the charges for
9 legal fees, deposit fees, and other similar service charges
10 as set forth on the Bank's published fee schedule--was part
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12 4/ In the circumstances of the above opinions, the
13 Commission determined that no prohibited contribution
14 resulted from the receipt of discounted or free goods or
15 services. For example, in Advisory Opinion 1992-24, the
16 Commission determined that a Senate campaign could purchase
17 books in bulk from a publisher at a discounted price. In
18 Advisory Opinion 1989-14, the Commission permitted a
19 restaurant to offer catering and reception services to a
20 campaign committee at reduced rates. Finally, in Advisory
21 Opinion 1987-24, the Commission determined that a hotel
22 corporation could provide services such as flowers, food,
23 free rooms and other "complimentary items" to a political
24 committee.

25 In all three opinions it was determined that a
26 corporation was treating its political clients no differently
27 than its other patrons and was acting within the context of a
28 business relationship. However, where a political committee
29 was accorded preferential treatment different from other
30 customers, or the treatment was outside of a business
relationship, the Commission has found that a prohibited
corporate contribution resulted. See Advisory
Opinions 1991-23 (proposed donation of a car for a raffle),
1987-22 (proposed donation of poll results) and 1986-30
(proposed free use of a houseboat).

The standard articulated in these opinions is similar to
the definition of ordinary course of business as set forth in
Commission regulations governing the extension of credit to
political committees by commercial vendors. 11 CFR 116.3(c).
Among the factors to indicate if a vendor followed its
ordinary course of business, are whether the vendor followed
its established procedures and past practices and whether
these practices conformed to the usual and normal practice in
the commercial vendor's trade or industry. See 11 CFR
116.3(c)(1) and (3).

3 of the Bank's past practice in the normal course of business
4 regarding its commercial customers, then it would be
5 permissible to offer the same consideration for its political
6 customers in similar circumstances.^{5/}

7 The Commission expresses no opinion regarding the
8 applicability of banking laws in the situation you have
9 described, nor as to any tax ramifications of the proposed
10 transaction, because these issues are not within its
11 jurisdiction.

12 This response constitutes an advisory opinion concerning
13 application of the Act, or regulations prescribed by the
14 Commission, to the specific transaction or activity set forth
15 in your request. See 2 U.S.C. §437f.

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17 For the Commission,

18
19 Trevor Potter
Chairman

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21 Enclosures (AOs 1992-24, 1991-23, 1989-14, 1987-24, 1987-22,
and 1986-30)

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^{5/} Your request contains examples of past situations where
28 the waiver of fees was granted to the Bank's clients. One of
29 these examples is the waiver of loan documentation fees for
30 "a political organization." The Commission takes no position
in this opinion regarding the permissibility of this past
action.